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, 2016 to December 31, 2016 by the Constitutional Court of Korea.

This volume contains one full text and 25 summaries of the Court's decisions in 25 cases.

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

October 31, 2017

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.

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I. Full Opinions

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Case

Request for Constitutional Review of Article 21 Section 1 of the Act on the Punishment of Arrangement of Commercial Sex Acts, Etc., Case No. 2013Hun-Ka2

Requesting Court

Seoul Northern District Court

Requesting Petitioner

Kim ○-Mi

Represented by JeongYul LLC (law firm)

Attorney in Charge: Jeong Gwan-Yeong

Original Case

Seoul Northern District Court, 2012GoJeong2220

Violation of the Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (Sex Trafficking)

Decided

March 31, 2016

Holding

Article 21 Section 1 of the Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (amended by Act No. 10697 on May 23, 2011) does not violate the Constitution.

Reasoning

I. Overview of the Case

The petitioner was prosecuted for engaging in sex trafficking, by having sexual intercourse upon receiving 130,000 won from Lee ○-Hu (23 years of age) on July 7, 2012, in No. ○○, ○○, ○○-dong, Dongdaemun-gu, Seoul (2012GoJeong2220, Seoul Northern District Court).

The requesting petitioner, while the aforementioned case was pending at the trial court, filed a motion to request constitutional review of Article 21 Section 1 of the 'Act on the Punishment of Arrangement of Commercial Sex Acts, Etc.' that punishes sex trafficking with the Seoul Northern District Court (2012ChoGi1262, Seoul Northern District Court). The court granted the motion and requested a constitutional review of this case on December 13, 2012.

II. Subject Matter of Review

The subject matter of this case is whether Article 21 Section 1 of the Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (amended by Act No. 10697 on May 23, 2011, hereinafter referred to as the "Commercial Sex Act") (hereinafter referred to as the "Instant Provision") violates the Constitution. The Instant Provision and related provisions are as follows.

Provision at Issue

Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (amended by Act No. 10697 on May 23, 2011)

Article 21 (Penalty Provisions)

(1) Any person who has engaged in the conduct of sex trafficking

shall be punished by imprisonment with labor for not more than one year, by a fine not exceeding three million won, or by misdemeanor imprisonment, or by a minor fine.

Related Provisions

Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (amended by Act No. 10697 on May 23, 2011)

Article 2 (Definitions)

(1) The terms used in this Act shall mean the following:

1. The term "sex trafficking" means committing any of the following acts for an unspecified person or becoming a partner thereof in return for receiving or promising to receive money, valuables or other property gains:
   (a) Sexual intercourse;
   (b) Pseudo-sexual intercourse using parts of the body, such as the mouth and anus, or implements.

The other related provisions are listed in the Appendix.

III. Why the Requesting Court Requested a Constitutional Review

The legislative purpose of the Instant Provision, which is to prevent human trafficking aimed at sex trafficking, and to protect victims of sex trafficking, is justified. However, punishing sex trafficking that does not involve exploitation or coercion fails to reflect changing social values, which have come to respect sexual self-determination, and it is questionable whether such punishment is effective in eradicating sex trafficking. Given that sex workers have resorted to sex trafficking due to social factors, they should be provided with protection and guidance. Imposing criminal punishment on them instead violates the appropriateness of means and the principle of minimum restriction.

1. Case on the Punishment of Commercial Sex Acts

The discriminatory criminalization used to distinguish between voluntary commercial sex and victims of sex trafficking compels sex workers to testify their involvement in sex trafficking so that they can seek relief as sex trafficking victims. This undermines their right to remain silent. Furthermore, punishing only sex workers targeting unspecified persons, while failing to punish so-called 'concubinage' targeting specified persons, infringes upon the right to equality.

IV. Review

A. The Legislative History of the Regulation of Sex Trafficking

Sex trafficking has been prescribed as a crime subject to criminal punishment since November 9, 1961, when the Act on the Prevention of Prostitution, Etc. was enacted as Act No. 771. Article 2 of the Act on the Prevention of Prostitution, Etc. provided the definition as, 'Prostitution means engaging in sexual acts in return for receiving or promising money or other property gains from an unspecified person or for other commercial purposes.' Article 4 prohibited acts of prostitution or becoming a partner thereof, while Article 14 prescribed that any person who violates such prohibition shall be punished by a fine not exceeding 30 thousand hwan, by misdemeanor imprisonment, or by a minor fine.

However, the provisions prohibiting sex trafficking under the Act on the Prevention of Prostitution, Etc. did not have any particular normative power. After the Seoul 1988 Summer Olympic Games, the expansion of the vice and adult entertainment industry and human trafficking became serious social problems. In response, the Act on the Prevention of Prostitution, Etc., wholly amended by Act No. 4911 on January 5, 1995, removed the phrase 'engaging in sexual acts for other commercial purposes' from the definition of prostitution (Article 2 Item 1), and raised the statutory sentence for any person who engages in prostitution

and the partner thereof to imprisonment with labor for not more than one year, a fine not exceeding three million won, misdemeanor imprisonment or a minor fine (Article 26 Section 3). The amended penalty provision was retained until the Act on the Prevention of Prostitution, Etc. was repealed by the Commercial Sex Act.

The Commercial Sex Act, enacted as Act No. 7196 on March 22, 2004, replaced the term 'prostitution' with 'sex trafficking,' including not only sexual intercourse but also pseudo-sexual intercourse in its scope (Article 2 Section 1 Item 1), and prescribed the prohibition and criminal punishment of such acts (Article 4, Article 21 Section 1). The amendment to the Commercial Sex Act by Act No. 10697 on May 23, 2011, made some revisions to the expressions, changing the part 'receiving or promising' in the definition of sex trafficking to 'receiving or promising to receive' (Article 2 Section 1 Item 1), and revising 'anyone who has engaged in sex trafficking' to 'any person who has engaged in the conduct of sex trafficking' (Article 21 Section 1). However, the statutory sentence for punishing sex trafficking has been 'imprisonment with labor for not more than one year, by a fine not exceeding three million won, by misdemeanor imprisonment, or by a minor fine' since the Commercial Sex Act was first enacted to date, and is the same as the statutory sentence that was prescribed in the Act on the Prevention of Prostitution, Etc. (Article 21 Section 1).

B. Scope of Application of the Instant Provision

The Commercial Sex Act defines sex trafficking as 'engaging in sexual intercourse or pseudo-sexual intercourse using parts of the body, such as the mouth and anus, or implements, for an unspecified person or becoming a partner thereof in return for receiving or promising to receive money, valuables or other property gains' (Article 2 Section 1 Item 1 of the Act), thereby prescribing that the acts of selling and buying sex both constitute sex trafficking. The Instant Provision punishes any person who has engaged in sex trafficking by imprisonment with

labor for not more than one year, by a fine not exceeding three million won, by misdemeanor imprisonment, or by a minor fine, which means sex workers and sex buyers are subject to the same statutory sentence (Article 21 Section 1).

An examination of the specific scope of the Instant Provision reveals that sex workers are not subject to criminal punishment if they amount to 'victims of sex trafficking' as defined by Article 2 Section 1 Item 4 of the Commercial Sex Act (Article 6 Section 1 of the Commercial Sex Act), and are also exempt from punishment if they are under 19 years of age, for the purpose of their protection and rehabilitation (Article 38 Section 1 of the Act on the Protection of Children and Juveniles Against Sexual Abuse). Furthermore, those who have purchased sex from a person under 19 years of age are subject to the Act on the Protection of Children and Juveniles against Sexual Abuse (Article 13 Section 1 of the Act on the Protection of Children and Juveniles against Sexual Abuse), which means only persons who have purchased sex from sex workers who are 19 years of age or older are subject to the Instant Provision. Since no provision specifies the age of the sex buyer, any person who is 14 years of age or older and thus capable of criminal acts is subject to the Instant Provision if he or she purchases sex. Therefore, those who are punished by the Instant Provision are 'sex workers who are 19 years of age or older, and who are not victims of sex trafficking' and 'sex buyers who are 14 years of age or older, who purchase sex from sex workers who are 19 years of age or older.'

C. Whether the Instant Provision is Unconstitutional

(1) Restriction of Fundamental Rights

Article 10 of the Constitution guarantees the individual right to personality and the right to pursue happiness; these rights assume that an individual has the right to determine his or her own destiny. The right to such self-determination includes sexual self-determination, through which

one can choose whether to engage in sexual conduct and also the partner thereof; whether a person wishes to engage in sexual conduct in exchange for financial compensation also involves sexual self-determination. This means the Instant Provision restricts an individual's right to sexual self-determination.

Furthermore, the Instant Provision restricts conduct falling within the intimate, private domain of one's personal sex life, and thus restricts the right and freedom to privacy guaranteed by Article 17 of the Constitution.

Meanwhile, the 'occupation' guaranteed by Article 15 of the Constitution means a continuous income-generating activity that aims to fulfill the basic needs of life. There is no denying that sex trafficking, setting its social harms aside, is an income-related activity that satisfies the basic requirements of a sex worker. Thus, the Instant Provision restricts the freedom of sex workers to choose their occupation.

(2) Whether the Rule against Excessive Restriction Has Been Violated

(a) Legitimacy of the legislative purpose and appropriateness of means

Article 1 of the Commercial Sex Act prescribes, "The purpose of this Act is to eradicate sex trafficking, acts of arranging sex trafficking, etc. as well as human trafficking aimed at sex trafficking and to protect the human rights of victims of sex trafficking," clarifying that the primary legislative purpose of the Commercial Sex Act is to eradicate sex trafficking. The determination of whether such legislative purpose is legitimate should be preceded by an examination as to whether sex trafficking is harmful and must be eradicated.

In line with the spread of individualism and liberal views on sex, there is a growing perception in Korean society that sexual matters and love belong to the private domain and should not be subject to intervention by law. Furthermore, society has come to acknowledge the importance of the personal legal interest of freedom of sexual self-determination, as

much as the social legal interest of maintaining a sound sexual culture and sexual morality. However, it cannot be said that the tendency toward the liberalization of sex should extend to tolerating or justifying selling and buying sex. Arguing that sex trafficking is the oldest vocation in human history or considering it an inevitable means for fulfilling human sexual instincts is an oversight of the inhumane, abusive and exploitative nature of sex trafficking. Sex trafficking takes the form of domination over the body and personality of a sex worker that is economically vulnerable, in exchange for financial compensation; thus it cannot be considered an unrestricted transaction between equal parties. Sex trafficking, which is based on financial transactions that do not involve emotional connections between humans, leads to the commercialization of sex, and spreads and recreates the perception that sex can be easily bought with money. Consequently, sex workers are deemed commodities, and are exposed to the dangers of mental or physical abuse from sex buyers who aim to fulfill their sexual desires. Sex trafficking also creates an environment more vulnerable to coercive sex crimes, such as sexual violence or human trafficking aimed at sex trafficking, which would further expand the decadent and hedonistic culture, and ultimately dismantle the sound sexual culture and sexual morality of society.

While individuals' sexual conduct *per se* belongs to the intimate realm of privacy and is subject to the protection of the right to sexual self-determination, they ought to be regulated by law should they be expressed in the public domain and undermine the sound sexual culture of society (*see also* 2009Hun-Ba17, etc., February 26, 2015); voluntary commercial sex work that apparently did not take place under coercion may nonetheless infringe upon the autonomy of the sex worker's personality by commercializing sex; and the increasing prosperity of the sex trafficking industry distorts the ordinary flow of capital and labor, leading to the deformation of industrial structures and thus serving as a serious detriment to society (2011Hun-Ba235, December 27, 2012). In particular, lately the sex trafficking industry has become more systematically organized and specialized in covert and abnormal ways;

the advancement of information and communications has enabled persons who arrange sex trafficking to turn to more inventive business tactics using the internet or mobile applications. Given such realities, legalizing or failing to punish sex trafficking will lead to massive capital inflows into the sex industry, a rise in the number of illegal immigrants, and the deformation of the labor market, subsequently harming the economic and social stability of people's lives and further exacerbating the corruption of people's sexual morality. To regard human sexuality as something honorable, and not treat it as a commodity or a tool, is an important value and fundamental premise that must be protected by the community for the purpose of upholding human dignity and worth. Even if the sex worker chose to engage in commercial sex work voluntarily, and not through coercion, debasing one's body for financial gain, as a means or a tool for the sexual satisfaction or pleasure of the sex buyer, is an act that goes beyond the private domain as it surrenders human dignity to the power of money. Voluntary engagement in commercial sex work is therefore no different, in essence, from forced sex trafficking. Therefore, the legislative purpose of the Instant Provision, which is to establish a sound sexual culture and sexual morality by eradicating sex trafficking, is legitimate regardless of whether the engagement in sex trafficking was voluntary.

Nevertheless, criminal punishment imposed on sex trafficking is criticized as being ineffective in eliminating the trade, since the sex trafficking market has remained in existence underground despite the enforcement of the Commercial Sex Act. However, the reason sex trafficking has not been completely eradicated is due to complex factors such as the tolerance for sex trafficking when it comes to the culture of entertaining guests and business partners, the low awareness of its illegality, the emergence of new and aberrant sex trafficking industries, inventive methods for arranging sex trafficking using the internet or smart phones, the lack of a dedicated investigation workforce, the tendency to punish sex buyers lightly, and inconsistency in crackdowns and enforcement; such practical issues related to enforcement cannot be

directly linked to the question of whether regulations *per se* are effective. In fact, according to research conducted by the Ministry of Gender Equality and Family in 2013, the numbers of brothels and female sex workers were on the decline in so-called 'red-light districts' in which premises for sex trafficking were concentrated, and most sex-buying offenders replied that, upon becoming aware that sex trafficking was punishable by the Commercial Sex Act, they refrained from purchasing sex. Therefore, we cannot say that the Instant Provision does not function as a punitive measure for regulating sex trafficking. Consequently, the Instant Provision is an appropriate means for achieving the legislative purpose of establishing a sound sexual culture and sexual morality by eradicating sex trafficking.

(b) Minimum restriction

1) In the modern day, criminal law leans toward the decriminalization of private affairs, under which the state authority does not intervene in individual conduct that belongs to the private domain and does no social harm or does not clearly infringe upon legal interests, even if such conduct may run contrary to moral law. However, whether an individual's conduct should be considered a crime and regulated by the punitive authority of the state, or whether it should be left to moral code, is a matter that would vary depending on the time and space concerned, taking into account the mutual relationship between individuals, and between individuals and society. In the end, such a decision will inevitably be based on the times the society is faced with, and the understanding of the members of society. Yet as aforementioned, sex trafficking is not a matter limited to individual conduct in a private and intimate domain, but is harmful conduct that dismantles the sexual culture and sexual morality across society by distorting the perception of sexuality. So having the state intervene to impose criminal punishment on sex trafficking, instead of leaving it up to the liberty of individuals, does not contradict the public's legal sentiment, nor can we say that the necessity to regulate sex trafficking no longer holds true in Korean

society today.

2) The demand for sex trafficking is the main driver behind the formation, maintenance and expansion of the sex trafficking market. Therefore, the most important factor in eradicating sex trafficking is to suppress the demand of sex buyers. Korean society is dominated by a tolerant view of sex trafficking due to the culture of excessively, and potentially inappropriately, entertaining guests and business partners, and is characterized by diverse types of active sex trafficking markets including, not only the traditional form centered on red-light districts, but also commercial-front sex trafficking, new and deviant types of sex trafficking, and sex trafficking through the internet and smart phones. Furthermore, we are witnessing increasingly complex patterns of sex trafficking undertaken by illegal immigrants or migrant workers, by juveniles and the elderly, and sex trafficking in the form of overseas sex trips and tourism. The failure to suppress the incessant demand for sex trafficking amid such circumstances gives rise to concerns that the sex trafficking market will swiftly expand due to the influx of not only adults, but also juveniles and females from underdeveloped countries.

There may be claims that sex trafficking can be eradicated by less restrictive means, such as education on preventing sex trafficking or deterring recidivism, instead of through criminal punishment of sex buyers. However, many people find themselves unable to resist the temptation of sex trafficking, despite being aware of the Commercial Sex Act and its content, and the illegality of such conduct, while the social perception of purchasing sex remains overwhelmingly tolerant. Given such realities, we cannot conclude that education on preventing sex trafficking or recidivism has an equal or stronger effect than criminal punishment. Therefore, criminal punishment imposed on sex buyers cannot be considered an excessive means.

3) The statutory sentence imposed by the Instant Provision on sex workers is equal to that imposed on sex buyers. This is based on the view that suppressing demand for sex trafficking by punishing sex buyers would not be effective in eradicating the trade if sex trafficking

is legalized. Decriminalizing the act of selling sex may lead to a rise in the supply of sex trafficking for economic gains, and entail the risk of making it easier for persons seeking sex trafficking to acquire access to sex workers. Furthermore, we cannot rule out the possibility that sex workers will induce sex trafficking under illegal conditions, for instance by securing ways for sex buyers to avoid crackdown and detection. The decriminalization of selling sex may also turn sex trafficking into a form of organized crime: for instance, procuring organizations could force female sex workers who have entered the sex trafficking market through illegal human trafficking to engage in legal sex trafficking. Moreover, given the prevalence of the commercialization of sex, there are concerns that this will entrench female sex workers in sex trafficking by making it harder for them to escape the sex trade, let alone enhance their human rights. Therefore, this fully justifies the necessity to impose criminal punishment on not only sex buyers but also sex workers in order to eradicate sex trafficking.

The discrimination against and stigmatization of female sex workers, the guarantee of their basic livelihoods, and the issue of the violation of human rights should not be resolved by accepting sex trafficking as a form of ‘labor’ or decriminalizing the sale of sex; rather, the state and society should prioritize providing effective alternatives that enable them to make a living without having to sell sex, while making more investments and transforming the cultural structure and perception of Korean society.

There may be criticism that the criminal punishment imposed on sex workers is excessive, when many of them engage in such work due to inevitable circumstances arising due to social structural factors. There is no denying that such factors, which include the discriminatory labor market or poverty, largely affect decisions to work in the sex trafficking industry. However, it is also beyond doubt that a considerable number of sex workers succumb to the allure of easy money and engage in the trade readily or voluntarily for additional income or extra spending money, not on account of social structural factors such as poverty. The

identities of sex workers take on diverse forms, from the two extremes of ‘free individual’ and ‘victim’ to those in between; a variety of classes exist among them and they display different characteristics, depending on the circumstances they face. Due to such complicated aspects, it is difficult to establish a single, general cause for the individual cases of sex trafficking and identify sex workers who have been forced into the trade for inevitable reasons. Furthermore, not all poor or socially vulnerable people become sex workers, and the effects of social structural factors are not entirely limited to the sex trafficking trade. Even if external factors have driven them toward sex trafficking, sex workers cannot be spared from potential criticism or responsibility unless they have been completely deprived of autonomous judgment. Sex workers can be recognized as ‘victims of sex trafficking’ under the Commercial Sex Act if they face specific circumstances that tend to exonerate them, and subsequently be exempt from criminal punishment. Therefore, the punishment of sex workers who are not sex trafficking victims cannot be deemed an excessive exercise of the authority to impose criminal punishment.

Some argue that ‘sex workers who depend on the trade for subsistence’ should not be punished. However, it is extremely difficult to set a standard for distinguishing between those who work for subsistence and those who do not (and we cannot conclude that only sex trafficking that occurs in red-light districts is related to ‘subsistence’). Furthermore, given that crime for subsistence may take on various forms other than sex trafficking, whether to punish the conduct of sex trafficking for subsistence should not be decided during constitutional review, but considered as extenuating circumstances in determining criminal punishment, or be reflected in policies that provide support for sex workers.

4) The Commercial Sex Act protects sex trafficking victims by employing a broad definition of victims that extends beyond the concept of victims of crime as defined by the Criminal Act.

The term ‘sex trafficking victim’ includes any person who has been

compelled to engage in sex trafficking by means of a deceptive scheme or by force, or by other means equivalent thereto; a person who has engaged in sex trafficking while addicted to narcotics, etc. by a person protecting or guarding him or her due to business relationships, employment relationships, etc.; a juvenile or a person with no or insufficient ability to discern things or make decisions; and any person who has been trafficked for the purpose of sex trafficking (Article 2 Section 1 Item 4 of the Commercial Sex Act). The term also includes persons who have been kept from disengagement against their will due to advance payments, and persons whose passport or any certificate in lieu of a passport have been withheld by their employers or supervisors, immigration or employment agents, or their assistants under the pretext of securing the performance of obligations, as sex trafficking victims deemed to have been trafficked with the purpose of sex trafficking (Section 2, Section 1 Item 3, and Section 1 Item 4 Sub-Item (d) of Article 2 of the Commercial Sex Act). Such sex workers, having been recognized as sex trafficking victims, will not be deemed responsible for engaging in the trade and are exempt from criminal punishment (Article 6 Section 1 of the Commercial Sex Act).

The Commercial Sex Act also leaves room for the possibility for sex workers who are not sex trafficking victims to be dealt with in a protection case instead of by criminal punishment, depending on the nature of or motive for the offence or the character and conduct of the offender (Article 12). When the prosecutor or the judge recognizes that it is appropriate to issue a protective disposition, the case shall be processed as a protection case, and the sex worker would be subject to a restraining order prohibiting entry into places or areas in which sex trafficking could take place; probation; order to perform social service or to attend courses; commissioning a counseling center for sex trafficking victims for counseling; or commissioning a specialized medical institution for medical treatment (Article 14 Section 1). This shows that while the Commercial Sex Act, as a rule, imposes criminal punishment on sex workers who are not sex trafficking victims, it also provides

complementary measures to minimize the side effects of criminal punishment, for instance by using institutional measures to induce disengagement from sex trafficking without imposing criminal punishment in certain cases.

Further, the 'Act on the Prevention of Commercial Sex Acts and Protection, etc. of Victims' (hereinafter referred to as the "Act on Protecting Commercial Sex Victims") includes various institutional measures to help sex workers disengage from sex trafficking and return to the normal sphere of society. The Act on Protecting Commercial Sex Victims prescribes that it is the responsibility of the state and local governments to establish legal and institutional systems and to take the necessary administrative and financial measures in order to protect sex trafficking victims, and to facilitate their recovery, self-reliance and self-support (Article 3 of the Act on Protecting Commercial Sex Victims). The state and local governments can assist the sex trafficking victim in school enrollment, to help his or her social rehabilitation (Article 8), and can also provide accommodation and meals, counseling services and medical treatment, assistance in medical services and accompany the victim to investigative agencies for questioning and to court for testimony, through support facilities, counseling centers for sex trafficking victims and rehabilitation support centers (Article 10, Article 11, and Article 15 through Article 18). These measures can help sex trafficking victims or sex workers escape the chains of sex trafficking and safely reintegrate into society.

5) Views on sex trafficking are extremely diverse, and are translated into a wide array of legal measures that differ by country. Sex trafficking policies may take the form of prohibition, as in Korea, but some countries choose management policies or decriminalization policies depending on the circumstances they face. However, even in countries where voluntary commercial sex between consenting adults is not criminally punished, solicitation may be regulated or the operation of brothels prohibited to forestall the negative effects sex trafficking may have on local communities. Countries where commercial sex and

commercial sex venues are legal may still restrict sex trafficking hours or areas, or combine such policies with measures that close red-light districts or strictly regulate commercial sex venues. Furthermore, countries that decriminalize commercial sex do not necessarily witness an improvement in the safety or human rights of sex workers, and oftentimes experience the opposite, which includes serious harms such as the expansion of the sex trafficking industry, more severe sexual exploitation, and an increase in human trafficking due to the rising demand for sex tourism.

As aforementioned, countries are implementing diverse policies on commercial sex, taking into account the general spirit of the times, shifting public awareness and socioeconomic structures. It is not an easy task to ascertain the efficiency of such diverse policies based on visible and external statistics and performance compiled in the short term. Therefore, the question of how a state should approach the sex trafficking issue cannot be decided so easily, and the various legislative efforts made by the lawmaker after determining that sex trafficking is harmful and should be eradicated cannot *per se* be debated for their constitutionality (2005Hun-Ma1167, June 29, 2006). Therefore, the Instant Provision, which punishes the act of sex trafficking but exempts sex trafficking victims, regarding them instead as a subject of protection, does not punish attempts, and prescribes a relatively light statutory sentence through ‘imprisonment with labor for not more than one year; by a fine not exceeding three million won; by misdemeanor imprisonment; or by a minor fine,’ cannot be said to contravene the principle of minimum restriction just by comparing it with the policies of other countries.

(c) Balance of interests

To regard not only one’s own, but also another person’s sex as honorable, and not to use it as an instrument, are values that have become the basic premise for developing a community where the dignity and equality of all humans are guaranteed. Sex trafficking, which enables

the severe erosion of human sexuality by money, undermines such values. Thus, the public value of a sound sexual culture and sexual morality that the state seeks to establish by actively intervening in individual sexual conduct undertaken in the form of sex trafficking, and by eradicating the trade, is no less significant than the restriction on fundamental rights such as the right to sexual self-determination. Therefore, the Instant Provision does not violate the principle of balance of interests.

(d) Sub-conclusion

The Instant Provision does not violate the rule against excessive restriction.

(3) Whether the Right to Equality Has Been Infringed Upon

The requesting court claims that the Instant Provision infringes upon the right to equality of sex workers who target unspecified persons, by punishing them while simultaneously exempting sex workers targeting specified persons from punishment. However, in terms of the impact on a sound sexual culture and sexual morality, the issue of exploitation by third parties and the expansion of the sex industry, sex trafficking targeting unspecified persons is much more detrimental to society than sex trafficking targeting specified persons. Therefore, we accept that such discrimination is reasonable, and that subsequently, the Instant Provision does not infringe upon the right to equality.

The requesting court also claims that the Instant Provision infringes upon the right to remain silent and violates international treaties. However, such claims are unfounded for the Instant Provision does not restrict the right to remain silent as it does not impose the duty to give testimony that could serve to incriminate the sex worker; meanwhile international treaties, which have the same effect as domestic law, do not provide a standard for constitutional review.

V. Conclusion

The Instant Provision does not violate the Constitution, as set forth in the holding. The decision was made with the unanimous opinion of participating justices, aside from the opinion for partial unconstitutionality of Justice Kim Yi-Su and Justice Kang Il-Won as set forth in VI, the opinion for full unconstitutionality of Justice Cho Yong-Ho as set forth in VII, and the concurring opinion to the majority opinion of Justice Lee Jung-Mi and Justice Ahn Chang-Ho as set forth in VIII.

VI. Opinion of Justice Kim Yi-Su and Justice Kang Il-Won for the Partial Unconstitutionality of the Instant Provision

We agree with the majority opinion that the legislative purpose of the Instant Provision, which is to eradicate sex trafficking and to protect sound sexual culture and sexual morality, is legitimate, and that the criminal punishment of sex buyers does not violate the Constitution. However, we believe that the criminal punishment of sex workers is an excessive exercise of the state's authority to impose criminal punishment, and therefore violates the Constitution.

A. The Nature of Sex Trafficking

Sex trafficking is not a question of personal transactions between sex buyers and sex workers. It is a complex issue related to the patriarchal social structure, the labor market structure and poverty. In other words, sex trafficking is not a problem of individuals selling sex, but a problem concerning the socioeconomic structure, in which sex is commercialized, and drives sex workers to engage in sex trafficking. Juveniles who enter the sex trafficking trade in their teens do so in a dependent and vulnerable state for reasons such as poverty, among others, and tend to

remain in the industry after becoming adults, having no other option to choose. Many of those who enter the sex trafficking industry as adults due to poverty or other reasons also work in a state of isolation and desperation, caused by social stigma and discrimination. These people are in a vulnerable position within the social structure, and can be said to have no other alternative to make a living aside from sex trafficking.

Some forms of sex trafficking take place between male sex workers and female sex buyers, but the majority involves female sex workers and male sex buyers. Furthermore, the perception that sex trafficking involves females selling sex, and males paying for it, is already culturally embedded. This shows that sex trafficking exists as an asymmetric form of transaction, where the norm is that a female sex worker provides sexual services to a male sex buyer and receives money or other rewards, while the opposite situation is rare. Other forms of labor that were mostly carried out by females such as childcare, cooking or nursing have also become commercialized in the modern day and are frequently traded. However, such types of labor are recognized, in and by themselves, for their *raison d'etre* and value even when they are not commercially traded, while sex trafficking is not, and cannot be, recognized in such a way.

Males who purchase sex use females solely for their own satisfaction, giving no thought to the personality or emotions of the sex worker involved. Meanwhile, although the female sex worker may have given consent to the sexual conduct *per se*, she will engage in the conduct following the demands of the sex buyer, a complete stranger, let alone someone with whom she shares affection or intimacy. Thus, such conduct will not only feel uncomfortable, but will cause physical and mental pain for the female sex worker.

Consequently, sex trafficking only reinforces the suppression and discrimination against females in a patriarchal social structure, and cannot prevent the objectification of sex workers. In essence, sex trafficking is a means for justifying sexual domination by males and the sexual subordination of females, and is an act that infringes upon the

personality and dignity of the sex worker.

B. Regulation on Conduct Related to Sex Trafficking and Changing Social Perceptions of Sex Trafficking

(1) There are diverse policies that regulate commercial sex, such as its complete prohibition and illegalization, the legalization of commercial sex itself but the illegalization of arranging the same, the establishment of a red-light district within which commercial sex would be legal, or the decriminalization of selling sex combined with criminal punishment imposed on buying sex.

Even in countries where commercial sex is legal, involuntary sex trafficking, such as sex trafficking through the trafficking of persons, is criminalized since it involves breaching the human rights of the sex worker, and the sex buyer concerned or person related to human trafficking is subject to criminal punishment.

In the case of voluntary commercial sex between consenting adults, the legal regulations on the acts of selling, buying and arranging commercial sex differ among countries.

Korea and most states in the U.S. impose criminal punishment on both selling and buying sex, but there are many countries that do not punish either act (the Netherlands, the UK, France, Germany, Canada, Australia, etc.). Sex trafficking itself is prohibited in Japan but is not criminally punished. However, by penalizing those who actively solicit or lure persons into commercial sex, punishment is in effect limited to sex workers. Some countries, like Sweden, Iceland and Norway, do not punish sex workers and only punish sex buyers. Meanwhile, most countries impose criminal punishment on the arrangement of sex trafficking.

(2) Looking back historically, the male-centered sense of virtue, through which men seek to maintain a patriarchal society, has been instrumental in criticizing and socially stigmatizing women who provide

sex to multiple men as immoral beings who undermine the social order; prohibiting commercial sex commenced based on this idea.

In Korea, the 'Act on the Prevention of Prostitution, Etc.,' enacted on November 9, 1961, initiated criminal punishment on females engaging in prostitution and the partners thereof, using the term 'prostitution,' which indicates 'the act of a degraded female selling her body.' On March 22, 2004, the 'Act on the Prevention of Prostitution, Etc.' was repealed and replaced with the more advanced Commercial Sex Act. This Act substitutes the term prostitution with the value-neutral 'sex trafficking,' and while continuing to punish all parties involved in sex trafficking, prescribes sex workers coerced to engage in the relevant conduct as 'victims of sex trafficking' and exempts them from criminal punishment.

In addition, the 'Act on the Prevention of Commercial Sex Acts and Protection, etc. of Victims' was also enacted on March 22, 2004, to prevent sex trafficking and to protect and support the self-reliance of sex trafficking victims and sex workers. This Act provides legal protection to not only sex trafficking victims, but also sex workers in general.

A bill that proposes to revise the Commercial Sex Act is pending in the 19th National Assembly; it outlines that buying sex constitutes sexual exploitation, and punishing female sex workers would run contrary to the nature of sex trafficking, and that, for these reasons criminal punishment should be limited to sex buyers, in line with the international trend of decriminalizing female sex workers. Another bill to revise the same Act proposes that the term 'coercion' be removed from the definition of sex trafficking victims, to prevent them from being categorized as voluntary sex workers for the lack of circumstances that indicate physical confinement, assault or coercion, and that sex workers who report the arrangement of sex trafficking or human trafficking aimed at sex trafficking be exempt from punishment.

The 49th Session of the UN Committee on the Elimination of Discrimination against Women held in 2011 urged Korea to follow through with Article 6 of the UN Convention on the Elimination of All Forms of Discrimination against Women, calling for the country to

'decriminalize female sex workers, and to review sex trafficking-related policies and legislation, including the Criminal Act, to ensure that women involved in sex trafficking are not punished,' showing its support for selective criminalization policies. The European Parliament resolution adopted in February 2014 also stated that sex workers should not be punished, and called on member states to repeal repressive legislation against sex workers, proclaiming that "one way of combating trafficking of women and under-age females for sexual exploitation and improving gender equality is the model implemented in Sweden, Iceland and Norway (the so-called Nordic model), and currently under consideration in several European countries, where the purchase of sexual services constitutes the criminal act, not the services of the prostituted persons."

The aforementioned attitude shifts were brought about by confronting the realities of the social, economic and cultural structures that surround sex trafficking, which led to the growing perception that females who sell sex are victims of a repressive, sexist social structure. Given such shifts in social perception, and in line with global trends, it is important to understand that sex workers today are basically people that require protection and guidance, rather than criminal punishment.

C. Unconstitutionality of Penalizing Sex Workers

(1) The following is an examination of whether the criminal punishment of sex workers is an appropriate means, and satisfies minimum restriction, for achieving the legislative purpose of the Instant Provision, which seeks to eradicate sex trafficking and establish a sound sexual culture and sexual morality.

Sex trafficking, by objectifying females who have turned to selling sex for a lack of any other means of living, despite the physical and mental pain it causes, infringes upon the personality and dignity of female sex workers. While male sex buyers are those who commit this breach of the right to personality, female sex workers are those who are in the shadow of repression and discrimination caused by the social structure;

thus, female sex workers should be provided with protection and guidance, rather than penalized through criminal punishment.

The Constitution prescribes that in certain areas women's rights require a special level of protection compared to the rights of men, as prescribed in the state's duty to protect motherhood (Article 36 Section 2), to promote the welfare and rights of women (Article 34 Section 3), and to accord special protection to working women (Article 32 Section 4). There is no denying that sex workers are generally perceived as being females, thus, unlike male sex buyers, they should be more closely protected for the sake of fulfilling the constitutional spirit of protecting females and motherhood.

Unlike other crimes committed for subsistence like theft, engaging in selling sex does not specifically infringe upon or threaten the legal interests of others. Therefore, if sex workers choose to engage in commercial sex for a lack of any other option due to the social structure, we cannot merely say this was voluntary, claiming they were left to their own decisions and subsequently holding them criminally liable.

The majority opinion was that the influence of such social structural factors is not limited to sex trafficking, and that, unless such external factors were enough to completely deprive the autonomous judgment of sex workers, they cannot be spared from criticism or responsibility.

However, the reason social structural factors cannot help but play a more prominent role in commercial sex, unlike in other crimes committed for subsistence, is because sex is a special matter. Sex is the source of love, marriage and childbirth - the pillars of human life - and upholding the value of one's sexuality becomes the basis of human dignity and worth. Voluntarily giving up such sexuality as an object of trade may subject the sex worker to unimaginable physical and mental pain. The reason sex workers engage in commercial sex work while putting up with such pain is that they face the reality of having to make a living, in other words because they are desperate for survival. This is a problem related to the social structure, and cannot easily be solved by

an individual. Furthermore, engaging in commercial sex may start out voluntarily, but very often involves violent, aberrant behavior on the part of the sex buyer, and can easily degenerate into forced prostitution. Given that sexual discrimination, as well as the prejudice and stigma against female sex workers, is prevalent across Korean society, even when sex workers are forced to engage in commercial sex work by procurers it will be virtually difficult for them to break it off voluntarily.

Therefore, even if a sex worker chooses to engage in sexual conduct voluntarily, choosing this as an occupation will inevitably involve intervention by involuntary factors, which means that the sexual conduct of a sex worker cannot be considered a completely autonomous decision.

To impose criminal punishment on a female sex worker in spite of these circumstances, instead of providing her with protection and guidance, may cause the discriminatory labor market, patriarchal social structure and the sexual bias against women to set in even further, thus aggravating the suppression and exploitation of female sex. The legislative purpose of eradicating sex trafficking and protecting a sound sexual culture and sexual morality cannot justify this phenomenon.

(2) Inhibiting entry into the sex trafficking trade and inducing sex workers to disengage cannot only be achieved through criminal punishment. Since most sex workers are selling sex due to financial reasons notwithstanding the threat of criminal punishment, a more fundamental and advisable way to encourage their disengagement and prevent their entry into the trade would be to assist them to engage in other economic activities and to provide protection. Alongside sex trafficking prevention education that aims to establish a proper perception of sex, it is also important to suppress the sex industry itself by imposing disciplinary measures, confiscation and surcharges on third parties that profit from brothels or sex trafficking. There are also ways to induce disengagement from sex trafficking through protection or guidance instead of criminal punishment, for instance by using protective dispositions such as the prohibition of entry into places or areas in

which sex trafficking could take place; probation; orders to perform social service or to attend courses; commissioning a counseling center for victims of sexual traffic for counseling; or commissioning a specialized medical institution for medical treatment (Article 12, Article 14 Section 1 of the Commercial Sex Act). This indicates that it is possible to eradicate sex trafficking through measures that impose less restriction on the fundamental rights of sex workers, without involving criminal punishment.

In this regard, the majority opinion is that the Commercial Sex Act employs a broad definition for sex trafficking victims, exempting them from criminal punishment and penalizing only voluntary sex workers who do not fall under that definition, and that for this reason the criminal punishment imposed on sex workers is not excessive. However, such dichotomy is only valid under the presumption that sex workers have the option of choosing another occupation, and that social structural factors such as the discriminatory labor market or poverty do not affect the sex worker's decision. Otherwise, using such distinction is pointless. Although the Act prescribes sex trafficking victims as persons compelled to engage in sex trafficking by means of a deceptive scheme or by force, or by other means equivalent thereto (Article 2 Section 1 Item 4 Sub-Item (a) of the Commercial Sex Act), and exempts them from criminal punishment and provides them with various means of protection (Article 6 of the Commercial Sex Act), it is not easy for sex workers - who cannot easily judge whether, by being forced to engage in sex trafficking by the deceptive scheme or force of a procurer, they are subject to such provisions that exempt punishment and provide protection - to report an abusive procurer or client, risking punishment. In fact, a sex worker who has no other means of living aside from sex trafficking, having no option of choosing another occupation, will be faced with detection and investigation with the predicament of being unable to claim that the sex trafficking was voluntary, or readily claim to be a sex trafficking victim. In such cases, due to their desire to avoid criminal punishment, most sex workers will be disadvantaged in their relationship

with the sex buyer, and become more dependent on procurers or criminal organizations that can protect them from punishment. This further reinforces an environment that is sexually exploitative of sex workers, aggravating economic exploitation and the breach of human rights, while driving the sex trafficking market underground and into the shadows, which hinders the eradication of sex trafficking.

The majority opinion holds that sex workers must be punished to effectively eliminate sex trafficking, but we should take note of the fact that Sweden, which chose to decriminalize sex workers, has in fact made remarkable progress to this end.

The above shows that imposing criminal punishment on female sex workers, who in fact require protection and guidance due to their vulnerability arising from social structural factors, is not an effective way to eradicate sex trafficking itself, and may actually worsen the repression, discrimination and exploitation of female sex workers, therefore violating the appropriateness of means and the rule of minimum restriction.

(3) The part of the Instant Provision that prescribes the punishment of sex workers fosters the underground sex trafficking market and aggravates the economic exploitation and infringement of human rights of sex workers, without contributing to the eradication of sex trafficking. The Instant Provision will only deprive sex workers of their livelihood, and as a result they will be pushed further into the group of socially vulnerable people. The public interest sought by the Instant Provision, of establishing a sound sexual culture or sexual morality, is abstract and vague, while the disadvantage imposed on sex workers is incomparably serious and dire. Thus, the part of the Instant Provision prescribing the punishment of sex workers violates the principle of balance of interests.

(4) However, our claim that the criminal punishment of sex workers is excessive does not mean that sex trafficking is worthy of the state's protection, that sex trafficking poses no social harm, or that selling sex

should be permitted. We are merely arguing that restricting sex trafficking through means other than criminal punishment on sex workers will help prevent the repression and exploitation of female sex workers. The criminal punishment of sex buyers requires a different perspective.

As aforementioned, the idea that sex with females can be purchased or that females can be used as sex objects defines female sexuality from a male perspective, and objectifies females, which is no different from acts of repression and discrimination that harm females. The fact that the sex worker has consented to the act of commercial sex, or has been paid by the sex buyer, does not change the fact that commercial sex, by nature, suppresses and exploits females.

The majority opinion and opinion for full unconstitutionality state that the Instant Provision restricts an individual's right to sexual self-determination, presuming that the sexual self-determination of the sex worker and the sex buyer are of the same nature. However, sex trafficking infringes upon the personality and dignity of the sex worker; thus the legal status of the sex buyer that purchases satisfaction through buying sex is clearly different from that of the sex worker who relinquishes his or her body and personality up to the disposal of the sex buyer for financial reasons.

Historically, when it comes to the issue of sex, only females were subject to legal regulation on a variety of issues, including birth control and abortion. The concept of the right to sexual self-determination was born from the idea that females, who had long been subject to regulation, have the right to make their own decisions about their own bodies. Therefore, the right to sexual self-determination of males cannot be acknowledged as being equal to that of females, who can become pregnant and give birth. We should not interpret the right to sexual self-determination as the right to freely choose one's sex partner or the right to purchase the sexual freedom of females.

It is important to understand that the male-centered perception of sex, which has taken root in the patriarchal social structure, is incorrect, and to rectify it. The punishment of sex buyers by the Instant Provision

would be a way to achieve this. It would have the effect of reminding people that the reason so many females inevitably choose to engage in sex trafficking is essentially due to the structural problem of sexual discrimination, and this in turn would make people more cautious about sexual discrimination and raise awareness on gender equality. If sex trafficking were to be completely legalized and sex buyers freed of punishment, it will become hard to prevent the further proliferation of sexually discriminating views that are prevalent across the society, or to protect the sound sexual morality which is already under threat. The European Parliament resolution examined earlier also points out that sex trafficking may perpetuate gender stereotypes such as the idea that females' bodies can be for sale to satisfy male demand for sex, and that the legalization of prostitution has an impact on young people's perception of sexuality and of the relationship between women and men.

Further, even if voluntary and forced commercial sex may be conceptually different, the sex industry is a complicated mixture of the two. Exempting sex buyers from punishment just because the commercial sex involved was consensual, will lead to a rise in demand for sex trafficking. In response to such demand, procurers looking to supply sexual services will attempt to secure sex workers by all means, including crimes such as human trafficking and confinement, so as to maximize profits. Therefore, legalizing commercial sex would ultimately fuel forced sex trafficking. Germany attempted to create an environment that would encourage disengagement from commercial sex, by legalizing commercial sex so that more sex workers could subscribe to social insurance and their working conditions could be improved. In reality, the demand for sex trafficking has risen and the related industry has witnessed a sharp expansion, while not much impact has been made toward the end of better working conditions or disengagement from the trade.

