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, 2018 to December 31, 2018 by the Constitutional Court of Korea.

This volume contains summaries of the Court's decisions in 31 cases.

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

September 30, 2019

Park Jong Mun
Secretary General
Constitutional Court of Korea

EXPLANATION OF ABBREVIATIONS & CODES

- Case Codes
  - Hun-Ka: constitutionality case referred by ordinary courts according to Article 41 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-Da: case involving adjudication on the dissolution of a political party
  - Hun-Ra: case involving adjudication on dispute regarding the competence of governmental agencies filed according to Article 61 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-Ba: constitutionality case filed by individual complainant(s) in the form of a constitutional complaint according to Article 68 Section 2 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" indicates a constitutionality case referred by an ordinary court, the docket number of which is No. 2, filed in the year of 1996.

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1. Case on Constitutionality of Additional Security Screening of Airline Passengers

[2016Hun-Ma780, February 22, 2018]

In this case, the Court held that the provision of the "National Aviation Security Plan," which prescribes additional security screening by an airline upon request by a Contracting State, does not violate the constitutional principle of statutory reservation and the rule against excessive restriction; and therefore does not infringe upon the fundamental rights of the Complainant, an airline passenger.

Background of the Case

The Complainant was subjected to the usual security screening procedure while going through immigration at Incheon Airport on the way to boarding a US-bound flight. ___ Airlines, on grounds that it had been notified by the US Transportation Security Administration that the Complainant was subject to secondary security screening, conducted additional screening before the Complainant boarded his/her flight. The additional screening was conducted by a security screening officer, who had the Complainant take out his/her belongings for visual identification and conducted a pat-down on the Complainant.

Thereupon, the Complainant, claiming that Article 8.1.19 of the National Aviation Security Plan (which prescribes additional security screening by an airline upon request by a Contracting State) infringed upon his/her fundamental rights, filed a constitutional complaint on September 12, 2016.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning the execution of additional security screening by an airline

upon request by a Contracting State, of Article 8.1.19 of Chapter 8, "Security Measures Concerning Passengers, Carry-on Items and Checked Baggage," of the National Aviation Security Plan (April 2011) (the "National Aviation Security Plan"), infringes on the fundamental rights of the Complainant. The provision at issue is underlined below.

Provision at Issue

National Aviation Security Plan (April 2011)

Chapter 8 (Security Measures Concerning Passengers, Carry-on Items and Checked Baggage)

8.1 (Security Screening of Passengers and Carry-on Items)

8.1.19. An air transport operator may conduct additional security screening before flight check-in procedures or in front of the boarding gate, upon request by a Contracting State or when deemed necessary.

Summary of the Decision

The National Aviation Security Plan presupposes that additional security screening, such as pat-downs, may be conducted on passengers who have already been subjected to general security screening during the check-in procedure for departure. Thus, the issue in this case is whether this infringes upon the right to personality or bodily freedom.

The Republic of Korea is obliged to observe the Convention on International Civil Aviation as a Contracting State thereof. The former part of Article 2.4.1 of Annex 17 (Security: Safeguarding International Civil Aviation against Acts of Unlawful Interference) to the Convention on International Civil Aviation, which has binding force equal to the Convention on International Civil Aviation, prescribes, "Each Contracting State shall ensure that requests from other Contracting States for additional security measures in respect of a specific flight(s) by operators of such other States are met, as far as may be practicable."

The Aviation Security Act, along with the obligation of air transport

operators to observe international conventions, prescribes basic matters concerning the standards and procedures of security screening; and that the Minister of Land, Infrastructure and Transport shall formulate and execute a national aviation security plan to perform aviation security-related affairs. Thus, the National Aviation Security Plan does not violate the constitutional principle of statutory reservation.

The National Aviation Security Plan aims to prescribe the observation of international conventions regarding civil aviation security, and to guarantee the safety and security of aircraft; thus, the legitimacy of its legislative purpose and its appropriateness of means is justified. Further, if an air operator does not comply with the request for additional security screening made by another Contracting State, the air transport operator may be denied permission to operate the aircraft itself; thus, the execution of additional security screening as per the National Aviation Security Plan is inevitable. Also, the relevant statutes provide specific standards and methods for security screening, minimizing the infringement of fundamental rights. Thus, the rule of minimum restriction is also satisfied. Moreover, given the rising number of safety-related accidents or threats of terrorism concerning aircraft in the domestic and international arenas, the major public interest of ensuring safe civil aviation outweighs the restriction on the fundamental rights of passengers incurred by additional security screening. Therefore, the balance of interests has been fulfilled. In conclusion, the National Aviation Security Plan does not violate the constitutional rule against excessive restriction.

Therefore, the National Aviation Security Plan does not infringe upon the fundamental rights of the Complainant.

2. Case on Simultaneous Crimes Resulting in Injury

[2017Hun-Ka10, March 29, 2018]

In this case, the Court upheld Article 263 of the Criminal Act, which prescribes that when the independent actions of at least two persons cause the injury of another, they shall be regarded as co-principals if it cannot be determined which action caused the injury. Although five justices (a majority) expressed their opinions in favor of unconstitutionality, they failed to reach the quorum for a decision of unconstitutionality.

Background of the Case

The Defendants were indicted for jointly assaulting the victim. In this original case, the Defendants claimed to the effect that, while they did strike the victim, they did not concurrently engage in assault. Following the indictment, the victim expressed his/her desire to drop the charges against the Defendants. While the original case was pending, the prosecutor requested amendment to the indictment, to alternatively add charges stating, "Defendant Seo ___ struck the victim twice in the face, and after Defendant Seo ___ left the scene, Defendant Kim ___ started quarreling further with the victim and struck him/her once in the face with his/her fist. The concurrent assault by the Defendants as described above inflicted abrasions around the victim's mouth and nose that require treatment for an indefinite period." This request for amendment was upheld by the original court. Thereafter, the court *sua sponte* requested constitutional review of Article 263 of the Criminal Act.

Subject Matter of Review

The subject matter of review in this case is whether Article 263 (the "Instant Provision") of the Criminal Act (enacted by Act No. 293 on September 18, 1953) violates the Constitution. The Instant Provision reads as follows.

Provision at Issue

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

Article 263 (Simultaneous Crimes)

When at least two persons use violence against another and thereby injure the latter, such persons, if it is impossible to determine which person caused the injury, shall be deemed co-principals.

Summary of the Decision

A harmful act inflicted upon a body, in itself, involves the risk of causing injury. Thus, it is difficult to presume that, when harmful acts have been inflicted upon a body, and the inflicted area shows signs of injury, there is a possibility that such harmful acts did not play a part in causing or aggravating the injury. Further, in cases of concurrent independent acts of harm, there is no way of measuring to what degree each act contributed to causing or aggravating the injury. Nonetheless, acts of violence by at least two persons that result in injury occur frequently in the scope of everyday life, and often lead to severe consequences such as the death of a victim. In consideration of the necessity to protect the legal interests of the victim and heighten the effectiveness of general crime prevention through the deterrence effect of law enforcement, the legislature enacted the Instant Provision to distinguish concurrent independent acts of harm from concurrent other independent acts so as to hold any defendant that inflicted harm culpable for the injury.

For the Instant Provision to apply, the prosecutor must verify all other relevant factors aside from the causality between the independent acts of harm and the injury, such as the existence of independent acts of harm, deliberate intention on the part of the defendant with regard to the harmful act, and the occurrence of injury, among others. In this process, the prosecutor must prove that there was harmful conduct that entailed specific danger that could have caused the injury that actually occurred.

If the harmful conduct by the defendant holds no risk of causing the actual injury that occurred, such as where the area on which the harm was inflicted is clearly different from the injured area, the defendant cannot be punished for the simultaneous crime of causing injury. This prevents incidents where a defendant inculpable for an injury is punished for the simultaneous crime of injury. The defendant may also prove an absence of causality between his or her act and the injury, so as not to be held culpable.

The court delivers a sentence that corresponds to the act of the defendant, in consideration of extenuating circumstances such as the motive that led the defendant to inflict harm, the manner and degree of violence of the act, the extent of the defendant's efforts to recover the damage, the relationship between the defendant and the victim, as well as the defendant's age, character and conduct. Thus, the person who inflicted harm bears criminal culpability based on his or her actions.

As seen above, the Instant Provision, with the purpose of realizing substantial justice through lawful retribution against injury intended or predicted by the defendant, makes the defendant whose harmful conduct caused injury take responsibility for his or her own actions. Therefore, it does not run contrary to the principle of responsibility, and thus does not violate the Constitution.

Summary of Dissenting Opinion of Five Justices

The Instant Provision, where concurrent independent acts cause injury, shifts the burden to prove causality onto a defendant, by making him or her bear the onus that occurs when the cause of injury has not been determined. However, asking the defendant without investigative authority to prove causality to absolve him- or herself of culpability for the injury, when a prosecutor with investigative authority fails to do so, is virtually asking for the impossible. This is extremely unfair and unjust, and may even risk a careless investigation on the part of the prosecutor.

It is always difficult to determine the act that caused the outcome when concurrent independent acts are involved, not just when independent acts of harm concurrently occur to cause injury. Article 19 of the Criminal Act prescribes that in such cases, each act shall be punished as an attempted crime, based on the principle of responsibility and the principle of criminal jurisprudence that accords the benefit of doubt to the accused. Punishment for an attempted crime merely points to the possibility that the sentence may be reduced, and thus it is not impossible to impose a punishment corresponding to the punishable act. It is hard to accept, under the framework of the Criminal Act, that the Instant Provision should impose a punishment for a consummated crime only where injury occurred, as opposed to other crimes, solely based on the grounds that the cause of the outcome cannot be determined.

While concurrent independent acts of harm have a relatively higher risk of causing injury and also occur frequently, it is particularly difficult to determine the cause. Thus, there may be concerns that punishment as attempted crimes, as in other cases involving concurrent independent acts, may be insufficient in protecting legal interests. Even so, it is unacceptable to uniformly punish all independent acts as consummated crimes as prescribed by the Instant Provision under the framework of the Criminal Act, which should apply the principle of responsibility strictly. If punishments for concurrent independent acts of harm should differ from punishments for concurrent other independent acts, such harmful acts could be separately prescribed as independent crimes, as in “Section 231: Taking part in a brawl” of the German Criminal Code and punished accordingly.

To shift onto a defendant the onus of proving causality between an independent harmful conduct and an injury is to ask for the virtually impossible. It may risk effectively holding any offender culpable for any injury that has occurred when concurrent independent acts result in injury, regardless of whose action caused it. This means that persons who are inculpable for the injury will be punished to a degree greater than their share of responsibility, just because the cause is undetermined.

Therefore, the Instant Provision runs against the constitutional principle of the rule of law in relation to the Criminal Act, as well as the principle of responsibility that can be inferred from the intent of Article 10 of the Constitution, and thus violates the Constitution.