(5) Sub-Conclusion

The part of the Instant Provision that extends criminal punishment to

sex workers is an excessive exercise of the state's authority to impose criminal punishment, contrary to the rule against excessive restriction. Thus, this part of the Instant Provision violates the Constitution.

VII. Opinion of Justice Cho Yong-Ho for the Full Unconstitutionality of the Instant Provision

I state my dissenting opinion as follows, for I believe the Instant Provision violates the Constitution.

A. Violation of the Rule against Excessive Restriction

The Instant Provision violates the Constitution, for it violates the rule against excessive restriction, thus infringing upon the right to sexual self-determination and the right and freedom to privacy of persons engaging in commercial sex (sex workers and sex buyers).

(1) Human Nature and the Essence of Sex Trafficking

(a) Human nature

Commercial sex, which has been ever present in the history of the human race, has been condemned from the aspect of personal ethics and has been the subject of regulation and punishment by social rules, regardless of the times or the country. Females who sell sex, in particular, have been the object of disdain in society. Nevertheless, commercial sex has never once disappeared, and has been tolerated by society or promoted by the state depending on the times and circumstances. Such historical facts, of course, cannot serve as the grounds for justifying or fully permitting commercial sex. However, commercial sex is expected to subsist today and in the days to come, not because the human race lacks morality or ethics or because the

regulation and punishment of commercial sex is not strong enough, but because it stems from the human nature of sexuality.

Unlike other animals, humans engage in sexual acts not just to perpetuate the species, but also for pleasure. The joy that derives from sexual conduct comes from physical pleasure, but also from the mental pleasure of emotional connection, relaxing the mind, psychological satisfaction and self-realization. Such pleasure leads to healthy and happy lives, and by connecting with a partner we engage in close communication or strengthen our solidarity. Sex *per se* was not always the ultimate goal or used just for carnal pleasures; sexual desires helped us seek various benefits and happiness. The sexuality of a human being accompanies an individual throughout his or her life, and is a pattern of behavior that makes that individual who he or she is. Thanks to the strong sexual desires of human beings, the human race has been able to avoid extinction and prosper as we do today through social solidarity.

(b) The essence of sex trafficking

Claims that the essence of commercial sex is moral corruption, a choice of occupation, a contradictory product born of capitalism and patriarchy or sexual abuse of women are all, in part, true. Under idealistic moral views, sexual conduct that conforms to a sound sexual culture and sexual morality is when a man and a woman naturally engage in consensual sexual relations that involve love, with no desire for any reward. However, the reality is that sexual relations do not necessarily presuppose love, while commercial sex does not necessarily exclude its involvement.

Historically, love between human beings was not punished or restricted for being based on rewards or financial terms, and it is actually hard to find cases of love or sexual relationships that are not connected to any type of compensation. Therefore, looking down upon or criticizing sexual relations just because they happen to involve money merely constitutes a moral or ethical prejudice against sex. Commercial sex poses no harm to

anyone, and there is no reason to morally condemn sexual conduct that is not based on marriage or love. Disapproval of commercial sex, claiming that it can degrade sexual morality, is incompatible with a society in which sex is a liberal matter. Moreover, commercial sex can be accepted as a way to relieve one's sexual desires. Supply of and demand for commercial sex has always existed due to human nature, which is why it has become one of the oldest occupations in human history.

Regardless of the differences in the positions on normalizing, regulating, prohibiting or criminally punishing commercial sex, I believe that this issue influences the quality of our lives. Thus, having contemplated the essence of commercial sex based on an in-depth examination of human nature, I believe that the legislator does not need to regulate commercial sex by restricting other fundamental rights to an extent that cannot be reasonably accepted in an open democratic society.

(2) On the Legitimacy of the Legislative Purpose

The majority opinion acknowledges the social harms of commercial sex, such as its objectification of human sexuality or its inhumane, abusive and exploitative nature. Based on this reasoning, the legislative purpose of the Instant Provision, which is to eradicate sex trafficking and to establish a sound sexual culture and sexual morality, is justified, according to the majority opinion. The opinion for partial unconstitutionality also agrees that the legislative purpose of the Instant Provision is legitimate.

However, I believe that the legislative purpose of the Instant Provision is not legitimate, considering human nature and the essence of sex trafficking discussed above.

(a) Whether commercial sex is socially harmful

Society is maintained by accepting that individuals possess different

values, and by tolerating the actions of such individuals, not by forcing members of society to share a predominant value.

Just as the values or happiness sought by individuals are pictured differently, sexual desires are expressed through different methods. A person with a very strict ideal about sexuality will believe that selling sex is the same as commercializing oneself, and will consider it an unpardonable act on par with viewing slavery as ethical. However, not all people have such strict ethical notions about sexuality, and voluntary commercial sex between consenting adults is entirely feasible. In voluntary commercial sex, the sex worker decides at will to engage in sexual conduct with the partner thereof for his or her interests, and is not surrendering one's personality and body to the power of money, as stated in the majority opinion. Since commercial sex takes place between the sex worker and sex buyer upon mutual agreement, it does not involve much anti-social illegality. Furthermore, since commercial sex involves selling sexual services, not the human body or personality, within that scope, commercial sex is essentially the same as labor provided in other service industries. The claim that commercial sex commercializes sex, infringing upon the right to personality of the sex worker, and that it harms sound sexual culture and deforms industrial structures is not based on the nature of commercial sex itself, but is merely the result of social stigma. In the end, the social harms mentioned by the majority opinion are merely presumptive, or do not specifically infringe upon legal interests.

Meanwhile, aside from mentioning that its purpose is to eradicate sex trafficking (Article 1), the Commercial Sex Act does not clarify why sex trafficking should be eradicated. If commercial sex itself is an infringement of human dignity, there is no reason for the Commercial Sex Act to separately provide a definition for 'victims of sex trafficking' (Article 2 Section 1 Item 4, Chapter 2, etc.). The legislative purpose of the Instant Provision is to punish sex workers in order to protect their human dignity and personal autonomy, which is hard to accept.

(b) The ambiguity of a sound sexual culture and sexual morality

As aforementioned, since commercial sex *per se* is not socially harmful, it is questionable whether it is the legitimate duty of the state to force a sexual culture, which belongs to the ethical and moral sphere, on the public and to supervise compliance therewith by exercising the state's authority to impose criminal punishment. It is not the duty of the law to intervene in sexual culture and sexual morality *per se*, and the sex life of a human being should not be regulated by criminal punishment, but provided with room for personal moral and immoral decisions. The idea of a sound sexual culture and sexual morality is decided by the conventional norms of society, and is not only extremely ambiguous, abstract and unclear but can always change depending on the times, place, circumstances and values; it is questionable as to who would be able to define such matters, and in what manner. In times when the perception of sex is changing due to the rapid spread of individualism and liberal views on sex life, the argument that specific sexual conduct harms sexual culture and sexual morality just for being based on monetary transactions cannot be deemed the general consensus among members of our society. Order in the intimate domain of sexual affairs should be established by society itself, and yet the state's intervention in this area to impose criminal punishment on sex trafficking under the pretext of establishing a sound sexual culture and sexual morality is ultimately a declaration and coercion of the lawmaker's specific moral views. This is clearly contrary to our constitutional values, which maintain neutrality on issues of gender, religion and social status, and being derived from the negative stigma against female sex workers and from the sexist notion of female chastity, it also runs counter to the spirit of the Constitution, which is based on gender equality.

(c) Violation of the state's minimum obligation to protect its people, and the Instant Provision

1) Voluntary sex work, in particular sex work undertaken for

subsistence, is a matter related to an ‘existential life’ where sex work is inevitably chosen as an occupation due to economic circumstances. The majority opinion states that sex trafficking should not be legally protected for it infringes upon human dignity, but nothing breaches human dignity more than a threat to survival. We should not ignore the fact that many female sex workers engage in commercial sex in desperate situations where they have no other option. Although sex work may provide an income, the occupation is extremely tough and dangerous, while sex workers must endure the contempt of society; thus, females who do choose sex work for a living would be doing so as a last resort. The dignified social values of establishing a sound sexual culture and sexual morality may ring true for the general public who can afford to make a living, but for people who must subsist on a day-to-day basis - socially and economically vulnerable females in particular - they are merely empty illusions. The values of or discourse on a social life must come after the matter of survival. The Instant Provision, which was developed to protect the human rights of female sex workers, is in fact threatening their survival, which is the severest violation of human rights of all.

2) Statutes must be carefully formulated and drafted to build up values that conform to the Constitution. Thus, even if a statutory provision seems value-neutral on the surface, it can be pronounced unconstitutional if it has the actual effect of diminishing constitutional ideologies and values. Article 34 of the Constitution of Korea guarantees that all citizens shall be entitled to a life worthy of human beings (Section 1), prescribes the state’s duty to endeavor to promote social security and welfare (Section 2), and prescribes that citizens who are incapable of earning a livelihood shall be protected by the state (Section 5). Voluntary female sex workers who work for subsistence choose commercial sex as a last resort to make a living, while the state fails to provide them with the minimum level of protection. The criminal punishment of these sex workers by a state that has failed to fulfill its minimum duty constitutes another form of social violence. We must heed

the outcries of the sex workers that say, “The most egregious procurer is the state.” Imagine that ‘Yeong-Ja’ (from *Yeong-Ja’s Heydays*), ‘Fantine’ (from *Les Miserables*) and ‘Sonia’ (from *Crime and Punishment*), who could be our daughters or sisters, are punished for sex trafficking under the Instant Provision. Would this be acceptable?

(3) On the Appropriateness of Means and Minimum Restriction

(a) Whether criminal punishment is appropriate

1) While parts of our life should be directly regulated by law, some domains should be left to moral judgment. It is impossible to subject all actions that deserve moral blame to criminal punishment. In the case of private domains such as an individual’s sex life, it is in line with the spirit of the Constitution to leave the area up to self-determination as much as possible, given the nature of its rights and freedoms. The essence of the constitutional protection of human dignity lies in the inviolability of the human body and importance of human values. Voluntary commercial sex between consenting humans fundamentally belongs to the highly intimate realm of individual privacy, and when taking place on a personal level without involving arrangement by a third party, can hardly be considered harmful to others or to a sound sexual culture and sexual morality. Even if the conduct took place because of a reward, voluntary commercial sex means both parties have given consent which, in turn, means that such conduct is at the very core of the scope of protection. Thus, in terms of the infringement of legal interests, the criminality of such conduct cannot be explained. So allowing the state to intervene in the domain of sex lives, the order of which should be left up to sexual morality and established by society, and to regulate it through criminal punishment, would constitute an infringement of the right to sexual self-determination and of the right and freedom to privacy. The freedom to not have these rights breached is ultimately aimed at protecting and guaranteeing human dignity.

2) As recognized by the majority opinion, the decriminalization of private affairs is the trend in modern criminal law. In the same context, the Constitutional Court ruled that the criminalization of sexual intercourse under the pretense of marriage and adultery under the Criminal Act is unconstitutional (*see also* 2008Hun-Ba58, etc., November 26, 2009; 2009Hun-Ba17, etc., February 26, 2015). A comparison between adultery and the Instant Provision shows that the statutory sentence for adultery was imprisonment for not more than two years (Article 241 Section 1 of the Criminal Act), while the Instant Provision imposes a punishment of imprisonment with labor for not more than one year; by a fine not exceeding three million won; by misdemeanor imprisonment; or by a minor fine. The social harms of adultery are acknowledged, for it destroys or may destroy the institution of marriage and the family by breaching the duty of sexual fidelity, and the spouse becomes a victim; on the contrary, the Instant Provision poses no social harm and involves no victim. This shows that positive law and the legal sentiment in society both deem the Instant Provision to be an issue of less gravity than adultery. Thus, when we examine the Instant Provision with consideration as to why the Court ruled the criminal punishment of adultery as unconstitutional, the circumstances seem ripe enough to decriminalize commercial sex. At its International Council Meeting held in Dublin in 2015, Amnesty International adopted a resolution that stated, “Sex workers are one of the most marginalized groups in the world who in most instances face constant risk of discrimination, violence and abuse. The best way to protect their human rights and lessen their exposure to abuse and violence is to decriminalize all aspects of sex work.” Provided, we should be careful not to broadly interpret the decriminalization of commercial sex as its ‘legalization,’ which would lead to the misconception that decriminalization will encourage and expand sex trafficking and compromise the integrity of society.

3) The majority opinion states that commercial sex *per se* takes on an inhumane, violent and exploitative nature, but this, in fact, is the result

of the state pushing sex workers toward the blind spots of legal protection by deeming commercial sex as a trade to be eliminated from society. Sex workers themselves are against the view that commercial sex is a form of violence brought about by the social structure, as commercial sex *per se* does not necessarily lead to abuse or exploitation. In the end, the view that commercial sex is a social structural violence may be a social prejudice wielded under the pretext of ethics or morality.

Any crimes including human trafficking with the aim of sex trafficking, the sex trafficking of children or juveniles, coercion, confinement, exploitation and violence that occur in the course of sex trafficking, should be countered with criminal punishment. The conduct of arranging, encouraging or abetting sex trafficking, solicitation and sex trafficking advertisements are also accepted as socially harmful for publicly exposing people to sex trafficking, and this would call for intervention and control by the state. By theory of legislation, at least, it will be much more effective to focus on detecting and punishing such crimes, and to execute effective criminal penalties.

(b) Whether criminal punishment is effective

1) Since the aim of the Instant Provision is to eradicate sex trafficking, it must have the effect of suppressing or preventing sex trafficking for it to provide an appropriate means. The majority opinion states that the Instant Provision provides an appropriate means, on the grounds that the number of brothels and sex workers declined in certain red-light districts after the Commercial Sex Act entered into force. However, the Instant Provision does not only punish sex trafficking that takes place in red-light districts, and if a rise in other types of sex trafficking negates the deterrence of the demand for and supply of the entire sex trafficking trade, the appropriateness of means cannot be accepted. Despite the fact that more than ten years have passed since the Commercial Sex Act came into force, no statistics support an overall

reduction in sex trafficking, while numerous fact-finding surveys reveal that the Act has only given rise to the side effect of expanding the underground sex trafficking market. While the total number of brothels and female sex workers has risen, and the increasing diversification of sex trafficking markets – not only in the traditional form centered on red-light districts, but also commercial-front sex trafficking; sex trafficking using the internet and smart phones; overseas sex trips and tourism; and other new and deviant types of sex trafficking – has become a serious social problem, even the size of such markets has yet to be properly assessed. This means that the Instant Provision, which aims to eradicate sex trafficking, is in no way fulfilling this purpose, which raises strong doubts about its effectiveness and leads to a violation of the requirement of appropriate means.

2) In such a situation where even the scale of the sex trafficking market is difficult to ascertain, the frequency or ease at which the general public is exposed to harmful environments in their daily lives, in the form of flyers advertising commercial sex, solicitation, etc., would also play a significant role in judging the effectiveness of the Instant Provision. Since the Commercial Sex Act entered into force, crackdowns have been concentrated on red-light districts and the ballooning effect has led to the rapid expansion of the underground sex trafficking market. Several studies report that this is also closely related to the recent rise in offenders of indecent acts or sexual violence. Setting aside the fact that this has made crackdowns on sex trafficking more difficult, new forms of sex trafficking that are hard to detect and punish are flourishing in a wide variety of venues including residential neighborhoods and studio apartments. Compared to the past when sex trafficking was mostly concentrated in red-light districts, accessibility to sex trafficking has increased further. This means that the general public, including juveniles, will be more easily exposed to information on sex trafficking or gain more opportunities to access sex trafficking, whether they like it or not. Thus, the legal interests of establishing a sound sexual culture and sexual morality, which should be protected by the Instant Provision, are

only being further compromised.

3) The outcomes mentioned above cannot merely be treated as matters of enforcement that should be left to the occasional crackdown undertaken by investigative agencies or to selective criminal prosecution, as stated in the majority opinion. It is practically impossible for the police to detect all sex trafficking that takes place in private, free of restraints on time and venue. Moreover, history and reality show us that this may actually lead to abuse of authority and corruption by the police, who, in a bid to bump up statistics, may concentrate crackdowns on red-light districts and be tempted by the lure of sting operations, not to mention engage in collusion and corruption in the process. The prohibition of sex trafficking only makes sex workers more vulnerable to violence and marginalized from society. In this regard, the Instant Provision is not an effective, appropriate means to eradicate sex trafficking.

(c) Availability of less restrictive measures

As mentioned in detail by the majority opinion, the Commercial Sex Act and the Act on Protecting Commercial Sex Victims do provide several institutional measures that help sex workers escape from sex trafficking and return to a normal life in society. However, although regulation on sex trafficking may be necessary, it should not be through criminal punishment, regardless of whether the conduct has arisen due to the financial needs of the sex worker or the sexual desires of the sex buyer. The best solution to solving sex trafficking is to support the disengagement of female sex workers from sex trafficking by expanding social security and social welfare policies. The majority opinion states that the exercise of the state's authority to impose criminal punishment can be minimized through protective dispositions that can be issued to protect sex workers. However, while protective dispositions for sex workers under the Commercial Sex Act should be supplemented by guidance, treatment and counseling to be truly effective, the infrastructure

currently available does not live up to such needs. In other words, the various institutional measures set forth by the majority opinion do not serve as fundamental solutions, and the provision of such measures cannot suffice to conclude that the rule of minimum restriction has been satisfied. Legislation and cases of other countries show that some countries permit commercial sex to a certain extent or decriminalize it, and this proves that there are measures that restrict fundamental rights to a lesser degree than criminal punishment on people who engage in commercial sex. Less restrictive measures also exist, such as permitting commercial sex within specific zones, instead of imposing criminal punishment. Thus, the Instant Provision violates the rule of minimum restriction.

(d) Specifically regarding punishment limited to sex buyers

1) The opinion for partial unconstitutionality holds that imposing punishment on sex buyers does not violate the Constitution, while stating that imposing punishment on sex workers does. However, the Instant Provision punishes both the sex worker and the sex buyer, indicating a crime of requisite complicity in theory. If commercial sex is socially harmful, as stated in the opinion for partial unconstitutionality, there is no reason to make a distinction between the culpability of the sex worker and sex buyer. Saying that sex workers should be spared from criticism due to social structural issues and punishing only sex buyers may lead to disproportionate punishment and reinforce a sexual double standard. The conducts of selling and buying sex occur simultaneously. The demand for and supply of sex is in line with human nature, and it is meaningless to discuss which of the two is more immoral or culpable.

If, as pointed out by the opinion for partial unconstitutionality, there are ways to eradicate sex trafficking through measures that restrict the fundamental rights of sex workers and sex buyers to a lesser degree - such as education on preventing sex trafficking, and the suppression of the sex industry, itself, by imposing strong disciplinary measures,

confiscation and surcharges on third parties that profit from brothels or sex trafficking - then the criminal punishment imposed on sex buyers, not only sex workers, is also an unnecessary and excessive restriction that violates the rule of minimum restriction.

Therefore, sex buyers *per se* pose no social harm, as in the case of sex workers, making it logically reasonable to deem the criminal punishment of such sex buyers as unconstitutional, and this view is also advisable when considering policies aiming to protect female sex workers. It is worth noting studies that show that countries that punish only sex buyers and not sex workers, regardless of gender (Nordic countries like Sweden), are witnessing the development of sex trafficking in covert forms using the internet and social networking services (SNS), and the reliance of sex workers on criminal organizations that arrange sex trafficking venues and manage clients.

2) If a state sets a specific moral standard and imposes criminal punishment on sexual conduct that violates such standard, as in the Instant Provision, the sexual desires of people who do not hold such moral standard will inevitably be suppressed. Those who find it difficult or impossible to engage in sexual relations that conform to such a standard will be forced into situations where they cannot satisfy their sexual needs, which is a basic human desire. Consequently, their right to sexual self- determination and right and freedom to privacy will be subject to unnecessary and excessive restriction. The matter of consent when it comes to a sex life can differ depending on various elements such as an individual's character, sex appeal, likeability and specific circumstances. Prohibiting sexual relations based on financial transactions nevertheless is the equivalent of forcing people who do not possess other appealing elements to give up their sex life, and this is a harsh predicament that counters human nature.

Our society includes people who find it hard to satisfy their sexual desires through natural relationships, due to injury, disease, disability, old age or other reasons, and wish to be sexually comforted but can only do so by buying sex. Examples would be physically challenged people,

senior citizens who have become single, men who live alone, homosexuals, unattractive people, illegal immigrants or migrant workers (hereinafter referred to as “the sexually marginalized”). The problem of sex with regard to the sexually marginalized is an important social issue. A sex life helps overcome social and emotional hardships such as loneliness and depression; and helps establish a positive mindset and improve self-identity and quality of life. Thus, commercial sex should be discussed more earnestly in the context of consideration for the sexually marginalized. Article 34 of the Constitution prescribes the right to a life worthy of human beings and the duty of the state to endeavor to promote social security and welfare (Sections 1 and 2); the duty of the state to implement policies for enhancing the welfare of senior citizens (Section 4); and the duty of the state to protect citizens incapable of earning a livelihood due to a physical disability, disease, old age or other reasons under the conditions prescribed by Act (Section 5). The sexually marginalized can be deemed people who require special protection by the state, and we cannot say that a sound sexual culture and morality of our society will collapse just because these people satisfy their sexual desires with the help of a partner who is voluntarily selling sex, without harming anyone else. Yet the state criticizes such conduct as immoral and criminalizes it, instead of lending a hand to resolve the difficulties these people face in their sex lives, which constitutes hypocrisy that imputes the state’s abrogation of responsibility to the morality of individual members of society.

(e) Sub-conclusion

Thus, the Instant Provision is not an appropriate means for establishing a sound sexual culture and sexual morality, and cannot be deemed the least restrictive means necessary for achieving this legislative purpose. Therefore, the Instant Provision violates the appropriateness of means and the rule of minimum restriction.

(4) On the Balance of Interests

As aforementioned, the establishment of a sound sexual culture and sexual morality cannot be deemed a justified legislative purpose of the Instant Provision. Even if the legitimacy of this purpose is recognized, such public interest is extremely abstract and vague and thus may differ depending on the subjective moral sentiment of an individual; merely constitutes the legal interests of a legislative policy and is not applicable to constitutional values; and the Instant Provision itself cannot be said to be properly fulfilling its role.

Meanwhile, criminal punishment imposed under the Instant Provision would bring about personal disadvantages that are very substantial, specific and severe, and the Instant Provision commits a grave violation of fundamental rights on par with the deprivation of fundamental rights guaranteed under the Constitution, namely the right to sexual self-determination and the right and freedom to privacy, which are essential for humans to satisfy their basic desires and pursue happiness. Therefore, the Instant Provision does not satisfy the balance of interests.

(5) Conclusion

The Instant Provision infringes upon the right to sexual self-determination and the right and freedom to privacy of persons engaging in commercial sex (sex workers and sex buyers) by violating the rule against excessive restriction, and thus violates the Constitution.

B. Violation of the Rule of Equality

Performing certain sexual conduct in return for receiving or promising to receive money, valuables or other property gains is essentially the same commercial sex whether it targets a specified person or unspecified persons. There is no reason for the Instant Provision to make a distinction between the two and only punish commercial sex targeting

unspecified persons. The majority opinion holds that commercial sex targeting unspecified persons is much more detrimental to society than commercial sex targeting a specified person, but this is an unfounded social prejudice. Due to the Instant Provision's punishment of only sex trafficking targeting unspecified persons, expensive forms of sex trafficking that target specific wealthy people, such as concubinage, mistress contracts targeting foreigners, or sponsorships - which have recently become a social issue - is brushed aside, while the conventional form of sex trafficking which targets unspecified average citizens and is comparatively inexpensive and less harmful is punished and socially disgraced, which is extremely unfair.

Thus, the Instant Provision violates the rule of equality under the Constitution for punishing only sex trafficking that targets unspecified persons.

C. Conclusion

There is a Korean saying that goes, "If you can't help a beggar, at least don't break his bowl." I do not believe the state is in a position to impose criminal punishment on sex workers under the pretext of 'eradicating sex trafficking,' which runs contrary to human nature and the essence of commercial sex, in a situation where sex workers are engaging in the trade for subsistence, having been pushed to their limits by a state that has failed to fulfill its minimum obligation to protect its people. On these grounds, I set forth my opinion that the Instant Provision is fully unconstitutional.

VIII. Concurring Opinion of Justice Lee Jung-Mi and Justice Ahn Chang-Ho to the Majority Opinion

We set forth our concurring opinion as follows, for it is questionable

whether sex trafficking, which treats human sexuality as an object to be traded, should be protected by the right to sexual self-determination, which stems from the right to pursue happiness, and for we believe that the social harms brought about by the decriminalization of sex trafficking would be excessively grave.

A. The right to pursue happiness as prescribed by Article 10 of the Constitution presupposes the right to determine one's own destiny. This would include the right to determine whether to engage in sexual conduct and to decide the partner thereof; in other words, the right to sexual self-determination. There may be a variety of opinions on what 'happiness' in "the right to pursue happiness" means, but we cannot say that all kinds of unrestrained human desires should be included in the concept.

Protecting all human actions that surrender to sensation or desire, instead of rationality, within the framework of the Constitution would indicate that all sorts of socially harmful crimes can be protected if they have been committed under human instinct. This will throw the entire society into disorder and chaos, and make the lives of its members unhappy. The right to pursue happiness should be based on the protection of values shared among members of society and the rational constraint required to enable this. Any desires that are swayed by uncontrolled instinct, thus damaging the values pursued by the community, and the actions that realize such desires, cannot be protected by the right to pursue happiness.

The same applies to the matter of sex. All humans possess sexual desires, and the ways in which such desires are expressed may differ by person. However, not all human actions related to sex can be protected by fundamental rights under the Constitution. The sexual self-determination protected by the Constitution derives from liberation from sexual violence, exploitation and oppression. It is highly questionable whether sex trafficking, which commercializes sex and treats it as an object to be traded, and harms a sound sexual culture and sexual

morality of society, should be protected within the constitutional framework of 'sexual self-determination.'

B. Determining what actions should be deemed criminal, and how to punish such crimes, is up to the legislator to decide, while fully considering not only the nature of the crime and the protectable legal interests, but also our history and culture, the times in which the legislation was drafted, the values or legal sentiment of the general public and criminal justice policies on preventing crime. Thus, we must acknowledge the legislator's broad legislative discretion or freedom to form legislation in this regard (*see also* 2008Hun-Ba84, March 25, 2010). Particularly in the case of legislation regarding society's sexual culture and sexual morality, the relevant norms, themselves, are based on moral and ethical value judgments, and the legislature has made its decisions reflecting historical and social realities, social values, social and public consensus, etc. Thus, the constitutional review of legislation related to sexual culture and sexual morality, such as the Instant Provision, should be carried out more carefully.

As aforementioned, when deciding whether sex trafficking should be subject to criminal punishment, the legislator should not only reflect the particular culture and social realities of society, but must also comprehensively consider the social problems that could accompany the decriminalization of sex trafficking. According to an article on a survey conducted by the Ministry of Gender Equality and Family, the number of Korean people who have experience in purchasing sex was significantly higher than people in the US or UK. This can be interpreted as a reflection of Korea's organizational culture and culture of entertaining guests and business partners, which are tolerant of sex trafficking. The full decriminalization of commercial sex under such circumstances would lead to the uncontrollable expansion of the sex industry, which will undoubtedly undermine a sound sexual culture and sexual morality of society.

The problems that entail the decriminalization of commercial sex are

evident from the experiences of other countries. In the case of Germany, after commercial sex work was recognized as a legal occupation in 2001 and legislation was enacted to guarantee the labor rights of those employed in the trade, the sex trafficking industry has witnessed a rapid expansion, not to mention a rise in the number of females entering the sex trafficking market as well as the number of sex buyers. Germany aimed to raise the social insurance membership rate among sex workers, to improve working conditions in the sex trafficking industry and to create an environment encouraging disengagement, but has yet to experience any significant development. Other countries that have normalized commercial sex, such as the Netherlands, the UK, France and Australia, are commonly struggling with social issues like the expansion of the sex trafficking industry and the growing number of females from underdeveloped countries entering the trade. Korea will not be an exception when it comes to such problems that accompany the decriminalization of commercial sex; thus we cannot readily accept the argument that supports decriminalization in the opinion for full unconstitutionality.

C. Meanwhile, the opinion for partial unconstitutionality argues for discriminatory criminalization, claiming that only sex buyers should be criminally punished and sex workers should not. The fact that people still turn to commercial sex due to the social structure is a deplorable but undeniable reality, and we understand the necessity to provide them with protection and guidance. However, in the case of crimes such as selling pornography or drugs, or organ trafficking, the seller is subject to more severe punishment than the trading partner, given the nature of the crime and the effect of fulfilling the legislative purpose. Organ trafficking is especially similar in character to sex trafficking, since many of the related crimes are committed for subsistence due to social structural factors, but nevertheless the opinion for partial unconstitutionality claims that only sex buyers should be punished, while the suppliers of sex trafficking, in other words sex workers, should be pardoned. It is

doubtful if this claim can avoid the question of fairness in punishment when compared to other crimes. Another questionable claim is that sex buyers and procurers should be punished while saying that commercial sex results from economic and social structural factors, when such buyers and procurers are the very people who can directly resolve the financial desperation of sex workers; this argument could be called on for its logical inconsistency or unfairness in punishment.

The scope of sex workers who depend on the trade for 'subsistence' in desperation is also unclear. The economic benefits required to make a living may differ by person, making the scope of 'subsistence' rather vague, and it is doubtful whether those who engage in commercial sex just because the remuneration is higher than in other occupations with different labor conditions - such as wages or working hours – can be classified as sex workers who work for 'subsistence' because they engage in sex work for a living. Even if we accept the existence of sex workers who work for subsistence, in addition to such people, there are still many who work in the sex trafficking industry to make easy money to use for pleasure or a lavish lifestyle. It is nearly impossible to impose selective criminal punishment by making a distinction between these groups based on subjective intent.

Yet decriminalizing all acts of selling sex means we must give up the legal restriction on sex workers who do not require protection, and in turn we cannot prevent them from using various methods to solicit sex buyers into sex trafficking. This will inevitably harm the legislative purpose of establishing a sound sexual culture and sexual morality. Further, the decriminalization of selling sex will cultivate the perception that 'sex work is a socially protected occupation' without forming any public consensus, and may discourage the healthy work motivation of the majority of the public who work hard to make a living. In particular, we have already seen the juvenile sex trafficking market flourish when the number of juvenile runaways soared in the 1990s; the decriminalization of commercial sex is highly likely to tempt juveniles,

who lack sound judgment about their future or have difficulty finding other jobs, to become entangled in sex trafficking to earn easy money. Sweden, which had formerly imposed no punishment on commercial sex, enacted legislation in 1999 to punish sex buyers and as a result witnessed a slight decrease in the trade. However, there has been criticism that the failure to impose criminal punishment on sex workers has only reinforced the subordination of female sex workers to procurers or criminal organizations. In light of this, the decriminalization of commercial sex does not necessarily solve such issues.

As seen above, the decriminalization of selling sex can bring about a number of social issues. Thus, the opinion for partial unconstitutionality, which claims that sex workers should not be criminally punished, is unreasonable.

D. Of course, some sex workers do engage in sex trafficking out of financial desperation, and we do not deny that such sex workers require protection. However, rather than provide such protection by applying a decriminalization policy to all sex workers, it would be more appropriate to flexibly interpret the term ‘victim of sex trafficking’ under the Commercial Sex Act with consideration to specific circumstances, and to protect them under the framework of this Act. Protective dispositions provided under the Act, including putting sex workers on probation, orders to perform social service or to attend courses, commissioning counseling centers for sex trafficking victims for counseling and commissioning specialized medical institutions for medical treatment should be actively utilized by the state in an effort to lead the way in protecting and guiding sex workers.

The reason sex trafficking is regulated is because it harms the society’s sound sexual culture and sexual morality, and because this, in turn, undermines human dignity and worth; thus, the detection of and crackdowns on sex trafficking should be carried out cautiously in line with such legislative purpose. Any crackdowns that do not conform to

this legislative purpose, giving no thought to the impact on a sound sexual culture and sexual morality and merely being performed to bump up statistics, must be avoided.

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]

Related Provisions

Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (amended by Act No. 10697 on May 23, 2011)

Article 1 (Purpose)

The purpose of this Act is to eradicate sex trafficking, acts of arranging sex trafficking, etc. as well as human trafficking aimed at sex trafficking and to protect the human rights of victims of sex trafficking.

Article 2 (Definitions)

(1) The terms used in this Act shall mean the following:

4. The term "victim of sex trafficking" means persons falling under any of the following sub-items:
   (a) A person compelled to engage in sex trafficking by means of a deceptive scheme or by force, or by other means equivalent thereto;
   (b) A person who has engaged in sex trafficking while addicted to narcotics, psychotropic drugs or cannabis referred to in Article 2 of the Act on the Control of Narcotics, etc. (hereinafter referred to as "narcotics, etc.") by a person protecting or guarding him or her due to business relationships, employment relationships and other relationships;
   (c) A juvenile, person having no or weak ability to discern things or make decisions, or a person with serious disabilities determined by Presidential Decree, any of whom is solicited or enticed to engage in sex trafficking;
   (d) A person who has been trafficked for the purpose of sex trafficking.

(2) In cases falling under any of the following items, targeted persons shall be deemed to be held under control and management referred to in

Section 1 Item 3 Sub-Item (a):

1. Where even if the consent of a targeted person is obtained by means of provision of pre-payments, etc., such targeted person is kept from disengagement against his or her will;
2. Where a person hiring and supervising other persons, a person arranging immigration and job opportunities, or a person assisting the said persons receives a passport or any certificate in lieu of a passport under the pretext of securing the performance of obligations, etc. for the purpose of having passport holders engage in acts of selling sex.

Article 5 (Relationship to Other Acts)

Where the Act on the Protection of Children and Juveniles from Sexual Abuse provides otherwise for matters prescribed in this Act, the provisions of the aforementioned Act shall govern.

Article 6 (Special Cases concerning Punishment of Victims of Sex Trafficking and Protection of Such Victims)

(1) No victims of sex trafficking shall be punished.

Article 12 (Processing of Protection Cases)

(1) When a prosecutor recognizes that it is appropriate to issue a protective disposition under this Act to a person who has engaged in sex trafficking in consideration of the nature and motives of the case as well as the character, conduct, etc. of the offender, he or she shall transfer the case to the competent court as a protection case unless any special circumstance exists.

(2) When recognizing that it is appropriate to issue a protective disposition under this Act after trying a sex trafficking case, a court shall transfer the case to the competent court for protective cases by its decision.

Article 14 (Determination on Protective Dispositions, Etc.)

(1) When recognizing that a protective disposition is necessary as a result of a trial, a judge may issue a disposition falling under any of the following items by his or her decision:

1. Prohibition of entrance into places or areas in which sex trafficking is concerned to take place;
2. Probation under the Act on Probation, Etc.;
3. An order for social service or attending courses under the Act on Probation, Etc.;
4. Commissioning a counseling center for victims of sex trafficking under Article 10 of the Act on the Prevention of Sex Trafficking and Protection, Etc. of Victims for counseling;
5. Commissioning a specialized medical institution referred to in Article 27 Section 1 of the Sexual Violence Prevention and Victims Protection Act for medical treatment.

Act on the Prevention of Commercial Sex Acts and Protection, etc. of Victims (amended by Act No. 12698 on May 28, 2014)

Article 3 (Responsibilities of the State, Etc.)

(1) The State and local governments shall establish legal and institutional systems for the following activities and shall take administrative and financial measures necessary therefor in order to prevent commercial sex acts, protect victims of commercial sex acts and persons who sell sex (hereinafter referred to as "victims of commercial sex acts"), and to assist them in their recovery from victimization, self-reliance and self-support:

1. The establishment and operation of a system for reporting cases of commercial sex acts, arrangement of commercial sex acts, and human trafficking for the purpose of commercial sex acts;
2. Survey, research, education, publicity, revision of laws, and policy-making for the purpose of prevention of commercial sex acts, arrangement of commercial sex acts, and human trafficking for the purpose of commercial sex acts;

3. The establishment and operation of facilities (including facilities for foreigners) for the protection of victims of commercial sex acts and assistance in their self-reliance;
4. Assistance to the victims of commercial sex acts in housing, vocational training, legal aid, and other supportive services;
5. The establishment and operation of a system to cooperate among related institutions for more efficiency in the protection of, and assistance to, the victims of commercial sex acts;
6. The surveillance of hazardous environments to prevent commercial sex acts and arrangement of commercial sex acts.

(2) The State shall endeavor to promote international cooperation for the prevention of human trafficking for the purpose of commercial sex acts.

II. Summaries of Opinions

1. Case on the Act on the Punishment of Commercial Sex Acts

[2013Hun-Ka2, March 31, 2016]

In this case, the Constitutional Court held that Article 21 Section 1 of the 'Act on the Punishment of Arrangement of Commercial Sex Acts, Etc.,' which prescribes that any person who has engaged in sex traffic shall be punished by imprisonment with labor for not more than one year, by a fine not exceeding three million won, by misdemeanor imprisonment, or by a minor fine, does not violate the right to sexual self-determination, the right to privacy, the freedom of sex workers to choose their occupation, nor the right to equality.

Background of the Case

The petitioner was prosecuted for engaging in sex trafficking, by having sexual intercourse upon receiving 130,000 won from Lee ○-Hu (23 years of age) on July 7, 2012, in Jeonnong-dong, Dongdaemun-gu, Seoul.

While the aforementioned case was pending at the trial court, the petitioner filed a motion to request a constitutional review of Article 21 Section 1 of the 'Act on the Punishment of Arrangement of Commercial Sex Acts, Etc.' that punishes sex trafficking with the Seoul Northern District Court, and the court granted the motion and requested a constitutional review of this case on December 13, 2012.

Subject Matter of Review

The subject matter of this case is whether Article 21 Section 1 of the 'Act on the Punishment of Arrangement of Commercial Sex Acts, Etc.' (amended by Act No. 10697 on May 23, 2011, hereinafter referred to as the "Act on the Punishment of Commercial Sex Acts") violates the Constitution.

1. Case on the Act on the Punishment of Commercial Sex Acts

Provision at Issue

Act on the Punishment of Arrangement of Commercial Sex Acts, Etc. (amended by Act No. 10697 on May 23, 2011)

Article 21 (Penalty Provisions)

(1) Any person who has engaged in the conduct of sex trafficking shall be punished by imprisonment with labor for not more than one year, by a fine not exceeding three million won, or by misdemeanor imprisonment, or by a minor fine.

Summary of the Decision

1. Whether the Principle against Excessive Restriction Is Violated

A. The Instant Provision imposes criminal punishment on sex trafficking, restricting the right to sexual self-determination and the right to privacy of the parties engaging in sex trafficking (sex workers and sex buyers), and the freedom of sex workers to choose their occupation.

B. In line with the spread of individualism and liberal views on sex life, there is a growing perception in the Korean society that sexual matters should not be subject to control by the law. However, it cannot be said that the tendency toward the liberalization of sex extends to tolerating selling and buying sex. While individuals' sexual conduct per se belongs to the intimate realm of privacy and is subject to the protection of the right to sexual self-determination, they ought to be regulated by law should they be expressed in the public domain and undermine the sound sexual culture of the society. Moreover, voluntary sex trafficking that apparently did not take place under coercion may nonetheless infringe on the autonomy of the sex worker's personality by commercializing sex; and the increasing prosperity of the sex trafficking industry distorts the ordinary flow of capital and labor, leading to the deformation of industrial structures and thus serving as a serious

detriment to society. In particular, lately the sex trafficking industry has become more systematically organized and specialized in a covert and abnormal manner, and the advancement of information and communications has enabled persons who engage in arranging sex trafficking to turn to more inventive business tactics using the internet or mobile applications. Given such realities, legalizing or failing to punish sex trafficking will lead to massive capital inflows into the sex industry, a rise in the number of illegal immigrants, and the deformation of the labor market, etc., subsequently harming the economic and social stability of people's lives and further exacerbating the corruption of people's sexual morality.

Sex trafficking *per se* is of an abusive and exploitative nature, and takes the form of domination over the body and personality of a sex worker that is economically vulnerable, thus it cannot be considered an unrestricted transaction between equal parties. Sex trafficking also creates an environment more vulnerable to sexual commercialization and sex crimes, and undermines sound sexual culture and sexual morality in the overall society by harming the economic and social stability of people's lives. Therefore, Article 21 Section 1 of the Act on the Punishment of Commercial Sex Acts is justified in its legislative purpose, as it seeks to establish a sound sexual culture and sexual morality by punishing sex trafficking.

The criminal punishment of sex trafficking is also acknowledged as an appropriate means of reducing it, considering that it has led to the reduction of sex trafficking business establishments and female sex workers, centered on red-light districts.

C. As the demand for sex trafficking is the major cause behind sustaining and expanding the sex trafficking market, it is of utmost importance to suppress the demand of sex buyers. Our society is dominated by a tolerant view of sex trafficking due to the culture of excessively, and potentially inappropriately, entertaining guests and business partners; is characterized by active sex trafficking markets of

diverse types including, not only the traditional form centered on red-light districts, but also commercial-front sex trafficking, new and aberrant types of sex trafficking, and sex trafficking through the internet and smart phones. Our society is also witnessing increasingly complex patterns of sex trafficking undertaken by illegal immigrants or migrant workers, juveniles and the elderly, and in the form of overseas sex trips and tourism. The failure to suppress the consistent demand for sex trafficking amid such circumstances gives rise to concerns that the sex trafficking market will swiftly expand due to the influx of not only adults, but also juveniles and females from underdeveloped countries. It is difficult to conclude that recidivism prevention programs or sex trafficking prevention education, etc., is as effective as criminal punishment. Thus, the repression of demand for sex trafficking requires criminal punishment on sex buyers, and this cannot be considered an excessive exercise of the authority to impose criminal punishment.

D. It is necessary to impose criminal punishment on not only the sex buyer, but also the sex worker, in order to eradicate sex trafficking. Notwithstanding the punishment on the sex buyer, the decriminalization of selling sex and subsequently imposing no punishment on the sex worker may lead to a rise in the supply of sex trafficking for economic gain, entail the risk of opening the way for persons willing to engage in sex trafficking to acquire easier access to sex workers, and the possibility cannot be ruled out that sex workers will induce sex trafficking under illegal conditions, for instance by securing ways for sex buyers to avoid crackdowns and detection. The decriminalization of selling sex also gives rise to the possibility of sex trafficking becoming a form of organized crime. For instance, procuring organizations could force female sex workers who have entered the sex trafficking market through illegal human trafficking to engage in legal prostitution. Furthermore, given the reality in which the commercialization of sex is prevalent, there are concerns that this will lead to female sexual workers becoming entrenched in sex trafficking by making it harder for them to

escape the sex trade, instead of enhancing their human rights. Therefore, this fully justifies the necessity to impose criminal punishment on, not only sex buyers, but also sex workers, to the purpose of eradicating sex trafficking.

There may exist females that inevitably engage in sex trafficking due to social structural factors, such as labor discrimination or poverty, but unless the sex workers have been completely deprived of autonomous judgment they cannot be spared from potential criticism or responsibility, and it is also extremely difficult to distinguish persons who depend on sex trafficking for subsistence from the various types of sex workers.

E. The Act on the Punishment of Commercial Sex Acts contains a broad recognition of the term 'victim of sex trafficking,' and exempts victims of sex trafficking from criminal punishment. In addition, upon the recognition that it is appropriate to issue a protective disposition to a person who has engaged in sex trafficking, the case can be processed as a protective case instead of a criminal case. In certain cases, there are many other institutional measures that induce disengagement from sex trafficking without criminal punishment. Thus, as complementary measures have been taken to minimize the side effects of criminal punishment, it cannot be said that the imposition of criminal punishment on sex workers is excessive.

F. While different countries implement various policies on sex trafficking, it is not easy to ascertain the efficiency of such policies based on visible and external statistics and performance compiled in the short term, nor can the lawmakers' diverse legislative efforts *per se* be debated for their constitutionality. Therefore, it cannot be said that the Instant Provision goes against the principle of least restrictive means merely by superficially comparing other countries to Korea, where statutory sentences are relatively not heavy.

G. To regard not only one's own, but also another person's sex as

honorable, and to not use it as an instrument, is a value that becomes the basic premise for the development of a community where the dignity and equality of all humans are a prerequisite. Therefore, the public values of a sound sexual culture and sexual morality in the overall society, which the State aims to defend by actively intervening in sex trafficking, cannot be deemed to be of lesser value than the restriction of fundamental rights such as the right to sexual self-determination. Thus, Article 21 Section 1 of the Act on the Punishment of Commercial Sex Acts does not violate the balance of interests.

2. Whether the Right to Equality Is Infringed Upon

Sex trafficking targeting unspecified persons and sex trafficking targeting specified persons differ in nature in terms of the impact on a sound sexual culture and sexual morality, and the exploitation of third parties. Thus, the fact that only sex trafficking targeting unspecified persons is subject to prohibition cannot be said to infringe on the right to equality.

Opinion of Two Justices (Partially Unconstitutional)

The legislative purpose of the Instant Provision is justified, and punishment imposed on the sex buyer is constitutional, but criminal punishment of the sex worker is an excessive exercise of the authority to impose criminal punishment, which violates the principle against excessive restriction.

In essence, sex trafficking is a means of justification for the sexual domination by males and the sexual subordination of females, and is an act that infringes on the personality and dignity of the sex worker. Therefore, female sex workers are fundamentally persons that require protection and guidance, rather than being subject to criminal punishment. The reason they inevitably engage in sex trafficking is in desperation for survival, and this is a social structural matter that cannot

be easily resolved on individual terms. Imposing criminal punishment on these persons will aggravate the oppression and exploitation of female sexuality, fostering the underground sex trafficking market and hindering the eradication of the sex trade, if anything, and thus the appropriateness of means is not justified.

It is advisable to encourage sex workers to disengage from, and to inhibit their influx into, sex trafficking by supporting their engagement in other economic activities and providing them with protection instead of imposing criminal punishment. There also exist measures such as suppressing the sex industry itself through education on preventing sex trafficking, and imposing disciplinary measures, confiscation and additional collection on third parties that profit from sex trafficking, or measures that are less restrictive on fundamental rights in the form of protection or guidance, etc., which indicates that criminal punishment on sex workers also goes against the principle of least restrictive means.

This also violates the balance of interests as, while the public interest of establishing a sound sexual culture or sexual morality is abstract and vague, the disadvantage to sex workers is serious and dire.

Opinion of One Justice (Unconstitutional)

1. Whether the Principle against Excessive Restriction Is Violated

The Instant Provision violates the Constitution for violating the principle against excessive restriction, thus infringing on the right to sexual self-determination and the right to privacy of the parties who engage in sex trafficking (sex buyers and sex workers).

Voluntary sex trafficking between consenting adults fundamentally belongs to the highly intimate realm of individual privacy, and can hardly be considered to be harmful to others or to pose evil to a sound sexual culture and sexual morality. The concept of a sound sexual culture and sexual morality is in itself abstract and ideological, and the intervention of the State in the intimate domain of sexual affairs to

impose criminal punishment is a declaration and coercion of the lawmakers' specific moral views. The legislative purpose of the provision cannot be justified, since the criminal punishment of voluntary female sex workers engaged in the trade for subsistence, imposed by a State that has failed to fulfill its minimum obligation to protect its people, is another form of social violence. More than ten years have passed since the Act on the Punishment of Commercial Sex Acts entered into force, but the Instant Provision has made absolutely no contribution to the eradication of sex trafficking, and thus the appropriateness of means cannot be justified. The Instant Provision has no punitive effect, not to mention the lack of appropriateness of criminal punishment, and goes against the trend of the decriminalization of private affairs in modern criminal law.

The best solution to sex trafficking is to support the disengagement of sex workers from sex trafficking through the expansion of social security and social welfare policies. The Instant Provision fails to meet the element of minimum restriction, as it is possible to use less restrictive means, such as conducting sex trafficking prevention education; suppressing the sex trafficking industry itself; or permitting sex trafficking within certain zones. Considering, in particular, the nature of requisite complicity of the crime of the Instant Provision, punishing only the sex buyer may reinforce disproportionate punishment and a sexual double standard. Criminal punishment by the State imposed on sexual conduct that goes against a specific moral standard will inevitably suppress the sexual desires of people who do not hold such moral standard.

While the establishment of a sound sexual culture and sexual morality is abstract and vague, and thus cannot be considered to conform to constitutional values, the personal harm caused by criminal punishment is substantial and concrete, and of an extensive degree, thus leading to a loss of balance of interests.

2. Whether the Right to Equality Is Infringed Upon

Regardless of whether sex trafficking targets specified or unspecified persons, it is, in essence, of the same nature. As there is no logical reason to punish only sex trafficking targeting unspecified persons, the Instant Provision violates the principle of the right to equality.

Concurring Opinion to Majority Opinion of Two Justices

Sexual self-determination, which derives from the right to pursue happiness, stems from liberation from sexual violence, sexual exploitation and sexual oppression. Therefore, it is highly questionable whether sex trafficking, which commercializes sex and treats it as an object to be traded, and harms the sound sexual culture and sexual morality of society, should be protected within the constitutional framework of 'sexual self-determination.'

There are concerns that the full decriminalization of sex trafficking in a country like Korea, where a high number of people have experience in buying sex, will further expand the sex industry and undermine the sexual culture and sexual morality. Further, given that countries that allow sex trafficking have social issues in common, such as the expansion of the sex trafficking industry and the influx of females from underdeveloped countries into sex trafficking, the opinion on full unconstitutionality is inappropriate.

The opinion that the Instant Provision is partially unconstitutional and that sex trafficking should be decriminalized is also inappropriate, considering the equity of punishment compared to other crimes, the fact that no legal restriction is imposed on sex workers that do not require protection, that the wrongful perception of sex trafficking may demoralize workers in the general public, that there is a high possibility that juveniles, who lack sound judgment about their future or have difficulty in finding other jobs, will get caught up in sex trafficking to earn easy money, and that this will fail to solve the subordination of sex

workers to traffickers or criminal organizations.

Provided, the term ‘victim of sex trafficking’ in the Act on the Punishment of Commercial Sex Acts should be interpreted flexibly with consideration given to specific facts, the protective disposition under the Act should be actively utilized in efforts to guide and protect sex workers, and any regulatory activities that do not coincide with the legislative purpose should be rejected.

2. Case on the Restriction on Employment of Medical Personnel that Have Committed a Sex Offense against an Adult

[2013Hun-Ma585 · 786, 2013Hun-Ba394, 2015Hun-Ma199 · 1034 · 1107 (consolidated), March 31, 2016]

In this case, the Constitutional Court held that the provision concerning "person sentenced to a penalty for committing a sex offense against an adult and for whom such sentence is made final and conclusive" in Article 44 Section 1 Item 3 of the former 'Act on the Protection of Children and Juveniles against Sexual Abuse,' which restricts persons sentenced to a penalty for committing a sex offense and for whom such sentence is made final and conclusive from establishing or working for medical institutions for ten years from the date on which the execution of the penalty is terminated, and the provision concerning "one sentenced to a penalty for committing a sex offense against an adult and for whom such sentence is made final and conclusive" in Article 56 Section 1 Item 12 of the 'Act on the Protection of Children and Juveniles against Sexual Abuse' infringe on the freedom to choose one's occupation. However, the Constitutional Court held that Article 3 of the Addenda to the former Act on the Protection of Children and Juveniles against Sexual Abuse, which prescribes that the above restrictions on employment are applied from the first person in whose case a sentence of punishment becomes final and conclusive after the aforesaid provision of the same Act enters into force, does not violate the Constitution.

Background of the Case

* The six consolidated cases differ in that the Instant Provisions involve the former and current laws, but the outlines of these cases are all similar, which is why one "leading case", or earliest-filed case, each from the former and current laws, are listed.

[2013Hun-Ma585] (Former law is the subject matter of review)

2. Case on the Restriction on Employment of Medical Personnel that Have Committed a Sex Offense against an Adult

On August 20, 2012, complainant 1 was notified of a summary order for a fine of three million won on a charge of quasi-indecent act by compulsion, and the sentence was finalized on October 23, 2012. Around April 2013, when the complainant was working at Baengnyeong Hospital in Jinchol-ri, Baengnyeong-myeon, Ongjin-gun, Incheon as a public health doctor, the Superintendent of Incheon Nambu Police Station notified the complainant of being subject to restriction on employment by a medical institution under Article 44 of the former 'Act on the Protection of Children and Juveniles against Sexual Abuse,' after which, on May 22, 2013, the Mayor of Incheon ordered that the complainant be transferred to the Incheon Fire & Safety Management Department, a non-medical institution. Thereupon, the above complainant filed a constitutional complaint on August 19, 2013, on the grounds that Article 44 Section 1 Item 13 of the above Act and Article 3 of the Addenda to the same Act infringe on the complainant's freedom of occupation and right to equality, and that they violate the principle against retroactivity referred to in Article 13 Section 2 of the Constitution.

[2015Hun-Ma199] (Current law is the subject matter of review)

On December 11, 2013, complainant 4, a hospital director that had established and was operating an internal medicine clinic, was sentenced to imprisonment with labor for eight months on a charge of indecent act by compulsion, and then appealed to the High Court and was sentenced, on September 4, 2014, to a fine of five million won, and this sentence was made final and conclusive following the dismissal of the complainant's appeal to the Supreme Court on November 27, 2014. Subsequently, the above complainant reported business closure in adherence to the guidelines on the voluntary reporting of business closure provided by the Mayor of Seongnam, and closed his medical institution on January 27, 2015. The complainant then filed a constitutional complaint on February 26, 2015, on the grounds that Article 56 Section 1 of the 'Act on the Protection of Children and Juveniles against Sexual Abuse' and Article 7 of the Addenda to the

same Act infringe on the complainant's freedom of occupation and right to equality.

Subject Matter of Review

The subject matters of this case are whether: ① the provision concerning "person sentenced to a penalty for committing a sex offense against an adult and for whom such sentence is made final and conclusive" in Article 44 (1) 13 of the former 'Act on the Protection of Children and Juveniles against Sexual Abuse' (amended by Act No. 11287 on February 1, 2012, but prior to amendment by Act No. 11572 on December 18, 2012) (hereinafter referred to as the "Instant Provision of the Former Act") and the provision concerning "one sentenced to a penalty for committing a sex offense against an adult and for whom such sentence is made final and conclusive" in Article 56 Section 1 Item 12 of the 'Act on the Protection of Children and Juveniles against Sexual Abuse' (wholly amended by Act No. 11572 on December 18, 2012; hereinafter the 'Act on the Protection of Children and Juveniles against Sexual Abuse' and the former equivalent, the 'Act on the Protection of Juveniles against Sexual Abuse,' are collectively referred to as the "Acts") (hereinafter referred to as the "Instant Provision of the Current Act"; hereinafter the former provision and new provision are collectively referred to as the "Instant Provisions"); and ② Article 3 of the Addenda to the 'Act on the Protection of Children and Juveniles against Sexual Abuse' (amended by Act No. 11287 on February 1, 2012) (hereinafter referred to as the "Instant Addendum") violate the Constitution or the basic rights of the complainants.

Provisions at Issue

Former Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act No. 11287 on February 1, 2012, but prior to amendment by Act No. 11572 on December 18, 2012)

2. Case on the Restriction on Employment of Medical Personnel that Have Committed a Sex Offense against an Adult

Article 44 (Restriction, etc. on Employment by Child or Juvenile-Related Educational Institutions, etc.)

(1) No person sentenced to a penalty or medical treatment and custody for committing a sex offense against a child, juvenile, or adult (hereinafter referred to as "sex offense") and for whom such sentence is made final and conclusive shall engage in the business providing educational services directly to children and juveniles by visiting their homes, nor operate any of the following facilities or institutions (hereinafter referred to as "child or juvenile-related educational institution, etc."), nor work for or provide actual labor to a child or juvenile-related educational institution, etc. for ten years from the date on which the execution of such penalty or medical treatment and custody is terminated, or wholly or partially suspended or exempted: *Provided*, That for the purposes of Item 11, the same shall apply only to those engaging in security guard business, and for the purposes of Item 13, the same shall apply only to medical personnel defined in Article 2 of the Medical Service Act.

13. Medical institutions defined in Article 3 of the Medical Service Act.

Act on the Protection of Children and Juveniles against Sexual Abuse (wholly amended by Act No. 11572 on December 18, 2012)

Article 56 (Restrictions, etc. on Employment at Child or Juvenile-Related Educational Institutions, etc.)

(1) No one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child, juvenile, or adult (hereinafter referred to as "sex offense") and for whom such sentence is made final and conclusive (excluding persons sentenced to punishment of a fine under Article 11 Section 5) shall provide educational services directly to children and juveniles by visiting their homes, or operate any of the following facilities or institutions (hereinafter referred to as "child or juvenile-related institution, etc."), or work for or provide actual labor to a child or juvenile-related institution, etc. for ten years from the date

on which the execution of such penalty or medical treatment and custody is wholly or partially terminated, or suspended or exempted: *Provided*, That for the purposes of Items 10 and 14, the same shall apply only to those performing security guard duties, and for the purposes of Item 12, the same shall apply only to medical personnel defined in Article 2 of the Medical Service Act.

12. Medical institutions defined in Article 3 of the Medical Service Act.

Addenda to the Act on the Protection of Children and Juveniles against Sexual Abuse (Act. No. 11287, February 1, 2012)

Article 3 (Applicability to Restrictions, etc. on Employment by Child or Juvenile-Related Educational Institutions, etc.)

The amended provisions of Articles 44 and 45 shall apply from the first person in whose case a sentence of punishment or medical treatment and custody concerning a sex offense against a child or juvenile or an adult becomes final and conclusive after this Act enters into force.

Summary of the Decision

1. Whether the Phrase "Sex Offense against an Adult" Violates the Rule of Clarity

Judging by its wording, the phrase "sex offense against an adult" can be interpreted as a sex-related crime against an adult victim, in the form of a crime that infringes on another person's right to sexual self-determination, or a crime that involves an adult and infringes on the sound sexual culture of a society; and judging by the legislative purposes of the Instant Provisions, a crime which also requires restriction on employment by medical institutions. In addition, by examining the content related to "sex offense against a child or juvenile" stipulated in the Acts, it can be presupposed that a "sex offense against an adult" will be subject to regulation similar to the regulation for a "sex offense

against a child or juvenile," and the content of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes, which has a close legal connection with the Acts in that it prevents sex offenses and protects victims, is also helpful in understanding what constitutes a "sex offense against an adult." The above shows that the phrase "sex offense against an adult" cannot be considered unclear, and therefore does not violate the rule of clarity under the Constitution.

2. Whether the Instant Provisions Infringe on the Freedom of Occupation

The Instant Provisions have the legislative purposes of protecting children and juveniles from potential sex offenses, and enhancing the ethics and credibility of medical institutions to allow for children and juveniles and their guardians to trust, use and rely on these institutions, by guaranteeing the quality of the operator or employee of a medical institution to a certain extent, and the legislative purposes are therefore found to be legitimate, and the restriction on the employment of former sex offenders by medical institutions for a certain period can be considered an appropriate means. However, the Instant Provisions take it for granted that a person with a sex offense record will commit the same type of crime in the future, deem that the risk of recidivism will not be eliminated until ten years from the date the execution of the penalty is terminated, and overlook the necessity for different penalties based upon the nature of the crime, thus violating the principle of the least restrictive means by imposing a uniform ten-year employment restriction on persons with a sex offense record but who do not hold the risk of recidivism; persons who have a sex offense record but for whom the risk of recidivism is likely to be resolved within the ten-year period; and persons whose offense is trivial and whose risk of recidivism is not comparatively high. Further, such restrictions violate the balance of interests for they extend beyond the level of endurance that our society should demand of the complainants. Therefore, the Instant Provisions

infringe on the freedom of occupation of the complainants.

3. Whether the Instant Addendum Violates the Principle Against Retroactivity, etc.

The Instant Addendum prescribes that the restriction on employment by medical institutions shall apply from the first person in whose case a sentence of punishment becomes final and conclusive after the Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act. No. 11287, February 1, 2012) enters into force, but since the restriction on employment is not a punishment, the principle against retroactivity prescribed in the former part of Article 13 Section 1 of the Constitution does not apply.

To the end of effectively handling the risk of recidivism of a sex offender, it is deemed necessary, given the potential risks, to impose restrictions on the employment of persons whose sentencing to punishment became final and conclusive after this Act entered into force, even if the relevant crime was committed before this Act entered into force, and the Instant Addendum does not impose the employment restriction retroactively on all persons who have committed a sex offense, but limits the restriction to those whose sentencing to punishment has been made final and conclusive after the Act entered into force. Moreover, the determination as to whether a person is subject to restriction on employment should be made on the basis of when the restriction on employment would begin, to ensure the effectiveness of the employment restriction measure; and additional measures can be adopted if it is decided that the measures currently being implemented are insufficient for securing public interest. Thus, it is difficult to say that the Instant Addendum excessively restricts basic rights.

3. Case on the Disciplinary Action of Detention in a Guardhouse against a Riot Police Constable

[2013Hun-Ba190, March 31, 2016]

In this case, the Constitutional Court held that the provision concerning 'detention in a guardhouse against a riot police constable' in Section 1 and Section 2 of Article 5 of the former 'Establishment of Riot Police Units Act,' which prescribes detention in a guardhouse as a form of disciplinary action against riot police constables, does not breach the principle of due process and rule against excessive restriction; and thus does not violate the Constitution.

Background of the Case

The petitioner, who had enlisted and was serving as an auxiliary police officer and was a riot police constable whose duty was to assist in maintaining public security, was brought to a disciplinary committee for bringing a mobile phone into the camp, and for keeping it in his possession and use. The disciplinary committee for police officials determined a disposition of disciplinary action of five days of detention in a guardhouse.

The petitioner objected to the disposition of disciplinary action and requested an appeal for review, after which he filed a lawsuit for revocation, and requested a constitutional review of Article 5 and Article 6 Section 2 of the former 'Establishment of Riot Police Units Act' in the process. When both the lawsuit and the request for constitutional review were dismissed, the petitioner filed a constitutional complaint on July 1, 2013.

Subject Matter of Review

The subject matter of review in this case is whether the provision concerning 'detention in a guardhouse against a riot police constable' in

Section 1 and Section 2 of Article 5 of the former 'Establishment of Riot Police Units Act' (amended by Act No. 10749 on May 30, 2011, and before amendment to the 'Act on the Establishment and Operation of Auxiliary Police Companies' by Act No. 13425 on July 24, 2015; hereinafter referred to as the "Act") (hereinafter referred to as the "Detention Provisions") and Article 6 Section 2 of the Act (hereinafter referred to as the "Appeals Provision") violate the Constitution. The Instant Provisions read as follows.

Provisions at Issue

Former Establishment of Riot Police Units Act (amended by Act No. 10749 on May 30, 2011, and before amendment to the 'Act on the Establishment and Operation of Auxiliary Police Companies' by Act No. 13425 on July 24, 2015)

Article 5 (Disciplinary Actions)

(1) Disciplinary actions against assistant inspectors, senior patrol officers and constables (including riot police constables) of riot police units shall include removal, discharge, suspension from office, salary reduction, reprimanding, detention and probation.

(2) Detention in a guardhouse means confinement in a riot police unit, warship, or other detention place and does not exceed 15 days.

Article 6 (Appeals)

(2) Even where an appeal for review has been filed under Section 1, the relevant disposition of a disciplinary action shall be complied with until a decision is made thereon.

Summary of the Decision

1. Appeals Provision

This provision concerns appeals, and does not apply to the original

case, which concerns the lawsuit on the revocation of the disposition of detention in a guardhouse. Therefore, it is nonjusticiable for being irrelevant to the original case.

2. Detention Provisions

Summary of the Majority Decision of Four Justices

A. Whether to Apply the Principle of Arrest by Warrant

The principle of arrest by warrant, prescribed by Article 12 Section 3 of the Constitution, stipulates that no person shall be subjected, in relation to criminal procedures, to compulsory dispositions of arrest, detention, seizure or search without a warrant issued by a certified judge. There is no reason to say that this equally applies to disciplinary procedures. Therefore, no further review will be conducted on whether the Detention Provisions violate the principle of arrest by warrant under the Constitution.

B. Whether the Principle of Due Process Has Been Violated

The principle of due process prescribed by Article 12 Section 1 of the Constitution is not limited to criminal procedures, but applies to all state action. Therefore, the disposition of detention in a guardhouse, which involves the bodily confinement of a riot police constable, should also comply with the principle of due process.

However, the disposition of detention in a guardhouse issued against a riot police constable arises due to a limited number of causes, requires the review of a disciplinary committee, and in the course of deliberating and executing disciplinary action, guarantees the right to appear and the right to be heard. There are also separate legal procedures for objection, such as appeals and administrative litigation, and in the case of an appeal the opportunity to be heard is an important procedural

requirement that influences the effect of the decision. Given this, the abovementioned provisions have not failed to satisfy the procedural standards required by the Constitution, and thus do not violate the principle of due process.

C. Whether the Rule against Excessive Restriction Has Been Violated

Restrictions on violations of service regulations are necessary for the strict management of the service discipline of riot police constables, and for collective combat power and facilitating operations. Detention in a guardhouse, with the aim of maintaining operational command within a police organization and of enforcing service regulations, is a disciplinary disposition that confines any person who violates such purpose in a restricted area for a certain period and does not include this period in the term of mandatory service; the impact of this disposition on enforcing service regulations and restricting violations is stronger than other disciplinary actions. Therefore, it serves a legitimate purpose and provides an appropriate means.

Detention in a guardhouse is a disciplinary disposition that holds a stronger power of deterrence compared to other disciplinary measures, and it cannot be concluded that other disciplinary measures have an equal or similar impact in terms of preventing or restricting severe violations of service regulations. The ‘Rules on the Management of Riot Police Constables, Etc.’ prescribe varying measures in the form of on-site admonitions, warnings, transfer to disciplinary training centers and disciplinary action depending on the severity of the violation of service regulations, and restrict the specific grounds for disciplinary dispositions, ensuring that disciplinary action is proportionate to liability. Furthermore, the ‘Decree on Disciplinary Action against Police Officials’ and the ‘Rules on Disciplinary Action against Police Officials, etc.’ are applied *mutatis mutandis*, and this allows for extenuating circumstances depending on the type and extent of the violation of duty, including the severity of negligence, existence of past distinguished performance,

extent of contrition or other reasons. As seen here, such standards ensure that disciplinary dispositions are proportionate to the extent of the violation of service regulations and culpability and therefore, the disciplinary action of detention in a guardhouse is quite unlikely to lead to being abused. Thus, the rule of minimum restriction is not violated.

The public interest of strictly managing the service discipline of riot police constables, and of enhancing collective combat power and facilitating swift operations is no smaller than the restriction of physical freedom imposed on the riot police constable during his term of detention in a guardhouse. Therefore, the balance of interests is satisfied.

Summary of Dissenting Opinion of Five Judges

1. Violation of the Principle of Arrest by Warrant under Article 12 Section 3 of the Constitution

From the perspective of the person being physically detained by the exercise of state authority, in essence, the restriction of physical freedom is the same whether such detention is the result of criminal procedures or administrative procedures. Therefore, as a rule, the principle of arrest by warrant under Article 12 Section 3 of the Constitution also applies in cases where an administrative body restricts physical freedom in the form of arrest or detention. Provided, when the nature of the administrative procedure makes it impossible to achieve its purpose while observing the principle of arrest by warrant, exceptions are permitted. The detention pursuant to the Detention Provisions by nature does not involve an element of urgency, but despite this, the detention proceeds without a warrant issued by the decision of a judge. Therefore, this violates the principle of arrest by warrant under Article 12 Section 3 of the Constitution.

2. Violation of the Rule against Excessive Restriction

Given the principle of guaranteeing physical freedom to the utmost extent, as a rule, confinement should not be permitted as a form of disciplinary action. While confinement could be allowed in certain cases, the only exceptions should be against acts of irregularity that are severe enough to necessitate bodily confinement to maintain service regulations, and even then confinement should be used as a supplementary measure only in cases where all other disciplinary measures have been exhausted and proven ineffective.

The grounds for disciplinary action set forth by the 'Rules on the Management of Riot Police Constables, Etc.' are too comprehensive, to the extent that minor offenses that are unlikely to become subject to censure may be punished by disciplinary action. The former 'Rules on Disciplinary Action against Police Officials, etc.' which apply *mutatis mutandis* to the disciplinary action criteria that apply to riot police, do not set forth any regulations on what types of conduct are subject to the disposition of detention in a guardhouse. Thus, even minor violations of rules or negligence can be punished by this disposition. Meanwhile, the former 'Establishment of Riot Police Units Act' does not include any regulations on the supplementary application of the disposition of detention in a guardhouse. Those who object to such a disposition may file an appeal, but this cannot be considered an effective measure of relief since it does not have the power to suspend the execution of detention in a guardhouse. The disposition of detention in a guardhouse, as a disciplinary measure that does not allow room for involvement by a judge, is an unreasonable measure that can hardly be found in any precedent when compared to legislation in other countries.

Therefore, the Detention Provisions restrict the physical freedom of riot police constables to an unnecessary extent, and violate the rule against excessive restriction, thus infringing upon the physical freedom of the petitioner.

4. Case on the Registration of Personal Information for the Crime of Obscene Conduct Using Means of Communication

[2015Hun-Ma688, March 31, 2016]

In this case, the Constitutional Court held that the relevant provision of Article 42 Section 1 of the 'Act on Special Cases concerning the Punishment, etc. of Sexual Crimes,' which prescribes that any person finally declared guilty of a crime of obscene conduct using means of communication shall be subject to registration of personal information, infringes on the right to informational self-determination, and thus violates the Constitution.

Background of the Case

(1) On April 17, 2015, the complainant was fined one million won and ordered to undergo 40 hours of a sex offender treatment program on the charge of sending the victim (female, 14 years of age), on November 29, 2014, words that cause a sense of sexual shame using a smart phone as a means of communication, with intent to satisfy his own sexual urges. On April 25, 2015, this judgment became final and conclusive.

(2) On June 30, 2015, the complainant filed a constitutional complaint on the ground that rendering a person subject to registration of personal information under Article 42 Section 1 of the 'Act on Special Cases concerning the Punishment, etc. of Sexual Crimes' for the crime of obscene conduct using means of communication, a comparatively minor crime, violates the principle against excessive restriction and thus violates the Constitution.

Subject Matter of Review

The subject matter of this case is whether the provision concerning "any person finally declared guilty of a crime as defined in Article 13

shall be a person subject to registration of personal information" in Article 42 Section 1 of the 'Act on Special Cases concerning the Punishment, etc. of Sexual Crimes' (wholly amended by Act No. 11556 on December 18, 2012) (hereinafter referred to as the "Instant Provision") infringes on the complainant's fundamental rights, thus violating the Constitution. The Instant Provision reads as follows:

Provision at Issue

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

Article 42 (Persons Subject to Registration of Personal Information)

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

Summary of the Decision

Receiving personal information from a person who has committed a certain sexual crime to preserve and manage that information, is an appropriate means for a justifiable purpose, to the end of suppressing recidivism and raising the efficiency of investigation when recidivism occurs. However, the registration of the personal information of sex offenders should be limited to the extent necessary for the legislative purpose of the personal information registration system, instead of

targeting all sex offenders. The types of activities that constitute the elements of a crime of obscene conduct using means of communication are extremely diverse in pattern, depending on the criminal intent, criminal motive, the victim targeted, and the frequency and method of the activity; and the risk of recidivism and necessity for the registration of personal information differ greatly according to the individual type of activity. However, the Instant Provision prescribes that any person finally declared guilty of a crime of obscene conduct using means of communication shall be subject to compulsory registration of personal information without the involvement of separate procedures such as review by judges, and has no means to contest the outcome once registration takes place. Thus, the Instant Provision is unconstitutional in that it violates the principle of least restrictive means, as it does not opt for other means that can lessen the infringement of fundamental rights, for instance, by reducing the number of persons subject to registration depending on the nature of the crime and the risk of recidivism, or by establishing a decision-making procedure by a judge, separately from the conviction procedure. It is also hard to acknowledge the balance of interests, as the Instant Provision can cause an imbalance between the public interest that will be accomplished and the private right that will be infringed on in the exceptional case of persons that have committed the crime of obscene conduct using means of communication, which is of minor illegality, and who have not been recognized as having any risk of recidivism.

Dissenting Opinion of Three Justices

Unlike the personal information disclosure and notification system, which discloses the personal information of sex offenders to the general public, in the case of the personal information registration system a state agency internally preserves and manages that information for the purpose of managing sex offenders, and thus the infringement of the legal interests of persons subject to registration is limited. The crime of

obscene conduct using means of communication is of no lesser degree than sexual crimes in physical spaces in terms of severity and harm, as it can infringe on the sexual freedom of victims and intensify a distorted sexual culture as do sexual crimes in physical spaces, despite involving no physical contact. Moreover, the crime of obscene conduct using means of communication is a crime with specific intent that can only be constituted with "intent to arouse or satisfy his/her own or the other person's sexual urges," and thus has a limited scope for constituting a crime. While the private right infringed upon by this Instant Provision is not significant, as it does not undermine the social rehabilitation of the persons subject to registration or label them in society as a former convict, the public interest of preventing sex offender recidivism and defending society through the Instant Provision is extremely important, and thus the balance of interests is acknowledged.

Concurring Opinion of Two Justices

Despite the fact that the main legislative purpose of the Instant Provision is to prevent the recidivism of sexual crimes, it does not, in the least, require the 'risk of recidivism' when selecting persons subject to registration. The Instant Provision, which prescribes that any person declared guilty of the crime of obscene conduct using means of communication is subject to registration of personal information, when it has not been proved that the recidivism rate is high for crimes of obscene conduct using means of communication, imposes unnecessary restrictions on persons subject to registration who have not been recognized as having a risk of recidivism. Therefore, the Instant Provision infringes on the complainant's right to informational self-determination.

5. Case on the Restriction on Treatment of Unconvicted Prisoners Subject to a Disposition for Forfeiture of Rights, and on the Notification of Reference Data for Sentencing

[2012Hun-Ma549, 2013Hun-Ma865 (consolidated), April 28, 2016]

In this case, the Constitutional Court held that the provision concerning Item 10 of Article 108 referred to in the main text of Article 112 Section 3 of the 'Administration and Treatment of Correctional Institution Inmates Act,' which restricts unconvicted prisoners from writing during the period in which their rights are forfeited, does not infringe on the freedom of expression, that the provision concerning Item 5 of Article 108 referred to in the main text of Article 112 Section 3 of the 'Administration and Treatment of Correctional Institution Inmates Act,' which restricts unconvicted prisoners from reading newspapers during the period in which they have been forfeited rights, does not infringe on the right to knowledge, and that notification to the court on the contravention of regulations, etc. by unconvicted prisoners subject to disciplinary forfeiture of rights as reference for sentencing does not infringe on the right to informational self-determination.

Background of the Case

(1) While being held as an unconvicted prisoner at ○○ Prison and ○○ Detention Center, disciplinary forfeiture of rights was imposed on the complainant for 30 days, and forfeiture of rights for nine days, for interfering with the duties of correctional officers, and for disturbing the peace, respectively.

(2) The wardens of ○○ Prison and ○○ Detention Center, under Article 112 Section 3 of the 'Administration and Treatment of Correctional Institution Inmates Act' (hereinafter referred to as the "Administration Act"), restricted treatment of the complainant, by

restricting writing (Item 10 of Article 108) and newspaper reading (Item 5 of Article 108), etc. during the period rights were forfeited, and notified ○○ Court and ○○ Court, the competent courts for holding the criminal trials involving the complainant, of the complainant's acts of contravening regulations and the details of the disposition of disciplinary action, as reference data for sentencing.

(3) In response, the complainant filed a constitutional complaint claiming that the above provisions of the Administration Act and the notification of reference data for sentencing (hereinafter referred to as the "Notification at Issue") infringed on the complainant's fundamental rights.

Provision at Issue

Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Act No. 8728 on December 21, 2007)

Article 112 (Execution of Disciplinary Action)

(3) The restriction on treatment provided for in Items 4 through 13 of Article 108 shall be imposed concurrently on those who are subject to a disposition provided for in Item 14 of Article 108 for the relevant period.

Related Provision

Administration and Treatment of Correctional Institution Inmates Act

Article 108 (Types of Disciplinary Action)

The types of disciplinary action shall be as follows:

5. Restriction on reading newspapers for up to 30 days;

10. Restriction on writing for up to 30 days.

5. Case on the Restriction on Treatment of Unconvicted Prisoners Subject to a Disposition for Forfeiture of Rights, and on the Notification of Reference Data for Sentencing

Summary of the Decision

1. Review of Restriction on Writing Clause

The restriction on writing imposed on unconvicted prisoners subject to disciplinary forfeiture of rights during the period in which their rights are forfeited is found to have a legitimate purpose and to be an appropriate means, for its purpose is to compel observation of discipline within correctional institutions, and to maintain safety and order in detention or confinement facilities. If deemed particularly necessary for the prisoner's remedy for infringed rights, etc., the warden may permit them to write during the period their rights are forfeited. Also, Article 85 of the Administration Act guarantees that an unconvicted prisoner may exercise the right to engage in essential writing activities such as the preparation of litigation documents, etc. Thus, it cannot be concluded that the above clause excessively infringes on the complainant's freedom of expression.

2. Review of Restriction on Newspaper Reading Clause

The restriction on newspaper reading, imposed concurrently on those who are subject to a disposition for forfeiture of rights as a disciplinary action for violating regulations by unconvicted prisoners, etc., has the purpose of inducing prisoners to comply with regulations and ultimately to establish order in the confinement facilities by encouraging violators of regulations to engage in self-reflection, and by warning other prisoners of the disadvantages that may be imposed for violating regulations. The restriction on newspaper reading under the above provision can only be imposed for up to 30 days, and prisoners subject to a disposition for forfeiture of rights still have unrestricted access to books that are kept inside the facilities. Thus, it cannot be concluded that the above clause excessively infringes on the complainant's right to knowledge.

3. Review of Notification of Reference Data for Sentencing

A. Opinion for Acceptance by Justices Park Han-Chul, Lee Jung-Mi, Kim Yi-Su, Lee Jin-Sung and Seo Ki-Seog

Article 115 Section 3 of the Administration Act, which stipulates that "necessary matters concerning disciplinary action" shall be prescribed by Ordinance of the Ministry of Justice, does not expressly refer to the notification of reference data for sentencing. Not only this, but it is also difficult to foresee only by this provision that the Notification at Issue, which is a restriction of fundamental rights independent from the punishment, is possible. Thus, Article 115 Section 3 of the Administration Act cannot serve as legal grounds for the Notification at Issue.

While information subject to the Notification at Issue was collected for the purpose of securing order in the correctional institution, it is difficult to say that it was provided for that intended purpose. Therefore, Article 15 Section 1 Item 3 and Article 17 Section 1 Item 2 of the Personal Information Protection Act are also unable to serve as legal grounds.

Since the Notification at Issue contains reference data for the sentencing of unconvicted prisoners, it can be deemed to have been provided for being "necessary for a court to perform its judicial affairs," as prescribed in Article 18 Section 2 Item 8 of the Personal Information Protection Act. However, the above provision of the Personal Information Protection Act merely permits the provision of personal information under the court's power to preside over trials; it does not permit the active and voluntary provision of personal information by a warden, etc. without the request of the court. Further, the respondents made no announcement in the official gazette, etc., or took any measure to ensure the safety of personal information as prescribed in Sections 4 and 5 of Article 18 of the Personal Information Protection Act.

Therefore, this Notification at Issue infringes on the complainant's right to informational self-determination for violating the principle of statutory reservation.

B. Opinion for Denial by Justice Ahn Chang-Ho and Justice Kang Il-Won

(1) Whether the Principle of Statutory Reservation Is Violated

Article 115 Section 3 of the Administration Act, itself, does not clearly or explicitly provide for the notification of reference data for sentencing. However, the grounds for the Notification at Issue can be found in the Personal Information Protection Act, which sets out the general law on the protection of personal information.

Not only the act of the warden compiling data related to the punishment of unconvicted prisoners, but also the notification of this data to the court, is for the purpose of fulfilling the duties of maintaining safety and order in the correctional institution. Therefore, this can be considered the provision of personal information to a third person under the purpose for which the personal information was collected, based on Article 17 Section 1 Item 2 of the Personal Information Protection Act.

Even if this is not the case, the Notification at Issue can be considered to be based on Article 18 Section 2 Item 8 of the Personal Information Protection Act, which prescribes that where it is necessary for a court to perform its judicial affairs, personal information may be provided to a third person for other than the intended purposes for which it has been collected. There are no grounds on which personal information can be provided per the above provision only in cases where a request has been made by the court, as claimed in the opinion for acceptance, and even if the respondents did not take any measures under Sections 4 and 5 of Article 18 of the Personal Information Protection Act, whether the provision of personal information has been based on a statutory provision, and whether *ex post* measures have been taken, are two different issues. Therefore, we cannot conclude that the Notification at Issue restricts the complainant's right to informational self-determination without any legal ground.

(2) Whether the Principle against Excessive Restriction Is Violated

The Notification at Issue has a legitimate purpose, and its means are appropriate, as it aims to maintain safety and order within the correctional institution and to appropriately sentence unconvicted prisoners.

The personal information provided in the Notification at Issue does not, in itself, fall under the category of information that requires strict protection, as it cannot be considered closely related to an individual's personality or to the intimate domain of privacy. Further, the scope of informational self-determination enjoyed by an unconvicted prisoner in relation to the court, which is the main agent that arrests or detains the unconvicted prisoner, can only be limited, and the relevant laws and regulations provide for measures for the protection of personal information. Thus, the element of minimum restriction is also satisfied.

The public interest that the Notification at Issue seeks to achieve largely outweighs the less significant degree of restriction of fundamental rights arising from the Notification at Issue, considering the nature of the information provided, or the limited scope of to whom the information is provided. Thus, the balance of interests is also satisfied.

Therefore, it cannot be concluded that the Notification at Issue infringes on the complainant's right to informational self-determination for violating the principle against excessive restriction.

C. Opinion for Dismissal by Justice Kim Chang-Jong and Justice Cho Yong-Ho

The complainant's intent in this case is to contend with only the disadvantages in the sentencing of his/her criminal trial, and not the fact that his/her personal information may be disclosed. Therefore, the fundamental right restricted by the Notification at Issue should be deemed the right to a fair trial.

The Notification at Issue is merely an internal factual act between

state agencies, and is not an act carried out by an administrative body in a superior position that directly incurs a prejudicial legal effect in relation to the legal status or rights and obligations of the complainant. Moreover, the sentencing decision in a criminal trial lies under the exclusive authority of the judge, which means the judge has discretion on deciding whether to reflect the information notified in the Notification at Issue in his/her sentencing decision, and the Notification at Issue holds no binding force in relation to the court. Thus, the Notification at Issue *per se* does not have the legal effect of incurring any disadvantage in the sentencing of the complainant.

Therefore, the Notification at Issue does not constitute the exercise of state power, which is the subject matter of the constitutional complaint, and thus the request for adjudication is nonjusticiable.

Summary of Dissenting Opinion of Four Justices on the Restriction on Writing Clause

The act of writing *per se* is a largely personal act related to mental activity, and does not pose any risk to maintaining order and safety in confinement facilities. The connection between the cause of violating regulations in the confinement facilities and the prohibition of writing activities is extremely weak.

The public interest of ensuring safety and order in the confinement facilities, etc. can be sufficiently achieved through other measures, such as permitting writing in principle accompanied by limited exceptions. Further, the act of writing does not presuppose that the resulting material is always disseminated to the outer domain. This means that compared to the more general freedom of expression, writing is closer to the freedom of conscience and ideology, or to the dignity and value of human beings, and the effect of the disciplinary action of restricting writing varies greatly depending on the person, by having either an immense impact or none at all. Thus, as the writing restriction clause in this case fails to comply with minimum restriction and balance of

interests, it infringes on the complainant's freedom of expression for violating the principle against excessive restriction.

Summary of Dissenting Opinion of Three Justices on the Restriction on Newspaper Reading Clause

If a person confined in a prison and forfeited rights is restricted from reading newspapers for up to 30 days, that person will have no knowledge of what is happening in society. Even if the period during which rights are forfeited ends and the person is allowed access to newspapers that were prohibited during the disciplinary period, the infringement on the central aspect of the right to knowledge, an extremely important fundamental right in the realization of democracy, cannot be recovered. Reading newspapers is a largely personal act related to the intellectual activity of a person, and poses no risk whatsoever to maintaining order and safety in the prison if the appropriate measures are taken, for instance deleting questionable parts. In fact, reading newspapers will enable prisoners to acquire the latest information to prepare for social rehabilitation in the future, and also encourages the sound mental activity of prisoners, contributing to their correction and edification. Thus, even considering the legislative purpose of establishing order in prisons, restricting prisoners from reading newspapers for violating regulations despite the above is an excessive restriction of fundamental rights, and violates the principle against excessive restriction.

6. Case on the Legislative Omission of the Constituencies of National Assembly Members

[2015Hun-Ma1177 · 1220, 2016Hun-Ma6 · 17 · 25 · 64 (consolidated), April 28, 2016]

In this case, the Constitutional Court held that the constitutional complaint against the National Assembly's legislative omission of failing to enact the legislation on constituencies of National Assembly members by the deadline for legislative amendment, despite the Constitutional Court's decision of nonconformity to the Constitution and its establishment of a deadline for the legislative amendment, is nonjusticiable, because although the National Assembly has an explicit legislative duty under the Constitution to legislate for constituencies, and delayed performing this constitutional duty with no justifiable ground, the National Assembly demarcated the constituencies before the pronouncement of the decision, enabling the complainants to achieve their subjective goal of running for the demarcated constituency or of voting, and thus the justiciable interests have been terminated.