3. Case on the Suspension of Qualification Provision of the National Security Act

[2016Hun-Ba361, March 29, 2018]

In this case, the Court held that the part applying to "any person who praises, incites or propagates or acts in concert with ··· such actions under Article 7 Section 1" and to "any person who holds or distributes documents, drawings or other expressive materials with the intention of praising, inciting or propagating or acting in concert with ··· such actions referred to in Section 1, under Article 7 Section 5" in Article 14 of the National Security Act, which prescribes the imposition of a suspension of qualification up to the maximum term of the punishment where imprisonment for a definite term has been sentenced for any crime as prescribed by the National Security Act, does not violate the principle of double jeopardy and the principle of proportional justice.

Background of the Case

The Complainant was prosecuted for praising, inciting, or propagating the activities of North Korea, an anti-state organization, or acting in concert with such actions, with the knowledge that this could endanger the existence and security of the State or democratic fundamental order; and for holding and distributing pro-enemy material for this purpose. The Complainant was also sentenced to imprisonment and suspension of qualification for 18 months at second instance. The Complainant appealed to the Supreme Court, but the appeal was rejected and the appellate judgment was made final.

While the above appellate trial was pending, the Complainant filed a request for the constitutional review of Article 14 of the National Security Act (amended by Act No. 4373 on May 31, 1991), and when this was rejected, filed this constitutional complaint.

3. Case on the Suspension of Qualification Provision of the National Security Act

Subject Matter of Review

The subject matter of review in this case is whether the part of Article 14 of the National Security Act (amended by Act No. 4373 on May 31, 1991) concerning "any person who praises, incites or propagates or acts in concert with such actions under Article 7 Section 1" and "any person who holds or distributes documents, drawings or other expressive materials with the intention of praising, inciting or propagating or acting in concert with such actions as referred to in Section 1, under Article 7 Section 5" (both parts hereinafter collectively referred to as the "Instant Provision") violates the Constitution. The provision at issue reads as follows:

Provision at Issue

National Security Act (amended by Act No. 4373 on May 31, 1991)

Article 14 (Concurrent Imposition of Suspension of Qualification)

If a person is sentenced to imprisonment for a definite term for any crime as prescribed by this Act, a suspension of qualification for not more than the maximum term of the punishment may be imposed.

Relevant Provisions

National Security Act (amended by Act No. 4373 on May 31, 1991)

Article 7 (Praise, Incitement, etc.)

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

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

Summary of the Decision

1. Whether the principle of double jeopardy has been violated

Double jeopardy occurs when a punishment or restriction is imposed multiple times for the same offense. However, the Instant Provision concurrently imposes imprisonment and a suspension of qualification in a case that was dealt with in the same criminal trial proceedings, and therefore does not violate the principle of double jeopardy.

2. Whether the principle of proportional justice has been violated

The words and actions of a person who holds public power or a certain level of social status and authority, can have a strong influence throughout society or affect the free formation of public opinion. Therefore, if a person who praises, incites or propagates pro-enemy activities or holds and distributes pro-enemy material as prescribed under the National Security Act acquires or maintains a socially influential status, for instance as part of a government agency, and again proceeds to violate the National Security Act, it may heighten the risk of tangible harm against the existence and security of the State or democratic fundamental order.

Thus, given the purposes of guaranteeing national security, protecting the democratic fundamental order, and securing trust in the State and public officials, suspending qualifications for becoming a public official or for conducting duties under public law is a measure necessary for achieving such purposes.

Further, the court can seek to provide specific relevance by deciding whether to concurrently impose the suspension of qualification; what types of qualification should be suspended; and for how long, proportionate to the nature of the crime and culpability, taking into account overall circumstances including the motives, modus operandi and risk of recidivism of the crime. Moreover, persons who have been subjected to a suspension of qualification can completely recover their restricted qualifications once the period of suspension ends.

Therefore, the Instant Provision does not violate the principle of proportional justice.

Summary of Unconstitutionality Opinion of Five Justices

In the decision on the constitutional complaint against Article 7 Section 1, etc. of the National Security Act (2012Hun-Ba95 et al., April 30, 2015), Justices Kim Yi-Su, Lee Jin-Sung and Kang Il-Won provided a dissenting opinion in favor of unconstitutionality, for the part of Article 7 Section 5 of the National Security Act concerning "any person who holds documents, drawings or other expressive materials with the intention of committing acts referred to in Section 1" (hereinafter referred to as the "part concerning 'person who holds' in the Pro-Enemy Material Provision").

The possession of pro-enemy material does not per se entail the possibility of propagation. Thus, it cannot be considered to hold the potential of harming the existence and security of the State; there is merely a vague and latent possibility that persons holding pro-enemy material could distribute and propagate such material; and the distribution and propagation of pro-enemy material can be sufficiently prevented by punishing the acts themselves. Therefore, to preemptively punish the act of holding material, when it has yet to reach the aforementioned stages, constitutes excessive regulation and infringes upon the freedom of expression and freedom of conscience, thus

violating the Constitution.

The part "holds" of the Instant Provision is naturally rendered unconstitutional if the part concerning 'person who holds' in the Pro-Enemy Material Provision violates the Constitution as seen above, for the latter is the element that serves as the precondition for the former's punishment.

Summary of Dissenting Opinion of Justice Kim Yi-Su

In the decision on the constitutional complaint against Article 7 Section 1, etc. of the National Security Act (2012Hun-Ba95 et al., April 30, 2015), my opinion was in favor of unconstitutionality for the part "acts in concert with" of the part, "any person who praises, incites or propagates or acts in concert with ··· such activities, with the knowledge that this may endanger the existence and security of the State or democratic fundamental order" of Article 7 Section 1 of the National Security Act (hereinafter referred to as the "Pro-Enemy Activities Provision").

The part "acts in concert with" of the Pro-Enemy Activities Provision indicates the act of making the same claims as, and acting in accordance with, instigation and propagation by anti-state organizations or relevant activities, consequently answering to and joining the activities of anti-state organizations, etc. It is difficult to determine the scope of punishable acts, which may also become excessively broad once the volition of the investigative agency or the court intervenes. Therefore, the part "acts in concert with" of the Pro-Enemy Activities Provision violates the rule of clarity of *nulla poena sine lege*. Further, such acts of conformity are much more passive than the acts of praise, incitement and instigation, and do not require another person as a target, which means they have an insignificant external impact. Thus, there is close to no possibility that such acts per se hold the definite risk of actually harming the existence and security of the State or the democratic fundamental order. Punishing acts in concert with anti-government

organizations, etc. would be the same as imposing punishment based on the content of claims and actions. Therefore, the part “acts in concert with” of the Pro-Enemy Activities Provision runs contrary to the rule against excessive restriction, consequently infringing upon the freedom of expression and freedom of conscience, and thus violating the Constitution.

The part “acts in concert with” of the Instant Provision is naturally rendered unconstitutional if the part “acts in concert with” of the Pro-Enemy Activities Provision violates the Constitution as seen above, for the latter is the element that serves as the precondition for the former’s punishment.

4. Case on Search by Arrest Warrant of Dwellings Other than the Suspect's

[2015Hun-Ba370, 2016Hun-Ka7 (consolidated), April 26, 2018]

In this case, the Court held that the part of Article 216 Section 1 Item 1 of the Criminal Procedure Act (amended by Act No. 5054 on December 29, 1995) concerning Article 200-2, which allows for the search of a suspect in another person's dwelling when necessary for executing an arrest warrant, does not conform to the Constitution.

Background of the Case

The Korean Railway Workers' Union (the "Railway Union") went on strike on December 9, 2013, led by its executive management, calling for the government to retract its plans to develop the railroad industry. Thereupon, the Korea Railroad Corporation sued the executive management of the Railway Union for interfering with business. When approximately ten of the executives disobeyed the summons for police investigation, an arrest warrant was issued on December 16, 2013.

To execute the aforementioned arrest warrant, the police, from around 09:00 a.m. to 11:00 a.m. on December 22, 2013, broke down the entrance to the lobby on the first floor of the Kyunghyang Shinmun Building and the entrance to the office of the Korean Confederation of Trade Unions located in that building to conduct a search, but the executives were not discovered.

The Complainant (2015Hun-Ba370) and Movant (2016Hun-Ka7) were prosecuted and convicted for obstructing the rightful performance of official duties in the execution of their arrest warrants by, during the search for suspects, conspiring with hundreds of Railway Union members to exercise collective force and assaulting and threatening police officers while carrying dangerous objects.

While the appellate trial was pending, the Complainant requested constitutional review of the part of Article 216 Section 1 Item 1 of the

Criminal Procedure Act concerning Article 200-2, which served as the grounds for the search by arrest warrant for the suspects. When the request was rejected, the Complainant filed this constitutional complaint on October 30, 2015. The Movant, while the appellate trial was pending, requested a constitutional review of the aforementioned provision of the Criminal Procedure Act, which was accepted by the court on March 9, 2016, and referred for constitutional review.

Subject Matter of Review

The subject matter of review in this case is whether the part of Article 216 Section 1 Item 1 of the Criminal Procedure Act (amended by Act No. 5054 on December 29, 1995) concerning Article 200-2 (the "Instant Provision") violates the Constitution. The Instant Provision reads as follows:

Provision at Issue

Criminal Procedure Act (amended by Act No. 5054 on December 29, 1995)

Article 216 (Compulsory Disposition without a Warrant)

(1) Where a prosecutor or senior judicial police officer arrests or detains a criminal suspect under Article 200-2, 200-3, 201 or 212, he or she may, if necessary, take the following measures without a warrant:

1. To investigate a criminal suspect in the dwelling of another person or houses, buildings, airplanes, vessels or vehicles which are guarded by other persons.

Summary of the Decision

1. Whether the rule of clarity has been violated

Article 16 of the Constitution prescribes that all citizens shall be free

from intrusion into their places of residence; and specifically indicates that a warrant must be presented in cases of search or seizure in a residence. Therefore, the necessity for search or seizure in a place of residence must be sufficiently justified by the probability that it contains evidence that could prove the charges. While a warrant is not a precondition in the case of the Instant Provision, the aforementioned interpretation must still be applied to investigations conducted as per the Instant Provision. Therefore, the phrase "if necessary" stated in the Instant Provision regarding arresting a suspect can be interpreted to mean "the probability that the suspect is residing in the place to be searched."

The Instant Provision indicates that, if necessary for arresting a suspect, the investigative agency can search for the suspect by entering the dwelling of another person without a warrant. The part "investigate a criminal suspect" in the Instant Provision can easily be interpreted to mean "search for a criminal suspect."

In light of the above, anyone can readily deduce from the Instant Provision that an investigative agency can search for a suspect in another person's dwelling if the probability of the suspect's existence therein can be explained. Therefore, the Instant Provision does not violate the rule of clarity.