Background of the Case

(1) On October 30, 2014, the Constitutional Court decided, "Attached Table 1 of Article 25 Section 2 of the Public Official Election Act (amended by Act No. 11374 on February 29, 2012) is inconsistent with the Constitution for violating equality in the value of votes. Table 1, the Electoral District Table for the elections of the local constituency members of the National Assembly, shall continuously apply until a legislator amends such provisions by the deadline of December 31, 2015." However, the National Assembly failed to implement its obligations to amend the legislation on the former Electoral District Table until after the above-mentioned deadline.

(2) The complainants, who were planning to run for the 20th National

Assembly elections or electors with the right to vote for National Assembly members, filed a constitutional complaint claiming that their freedom to engage in election campaigns, right to hold public office, etc. were violated by the National Assembly's legislative omission of failing to demarcate constituencies.

Subject Matter of Review

The subject matter of this case is whether the National Assembly's legislative omission of failing to enact legislation on the constituencies of National Assembly members (hereinafter referred to as the "Legislative Omission at Issue") infringes on the fundamental rights of the complainants, and thus violates the Constitution.

Summary of the Decision

1. The Existence of Legislative Duty under the Constitution

Article 41 Section 3 of the Constitution prescribes that constituencies, a vital element of the National Assembly elections, shall be determined by legislations. Therefore, it cannot be said that the legislator holds any freedom of formation on whether to legislate for constituencies, which means the National Assembly has an explicit legislative duty under the Constitution to legislate the constituencies of National Assembly members. Constituencies are the premises that guarantee the freedom to engage in election campaigns, and also serve as the basis for realizing National Assembly member candidates' right to be elected, and electors' right to vote. Thus, the Constitution can be interpreted as imposing on the National Assembly the duty to legislate the constituencies of National Assembly members in order to realize the principle of the people's sovereignty and the principle of representative democracy, and to guarantee the people's right to vote and right to be elected.

2. Delay in Performing Legislative Duty Imposed by the Constitution

If a legislator has neglected to perform his or her legislative duty pertaining to constituencies, delegated by the Constitution, for a considerable period without a justifiable ground, the legislator should be deemed to have delayed performing the legislative duty to enact legislation on constituencies. Upon the decision that the former Electoral District Table does not comply with the Constitution, the Constitutional Court granted the National Assembly a period of one year and two months to amend the legislation. This period was not insufficient for holding in-depth discussions on constituency demarcation and following up with legislation, and despite this fact the National Assembly exceeded the deadline for amending the legislation and caused a vacuum in the constituencies. In spite of this vacuum being sustained for over two months up until just around 40 days ahead of the 20th National Assembly elections, the National Assembly still had not enacted the legislation on constituencies, and consequently, persons planning to run for the National Assembly elections, etc. were not fully guaranteed the freedom to engage in election campaigns, thus it became difficult for electors to acquire election information. Judging by the above, even given that there may have been a number of difficulties in constituency demarcation, for instance the adjustment of the number of National Assembly members of local constituencies following the division or unification of constituencies under the stricter population ratio standards, the Legislative Omission at Issue cannot be recognized as a legislative delay within a reasonable period, and no other special reason to justify such a delay can be found. This means that the National Assembly delayed performing its legislative duty imposed by the Constitution to enact the legislation pertaining to constituencies.

3. Termination of Justiciable Interests

Provided, for the filing of a constitutional complaint to be justiciable,

there must be justiciable interests at the time the complaint is filed, and at the time the decision is made. However, the National Assembly demarcated the constituencies on March 2, 2016, resolving the situation of the National Assembly's legislative omission of failing to enact the legislation on constituencies, and this enabled the complainants to achieve their subjective goal of running as candidate for the National Assembly seat of a demarcated constituency or of voting as an elector. Thus, the complainants' request for adjudication on the Legislative Omission at Issue is nonjusticiable for a lack of justiciable interests.

Summary of Dissenting Opinion by Four Justices

1. Justiciable Interests

There still remains the risk of a vacuum in the constituencies, as in this Legislative Omission at Issue, and there has been no clarification yet as to whether the omission by the National Assembly of failing to prepare legislation on the constituencies until the National Assembly elections are imminent violates the Constitution. Therefore, although the justiciable interests for this constitutional complaint have been terminated, the judgment on the merits is appropriate in this case as the justiciable interests can be exceptionally sustained.

2. Unconstitutionality of the Legislative Omission at Issue

As the constituency of a National Assembly member is the key premise for effectively guaranteeing the exercise of the freedom to engage in election campaigns and the right to vote, it would only be constitutional for constituencies to be constantly maintained, and the constitutional demand for legislation becomes higher when the National Assembly elections are imminent.

In this case, the National Assembly failed to enact the legislation on constituencies, its legislative duty imposed by the Constitution, until

around 40 days before the election date, despite the fact that the registration of preliminary candidates, which is based on the constituencies, had already started, thus meaning that the 20th National Assembly elections were extremely imminent. This creates a massive setback in the election campaigns of persons set to run for the National Assembly elections or persons registered as preliminary candidates, and it also becomes difficult for the electors of National Assembly members to acquire election information. This gravely endangers the basic principles of democracy, which run on the basis of popular sovereignty. Moreover, there are concerns that elections that take place without guaranteeing full freedom to engage in election campaigns, and that are based on limited election information, may be undermined in terms of democratic legitimacy.

Therefore, the Legislative Omission at Issue is a serious violation of the Constitution, in that the National Assembly neglected its legislative duty expressly delegated by the Constitution, and no special reason to justify the delay in the National Assembly's legislation can be found. This means that the National Assembly's Legislative Omission at Issue constitutes nonfeasance of legislative duty that exceeds the limits of legislative discretion, and infringes on the freedom of persons planning to run for the 20th National Assembly elections and persons registered as preliminary candidates to engage in election campaigns, as well as the right of electors to vote, and thus violates the Constitution.

7. Case on the Restriction on Employment of Persons that Have Committed a Sex Offense against a Child or Juvenile

[2015Hun-Ma98, April 28, 2016]

In this case, the Constitutional Court held that the provision "one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child or juvenile and for whom such sentence is made final and conclusive" in Article 56 Section 1 of the 'Act on the Protection of Children and Juveniles against Sexual Abuse' (amended by Act No. 12329 on January 21, 2014), which prescribes that no one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child or juvenile and for whom such sentence is made final and conclusive shall work for or provide actual labor to a child or juvenile-related institution, etc. for ten years from the date on which the execution of such penalty or medical treatment and custody is terminated, suspended or exempted, violates the Constitution.

Background of the Case

(1) On July 17, 2014, the complainant was sentenced by Incheon District Court to imprisonment with labor for one year and six months and medical treatment and custody, etc. (hereinafter referred to as the "Judgment on Medical Treatment and Custody, Etc."), for violating the Act on the Protection of Children and Juveniles against Sexual Abuse (indecent act by compulsion).

(2) On January 30, 2015, while being held prisoner at the Institute of Forensic Psychiatry under the Ministry of Justice following the Judgment on Medical Treatment and Custody, etc., the complainant filed a constitutional complaint on the grounds that Article 16 Section 2 Item 1 of the Medical Treatment and Custody Act, Article 23 Section 1 of the 'Act on the Probation and Electronic Monitoring, etc. of Specific

Criminal Offenders' and Article 56 Section 1 of the 'Act on the Protection of Children and Juveniles against Sexual Abuse' infringe on the basic rights of the complainant.

Subject Matter of Review

The subject matters of this case are whether the provision concerning Article 2 Section 1 Item 3 referred to in Article 16 Section 2 Item 1 of the Medical Treatment and Custody Act (amended by Act No. 9111 on June 13, 2008) (hereinafter referred to as the "Medical Treatment and Custody Act Provision"), the provision concerning a person subject to medical treatment and custody in Article 23 Section 1 of the 'Act on the Probation and Electronic Monitoring, etc. of Specific Criminal Offenders' (amended by Act No. 10257 on April 15, 2010; the Act is written as above, since under Act No. 11558 on December 18, 2012, the title of this Act was changed from the 'Act on the Electronic Monitoring of Specific Criminal Offenders' to the 'Act on the Probation and Electronic Monitoring, etc. of Specific Criminal Offenders'; hereinafter referred to as the "Electronic Monitoring Act") (hereinafter referred to as the "Electronic Monitoring Act Provision"), and the provision concerning "one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child or juvenile and for whom such sentence is made final and conclusive" in Article 56 Section 1 of the 'Act on the Protection of Children and Juveniles against Sexual Abuse' (amended by Act No. 12329 on January 21, 2014; hereinafter referred to as the "Act on the Protection of Juveniles against Sexual Abuse") (hereinafter referred to as the "Restriction on Employment Provision") infringe on the basic rights of the complainant. The Instant Provisions read as follows:

Provisions at Issue

○ Medical Treatment and Custody Act (amended by Act No. 9111 on

June 13, 2008)

Article 16 (Details of Medical Treatment and Custody)

(2) The period for committal of a person under medical treatment and custody to a medical treatment and detention center shall not exceed the periods classified in each of the following Items:

1. Persons falling under Article 2 Section 1 Items 1 and 3: 15 years.

○ Act on the Electronic Monitoring of Specific Criminal Offenders (amended by Act No. 10257 on April 15, 2010)

Article 23 (Provisional Termination of Execution, etc. and Attachment of Electronic Devices)

(1) The Medical Treatment and Custody Deliberation Committee referred to in Article 37 of the Medical Treatment and Custody Act (hereinafter referred to as "Medical Treatment and Custody Deliberation Committee") may order a person subject to medical treatment and custody, who is not subject to an attachment order referred to in Article 9 in spite of the commission of a specific crime and who is placed under the provisional termination of execution or the entrustment for treatment during the execution of the medical treatment and custody or a person subject to protection and custody who is placed under the provisional release from prison during the execution of the protection and custody (hereinafter referred to as "person placed under the provisional termination of execution, etc.") to wear an electronic device for a fixed period not exceeding the term of probation so as to ensure the implementation of the matters to be observed under the Social Protection Act (referring to the Act enforced before its repeal by Act No. 7656).

○ Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act No. 12329 on January 21, 2014)

Article 56 (Restrictions, etc. on Employment at Child or Juvenile-Related Educational Institutions, etc.)

7. Case on the Restriction on Employment of Persons that Have Committed a Sex Offense against a Child or Juvenile

(1) No one sentenced to a penalty or medical treatment and custody for committing a sex offense against a child, juvenile or adult (hereinafter referred to as "sex offense") and for whom such sentence is made final and conclusive (excluding persons sentenced to punishmen t of a fine under Article 11 Section 5) shall provide educational services directly to children and juveniles by visiting their homes, or operate any of the following facilities or institutions (hereinafter referred to as "child or juvenile-related institution, etc."), or work for or provide actual labor to a child or juvenile-related institution, etc. for ten years from the date on which the execution of such penalty or medical treatment and custody is wholly or partially terminated, or suspended or exempted: *Provided*, That for the purposes of Items 10 and 14, the same shall apply only to those performing security guard duties, and for the purposes of Item 12, the same shall apply only to medical personnel defined in Article 2 of the Medical Service Act.

1. Kindergartens defined in Item 2 of Article 2 of the Early Childhood Education Act;
2. Schools defined in Article 2 of the Elementary and Secondary Education Act;
3. Private teaching institutes defined in Item 1 of Article 2 of the Act on the Establishment and Operation of Private Teaching Institutes and Extracurricular Lessons, teaching schools defined in Item 2 and private tutors defined in Item 3 of the same Article of the same Act (referring to private teaching institutes, teaching schools, and private tutors for children and juveniles designated by the Minister of Education, the use of which by children and juveniles is not restricted);
4. Centers for the protection and rehabilitations of juveniles under Article 35 of the Juvenile Protection Act;
5. Facilities for youth activities defined in Item 2 of Article 2 of the Juvenile Activity Promotion Act;
6. Juvenile counseling and welfare centers under Article 29 Section 1 of the Juvenile Welfare Support Act and youth shelters under

Item 1 of Article 31 of the same Act;

7. Child-care centers defined in Item 3 of Article 2 of the Infant Care Act;
8. Child welfare facilities defined in Item 10 of Article 3 of the Child Welfare Act;
9. Juvenile supporting institutions under Article 5 Section 1 Item 2 of the Act on the Prevention of Sexual Traffic and Protection, etc. of Victims and counseling centers for victims, etc. of sexual traffic under Article 10 of the same Act;
10. Housing management offices of collective housing defined in Item 2 of Article 2 of the Housing Act;
11. Sports facilities designated by the Minister of Culture, Sports and Tourism, the use of which by children and juveniles is not restricted, among sports facilities established under the Installation and Utilization of Sports Facilities Act;
12. Medical institutions defined in Article 3 of the Medical Service Act;
13. Places of business for following businesses under the Game Industry Promotion Act:
    (a) A business providing Internet computer game facilities defined in Item 7 of Article 2 of the Game Industry Promotion Act;
    (b) A combined distribution and game providing business defined in Item 8 of Article 2 of the Game Industry Promotion Act;
14. Corporations providing security services defined in Item 1 of Article 2 of the Security Services Industry Act;
15. Places of business for planning, supervising and operating juvenile activities defined in Item 3 of Article 3 of the Framework Act on Juveniles for commercial purposes (hereinafter referred to as “business establishments for planning juvenile activities”);
16. Places of business for training, instructing or counseling persons who provide, or intend to provide, services related to acting,

dancing, playing musical instruments, singing, reciting, or other services related to artistic talents for commercial purposes (hereinafter referred to as "business establishments for popular culture and arts planning");

17. Any of the following institutions, facilities or places of business where the employment of children or juveniles or their entrance is permitted (hereafter referred to as "facilities, etc." in this Item), the types of which are prescribed by Presidential Decree:
   (a) Facilities, etc. where there exists, or it is likely to exist, a business or actual relationship wherein any force can be exercised between children or juvenile and the operator, workers or actual labor suppliers of the relevant facilities, etc.;
   (b) Facilities, etc. favored or frequented by children or juveniles, where it is likely to occur any sex offense against a child or juvenile by the operator, workers or actual labor suppliers in the course of operating the relevant facilities, etc.

Summary of the Decision

(1) The complainant would have become aware that the Medical Treatment and Custody Provision has a cause for infringement of basic rights at the time the sentence the complainant received for medical treatment and custody, etc. was made final and conclusive, and since the request for adjudication of the Medical Treatment and Custody Provision was filed more than 90 days after the complainant was sentenced, it is inadmissible.

(2) The Electronic Monitoring Act Provision predetermines that the Medical Treatment and Custody Deliberation Committee will perform the order for attachment of an electronic device, and prescribes that the decision on the attachment is at the discretion of the Medical Treatment and Custody Deliberation Committee, which renders the request for

adjudication of the Electronic Monitoring Act Provision nonjusticiable for lack of directness.

(3) The Restriction on Employment Provision prevents persons who have committed a sex offense against a child or juvenile from coming into contact with children or juveniles by restricting their operation of or employment at child or juvenile-related institutions, etc. for a certain period, with the legislative purpose of protecting children and juveniles against sexual abuse and enhancing the ethics and credibility of child or juvenile-related institutions, etc. so that children and juveniles and their guardians can trust, use and rely on these institutions, and the legislative purpose is therefore found to be legitimate, and restricting the employment of persons who have a record of committing a sex offense against a child or juvenile at child or juvenile-related institutions, etc. for a certain period can be deemed an appropriate means.

However, the Restriction on Employment Provision violates the principle of the least restrictive means, in that it imposes a blanket prohibition of ten years on employment by child or juvenile-related institutions, etc. on persons with a record of committing a sex offense against a child or juvenile, deeming that they are, without any exception, likely to recommit a sex crime, that this Restriction on Employment Provision in particular is contrary to the intent of the medical treatment and custody system, as it presupposes that persons under medical treatment and custody are still likely to recommit a sex crime even in cases where the Medical Treatment and Custody Deliberation Committee has determined that the medical treatment and custody of the persons under medical treatment and custody should be terminated on the premise that the psychosexual disorder that shows a propensity for sexual activity, such as pedophilia, sexual sadism, etc. that was the cause of the sex offense against the child or juvenile was cured, and that the Restriction on Employment Provision imposes a blanket restriction of ten years on employment on persons whose offense is trivial and whose risk of recidivism is comparatively low, without reflecting the type or

specific fact pattern of the crime. Further, while the public interest that the Restriction on Employment Provision seeks to achieve is an important social public interest, the Restriction on Employment Provision excessively restricts the complainant's freedom of occupation, and thus violates the balance of interests.

Therefore, the Restriction on Employment Provision infringes on the complainant's freedom of occupation.

8. Case on the Retrial of the Decision to Dissolve the Unified Progressive Party

[2015Hun-A20, May 26, 2016]

In this case, the Constitutional Court held that the request for a retrial on the decision on the Dissolution of the Unified Progressive Party (2013Hun-Da1), pronounced on December 19, 2014, is nonjusticiable.

Background of the Case

The claimant requesting a retrial was dissolved by the decision of the Constitutional Court on December 19, 2014, ordering the dissolution of the political party, and the five Members of the National Assembly belonging to the claimant forfeited their seats in the National Assembly. The claimant filed a motion with the Constitutional Court to request a new trial to overturn the decision to dismiss the Unified Progressive Party on February 16, 2015, on the ground that, among the criminal cases that served as the premises for the decision requested to be retried, the charges of conspiracy of insurrection, etc. were acquitted in the Supreme Court (Supreme Court Decision 2014Do10978) on January 22, 2015, and thus the trial that served as the basis for the decision requested to be retried had been altered.

Summary of the Decision

1. Whether a Retrial on the Decision to Dissolve a Political Party Should Be Permitted

As a rule, adjudication on the dissolution of a political party is only effective to the extent of the political party in question, and a decision ordering dissolution has the effect of prohibiting the establishment of a substitute party or one with similar principles to the dissolved party,

which means that the failure to rectify a decision that contains an error may incur undue restrictions on the political decision-making of future generations. Thus, in the procedures of adjudication on the dissolution of a political party, a retrial should be permitted, as the benefits of the concrete validity of granting a retrial outweigh the benefits of the legal stability that can be achieved by not granting a retrial. Meanwhile, as a rule, the provisions on retrial in the Civil Procedure Act shall apply *mutatis mutandis* to the procedures for the retrial at issue.

2. Whether the Request for Retrial in this Case Is Nonjusticiable

A. The subject matters of review in the decision requested to be retried were whether the objectives or activities of the claimant were contrary to the basic order of democracy; whether the decision to dissolve the political party related to the claimant should be pronounced; and if the dissolution of the political party is ordered, whether the Members of the National Assembly belonging to that political party should forfeit their seats in the National Assembly. The conviction or acquittal of the charges of conspiracy of insurrection in the criminal cases on plots for sedition, etc. was neither the subject matter of review in the decision requested to be retried, nor a logical prerequisite to be reviewed with priority. Thus, even if the Supreme Court has denied the existence of an underground revolutionary organization and the establishment of a crime of plotting for sedition in the criminal cases on the conspiracy of insurrection, etc. involving Lee ○-Ki, etc., that does not necessarily mean that the decision requested to be retried constitutes the grounds for retrial under Article 451 Section 1 Item 8 of the Civil Procedure Act.

B. Claims (by the claimant party) that the decision requested to be retried was illegal in that it forfeited the National Assembly seats of the Members without proper legal grounds, or that it later decided to correct some facts ineligible for correction, are merely related to the

misunderstanding of facts or legal principles (by the decision requested to be retried by the Constitutional Court), and therefore, do not satisfy any of the grounds for retrial stipulated in Article 451 Section 1 of the Civil Procedure Act.

Concurring Opinion of Three Justices

* Justice Ahn Chang-Ho, Justice Seo Ki-Seog, and Justice Cho Yong-Ho

When a decision ordering the dissolution of a political party is pronounced, the existence and activities of the political party are prohibited, the remaining assets of the political party revert to the National Treasury, and the establishment of a party that has similar principles to the dissolved party, or a substitute party, is prohibited. As the National Assembly Members belonging to the political party lose their seats in the National Assembly, vacancy elections will take place for regional seats that have lost their Members, bringing change to the composition of the National Assembly with the election of new National Assembly Members. For such reasons, the effect of a decision to dissolve a political party has a far-reaching influence on the political and social order of the Korean society, and thus permitting a retrial may threaten the foundations of legal stability.

Therefore, in the case of a decision ordering the dissolution of a political party, the benefits of the legal stability that can be achieved by not granting a retrial outweigh the benefits of the concrete validity of granting a retrial, and thus the nature of the relevant decision does not allow for objection through retrial.

9. Case on the National Assembly Advancement Act

[2015Hun-Ra1, May 26, 2016]

In this case, members of the National Assembly belonging to the ruling Saenuri Party requested adjudication on the competence of the National Assembly Speaker, etc., claiming that their power to deliberate and vote on bills had been infringed upon. The Court dismissed the petition, on the grounds that the refusal of the respondent, the National Assembly Speaker, to designate an examination period for bills on December 17, 2014 and January 6, 2016, lacked legal prerequisites and was therefore nonjusticiable.

Background of the Case

1. The plaintiffs are members of the 19th National Assembly belonging to the negotiating party of the Saenuri Party, while one of the plaintiffs, Na ○-Rin, is a member of the National Assembly's Strategy and Finance Committee.

2. On December 9, 2014, 146 members of the National Assembly including the plaintiffs requested that 11 legislative bills pending in each competent standing committee, including the North Korean Human Rights Act, be designated an examination period and referred to the plenary session (hereinafter referred to as "*ex officio* proposal"). However, on December 17, 2014, the respondent – the National Assembly Speaker – replied to the effect that an *ex officio* proposal was not possible for the legislative bills mentioned above, as they did not satisfy the requirements for designation of an examination period prescribed in Article 85 Section 1 of the National Assembly Act.

3. On January 15, 2015, 11 members of the Strategy and Finance Committee, including plaintiff Na ○-Rin, submitted a motion to request that the respondent – the chairperson of the Strategy and Finance

Committee – designate the Service Industry Development Bill as an agenda for expeditious processing. However, on January 29, 2015, the respondent sent a reply to the effect that the above motion could not be put to vote as per Article 85-2 Section 1 of the National Assembly Act, as it was not signed by the majority of all incumbent National Assembly members of the Strategy and Finance Committee (14 persons).

4. Thereupon, on January 30, 2015, the plaintiffs requested adjudication on competence, claiming that the provision "agreement with the representative National Assembly members of each negotiating party" in Article 85 Section 1 Item 3 of the National Assembly Act and the provision "affirmative votes of at least 3/5 of all incumbent National Assembly members" in Article 85-2 Section 1 of the same Act were unconstitutional for violating the rule of majority under the Constitution, and that the respondents' acts of refusal based on the unconstitutional provisions of the National Assembly Act mentioned above infringed on the plaintiffs' power to deliberate and vote on bills as National Assembly members.

5. Meanwhile, on December 16, 2015, 157 members of the Saenuri Party, including the plaintiffs, requested that the respondent – the National Assembly Speaker – refer ten legislative bills, including the Service Industry Development Bill, through an *ex officio* proposal. However, on January 6, 2016, the respondent replied that an *ex officio* proposal could not be made for the legislative bills mentioned above, as they did not satisfy the requirements for designation of an examination period prescribed in Article 85 Section 1 of the National Assembly Act.

6. On January 11, 2016, the plaintiffs added to the relief sought the affirmation of the infringement of the plaintiffs' competence regarding, and invalidity of: ① the refusal of the respondent – the National Assembly Speaker – on January 6, 2016, to designate an examination period for ten legislative bills including the Service Industry Development

Act bill; and ② the declaration of the adoption, by the respondent – the National Assembly Speaker – of Article 85-2 of the National Assembly Act in the amendment bill to the legislative bill for the partial amendment of the National Assembly Act, in the 307th session of the National Assembly on May 2, 2012.

Subject Matter of Review

The subject matter of this case is whether: ① the amendment by the National Assembly of the Republic of Korea of Article 85 Section 1 and Article 85-2 Section 1 of the National Assembly Act by Act No. 11453 on May 25, 2012 (hereinafter referred to as the "Amendment to the National Assembly Act"); ② the refusal of the respondent – the National Assembly Speaker – to designate an examination period for 11 legislative bills including the North Korean Human Rights Bill on December 17, 2014 (hereinafter referred to as the "First Refusal to Designate an Examination Period") and to designate an examination period for ten legislative bills including the Service Industry Development Bill on January 6, 2016 (hereinafter referred to as the "Second Refusal to Designate an Examination Period"; hereinafter the two refusals are collectively referred to as the "Refusals to Designate Examination Periods"); ③ the refusal of the respondent – the chairperson of the Strategy and Finance Committee – on January 29, 2015, to put to vote the motion to designate the agenda for expeditious processing regarding the Service Industry Development Bill, on the ground that the motion was not signed by the majority of all incumbent members of the National Assembly of the Strategy and Finance Committee (hereinafter referred to as the "Refusal to Execute a Vote"); and ④ the declaration of the respondent – the National Assembly Speaker – to adopt Article 85-2 of the National Assembly Act in the amendment bill to the legislative bill for the partial amendment of the National Assembly Act (hereinafter referred to as the "Declaration of Adoption") in the 307th session of the National Assembly on May 2, 2012, infringe on the

plaintiffs' power to deliberate and vote on bills, and whether the Declaration of Adoption is void.

Provisions at Issue

National Assembly Act (amended by Act No. 11453 on May 25, 2012)

Article 85 (Examination Period)

(1) In any of the following cases, the Speaker may designate an examination period on cases to be tabled or that have been tabled to the committee. In such cases, in cases falling under Items 1 or 2, the Speaker may designate the examination period only on cases related to the applicable Item in consultation with the representative National Assembly members of each negotiating party.

1. Where a natural disaster occurs;
2. Where a war, an incident, or a national emergency occurs;
3. Where the speaker reaches an agreement with the representative National Assembly members of each negotiating party.

(2) In cases falling under Section 1, if the committee fails to complete the examination within the fixed period without justifiable grounds, the Speaker may table it to another committee or directly to the plenary session after hearing an interim report.

Article 85-2 (Expeditious Processing of Agendas)

(1) Where it is intended to designate any agenda referred to the committee (including an agenda referred to the Legislation and Judiciary Committee for examination of systems and wording) as the agenda to be expeditiously processed under Section 2, a National Assembly member shall submit to the Speaker the motion for request for designation of the agenda for expeditious processing which was signed by a majority of all incumbent National Assembly members (hereinafter referred to as "motion for designation of the agenda for expeditious processing" in this Article), and members of the competent committee responsible for an

agenda shall submit to the chairperson of the competent committee the motion for designation of the agenda for expeditious processing signed by a majority of all incumbent National Assembly members of the competent committee. In such cases, the Speaker or the chairperson of the competent committee responsible for an agenda shall without delay pass a resolution on the motion for designation of the agenda for expeditious processing by secret vote, with the affirmative votes of at least 3/5 of all incumbent National Assembly members or of at least 3/5 of all incumbent National Assembly members of the competent committee responsible for the agenda.

(2) When the motion for designation of the agenda for expeditious disposition is approved under the latter part of Section 1, the Speaker shall designate the relevant agenda as the one to be examined within the period specified under Section 3. In such cases, when the committee formulates an alternative to the agenda designated under the former part of this Section (hereinafter referred to as "agenda for expeditious processing"), the aforementioned alternative shall be deemed an agenda for expeditious processing.

Summary of the Decision

1. Adjudication on the Amendment to the National Assembly Act

In adjudications on competence disputes that deal with the enactment and amendment of laws, the National Assembly has standing as a respondent. Therefore, the plaintiffs' request for adjudication on the amendment to the National Assembly Act against the National Assembly Speaker and the chairperson of the Strategy and Finance Committee is nonjusticiable for being a claim against subjects that do not have standing as respondents.

2. Adjudication on the Declaration of Adoption

The plaintiffs' request to change the relief sought was submitted to the Constitutional Court on January 11, 2016. The request for adjudication on the Declaration of Adoption was made more than 180 days after the Declaration of Adoption, which was made on May 2, 2012, and is therefore nonjusticiable for clearly exceeding the period for request.

3. Adjudication on the Refusal to Execute a Vote

Article 85-2 Section 1 of the National Assembly Act prescribes that, only when a motion submitted to the chairperson of the competent committee requesting the designation of the agenda for expeditious processing fulfills the requirement of being signed by the majority of all incumbent National Assembly members of the competent committee, does the chairperson become responsible for executing a secret vote, and do the National Assembly members of the competent committee acquire the authority to vote on the motion. In this case, there is no possibility that the plaintiff Na ○-Rin's power to vote on the motion to designate the agenda for expeditious processing will be directly violated by the Refusal to Execute a Vote, for the motion does not fulfill the requirement of being signed by the majority of all incumbent National Assembly members of the competent committee. Even if the provision of Article 85-2 Section 1 of the National Assembly Act requiring three-fifths consent of all incumbent National Assembly members is pronounced to be unconstitutional, this does not mean that the respondent – the chairperson of the Strategy and Finance Committee – takes on the duty to execute a vote on a motion to designate an agenda for expeditious processing that does not fulfill the designation requirement. Thus, the unconstitutionality of the clause has no effect on the Refusal to Execute a Vote. Therefore, the request for adjudication on the Refusal to Execute a Vote is nonjusticiable, for the refusal does not infringe on or pose the risk of infringing on the plaintiff Na ○-Rin's

power to vote on the motion to designate the agenda for expeditious processing.

4. Adjudication on the Refusals to Designate Examination Periods

The first issue for consideration is as to whether the Refusals to Designate Examination Periods infringe or risk infringing on the plaintiffs' power to deliberate and vote on bills. The purpose of the power to make an *ex officio* proposal under Article 85 Section 1 of the National Assembly Act is to recover a constitutional disorder that creates an emergency in the National Assembly, and this power falls under the authority of the National Assembly Speaker to regulate proceedings. It is perceived as an emergency, exceptional procedure in Korea's National Assembly, which revolves around committees when it comes to the examination of bills. The grounds for designation presented in each of the Items of Article 85 Section 1 of the National Assembly Act merely restrict the Speaker's power to make an *ex officio* proposal, and do not impose any restriction on the power of National Assembly members to deliberate and vote on bills. The risk of violating the plaintiffs' power to deliberate and vote on bills will only materialize if the relevant bill is referred to the plenary session, and the National Assembly Speaker has the right not to exercise his or her power to make an *ex officio* proposal even if there are grounds for designation under Article 85 Section 1 of the National Assembly Act. Thus, it is not possible for the plaintiffs' power to deliberate and vote on bills to be directly violated by the Refusals to Designate Examination Periods.

Next, we examined whether the Refusals to Designate Examination Periods infringe or risk infringing on the plaintiffs' power to deliberate and vote on bills if Article 85 Section 1 Item 3 of the National Assembly Act is found to be unconstitutional. Even if Article 85 Section 1 Item 3 of the National Assembly Act, which prescribes, "Where the Speaker reaches an agreement with the representative National Assembly members of each negotiating party" as the requisite for designating an

examination period, is pronounced unconstitutional for violating the rule of majority, the designation of an examination period for a bill still remains the authority of the Speaker, as shown above. Thus, the Speaker does not immediately assume the obligation to designate an examination period on the bill. Therefore, the constitutionality of Article 85 Section 1 Item 3 of the National Assembly Act has no effect on the validity of the Refusals to Designate Examination Periods.

Lastly, we examined whether the Refusals to Designate Examination Periods infringe or risk infringing on the plaintiffs' power to deliberate and vote on bills if the legislative omission by the National Assembly Speaker, of failing to designate an examination period on a bill for which the majority of all incumbent National Assembly members has requested the designation of an examination period as per Article 85 Section 1 of the National Assembly Act (hereinafter referred to as the "Legislative Omission at Issue"), is found to be unconstitutional. The Legislative Omission at Issue is a 'genuine legislative omission' in which a vacuum in law has arisen due to the failure of the legislator to legislate on an emergency procedure that can bypass the examination of committees upon the request of the majority of all incumbent National Assembly members. Therefore, the constitutionality of the Legislative Omission at Issue has no connection with Article 85 Section 1 of the National Assembly Act, and its constitutionality has no effect on the Refusals to Designate Examination Periods. Furthermore, given the functional limitation of the Constitutional Court in its relationship with the National Assembly, which is a political and democratic institution that holds primary formative power in fulfilling the Constitution, it is inappropriate for the Constitutional Court to extend its scope of review to the constitutionality of the Legislative Omission at Issue, which does not serve as legal grounds. Thus, it is advisable to refrain to the utmost extent from exercising judicial review and to provide due deference to the autonomy of the National Assembly in controlling proceedings. Even if the constitutionality of the Legislative Omission at Issue is a matter for preliminary consideration, we cannot say this indicates that there is

an obligation as per the letter or interpretation of the Constitution that the National Assembly Speaker must designate an examination period for bills and refer them to the plenary session, in cases where the majority of all incumbent National Assembly members have made such a request. Thus, Article 85 Section 1 of the National Assembly Act cannot be considered to go against the rule of majority, or indeed parliamentary democracy, for not prescribing such content.

On these grounds, the Refusals to Designate Examination Periods do not infringe or risk infringing on the plaintiffs' power to deliberate and vote on bills. Further, the unconstitutionality of Article 85 Section 1 Item 3 of the National Assembly Act, which serves as the legal grounds, or of the Legislative Omission at Issue which fails to prescribe the compulsory designation of an examination period for bills that have been requested for designation by the majority of all incumbent National Assembly members, does not provide grounds for the Refusals to Designate Examination Periods to be considered as having the possibility to infringe upon the plaintiffs' power to deliberate and vote on bills. Therefore, the request for adjudication on the Refusals to Designate Examination Periods is nonjusticiable.

Summary of Concurring Opinion and Opinion for Denial of Two Justices on the Refusal to Designate an Examination Period

1. Review of Legal Prerequisite

The Second Refusal to Designate an Examination Period fundamentally deprives the plaintiffs, who are part of the 157 persons that would constitute the majority of all incumbent National Assembly members, from exercising power to deliberate and vote on bills at the plenary session. Therefore, this clearly indicates the likelihood that the plaintiffs' power to deliberate and vote on bills may be infringed upon. This is because the 157 persons that exceed the majority of sitting members can vote once a bill is designated an examination period and is referred to

the plenary session. However, the First Refusal to Designate an Examination Period is a refusal against the request of 146 National Assembly members, which falls short of the majority of incumbent members, to designate an examination period and refer the bill to the plenary session. Therefore, there is no likelihood that the plaintiffs' power to deliberate and vote on bills has been or will be infringed upon.

2. Review on Merits of the Second Refusal to Designate an Examination Period

Article 85 Section 1 of the National Assembly Act, which serves as the legal grounds for the Second Refusal to Designate an Examination Period, belongs to the domain of the National Assembly's inherent autonomous legislative power, and must be guaranteed the utmost autonomy. Thus, it is up to the legislator's extensive legislative discretion under which requirements, and through what manner, the *ex officio* proposal system will be adopted. In a National Assembly that centers on committees, the examination of Standing Committees is an extremely important process in the enactment of laws. Thus, the *ex officio* proposal system, which refers directly to the plenary session bills that have not been completely reviewed by the committees, is a very exceptional, extraordinary legislative procedure. Furthermore, the normal quorum is merely a voting method used by the National Assembly for practicing the rule of majority, and cannot be considered a principle or rule under the Constitution *per se*. Therefore, it is up to the National Assembly's autonomous discretion whether to choose qualified majority voting or simple majority voting when drafting laws on its own proceedings. Moreover, Article 85 Section 1 of the National Assembly Act cannot be concluded as the reason for the failure to solve a legislative impasse in committees, for a legislative impasse is merely a factual issue, not a legal issue. Thus, Article 85 Section 1 of the National Assembly Act cannot be said to violate the Constitution for reasons that the National Assembly is running contrary to the rule of majority or the principle of

parliamentary democracy by severely deviating from or abusing the power of legislative discretion, by going beyond its limits of autonomy. The Second Refusal to Designate an Examination Period, which complies with Article 85 Section 1 of the National Assembly Act, does not infringe on the plaintiffs' power to deliberate and vote on bills, and therefore should be dismissed.

Summary of Opinion for Denial and Opinion for Acceptance of Two Justices on the Refusal to Designate an Examination Period

1. Whether the Request for Adjudication on the Competence Dispute on the Refusals to Designate Examination Periods Is Justiciable

The Refusals to Designate Examination Periods have made it impossible for the bills that were requested to be designated an examination period to be referred or proposed to the plenary session, and this has incurred a severe setback for the plaintiffs, who are National Assembly members, in exercising their power to deliberate and vote on those bills in the plenary session. Thus, there is a possibility that the authority of the plaintiffs may be infringed upon.

2. Whether the Refusals to Designate Examination Periods Infringe on the Plaintiffs' Authority

In Korea, the final decision on a bill in the National Assembly is made in the plenary session, not by the committees, under the principle of the Constitution. Thus, agendas in an impasse at the committee stage can be referred and proposed to the plenary session at the request of the plenary session, so the final decision-making power on the bill should lie with the plenary session; a National Assembly member's power to deliberate and vote on bills should likewise be ultimately exercised in the plenary session; and unless specified by the Constitution or law, the majority of all incumbent National Assembly members can vote on all agendas in the

plenary session. Judging by the above, there should be an emergency processing procedure where if an agenda in an impasse at the committee stage is requested to be referred and proposed to the plenary session by the majority of incumbent National Assembly members that can vote in the plenary session, it is subject to obligatory referral and proposal so that all National Assembly members can deliberate and vote on the agenda involved. Despite this, Article 85 Section 1 of the National Assembly Act does not contain any stipulation that when the majority of incumbent National Assembly members request the designation of an examination period for an agenda at an impasse at the committee stage, the Speaker is obliged to designate an examination period. This violates the rule of majority as the decision-making method of the National Assembly under Article 49 of the Constitution, and the principle under the Constitution that final decisions are made in the plenary session of the National Assembly. Furthermore, it violates the principles of people's sovereignty, of representative democracy, and of parliamentary democracy.

The First Refusal to Designate an Examination Period was made against a request to designate an examination period by 146 National Assembly members including the plaintiffs, which falls short of the majority of incumbent members. This indicates that the above refusal does not infringe upon the plaintiffs' power to deliberate and vote on bills. Thus, the request for adjudication on this refusal was dismissed for a lack of grounds. Meanwhile, the Second Refusal to Designate an Examination Period was made against a request for designation of an examination period by the majority of the incumbent National Assembly members, but was rejected by the Speaker, the respondent, based on the unconstitutional Article 85 Section 1 of the National Assembly Act. Thus, this violates the Constitution, and infringes upon the plaintiffs' power to deliberate and vote on bills. Therefore, this request for adjudication is accepted as justified.

3. Decision of Nonconformity to the Constitution of Article 85 Section 1 of the National Assembly Act

If the Constitutional Court declares the simple unconstitutionality of Article 85 Section 1 of the National Assembly Act, it would instantly lose effect and create a vacuum in the law. Thus, it is advisable that the Court deliver a decision of nonconformity to the Constitution but order the continued application of the above-mentioned provision until an amendment is made.

10. Cases on the Disclosure and Notification of Personal Information and on the Increased Period of Attachment Provision

[2014Hun-Ba68, 2014Hun-Ba164 (consolidated), May 26, 2016]

The issue of this case was whether Item 1 of the main text of Article 38 Section 1 and Item 1 of the main text of Article 38-2 Section 1 of the former 'Act on the Protection of Children and Juveniles against Sexual Abuse,' which prescribe the disclosure and notification of the personal information of persons who have committed a sex offense against a child or juvenile, infringe on the petitioners' right to personality and right to informational self-determination, and whether the provision concerning Article 5 Section 1 Item 4 in the proviso of Item 1 of Article 9 Section 1 of the 'Act on the Probation and Electronic Monitoring, etc. of Specific Criminal Offenders,' which doubles the minimal period of the attachment of an electronic device when a sex offense is committed against a person under 19 years of age, infringes on the right to privacy, etc. of the person wearing the electronic device.

Background of the Case

(1) 2014Hun-Ba68

The petitioner was charged for the crime of forcibly committing an indecent act on the victim (female, 15 years of age), and was sentenced in the appellate trial to imprisonment with labor for six months, suspended for two years, a probation order and an order to complete a sexual assault treatment program of 80 hours, along with an order to disclose and notify personal information for five years. In the trial on appeal to the Supreme Court, the petitioner filed a motion to request the constitutional review of the main text of Article 13 Section 1, Article 33 Section 1, Article 36 Section 1, Article 38 Section 1 and Article 38-2 Section 1 of the former 'Act on the Protection of Children and Juveniles

against Sexual Abuse,' but the Supreme Court denied the motion on January 23, 2014, and simultaneously dismissed the appeal. Thereupon, the petitioner filed this constitutional complaint on February 3, 2014.

(2) 2014Hun-Ba164

The petitioner was charged for the crime of causing injury resulting from rape, etc. to the victim (male, eight years of age), and was sentenced, on September 24, 2013, in the first instance to imprisonment with labor for six years, an order on the disclosure and notification of personal information for ten years, and an order for attachment of an electronic device for 20 years. While the trial was pending in the Supreme Court, the petitioner filed a motion to request the constitutional review of Article 38 Section 1 and Article 38-2 Section 1 of the former 'Act on the Protection of Children and Juveniles against Sexual Abuse' and of the proviso of Item 1 of Article 9 Section 1 of the 'Act on the Probation and Electronic Monitoring, etc. of Specific Criminal Offenders,' but the Supreme Court denied the motion on February 13, 2014, and simultaneously dismissed the appeal. Thereupon, the petitioner filed this constitutional complaint on March 17, 2014.

Subject Matter of Review

The subject matter of this case is whether Item 1 of the main text of Article 38 Section 1 of the former 'Act on the Protection of Children and Juveniles against Sexual Abuse' (amended by Act No. 10260 on April 15, 2010, but prior to being wholly amended by Act No. 11572 on December 18, 2012; hereinafter the Act on the Protection of Children and Juveniles against Sexual Abuse is referred to as the "Sexual Protection Act for Children and Juveniles") (hereinafter referred to as the "Personal Information Disclosure Provision"), Item 1 of the main text of Article 38-2 Section 1 of the former Sexual Protection Act for Children and Juveniles (amended by Act No. 11047 on September 15, 2011, but

prior to being wholly amended by Act No. 11572 on December 18, 2012) (hereinafter referred to as the "Personal Information Notification Provision"), and the provision concerning Article 5 Section 1 Item 4 in the proviso of Item 1 of Article 9 Section 1 of the Act on the Probation and Electronic Monitoring, etc., of Specific Criminal Offenders (amended by Act No. 11558 on December 18, 2012; hereinafter referred to as the "Electronic Monitoring Act") (hereinafter referred to as the "Increased Period of Attachment Provision") violate the Constitution. The Instant Provisions read as follows:

Provisions at Issue

Former Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act No. 10260 on April 15, 2010, but before being wholly amended by Act No. 11572 on December 18, 2012)

Article 38 (Disclosure of Registered Information)

(1) With respect to any of the following persons (hereinafter referred to as "persons subject to disclosure of information"), the court shall pronounce an order to disclose open information under Section 3 through an information and communications network during the registration period (hereinafter referred to as "order to disclose information") in concurrence with a judgment on a sex offense case against a child or juvenile: *Provided*, That the same shall not apply where a fine is sentenced for a sex offense case against a child or juvenile, or the accused is a child or juvenile, or any other extraordinary circumstance against disclosure of personal information exists:

1. A person who commits a sex assault crime against a child or juvenile.

Former Act on the Protection of Children and Juveniles against Sexual Abuse (amended by Act No. 11047 on September 15, 2011, but before being wholly amended by Act No. 11572 on December 18, 2012)

10. Cases on the Disclosure and Notification of Personal Information and on the Increased Period of Attachment Provision

Article 38-2 (Notification of Registered Information)

(1) With respect to any of the following persons (hereinafter referred to as "persons subject to notification of information") from among persons subject to disclosure of information under Article 38, the court shall issue an order to notify local residents who reside in a *Eup/Myeong/Dong* where the person subject to notification of information is domiciled and the heads of day care centers under the Infant Care Act, kindergartens under the Early Childhood Education Act, and schools defined in Article 2 of the Elementary and Secondary Education Act in such region of the information subject to notification under Section 3 (hereinafter referred to as "order to notify information") during the period set forth in Article 38 to disclose information in concurrence with a judgment on a sex offense case against a child or juvenile: *Provided*, That the same shall not apply where a fine is sentenced for a sex offense against a child or juvenile, or the accused is a child or juvenile, or any other extraordinary circumstance against disclosure of personal information exists:

1. A person who has committed a sex assault crime against a child or juvenile.

Act on the Probation and Electronic Monitoring, etc. of Specific Criminal Offenders (amended by Act No. 11558 on December 18, 2012)

Article 9 (Judgment, etc. on Attachment Orders)

(1) Where a request for attachment order is deemed well-grounded, a court shall issue an attachment order by judgment setting a period of attachment within the following applicable periods: *Provided*, That when a specific crime is committed against a person under 19 years of age, the minimal period of attachment shall be the double the minimal periods stipulated in the following Items:

1. Specific crimes, the maximum legal penalty for which is death penalty or imprisonment for life: From 10 to 30 years.

Summary of the Decision

A. The Constitutional Court has already ruled (in 2011Hun-Ba106, etc., October 24, 2013) that, "The purpose of the Personal Information Disclosure Provision is to protect children and juveniles from sexual abuse and to defend society, and the scope of those affected or the period of disclosure is limited. Meanwhile, the judge decides whether to order disclosure considering 'particular circumstances,' and there also exist mechanisms to minimize the damage from disclosure. All of the above indicate that the least restrictive means have been used. Moreover, the purpose of 'protecting children and juveniles from sexual abuse' is a very significant public interest compared to the private interest infringed on by the provision, and therefore a balance of interests is achieved. For this reason, the Personal Information Disclosure Provision does not infringe on the petitioners' right to personality and right to informational self-determination." There is no change of circumstances or necessity in this case that requires a different judgment from the above precedent, so the Personal Information Disclosure Provision cannot be concluded to be in violation of the Constitution.

B. The legislative purpose of the Personal Information Notification Provision is to protect the safety of the children and juveniles residing in the relevant area by warning those who are responsible for them, that sex offenders have been rehabilitated back into society, and is thus found to be legitimate. The notification of personal information directly via mail is also effective in alerting the local residents, etc., which means the Provision also provides an appropriate means. While it is highly necessary to raise awareness about sexual crimes against children and juveniles, other security dispositions only provide the personal information of sex offenders to the relevant agencies, such as investigative authorities, etc., and not to local residents. Likewise, the personal information disclosure system is limited in scope, as users must take the trouble of accessing the internet and going through the user

authentication procedure. Further, the Personal Information Notification Provision limits the scope of those affected to persons who have committed a sex offense against a child or juvenile, limits those subject to notification by making exceptions for special circumstances under which the personal information of some persons are deemed unfit for notification, and after the initial notification via mail within one month from the date personal information is registered by the person subject to notification or from the date the person moves into the area he or she shall be domiciled after being released from prison, no additional notification is made unless the person relocates. All of the above indicate that the least restrictive means have been used. Moreover, the disadvantage that the Personal Information Notification Provision brings to the person who has committed a sex offense against a child or juvenile does not outweigh the public interest of protecting children and juveniles from sexual abuse, which means that the Provision achieves a balance of interests. Therefore, the Personal Information Notification Provision does not infringe on the petitioners' right to personality and right to informational self-determination.

C. (1) Persons who have committed sex crimes against children or juveniles cannot be placed in a comparative group that is 'essentially the same' as other general criminals, and there are logical reasons for disclosing and notifying the personal information of persons who have committed sex offenses against children or juveniles. Therefore, the Personal Information Disclosure and Notification Provisions do not violate the principle of equality.

(2) The order to disclose and notify personal information can only be made where the person subject to disclosure and notification has been put on trial, and where the court has ruled that the person has committed a sex offense against a child or juvenile and pronounces a conviction. Meanwhile, the judge takes various circumstances into broad consideration, aside from considering the risk of recidivism, and decides whether or not

there are special conditions under which the personal information should not be disclosed or notified. Moreover, the Sexual Protection Act for Children and Juveniles provides a number of other institutional measures, such as provisions on confidentiality and prohibition of abuse of disclosed information, for the purpose of protecting the right to personality of the persons subject to disclosure and notification of information. Further, as the Sexual Protection Act for Children and Juveniles explicitly stipulates the requirements for disclosure and notification orders, etc., a claim that the defendant was not aware that he or she would be subject to such orders prior to the pronouncement merely amounts to ignorance of the law. All of the above indicate that the Personal Information Disclosure and Notification Provisions do not violate the due process of law or infringe on the right to a trial, just because they do not prescribe a prosecutor's request as a precondition.

(3) The orders to disclose and notify information are security dispositions that serve a different purpose and target from the punishment, and therefore do not violate the principle of double jeopardy for being imposed concurrently with a punishment for the same crime.

D. (1) The Increased Period of Attachment Provision serves a legitimate purpose, for it aims to prevent criminals that have committed a sex offense against a minor from recommitting the same crime. Attaching an electronic device does not mean that physical activity, itself, is prohibited or restricted, and the Electronic Monitoring Act provides measures to minimize human rights violation in the process of enforcing the attachment, as well as a measure for provisionally cancelling the attachment of the electronic device every three months after its initial attachment. Therefore, the Increased Period of Attachment Provision does not violate the principle of least restrictive means. Moreover, the disadvantage incurred by the increased period of attachment of the electronic device does not outweigh the public interest it seeks to achieve, which means that a balance of interests is achieved.

Thus, the Increased Period of Attachment Provision does not infringe on the right to privacy, right to informational self-determination, physical freedom and right to personality of the person wearing the electronic device.

(2) Increasing the minimal period for attachment of an electronic device is only possible when a conviction has been pronounced for a sexual crime against a minor, and the court only rules it where a risk of recidivism has been identified among persons that meet certain requirements under the Electronic Monitoring Act. Further, even if the scope of the judge's discretion has been narrowed down, it is to a rational degree acceptable under the principle of proportionality. Considering the above, the Increased Period of Attachment Provision does not infringe on the right to undergo a trial.

Summary of Dissenting Opinion of Two Justices on the Personal Information Disclosure Provision

The Personal Information Disclosure Provision serves a legitimate purpose, but fails to provide an appropriate means, for it is difficult to conclude that the information disclosure system is effective in deterring crime. The personal information disclosure system uses the information and communications network, and would be similar to a 'shaming punishment' comparable to a 'modern-day scarlet letter.' It holds a high risk of completely barring the social rehabilitation of the person subject to disclosure; may put their family under emotional distress or deprive them of the basis of their livelihoods; and the scope of those affected by disclosure is also excessively broad as, in principle, the judge orders the disclosure of personal information without further subdividing the judgment criteria, for instance, by assessing the 'risk of recidivism.' Thus, it can hardly be said that the Provision satisfies the principle of least restrictive means. Further, while the fundamental rights of the person subject to disclosure are severely undermined, the deterrent effect

of the Provision is largely uncertain, which indicates the failure to achieve balance of interests. Therefore, the Personal Information Disclosure Provision infringes on the petitioners' right to personality and right to informational self-determination.

Summary of Dissenting Opinion of Three Justices on the Personal Information Notification Provision

The Personal Information Disclosure Provision makes it possible for anyone to search and check the information and communications network to find the personal information of sex offenders subject to disclosure that are residing in their neighborhood. Even in cases where notification is required, there are means that infringe less upon the fundamental rights of the sex offenders, for instance through limited notification of necessary information to only those who wish to receive such information. Despite this, the personal information notification system severely restricts the fundamental rights of a sex offender and his or her family, by uniformly notifying his or her personal information, including his or her detailed address, to residents that live within a certain perimeter in the same area as the sex offender, whether the residents wish to receive that information or not. Thus, the Personal Information Notification Provision violates the principle of least restrictive means. While the fundamental rights of the person subject to notification and his or her family are severely infringed upon by the notification of personal information, its deterrent effect is uncertain, which indicates that the Provision does not achieve a balance of interests. Therefore, the Personal Information Notification Provision infringes on the petitioners' right to informational self-determination and right to personality.

11. Case on the Restriction on Treatment of Prisoners Subject to a Disposition for Forfeiture of Rights

[2014Hun-Ma45, May 26, 2016]

In this case, the Constitutional Court held that the provision concerning Item 6 of Article 108 referred to in the main text of Article 112 Section 3 of the 'Administration and Treatment of Correctional Institution Inmates Act,' which restricts prisoners subject to a disposition for forfeiture of rights from watching television, does not violate the Constitution, and that the provision concerning Item 13 of Article 108 referred to in the main text of Article 112 Section 3 of the above Act, which restricts the above prisoners from outdoor exercise, infringes on the complainant's physical freedom and thus violates the Constitution.

Background of the Case

(1) While serving his or her prison sentence, the complainant received a disposition for forfeiture of rights for 25 days on charges of noncompliance with orders and obstruction of duties, executed from November 10 through December 4, 2013. During the period rights were forfeited, the complainant concurrently received the dispositions for prevention from participation in joint events, restriction on reading newspapers, restriction on watching television, restriction on using the goods purchased at his or her own expense, suspension of work, restriction on telephone communications, restriction on writing, restriction on receiving and sending correspondence, restriction on holding meetings and suspension of engaging in outdoor exercise.

(2) Thereupon, the complainant filed a constitutional complaint on January 10, 2014, claiming that the provisions of the 'Administration and Treatment of Correctional Institution Inmates Act,' which imposed the above restrictions on treatment during the period rights were forfeited, infringed on the complainant's human dignity and worth, right to judicial

process, freedom of expression, etc.

Subject Matter of Review

The subject matter of this case is whether the provisions concerning Items 6 and 13 of Article 108 referred to in the main text of Article 112 Section 3 of the 'Administration and Treatment of Correctional Institution Inmates Act' (wholly amended by Act No. 8728 on December 21, 2007) (hereinafter referred to as the "Forfeiture Provision") infringe on the complainant's fundamental rights, and thus violate the Constitution. The Instant Provision and relevant provision read as follows:

Provision at Issue

Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Act No. 8728 on December 21, 2007)

Article 112 (Execution of Disciplinary Action)

(3) The restriction on treatment provided for in Items 4 through 13 of Article 108 shall be imposed concurrently on those who are subject to a disposition provided for in Item 14 of Article 108 for the relevant period: *Provided*, That if deemed especially necessary for the remedy against infringement of rights of prisoners and convicted prisoners' edification or sound rehabilitation into society, any warden may permit them to write works, receive correspondence, hold a meeting, or do outdoor exercise.

Related Provision

Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Act No. 8728 on December 21, 2007)

Article 108 (Types of Disciplinary Action)

The types of disciplinary action shall be as follows:

6. Restriction on watching television for up to 30 days;
13. Suspension of doing outdoor exercise for up to 30 days;
14. Forfeiture of rights for up to 30 days.

Summary of the Decision

1. Review of the Provision Concerning Item 6 of Article 108 in the Forfeiture Provision

The provision concerning Item 6 of Article 108 in the Forfeiture Provision imposes the disadvantage of restriction on watching television during the period rights are forfeited, concurrently with the execution of forfeiture of rights, on persons subject to a disposition for forfeiture of rights. This is found to serve a legitimate purpose and be an appropriate means, for its purpose is to compel observation of discipline so as to maintain safety and order within the confinement facilities.

A disposition for forfeiture of rights has the purpose of confining a person subject to the disposition for forfeiture of rights to the discipline ward, so the person can concentrate on self-reflection. To allow such a person to watch television like an ordinary prisoner is difficult, given the operational affairs of the correctional institution. In place of watching television, a person that has received a disposition for forfeiture of rights has access to other information sources, such as books kept in the confinement facilities. Such disadvantages do not outweigh the public interest of maintaining order in the confinement facilities through compliance with regulations.

The provision concerning Item 6 of Article 108 in the Forfeiture Provision does not infringe on the complainant's right to knowledge.

2. Review of the Provision Concerning Item 13 of Article 108 in the Forfeiture Provision

The provision concerning Item 13 of Article 108 in the Forfeiture Provision imposes the disadvantage of suspension of outdoor exercise as a rule during the period rights are forfeited, concurrently with the execution of forfeiture of rights, on persons subject to a disposition for forfeiture of rights. This serves a legitimate purpose and is an appropriate means, for its purpose is to compel observation of discipline so as to maintain safety and order within the confinement facilities.

Outdoor exercise is a minimal, basic request to maintain the physical and mental health of a prisoner held in confinement, and maintaining the health of prisoners is essential in achieving the fundamental goals of the administration of their punishment, which are correction and edification and their sound rehabilitation into society.

The provision concerning Item 13 of Article 108 in the Forfeiture Provision prohibits persons who have received a disposition for forfeiture of rights to outdoor exercise, as a rule, although exceptions are made at the warden's discretion. However, despite the existence of a less restrictive measure in which outdoor exercise is restricted in exceptions where the prisoner risks engaging in disturbing or disorderly conduct or harming other people, and where permission for this prisoner to engage in outdoor exercise would make it difficult to achieve the goal of the disposition for forfeiture of rights, the above provision as a rule prohibits all persons who have received a disposition for forfeiture of rights to outdoor exercise. Moreover, while the above provision allows outdoor exercise as an exception, the minimum criterion for granting the opportunity to engage in outdoor exercise is not clear. This violates the principle of least restrictive means. The above provision imposes an excessive disadvantage on the mental and physical health of the prisoner by allowing exceptions in outdoor exercise at the warden's discretion, and this outweighs the public interests. Thus, the above provision does not achieve a balance of interests.

11. Case on the Restriction on Treatment of Prisoners Subject to a Disposition for Forfeiture of Rights

The provision concerning Item 13 of Article 108 in the Forfeiture Provision infringes on the complainant's physical freedom.

Summary of Dissenting Opinion of Three Justices on the Provision concerning Item 6 of Article 108 of the Forfeiture Provision

Television delivers information on issues that occur in society practically in real-time, and is a medium easily accessible by illiterate people. Persons that have received a disposition for forfeiture of rights are restricted from telephone communications, receiving and sending correspondence, holding meetings, listening to the radio, reading newspapers, etc. The additional restriction on watching television would prevent the prisoner from learning about what is happening in society, for up to 30 days. Acquiring information by watching television is a largely personal act related to the intellectual activity of an individual, and allowing prisoners to acquire new information by watching television has no possibility of endangering the attainment of the purpose of the disposition for forfeiture of rights, as long as they are prohibited from watching entertainment programs that go against the purpose of the disposition for forfeiture of rights. In fact, the prisoner can acquire the latest information to prepare for rehabilitation into society, and the sound mental activity of the prisoner will be encouraged, contributing to his correction or edification.

Therefore, the provision concerning Item 6 of Article 108 in the Forfeiture Provision is an excessive restriction of the right to knowledge, and violates the Constitution.

12. Case on Barring Journalists from Election Campaigns

[2013Hun-Ka1, June 30, 2016]

In this case, the Constitutional Court held that the provision 'a person who falls under Article 53 Section 1 Item 8' in Article 60 Section 1 Item 5 of the former Public Official Election Act, and the provision 'a person who falls under Article 53 Section 1 Item 8' in Article 60 Section 1 Item 5 under Article 255 Section 1 Item 2 of the former Public Official Election Act, which prohibit and punish journalists engaging in election campaigns, violate the Constitution.

Background of the Case

(1) The requesting petitioners were charged for engaging in election campaigns on numerous occasions, despite being journalists and thus prohibited from doing so.

(2) While the aforementioned trial was pending, the petitioners filed a motion to request constitutional review of the provision of Article 53 Section 1 Item 8 in Article 60 Section 1 Item 5 of the former Public Official Election Act, which bars journalists from engaging in election campaigns, and the court requested a constitutional review of this case.

Subject Matters of Review

The subject matters of this case are whether the provision 'a person who falls under Article 53 Section 1 Item 8' in Article 60 Section 1 Item 5 of the former Public Official Election Act (amended by Act No. 9974 on January 25, 2010, and before amendment by Act No. 13617 on December 24, 2015) (hereinafter referred to as the "Prohibition Provision"); and the provision 'a person who falls under Article 53 Section 1 Item 8' in Article 60 Section 1 Item 5 under Article 255

Section 1 Item 2 [hereinafter referred to as the "Punishment Provision"; hereinafter the above provisions are collectively referred to as the "Instant Provisions"; hereinafter the former Public Official Election Act (before amendment by Act No. 13617 on December 24, 2015) is referred to as the "Act"] violate the Constitution.

Provisions at Issue

Former Public Official Election Act (amended by Act No. 9974 on January 25, 2010, and before amendment by Act No. 13617 on December 24, 2015)

Article 60 (Persons Barred from Election Campaigns)

(1) A person who falls under any of the following Items shall not engage in an election campaign: *Provided*, That this shall not apply to cases where anyone falling under Item 1 is the spouse of a preliminary candidate or a candidate, or where anyone falling under Items 4 through 8 is the spouse of a preliminary candidate or a candidate or a lineal ascendant or descendant of a candidate:

5. A person who falls under Article 53 Section 1 Items 2 through 8 (including a fulltime employee in case of Items 4 through 6).

Article 255 (Unlawful Election Campaign)

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

2. A person who carries out or makes another person carry out an election campaign, in contravention of Article 60 Section 1, or who becomes or makes another person become an election campaign manager, in contravention of Section 2 of the same Article or Article 205 Section 4.

Related Provisions

Former Public Official Election Act (amended by Act No. 9974 on January 25, 2010, and before amendment by Act No. 13617 on December 24, 2015)

Article 53 (Candidacy of Public Officials, etc.)

(1) Any person who intends to be a candidate and falls under any one of the following Items, shall resign his post 90 days before the election day: *Provided*, That the same shall not apply to cases where any National Assembly member runs for the presidential election or the election of the National Assembly members with his present post held, and where any local council member or the head of a local government runs in the election of local council members or the head of the local government with his present post held:

8. A journalist as prescribed by Presidential Decree.

Enforcement Decree of the Former Public Official Election Act (amended by Presidential Decree No. 22003 on January 27, 2010, and before revocation by Presidential Decree No. 27035 on March 11, 2016)

Article 4 (Scope of Journalists that are Prohibited Candidacy while in Service)

"A journalist as prescribed by Presidential Decree" under Article 53 Section 1 Item 8 of the Act refers to journalists as defined in any of the following Items.

1. Persons that publish and operate newspapers, internet newspapers and periodicals, of newspapers and internet newspapers registered under Article 9 of the Act on the Promotion of Newspapers, Etc., and periodicals (only those that have registered to be issued at least quarterly or more) registered under Article 15 of the Act on the Promotion of Periodicals, Including Magazines or reported under Article 16 of the same Act, excluding those defined in any of the following sub-items, and persons who work for them as regular

employees and engage in the work of editing, gathering materials or writing:

a. Newspapers of political parties and school newspapers of universities and colleges, industrial colleges, teacher's colleges, junior colleges, cyber colleges, technical colleges and various kinds of schools as defined by Article 2 of the Higher Education Act;

b. Newspapers, internet newspapers or periodicals related to specialized fields including the industry, economy, society, science, religion, culture, sports, etc. issued for purely academic reasons or for the purpose of providing and exchanging information;

c. Newspapers, internet newspapers or periodicals issued by businesses to inform members of recent updates or notifications, for company promotion or to introduce products;

d. Newspapers, internet newspapers or periodicals issued by legal persons or organizations to inform members of recent updates or notifications;

e. Newspapers, internet newspapers or periodicals issued without the purpose of reporting or commenting on politics;

f. Other newspapers, internet newspapers or periodicals issued without the purpose of forming public opinion.

2. Persons who operate broadcasting businesses (program-providing business operators are limited to those specializing in news programs) under the Broadcasting Act and persons who work for them as regular employees and engage in the work of editing, producing, gathering materials, writing or reporting.

Summary of the Decision

1. Whether the Rule against Blanket Delegation Is Violated

The Prohibition Provision merely states, 'A journalist as prescribed by

Presidential Decree,' and aside from the word 'journalist,' does not restrict the scope of what is to be defined by the Presidential Decree. It is difficult to foresee, even from an overall examination of the Related Provisions, the scope of media outlets that would apply, of the numerous sources including broadcasting, newspapers, news agencies, etc., and how deeply a person should be involved in the work to be called a journalist. Therefore, the Prohibition Provision violates the rule against blanket delegation.

2. Whether the Freedom to Engage in Election Campaigns Is Infringed

Based on the influence that the press has on public official elections and the high degree of public interest and social responsibility that journalists should bear, the Instant Provisions prohibit journalists from intervening in and exercising biased influence on elections. Ultimately, the Instant Provisions' goal is to secure the fairness and equity of elections, and they thus serve a legitimate purpose. Furthermore, uniformly prohibiting journalists belonging to a certain scope from engaging in election campaigns is an appropriate means for achieving the above purpose.

However, problems that may arise from the intervention of journalists in elections would be related to activities using media outlets; in other words, activities using or based on the journalist's status. Thus, it is unnecessary to entirely prohibit a journalist from engaging in election campaigns as an individual when media outlets are not involved. The legislative purpose of the Instant Provisions can be fully achieved by regulating journalists of a certain scope regarding problems that could possibly occur from activities using media outlets. However, in times marked by the drastic rise of media outlets including internet newspapers, and in which it is normal for a citizen to actively participate in the press, the scope of "journalists" as prescribed in the Instant Provisions is excessively broad. Furthermore, the law already prescribes the responsibilities of press for fair reporting, and sufficiently regulates

this through various approaches on media outlet activities that can undermine the fairness of elections, such as reports and comments in media outlets; activities involving press members; activities involving specific candidates outside the press, etc. Therefore, the Instant Provisions infringe on the freedom to engage in election campaigns.

Summary of Dissenting Opinion of Two Justices

1. Whether the Rule against Blanket Delegation Is Violated

In line with technology development, press agencies, to which journalists belong, are gradually expanding their domain, and the spectrum of human resources involved is also diverse. Thus, the necessity for delegation is recognized. Moreover, it is sufficiently predictable that, judging by the Related Provisions and purpose of the Act, the scope of journalists prescribed by the Presidential Decree can initially be defined by the standard of whether they engage in work related to the formation of public opinion on elections, such as operation, management, editing, writing, reporting, etc. at press agencies including broadcasting and newspapers, or at similar media outlets, and then be further specified. Therefore, the Prohibition Provision does not violate the rule against blanket delegation.

2. Whether the Freedom to Engage in Election Campaigns Is Infringed

The Instant Provisions set the minimum necessary standard for journalists barred from election campaigns, and it cannot be said that journalists that work with internet newspapers bear less public interest or social responsibility compared to journalists working with newspapers or broadcasting businesses, etc. Meanwhile, the responsibility of the press to issue fair reports under the Act is only subject to the deliberation and measures of the relevant deliberative committee; there are no provisions that punish related violations. Therefore, it is difficult to say that such

measures, alone, have the power to deter election campaigns that use internet media channels in particular. Therefore, the Instant Provisions do not infringe upon the freedom to engage in election campaigns.

13. Case on the Request for Issuance of Certificates by Siblings

[2015Hun-Ma924, June 30, 2016]

In this case, the Constitutional Court held that the word 'siblings' in the main text of Article 14 Section 1 of the 'Act on the Registration, etc. of Family Relationships,' which gives siblings the right to request certificates to be issued under the Family Relations Registration Act, infringes on the complainant's right to informational self-determination.

Background of the Case

(1) Through a request for information disclosure, on September 12, 2013, the complainant became aware that a uterine sibling had obtained a certificate of family relations and certificate of marital relations of the complainant on January 21, 2013.

(2) Thereupon, the complainant filed a constitutional complaint, claiming that the interpretation of 'siblings' in the main text of Article 14 Section 1 of the 'Act on the Registration, etc. of Family Relationships,' which prescribes persons who have the right to request the issuance of certificates with respect to matters entered in family relations registers, etc. violates the Constitution if it includes uterine or agnate siblings.

Subject Matter of Review

The complainant's claim is that the aforementioned provision is unconstitutional if it gives siblings the right to request the issuance of certificates with respect to matters noted in family relations registers, etc. presuming that uterine or agnate siblings are included in the definition of 'siblings.'

Thus, the subject matter of review in this case is whether the word 'siblings' in the main text of Article 14 Section 1 of the 'Act on the

Registration, etc. of Family Relationships' (amended by Act No. 8435 on May 17, 2007; hereinafter referred to as the "Family Relations Registration Act") (hereinafter referred to as the "Instant Provision") infringes on the complainant's fundamental rights. The Instant Provision reads as follows:

Provision at Issue

Act on the Registration, etc. of Family Relationships (enacted by Act No. 8435 on May 17, 2007)

Article 14 (Issuance, etc. of Certificates)

(1) The person him/herself or his/her spouse, lineal blood relatives, and siblings (hereafter referred to as the "person him/herself, etc." in this Article) may request for the issuance of a certificate issuable with respect to matters entered in registers, etc. as provided for in Article 15, and where an agent of the person him/herself, etc. makes such a request, the agent shall be entrusted by the person him/herself, etc. (Proviso omitted.)

Summary of the Decision

The Instant Provision, which allows siblings to obtain certificates that contain personal information under the Family Relations Registration Act, without the consent of the person him/herself, restricts the right to informational self-determination.

The Instant Provision serves a legitimate purpose for it seeks to help a person that is not in a position to have certificates issued him/herself to obtain certificates through siblings, and to enable siblings seeking to collect data related to relatives and inheritances, etc. to obtain certificates regarding the person him/herself with ease. Granting siblings the right to request the issuance of certificates with no particular restriction, based on the trust and bond between family members, is an appropriate means for serving the aforementioned purpose.

Certificates issued under the Family Relations Registration Act not

only include information for personal identification, such as names and resident registration numbers of the person in question, but also contain sensitive information regarding divorce, dissolution of adoption, sex change, etc. Since the subjects of such information will suffer severely if this information is divulged or abused, the scope of those granted the right to request the issuance of certificates should be narrowed down to the utmost extent.

Personal information should not be disclosed to or used by persons just because they are family members, and there should be a system that eliminates the possibility of them abusing or divulging such information. A law that allows the provision of personal information without the consent of the subjects of the information should place priority on the protection of an individual, an independent personality, and should be carefully formulated in line with strict criteria and modalities. Even if the provision of such information is required, such allowances should be made to the minimum extent necessary.

The bond and level of trust between siblings may be weaker in comparison to that between spouses or parents and their children. Siblings do not always share the same interests, and may even have feuds over conflicting interests such as inheritances. In such cases, it is always possible for siblings to abuse or divulge one's personal information.

Nonetheless, this Instant Provision grants siblings rights nearly equivalent to that of the person in question, or the subject of the information, when it comes to the issuance of certificates under the Family Relations Registration Act. In other words, siblings can obtain all certificates related to the person him/herself, and also certificates showing all records. This cannot be considered to have limited the scope of persons with the right to request the issuance of certificates to the minimum extent necessary.

Meanwhile, the Family Relations Registration Act contains other measures to serve the convenience of the person him/herself and siblings, aside from this Instant Provision. One can use the internet or an

agent to have certificates issued, which means that it is not entirely necessary to obtain certificates with the help of siblings. Also, as per the proviso to Article 14 Section 1 of the Family Relations Registration Act, third parties may request the issuance of certificates where it is required in various procedures for litigation, non-litigation cases, and execution of civil cases; where other statutes require the submission of a certificate concerning the person him/herself, etc.; where the party is his/her legal representative under the Civil Act; and where it is necessary for confirming the scope of inheritors for inheriting claims and obligations, etc. Therefore, siblings can always obtain certificates of the person him/herself under such circumstances.

Thus, the Instant Provision infringes on the complainant's right to informational self-determination for violating the rule against excessive restriction.

Summary of Dissenting Opinion of Three Justices

Siblings form a strong bond and level of trust, based on their intimacy as members of the same family. Therefore, it is unlikely for them to abuse or divulge one another's personal information, and it is hard to say that granting the right to request the issuance of certificates to serve the convenience of family members is problematic.

When the Civil Act and the Family Litigation Act recognize that siblings have standing to sue for contending the relationship of status, they can commence procedures of lawsuits, non-contentious litigation cases, etc. from an independent standing for the person him/herself. In such cases, there may be instances that are not established under the proviso to Article 14 Section 1 of the Family Relations Registration Act, and thus siblings should be prescribed in the general provisions as persons with the right to request the issuance of certificates, to protect the rights of the person in question.

There has been a rise in the number of stepfamilies, and uterine or agnate siblings can always form a strong bond; that the person him/herself

may have conflicting interests with siblings is an assumption that can also be applied to spouses and lineal blood relatives. Therefore, this cannot serve as grounds for restricting the right to request the issuance of certificates.

The Instant Provision allows the convenient issuance of certificates to siblings, not only for the person him/herself, but also for the siblings to exercise their rights under the Family Relations Registration Act. Requiring them to prove their justified interests will only make it more difficult for them to exercise their rights.

The Family Relations Registration Act discloses the resident registration number of the applicant only in certain cases, the issuance of certificates can be denied when it is clearly intended for a wrongful purpose, and siblings must cite clear grounds for requesting a certificate of family relations, to prevent the imprudent issuance of certificates by siblings.

Therefore, the Instant Provision does not infringe on the complainant's right to informational self-determination.

14. Case on the Constitutional Complaint against Article 92-5 of the Former Military Criminal Act Which Prescribes Punishment by Imprisonment for 'Other Indecent Conduct'

[2012Hun-Ba258, July 28, 2016]

In this case, the Constitutional Court held that the term 'other indecent conduct' in Article 92-5 of the former Military Criminal Act, which prescribes punishment by imprisonment with prison labor for not more than two years for other indecent conduct that falls short of sodomy, does not violate the Constitution in terms of the rule of clarity of the principle of *nulla poena sine lege*, the rule against excessive restriction, and the principle of equality, etc. Meanwhile, four justices issued the dissenting opinion that the Instant Provision violates the rule of clarity of the principle of *nulla poena sine lege*, and thus violates the Constitution.

Background of the Case

The petitioner was prosecuted for the charge of committing indecent conduct on the victim a total of 13 times, from early October through December 13 of 2011, by placing his hand inside the underpants of the victim, a lower-ranking subordinate, and touching the victim's genitals, etc., in the army barracks of his regiment or the waiting room of a sentry post on the shore. As a result, the petitioner was sentenced to six months imprisonment with prison labor, but with a stay of execution for one year, on February 22, 2012.

The petitioner appealed and, while this trial was pending filed a motion to request the constitutional review of Article 92-5 of the former Military Criminal Act, which was the provision that served as the basis for the punishment. The motion was denied on June 15, 2012, whereupon the petitioner filed a constitutional complaint on July 9, 2012.

14. Case on the Constitutional Complaint against Article 92-5 of the Former Military Criminal Act Which Prescribes Punishment by Imprisonment for 'Other Indecent Conduct'

Subject Matter of Review

The subject matter of this case is whether the term 'other indecent conduct' in Article 92-5 of the former Military Criminal Act (amended by Act No. 9820 on November 2, 2009, and before amendment by Act No. 11734 on April 5, 2013) (hereinafter referred to as the "Instant Provision") violates the Constitution.

Provision at Issue

Former Military Criminal Act (amended by Act No. 9820 on November 2, 2009, and before amendment by Act No. 11734 on April 5, 2013)

Article 92-5 (Indecent Conduct)

A person who commits sodomy or other indecent conduct shall be punished by imprisonment with prison labor for not more than two years.

Summary of the Decision

1. Whether the Rule of Clarity of the Principle of *Nulla Poena Sine Lege* Is Violated

Article 92-5 of the former Military Criminal Act is an illustrative type of legislation, and given that 'sodomy' in the illustrative provision means anal intercourse between males; that the army's closed, same-sex society bears a high possibility of abnormal sexual acts taking place between the same sex; and that the main legal interests the Instant Provision aims to protect is the social interest of the 'sound conduct and military discipline of the army as a community,' the term 'other indecent conduct' in the Instant Provision can be interpreted as being relevant only to sexual acts between soldiers of the same sex.

The former Military Criminal Act amended in 1962 was problematic

due to its extensive scope of punishment, as it regulated indecent acts by all degrees of compulsion under 'other indecent conduct' in the single provision of Article 92.[1] However, the former Military Criminal Act amended in 2009 separated molestation by violence or threat (Article 92-2) and quasi-molestation taking advantage of insanity or inability to resist (Article 92-3) into additional provisions, which led the term 'other indecent conduct' in the Instant Provision to be restricted to indecent conduct outside the scope of molestation or quasi-molestation by force.[2]

Thus, the term 'other indecent conduct' in the Instant Provision is interpreted as indecent conduct that falls short of molestation and

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1) Former Military Criminal Act (enacted by Act No. 1003 on January 20, 1962, and before amendment by Act No. 9820 on November 2, 2009)
CHAPTER XV OTHER CRIMES
Article 92 (Disgraceful Conduct) A person who commits anal intercourse or other disgraceful conduct shall be punished by imprisonment with labor for not more than one year.

2) Former Military Criminal Act (amended by Act No. 9820 on November 2, 2009, and before amendment by Act No. 11734 on April 5, 2013)
CHAPTER XV CRIMES OF RAPE AND MOLESTATION
Article 92 (Rape) A person who, by violence or threat, rapes a woman falling under any provision of Article 1 (1) through (3) shall be punished by imprisonment with prison labor for a specified period of not less than five years.
Article 92-2 (Molestation) A person who, by violence or threat, molests another person falling under any provision of Article 1 (1) through (3) shall be punished by imprisonment with prison labor for not less than one year.
Article 92-3 (Quasi-Rape, Quasi-Molestation) A person who commits adultery with or molests another person falling under any provision of Article 1 (1) through (3), taking advantage of the other person's insanity or inability to resist, shall be punished in accordance with Article 92 or 92-2.
Article 92-4 (Attempt) An attempt to commit a crime under Article 92, 92-2, or 92-3 shall be punished.
Article 92-5 (Disgraceful Conduct) A person who commits sodomy or other disgraceful conduct shall be punished by imprisonment with prison labor for not more than two years.
Article 92-8 (Criminal Complaint) A crime under any provision of Articles 92 and 92-2 through 92-4 may be subject to public prosecution only when a criminal complaint is filed with regard to the crime.

quasi-molestation by force; is an act of sexual gratification between soldiers of the same sex that falls short of sodomy; and from an objective point of view, causes a sense of aversion in the general public and runs contrary to virtuous sexual moral ideals. It is also interpreted as an act that infringes on the sound conduct and military discipline of the army as a community, and whether the act in question falls under this definition would be up to the court's general interpretation and application of laws.

Since a soldier with sound common sense and a general legal awareness is fully capable of identifying which acts would constitute the elements of the Instant Provision, and there is no cause for concern that the enforcement agencies would arbitrarily stretch the law, the Instant Provision does not violate the rule of clarity of the principle of *nulla poena sine lege*.

2. Whether the Principle against Excessive Restriction Is Violated

The Constitutional Court, in the Constitutional Court Decision 2001 Hun-Ba70 on June 27, 2002, and the Constitutional Court Decision 2008Hun-Ka21 on March 31, 2011, ruled that, "The term 'other indecent conduct' in Article 92 of the former Military Criminal Act has the legislative purpose of establishing sound conduct and military discipline of the army as a community, and of prohibiting acts of sexual gratification between same-sex soldiers; hence imposing imprisonment with prison labor is an appropriate means for achieving this legislative purpose. Given the security conditions and the conscription system of the Republic of Korea, it is difficult to effectively regulate acts of indecent conduct between same-sex soldiers through simple administrative restrictions. Thus, the above provision does not violate the principle against excessive restriction."

Although the above provision was since amended to the Instant Provision and raised the statutory sentence to imprisonment with prison labor for not more than two years, it cannot be concluded that the

sentence is excessively heavy compared to sentences for crimes related to disgraceful conduct prescribed in other laws. Furthermore, suspension of sentencing or execution of punishment is possible depending on the circumstances. Considering the above, it is difficult to say that there is a particular change of condition or necessity that requires an adjustment to the decision of the precedent above.

Therefore, the Instant Provision does not run contrary to the principle against excessive restriction, or consequently infringe upon the soldier's right to sexual self-determination, right to privacy and right to physical freedom.

3. Whether the Principle of Equality Is Violated

As mentioned above, the Instant Provision does not cover 'molestation by violence or threat,' and thus, contrary to the claim of the petitioner, a 'soldier' charged with the crime of indecent conduct under the Instant Provision, and the 'general public' charged with the crime of indecent act by compulsion under Article 298 of the Criminal Act, belong to comparison groups of a different nature.

Further, the Instant Provision does not impose imprisonment with prison labor merely because a sexual act has taken place between soldiers of the same sex. Rather, the punishment is for an act of sexual gratification between same-sex soldiers that falls short of sodomy, which from an objective point of view, causes a sense of aversion in the general public and runs contrary to virtuous sexual moral ideals, and subsequently infringes upon the sound conduct and military discipline of the army as a community. So even if this may lead to discrimination against soldiers of the same sex in comparison to soldiers of the opposite sex, we recognize this restriction is imposed to preserve the distinctiveness and combat power of the army, and thus constitutes a reasonable cause.

Therefore, the Instant Provision does not violate the principle of equality.

14. Case on the Constitutional Complaint against Article 92-5 of the Former Military Criminal Act Which Prescribes Punishment by Imprisonment for 'Other Indecent Conduct'

Summary of Dissenting Opinion of Four Justices

The principle of *nulla poena sine lege* guaranteed under Articles 12 and 13 of the Constitution requires the law to explicitly prescribe its elements, so that anyone can understand what kind of acts the law punishes, foresee what the corresponding punishment would be, and decide his or her actions based on this understanding. A vague or abstract, and thus unclear, punitive provision will make it difficult for the general public to understand what exactly is prohibited, and consequently make it hard to abide by the law. Moreover, whether a crime is valid would be left up to the arbitrary interpretation of the judge, which runs contrary to the realization of the rule of law, which aims to guarantee the freedom and rights of the public through the principle of *nulla poena sine lege*.

The Criminal Act and the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes strictly distinguish between 'indecent acts,[3]' which infringe upon an individual's sexual freedom through compulsion, and 'obscene acts,[4]' which are not coerced but infringe on sound social morals. However, the Instant Provision prescribes the elements that constitute a crime as 'other indecent conduct,' with a vague indication as to whether this entails compulsion, and thus obscene acts occurring with voluntary consent and without compulsion, and molestation by violence and threat which involves compulsion of the highest degree, are punished equally under the same punitive provision. This creates an unacceptable inconsistency in the punitive system.

Moreover, the Instant Provision is an illustrative type of legislation. In such cases, the illustrative provision itself must serve as a guideline for

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3) Refer to Article 298 (Indecent Act by Compulsion), Article 299 (Quasi-Indecent Act by Compulsion) and Article 302 (Sexual Intercourse with a Minor, etc.) of the Criminal Act; and Article 10 (Indecent Acts through Abuse of Occupational Authority, etc.) of the Act on Special Cases Concerning the Punishment, etc. of Sexual Crimes.

4) Refer to Chapter 22 of the Criminal Act on Crimes Concerning Sexual Morals.

interpreting general provisions, and therefore the term ‘other indecent conduct,’ which constitutes the general provision of the Instant Provision, should be interpreted as acts that in the least apply to ‘sodomy,’ the illustrative provision. However, a decision by the Supreme Court (Supreme Court Decision 2008Do2222) rules that ‘other indecent conduct’ in Article 92 of the former Military Criminal Act indicates ‘sexual acts between persons of the same sex that fall short of sodomy,’ and holds that the degree of obscenity may be weaker than sodomy. This is not only because ‘sodomy’ cannot serve as the criteria for deciding whether an act would fall under ‘other indecent conduct,’ but also because no criteria whatsoever have been presented on the degree of obscenity that would constitute ‘other indecent conduct.’

As stated above, the Instant Provision provides an ambiguous prescript on the degree of conduct, making it impossible for the person engaging in acts to foresee which types of conduct would be punished by law, and incurring the arbitrary interpretation and application of law by the enforcement agencies.

Furthermore, the Instant Provision does not include any stipulation on the object of the conduct, which makes it ambiguous as to whether ‘other indecent conduct’ only applies to disgraceful conduct between males, or also applies to disgraceful conduct between females or between the opposite sexes. This is because when the Military Criminal Act first prescribed the crime of indecent conduct in 1962, it seems to have indicated only ‘indecent conduct between males’ since the army was comprised of mostly males back then. However, the number of female soldiers was on the rise when the Instant Provision entered into force in 2010, and thus the Instant Provision could be interpreted as also prohibiting ‘indecent conduct between females or between the opposite sexes.’ The Instant Provision is also vague as to whether only indecent conduct between soldiers is punished, or whether indecent conduct between soldiers and the general public is also punished.

The reason indecent conduct taking place in the army was defined differently under the Military Criminal Act since its enactment, compared

to the Criminal Act or the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes, was because 'given the nature of the army, especially in the case of enlisted soldiers, persons of the same sex sleep in groups inside military camps, and it is virtually impossible to disobey the orders of a superior under a hierarchical command chain.' Given this, indecent conduct as defined in the Instant Provision should be limited to 'obscene acts that take place inside military camps between same-sex soldiers.' However, as of now it is unclear whether 'obscene acts that take place outside of military camps' would also fall under the Instant Provision, since it does not clarify a time and place for the act, and the legal interests to be protected, as instructed by the Supreme Court, are far-reaching and comprehensive.