2. Whether the warrant requirement has been violated

Unlike Article 12 Section 3 of the Constitution, the latter part of Article 16 of the Constitution merely prescribes, "In cases of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented," and does not stipulate an exception to the warrant requirement. However, given the connection between Article 12 Section 3 and Article 16 of the Constitution; the necessity for emergency searches and seizures in places of residence; and the purpose of Article 16 of the Constitution which pronounces the warrant requirement regarding the freedom of residence, it is fair to say that exceptions to the warrant requirement should be made in only limited cases when (1)

there is a probability that evidence that can prove the charges or a suspect exists in the place of interest, and (2) an emergency situation makes it impracticable to obtain a warrant in advance.

By prescribing that it is possible to investigate a criminal suspect in the dwelling of another person without a warrant "if necessary," when seeking to arrest the suspect with an arrest warrant, the Instant Provision permits the search of another person's dwelling without a warrant if there is a probability that the suspect resides in such dwelling, without determining whether an emergency situation makes it impracticable to obtain a search warrant. This indicates that a search for a suspect can be conducted without a warrant even if such an emergency situation has not been recognized, as long as it is probable that a suspect for whom an arrest warrant has been issued is residing in another person's dwelling. Thus, the Instant Provision does not count as an exception to the warrant requirement provided in Article 16 of the Constitution.

3. Decision of nonconformity to the Constitution

The unconstitutionality of the Instant Provision lies in the fact that it recognizes exceptions to the warrant requirement regardless of whether an emergency situation makes it impracticable to obtain a search warrant to arrest a suspect for whom an arrest warrant has been issued, as long as there is a probability that the suspect resides in another person's dwelling. If the Instant Provision immediately loses effect due to a decision of unconstitutionality, a legal vacuum would occur upon removing legal grounds that allow the search of another person's dwelling without a search warrant, where the suspect must be arrested urgently.

Therefore, we deliver a decision of nonconformity to the Constitution instead of an unconstitutionality decision for the Instant Provision; and order that it remain applicable until the legislature revises it by removing the element of unconstitutionality by March 31, 2020. Provided, the Instant Provision must be applied in limited cases where the probability

that a suspect, for whom an arrest warrant has been issued, is residing in another person's dwelling has been clarified, and an emergency situation makes it impracticable to obtain a specific search warrant ahead of the search.

5. Case on Prohibiting Attorneys Qualified as Certified Tax Accountants from Providing Tax Agent Services

[2015Hun-Ka19, April 26, 2018]

In this case, the Court held that the parts concerning attorneys in Article 6 Section 1 and the main text of Article 20 Section 1 of the Certified Tax Accountant Act, which prohibit attorneys-at-law qualified as certified tax accountants from providing tax agent services, violate the rule against excessive restriction; and that consequently they infringed the freedom of occupational choice of attorneys-at-law qualified as certified tax accountants in violation of the Constitution.

Background of the Case

The Movant became qualified as an attorney-at-law by passing the Korean bar examination in 2004, and on October 8, 2008, was newly granted registration for tax agent services. While providing tax agent services, the Movant requested the head of the Seoul Regional Office of the National Tax Service to renew his/her registration, but was given a disposition to *ex officio* cancel registration of tax agent services and a disposition refusing to renew such registration. Thereupon, the Movant filed an action with the Seoul Administrative Court seeking the revocation of each disposition, and appealed upon losing the case. While the appellate trial was pending, the Movant requested constitutional review of Article 6, Article 20 Section 1 and Article 20-2 of the Certified Tax Accountant Act. On May 18, 2015, the requesting court referred the case for review.

Subject Matter of Review

The subject matter of review in this case is whether the parts concerning attorneys-at-law in Article 6 Section 1 of the Certified Tax Accountant Act (amended by Act No. 11610 on January 1, 2013) and in

the main text of Article 20 Section 1 of the Certified Tax Accountant Act (amended by Act No. 9348 on January 30, 2009) (the "Instant Provisions") violate the Constitution. The Instant Provisions read as follows:

Provisions at Issue

Certified Tax Accountant Act (amended by Act No. 11610 on January 1, 2013)

Article 6 (Registration)

(1) Where a person qualified as a certified tax accountant after having passed a qualifying examination for certified tax accountants referred to in Article 5 intends to commence providing tax agent services, he/she shall register such matters specified by Presidential Decree in the register of certified tax accountants kept with the Ministry of Strategy and Finance.

Certified Tax Accountant Act (amended by Act No. 9348 on January 30, 2009)

Article 20 (Restriction, etc. of Services)

(1) No person, other than those registered under Article 6, shall provide tax agent services: Provided, that this shall not apply where he/she provides tax agent services as duties of an attorney-at-law pursuant to Article 3 of the Attorney-at-Law Act, and where he/she is registered under Article 20-2 Section 1.

Summary of the Decision

1. Whether the freedom of occupational choice has been infringed upon

The legislative purposes of the Instant Provisions are understandable: to protect the rights and interests of taxpayers; to facilitate the smooth execution of tax administration; and to promote the proper performance of taxpaying duties by ensuring the expertise of tax agent services and

by preventing poorly performed services.

The duties of certified tax accountants include acting as agents for reporting, or filing applications or requests with regard to taxes; preparing statements of tax adjustment and other tax-related documents; consulting or advising on taxes; acting as agents for stating a taxpayer's opinion in relation to an investigation, disposition, etc. by a tax office; and acting as agents for filing objections to public notice of officially assessed individual land prices, the prices of detached houses and the prices of multi-family houses under the Act on the Public Announcement of Real Estate Values. To properly perform such duties, it is essential to possess expertise on tax laws and relevant laws required for interpreting and applying the same, such as the Constitution, the Civil Act and the Commercial Act, as well as the ability to methodically interpret and apply the law. When it comes to the interpretation and application of tax laws and relevant laws, attorneys, as legal professionals who deal with general legal affairs, can be more highly recognized for such expertise and abilities, compared to tax accountants or public accountants. In spite of this, the Instant Provisions completely prohibit attorneys qualified as certified tax accountants from providing tax agent services. Thus the appropriateness of means is not satisfied.

Attorneys-at-law qualified as tax accountants have been qualified as such by law, which means they have acquired the freedom to perform duties per such qualification. They have also been recognized for their expertise and ability regarding tax accountant duties, which require interpreting and applying tax laws and relevant laws. Nevertheless, the Instant Provisions completely prohibit attorneys qualified as tax accountants from providing tax agent services as tax accountants. This is a complete prohibition of the freedom of occupational choice recovered upon acquiring qualifications as a certified tax accountant. Not only does this deprive the certified tax accountant qualification of its meaning, but it also contradicts the entire legal framework that regulates the qualification system, and excessively restricts the freedom of occupational choice that applies to tax accountant qualifications.

Moreover, the legislative purpose of ensuring expertise in tax agent services and protecting the rights and interests of taxpayers is more closely met when consumers are able to make the most appropriate choice between certified tax accountants, certified public accountants, and attorneys-at-law, after deciding whether the tax agent services they seek can be delivered by working-level procedures related to the competent tax office, or whether the focus should lie in the interpretation and application of tax laws and relevant laws. Therefore, the Instant Provisions breach the rule of minimum restriction.

It cannot be said that the disadvantage imposed on attorneys qualified as certified tax accountants, by being unable to provide tax agent services as tax accountants, is less important than the public interest that the Instant Provisions seek to achieve. Therefore, the Instant Provisions do not satisfy the balance of interests.

Therefore, the Instant Provisions violate the rule against excessive restriction, consequently infringing upon the freedom of occupational choice of attorneys-at-law qualified as certified tax accountants, and thus violate the Constitution.

2. Decision of nonconformity to the Constitution and order for temporary application

Pronouncing the Instant Provisions to be unconstitutional would create a legal vacuum, removing the legal grounds for registration of general tax accountants as certified tax accountants. The unconstitutionality of the Instant Provisions does not lie in restricting tax agent services provided by attorneys qualified as certified tax accountants per se, but in the complete and uniform prohibition of their provision of tax agent services as certified tax accountants. It is up to the legislature to decide the extent of tax agent services permitted to be performed by such attorneys, and the specific procedures and details necessary for granting such attorneys authority to provide tax agent services; thus, we deliver a decision of nonconformity to the Constitution; and order that the

provisions remain applicable until revision by the legislature.

Summary of Dissenting Opinion of Three Justices

1. Whether the freedom of occupation has been infringed upon

The Instant Provisions heighten public confidence in the qualifications for certified tax accountants and protect the rights and interests of taxpayers by preventing poorly performed tax agent services. They also prohibit attorneys qualified as certified tax accountants from providing tax agent services other than as legal services, to facilitate execution of tax administration. Thus, the legislative purpose is legitimate, and the appropriateness of means satisfied.

Whether to grant an attorney-at-law another qualification, and to what extent the authority of such attorney in performing duties should be recognized, is up to the legislature to decide. It is comprehensible that the legislature decided that attorneys cannot be as proficient as certified tax accountants in dealing with practical matters related to tax offices, which require expertise on accounting, especially considering the subjects in the qualifying examination. Measures that grant attorneys educated in tax laws the same authority as certified tax accountants would not ensure the same level of operational transparency or consistency of outcomes as qualifying examinations for certified tax accountants. There is also no effective measure that can otherwise achieve the legislative purpose of the Instant Provisions. Therefore, the Instant Provisions do not breach to the rule of minimum restriction.

It cannot be said that the disadvantage imposed on attorneys-at-law qualified as certified tax accountants, who cannot provide services pertaining to the domain of tax agent services by certified tax accountants although they can freely perform services as attorneys, outweighs the public interest of preventing poorly performed tax agent services and providing appropriate services to taxpayers. Therefore, the Instant Provisions do not violate the balance of interests. Thus, the

Instant Provisions do not infringe upon the freedom of occupation of attorneys-at-law qualified as certified tax accountants by violating the rule against excessive restriction.

2. Whether the rule of equality has been violated

The Instant Provisions do not discriminate between attorneys-at-law qualified as certified tax accountants and attorneys-at-law who intend to perform patent attorney services. Although discrimination exists between attorneys-at-law qualified as certified tax accountants and certified public accountants who can provide tax agent services after being registered on the tax agent services register, certified public accountants are understood to possess the expertise necessary for executing practical tax agent services. Therefore, the Instant Provisions do not violate the rule of equality.

6. Case on School Regulations Requiring an Applicant for University Presidential Candidacy to Pay a Deposit

[2014Hun-Ma274, April 26, 2018]

In this case, the Court held that Article 15 Section 1 Item 9 and Article 15 Section 3 of the Regulations on the Appointment of Candidates for the Chonbuk National University President, which requires persons wishing to apply as a candidate for university presidential to pay a deposit of 10 million won upon application, infringed upon the Complainant's right to serve in public office, and thus violated the Constitution.

Background of the Case

The Complainant has been working as a professor at Chonbuk National University since March 1, 2004. The Complainant filed a constitutional complaint against Article 15 Section 1 Item 9 and Article 16 Item 3 of the former Regulations on the Appointment of Candidates for the Chonbuk National University President (the "Regulations on Presidential Candidate Appointments"), which required persons applying as a university presidential candidate to pay development funds amounting to 30 million won.

Thereafter, the Regulations on Presidential Candidate Appointments were amended, effectively removing all provisions related to the development funds. Instead, new provisions were inserted, requiring persons applying as a university presidential candidate to pay a deposit of 10 million won (Article 15 Section 1 Item 9 and Article 15 Section 3 of the Regulations on Presidential Candidate Appointments). The Complainant amended the purpose of the claim to seek a ruling as to the unconstitutionality of the above provisions and Article 15 Section 1 Item 9 and Article 15 Section 3 of the Regulations on Presidential Candidate Appointments.

Subject Matter of Review

The subject matter of review in this case is whether: (1) Article 15 Section 1 Item 9 and Article 16 Item 3 of the former Regulations on the Appointment of Candidates for the Chonbuk National University President (enacted by Directive No. 1724 on December 31, 2013, and before amendment by Directive No. 1753 on June 13, 2014) (collectively, the "Development Fund Provisions"); and (2) Article 15 Section 1 Item 9 of the Regulations on the Appointment of Candidates for the Chonbuk National University President (amended by Directive No. 1753 on June 13, 2014) and Article 15 Section 3 of the Regulations on the Appointment of Candidates for the Chonbuk National University President (amended by Directive No. 1768 on August 22, 2014) (collectively, the "Deposit Provisions") infringe upon the fundamental rights of the Complainant.

Provisions at Issue

Former Regulations on the Appointment of Candidates for the Chonbuk National University President (enacted by Directive No. 1724 on December 31, 2013, and before amendment by Directive No. 1753 on June 13, 2014)

Article 15 (Submission of Application for Presidential Candidate)

(1) Persons who wish to apply as a candidate must submit to the Management Committee the following documents within the public notice period. *Provided*, if the deadline for submission falls upon a Saturday or public holiday, it will be moved to the following day.

9. One copy of a certificate confirming payment of development funds

Article 16 (Qualification for Presidential Candidate)

Persons who wish to apply as a candidate must be nationals of the Republic of Korea who possess the education, virtue, leadership and administrative ability required as a university president, and must satisfy the following qualifications:

3. Persons who have paid development funds amounting to 30 million won to Chonbuk National University during the candidate registration period.

Regulations on the Appointment of Candidates for the Chonbuk National University President (amended by Directive No. 1753 on June 13, 2014)

Article 15 (Submission of Application for Presidential Candidate)

(1) Persons who wish to apply as a candidate must submit to the Management Committee the following documents within the public notice period. *Provided*, if the deadline for submission falls upon a Saturday or public holiday, it will be moved to the following day.

9. One copy of a receipt confirming payment of the deposit.

Regulations on the Appointment of Candidates for the Chonbuk National University President (amended by Directive No. 1768 on August 22, 2014)

Article 15 (Submission of Application for Presidential Candidate)

(3) Persons who wish to apply as a candidate must pay a deposit of 10 million won, upon application, to a bank account designated by the Management Committee.

Summary of the Decision

1. Whether the legal prerequisites to the request for adjudication on the Development Fund Provisions have been satisfied

The Development Fund Provisions have been removed as per the amendment to the Regulations on Presidential Candidate Appointments by Directive No. 1753 on June 13, 2014. Consequently, the request for adjudication on this part lacks justiciable interests. The request for adjudication on the Development Fund Provisions is therefore non-justiciable.

2. Whether the Deposit Provisions infringe upon the right to serve in public office

(1) The legislative purpose of the Deposit Provisions can be recognized as being legitimate, for they aim to prevent indiscriminate applications to become candidates for university president; and to ensure the responsibility and integrity of such applications, thereby preventing campaigns from becoming overheated.

Since requiring persons applying as a presidential candidate to pay a deposit of 10 million won can help prevent applicants from imprudently applying for candidacy, the appropriateness of means of such measure is also recognized.

(2) According to the Regulations on Presidential Candidate Appointments currently in force, candidates for presidency are selected through an indirect election, and the only chance an applicant gets to engage in an election campaign is at the joint speech session held for the benefit of the Recommendation Committee for Presidential Candidates (the "Recommendation Committee"). Such method leaves little room for elections to become inundated with candidates or to become overheated.

Further, an examination of the history of the regulations does not clearly reveal any grounds for why the deposit system, which was adopted when the direct election system was used in the past, is necessary under the current indirect election system.

If there are concerns that elections may become overheated due to an indiscriminate number of candidates for university president, such inundation can be prevented by applying stricter standards for candidate eligibility, for instance by strengthening the qualification requirements in the current Regulations on Presidential Candidate Appointments. Overheated elections can also be prevented by prohibiting fraudulent conduct and imposing sanctions thereon under the regulations. Such measures could be appropriate alternatives for the Deposit Provisions.

The deposit of 10 million won is a significant amount of money, not only for school personnel such as faculty members, but also from the

perspective of the general public. Combined with the fact that whether the deposit is returned is solely based on the first vote by the Recommendation Committee; and that in certain cases the deposit reverts to the development fund regardless of the intent of the applicant, the amount of 10 million won prescribed by the Deposit Provisions is excessive enough to lead school personnel such as faculty members as well as the general public who lack the financial means to abandon applying for candidacy.

In light of these facts, the Deposit Provisions run contrary to the rule of minimum restriction.

(3) The public interest sought by the Deposit Provisions under the indirect election system prescribed by the current Regulations on Presidential Candidate Appointments is limited. On the other hand, the Deposit Provisions lead school personnel such as faculty members and the general public who lack the financial means to abandon applying for candidacy, which means that the extent of the restriction of the right to hold public office imposed by the Deposit Provisions cannot be underestimated.

Since the public interest sought by the Deposit Provisions does not outweigh the restriction on the right to hold public office, the Deposit Provisions do not satisfy the balance of interests.

(4) The Deposit Provisions violate the rule against excessive restriction; and thus infringe upon the Complainant's right to serve in public office.

Summary of Concurring Opinion of One Justice

The Complainant is a public official, being a faculty member of Chonbuk National University, and the Regulations on Presidential Candidate Appointments are the school regulations thereof. Since the Complainant is claiming the infringement of fundamental rights as an individual, he or she should be recognized as a bearer of fundamental rights.

Even if the Regulations on Presidential Candidate Appointments are

considered to be of a nature equal to that of administrative rules, they should be regarded as an exercise of governmental power which is subject to constitutional complaints.

While the Complainant, being a public official, may enjoy fundamental rights to a more restricted degree compared to the members of the general public, as seen in the majority opinion, the Deposit Provisions in this case do not satisfy the rule of minimum restriction and the balance of legal interests. Further, since the Deposit Provisions apply to the general public, and not only to school personnel such as faculty members, the unique nature of the status of public officials need not be reflected in determining whether fundamental rights have been infringed.

7. Case on Banning Outdoor Assemblies within 100m of the National Assembly Building

[2013Hun-Ba322, 2016Hun-Ba354, 2017Hun-Ba360 · 398 · 471, 2018Hun-Ka3 · 4 · 9 (consolidated), May 31, 2018]

In this case, the Court held that the part concerning "the National Assembly building" of Article 11 Item 1 and the part of Article 23 concerning "the National Assembly building" of Article 11 Item 1 of the Assembly and Demonstration Act (amended by Act No. 8424 on May 11, 2007), which prohibit outdoor assemblies or demonstrations within a 100-meter radius from the boundary of the National Assembly building and prescribe the penalty therefor, infringe upon the freedom of assembly and thus violate the Constitution.

Background of the Case

The Complainant was charged at the Seoul Central District Court for participating in an assembly held on the right-hand side riverbank running from the north gate to the east gate of the National Assembly building, 30m to 40m away from the boundary thereof.

While the trial in the first instance was pending, the Complainant requested constitutional review of the part concerning "the National Assembly building" of Article 11 Item 1 of the Assembly and Demonstration Act with the Seoul Central District Court, which was rejected by the same court. Thereupon, the Complainant filed this constitutional complaint.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning "the National Assembly building" of Article 11 Item 1 and the part of Article 23 concerning "the National Assembly building" of

Article 11 Item 1 of the Assembly and Demonstration Act (wholly amended by Act No. 8424 on May 11, 2007) (the "Instant Provisions") violate the Constitution.

Provisions at Issue

Assembly and Demonstration Act (wholly amended by Act No. 8424 on May 11, 2007)

Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)

No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences:

1. The National Assembly building, all levels of courts, and the Constitutional Court.

Article 23 (Penal Provisions)

Any person who violates the main text of Article 10 or Article 11; or who violates the ban provided for in Article 12, shall be punished according to the following classification of offenders:

1. The organizer shall be punished by imprisonment for not more than one year, or by a fine not exceeding one million won;

2. The moderator shall be punished by imprisonment for not more than six months, a fine not exceeding 500,000 won, penal detention, or a minor fine; and

3. A person who participates in an assembly or demonstration with knowledge of the fact shall be punished by a fine not exceeding 500,000 won, penal detention, or a minor fine.

Summary of the Decision

1. Whether the freedom of assembly has been infringed upon

(1) The National Assembly serves an important role in determining national policies, as it enacts or amends statutes, as a body representing

the people, and exercises strong control over the executive branch, as an authority controlling national affairs. Thus, the function and role of the National Assembly, given their unique nature and significance, require special and sufficient protection.

The legislative purposes of the Instant Provisions are legitimate, since they aim to ensure that National Assembly members and staffs employed at the National Assembly, and members of the general public and public officials attending the National Assembly to make statements perform their duties by freely entering the National Assembly building under no pressure or threat, while also intending to guarantee the safety of National Assembly facilities including the National Assembly building. The complete prohibition of outdoor assemblies within a 100-meter radius from the boundary of the National Assembly building ("nearby the National Assembly building") helps protect the National Assembly's function, and thus satisfies the appropriateness of means.

(2) The constitutional role of the National Assembly can coexist with assemblies being held nearby the National Assembly building; in fact, they may help the National Assembly stay more true to its constitutional role. As National Assembly members must perform their duties conscientiously by putting national interests first, given the National Assembly's role of "gathering public consensus," the necessity to protect the National Assembly from unreasonable duress exercised by specific persons or certain forces should, as a rule, be limited to protection from potential physical duress or harm against National Assembly members and from the risk of threats against entry into, or the safety of, National Assembly facilities including the National Assembly building.

Considering the legislative purpose of the Instant Provisions, the "National Assembly building" can be interpreted to mean the entirety of the National Assembly site where National Assembly functions take place, including the Members' Office Building and the National Assembly Library. However, such an interpretation would lead to the inclusion of areas unrelated to entry into the National Assembly building, and areas separated from the National Assembly site by roads as well as

nearby parks and green spaces, in the scope of the areas where assemblies are prohibited. Further, a fence is installed on the boundary of the National Assembly site and significant space lies between the fence and National Assembly facilities such as the National Assembly building, which guarantee the constitutional function of the National Assembly.