Thus, the Instant Provision deprives norm addressees of predictability, and creates the possibility of arbitrary legal interpretation by the enforcement agencies, by using the vague and comprehensive terms of 'sodomy or other indecent conduct' for the elements of the crime, and provides no indication of the necessity of compulsion, or detailed criteria on the degree, object, time, place, etc. of the act. Therefore, the Instant Provision violates the rule of clarity of the principle of *nulla poena sine lege*, and thus violates the Constitution.

15. Case on the 'Orderly Conduct' Requirement for Permission for Naturalization

[2014Hun-Ba421, July 28, 2016]

In this case, the Constitutional Court held that Item 3 of Article 5 of the Nationality Act, which requires that a foreigner's 'conduct shall be orderly' for him/her to become naturalized, does not violate the rule of clarity.

Background of the Case

(1) The petitioner, a foreigner of Nepalese nationality, applied for naturalization to the Minister of Justice on January 24, 2013. However, the Minister of Justice denied the naturalization of the petitioner on March 11, 2014, on the grounds that the petitioner had a history of illegal residency, and a criminal record that was made final and conclusive on February 27, 2014, and thus failed to meet the requirement of 'orderly conduct' prescribed in Item 3 of Article 5 of the Nationality Act.

(2) The petitioner filed an action with the Seoul Administrative Court seeking cancellation of the abovementioned disposition, and requested a constitutional review of Item 3 of Article 5 of the Nationality Act while the trial was pending. Upon its rejection, the petitioner filed a constitutional complaint on October 10, 2014.

Subject Matter of Review

The subject matter of this case is whether Item 3 of Article 5 of the Nationality Act (amended by Act No. 8892 on March 14, 2008) violates the Constitution. The Instant Provision reads as follows:

Provision at Issue

Nationality Act (amended by Act No. 8892 on March 14, 2008)

Article 5 (Requirements for General Naturalization)

A foreigner shall meet each of the following requirements in order to become naturalized, except where prescribed by Articles 6 and 7:

3. His/her conduct shall be orderly.

Summary of the Decision

'Naturalization' is a system by which foreigners are granted nationality in the Republic of Korea, where said foreigners have never attained such nationality. Persons who have attained nationality acquire sovereignty, and at the same time become a personal subject of state authority. Therefore, the state considers from various perspectives whether the person will fit the order of the state and society, when setting the naturalization requirements for accepting a foreigner as a new national.

As one of these naturalization requirements, the Instant Provision aims to assess whether the foreigner possesses an upright personality and character that integrates with the existing state order and members of society, when accepting a foreigner as a new member of the national community. Considering, also, that the state has extensive discretion in deciding whether to permit naturalization, it is somewhat inevitable that the Instant Provision uses, to a certain extent, a rather general and evaluative concept such as 'conduct shall be orderly.'

Many other examples of legislation related to naturalization requirements also use the indeterminate concept of personality or character, due to the aforementioned nature of the naturalization system. Some examples would be the United States' "good moral character;" the United Kingdom's "good character;" France's "*bonnes vie et moeurs* (good character);" and Japan's "upright conduct."

Meanwhile, 'orderly conduct' is widely understood as possessing a character and behavior that is well-mannered and decent. Also, in

general, the court rules that "orderly conduct means to act with a character that does not hinder the acceptance of that foreigner as a member of the national community of the Republic of Korea, and as a person with sovereignty."

Taking the above into consideration, the requirement that 'his/her conduct shall be orderly' as prescribed in the Instant Provision can be interpreted as 'he/she shall possess a character and conduct that does not hinder the acceptance of the applicant for naturalization as a new national of the Republic of Korea.' What this would exactly indicate in detail would depend on the overall consideration of numerous conditions, including the applicant's gender, age, job, family, career, criminal record, etc., and it can be presumed that the criminal record condition in particular would not only consider whether a crime has been committed, but also comprehensively reflect the details of the crime; the severity of the punishment; circumstances at the time of and after the crime; and the period from the date the crime was committed until the disposition of naturalization, etc.

Therefore, the Instant Provision does not violate the rule of clarity.

16. Case on the Improper Solicitation and Graft Act

[2015Hun-Ma236 · 412 · 662 · 673 (consolidated), July 28, 2016]

In this case, the Constitutional Court held that the provisions in the Improper Solicitation and Graft Act, that include journalists and private school employees in the definition of public officials, etc., that are prohibited from being involved in improper solicitation, and that do not apply the Act on any conduct deemed in line with social norms (Provisions on Improper Solicitation); the provisions that not only prohibit the receipt of financial or other advantages in connection with duties regardless of whether they are given in exchange for any favors, but also prohibit the receipt of financial or other advantages exceeding a certain amount from the same person regardless of whether it is connected to duties or given in exchange for any favors (Provisions on the Receipt of Financial or Other Advantages); the provisions that delegate to a Presidential Decree the specification of the limit on honorariums for outside lectures, etc. and on the value of food and drink, congratulatory or condolence money, gifts, etc. that can be received by journalists and private school employees (Delegation Provisions); the provision that imposes on journalists and private school employees, the duty to report any cases where they become aware that his or her spouse received unacceptable financial or other advantages in connection with the duties of the journalist or private school employee in question (Mandatory Reporting Provision); and the provisions that prescribe that any person who fails to report such matters shall be subject to punishment or an administrative fine (Penalty Provisions), all prescribed under the Improper Solicitation and Graft Act, do not infringe upon the complainants' general freedom of action or right to equality.

Background of the Case

1. The Improper Solicitation and Graft Act (hereinafter referred to as the "Solicitation Act") was promulgated on March 27, 2015, and shall

enter into force on September 28, 2016.

2. One of the complainants, a corporation called the Journalists Association of Korea, is a media organization with a membership of over 10,000, comprised of journalists working for newspapers, broadcasters and press agencies nationwide. Complainant Kang ○-Eob is the public information director for the Korean Bar Association, while Complainant Park ○-Yeon is an editor at the Korean Bar Association Newspaper. Upon the passage of the Solicitation Act bill at the plenary session of the National Assembly, the complainants filed a constitutional complaint on March 5, 2015, claiming that: ① Article 2 Item 1 Sub-Item (e) of the Solicitation Act bill which classifies press organizations defined by Item 12 of Article 2 of the 'Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports' as 'public institutions'; ② Article 5 of the Solicitation Act bill which prohibits improper solicitations to any public official, etc.; and ③ Article 9 Section 1 Item 2, Article 22 Section 1 Item 2 and Article 23 Section 5 Item 2 of the Solicitation Act bill which prescribe that public officials, etc. are obliged to report any cases in which they become aware that his/her spouse received unacceptable financial or other advantages (hereinafter referred to as "unacceptable financial or other advantages") in connection with his or her duties as prescribed in Section 1 or 2 of Article 8 - and will incur a punishment or administrative fine if they fail to do so - infringe upon the complainants' freedom of press, freedom of conscience and right to equality. On March 19, 2015, the complainants added the claims that: ① Article 8 Section 3 Item 2 of the Solicitation Act bill, which prescribes that 'financial or other advantages the value of which is within the limit specified by Presidential Decree, in the form of food and drink, congratulatory or condolence money, gifts, etc. offered for purposes of social intercourse, etc.' shall not constitute unacceptable financial or other advantages; and ② Article 10 Section 1 of the Solicitation Act bill, which prescribes that no public official, etc. shall accept money exceeding the limits specified by Presidential Decree as an honorarium

for a lecture, presentation, or contribution related to his or her duties or requested due to *de facto* influence arising from his or her position or responsibilities (hereinafter referred to as "outside lecture, etc.") at a training course, promotional event, forum, seminar, public hearing, or any other meeting, are both in violation of the rule of clarity of the principle of *nulla poena sine lege* and the rule against blanket delegation. On November 12, 2015, the complainants also added to their relief sought to review Article 2 Item 2 Sub-Item (d) of the Solicitation Act, which includes representatives, executive officers, and employees of press organizations in the definition of 'public official, etc.' (2015Hun-Ma236).

3. The complainants, as the publisher, editor, CEO and reporter of an online newspaper, filed a constitutional complaint on April 21, 2015, claiming that: ① Item 1 Sub-Item (e) and Item 2 Sub-Item (d) of Article 2 of the Solicitation Act; ② Article 5 of the Solicitation Act; ③ Article 9 Section 1 Item 2, Article 22 Section 1 Item 2 and Article 23 Section 5 Item 2 of the Solicitation Act; ④ Article 8 Section 3 Item 2 of the Solicitation Act; and ⑤ Article 10 Section 1 of the Solicitation Act violate their fundamental rights of freedom of press, freedom of conscience and right to equality (2015Hun-Ma412).

4. The complainants, as persons serving as the heads of private kindergartens authorized for establishment under the relevant laws including the Early Childhood Education Act, filed a constitutional complaint on June 23, 2015, claiming that: ① Item 1 Sub-Item (d) and Item 2 Sub-Item (c) of Article 2 of the Solicitation Act, which defines private kindergartens established under the Early Childhood Education Act as 'public institutions' and the heads of such private kindergartens as 'public officials, etc.'; ② Article 5 of the Solicitation Act; ③ Article 8 Section 3 Item 2 of the Solicitation Act; ④ Article 9 Section 1 Item 2, Article 22 Section 1 Item 2 and Article 23 Section 5 Item 2 of the Solicitation Act; and ⑤ Article 10 Section 1 of the Solicitation Act

violate their fundamental rights of freedom of private school education, freedom of conscience and the right to equality (2015Hun-Ma662).

5. The complainants, as the heads and faculty members of private schools of each level and the executive officers of private school foundations, filed a constitutional complaint on June 25, 2015, claiming that: ① Item 1 Sub-Item (d) and Item 2 Sub-Item (c) of Article 2 of the Solicitation Act; ② Article 5 of the Solicitation Act; ③ Article 9, Article 22 Section 1 Item 2 and Article 23 Section 5 Item 2 of the Solicitation Act violate their fundamental rights including their right to equality, independence of education and autonomy of universities, and their freedom of conscience (2015Hun-Ma673).

Subject Matter of Review

The complainants' petitions for constitutional complaints, the supplementary documents to their arguments, and their testimonies at pleadings together show that the complainants are contending Sub-Items (d) and (e) of Item 1 and Sub-Items (c) and (d) of Item 2 of Article 2 (hereinafter referred to as the "Definition Provisions"); Article 5 Section 1, Article 2 Item 7, Article 8 Section 3 Item 2, Article 9 Section 1 Item 2, Article 10 Section 1, Article 22 Section 1 Item 2, and Article 23 Section 5 Item 2 of the Solicitation Act. However, since the complainants amount to the heads and faculty of schools of each level and the executive officers and employees of educational foundations under Article 2 Item 2 Sub-Item (c) of the Solicitation Act (hereinafter referred to as "private school employees"); and the representatives, executive officers and employees of press organizations under Article 2 Item 2 Sub-Item (d) of the Solicitation Act (hereinafter referred to as "journalists"), the subject matter of review in this case is limited to the areas relevant to the above.

The Definition Provisions, in and of themselves, do not affect the duties and rights of the complainants. The provisions under the

Solicitation Act which restrict the fundamental rights of the complainants are, aside from the Definition Provisions, the provisions set forth by the complainants and Sections 1 and 2 of Article 8, which prohibit the receipt of financial or other advantages. Therefore, it will suffice to review the complainants' claims that the Definition Provisions are unconstitutional by narrowing the scope of review to whether the other provisions that restrict the complainants' fundamental rights are unconstitutional. Provided that, the determination of the unconstitutionality of Sections 1 and 2 of Article 8 shall be limited to the areas relevant to the claims as to the unconstitutionality of the Definition Provisions, since the complainants are not claiming Sections 1 and 2 of Article 8 as subject matters of review and are not claiming their unconstitutionality as independent provisions.

Thus, the subject matter of review in this case is whether: ① the provisions concerning private school employees and journalists in Article 5 Section 1 and Article 5 Section 2 Item 7 of the Solicitation Act (enacted by Act No. 13278 on March 27, 2015) (hereinafter referred to as the "Provisions on Improper Solicitation"); ② the provisions concerning private school employees and journalists in Sections 1 and 2 of Article 8 (hereinafter referred to as the "Provisions on the Receipt of Financial or Other Advantages"); ③ the provisions concerning private school employees and journalists in Article 8 Section 3 Item 2 and Article 10 Section 1 (hereinafter referred to as the "Delegation Provisions"); ④ the provision concerning private school employees and journalists in Article 9 Section 1 Item 2 (hereinafter referred to as the "Mandatory Reporting Provision"); and ⑤ the provisions concerning private school employees and journalists in the main text of Article 22 Section 1 Item 2 and the main text of Article 23 Section 5 Item 2 (hereinafter referred to as the "Penalty Provisions"), infringe upon the fundamental rights of the complainants.

Provisions at Issue

Improper Solicitation and Graft Act (enacted by Act No. 13278 on March 27, 2015)

Article 5 (Prohibition of Improper Solicitation)

(1) No person shall make any of the following improper solicitations to any public official, etc. performing his or her duties, directly or through a third party:

1. Soliciting to process, in violation of Acts or subordinate statutes, such tasks as authorization, permission, license, patent, approval, inspection, qualification, test, certification, or verification, for which Acts and subordinate statutes (including Ordinances and Rules; hereinafter the same shall apply) prescribes requirements and which should be processed upon application by a duty-related party;
2. Soliciting to mitigate or remit administrative dispositions or punishments such as cancellation of authorization or permission, and imposition of taxes, charges, administrative fines, penalty surcharges, charges for compelling compliance, penalties, or disciplinary actions, in violation of Acts or subordinate statutes;
3. Soliciting to intervene or exert influence in the appointment, promotion, job transfer, or any other personnel management of public officials, etc., in violation of Acts or subordinate statutes;
4. Soliciting to appoint or reject a person, in violation of Acts or subordinate statutes, for a position which intervenes in the decision-making of a public institution, including a member of various deliberation, decision-making, and arbitration committees, and a member of a committee for a test or screening administered by a public institution;
5. Soliciting to choose or reject a specific individual, organization, or legal person, in violation of Acts or subordinate statutes, in any award, prize, or selection of outstanding institutions or persons, administered by a public institution;

6. Soliciting to disclose, in violation of Acts or subordinate statutes, duty-related confidential information on tender, auction, development, examination, patent, military affairs, taxation, etc.;
7. Soliciting to select or reject a specific individual, organization, or legal person as a party to a contract, in violation of Acts or subordinate statutes governing contracts;
8. Soliciting to intervene or exert influence so that subsidies, incentives, contributions, investments, grants, funds, etc., are assigned to, provided to, invested in, deposited in, lent to, contributed to, or financed to a specific individual, organization, or legal person, in violation of Acts or subordinate statutes;
9. Soliciting to allow a specific individual, organization, or legal person to buy, exchange, use, benefit from, or possess goods and services that are produced, supplied, or managed by public institutions, at prices different from what is prescribed by Acts or subordinate statutes, or against normal transaction practices;
10. Soliciting to process or manipulate affairs of schools of each level, such as admission, grades, or performance tests, in violation of Acts or subordinate statutes;
11. Soliciting to process affairs related to military service, such as physical examination for conscription, assignment to a military unit, or appointment to a position, in violation of Acts or subordinate statutes;
12. Soliciting to conduct various assessments or judgments implemented by public institutions, or to manipulate the results thereof, in violation of Acts or subordinate statutes;
13. Soliciting to make a specific individual, organization, or legal person subject to or exempt from administrative guidance, enforcement activities, audit, or investigation; to manipulate the outcome thereof; or to ignore any illegality, in violation of Acts or subordinate statutes;
14. Soliciting to process investigation of a case, trial, adjudication, decision, mediation, arbitration, reconciliation, or other equivalent

affairs, in violation of Acts or subordinate statutes;

15. Soliciting a public official, etc. to perform affairs, described in Items 1 through 14 as subject to solicitation, in a manner exceeding the limits of his or her position or authority assigned by Acts or subordinate statutes, or to perform affairs not belonging to his or her authority.

(2) Notwithstanding Section 1, this Act shall not apply to any of the following cases:

7. Any other act deemed in accordance with social norms.

Article 8 (Prohibition of Receipt of Financial or Other Advantages)

(1) No public official, etc. shall accept, request, or promise to receive any financial or other advantages exceeding one million won at a time or three million won in a fiscal year from the same person, regardless of whether it is connected to his or her duties and regardless of any pretext such as a donation, sponsorship, gift, etc.

(2) No public official, etc. shall, in connection with his or her duties, accept, request, or promise to receive any financial or other advantages not exceeding the amount prescribed by Section 1, regardless of whether the financial or other advantages are given in exchange for any favors.

(3) An honorarium for an outside lecture, etc. described in Article 10, or any of the following shall not constitute financial or other advantages, the receipt of which is prohibited by Section 1 or 2:

2. Financial or other advantages the value of which is within the limit specified by Presidential Decree, in the form of food and drink, congratulatory or condolence money, gifts, etc. offered for purposes of facilitating performance of duties, social intercourse, rituals, or aid.

Article 9 (Reporting and Disposal of Unacceptable Financial or Other Advantages)

(1) A public official, etc. shall report without delay in writing to the head of the relevant institution in any of the following cases:

2. Where the public official, etc. becomes aware that his or her spouse received unacceptable financial or other advantages, or a promise or an expression of intention to offer it.

Article 10 (Restriction on Accepting Honoraria for Outside Lectures, etc.)

(1) No public official, etc. shall accept money exceeding the limits specified by Presidential Decree as an honorarium for a lecture, presentation, or contribution related to his or her duties or requested due to *de facto* influence arising from his or her position or responsibilities (hereinafter referred to as "outside lecture, etc.") at a training course, promotional event, forum, seminar, public hearing, or any other meeting.

Article 22 (Penalty Provisions)

(1) Any of the following persons shall be subject to imprisonment with labor for not more than three years or an administrative fine not exceeding 30 million won:

2. A public official, etc. (including private persons performing public duties under Article 11) who fails to report pursuant to Article 9 Section 1 Item 2 or Article 9 Section 6, although he or she is aware that his or her spouse received, requested, or promised to receive unacceptable financial or other advantages specified in Article 8 Section 1, in violation of Article 8 Section 4: *Provided*, That the foregoing shall not apply if a public official, etc. or his or her spouse returned, delivered, or expressed an intention to reject unacceptable financial or other advantages pursuant to Article 9 Section 2.

Article 23 (Imposition of Administrative Fines)

(5) Any of the following persons shall be subject to an administrative fine of two to five times the monetary value of the financial or other advantages related to the violation: *Provided*, That no administrative fine shall be imposed if criminal punishment (including confiscation and

collection) is imposed under Article 22 Section 1 Items 1 through 3, the Criminal Act, or any other Act; if criminal punishment is imposed after an administrative fine is imposed, the imposition of such an administrative fine shall be revoked:

2. A public official, etc. (including private persons performing public duties under Article 11) who fails to report pursuant to Article 9 Section 1 Item 2 or Article 9 Section 6, although he or she is aware that his or her spouse received, requested, or promised to receive unacceptable financial or other advantages specified in Article 8 Section 2, in violation of Article 8 Section 4: *Provided*, That the foregoing shall not apply if a public official, etc. or his or her spouse returned, delivered, or expressed an intention to reject unacceptable financial or other advantages pursuant to Article 9 Section 2.

Summary of the Decision

1. Whether the Request for Adjudication by the Journalists Association of Korea Is Justified

The complainant, the Journalists Association of Korea, is a non-profit incorporated association as defined by the Civil Act, with a membership of over 10,000 active reporters belonging to newspapers, broadcasters and press agencies nationwide. Under Article 2 Item 12 of the 'Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports,' the complainant is classified as a press organization. However, the norm addressees under the Instant Provisions are limited to natural persons; this means the fundamental rights of the complainant, the Journalists Association of Korea, which is an incorporated association, cannot be directly infringed by the Instant Provisions. Furthermore, being an incorporated association, the Journalists Association of Korea cannot file a constitutional complaint on behalf of its member reporters. Thus, the request for adjudication by the above complainant is nonjusticiable,

for the self-relatedness of the infringement upon fundamental rights cannot be acknowledged.

2. Whether the Provisions on Improper Solicitation Violate the Rule of Clarity of the Principle of *Nulla Poena Sine Lege*

The term 'improper solicitation' is being used in many statutes, including the Criminal Act; the Supreme Court has accumulated a large number of judicial precedents on the definition of improper solicitation; and instead of being directly defined as a single concept in the legislative procedure of the Solicitation Act, specific elements of improper solicitation are specified in the Solicitation Act through a detailed description of the form and types of improper solicitation across 14 areas. Meanwhile, the Provisions on Improper Solicitation explicitly clarify that they are applicable to Acts and subordinate statutes in the general sense, and that this includes Ordinances and Rules. The concept of 'social norms' is also used in Article 20 of the Criminal Act, and the Supreme Court has made consistent rulings with regard to its meaning. Therefore, there is no reason for social norms under the Provisions on Improper Solicitation to be interpreted in a different manner. As seen here, the terms 'improper solicitation,' 'Acts and subordinate statutes,' and 'social norms' as prescribed by the Provisions on Improper Solicitation have clear meanings, and thus do not violate the rule of clarity of the principle of *nulla poena sine lege*.

3. Whether the Provisions on Improper Solicitation and the Provisions on the Receipt of Financial or Other Advantages Violate the Complainants' Right to General Freedom of Action

A. Given the powerful influence of education and the press on the nation or across society, corruption in these areas has comparably large repercussions and the damage tends to be extensive and longstanding, while recovery is impossible or extremely difficult. Thus, private school

employees and journalists are required a level of impartiality and non-purchasability of their conduct on par with public officials. Given the realities of education and the press where corruption and malpractice persist, the influence that private school employees and journalists have on society, the purpose of the Solicitation Act which is to eradicate the practice of improper solicitation, the public nature of education and the press and the support provided by the state and society based on this nature, and other relevant circumstances, the legislator has made an understandable choice in including private school employees and journalists in the definition of 'public official, etc.' and prohibiting them from receiving any improper solicitation or any financial or other advantages without a justifiable reason. We acknowledge the legitimacy of the legislative purpose of the Provisions on Improper Solicitation and the Provisions on the Receipt of Financial or Other Advantages, which aim to secure public trust by eradicating practices of improper solicitation and the receipt of money or goods, so as to guarantee that private school employees and journalists, who engage in work of a public nature, perform their duties in a fair manner. Prohibiting private school employees and journalists from receiving financial or other advantages in violation of Acts and subordinate statutes and social norms, and prohibiting any person from making improper solicitations to them, are appropriate means for achieving this legislative purpose.

B. By listing in detail acts that are prohibited in areas where corruption frequently occurs, the Provisions on Improper Solicitation limit the types of improper solicitation; even if any conduct falls under one of these categories, it is excluded from restrictions when it is justifiable from a comprehensive law and order perspective; and punishments are limited to cases where journalists or private school employees have performed their duties at the request of an improper solicitation. Meanwhile, conduct of improper solicitation or the receipt of financial or other advantages cannot be punished for the crime of receiving bribes by breach of trust since the compensational relationship

is difficult to prove, and thus it is insufficient for such conduct to be punished for the crime of receiving bribes by breach of trust under the Criminal Act. Furthermore, the general perception gathered from various surveys and public awareness is that practices of improper solicitation and the receipt of financial or other advantages have long been rampant in the education sector and the press, and have not shown any significant signs of improvement. Therefore, we cannot say that the legislator was wrong in deciding that the education sector and the press could not be left to rectify themselves.

The Provisions on the Receipt of Financial or Other Advantages punish the receipt of financial or other advantages exceeding one million won on one occasion or three million won in a fiscal year from the same person, regardless of whether it is connected to his or her duties or whether it is given in exchange for any favors. This is based on the presumption that giving a significant amount of money to private school employees or journalists cannot be based on pure intentions, and that a certain compensational relationship can be presumed. It also goes against sound common sense in our society to give to private school employees and journalists, who are not financially vulnerable members of the society, financial or other advantages exceeding one million won on one occasion or three million won in a fiscal year. Furthermore, it is hardly unfair to prohibit private school employees and journalists from receiving financial or other advantages in connection with his or her duties without a justifiable reason, however small the value. When reviewing the unconstitutionality of Acts prior to their enactment, it cannot be presupposed that the state, disregarding the legislative purpose of the Act in question, will abuse power and execute the relevant law in an unjust manner. Considering the above, it is difficult to say that the Provisions on Improper Solicitation and the Provisions on the Receipt of Financial or Other Advantages run contrary to the rule of minimum restriction.

C. Due to the Provisions on the Receipt of Financial or Other Advantages, private school employees or journalists may be put at the disadvantage of being cut off from their usual intake of money, goods or entertainment exceeding a certain amount. However, it can hardly be said that such disadvantages constitute an infringement of rights and interests that should be legally protected. On the other hand, the public interest sought by the Provisions on Improper Solicitation and the Provisions on the Receipt of Financial or Other Advantages are extremely significant, and thus the balance of interests is satisfied.

D. Thus, the Provisions on Improper Solicitation and the Provisions on the Receipt of Financial or Other Advantages cannot be said to infringe upon the general freedom of action of the complainants by violating the rule against excessive restriction.

4. Whether the Delegation Provisions Violate the Principle of *Nulla Poena Sine Lege*

Since private school employees or journalists are punished upon receipt of financial or other advantages exceeding one million won at a time or three million won in a fiscal year from the same person, the provision 'the value of which is within the limit specified by Presidential Decree' of the Delegation Provisions do not serve as negative elements of crime. Therefore, the principle of *nulla poena sine lege* is not violated. Meanwhile, private school employees and journalists are imposed an administrative fine if they receive money exceeding the limits specified by Presidential Decree as an honorarium for an outside lecture, etc., and fail to report or return it, or if they receive money, goods, or other values equal to or less than one million won on one occasion or three million won in a fiscal year from the same person. However, administrative fines are merely administrative penalties and not punitive measures; this means they are not subject to the principle of *nulla poena sine lege*. Therefore, the claim that the Delegation

Provisions violate the principle of *nulla poena sine lege* is groundless, and does not require further examination.

5. Whether the Delegation Provisions Infringe upon the Complainants' General Freedom of Action by Violating the Rule of Clarity

'Social intercourse,' 'rituals' and 'gifts' are clearly defined in the dictionary and are expressions frequently used in everyday language. Drawing from the legislative purpose of the Delegation Provisions and the relevant provisions including Article 2 Item 3 of the Solicitation Act, which defines financial or other advantages, it can easily be deduced that 'gifts offered for purposes of social intercourse or rituals' are goods or securities, accommodation vouchers, memberships, admission tickets or equivalent matters provided without compensation with the purpose of socializing or as courtesy. Thus, the Delegation Provisions do not infringe upon the complainants' general freedom of action by violating the rule of clarity.

6. Whether the Delegation Provisions Infringe upon the Complainants' General Freedom of Action by Violating the Rule against Blanket Delegation

It is somewhat impractical to uniformly define by law the monetary value of honoraria for outside lectures, etc. or congratulatory or condolence money, gifts or food and drink for purposes of social intercourse and rituals, the receipt of which is allowed under the Solicitation Act. We therefore acknowledge the necessity to delegate this to adaptable administrative legislation, so that such matters can be flexibly regulated to reflect social norms and in response to circumstantial changes. Thus, upon a closer examination of the legislative purpose of the Delegation Provisions and the relevant laws, it can be easily deduced that the value of acceptable financial or other advantages or honoraria for outside lectures as specified by Presidential Decree in the Delegation Provisions

are connected to duties and should therefore be of a value reasonable by all standards, within the limit of one million won. In other words, the value would be an amount that would not compromise the integrity of public agencies as defined by the Solicitation Act, reflecting the customs of the society in congratulatory or condolence money, or entertainment and gifts. Therefore, the Delegation Provisions do not infringe upon the complainants' general freedom of action by violating the rule against blanket delegation.

7. Whether the Mandatory Reporting Provision and Penalty Provisions Infringe upon the Complainants' General Freedom of Action by Violating the Rule of Clarity of the Principle of *Nulla Poena Sine Lege*

The legislative purpose of the Mandatory Reporting Provision and Penalty Provisions is to prevent the receipt of financial or other advantages through an alternative channel, i.e. a spouse, and to protect private school employees and journalists by providing grounds for exemption through reporting. Considering this together with the relevant laws, including Article 13 of the Criminal Act, it is clear that private school employees and journalists can be punished under the Mandatory Reporting Provision and Penalty Provisions only when they are aware that their spouse has received unacceptable financial or other advantages, or a promise or an expression of intention to offer it, in connection with his or her duties. Therefore, the Mandatory Reporting Provision and Penalty Provisions do not infringe upon the general freedom of action of the complainants by violating the rule of clarity of the principle of *nulla poena sine lege*.

8. Whether the Mandatory Reporting Provision and Penalty Provisions Violate the Principle of Personal Responsibility and the Prohibition of Guilt by Association

The spouse of a private school employee or journalist maintains a

close relationship with the person in question, sharing financial gains and everyday life. The receipt of unacceptable financial or other advantages by such a spouse in connection with the duties of the private school employee or journalist can in fact be considered the equivalent to the receipt of financial or other advantages by the private school employee or journalist him or herself. The Solicitation Act does not include a provision that penalizes the spouse that has received financial or other advantages, and the Mandatory Reporting Provision and Penalty Provisions punish conduct in violation of the obligation to report only when a public official, etc. fails to report the offence of a spouse when made aware of it. Therefore, this does not conform to the guilt-by-association treatment prohibited under Article 13 Section 3 of the Constitution, nor does it violate the principle of personal responsibility.

9. Whether the Mandatory Reporting Provision and the Penalty Provisions Infringe upon the Complainants' General Freedom of Action by Violating the Rule against Excessive Restriction

A. The legislative purpose of the Mandatory Reporting Provision and Penalty Provisions is to prevent private school employees and journalists from receiving financial or other advantages through their spouses and subsequently engaging in improper affairs; and to block others from improperly influencing private school employees and journalists using their spouses as alternative channels, and by doing so, to ensure they perform duties in a fair manner and to secure the trust placed in them by the public. This legislative purpose is justiciable and satisfies the appropriateness of means.

B. The prohibition on receiving financial or other advantages under the Solicitation Act is limited to the spouse in the family, while the Act minimizes the scope of prohibition by requiring a connection to the duties of a private school employee or a journalist, and does not penalize the spouse in any way. The reason a private school employee

or journalist is punished is because, despite becoming aware that his or her spouse received unacceptable financial or other advantages, he or she failed to report such conduct. Private school employees and journalists are protected for they gain immunity if, upon becoming aware of such facts, they report this to the head of the relevant institution, or when he or she or his or her spouse returns, delivers or expresses an intention to reject such unacceptable financial or other advantages. Meanwhile, private school employees or journalists are only subject to the duty to report when they become aware of the receipt of financial or other advantages by their spouses, which means that it is hard to say that the Mandatory Reporting Provision and Penalty Provisions impose excessive pressure on private school employees or journalists, for instance by compelling them to constantly monitor their spouses' actions. Furthermore, it is difficult to postulate other effective measures to guarantee the fair performance of duties, besides shutting off alternative channels that aim to evade the application of the Solicitation Act. Therefore, the Mandatory Reporting Provision and Penalty Provisions do not run contrary to the rule of minimum restriction.

C. The public benefits sought by the Mandatory Reporting Provision and Penalty Provisions outweigh the private interests that are restricted thereby. Thus, the Mandatory Reporting Provision and Penalty Provisions do not infringe upon the general freedom of action of the complainants by violating the rule against excessive restriction.

10. Whether the Provisions on Improper Solicitation, the Provisions on the Receipt of Financial or Other Advantages, the Mandatory Reporting Provision and the Penalty Provisions Infringe upon the Right to Equality of the Complainants

It is up to the legislator, and his or her legislative discretion, to decide which of those employed in areas that require fairness, integrity and the non-purchasability of duties on par with public officials, should be

covered by the Solicitation Act; such a decision would reflect several factors, such as the public nature of the duties involved, the existence of solicitation practices and entertainment culture and the extent of their severity, public awareness, and the ensuing influence on society. The Provisions on Improper Solicitation, the Provisions on the Receipt of Financial or Other Advantages, the Mandatory Reporting Provision and the Penalty Provisions do not target the entire private sector, but instead, include only private school employees and journalists in the definition of 'public official, etc.' and impose the corresponding obligations. As long as these provisions do not infringe the general freedom of action of the complainants, the legislator's decision to include only these particular occupations in the definition of 'public official, etc.' for the time being, cannot be considered arbitrary discrimination. Both the public and private sectors are involved in education and the media, which are domains of a highly public nature, and do not allow room for discrimination based on the public or private nature of the participating party. Therefore, the Provisions on Improper Solicitation, the Provisions on the Receipt of Financial or Other Advantages, the Mandatory Reporting Provision and the Penalty Provisions do not infringe upon the right to equality of the complainants just because the Solicitation Act does not apply to workers in parts of the private sector that assume a public nature on par with private school employees and journalists.

Summary of Dissenting Opinion of Two Justices on the Definition Provisions

The most fundamental and effective remedy from the viewpoint of the complainants would be to directly review the Definition Provisions and confirm their unconstitutionality. Moreover, the Definition Provisions prescribe the scope of the people that are subject to the prohibition of acts such as performing duties upon improper solicitation or the receipt of financial or other advantages, and are thus closely related to the fundamental right of the general freedom of action of the complainants.

Furthermore, the stipulation of the scope of people subject to the penalty provisions under the Solicitation Act constitutes an important element of the punishment provisions, and thus the directness of the infringement of fundamental rights is accepted.

It is virtually impossible for the state to actively intervene in all irregularities that occur across society with the aim of eradicating corruption. Moreover, it is hardly advisable for all domains of society to be placed under the surveillance of the state for that sole purpose. It is hard to accept the legitimacy of the legislative purpose, in and of itself, of extending the coverage of the Solicitation Act, disregarding the intrinsic differences between the public and private sectors and applying the same standards just because the occupations in question take on a public nature. Including the private sector in the sphere of the Solicitation Act for the rather dubious benefit of discouraging people hoping to benefit by making improper solicitations or providing money or goods, and of preventing diminished trust in the media or private schools, cannot be considered an appropriate means in terms of the efficiency of achieving the legislative purpose of the Act.

Private schools are merely sharing the role of the state by participating in public education. The status of heads and faculty members of private schools, which are based on private labor relations, is not equal to the status of heads and faculty members of national or public schools. Meanwhile, in a democratic society the press sector is an autonomous domain that must be guaranteed its freedom, and naturally falls behind once it becomes corrupt and loses credibility. Thus, private school heads and faculty members and journalists cannot be asked to practice fairness and credibility in and the non-purchasability of duties to a level on par with public officials. The Definition Provisions have made it possible for the Solicitation Act, through punishments and administrative fines, to restrict violations of social ethics and norms by private school employees or journalists, who belong to the private sector. This is an excessive exercise of the state's punitive authority, and the penalties imposed on the receipt of financial or other advantages under the Solicitation Act

also deviate from the principle of proportionality between liability and punishment. Moreover, the Definition Provisions discourage the private sector's willingness to voluntarily eradicate corruption by disregarding its autonomous regulation and self-correcting functions, may undermine the power of rule and effectiveness in the eradication of corruption by making investigative agencies depend chiefly on the Solicitation Act, which is convenient in terms of substantiation, fails to provide a rational criterion for subjecting private school employees and journalists to the Solicitation Act in the same manner as public officials, giving rise to suspicions that the targets may have been selected arbitrarily, and seem to have been legislated in haste driven by public opinion without being preceded by serious discussion. Thus, the Definition Provisions run contrary to the rule of minimum restriction.

While the public interest sought by the Definition Provisions is a vague and abstract danger of the future, that has yet to be realized, the extent of restriction to the right of general freedom of action caused by the inclusion of private school employees and journalists in the coverage of the Solicitation Act is grave, and may potentially constrict the freedom of education and freedom of press. Therefore, the balance of interests is not satisfied as the restriction on private interests largely outweighs the public interest sought by the Definition Provisions.

Summary of Concurring Opinion of One Justice regarding the Dissenting Opinion on the Definition Provisions

As in other litigation procedures such as civil proceedings, the subject matter of review in constitutional trials holds great importance. The Constitutional Court cannot *sua sponte* exclude from the subject matter of review the statutory provision that the complainant has explicitly listed in the request for adjudication, when no necessity for such exclusion on account of the uniqueness of constitutional trials is found. Not only does this clearly violate the principle of application by the party or the principle of disposition, but it may also become an

'omission of review' and constitute grounds for a retrial. The Court's majority opinion excludes the Definition Provisions from the subject matters of review on the grounds that they do not *per se* affect the legal status of the complainants by restricting their freedom or imposing duties. However, this alone is not a justifiable ground to exclude the Definition Provisions *sua sponte* from the subject matters of review, when they have been explicitly listed by the complainants in the request for adjudication. Therefore, the Definition Provisions should not be excluded from the subject matters of review.

Meanwhile, the Definition Provisions, in and of themselves, restrict the fundamental rights or affect the legal status of the complainants by restricting their right to general freedom of action and imposing various duties, and thus the directness of the infringement of fundamental rights is accepted.

The complainants are claiming that the Definition Provisions, by deeming private school employees and journalists equal to public officials, who are actually of an entirely different nature, and thereupon including them in the scope of the Solicitation Act, and by specifically including only private school employees and journalists in the definition of 'public official, etc.,' among the many private sectors that display strong public characteristics, infringe upon the complainants' right to equality and upon the freedom of press or freedom of private education. Therefore, as to whether the inclusion of the complainants in the definition of 'public official, etc.' under the Solicitation Act infringes upon fundamental rights such as the right to equality or the right to general freedom of action should be determined by making the Definition Provisions the subject matter of review. This would provide the complainants with the most efficient and basic means to remedy fundamental rights.

In earlier precedents, the Constitutional Court widely accepted the directness of the infringement of fundamental rights in cases where complainants claimed their right to equality was being infringed upon in the form of exclusion from the coverage of definition provisions under

'legislation bestowing benefits.' In this case, the claim is that including the complainants in the Definition Provisions that prescribe those affected by the Solicitation Act infringes upon the right to equality of the complainants. Given that the Solicitation Act is 'legislation infringing on people's rights,' there is no reasonable cause for this case to be determined in a different manner.

Summary of Dissenting Opinion of Three Justices on Article 8 Section 3 Item 2 of the Delegation Provisions

Sections 1 and 2 of Article 8 of the Solicitation Act, by themselves, in effect prohibit public officials, etc. from engaging in all ordinary, personal monetary transactions that have no connection to the legislative purpose of the Solicitation Act, and this leads to the prohibition of actions that do not infringe upon legally protectable interests. Therefore, the above provisions do not *per se* constitute complete prohibitive provisions. In order to resolve this unreasonable element, and to guarantee the effectiveness of the Solicitation Act in line with its legislative purpose, the Act provides Article 8 Section 3 so that actions that do not infringe the legally protectable interests of the Solicitation Act whatsoever, are excluded from the regulations of Sections 1 and 2 from the outset.

Therefore, the actual code of conduct that applies to public officials, etc. with regard to the receipt of financial or other advantages is when the value 'exceeds one million won at a time or three million won in a fiscal year from the same person' as set forth in Article 8 Section 1, and the 'lower limit on the value of unacceptable financial or other advantages' specified by Presidential Decree under Article 8 Section 3 Item 2 of the Solicitation Act.

The food and drink, congratulatory or condolence money, gifts, etc. set forth in Article 8 Section 3 Item 2 of the Solicitation Act are not only exchanged between public officials, etc., but also between the general public in their everyday lives with the purpose of social intercourse,

rituals or aid. Therefore, the 'lower limit on the value of unacceptable financial or other advantages' specified by Presidential Decree may serve as criteria that set the course of action for the general public, in addition to public officials. On top of the fact that a great many public officials and their spouses will be subjected to the Solicitation Act, the entire general public will bear the obligation to abstain from offering, promising to offer, or expressing an intention to offer unacceptable financial or other advantages to a public official or his or her spouse. Furthermore, a significant number of people will possibly be substantially or indirectly affected by the 'lower limit on the value of unacceptable financial or other advantages' specified by Presidential Decree, from people involved in the production, sales and distribution of domestic agricultural, livestock and marine products to people working in industries related to what is defined as 'financial or other advantages' under the Solicitation Act, including the food service industry. This means that the Solicitation Act actually involves the interests of the entire public.

According to the majority opinion above, the Presidential Decree is at liberty to decide the permitted value within the limit of one million won. However, taking into account the generally accepted common practice, and legal sentiment, of the public regarding the value of food and drink, congratulatory or condolence money and gifts, as well as the legislative purpose of the Solicitation Act which is to heighten transparency in public offices, the upper limit of one million won is excessively high. Thus, it does not function as a legislative guideline, and does not hold particular significance as a specific code of conduct for public officials. So even if the permitted value of food and drink, congratulatory or condolence money, and gifts provided to public officials, etc. is within the limit of one million won, the legislator should present a specific standard that fully accounts for the interests of the public majority, and accords with the legal sentiment of the people and the legislative purpose of the Solicitation Act.

Meanwhile, there are no inevitable circumstances that make it difficult

for the law to specifically prescribe the 'lower limit on the value of unacceptable financial or other advantages.' Neither is this a specialized, technical area that requires the expert judgment of officials from the administrative branch. Moreover, the amount of financial or other advantages is not prone to swift and abrupt changes, even considering changes in the times, economy and culture, public awareness, and the size of the economy and price levels. Given the rising demand for transparency in the public sector, the public's legal sentiment regarding the 'lower limit on the value of unacceptable financial or other advantages' is not expected to change any time soon. Therefore, we find no urgent necessity to arrange responsive measures through administrative legislation.

Therefore, the 'lower limit on the value of unacceptable financial or other advantages' specified by Presidential Decree as per Article 8 Section 3 Item 2 of the Solicitation Act concerns important elements, or the essence, of public officials' general freedom of action. Furthermore, this is a fundamental and significant issue that both directly and indirectly influences the interests or the restriction of the fundamental rights of the general public. Therefore, this is a matter to be decided by law by the legislature, not one to be passed on to the administrative branch.

Thus, the fact that Article 8 Section 3 Item 2 of the Solicitation Act, one of the Delegation Provisions, delegates the decision on the 'lower limit on the value of unacceptable financial or other advantages' to a Presidential Decree, instead of prescribing it by law, violates the principle of statutory reservation of fundamental rights, in particular parliamentary reservation, and thus infringes upon the general freedom of action of the complainants.

Summary of Dissenting Opinion of One Justice on the Delegation Provisions

Without providing any specific criteria or scope for the value of acceptable financial or other advantages, the Delegation Provisions

comprehensively delegate this to a Presidential Decree, a lower statute. Thereupon, the Delegation Provisions merely tell public officials, or the norm addressees, that the subject to be delegated to Presidential Decree is 'the value of financial or other advantages' or 'the amount of the honorarium,' while it is impossible to predict how the Presidential Decree will prescribe the upper limit or scope of the value of financial or other advantages or amount of honorarium that are acceptable.

Given that the Delegation Provisions do not prescribe that the acceptable value of financial or other advantages or amount of honorarium be decided within the limit set forth in Section 1 or Section 2 of Article 8; and given that Article 8 Section 3 of the Solicitation Act prescribes that, "An honorarium for an outside lecture, etc. described in Article 10, or any of the following shall not constitute financial or other advantages, the receipt of which is prohibited by Section 1 or Section 2," it is possible to interpret that the value to be prescribed under Presidential Decree as per the delegation of the Delegation Provisions may be decided regardless of the limits set forth in Section1 or Section 2 of Article 8.

The receipt of 'food and drink, congratulatory or condolence money, gifts, etc. offered for purposes of facilitating social intercourse, rituals, or aid' as prescribed under Article 8 Section 3 Item 2 of the Solicitation Act is merely part of the everyday social life of a public official as a member of society, and it is unclear whether the honorarium for a forum, seminar, public hearing, etc., which are classified as outside lectures under Article 10 Section 1, is connected to the duties of a public official. Therefore, it cannot be easily predicted that the value of acceptable financial or other advantages or amount of an honorarium for an outside lecture, not accepted as being related to duties, will be set within the limit of one million won by Presidential Decree as per the Delegation Provisions.

Therefore, the Delegation Provisions violate the rule against blanket delegation, and thus infringe upon the general freedom of action of the complainants.

Summary of Concurring Opinion of One Justice regarding the Majority Opinion on the Delegation Provisions

Even if Article 8 and Article 10 of the Solicitation Act are insufficient to predict that the value of financial or other advantages or the upper limit of honoraria to be decided by Presidential Decree will be lower than one million won, the Public Service Ethics Act, which applies to public officials; the Code of Conduct for Public Officials enacted under Article 8 of the 'Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission'; the 'Guideline on the Code of Conduct for Public Officials'; the 'Work Manual on the Code of Conduct for Public Officials'; 'Measures for Institutional Improvements regarding Outside Lectures by Public Officials' under Article 27 of the 'Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission' and the 'Code of Ethics for Private Kindergartens' applicable to private school employees and journalists; the 'Rules on Disciplinary Action on Educational Officials'; the 'Measures on the Eradication of Illegal Donations and Bribes' enforced by the Seoul Office of Education; and the Code of Ethics for Journalists, prescribe the value of financial or other advantages or upper limits on honoraria for outside lectures acceptable by public officials, as well as guidelines on the receipt of financial or other advantages that public officials should comply with. Public officials are fully aware of such rules and regulations, which have been in force for a considerable period. Therefore, it can be predicted that the Presidential Decree will decide the value of acceptable financial or other advantages or the upper limit on honoraria for outside lectures within a scope that does not harm the integrity of public institutions under the Solicitation Act, based on the aforementioned laws and regulations and widely accepted social customs. Thus, the Delegation Provisions do not violate the rule against blanket delegation.

Summary of Dissenting Opinion of Four Justices on Article 22 Section 1 Item 2 of the Penalty Provisions

Even if it is necessary to punish a public official who has become aware that his or her spouse received financial or other advantages but fails to report such conduct (hereinafter referred to as "failure to report"), it is hard to say that the culpability, nature of the crime, possibility of criticism and liability for action is equal to cases in which public officials directly received financial or other advantages. Even so, Article 22 Section 1 Item 2 of the Penalty Provisions (hereinafter referred to as "Penalty Provision on the Failure to Report") prescribes equal statutory sentences for public officials' failure to report and the direct receipt of financial or other advantages. This violates the principle of proportionality between liability and punishment.

Aside from the crime of failing to inform the authority prescribed in Article 10 of the National Security Act, such crimes are not generally punished under the criminal justice system in Korea. Furthermore, while the actual offender is punished severely for the crime of failing to inform under the National Security Act, the Penalty Provision on the Failure to Report punishes the person (i.e. public official, etc.) who fails to report after becoming aware of the conduct of the actual offender, while the actual offender is not punished in any way; such cases are all the more uncommon. The Penalty Provision on the Failure to Report, by punishing only the act of failing to report when made aware of the conduct of the actual offender, who is exempt from punishment, constitutes an extremely uncommon form of legislation by the standards of Korea's criminal justice system, and imposes a punishment that does not correspond to the level of liability. Therefore, this constitutes excessive legislation which lacks proportionality under the criminal justice system.

Such an unprecedented form of legislation has led to the unreasonable, indefinite extension of the five-year limitation for prosecution of the Penalty Provision on the Failure to Report. If a spouse, the person who

directly received the financial or other advantages, is punished, then the limitation of prosecution for that Penalty Provision would be five years since the receipt. However, since the spouse's act of receiving financial or other advantages is not punished, if the public official fails to report that his or her spouse engaged in such an act more than five years after the act took place, then the five-year limitation for prosecution would still begin at any time the public official becomes aware of the spouse's act of receiving financial or other advantages.

The clearest and most effective way of blocking the channels through which financial or other advantages can be received indirectly through a spouse, is to directly punish the public official's spouse for receiving unacceptable financial or other advantages. This is because a violation of such penal statute by the spouse of a public official, by receiving financial or other advantages 'in connection with the duties of a public official,' is far from a minor offence in terms of the nature of the crime, culpability and liability. Furthermore, mitigating or exempting the sentence imposed on the spouse when the public official concerned reports the act upon becoming aware of it will fully satisfy the purpose of shutting off the indirect channel through which financial or other advantages can be received through a spouse.

Therefore, the Penalty Provision on the Failure to Report runs contrary to the principle of proportionality between punishment and liability, and does not strike a balance under the criminal justice system, thus infringing upon the complainants' general freedom of action.

17. Case on the Involuntary Hospitalization of Mentally Ill Patients

[2014Hun-Ka9, September 29, 2016]

In this case, the Constitutional Court held that Sections 1 and 2 of Article 24 of the Mental Health Act (amended by Act No. 11005 on August 4, 2011), which allow for the involuntary hospitalization of a mentally ill person with the consent of two persons responsible for protecting him or her and a diagnosis by one neuropsychiatrist, violate the rule against excessive restriction and thus infringe upon physical freedom. The Constitutional Court ruled that these provisions do not conform to the Constitution while ordering the continued application of the provisions until an amendment is made.

Background of the Case

(1) Article 24 of the Mental Health Act prescribes 'involuntary hospitalization,' where two persons responsible for protecting a mentally ill person give consent, and a neuropsychiatrist determines that hospitalization or admission (hereinafter referred to as "hospitalization") is necessary, thus enabling the mentally ill person to be forcefully hospitalized in a mental medical institution or a mental health sanatorium (hereinafter referred to as "mental medical institution"). The involuntary hospitalization system was first legislated by Act No. 5133 on December 30, 1995, through Article 25 of the former Mental Health Act which prescribed that with the consent of one person responsible for protecting a mentally ill person, and a diagnosis by a neuropsychiatrist stating that hospitalization is necessary, the mentally ill person in question can be hospitalized against his or her will in a mental medical institution. Aside from the amendment by Act No. 8939 on March 21, 2008, of Article 24 of the former Mental Health Act, which changed the requirement to consent by two persons responsible for protecting a mentally ill person, the legislation has remained substantially the same.

(2) The requesting petitioner, on November 4, 2013, was hospitalized in Hwaseong Green Hospital, a mental medical institution located in Hwaseong City, with the consent of her two children, who were responsible for her protection, and the diagnosis by a neuropsychiatrist approving her hospitalization. Claiming that she was forcefully hospitalized despite having merely been suffering from menopausal depression at the time of hospitalization, not a mental illness requiring treatment through hospitalization at a mental medical institution, and despite posing no harm to her own health and safety or the safety of others, the requesting petitioner filed a petition for habeas corpus under the Habeas Corpus Act with the Seoul Central District Court.

(3) While the aforementioned habeas corpus petition was pending, on February 3, 2014, the requesting petitioner filed for a review of the constitutionality of Article 24 of the Mental Health Act, which enabled the hospitalization of a mentally ill person with the consent of two persons responsible for protecting him or her and a diagnosis by one neuropsychiatrist, claiming that it infringed upon the physical freedom of the requesting petitioner. The Seoul Central District Court, which was the original trial court, accepted the above petition on May 14, 2014, and requested a constitutional review of this case regarding Sections 1 and 2 of Article 24 of the Mental Health Act.

(4) The Constitutional Court proceeded with oral arguments, open to the public, on April 16, 2016, for the constitutional review of this case, and announced its decision on September 29, 2016.

Subject Matter of Review

The subject matter of this case is whether Sections 1 and 2 of Article 24 of the Mental Health Act (amended by Act No. 11005 on August 4, 2011) violate the Constitution. The Instant Provisions read as follows:

Provisions at Issue

Mental Health Act (amended by Act No. 11005 on August 4, 2011)

Article 24 (Hospitalization by Person Responsible for Protection)

(1) The director of a mental medical institution, etc. may, limited to cases where a neuropsychiatrist decides that hospitalization, etc. is necessary with the consent of two persons responsible for the protection of a mentally ill person (with the consent of one person in cases where one person is responsible for providing protection), hospitalize the concerned mentally ill person, and shall, at the time of his or her hospitalization, receive a written consent of hospitalization, etc. and a document from the relevant person responsible for protection verifying that he or she is such person, prescribed by Ordinance of the Ministry of Health, Welfare and Family Affairs.

(2) When a neuropsychiatrist has diagnosed that a mentally ill person needs to be hospitalized, the former shall attach a written recommendation of hospitalization, etc. stating his or her opinion of decision that the mentally ill person concerned falls under cases prescribed in any of the following subparagraphs, to the written consent of hospitalization, etc. under Section 1:

1. Cases where a patient suffers from mental illness that needs, in the degree and nature, medical treatment, such as hospitalization, and care etc., in a mental medical institution, etc.;
2. Cases where hospitalization, etc. of a patient is necessary for the health or safety of the patient himself or herself or for the safety of others.

Summary of the Decision

(1) The Instant Provisions serve a legitimate purpose, for they aim to administer swift and appropriate treatment to mentally ill persons, and to protect the safety of the mentally ill person and of the society. They also provide an appropriate means, for the involuntary hospitalization in a

mental medical institution and subsequent treatment of a mentally ill person, requiring the consent of two persons responsible for protecting him or her and a diagnosis by one neuropsychologist, can contribute to a certain extent to achieving the legislative purpose of the provisions.

Involuntary hospitalization restricts the physical freedom of a mentally ill person to a level on par with bodily confinement, which means that the process should minimize depriving physical freedom, prevent any chance of the system being misused or abused, and should not be used as a means to isolate or exclude mentally ill persons from society against their will. However, the involuntary hospitalization system currently in force does not provide specific criteria as to what types of mental illnesses require hospitalized treatment and care; it does not sufficiently prevent the conflict of interests between those responsible for protection and mentally ill persons, while simultaneously requiring the consent of those two responsible persons for involuntary hospitalization; it entrusts a single neuropsychiatrist to determine whether hospitalization is necessary, thus leaving room for the possibility of him or her making an arbitrary decision or abusing authority; the system is in greater danger of being abused if the neuropsychiatrist colludes with the two persons responsible for protecting the mentally ill person or if the neuropsychiatrist abets and tolerates any questionable action; there are frequent cases in which private emergency transfer services engage in illegally transferring, confining or assaulting mentally ill persons; the initial term for involuntary hospitalization is set at six months, which is not only long-term but can also be continuously extended and therefore creates concerns that involuntary hospitalization may be used for the purpose of isolation rather than treatment; there are no procedures for protecting the rights of the mentally ill person in the process of involuntary hospitalization; and it is hard to say that deliberation by the Basic Mental Health Deliberative Committee or a habeas corpus petition under the Habeas Corpus Act provides sufficient protection against illegal or unjustified involuntary hospitalization. In light of these facts, the Instant Provisions violate the rule of minimum restriction.

We accept that the Instant Provisions aim to provide swift and appropriate treatment for mentally ill persons, and seek the public interest of ensuring the safety of the mentally ill person and of the society. However, they also impose excessive restrictions on fundamental rights by failing to provide appropriate measures that can minimize the infringement of the physical freedom of mentally ill persons. Thus, the Instant Provisions do not satisfy the balance of interests.

Therefore, the Instant Provisions deprive physical freedom by violating the rule against excessive restriction.

(2) A declaration of the simple unconstitutionality of the Instant Provisions would remove the legal basis for involuntary hospitalization, and would thus create a vacuum in law, making it impossible to proceed with involuntary hospitalization even where deemed necessary. Therefore, it is advisable that the Court deliver a decision of nonconformity to the Constitution, but order that the provisions are applied until they are amended.

18. Case on Accidents that Occur While Commuting to or from Work

[2014Hun-Ba254, September 29, 2016]

In this case, the Constitutional Court held that Article 37 Section 1 Item 1 Sub-Item (c) of the Industrial Accident Compensation Insurance Act, which only acknowledges injuries, etc. from accidents that occur while commuting to or from work under the control and management of his or her employer as occupational accidents, violates the Constitution.

Background of the Case

(1) The petitioner, who had been working as an electrician at an apartment superintendent's office, was bicycling home from work on November 11, 2011, when he fell off and got his hand caught under the rear wheel of a bus, and broke his index finger and middle finger. The petitioner applied to the Korea Workers' Compensation and Welfare Service for the medical care benefits prescribed by the Industrial Accident Compensation Insurance Act, but the Korea Workers' Compensation and Welfare Service declined to provide medical care benefits on December 14, 2011, citing that the injury sustained by the petitioner did not constitute an occupational accident.

(2) The petitioner filed a lawsuit against the Korea Workers' Compensation and Welfare Service requesting that this disposition be revoked. While this lawsuit was pending, the petitioner filed a motion requesting a review of the constitutionality of Article 37 Section 1 Item 1 Sub-Item (c) of the Industrial Accident Compensation Insurance Act, which served as the grounds for the above disposition. Upon the dismissal of this motion, the petitioner filed a constitutional complaint claiming that Article 37 Section 1 Item 1 Sub-Item (c) of the Industrial Accident Compensation Insurance Act and Article 29 of the Enforcement Decree of the Industrial Accident Compensation Insurance Act violate

the Constitution.

Subject Matter of Review

The subject matter of this case is whether Article 37 Section 1 Item 1 Sub-Item (c) of the Industrial Accident Compensation Insurance Act (wholly amended by Act No. 8694 on December 14, 2007) and Article 29 of the Enforcement Decree of the Industrial Accident Compensation Insurance Act (wholly amended by Presidential Decree No. 20875 on June 25, 2008) violate the Constitution. The Provisions at Issue read as follows:

Provisions at Issue

Industrial Accident Compensation Insurance Act (wholly amended by Act No. 8694 on December 14, 2007)

Article 37 (Standards for Recognition of Occupational Accidents)

(1) If a worker suffers any injury, disease or disability or dies due to any of the following causes, it shall be deemed an occupational accident. *Provided*, that this shall not apply where there is no proximate causal relationship between his or her duties and the accident.

1. Accident on duty
   (c) Any accident that occurs while he or she commutes to or from work using a transportation means provided by the employer concerned or other similar means under the control and management of his or her employer.

Enforcement Decree of the Industrial Accident Compensation Insurance Act (wholly amended by Presidential Decree No. 20875 on June 25, 2008)

Article 29 (Accidents During Commute to or from Work)

If an accident that happens while a worker is commuting to or from work meets each of the following conditions, it shall be deemed an

accident on duty under Article 37 Section 1 Item 1 Sub-Item (c) of the Act.

1. The accident should happen while the worker is using the means of transportation which is provided by the employer for the worker's commute to and from work or can be regarded as being provided by the employer;
2. The worker should not have the entire and exclusive responsibility to manage or use the means of transportation used for his or her commute to and from work.

Summary of the Decision

1. Whether the Request for Adjudication on the Constitutionality Regarding Article 29 of the Enforcement Decree of the Industrial Accident Compensation Insurance Act is Justiciable

A presidential decree, not serving as grounds for a trial, cannot become the subject of a constitutional complaint under Article 68 Section 2 of the Constitutional Court Act. The provision concerning Article 29 of the Enforcement Decree of the Industrial Accident Compensation Insurance Act in the request for adjudication in this case concerns a presidential decree which, under Article 68 Section 2 of the Constitutional Court Act, cannot become the subject of a constitutional complaint, and is therefore nonjusticiable.

2. Whether Article 37 Section 1 Item 1 Sub-Item (c) of the Industrial Accident Compensation Insurance Act (hereinafter referred to as the "Instant Provision") Violates the Principle of Equality

A worker who is a policyholder of industrial accident compensation insurance (hereinafter referred to as "industrial accident insurance") and commutes to and from work on foot or using his or her own means of transportation or public transportation (hereinafter referred to as a

"worker without transportation benefits") is as much a worker as is one who is a policyholder of industrial accident insurance and commutes to and from work using a means of transportation provided by his or her employer or other similar means (hereinafter referred to as a "worker with transportation benefits"). Yet when a worker without transportation benefits, while commuting to and from work using a conventional route and means not under the control and management of his or her employer, is involved in an accident (hereinafter referred to as an "accident on a conventional commute"), such accident on a conventional commute is not accepted as an occupational accident, which constitutes discriminatory treatment.

The purpose of the industrial accident insurance system is in part to transfer the business owner's strict liability of compensation; but in the present day, the purpose of protecting the livelihoods of the victim and his or her family from industrial accidents, is growing more important. A worker's act of commuting to and from work is an act that precedes performance at work, and the two are closely related and inseparable. The act of commuting is in fact bound to the working hours and venue of employment decided by the business owner. The Supreme Court acknowledges accidents that occur during business trips as occupational accidents that have occurred under the control and management of the business owner. Since business trips allow the worker to select the transportation means and route, they are in fact no different from the act of conventional commuting. Therefore, accepting an accident on a conventional commute as an occupational accident so as to protect the worker conforms to the purpose of the industrial accident insurance, which is to guarantee the livelihoods of employees.

Workers without transportation benefits, who have not been provided with vehicles for commuting or other similar means of transportation due to the insufficient size or financial conditions of the workplace, or the unilateral decision or personal matters of the business owner, cannot receive compensation for accidents that occur while commuting, despite being policyholders of industrial accident insurance. There are no

reasonable grounds that can justify such discrimination.

Some problems that may emerge by acknowledging an accident on a conventional commute as an occupational accident under the Industrial Accident Compensation Insurance Act include exacerbating the financial conditions of industrial accident insurances, or increasing insurance premiums paid by the business owner. Such problems can be solved somewhat by limiting the coverage of compensation or making workers partly responsible for paying the premiums. The reality today is that workers without transportation benefits who have become the victim of an accident on a conventional commute do not receive sufficient remedies, even when the perpetrator is held liable. Thus, the mental or physical damage or economic disadvantages sustained by workers without transportation benefits and their families on account of the Instant Provision are extremely grave.

Therefore, the Instant Provision violates the principle of equality under the Constitution for arbitrary discrimination without just grounds against workers without transportation benefits.

3. Orders for Continued Application Following a Decision of Nonconformity

If the Constitutional Court declares the simple unconstitutionality of the Instant Provision, the minimal legal basis that acknowledges an accident on a conventional commute as an occupational accident will be forfeited, which may create a legal vacuum and disorder. Thus, the Court rules that the Instant Provision does not conform to the Constitution, but orders that the provision is applied until it is amended by the legislature by December 31, 2017.

Summary of Dissenting Opinion of Three Justices

Under the Instant Provision, it is reasonable to exclude accidents that occur on a conventional commute which is not under the control and management of the business owner and which cannot be deemed part of

an occupational duty from the scope of occupational accidents, considering the purpose and nature of the industrial accident insurance and the legal principles of occupational accidents. A worker without transportation benefits may be disadvantaged by being unable to benefit from the Industrial Accident Compensation Insurance Act with regard to accidents that occur while commuting. However, such a disadvantage is an inevitable result caused by differences in the working conditions and welfare benefits of each business, not the result of any unconstitutional element of the Instant Provision itself.

It may be desirable to include accidents that occur on a conventional commute in the scope of occupational accidents, for protecting workers without transportation benefits. However, this is an issue to be resolved by the state incrementally through legislation, taking into account the financial conditions of industrial accident insurances, social consensus between business owners and workers, and the overall level of social security.

It has only been three years since the Constitutional Court ruled that the Instant Provision did not violate the Constitution. There does not seem to be any radical change in the constitutional reality that calls for the Instant Provision to be reconsidered in a constitutional adjudication for stricter review, nor does there seem to be any necessity for a new interpretation. Thus, it is unnecessary to hastily overturn a precedent regarding the Instant Provision.

Summary of Concurring Opinion of One Justice

There is no denying that in the modern industrial society, guaranteeing a worker's safety from the dangers of industrial accidents and survival has become an important part of the state's duties. Article 32 and Article 34 of the Constitution call for a higher level of protection for people whose 'minimum necessary material means required for a life worthy of human dignity' are being threatened by industrial accidents and for people closely involved with such circumstances, even if such entitlement

to social security is guaranteed by law under the reservation of possible limitations in national finance and social capacity. Thus, it is necessary to more thoroughly review the equality of entitlements to industrial accident insurance.

Meanwhile, when it comes to the entitlement of workers without transportation benefits to industrial accident insurance for accidents on a conventional commute, the formation of rights under specific legislation has merely been reserved, and the workers without transportation benefits maintain a status under public law that potentially acknowledges the nature of property rights. Therefore, the equality of discrimination between workers with and without transportation benefits in this case should be reviewed more thoroughly, taking such potential nature of property rights into account.

Stronger responsibility and higher consideration will be required on the part of the state and employers with regard to accidents that occur while commuting (nature of the protected area), while payments to workers without transportation benefits who have become the victim of such accidents take on an element of urgency (urgency of protection). However, the Instant Provision does not provide sufficient measures that appropriately and effectively protect workers without transportation benefits, and run against the essence of the industrial accident insurance as a social security system (appropriate level of protection). Thus, there is no justifiable and sufficient reason acceptable under the Constitution for the Instant Provision to discriminate between workers with and without transportation benefits.

19. Case on the Repeal of the Korean Bar Examination Act

[2012Hun-Ma1002, 2013Hun-Ma249, 2015Hun-Ma873, 2016Hun-Ma267 (consolidated), September 29, 2016]

In this case, the Constitutional Court held that Article 2 of the Addenda to the National Bar Examination Act, which prescribes that the Korean Bar Examination Act be repealed, does not infringe upon the complainants' freedom of occupation.

Background of the Case

The complainants, who are attending colleges of law or preparing for the Korean Bar Examination and aim to become legal professionals by taking the Korean Bar Examination, filed constitutional complaints on the grounds that Article 1, Article 2 and Article 4 Section 1 of the Addenda to the National Bar Examination Act, which prescribes that the Korean Bar Examination Act be repealed as of December 31, 2017, infringe upon the complainants' freedom of occupation, right to hold public office, and right to equality.

Subject Matter of Review

The subject matter of this case is whether Article 2 of the Addenda to the National Bar Examination Act (Act No. 9747, May 28, 2009) infringes upon the fundamental rights of the complainants. The Instant Provision reads as follows:

Provision at Issue

Addenda to the National Bar Examination Act (Act No. 9747, May 28, 2009)

Article 2 (Repeal of Other Acts)

The Korean Bar Examination Act shall be repealed.

Summary of the Decision

The legislative purpose of the Instant Provision is to stabilize legal education and train legal professionals with expertise and global competitiveness, so as to provide high-quality legal services and enable the efficient allocation of the nation's workforce. Thus, it serves a legitimate purpose. In order to achieve this legislative purpose, it has been decided that legal professionals will be 'trained through education' instead of 'selected by examinations,' and that the Korean Bar Examination will be gradually repealed after providing persons who were preparing for this test with the opportunity to take it for a certain period. This is an appropriate means to achieve the aforementioned legislative purpose.

The Constitutional Court has already held (2009Hun-Ma608, etc., April 24, 2012) that administering the Korean Bar Examination alongside the National Bar Examination will make it difficult to achieve the legislative purpose of stabilizing legal education, and that the Act on the Establishment and Management of Professional Law Schools provides measures for people who need financial aid. If the Korean Bar Examination is maintained along with the professional law school system and a large number of applicants pass, the purpose of adopting the professional law school system will be greatly undermined, while there would be no reason to maintain the Korean Bar Examination if only a small number of people pass.

From the viewpoint of the people who intended to prepare for the Korean Bar Examination, the reliance interest that it will be maintained has been altered or has ceased to exist after the Instant Provision was enacted, declaring the repeal of the Korean Bar Examination. In the course of repealing the Korean Bar Examination and adopting the professional law school system, the legislator has set a grace period of eight years to protect the confidence of those who were preparing for the exam. In fact, maintaining the Korean Bar Examination would actually undermine the confidence of those who have entered or are

preparing for admission to professional law school assuming that the Korean Bar Examination will be repealed, or educational institutions authorized for and operating professional law schools.

Some universities that run professional law schools have been criticized for the unfairness of their admission processes or substandard curricula. At this stage, however, collective efforts are required to help these professional law schools become established, in accordance with the purpose of their foundation. It is hard to say that professional law schools are currently being run in a manner that infringes upon the fundamental rights of the complainants. Judging by the above, the restriction of the freedom of occupation imposed by the Instant Provision does not run contrary to the rule of minimum restriction.

Moreover, the public interest that the Instant Provision seeks by training legal professionals through education, under the precondition that the Korean Bar Examination is repealed and the professional law school system is adopted, outweighs the disadvantages imposed on the complainants by the Instant Provision, thus satisfying the balance of interests.

Therefore, the Instant Provision does not infringe upon the complainants' freedom of occupation.

Summary of Dissenting Opinion of One Justice

1. Whether the Freedom of Occupation Has Been Infringed Upon

The Korean Bar Examination system fully satisfies the goal of 'training legal professionals through education,' since in conjunction with the Judicial Research and Training Institute it provides the best education, combining theory and practice. Therefore, the legislative purpose of the Instant Provision is merely a superficial pretext to justify repealing the Korean Bar Examination or adopting the professional law school system. There are no grounds to prove that legal professionals trained under the professional law school system are more competitive

and superior to those selected through the Korean Bar Examination. The professional law school system also falls short of the Korean Bar Examination in terms of the diversity of social background or values. Therefore, the appropriateness of means is not satisfied.

Professional law schools inevitably adopt a high-cost structure, and there are fundamental limitations in solving the issue of high tuition fees through special admissions or scholarships. They have also lost credibility in terms of fairness, on account of their unfair admission procedures, poor management of academic affairs, etc. The social problem of 'jobless people preparing for the Korean Bar Examination' has merely turned into a problem of 'jobless people preparing for law school' or 'jobless people preparing for the National Bar Examination.' Meanwhile, the reality is that the three-year curriculum is overwhelmingly short for training legal professionals learned in theory and practice, and is failing to produce talented, competitive legal professionals.

More moderate measures are available for solving the problems related to the Korean Bar Examination, such as limiting the qualifications required to take the exam or the number of times one can apply, or raising the acceptance rate. Furthermore, not only does maintaining the Korean Bar Examination present an effective solution to the side effects incurred by the exclusivity of professional law schools in terms of training legal professionals, but it also encourages friendly competition, which would be beneficial to the public who are on the receiving end of legal services. The repeal of the Korean Bar Examination does not simply stop at infringing upon the freedom of occupation of those who wish to become legal professionals, but infringes severely upon public interests by deepening distrust and enmity between classes and undermining social integration, thus leading to a loss of balance of interests. Therefore, the Instant Provision infringes upon the complainants' freedom of occupation.

2. Whether the Right to Hold Public Office Has Been Infringed Upon

According to the Court Organization Act and the Prosecutors' Office Act, those without a lawyer's license cannot be appointed as judges or prosecutors, meaning that those without the financial means to attend professional law school cannot acquire a lawyer's license, and thus lose the opportunity to be appointed as a judge or a prosecutor. Thus, the right to hold public office is infringed upon.

3. Whether the Right to Equality Has Been Infringed Upon

The Instant Provision imposes a grave restriction on the freedom of occupation, and thus the principle of proportionality should be applied to the purpose and means of differential treatment under the strict scrutiny standard. The Instant Provision lacks proportionality between its legislative purpose and means, and therefore infringes upon the right to equality of the complainants, who have no financial means to attend professional law school.

Summary of Dissenting Opinion of Three Justices

1. Whether the Freedom of Occupation Has Been Infringed Upon

The Korean Bar Examination and the professional law school system are not incompatible, and it cannot be said that one is exceptionally better than the other, since each has its flaws and merits as a system for training legal professionals. In fact, if the two systems are left to compete by promoting their merits and find ways to remedy their flaws, talented people from diverse social backgrounds will be able to become legal professionals and help promote the rights and interests of the public. The professional law school system currently in force, which prevents those who have not attended professional law school from becoming legal professionals once the Korean Bar Examination is

repealed, goes beyond the limits of legislative discretion by eliminating the many merits of the Korean Bar Examination by repealing it, despite there being more moderate measures that can solve the flaws of this system.

The disadvantage imposed by repealing the Korean Bar Examination upon those who have no financial means to attend professional law school is as grave as the public interests it seeks. Therefore, the Instant Provision infringes upon the complainants' freedom of occupation.

2. Whether the Right to Hold Public Office Has Been Infringed Upon

The Court Organization Act and the Prosecutors' Office Act do require a lawyer's license for one to be appointed as a judge or a prosecutor, but such appointments are in line with the requirements and procedures set forth by the above Acts, and the connection to the Korean Bar Examination is merely incidental. Thus, the Instant Provision does not infringe upon the right to hold public office of the complainants.

3. Whether the Right to Equality Has Been Infringed Upon

The Korean Bar Examination has been repealed due to the Instant Provision, and as a result, professional law schools have become the only pathway to becoming a legal professional, which means that this qualification entitles privileged treatment based upon financial background. This cannot be merely considered as *de facto* discrimination, since it has occurred on account of a change in the normative state in the form of the repeal of the Korean Bar Examination. Instead of giving a head start for the financially vulnerable, repealing the Korean Bar Examination eliminates their chances of becoming legal professionals and consequently undermines formal equality, thus infringing upon the right to equality of the complainants.

20. Case on the Unconstitutionality of the Enforcement Decree of the Act on the Promotion of Newspapers, Etc. Prescribing the Employment Requirements for an Online Newspaper

[2015Hun-Ma1206, 2016Hun-Ma277 (consolidated), October 27, 2016]

In this case, the Constitutional Court held that Article 2 Section 1 Item 1 Sub-Item (a), Sub-Items (c) and (d) of Article 4 Section 2 Item 3, and Article 2 of the Addenda of the 'Enforcement Decree of the Act on the Promotion of Newspapers, Etc.', which prescribe that online newspapers must have at least five regular employees consisting of reporters and editors; and that they must submit documents to verify compliance therewith, infringe upon the freedom of press of the complainants, who are online newspaper enterprisers, and thus violate the Constitution. The Court also held that the provision concerning online newspapers in Item 2 of Article 2 and Article 9 Section 1 of the 'Act on the Promotion of Newspapers, Etc.' which prescribe the definition and require registration of online newspapers, do not violate the Constitution.

Background of the Case

(1) Complainants 1 to 9 are online newspaper corporations. Complainants 10 to 18 are private owners of online newspapers. Complainant 19 is an online newspaper reporters' association. Complainants 20 to 52 are executives or reporters working at online newspapers. Complainants 53 to 62 are online newspaper readers, and Complainant 63 and Complainant ○○○ are preparing to launch online newspapers.

(2) The complainants filed a constitutional complaint, claiming that Item 2 of Article 2 and Article 9 Section 1 of the 'Act on the Promotion of Newspapers, Etc.', and Article 2 Section 1 Item 1 Sub-Item (a), Sub-Items (c) and (d) of Article 4 Section 2 Item 3 and Article

2 of the Addenda of the Enforcement Decree of the Act on the Promotion of Newspapers, Etc. infringe upon the fundamental rights of the complainants.

Subject Matter of Review

The subject matter of review in this case is whether Item 2 of Article 2 of the 'Act on the Promotion of Newspapers, Etc.' (wholly amended by Act No. 9785 on July 31, 2009) (hereinafter referred to as the "Definition Provision"), the provision concerning online newspapers in Article 9 Section 1 of the former 'Act on the Promotion of Newspapers, Etc.' (wholly amended by Act No. 9785 on July 31, 2009, and before amendment by Act No. 13968 on February 3, 2016; hereinafter collectively referred to as the "Newspaper Act" regardless of its history of amendment) (hereinafter referred to as the "Registration Provision"), and Article 2 Section 1 Item 1 Sub-Item (a) (hereinafter referred to as the "Employment Provision"), Sub-Items (c) and (d) of Article 4 Section 2 Item 3 (hereinafter referred to as the "Verification Provisions") and Article 2 of the Addenda (Presidential Decree No. 26626, November 11, 2015) (hereinafter referred to as the "Addenda Provision") of the 'Enforcement Decree of the Act on the Promotion of Newspapers, Etc.' (amended by Presidential Decree No. 26626 on November 11, 2015; hereinafter referred to as the "Enforcement Decree of the Newspaper Act") (hereinafter collectively referred to as the "Instant Provisions"), infringe upon the fundamental rights of the complainants and are thus unconstitutional.

Provisions at Issue

Act on the Promotion of Newspapers, Etc. (wholly amended by Act No. 9785, July 31, 2009)

Article 2 (Definitions)

The terms used in this Act shall be defined as follows:

2. The term "online newspaper" means an electronic publication published in order to spread news, commentaries, public opinion, information, etc. regarding politics, economics, society, culture, etc. by using equipment capable of processing information, such as computers, and communications networks, which meet the standards prescribed by Presidential Decree, such as the independent production of news articles and continuous publication;

Former Act on the Promotion of Newspapers, Etc. (wholly amended by Act No. 9785, July 31, 2009, and before amendment by Act No. 13968, February 3, 2016)

Article 9 (Registration)

(1) A person who intends to publish a newspaper, or to electronically publish an online newspaper or online news services shall have the following matters registered with the Special Metropolitan City Mayor, Metropolitan City Mayor, *Do* Governor or Governor of a Special Self-Governing Province (hereinafter referred to as "Mayor/*Do* Governor") having jurisdiction over the address of the principal office, as prescribed by Presidential Decree. The same shall also apply to the modification of registered matters: *Provided*, That where the State or local governments publish or manage a newspaper, etc., or a juristic person, organization or institution publishes a newspaper, etc. in order to distribute them to their affiliated personnel, and in cases prescribed by Presidential Decree, this shall not apply:

1. Name of newspaper or online newspaper (limited to newspapers or online newspapers);
2. Trade name and name of online news service (limited to online news services);
3. Kind and frequency of publication (limited to newspapers);
4. Name, date of birth and address (where such newspaper enterpriser or printer is a juristic person or organization, the name and address of the principal office thereof, and the name, date of birth and

address of the representative thereof) of the newspaper enterpriser and the publisher, editor (excluding cases in which a foreign newspaper is printed and distributed in Korea as it is without any modification of details; hereinafter the same shall apply) and printer of newspaper;

5. Name, date of birth and address of the online newspaper enterpriser and the publisher and editor of online newspaper (where such online newspaper enterpriser is a juristic person or organization, the name and address of the principal office thereof, and the name, date of birth and address of the representative thereof);
6. Name, date of birth and address of online news service provider and news article layout manager (where such online news service enterpriser is a juristic person or organization, the name and address of the principal office thereof, and the name, date of birth and address of the representative thereof);
7. Location of publishing office;
8. The objectives and details of publication;
9. Main target of circulation and circulation district (limited to newspapers);
10. Division of publication (with or without compensation);
11. Matters concerning electronic publication, such as web site addresses, etc.

Enforcement Decree of the Act on the Promotion of Newspapers, Etc. (amended by Presidential Decree No. 26626, November 11, 2015)

Article 2 (Online Newspaper)

(1) The part "standards prescribed by Presidential Decree, such as the independent production of news articles and continuous publication" of Item 2 of Article 2 of the Act on the Promotion of Newspapers, Etc. (hereinafter referred to as the "Act") refers to the standards set forth in the following items:

1. Requirements for the independent production of news articles are

as follows, and should all be satisfied:

(a) Employ regular workforce consisting of five or more reporters or editors, including three or more reporters.

Article 4 (Registration)

(2) The documents according to the following classification (including electronic documents) shall be attached to the application form submitted as per Section 1:

3. Online newspaper

(c) Documents that confirm that reporters are insured by the National Pension, the National Health Insurance or Industrial Accident Compensation Insurance;

(d) Documents that confirm that editors are insured by the National Pension, the National Health Insurance or Industrial Accident Compensation Insurance.

Addenda (Presidential Decree No. 26626, November 11, 2015)

Article 2 (Transitional Measures Concerning Standards for Online Newspapers)

Any online newspaper enterpriser who has registered under Article 9 Section 1 of the Act before this Presidential Decree was enforced, and who falls short of the standards set forth in the amended provision of Article 2 Section 1 Item 1 Sub-Item (a), must meet the standards set forth in the amended provision of Article 2 Section 1 Item 1 Sub-Item (a) within one year of the enforcement of this Presidential Decree.

Summary of the Decision

1. It is clear that ‘online newspapers’ indicate newspapers that are published and distributed via the internet instead of on paper, and the Definition Provision explicitly clarifies the independent production of news articles and continuous publication as the basic requirements of an online newspaper. It is also necessary to delegate the specific standards

of publishing an online newspaper to Presidential Decree, so as to regulate online newspapers flexibly, in line with changing times and technology. Meanwhile, the Newspaper Act, while guaranteeing the independence and role of online newspapers, also prescribes regulations on social responsibility, and online newspapers, unlike printed newspapers, do not require standards for physical facilities. Given this, it can be expected that the requirements for online newspapers prescribed by Presidential Decree will be requirements for the personnel of online newspapers. Therefore, the Definition Provision does not violate the rule of clarity and the principle of the rule against blanket delegation.

2. By definition, 'registration' means to enter a certain legal fact or legal relationship in a register managed by a specific registration agency; the meaning of this definition is clear. Furthermore, we find it necessary to regulate online newspapers in a flexible manner, in line with swift technological changes and developments, while given the text of Item 2 of Article 2 of the Newspaper Act, it is fully predictable that the Presidential Decree will include regulations on documents that verify whether online newspapers satisfy the requirements of the "independent production of news articles and continuous publication" when they apply for registration. Therefore, the Registration Provision does not violate the rule of clarity and the principle of the rule against blanket delegation.

The Registration Provision requires limited registration of peripheral and objective facts of an online newspaper, such as the name of the newspaper, and the personal information of the publisher and editor. The Employment Provision and Verification Provisions prescribe that online newspapers hire at least five reporters and editors in total, and that they submit documents verifying such facts when they register. These provisions aim to regulate and verify the human resource requirements of online newspapers, and it is evident that they do not intend to control the newspapers ahead of publication by reviewing and limiting their content. Therefore, the Registration Provision does not violate the principle of the prohibition of advance permit.

3. Freedom of press protects all activities that are essentially related to the function of the press, from the acquisition of information to spreading the news and opinions. In relation to this, the Employment Provision and Verification Provisions have the effect of restricting the publication of online newspapers, and therefore restrict the freedom of press.

The Employment Provision, by allowing only online newspapers equipped with reporting and editing capacity to register, aims to enhance the credibility and social responsibility of online newspapers as press, while the Verification Provision aims to objectively verify the number of employees working at the online newspaper. These provisions thus serve a legitimate purpose and provide appropriate means.

Although it may be necessary to regulate the harms incurred by the inaccurate reporting of online newspapers, the Newspaper Act and the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports (hereinafter referred to as the "Press Arbitration Act") provide sufficient measures that are less restrictive. If smaller online newspapers are excluded from the scope of the Newspaper Act due to the Employment Provision and the Verification Provisions, they will no longer be responsible for the obligations of a press organization under the Newspaper Act, and furthermore will be excluded from remedial procedures provided under the Press Arbitration Act. Not only this, but the representatives, executives, or employees of small online newspapers will not be included in the concept of public officials as defined by the 'Improper Solicitation and Graft Act,' which means they will be completely unaffected by the law that prevents, or provides remedies for, the harms that may be caused by the press activity of small online newspapers.

If online newspapers publish false or poor reports, or their reporting deviates from public order and social ethics, they will end up being rejected by readers and will have no choice but to shut down. Given the nature of the internet, readers will not stop at merely passively reading online newspapers, but will actively select, read, judge and respond to articles. We do not find the necessity to provide additional measures

reserved for online newspapers, when several legal measures already exist to prevent the harmful consequences that may arise from inaccurate reporting. In addition, there is no valid reason to protect the readers of online newspapers more strongly than readers of other media.

Furthermore, it cannot be concluded that the falling quality of online newspaper articles and the ensuing harms are caused by the lack of reporters and editors working at online newspapers. In fact, such harms derive from the distribution structure of online newspapers, which depends on the search results of major web portals. Therefore, a more fundamental solution to this issue would be to formulate measures that enable online newspapers to escape from their dependence on web portals, and find an independent distribution channel. Furthermore, taking into account the rapidly changing web environment and technological development, the diversification of media and demand for new or alternative media, forcing online newspapers to employ a regular workforce consisting of a certain number of reporters and editors is not absolutely necessary for improving the credibility of online newspapers.

While the Employment Provision and Verification Provisions can completely erase the chance for small online newspapers to function as press, the effect of the legislative purpose, which is to enhance the credibility of online newspapers, is questionable, meaning the balance of interests is not satisfied. Therefore, the Employment Provision and the Verification Provisions violate the rule against excessive restriction, and infringe upon the freedom of press of the complainants.

As long as the Employment Provision is unconstitutional, the Addenda Provision, which applies the Employment Provision to online newspaper enterprisers already registered, requires no further examination to prove that it violates the Constitution.

Summary of Dissenting Opinion of Two Justices on the Employment Provision, Verification Provisions and Addenda Provision

1. The freedom of press guarantees the basic methods of expression

and freedom of content of the press and publications, not the facilities required for objectifying the above or the activities of enterprisers that run press organizations. Rather than regulating the expressions or content of the media - in other words areas that are essentially related to the function of a newspaper - the Employment Provision and Verification Provisions simply regulate the external factors required to engage in press activities as an online newspaper. Furthermore, those that do not meet these external conditions can always engage in a format of press activities other than an online newspaper. Thus, the Employment Provision and Verification Provisions do not directly restrict the freedom of press.

Online newspapers that do not meet the employment criteria of at least five persons cannot register, and subsequently the complainants become unable to perform the job they have chosen (as a journalist) in the manner that they have determined (by publishing the news under the title of an online newspaper). Thus, the Employment Provision and Verification Provisions directly restrict the complainants' freedom to perform their occupational functions.

Therefore, the review of this case should center on whether the freedom to perform occupational functions, not the freedom of press, has been infringed.