The general presumption is that assemblies held nearby the National Assembly building pose a direct threat to the legal interests protected by the Instant Provisions. If this presumption can be refuted by specific situations, the legislature must prescribe the Instant Provisions to allow outdoor assemblies as an exception. For instance, in cases where the constitutional function of the National Assembly is not, or highly unlikely to be, infringed upon by outdoor assemblies - such as in cases of small-scale assemblies that are unlikely to directly undermine the National Assembly's function, assemblies held on public holidays or when the National Assembly is in recess, or assemblies that are not against the National Assembly's activities or that intend to indirectly influence the National Assembly - the legislature should acknowledge exceptions to mitigate the possibility of excessively restricting the freedom of assembly through the Instant Provisions.

There is, of course, a possibility that the constitutional function of the National Assembly may be harmed when violent, illegal and large-scale assemblies take place nearby the National Assembly building. However, the Assembly and Demonstration Act prescribes diverse regulatory measures to deal with such situations, and any acts of violence or obstruction of work that occur during the assemblies are punished as crimes under criminal law.

In sum, the Instant Provisions go beyond the minimum scope necessary for achieving their legislative purpose, by uniformly and completely prohibiting assemblies that do not require regulation or can be permitted as an exception. Therefore, the Instant Provisions violate the rule of minimum restriction.

2. Decision of nonconformity to the Constitution (temporary application)

The prohibition of outdoor assemblies nearby the National Assembly building, imposed by the Instant Provisions, contains both unconstitutional and constitutional elements. We thus issue a decision of nonconformity to the Constitution, and order that the Instant Provisions remain applicable until amended by the legislature by December 31, 2019.

8. Case on the Right to Meet Counsel of a Refugee Detained for Repatriation at Incheon International Airport

[2014Hun-Ma346, May 31, 2018]

In this case, the Court held that the rejection by the head of Incheon Airport Immigration Office of the request to meet with counsel by a refugee detained in the waiting room for repatriation at Incheon International Airport, infringed upon the right to receive assistance of counsel and thus violated the Constitution.

Background of the Case

The Complainant is a foreigner of Sudanese nationality. Upon arriving at Incheon International Airport on November 20, 2013, the Complainant applied for recognition of refugee status, and was detained in a waiting room for repatriation at Incheon International Airport until it was decided whether the request for recognition would be referred for refugee status screening. The Respondent, the head of the Incheon Airport Immigration Office, refused to refer the Complainant for refugee status screening on November 26, 2013, and the Complainant was continuously detained in the waiting room for repatriation at Incheon International Airport.

On November 28, 2013, the Complainant filed a lawsuit to annul the decision to deny a referral for refugee status screening, and on December 19, 2013, filed a habeas corpus petition to seek release from confinement. While these two lawsuits were pending, the Complainant's counsel requested the Respondent to allow a meeting with the Complainant on April 25, 2014, but the Respondent refused.

The Complainant filed this constitutional complaint on April 30, 2014, claiming that the Respondent's refusal to allow visitation by a counsel infringed upon the right to receive assistance of counsel as prescribed in the main text of Article 12 Section 4 of the Constitution, and the right to trial.

Subject Matter of Review

The subject matter of review in this case is whether the Respondent's refusal on April 25, 2014, to accept the Complainant's request to meet with his/her counsel, infringes upon the fundamental rights of the Complainant, who is being detained in a waiting room for repatriation at Incheon International Airport after being denied referral for refugee status screening (hereinafter the Respondent's refusal on April 25, 2014, to allow visitation by counsel is referred to as "disallowance of visitation by counsel").

Summary of the Decision

1. Whether the Respondent was the actor that detained the Complainant in a waiting room for repatriation

The Respondent is the joint decision-maker on managing and operating the waiting room for repatriation, a detention facility; exercised decisive authority in commencing and terminating the Complainant's detention; shared a portion of the detention costs; and by detaining the Complainant enjoyed the administrative benefit of conveniently controlling him/her, amongst other persons denied entry into the country. Therefore, the Respondent is the actor that, in conjunction with the Incheon Airport Airline Operation Council, detained the Complainant.

2. Whether the right to receive assistance of counsel prescribed in the main text of Article 12 Section 4 of the Constitution is immediately guaranteed for persons detained under administrative procedures

Given the language of the main text of Article 12 Section 4 of the Constitution, the structure of the provisions of Article 12 of the Constitution, the nature of the right to assistance of counsel, and the purpose of the Constitution's guarantee of physical freedom, the

"detainment" prescribed in the main text of Article 12 Section 4 includes not only detention under judicial proceedings, but also detention by administrative procedures. Therefore, the right to assistance of counsel prescribed in the main text of Article 12 Section 4 of the Constitution is immediately guaranteed for persons detained in the latter category of cases as well.

The Constitutional Court previously delivered a decision to the contrary (2008Hun-Ma430, August 23, 2012), opining that the right to assistance of counsel prescribed in the main text of Article 12 Section 4 of the Constitution intends to guarantee the suspect's or defendant's right to self-defense in criminal proceedings, and should not be applied to procedures for protection or deportation under the Immigration Act. Such decision is to be reversed to the extent it conflicts with the decision in this case.

3. Whether the Complainant was under detention in the waiting room for repatriation

The waiting room for repatriation at Incheon International Airport is a confined space with a steel door for an entrance; and access to the room is controlled by the Incheon Airport Airline Operation Council. Therefore, the Complainant could not leave the waiting room to venture into the transit area, and had no way of communicating with the outside world aside from via a payphone. The Complainant had been detained in the waiting room for repatriation for approximately five months at the time when the Respondent refused to allow visitation by counsel, and could not have expected to leave the waiting room at his/her discretion until the lawsuit on the revocation of the decision to deny referral for refugee status screening was completed. Since the Complainant had already filed a habeas corpus petition to seek release from confinement in the waiting room when the Respondent disallowed visitation by counsel, the Complainant cannot be deemed to have been remaining in the waiting room at will. Therefore, the Complainant was being "detained," as

prescribed in the main text of Article 12 Section 4 of the Constitution, when disallowed visitation by counsel.

Considering the specific and practical circumstances faced by the Complainant, who had fled persecution by his/her country of citizenship, the Complainant's freedom to depart the country is merely an abstract possibility that in reality cannot be realized. Therefore, such notional freedom to depart the country is not an element that should be considered when deciding whether the Complainant was being "detained" in the waiting room for repatriation. Even if such possibility is taken into account, the Complainant was prohibited from leaving the waiting room to enter the transit area for a long period, which confirms that the Complainant was detained in the waiting room, which was a confined area.

4. Whether disallowing visitation by counsel in this case infringed upon the Complainant's right to receive assistance of counsel

Disallowing visitation by counsel in this case restricted the Complainant's right to assistance of counsel without legal grounds, and thus infringed upon the Complainant's right to assistance of counsel.

Further, it is not likely that allowing the Complainant to meet with his/her counsel would interfere with guaranteeing national security, maintaining order or seeking public welfare. The Complainant's right to meet with his/her counsel can be properly guaranteed without particularly disrupting national security or order in the transit area if certain measures are taken, for example restricting meeting venues to the minimum extent necessary. Therefore, the disallowance of visitation by counsel in this case cannot be considered a restriction of fundamental rights required for guaranteeing national security, maintenance of order, and public welfare. From this viewpoint, the disallowance of visitation by counsel likewise infringes upon the Complainant's right to receive assistance of counsel.

Summary of Concurring Opinion of Two Justices

1. Whether the right to receive assistance of counsel has been infringed upon

Foreigners forbidden entry into the country have merely been denied entry into the Republic of Korea, and can always leave the waiting room for repatriation by voluntarily departing for his/her home country or a third country. Therefore, the restriction on the "freedom of movement" of foreigners denied entry into the country takes on a unique nature in that such restriction depends on the foreigner's volition.

It is necessary to restrict the "freedom of movement" of foreigners denied entry into the country, in order to guarantee national security, maintain order and promote public welfare. Further, such restriction of freedom occurred against the Complainant in the course of controlling his/her continued attempts to enter the Republic of Korea despite denial of entry, even though the Complainant could have voluntarily departed the country. Therefore, this restriction of freedom is not completely unrelated to the volition of the Complainant. Also, the reason the Complainant was made to remain for over five months in the waiting room for repatriation was because he/she had filed a lawsuit seeking revocation of the denial of referral for refugee status screening, and had to remain for an extended period at the port of entry and departure for the litigation process.

Considering such facts, the Complainant cannot be deemed as having been "detained" as established by the Constitution, and thus is not eligible for the right to receive assistance of counsel granted to persons detained as prescribed in Article 12 Section 4 of the Constitution. Therefore, the disallowance of visitation by counsel (hereinafter referred to as "disallowance of visitation by an attorney" in the following concurring opinion) does not restrict the Complainant's constitutional right to receive assistance of counsel.

2. Whether the right to trial has been infringed upon

The Complainant, who was confined in the waiting room for repatriation, filed a habeas corpus petition to argue the fairness of such confinement, and sought the assistance of an attorney in relation to the lawsuit. Therefore, the right to trial in this case is an essential right for effectively guaranteeing physical freedom, which is a human right. Thus, the Complainant is a bearer of the right to trial, despite being a foreigner.

Guaranteeing the right to visitation between a person remaining in a waiting room for repatriation at a port of entry and departure for being denied entry into the country; and an attorney comprises part of the right to trial guaranteed by the Constitution. Therefore, the disallowance of visitation by an attorney restricts the Complainant's right to assistance by an attorney, as part of the right to trial.

The disallowance of visitation by an attorney has no legal ground, and is not a restriction of fundamental rights necessary for guaranteeing national security, maintaining order, and promoting public welfare; and thus infringes upon the Complainant's right to trial.

9. Case on Using Water Cannons Containing Tear Gas Mixed with Water

[2015Hun-Ma476, May 31, 2018]

In this case, the Court held that the conduct by the chief of Seoul Jongno Police Station, of spraying the Complainants with a water cannon using a solution of tear gas mixed with water between 22:13 and 23:20 on May 1, 2015, violated the principle of statutory reservation, and thus violated the Constitution.

Background of the Case

The Complainants participated in the nationwide all-night assembly calling for the rescission of the "Bill of the Enforcement Decree of the Special Act on Investigating the Truth of the April 16 Sewol Ferry Disaster and Building a Safe Society," held around the Anguk-dong pedestrian crossing in Jongno-gu, Seoul for two days from May 1, 2015 (the "Assembly").

With an aim to stop the participants of the Assembly including the Complainants from marching toward Cheong Wa Dae, the office of the President, the Respondent, the chief of Seoul Jongno Police Station, turned a truck-mounted water cannon on the Assembly participants containing a solution of the tear gas PAVA mixed with water, from 22:13 to 23:20 on May 1, 2015.

The Complainants filed this constitutional complaint on May 6, 2015, claiming that they suffered harm including pain in their eyes and facial skin due to the Respondent's using the water cannon.

Subject Matter of Review

The subject matter of review in this case is whether: (1) the conduct by the Respondent of spraying the Complainants with a water cannon

using a solution of tear gas mixed with water, from 22:13 to 23:20 on May 1, 2015 (the "Instant Conduct"); and (2) the part concerning the use of water cannons containing tear gas in Chapter 2 of the "Operation Manual on Water Cannons (April 3, 2014)," which serves as the ground for the Instant Conduct (the "Manual"), infringed upon the Complainants' fundamental rights, thus violating the Constitution. The Manual reads as follows:

Provision at Issue

Operation Manual on Water Cannons (April 3, 2014)

Chapter 2 (Use of Water Cannons)

3. Use of Water Cannons at Assemblies and Demonstrations

B. Methods of using a water cannon

4) Using tear gas in a water cannon

a) Instructions: Mix lachrymator agents such as tear gas in the water cannon truck's water tank, to the appropriate concentration necessary for suppressing persons committing crimes, and ensure that harm to nearby third parties is minimized.

b) Conditions of use: Use upon approval by the commissioner of the district police agency when people do not disperse, upon high-angle or direct spraying.

Summary of the Decision

1. Whether the legal prerequisites have been met

The Complainants' fundamental rights were not infringed by the Manual, but by the conduct of using a water cannon containing tear gas, which was specific conduct executed by an administrative authority. Therefore, the Manual does not directly infringe upon fundamental rights, and thus the constitutional complaint in this regard is non-justiciable.

The situation in which the Complainants' fundamental rights were

being infringed upon by the Instant Conduct has been terminated. However, under the relevant regulations, the conduct of using a water cannon containing tear gas is likely to be repeated at other assemblies or demonstrations, and such conduct is an exercise of public power from which a grave infringement of legal interests that could pose a risk to people's lives or physical safety is expected to occur. Since the Constitutional Court has heretofore never clarified whether the conduct of using a water cannon containing tear gas conforms to the Constitution, the justiciable interests are recognized.

2. Whether the principle of statutory reservation has been violated

The conduct of using a water cannon containing tear gas to disperse or block assemblies and demonstrations not only restricts the freedom of assembly, but also directly breaches the right to not to be harmed, which is derived from the right to physical freedom. Therefore, the legislature must regulate, by law, matters related to the essence of such restriction/ breach.

Depending on their usage, water cannons can inflict severe harm on the health and safety of the people, as much as other lethal police equipment such as police gear or weapons. Therefore, the conditions and standards for using water cannons should be based on statutes.

Given the danger entailed in using lethal police equipment such as water cannons and the necessity to protect fundamental rights, the guidelines on using lethal police equipment as prescribed in the Act on the Performance of Duties by Police Officers and the Regulations on Standards for Usage of Lethal Police Equipment (the "Instant Presidential Decree") must be subject to strictly limited interpretation as per the principle of statutory reservation, while lethal police equipment must be used for their designated purpose in line with their original method of use, and must be justified by legal grounds when used for other purposes or by different methods.

Water cannons are equipment that suppress crowds using the pressure

of streams of water, and must be used for that purpose only. Heightening the ability to injure by mixing tear gas in the water for the water cannon must be based on legal grounds, as it is a "new type of lethal police equipment." However, the legal grounds for this method cannot be found in Acts or presidential decrees currently in force, and there is no statute that delegates to the Manual the authority to prescribe the legal grounds for using water cannons with mixed solutions.

As a result of failing to specify by statute standards and instructions on using water cannons, and instead leaving this to internal guidelines used by the police, water cannons continue to be used inappropriately, leading to the death or injury of demonstrators. As in the case of other lethal police equipment, basic matters regarding the specific operational methods and procedures of water cannons should be prescribed by Act or presidential decree, so as to strictly limit the use of water cannons, to ultimately protect the health and safety of the people.

Therefore, the Manual, which prescribes methods of using water cannons with mixed solutions without specific delegation of authority by the Act on the Performance of Duties by Police Officers or the Instant Presidential Decree, violates the principle of statutory reservation. Meanwhile, the Instant Conduct, which is supported only by this Manual, constitutes an exercise of public power that infringes upon the Complainants' bodily freedom and freedom of assembly, thus violating the Constitution.

Summary of Dissenting Opinion of Two Justices

1. Whether the principle of statutory reservation has been violated

In relation to the Instant Conduct, Sections 1, 2, 4 and 6 of Article 10 of the Act on the Performance of Duties by Police Officers specifically prescribe "lethal police equipment" and the relevant details and scope that should be delegated to presidential decree, while Article 2 and Article 13 Section 1 of the Instant Presidential Decree, within the scope

of delegation, set forth the types of lethal police equipment as water cannons, tear gas grenades (that include trigger devices), spray guns, etc., and then prescribe the conditions of use and specific standards of each type of police equipment.

As long as the relevant Acts and presidential decrees clarify that water cannons, tear agents and the trigger devices thereof may be used, and prescribe the relevant general conditions of use and standards, it is not absolutely necessary for the legislature to prescribe by Act the specific methods and standards for using tear agents, such as which trigger device should be used to spray tear agents; or whether it is possible to mix tear agents and water when using water cannons. In particular, to employ appropriate and flexible countermeasures at various assemblies and demonstrations where situations take sudden turns by the minute, the details should be delegated to statutory instruments, rather than being enacted by the National Assembly as statutes.

The majority opinion states that the use of mixed solutions in water cannons is equivalent to a new type of lethal police equipment that has no legal ground, and that basic matters regarding the specific operational methods and procedures of water cannons should be prescribed by Act or presidential decree, and thus, that the Manual, which was not delegated by statute, violates the principle of statutory reservation. However, using mixed solutions in water cannons is merely a method used when deploying tear agents and the trigger devices thereof or water cannons, which are already prescribed as types of lethal police equipment by Act and presidential decree. Thus, this cannot be considered a new type of lethal police equipment.

Moreover, basic matters on the essence of the restriction of fundamental rights that occur when using lethal police equipment such as water cannons are prescribed by the Act on the Performance of Duties by Police Officers and the Instant Presidential Decree. As long as this is the case, prescribing specific matters on using water cannons with mixed solutions in the Rules on the Management of Police Equipment (the “Instant Rules”), enacted to decide matters regarding implementing the

Instant Presidential Decree, or in the Manual that was enacted based on the Instant Rules, does not run contrary to the principle of statutory reservation.

Therefore, the Instant Conduct is a specific method used for spraying tear agents at assemblies or demonstrations, rather than a new type of lethal police equipment. Moreover, it has been exercised based on legal grounds including Sections 2, 4 and 6 of Article 10 of the Act on the Performance of Duties by Police Officers; Article 2 and Article 13 Section 1 of the Instant Presidential Decree; Article 97 Section 2 of the Instant Rules; and the Manual. Thus it does not violate the principle of statutory reservation.

2. Whether the rule against excessive restriction has been violated

The Assembly was originally intended to be a memorial ceremony, but accelerated into an illegal assembly that occupied all the adjacent roads used for vehicle passage, completely blocking off traffic in the area. Furthermore, it developed into an illegal, violent demonstration with casualties occurring among both the Assembly participants and the police, as some of the participants resisted by tying ropes to the wheels of buses being used as barricades and pulled on them. The Instant Conduct in this situation was exercised to control such imminent danger and to maintain social order, and is thus a legitimate legislative purpose and satisfies the appropriateness of means.

The Complainants could have easily perceived the prior warnings of the police, the intervals in between the spraying of water, and the mixture of tear gas, and subsequently attempt to avoid being sprayed by the water cannon, stop their marching, and disperse. Instead, they continued engaging in an illegal and violent demonstration, damaging buses used as barricades and inflicting harm on the police force, which led the Respondent to try dispersing the crowd using water cannons firing tear gas and water solutions as a last resort.

Meanwhile, it is highly probable that the use of direct physical force

by the police, in the manner of pulling the demonstrators out of the roads, would have brought on more severe harm due to injuries on both sides sustained in the course of physical confrontation. Also, it would have been a less effective way to achieve the purpose of recovering traffic flow on the roads. Thus, this would have not been an appropriate alternative.

Further, in an attempt to minimize harm to the human body, in place of CS gas the police used PAVA, known to be a safer alternative; used a more diluted version of the mixture compared to the ratio recommended by the manufacturer; and sought to achieve safety by including 1% tear gas in the solution, which is lower than the standard 1.5% used for mixtures of tear gas in water cannons. Therefore, the Instant Conduct does not violate the rule of minimum restriction.

Although the Instant Conduct may impose a restriction on significant private interests such as the Complainants' physical freedom and freedom of assembly, the public interest of achieving public security and maintaining order by dispersing illegal assembly or demonstration is no less important than the private interests that have been infringed upon. Therefore, the balance of interests has been satisfied.

Therefore, the Instant Conduct is a lawful exercise of public power based on relevant statutes, and does not violate the Constitution by running contrary to the rule against excessive restriction.

10. Case on Electronic Monitoring of Prisoners When They Appear in Court

[2016Hun-Ma191 · 330, 2017Hun-Ma171, May 31, 2018]

In this case, the Court held that the constitutional complaint against the "Plan on Electronic Tracking Devices to Prevent Prisoner Escape," which prescribes that electronic devices be attached to the ankles of prisoners to prevent flight where such prisoners confined in prisons or detention centers go outside the facility, is non-justiciable. The Court ruled that attaching electronic devices as per the above Plan does not infringe upon the right to personality and right to physical freedom of the Complainants, who are prisoners.

Background of the Case

The Complainants were prisoners convicted and confined in prisons or detention centers, and were designated as prisoners of concern pursuant to Items 8 and 13 of Article 210 of the Enforcement Rules of the Administration and Treatment of Correctional Institution Inmates Act (the "Criminal Administration Act").

Citing the risk that the Complainants could flee given that they were prisoners of concern, the correctional officer in charge attached electronic devices to the ankles of the Complainants at the point when they left the correctional institution to appear in court and removed them when they returned.

The Complainants filed this constitutional complaint, claiming that the conduct by the prison warden and the head of the detention center, the Respondents, of ordering electronic devices to be attached to their ankles, infringed upon their fundamental rights including their physical freedom, and that the Plan on Electronic Tracking Devices to Prevent Prisoner Escape (official document issued on November 13, 2015, by the Korea Correctional Service) which served as the grounds for such attachment violated the Constitution.

Subject Matter of Review

The subject matter of review in this case is whether: (1) the part concerning prisoners appearing in court (Step 2) of prisoners subject to attachment of electronic devices in "V. Operational Plan for Electronic Tracking Devices Attached to Prisoners" in the Plan on Electronic Tracking Devices to Prevent Prisoner Escape (official document issued on November 13, 2015, by the Korea Correctional Service) (the "Plan"); and (2) the conduct by the prison warden and the head of the detention center, the Respondents, of ordering electronic devices to be attached to the Complainants (the "Attachment") infringed upon the fundamental rights of the Complainants.

Provision at Issue

Plan on Electronic Tracking Devices to Prevent Prisoner Escape (official document issued on November 13, 2015, by the Korea Correctional Service)

V. Operational Plan for Electronic Tracking Devices Attached to Prisoners

[1] Trial Operation and Persons Subject to Attachment

□ Prisoners subject to attachment

...