2. Persons who wish to work as journalists can choose to be regulated by law while enjoying the various benefits prescribed by the Newspaper Act, as a registered online newspaper that has satisfied the personnel requirements; or by choosing not to register as an online newspaper, can give up the benefits enjoyed by a registered online newspaper and instead, engage in a similar job while being free of certain obligations. Therefore, it is hard to find that the complainants have been deprived of the right to choose the above just because two regular employees have been added to the workforce. Moreover, the Employment Provision and Verification Provisions are the minimum necessary measures required to guarantee the function of online newspapers. Although the reinforcement of the registration conditions may somewhat restrict the freedom to

perform occupational functions of journalists who fall short of the renewed requirements, these provisions are not unconstitutional to the extent that they must be invalidated for this reason. Therefore, the Employment Provision and Verification Provisions do not infringe upon the complainants' freedom to perform occupational functions by violating the rule against excessive restriction.

3. Compared to printed newspapers, online newspapers require relatively less investment in facilities and equipment, and are not limited by page space. Moreover, distribution costs are low, making it easier to write and publish articles, while all unspecified persons connected to the internet are potential readers, articles can be reproduced through blogs or social network services (SNS), and by being posted on SNS channels, articles can be continuously preserved and looked up even after they are removed; this all indicates that online newspapers have a much broader reach and more far-reaching power than printed ones. Given such characteristics, the restriction of personnel requirements for online newspapers, unlike printed newspapers, is a case for reasonable discrimination.

4. Online newspapers have an extremely wide reach; the legislative purpose of the amended Employment Provision would be overshadowed if it cannot be applied to the many online newspapers that are already registered; the number of registered online newspaper companies is rising sharply, but in tandem with the harms of inaccurate or sensational reporting, or harmful advertising; remedies provided under the Press Arbitration Act and the Newspaper Act are merely ex post facto measures, and thus do not serve as effective remedies for false reports by online newspapers, which have a wide reach; and the grace period of one year given to the complainants by the Addenda Provision cannot be deemed too short to address the circumstantial changes brought about by the amendment of the Enforcement Decree. In light of this, the Addenda Provision does not infringe upon the confidence of the complainants.

21. Case on the Obscene Exposure Provision in the Punishment of Minor Offenses Act

[2016Hun-Ka3, November 24, 2016]

In this case, the Constitutional Court held that Article 3 Section 1 Item 33 of the Punishment of Minor Offenses Act, which punishes 'any person who embarrasses or offends other people by excessively exposing his or her naked body or exposing any part of his or her body which ought to be hidden, in, or within the view of, a public place,' violates the rule of clarity of the principle of *nulla poena sine lege*.

Background of the Case

The Chief of Yangsan Police Station issued penalty notice to the defendant of this case on August 16, 2015, for the offense of 'an act of obscene exposure by taking off his top (upper clothing) to sunbathe in a park in front of an apartment.' The defendant failed to pay the penalty, whereupon the Chief of Yangsan Police Station filed for a summary trial at Ulsan District Court. The Court sentenced the defendant to a fine of 50,000 Korean won on September 14, 2015. The defendant filed for a formal trial at this Court on September 18, 2015, which is currently pending. On January 26, 2016, the requesting court, *sua sponte*, requested a constitutional review of Article 3 Section 1 Item 33 of the Punishment of Minor Offenses Act, claiming that it violates the rule of clarity of the principle of *nulla poena sine lege*.

Subject Matter of Review

The subject matter of this case is whether Article 3 Section 1 Item 33 of the Punishment of Minor Offenses Act (wholly amended by Act No. 11401 on March 21, 2012) violates the Constitution. The Instant Provision reads as follows:

Provision at Issue

Punishment of Minor Offenses Act (wholly amended by Act No. 11401 on March 21, 2012)

Article 3 (Categories of Minor Offenses)

(1) Any of the following persons shall be punished by a fine not exceeding one hundred thousand won, by misdemeanor imprisonment, or by a minor fine.

33. (Obscene Exposure) Any person who embarrasses or offends other people by excessively exposing his or her naked body or exposing any part of his or her body which ought to be hidden, in, or within the view of, a public place.

Summary of the Decision

The Instant Provision does not set forth specific criteria for what constitutes 'excessively exposing' a naked body, making it difficult to discern what would constitute such conduct. The meaning of 'any part of the body which ought to be hidden' is also vague. The part of the Instant Provision which reads, 'embarrasses or offends,' would naturally be interpreted differently depending on the person involved. Parts of the body that cause embarrassment or are offensive also differ depending on who they are exposed to. Therefore, it is difficult to define the meaning of 'excessively' and 'part ought to be hidden' through the phrase, 'embarrasses or offends.'

The purpose of the Instant Provision is to protect 'virtuous sexual morals and sexual culture.' It is, however, extremely vague as to what exactly such sexual morals and sexual culture are. Therefore, there is a limit to clarifying the meaning of the Instant Provision by taking into account its legislative purpose. Bodily exposure, which was prohibited in the past, is now accepted as part of a trend, and exposure that may cause slight embarrassment or be slightly offensive is accepted as a question of personal taste or individuality, or means to express ideas or

make statements.

The Supreme Court ruled, 'Even if there has been an exposure of the body, taking into account specific circumstances such as the time and date, venue, part exposed, manner and extent of exposure, and the motive and detailed account, if it is not an act that would stimulate sexual desire in the average person, causing sexual arousal and a normal level of sexual humiliation, and instead is merely an act that embarrasses or offends other people, then it does not constitute an obscene act as set forth in Article 245 of the Criminal Act, even if it conforms to the Instant Provision.' This decision, however, does not clarify the meaning of 'part ought to be hidden' or 'excessively.' In some cases, lower courts rule that conduct that does not involve the exposure of major body parts nonetheless constitutes an act under the Instant Provision. This may lead to punishing conduct that does not actually damage the legal interests of others.

Using legislative techniques, it is not difficult to clearly set forth the body parts that are prohibited from being exposed, so as to resolve the ambiguity of the Instant Provision. For instance, if it is necessary to prohibit the exposure of genitals by exhibitionists, or flashers, then the part that is prohibited from exposure can be specified as 'genitals.'

As shown above, the Instant Provision violates the rule of clarity of the principle of *nulla poena sine lege*.

Summary of Dissenting Opinion of Two Justices

The phrase 'excessively exposing' in the Instant Provision can be interpreted as 'an act of exposing the body that harms sexual morals or culture to an extent unacceptable by the average person according to social norms.' Examples include the act of exposing one's genitals in a park, or covering one's body with merely a coat and waiting until someone goes by to remove and open it and expose his or her naked body. Acceptable, inevitable exposure for a short period, such as exposing breasts for the purpose of breastfeeding, would not apply.

The phrase that reads ‘any part which ought to be hidden’ in the Instant Provision can be interpreted as parts that are normally hidden by clothes, considering the legislative purpose, amendment history and content of the Instant Provision. Given the structure of the Instant Provision, it can be deduced that such parts have the possibility of disturbing sound sexual morals or sexual culture should they be exposed, since they would be equivalent to a ‘naked body’ in such cases. Taking this into account, such parts can be specified as ‘parts that the average person would cover according to social norms, such as male and female genitalia, buttocks, or female breasts.’

Whether an excessive exposure of the body is ‘embarrassing or offensive’ should be judged from the perspective of the average person, and therefore, cannot vary depending on the interpretations of different people. It is highly likely that unacceptable acts of excessive exposure of the body, such as the exposure of genitals, will embarrass or offend other people. It is also possible to decide, specifically and comprehensively, what would constitute acts that are embarrassing or offensive. This is sufficient to deduce which bodily exposure would embarrass or offend others to an extent unacceptable according to sexual morals or sexual culture.

Specifying and listing parts of the body that are prohibited from being exposed, such as ‘genitals,’ is inappropriate in terms of achieving the legislative purpose of protecting ‘sound sexual morals or sexual culture.’ Acts of excessive exposure take on various forms and ways, and may or may not be deemed excessive depending on the society and culture. Thus, an open legislative structure is necessary for ensuring law enforcement that reflects propriety and soundness or timeliness.

As stated above, considering the text, legislative purpose and legislative history of the Instant Provision, the excessive exposure that it prohibits can be sufficiently comprehended as ‘an act which exposes the naked body or a part of the body that may harm the sexual morals or culture of the social norms of the times, such as male and female genitalia, buttocks or female breasts, to an extent unacceptable by the

average person in a public place in view of unspecified or many persons, and which embarrasses or offends other people.'

Therefore, the Instant Provision does not violate the rule of clarity of the principle of *nulla poena sine lege*.

22. Case on Use of Telephone and Computer Communications in Election Campaigns for Directors of Agricultural Cooperatives

[2015Hun-Ba62, November 24, 2016]

In this case, the Constitutional Court held that Article 50 Section 4 and Article 172 Section 2 Item 2 of the Agricultural Cooperatives Act, which prohibits using telephones (including text messages) or computer communications (including electronic mail) to appeal for support in campaigns for election as directors of regional agricultural cooperatives; and imposes criminal punishment on any person who violates this prohibition, infringe upon the freedom of association and freedom of expression, and thus violate the Constitution.

Background of the Case

The petitioners were candidates in an election for non-executive director positions at regional agricultural cooperatives. Article 50 Section 4 of the former Agricultural Cooperatives Act prescribes that no person can conduct an election campaign by means other than distributing official election gazettes in cases of elections for directors. Nonetheless, the petitioners used means other distributing official election gazettes by appealing to representatives for support by telephone or text messages, and were convicted for this crime. The petitioners filed a motion to request a review of the constitutionality of Article 50 Section 4 and Article 172 Section 2 Item 2 of the former Agricultural Cooperatives Act, and upon its dismissal, filed a constitutional complaint.

Subject Matter of Review

The subject matters of review in this case are whether: ① the provision prohibiting election campaigns under Item 4 in ‘elections of directors,’ of Article 50 Section 4 of the former Agricultural Cooperatives

Act (amended by Act No. 11690 on March 23, 2013, and before amendment by Act No. 12755 on June 11, 2014) and the provision prescribing the punishment of those who conduct election campaigns in violation of the above statutory provisions, of Article 172 Section 2 Item 2 of the former Agricultural Cooperatives Act (amended by Act No. 10522 on March 31, 2011, and before amendment by Act No. 12755 on June 11, 2014); and ② the provision prohibiting election campaigns under Item 4 in 'elections of directors,' of Article 50 Section 4 of the Agricultural Cooperatives Act (amended by Act No. 12755 on June 11, 2014) and the provision prescribing the punishment of those who conduct election campaigns in violation of the above statutory provisions, of Article 172 Section 2 Item 2 of the same Act (hereinafter ① and ② are collectively referred to as the "Instant Provisions"), violate the Constitution. The Instant Provisions read as follows.

Provisions at Issue

Former Agricultural Cooperatives Act (amended by Act No. 11690 on March 23, 2013, and before amendment by Act No. 12755 on June 11, 2014)

Article 50 (Restrictions on Election Campaign)

(4) No person shall conduct an election campaign by other than the following means in connection with an election of officers (limited to Item 2 in cases where the president of the cooperative is elected by the representatives or in elections for directors and auditors).

1. Posting advocacy posters;
2. Distributing official election gazettes;
3. Holding joint speeches or public forums;
4. Appealing for support by telephone (including text messages) or computer communications (including electronic mail)
5. Appealing for support or handing out name cards in public areas with heavy foot traffic or crowds such as roads or markets, as specified by Ordinance of the Ministry of Agriculture, Food and

Rural Affairs.

Former Agricultural Cooperatives Act (amended by Act No. 10522 on March 31, 2011, and before amendment by Act No. 12755 on June 11, 2014)

Article 172 (Penalty Provisions)

(2) Any person who falls under any of the following items shall be punished by imprisonment with prison labor for no more than one year or by a fine not exceeding 10 million won.

2. A person who conducts an election campaign, in violation of Section 4 and Section 6 of Article 50 (including cases to which Article 107 and Article 112 apply *mutatis mutandis*) or Article 130 Section 11.

Agricultural Cooperatives Act (amended by Act No. 12755 on June 11, 2014)

Article 50 (Restrictions on Election Campaign)

(4) No person shall conduct an election campaign by other than the following means in connection with an election of officers (limited to Item 2 in elections for directors and auditors).

1. Posting advocacy posters;
2. Distributing official election gazettes;
3. Holding joint speeches or public forums;
4. Appealing for support by telephone (including text messages) or computer communications (including electronic mail);
5. Appealing for support or handing out name cards in public areas with heavy foot traffic or crowds such as roads or markets, as specified by Ordinance of the Ministry of Agriculture, Food and Rural Affairs.

Article 172 (Penalty Provisions)

(2) Any person who falls under any of the following items shall be punished by imprisonment with prison labor for no more than one year

or by a fine not exceeding 10 million won.

2. A person who conducts an election campaign, in violation of Section 4, Section 6 and Section 7 *of Article 50* (including cases to which Article 107 and Article 112 apply *mutatis mutandis*) or Article 130 Section 11.

Summary of the Decision

The legislative purpose of the Instant Provisions is to prevent the fairness of elections from being undermined as elections for directors of agricultural cooperatives become overheated. For instance, election campaigns can become unbalanced due to differences in financial capabilities, or the use of false propaganda may result in unfair competition. Permitting election campaigns only through the means of distributing official election gazettes; prohibiting election campaigns that appeal for support by telephone or computer communications; and punishing any person that conducts an election campaign in violation of the above provisions all provide appropriate means for achieving the aforementioned legislative purpose.

However, the Instant Provisions do not satisfy the requirement of minimum restriction for the following reasons. The elections for the agricultural cooperative directors function as a way to ensure autonomy and democracy of agricultural cooperatives. However, under the current circumstances where the only permitted means to conduct an election campaign is by distributing official election gazettes, elections are unable to fulfill that function since they are based on existing relations between the elector and the candidate; or involve unlawful methods such as providing money and goods. Furthermore, given that the telephone and computer communications are media easily accessible by anyone at a very low cost, and that the Agricultural Cooperatives Act sets forth provisions which strictly regulate the use of false propaganda, it is found to be unnecessary to prohibit appeals for support by telephone and computer communications in order to prevent unequal election campaigns

caused by disparate financial capabilities of candidates or unfair competition using false propaganda. Meanwhile, elections for the directors of cooperatives or credit unions similar to agricultural cooperatives in terms of function and organization allow the use of multiple methods for election campaigns, including appeals for support by telephone and computer communications.

The public interest that the Instant Provisions seek to achieve is to ensure fair elections for composing boards of agricultural cooperatives, but this is not significant enough to justify the restriction of the freedom of association or freedom of expression. Thus, the balance of interests is not satisfied.

Therefore, the Instant Provisions violate the rule against excessive restriction and infringe upon the freedom of association and freedom of expression, and thus violate the Constitution.

23. Case on Divided Pension under the National Pension Act

[2015Hun-Ba182, December 29, 2016]

In this case, the Constitutional Court held that Article 64 Section 1 of the National Pension Act, which recognizes divorced spouses who were not in an actual marriage with the pensioner on account of separation or absconding from home - and thus have not contributed to the pension - as annuitants of divided pensions based on the term of legal marriage, does not comply with the Constitution, and ordered the continued application of the above provision until an amendment is legislated by June 30, 2018.

Background of the Case

(1) The petitioner was insured by the National Pension Service from January 1, 1988, to December 31, 2008. On June 14, 2010, the petitioner acquired entitlement to an early old-age pension and has been receiving old-age pension payments from the National Pension Service since July 2010. Meanwhile, the petitioner married Park ○○ on August 15, 1975, and divorced on April 21, 2004.

(2) On April 24, 2014, Park ○○ requested payment of a divided pension to the National Pension Service, whereupon the National Pension Service decided on June 2, 2014, to pay the divided pension to Park ○○ and subsequently on June 23, 2014, subjected the petitioner to a disposition that reduced the petitioner's old-age pension payment from 774,440 won to 491,620 won.

(3) The petitioner filed a lawsuit against the National Pension Service to revoke the above disposition, and while this lawsuit was pending filed a constitutional complaint, claiming that it is unconstitutional to recognize a divorced spouse who was not in an actual marriage with the pensioner due to separation or absconding from home, and has therefore

not contributed to the pension, as an annuitant entitled to the divided pension.

Subject Matter of Review

The subject matter of review in this case is whether Article 64 Section 1 of the National Pension Act (amended by Act No. 11143 on December 31, 2011) (hereinafter referred to as the "Instant Provision") violates the Constitution.

Provision at Issue

National Pension Act (amended by Act No. 11143 on December 31, 2011)

Article 64 (Annuitants of Divided Pension, etc.)

(1) When a person who has been married for at least five years (limited to the marriage period during which one's spouse is under insurance coverage; hereinafter the same shall apply) meets all of the following requirements, he or she may be paid a specified amount of his or her spouse's old-age pension (hereinafter referred to as "divided pension") during his or her lifetime, from the time:

1. When the person has divorced his or her spouse;
2. When his or her former spouse is a beneficiary of an old-age pension;
3. When the person reaches age 60.

Summary of the Decision

1. Whether the Right to Property Has Been Infringed Upon

The divided pension system takes on both the nature of a property right and of social security. The former is manifested in the fact that the entitlement to an old-age pension is the result of cooperation between a

married couple and therefore constitutes joint property, and thus in the case of divorce should be divided proportionate to the contribution from each side. The contribution mentioned here indicates the housework, childcare, etc. that have been shared between a couple during their marriage, which means the divided pension should be calculated based on the term of the actual marriage during the insurance coverage period. Therefore, if no contribution has been made to the old-age pension entitlement on account of the marriage having actually dissolved, there is no premise to file for the division of the old-age pension with regard to that period even if a marriage in the legal sense had been maintained.

Nevertheless, the Instant Provision calculates the divided pension based on the term of marriage that includes the period where an actual marriage did not exist due to separation or absconding from home, despite the existence of a legal marriage. This shows complete disregard for the nature of the divided pension system as a property right, and goes beyond the discretion of legislative policy-making power.

An amendment to the National Pension Act on December 29, 2015, newly enacted Article 64-2, which prescribes that in cases where the division of a pension is otherwise determined pursuant to claims for division of property under the Civil Act, such decisions hold precedence. However, leaving the Instant Provision as is just because the above provision has been enacted, despite the fact that whether to claim a division of property is optional, would in effect force the old-age pension beneficiary to exercise his or her claim for division of property regardless of his or her intent. Given this, enacting the above provision does not resolve the unconstitutionality of the Instant Provision. Therefore, the Instant Provision infringes upon the right to property.

2. Decision of Nonconformity to the Constitution and Order for Provisional Application

A declaration of the simple unconstitutionality of the Instant Provision would create a vacuum in law by removing the provision that serves as

the grounds for the divided pension entitlement of a divorced spouse who has contributed to the entitlement to an old-age pension, and furthermore grant extensive legislative discretion to the legislator in creating an amendment. Therefore, the Court delivers a decision of nonconformity to the Constitution regarding the Instant Provision, but orders its continued application until an amendment is made by June 30, 2018.

Summary of Concurring Opinion of One Justice

1. Precondition of Adjudication of a Case and the Scope of the Court's Review

The newly enacted Article 64-2 of the National Pension Act does not apply to the petitioner who, in this case, was issued a disposition regarding the payment of his divided pension before this provision entered into force. Therefore, the statutory provision that can be accepted as the precondition of adjudication in this case is the 'Instant Provision before Article 64-2 entered into force,' and there is no need to take Article 64-2 into account when reviewing the constitutionality of the Instant Provision, since it does not apply to the petitioner.

2. Enactment of Article 64-2 of the National Pension Act and the Unconstitutionality of the Instant Provision

The Instant Provision unconditionally grants divorced spouses entitlements to divided pensions calculated based on the term of legal marriage, despite the fact that they had not been in an actual marriage with the pensioner. The unconstitutionality of this Instant Provision lies in the fact that there is no exception clause that allows the old-age pension beneficiary to contest the amount of the divided pension based upon specific circumstances. The legislator enacted Article 64-2 intending to solve this problem, and any old-age pension beneficiary that

is subject to this provision after it enters into force is given the chance to seek substantial validity in the division of pensions, through claims for division of property under the Civil Act. Furthermore, in some cases the old-age pension beneficiary may avoid claiming a division of property considering the property each owned by himself or herself and his or her spouse, which would be subject to division. Therefore, the claim for division of property is not necessarily enforced as a preliminary measure. Thus, in the case of old-age pension beneficiaries subject to the application of the newly enacted Article 64-2, the Instant Provision does not violate the Constitution.

However, old-age pension beneficiaries like the petitioner who are ineligible to be covered by Article 64-2 of the National Pension Act, cannot reflect specific circumstances in the division of their pension; for instance, the fact that their spouse has been unable to effectively contribute to the accumulation of the pension due to absconding from home or separation. Therefore, the Instant Provision infringes upon the right to property. The Court has made a valid decision in pronouncing the Instant Provision's nonconformity to the Constitution and ordering provisional application to make the legislator resolve the unconstitutionality that occurs with regard to old-age pension beneficiaries who are not covered by Article 64-2.

24. Case on Overcrowded Detention Centers

[2013Hun-Ma142, December 29, 2016]

In this case, the Constitutional Court held that the act of confining convicted prisoners in detention center rooms that do not provide the minimum space required by a person infringes upon human dignity and worth, and thus violates the Constitution.

Background of the Case

(1) The complainant was sentenced to a fine of 700 thousand won for the crime of interfering with business, but was ordered to be confined in a workhouse for refusing to pay the fine and was consequently confined in Room 14 on the ground level of Building 13 at the Seoul Detention Center (8.96 ㎡, 6 pax, hereinafter referred to as the "Room at Issue") from approximately 16:00 on December 8, 2012, to 13:00 on December 18, 2012, after which the complainant was released when his sentence period expired.

(2) On March 7, 2013, the complainant filed a constitutional complaint on the grounds that the conduct of the respondent, the warden of the Seoul Detention Center, of confining the complainant from 16:00 on December 8, 2012, to 13:00 on December 18, 2012, in the Room at Issue infringed upon the complainant's fundamental rights, including his human dignity and worth.

Subject Matter of Review

The subject matter of this case is whether the respondent's conduct of confining the complainant in the Room at Issue from 16:00 on December 8, 2012 to 13:00 on December 18, 2012 (hereinafter referred to as the "Confinement at Issue") infringes on the fundamental rights of the complainant.

Summary of the Decision

1. Review of the Legal Prerequisites

The complainant has already been released upon the expiration of his period of sentence, and thus the complainant's rights cannot be remedied even if the request for adjudication of this case is accepted. However, there are concerns that the problem at issue, which concerns the conduct of overcrowding prisoners in correctional institutions, may continue, and since this involves an important issue regarding the basic treatment of convicted prisoners and thus requires constitutional clarification, the justiciable interests are accepted as an exception.

2. Limitations on the Exercise of the State's Authority to Punish Crime

With regard to the exercise of the state's authority to punish crime, the human dignity and worth guaranteed by Article 10 of the Constitution prohibit treating people as a mere object of state action or imposing inhumane, cruel punishment, and, in the case of criminal administration, prohibit confining people in facilities that lack the basic requirements necessary for human survival. Although it may be inevitable to restrict the fundamental rights of a convicted prisoner to the minimum extent necessary to achieve the purpose of confinement, under no circumstances can the state harm the human dignity and worth of a convicted prisoner.

3. Whether the Confinement at Issue Infringes Upon the Human Dignity and Worth of the Complainant

In judging whether the complainant's human dignity and worth have been infringed upon by being confined in correctional facilities lacking the basic requirements needed for human survival, it is necessary to

consider, in addition to the confinement space available per person, various circumstances including the overall operation of the confinement facilities, for instance the number of convicted prisoners and prison wards; the period of confinement; and national budget issues, among others. However, if the confinement space provided per person in the correctional facilities is excessively small, so as to make it difficult for the convicted prisoner to have the basic needs of a human being, then this exceeds the limitations on the exercise of a state's authority to punish and in itself is an infringement of the human dignity and worth of the convicted prisoner.

In this case, the space that was available for use per person during the time the male adult complainant was confined in the Room at Issue was 1.06 ㎡ for two days and 16 hours and 1.27 ㎡ for six days and five hours. Such space is insufficient for a Korean male adult of average height to comfortably stretch his limbs, and so small that one must lie on one's side to sleep. Thus, even considering the overall circumstances, such as the period the complainant was confined in the Room at Issue, and the time he spent outside of the Room at Issue due to visits and exercise, it is highly probable that the complainant experienced severe distress in the Room at Issue in the form of deterioration of physical or mental health, or deprivation of the requirements needed for the basic activities of a human being. Therefore, the Confinement at Issue, which took place in a space overcrowded to the extent that the complainant could not maintain his minimum dignity as a human being, infringes upon the human dignity and worth of the complainant.

Summary of Concurring Opinion of Four Justices

In light of Article 10 of the Constitution which prescribes the inviolable dignity and worth of humans, the 'Administration and Treatment of Correctional Institution Inmates Act,' the 'Basic Rules for Legal Facilities,' and the 'Guidelines on Separate Confinement and Transfer and Recording, etc.' that aim to guarantee at least the basic

treatment of convicted prisoners, and the relevant international norms and judicial precedents in other countries, the state, to protect the convicted prisoner's human dignity and worth during confinement, should secure a confinement space of at least 2.58 ㎡ per each convicted prisoner within the correctional facilities. Nevertheless, considering the practical difficulties with regard to expanding correctional facilities, we call for improvements to be made in line with the aforementioned criteria within a certain period (within five to seven years at the latest).

25. Case on Deposit Money, etc. in Elections of Proportional Representative National Assembly Members

[2015Hun-Ma509, 2015Hun-Ma1160 (consolidated), December 29, 2016]

In this case, the Constitutional Court held that the provision concerning 'elections of proportional representative National Assembly members' in Article 56 Section 1 Item 2 of the Public Official Election Act, which prescribes that political parties who register candidates for proportional representative National Assembly members shall pay a deposit of 15 million won per candidate, infringes upon the right to hold public office and therefore does not comply with the Constitution; that the provision concerning 'candidates for proportional representative National Assembly members' in Article 79 Section 1 of the same Act, which prohibits candidates for proportional representative National Assembly members from campaigning by making campaign speeches or giving interviews in open places, does not infringe upon the complainants' freedom to engage in election campaigns; that Sections 1 and 3 of Article 106 of the same Act, which prohibit campaigning by making house-to-house visits, do not infringe upon the complainants' freedom to engage in election campaigns; and that the provision concerning 'elections for local constituency members of the National Assembly' in Article 56 Section 1 Item 2 of the same Act, which prescribes that each candidate in an election of local constituency members of the National Assembly must pay a deposit of 15 million won, the provision concerning 'where he or she has obtained 15/100 or more of the gross number of valid votes' in Sub-Item (a), regarding the 'election of the local constituency members of the National Assembly,' and Sub-Item (b), of Article 57 Section 1 Item 1 of the same Act, which prescribes that deposit money be returned depending on the rate of votes obtained, and the provision concerning 'documents' and 'printed matter' in the main text of Article 93 Section 1 of the same Act, which prohibits campaigning using documents or printed matter in ways that

are not in accordance with the provisions of the Public Official Election Act, do not infringe upon the fundamental rights of the complainants.

Background of the Case

(1) 2015Hun-Ma509

The ○○ Party, the complainant at the time the request for adjudication was made, was a political party planning for its party members to run for the election for the 20th National Assembly held on April 13, 2016, while the rest of the complainants were planning to register as candidates for the 20th election of the local constituency members of the National Assembly. On May 15, 2015, the complainants filed a constitutional complaint against Article 56 Section 1 Item 2 of the Public Official Election Act.

(2) 2015Hun-Ma1160

The complainants, at the time the request for adjudication was made, were persons recommended as candidates for the ○○ Party in the election for proportional representative members of the 20th National Assembly, and filed a constitutional complaint on December 14, 2015, against Article 56 Section 1 Item 2 of the Public Official Election Act.

Subject Matter of Review

The subject matter of this case is whether: ① Article 56 Section 1 Item 2 (hereinafter referred to as the "Deposit Money Provision," of which the provision, 'election of the local constituency members of the National Assembly' is referred to as the "Local Constituency Deposit Money Provision" and the provision, 'election of the proportional representative National Assembly members' is referred to as the "Proportional Representative Deposit Money Provision") of the Public

Official Election Act (amended by Act No. 9974 on January 25, 2010); ② the provision concerning 'where he or she has obtained 15/100 or more of the gross number of valid votes' in Sub-Item (a), regarding the 'election of the local constituency members of the National Assembly,' and Sub-Item (b) of Article 57 Section 1 Item 1 of the same Act (hereinafter referred to as the "Return of Local Constituency Deposit Money Provision"); ③ the provision concerning 'candidates for the proportional representative National Assembly members' in Article 79 Section 1 of the same Act (hereinafter referred to as "Provision Prohibiting Speech, Etc."); ④ the provision concerning 'documents' and 'printed matter' in the main text of Article 93 Section 1 of the same Act (hereinafter referred to as the "Provision Prohibiting Documents and Printed Matter"); and ⑤ Sections 1 and 3 of Article 106 (hereinafter collectively referred to as the "Provisions on Prohibition of House-to-House Visits") of the Public Official Election Act (amended by Act No. 7681 on August 4, 2005) infringe upon the fundamental rights of the complainants and thus violate the Constitution. The Instant Provisions read as follows.

Provisions at Issue

Public Official Election Act (amended by Act No. 9974 on January 25, 2010)

Article 56 (Deposit Money)

(1) A person who applies for a candidate registration shall pay the following deposit money per candidate to the competent constituency election commission at the time of the application for registration, pursuant to Regulations of the National Election Commission: (Remainder omitted.)

2. 15 million won, in cases of an election of a National Assembly member.

Article 57 (Return, etc. of Deposit Money)

(1) The competent constituency election commission shall return amounts classified under the following items to the depositor within 30 days after the day of the election. In such cases, deposit money, which is not returned, shall revert to the State or local governments:

1. The presidential election, the election of the National Assembly members of local constituency, the election of the local council members of local constituency and the election of the heads of local governments:
   (a) Whole amount of the deposit money in cases where the candidate has been elected or has deceased, and where he or she has obtained 15/100 or more of the gross number of valid votes;
   (b) Amount equivalent to 50/100 of the deposit money in cases where the candidate has obtained not less than 10/100 but less than 15/100 of the gross number of valid votes.

Article 79 (Campaign Speeches or Interviews in Open Places)

(1) The candidate (excluding any candidate for the proportional representative National Assembly member and the proportional representative local council member, hereafter in this Article the same shall apply) may make a campaign speech or interview at an open place for the purpose of providing information on the platform and policy of the political party to which he or she belongs, his or her political views or other necessary matters during the election campaign period.

Article 93 (Prohibition of Unlawful Distribution or Posting, etc. of Documents and Pictures)

(1) No one shall distribute, post, scatter, play, or run an advertisement, letter of greeting, poster, photograph, document, drawing, printed matter, recording tape, video tape, or the like which contains the contents supporting, recommending or opposing a political party (including the preparatory committee for formation of a political party, and the platform

and policy of a political party; hereafter the same shall apply in this Article) or candidate (including a person who intends to be a candidate; hereafter the same shall apply in this Article) or showing the name of the political party or candidate with the intention of influencing the election, not in accordance with the provisions of this Act, from 180 days before the election day (when the reason for holding the election becomes final, in case of a special election) to the election day: *Provided*, That the same shall not apply to any of the following acts:

1. Where any candidate or any person falling under any of the items of Article 60-3 Section 2 (including the chief of an election campaign liaison office, in cases falling under Item 2, and, in such cases, "preliminary candidates" shall be deemed "candidates") personally hands out the name cards of a candidate under Article 60-3 Section 1 Item 2 during the election campaign period;
2. Ordinary political party activities under Article 37 Section 2 of the Political Parties Act during a period, other than the election period.

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

Article 106 (Restriction on House-to-House Visits)

(1) No one shall make a house-to-house call to persuade other persons to join a political party, for an election campaign or during the election period.

(3) No one shall make a house-to-house call for the notification of any campaign speech or interview at an open place during the election period.

Summary of the Decision

1. Local Constituency Deposit Money Provision and Return of Local Constituency Deposit Money Provision

The abovementioned provisions aim to guarantee the credibility of the elections and the sincerity of the candidates, and also to secure, in advance, any fines, etc. imposed for illegal conduct in the course of the elections. Thus, they serve a legitimate purpose and provide an appropriate means. Given the role of elections and purpose of the deposit money system in a representative democracy; the need for such a measure considering the political culture and nature of elections in Korea; the changes in the number of candidates per constituency; and the average monthly income of workers, it is hard to propose a less onerous measure than the deposit money system, the amount is not unreasonably high, and the requirements for return are inevitable means, and satisfy minimum restriction. Therefore, the above provisions do not infringe upon the right to hold public office.

2. Proportional Representative Deposit Money Provision

The purpose of the Proportional Representative Deposit Money Provision is to prevent the escalation of election-related management duties and costs, incurred by imprudent recommendations by political parties for candidates for proportional representative National Assembly members, and to secure in advance the fines imposed for illegal conduct committed in the election procedures as well as administrative vicarious execution costs. This serves a legislative purpose, and the establishment of a deposit money requirement provides an appropriate means for achieving that purpose.

The following is an examination as to whether the deposit prescribed by the Proportional Representative Deposit Money Provision is the least restrictive means necessary for achieving its legislative purpose. To begin

with, the election of proportional representative National Assembly members is fundamentally different from the election of local constituency members of the National Assembly, in that the former is closer to an election of a political party while the latter is an election of individual persons. It is much less likely for an election of proportional representative National Assembly members, compared to that of local constituency members, to be corrupt or overheated through election campaigns permitted under the Public Official Election Act. Nonetheless, the Proportional Representative Deposit Money Provision sets a high deposit equal to the elections for the local constituency members of the National Assembly. Next, with regard to the legislative purpose of securing, in advance, fines and administrative vicarious execution costs, the total amount of such fines and costs actually imposed on political parties in the elections of proportional representative members of the 17th to the 19th National Assembly falls far short of 15 million won, the deposit allocated for each candidate. Furthermore, the proportional representative system was introduced to make up for the flaws of the majority representation system, which is without question favorable to large political parties and may produce dead votes for failing to properly represent the diverse voices of the people. Yet, the large deposit amount, combined with the requirement for return, will not serve as any restriction to political parties that are highly likely to receive their entire deposit back, while for new or minor parties, which are most unlikely to receive their deposit money back, the large deposit serves as a burden in their participation in the elections and, furthermore, in the recommendation of party candidates. Therefore, the deposit of 15 million won per candidate cannot be deemed the minimum amount necessary for achieving the aforementioned legislative purpose, and consequently the Proportional Representative Deposit Money Provision violates the principle of minimum restriction.

The disadvantage of restrictions on the right to hold public office and freedom of political party activities, imposed by the Proportional Representative Deposit Money Provision on candidates for proportional

representative National Assembly members or political parties who recommend them, significantly outweighs the public interest of keeping, through this provision, the recommendations for political party candidates sincere, and of securing the fines for election-related illegal conduct and administrative vicarious execution costs. Therefore, the Proportional Representative Deposit Money Provision violates the balance of interests.

Thus, the Proportional Representative Deposit Money Provision violates the rule against excessive restriction, and infringes upon the complainants' right to hold public office.

3. Provision Prohibiting Speech, Etc.

A. Opinion of Four Justices that the Provision is Constitutional

The Constitutional Court, in the Constitutional Court Decision 2004Hun-Ma27 on July 27, 2006, and the Decision 2012Hun-Ma311 on October 24, 2013, has already ruled that prohibiting proportional representative National Assembly member candidates from making campaign speeches or giving interviews in open places does not violate the Constitution, and there has been no change of circumstances that requires the aforementioned precedents to be overruled, and thus the positions of the Court declared in those precedents remain valid in this case. Therefore, the Provision Prohibiting Speech, Etc. does not infringe upon the freedom to engage in election campaigns by violating the rule against excessive restriction.

B. Opinion of Five Justices that the Provision is Unconstitutional

In elections of proportional representative National Assembly members, political parties can prepare campaign bulletins, make broadcast speeches using broadcast facilities, and run newspaper or internet advertisements. However, since the allocated newspaper space; number of participants; frequency; and time range are strictly limited by law, and means such as advertisements demand high costs, new or minor parties that have relatively low approval rates or are in poor financial conditions find it

difficult to utilize such measures. This calls for a tool through which political parties can reach out to voters and conduct election campaigns regardless of their size or name recognition.

Concerns over election campaigns becoming overheated when candidates for proportional representative National Assembly members are permitted to give campaign speeches or interviews in open places can be resolved partially by restricting the methods and conditions for giving speeches or interviews, for instance by limiting registration for giving speeches to one candidate per local constituency. Despite such options, the Provision Prohibiting Speech, Etc. completely deprives candidates for proportional representative National Assembly members of the chance to make campaign speeches or give interviews, thus violating the principle of minimum restriction.

Considering the importance of elections in a representative democracy, the extent of the freedom to engage in election campaigns and political activities restricted by the Provision Prohibiting Speech, Etc. largely outweighs the public interest of saving social costs or guaranteeing fair elections sought by such restriction, and thus the Provision on Prohibiting Speech, Etc. also violates the balance of interests.

Therefore, the Provision Prohibiting Speech, Etc. violates the rule against excessive restriction, and thus infringes upon the freedom to engage in election campaigns.

4. Provision Prohibiting Documents and Printed Matter

Constitutional Court Decision 2011Hun-Ba17, etc. on April 24, 2014, ruled that this provision does not violate the rule against excessive restriction, and therefore does not infringe upon the freedom to engage in election campaigns or the freedom of political expression. There has been no change of circumstances that requires this precedent to be overturned, and therefore this position remains valid in this case.

5. Provisions on Prohibition of House-to-House Visits

The Provisions on Prohibition of House-to-House Visits aim to guarantee the fairness of elections and to protect the privacy of voters, and thus serve a legitimate purpose and provide an appropriate means. Considering the history of elections and political realities in Korea, in which the vestiges of illegal elections and bribery still remain; the possibility that the fairness of elections may be undermined, which is inherent in the method of house-to-house visits; the availability of other campaigning methods suited to the characteristics of each election, aside from house-to-house visits; and the fact that the prohibition does not extend to open places where people have freedom of movement and are frequented by many persons, the prohibition of house-to-house visits cannot be deemed an excessive restriction. Thus, the provisions do not violate the principle of minimum restriction. The extent of the restriction of fundamental rights imposed by the Provisions on Prohibition of House-to-House Visits are no larger than the public interest of seeking fair elections and protecting privacy, and therefore the Provisions on Prohibition of House-to-House Visits do not violate the balance of interests.

Summary of Opinion of Three Justices as to the Unconstitutionality of the Proportional Representative Deposit Money Provision

The legislative purpose of requiring deposit money in an electoral system can be interpreted differently depending on the type or nature of the election; method used for campaigning; number of candidates allowed to run and whether this can be limited; the election culture and the political culture. The legislative history does not show a clear legislative intent for adopting the Proportional Representative Deposit Money Provision.

First of all, given the role of political parties in this party-based democracy, and the strict establishment procedures and registration

requirements they are subject to, the purpose of preventing the elections from being crowded with multiple political parties, in other words preventing actual participation of political parties in elections, cannot be presented as a legislative purpose. Meanwhile, it is possible for elections of local constituency members of the National Assembly to be crowded with an indefinite number of candidates. However, in cases of elections of proportional representative National Assembly members, only political parties that have fulfilled the establishment procedures and registration requirements, and can thus play a part in forming the public's political views, can recommend candidates, and the number of candidates that can be recommended by political parties is also limited to a fixed number (47). Accordingly, this prevents any concerns that a candidate may run for election with a lack of sincerity and integrity, as may be the case of elections for local constituency National Assembly members. Furthermore, as a rule, campaigning is led by the political party, while the candidate can only participate in the election campaign to a limited extent compared to elections of local constituency National Assembly members. Therefore, concerns that a rise in the number of candidates recommended by a political party will directly lead to overheating or corruption in the elections are unfounded. In light of this, the purpose of the Proportional Representative Deposit Money Provision, which is presumably to prevent insincere recommendations of candidates so as to avoid an increase in duties or costs related to election management, lacks legitimacy. Moreover, a purpose seeking such administrative public benefits is based on the presumption of illegal conduct that has not yet occurred. Any procedural irregularities that are committed in the course of an election can be sanctioned after their occurrence, and it is hard to justify any severe restriction on the freedom of political party activities - which are instrumental in forming political opinion in a representative democracy - merely for the purpose of administrative public benefits. Furthermore, in cases of a political party where the entire deposit reverts to the state for being unable to satisfy the requirements for return, fines cannot be deducted from the deposit money, which means that this

legislative purpose is invalid. In other words, the Proportional Representative Deposit Money Provision does not serve a legitimate purpose.

Large deposits run contrary to the intentions of the proportional representative system, holding back minor groups from political participation, and being of no help in the promotion of party politics. Therefore, the Proportional Representative Deposit Money Provision does not provide an appropriate means, and as in the Court's opinion, does not satisfy the rule of minimum restriction or the balance of interests. In summary, the Proportional Representative Deposit Money Provision violates the principle against excessive restriction, and infringes upon the right to hold public offices, thus violating the Constitution.

Summary of Opinion of Three Justices as to the Unconstitutionality of the Provision Prohibiting Documents and Printed Matter

The Provision Prohibiting Documents and Printed Matter prohibits everyone - candidates and the general public alike - from expressing views through any type of document or printed matter, from 180 days before the election date, thus prohibiting all types of political expression including those that are not likely to undermine the fairness of elections. This violates the principle against excessive restriction and thus infringes upon the freedom of political expression.

Summary of Opinion of Two Justices as to the Unconstitutionality of the Provisions on Prohibition of House-to-House Visits

Campaigning for elections by making door-to-door visits is the easiest way to meet voters in person, with no particular preparations or capital required, and can provide more intuitive, crucial data compared to information acquired through other types of media. This method is particularly useful in rural areas sparsely populated and inhabited by

older voters, where information acquired through visits in person is of great value, and also offers the chance to promote a political party regardless of the party's name recognition or political influence. Given such advantages, campaigning for elections through house-to-house visits should be permitted. Any overheating that this may cause can be curbed by limiting the scope of people that can conduct door-to-door visits, or by using the method only in cases of households that wish to respond, while illegal campaigning through forced entry or the provision of money and goods can be regulated through ex post facto criminal punishment imposed under the Criminal Act or the Public Official Election Act; necessary mitigation or discharge for persons who voluntarily surrender to the police; protection of and payment of rewards to people who report election crimes, etc. Notwithstanding these many options, the Provisions on Prohibition of House-to-House Visits entirely prohibit campaigning in the form of door-to-door visits, and therefore violate the rule of minimum restriction.

The freedom to engage in election campaigns or freedom of political party activity restricted by the Provisions on Prohibition of House-to-House Visits largely outweigh the public interest of fair elections or respect for privacy sought by the provisions, and therefore the Provisions on Prohibition of House-to-House Visits violate the principle against excessive restriction, and thus infringe upon the freedom to engage in election campaigns.

Appendix

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.

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