△ Step 2: Prisoners visiting external hospitals or appearing in court, etc. (1 month, including those subject to Step 1)

O Steps 1 & 2: Prisoners subject to Items 7, 8 and 13 of Article 210 (Prisoners of Concern) of the Enforcement Rules of the Administration and Treatment of Correctional Institution Inmates Act

Summary of the Decision

1. Whether the request for adjudication on the Plan is justiciable

The Plan is an official document sent by the Korea Correctional Service, an affiliation of the Ministry of Justice, to prison wardens. It is merely internal conduct or simple implementation measure taken by an administrative agency, deciding the scope of correctional institutions to test the "Safe Custodial Measures Using Electronic Devices" prescribed by the Criminal Administration Act and the Enforcement Rules thereof, and prescribing the relevant action plans; thus, it is not an order or instruction that has externally binding force. The Plan does not have any legal effect with regard to the people's rights and obligations, and therefore does not constitute an exercise of governmental power which is subject to constitutional complaints as prescribed by Article 68 Section 1 of the Constitutional Court Act. Therefore, the request for a constitutional complaint against the Plan is non-justiciable.

2. Whether the Attachment infringes on fundamental rights

a. Whether the principle of statutory reservation has been violated

The purpose of the Attachment is to prevent prisoners from escaping when they are outside of correctional institutions, by monitoring whether they are within the scope of custody, and whether they are maintaining a certain distance with the guarding officer. Since the Attachment is grounded on Sections 1 and 4 of Article 94 of the Criminal Administration Act and Article 160 Item 3 and Article 165 of the Enforcement Rules of the Criminal Administration Act, it does not infringe upon the right to personality and physical freedom of the Complainants, who are prisoners, by violating the principle of statutory reservation.

b. Whether the principle of due process has been violated

Unlike the attachment of electronic tracking devices under the Act on

Probation and Electronic Monitoring, etc. of Specific Criminal Offenders, the Attachment is applied to prisoners under the Criminal Administration Act for maintaining safety and order in correctional institutions; and does not require a court order beforehand. Further, it is inevitable that the fundamental rights of prisoners, such as physical freedom, are restricted to seek safety in the correctional institutions and maintain orderly life under detention; matters executed under statutes related to criminal administration are not subject to the provisions of the Administrative Procedures Act on seeking or presenting opinions (Article 3 Section 2 Item 6 of the Administrative Procedures Act); the attachment of electronic devices is applied to prisoners designated as prisoners of concern, who may attempt flight; and the Criminal Administration Act provides measures on applying for interviews with wardens or filing petitions with the Minister of Justice (Articles 116 and 117). Considering these facts, the Attachment does not infringe upon the right to personality and physical freedom of the Complainants, who are prisoners, by violating the principle of due process.

c. Whether the rule against excessive restriction has been violated

The Attachment intends to prevent flight by prisoners outside of the correctional institutions, to enable swift action and apprehension when prisoners manage to escape; and to guarantee the safety of the public, by attaching electronic devices to prisoners who are going outside the correctional institution to be hospitalized in an external medical institution, to be transferred, to appear in court, or for other reasons. Therefore, the legislative purpose is legitimate, and the appropriateness of means satisfied.

When a prisoner escapes with an electronic device attached, correctional officers will be immediately alerted, allowing swift apprehension; and as long as the prisoner does not go beyond a certain distance after escaping, he or she can be arrested upon pursuit. Therefore, electronic devices are convenient tools for preventing flight, and it is difficult to find an alternative.

The Attachment is limited to those among prisoners of concern who have been deemed likely to escape; and is only applied temporarily when it is necessary for such prisoner to go outside of the correctional institution. Furthermore, the correctional officer records any use of electronic devices in the escort plan or prisoner register, to prevent the attachment of electronic devices from being abused.

The Attachment prevents incidents that involve prisoner escape, and enables swift apprehension even if they do occur, thus guaranteeing public safety. In other words, the public interest that would be achieved by attaching electronic devices outweighs the restriction of fundamental rights that must be borne by prisoners.

Therefore, the Attachment does not infringe upon the right to personality and physical freedom of the Complainants, who are prisoners, by violating the rule against excessive restriction.

Summary of Concurring Opinion Regarding the Plan by One Justice

(1) Whether administrative rules are subject to constitutional complaints, and whether they are considered a law or regulation should be decided solely by the inherent purpose, structure and function of constitutional complaints and administrative suits.

(2) While an administrative rule differs from a law, rule and regulation of the Supreme Court and a regulatory order in terms of formation, procedures, formats and mechanisms, it cannot be denied that they are also conduct of sovereignty of a general and abstract nature; thus, there is no particular reason for only administrative rules to be placed under examination on whether they are subject to constitutional complaints, depending on whether they have external binding force.

(3) Even if administrative rules are only internally effective, they require regulation as they may restrict the fundamental rights of affiliated public officials.

(4) While the matter of whether particular administrative rules have external binding force will most probably cause division and confusion,

it makes no contribution in particular to specific remedial procedures in constitutional complaints.

(5) Whether a complainant's legal relations or legal position will be unfavorably affected by administrative rules is decided while reviewing whether fundamental rights may be infringed upon, and whether the self-relatedness and directness requirements have been satisfied; thus this does not need to be considered to determine whether administrative rules are subject to constitutional complaints. Taking into account the aforementioned facts, administrative rules are conduct of sovereignty exercised by the administrative authority and thus should be deemed subject to constitutional complaints, regardless of whether they have external binding force.

Even if administrative rules are deemed subject to constitutional complaints, there should be no concern over the scope of constitutional complaints becoming too extensive, as the directness requirement under Article 68 Section 1 of the Constitutional Court Act must be satisfied. Provided that, where administrative rules incur benefits such as the acquisition of rights or exemption of duties; or where national agencies or public organizations engage in contracts under public or private law on equal terms with the general public based on administrative rules, and not as a sovereign authority, constitutional complaints made directly against administrative rules should be deemed justiciable, being exceptions to the directness requirement.

The Plan sets forth the details on how correctional officers should exercise their discretion in attaching electronic devices, under which correctional officers attach electronic alarms to prisoners; which means the Plan falls under the category of administrative rules. This is true even though the Korea Correctional Service, an affiliation of the Ministry of Justice, sent the Plan to prison wardens as an official document. Although it is standard procedure, and in fact advisable, for administrative rules to be sent as a legal document listing provisions, this does not mean that the administrative rules themselves are a formality.

Provided, while the Plan may be subject to constitutional complaints,

the fundamental rights of the prisoners are directly restricted by the correctional officer's attachment of the electronic device in line with the Plan, and not the Plan per se. Therefore, the Plan does not directly infringe upon the fundamental rights of the Complainants. Accordingly, the request for adjudication in this regard is non-justiciable.

11. Case on Banning Assembly near Official Residence of the Prime Minister

[2015Hun-Ka28, 2016Hun-Ka5 (consolidated), June 28, 2018]

In this case, the Court held that both the provision of the Assembly and Demonstration Act stating that any person holding any outdoor assembly or staging any demonstration anywhere within a 100-meter radius from the boundary of the official residence of the Prime Minister, except for a parade, shall be subject to criminal punishment; and the provision of the same Act requiring to punish any person who disobeys a dispersion order against such outdoor assembly or demonstration violating the above provision, fail to conform to the Constitution.

Background of the Case

The petitioner of 2016Hun-Ka5, who is also the criminal defendant in the original case of 2015Hun-Ka28 (hereinafter referred to as the 'Petitioner'), was prosecuted for organizing a demonstration at a place 60 meters from the boundary of the official residence of the Prime Minister, where any outdoor assembly or demonstration is banned, and for disobeying a dispersion order.

While his criminal trial was pending at a lower court, the Petitioner filed a motion to request a constitutional review on the part of the provision concerning 'any person who disobeys a dispersion order against any assembly or demonstration that violates Article 20 Section 1 Item 1 and Article 11 Item 3' of Article 20 Section 2 specified in Article 24 Item 5 of the Assembly and Demonstration Act, which provides the legal ground to impose punishment for disobeying the dispersion order against any outdoor assembly or demonstration waged near the official residence of the Prime Minister. The ordinary court accepted the petition on September 9, 2015 before requesting a constitutional review on the provision (2016Hun-Ka5) and also requested,

sua sponte, a constitutional review on Article 11 Item 3 indicated in Article 23 Item 1 of the Act, according to which any person organizing an outdoor assembly or demonstration near the official residence of the Prime Minister shall be punished (2015Hun-Ka28).

Subject Matter of Review

The subject matter of review in this case is whether Article 11 Item 3 and the part of Article 11 Item 3 indicated in Article 23 Item 1 (hereinafter collectively referred to as 'Prohibited Places Provisions') of the 'the Assembly and Demonstration Act' (wholly amended by Act No. 8424 on May 11, 2007); and the part of 'Article 20 Section 2' from Article 24 Item 5 concerning 'any assembly or demonstration that violates Article 11 Item 3' (hereinafter referred to as 'Provision on Disobeying Dispersion Order,' and collectively referred to as 'Provisions at Issue') violate the Constitution. The Provisions at issue read as follows:

Provisions at Issue

Assembly and Demonstration Act (wholly amended by Act No. 8424 on May 11, 2007)

Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)

No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences:

...

3. The official residence of the Prime Minister: *Provided*, That the same shall not apply in cases of a parade or procession.

Article 23 (Penal Provisions)

Any person who violates the main sentence of Article 10 or Article 11, or who violates the ban as provided for in Article 12, shall be punished according to the following classification of offenders:

1. The organizer shall be punished by imprisonment for not more than one year, or by a fine not exceeding one million won;

Article 24 (Penal Provisions)

Any person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than six months, a fine not exceeding 500,000 won, penal detention or minor fine:

5. A person who violates Article 16 (5), 17 (2), 18 (2) or 20 (2).

Summary of the Decision

1. Decision on the Prohibited Places Provisions

The Prime Minister serves as an Acting President, aid to the President and the second highest ranking official in the Executive Branch. Given the position of the Prime Minister prescribed in the Constitution, the legislative purpose of the Prohibited Places Provisions to protect the function and peace of the official residence of the Prime Minister as both living space and office is justifiable. Also, prohibiting any outdoor assembly or demonstration except for a parade near the official residence of the Prime Minister is an appropriate measure to serve the legislative purpose.

Since banning an assembly shall be the last resort that can be considered after all other options that less restrict the freedom of assembly are exhausted, an outdoor assembly and/or demonstration shall be permitted as an exception if the general presumption that such activities near the Prime Minister's official residence pose direct threats to its function and peace can possibly be denied by specific circumstances. The Prohibited Places Provisions prevent all outdoor assemblies and/or demonstrations without exception, including 'small ones' and 'those not organized against the Prime Minister,' which would least likely to directly undermine the function and peace of the official residence. Therefore, it is an extreme restriction that exceeds the scope necessary to serve the legislative purpose.

The Prohibited Places Provisions allow a 'parade' near the official residence. However, the concept of the 'parade' under the Act is ambiguous, thus it is difficult to expect the relaxing effect on the restriction of basic rights. The Act also provides for various restrictions depending on the nature and condition of the assembly besides the Prohibited Places Provisions. Accordingly, even when an outdoor assembly and/or demonstration near the official residence are exceptionally permitted, the function and peace of the official residence can be sufficiently maintained.

In light of the above, the Prohibited Places Provisions impose an indiscriminate and total ban on assemblies including those which do not need restricting or can be given exceptional permission beyond the minimum extent necessary to fulfill its legislative purpose. Therefore, it violates the principle of minimum restriction.

When comparing the purpose of ensuring the function and peace of the official residence of the Prime Minister with the Prohibited Places Provisions with the level of restriction they impose on the freedom of assembly, it cannot be claimed that the public interest to be achieved by the Provisions outweighs the restricted freedom of assembly. Thus, the Prohibited Places Provisions violate the balance of interests as well.

Consequently, the Provisions infringe upon the freedom of assembly by violating the principle against excessive restriction.

2. Decision on the Provision on Disobeying Dispersion Order

According to the Provision on Disobeying Dispersion Order, violating the Prohibited Places Provisions and disobeying a dispersion order against any outdoor assembly and/or demonstration near the official residence of the Prime Minister lead to criminal punishment. As stated earlier, since the Prohibited Places Provisions infringe upon the freedom of assembly by violating the principle against excessive restriction, the Provision on Disobeying Dispersion Order, of which the Prohibited Places Provisions are an element, also infringes upon the freedom of

assembly. Thus the Provision on Disobeying Dispersion Order violates the Constitution.

3. Decision of nonconformity to the Constitution

Unconstitutionality of the Provisions at Issue lies in the fact that they prohibit assemblies near the Prime Minister's official residence indiscriminately and totally, which exceeds the scope necessary to protect the function and peace of the official residence. In other words, banning outdoor assemblies and/or demonstrations near the official residence of the Prime Minister has both constitutional and unconstitutional aspects simultaneously.

In this regard, it should be within the discretion of the legislators to decide which one of such activities should be permitted as an exception.

Therefore, the Court delivers a decision of nonconformity to the Constitution, and orders the Provisions at Issue to remain applicable until the legislature amends them by December 31, 2019. If amendment is not made by such date, the Provisions at Issue shall become invalid as of January 1, 2020.

12. Case on the Provisions of Deliberation on Advertisements Regarding Functionality under Health Functional Foods Act

[2016Hun-Ka8, 2017Hun-Ba476 (consolidated), June 28, 2018]

In this case, the Court held that relevant provisions of the Health Functional Foods Act, which prohibit advertising regarding functionality bearing different details from the details deliberated previously upon under the Act; and punish any person who advertises in violation of such provision, with criminal punishment or administrative sanctions, amount to censorship outlawed by the Constitution; and thus violate the Constitution.

Background of the Case

During the appeal against the charge of violation of the provision prohibiting advertising regarding functionality bearing different details from the details deliberated upon under the Act, the Movant (of 2016Hun-Ka8) filed a motion to request constitutional review on the part including "advertisements" under Article 18 Section 1 Item 6 of the Health Functional Foods Act (the "Act") and 'advertisement' included in Article 18 Section 1 Item 6 under Article 44 Item 4 of the same Act. Accordingly, the requesting court referred the provisions to the Court for constitutional review.

The Complainant (of 2017Hun-Ba476), an enterprise selling various goods through TV shopping channels, received a disposition of suspending business operation for two months from the district head of Gangdong-gu, Seoul for placing or running labels and advertisements containing contents different from those deliberated upon while selling health functional foods on TV shopping channels, pursuant to Article 18 Section 1 Items 1, 3, and 6 as well as Article 32 Section 1 Item 3 of the Act. The Complainant filed a lawsuit to seek revocation of the aforementioned disposition and requested a constitutional review of

Article 18 Section 1 Item 6 and etc. of the Act. However, the request was rejected by the ordinary court; accordingly, the Complainant filed a constitutional complaint.

Subject Matter of Review

The subject matter of review in this case is whether 'advertisements bearing different details from details deliberated upon under Article 16 Section 1' in Article 18 Section 1 Item 6 of the Act (amended by Act No. 11508 on October 22, 2012 and before being amended by Act No. 15480 on March 13, 2018) (the "Prohibitive Provision of this case"), and 'any person who makes advertisements bearing different details from details deliberated upon under Article 16 Section 1' in Article 18 Section 1 Item 6 of Article 44 Item 4 of the former Act (amended by Act No. 11508 on October 22, 2012 and before being amended by Act No. 12669 on May 21, 2014) (the "Penalty Provision of this case"); as well as 'any person who makes advertisements bearing different details from details deliberated upon under Article 16 Section 1' in Article 18 Section 1 Item 6 of Article 32 Section 1 Item 3 of the former Act (amended by Act No. 12669 on May 21, 2014 and before being amended by Act No. 14018 on February 3, 2016) (the "Punishing Provision of this case") violate the Constitution. The Instant Provision and relevant provisions read as follows:

Provisions at Issue

Health Functional Foods Act (amended by Act No. 11508 on October 22, 2012 and before being amended by Act No. 15480 on March 13, 2018)

Article 18 (Prohibiting False, Exaggerative, or Negative Labels or Advertisements)

(1) No one shall place or run false, exaggerative, or negative labels or advertisements as follows, with respect to the names,

raw materials, manufacturing methods, nutrients, ingredients, methods of use, or quality of health functional foods, and the tracking management of records on functional health foods:

...

6. Labels or advertisements that have not deliberated upon under Article 16 (1) or bearing different details from details deliberated upon.

Former Health Functional Foods Act (amended by Act No. 12669 on May 21, 2014 and before being amended by Act No. 14018 on February 3, 2016)

Article 32 (Revocation, etc. of Permission to Run Business)

(1) The Minister of Food and Drug Safety, the Mayor of a Special Self-Governing City, the Governor of a Special Self-Governing Province, or the head of a Si/Gun/Gu may revoke permission to run business, fully or partially suspend the relevant business for a specified period not exceeding six months, or issue an order to close the place of business (limited to business reported under Article 6; hereafter in this Article, the same shall apply), as prescribed by Presidential Decree, if a business entity falls under any of the following cases:

...

3. When it violates Article 18 (1)

Former Health Functional Foods Act (amended by Act No. 11508 on October 22, 2012 and before being amended by Act No. 12669 on May 21, 2014)

Article 44 (Penalty Provisions)

Any of the following persons shall be punished by imprisonment with labor for not more than five years, or by a fine not exceeding 50 million won. In such cases, imprisonment with labor and fines may be imposed concurrently:

...

4. Any person who makes a false, exaggerative, or negative label or advertisement in violation of Article 18 (1)

Summary of the Decision

Pursuant to the current Constitution, censorship is prohibited without exception on any subject matter where freedom of speech should be protected. The advertisement regarding functionality of health functional foods has the commercial purpose to promote consumption of such foods by spreading the functionality related information that the product has positive effects for the health use regarding the structure and function of the human body. However, such advertisement is also the subject matter where freedom of speech should be protected in accordance with Article 21 Section 1 of Constitution as well as where censorship should be prohibited pursuant to Article 21 Section 2 of the Constitution.

Whether the deliberative agency is an administrative agency ought to be determined based upon its substance rather than its form. Besides, even when a private organization is in charge of the deliberative process, if the administrative agencies intervene in the deliberative process and subsequently fail to guarantee autonomy; or if it is possible for any administrative agency to arbitrarily intervene in such deliberative process, such possibility itself shall be regarded as censorship prohibited by the Constitution. Although advertisements regarding functionality under the Act are deliberated upon by the Korea Health Supplements Association ("KHSA") entrusted by the Minister of Food and Drug Safety, pursuant to the Act, the principal agent of the deliberation is still the Minister, who has the power to withdraw the entrustment at any given time, as an administrative agency. As long as there is any possibility for the administrative agencies to intervene in and continue to affect formation of the deliberation committee by related statutes, the private organization cannot be deemed to have guaranteed autonomy. The Minister can influence the contents and procedure of the deliberation by legislating and amending the deliberation criteria, etc.; and the deliberation agency

has to follow the recommendation of the Minister on re-deliberation. The fact that the agency is required to make a quarterly report to the Minister suggests that its deliberations are not performed with full independence or autonomy.

Consequently, prior deliberation upon advertisements regarding functionality of health functional foods in this case can be regarded as censorship carried out by the administrative authorities, which is prohibited by the Constitution. Therefore, such deliberation violates the Constitution.

Summary of Dissenting Opinion of One Justice

The principle of prohibition of censorship shall only be limitedly applied within the constitutional purpose to ensure freedom of speech and the press; and to prohibit censorship. When the legislature enacted the Act that provides a prior deliberative procedure for the expressions entailing higher necessity for regulation, such as advertisements regarding functionality of health functional foods, with an intention to protect the public right to health and to enforce the national obligation of protecting public health, the principle of prohibition of censorship should not be applied.

Even though the principle of prohibition of censorship is applied to advertisements regarding functionality of health functional foods, it is difficult to recognize the KHSA as an administrative agency, since it is an independent private agency with autonomy. Therefore, the censorship cannot be regarded as censorship prohibited by Constitution.

Since citizens can be largely harmed by false information in advertisements regarding functionality of health functional foods, enforcing a prior deliberation upon such advertisements shall be deemed within the scope necessary to achieve the legislative purpose, and thus does not violate the principle against excessive restriction.

13. Case on Conscientious Objectors

[2011Hun-Ba379 and 27 other cases (consolidated), June 28, 2018]

1. Court opinion

The Constitutional Court found the Categories of Military Service Provision nonconforming to the Constitution on the ground that it stipulated only five categories of military service excluding Alternative service. The five categories are: Active duty service, Reserve service, Supplementary service, Preliminary military service, and Wartime labor service. The Court's decision is summarized as follows:

The Categories of Military Service Provision has the purpose of ensuring national security by equally imposing military duty and retaining and efficiently allocating military service resources. Therefore, the provision itself is an adequate means to fulfill the reasonable legislative purpose.

Since types of military service stipulated in the Categories of Military Service Provision are all set upon the premise of receiving military training, it may cause conflict in the conscience of conscientious objectors, if such military duty is imposed on them. As such, the possibility of Alternative service has long been examined.

The number of conscientious objectors is not large enough to discuss the resultant decrease of available military service resources; and even when punishing the objectors, they will be imprisoned in the correctional facility not utilized as military resources. Thus, permitting the Alternative service program will not generate a loss of military resources. Also, when considering the fact that the importance of military service resources in the entire national defense system has been decreasing, it is hard to find that introducing the Alternative service program will have significant impact on the national defense power of Korea.

13. Case on Conscientious Objectors

Provided that an objective and fair preliminary examination and a strict post-management procedure are regulated by the Government and equity is acquired between Active military service and Alternative service regarding the level of difficulty and duration, thus removing the causes of evading military duty, the problem of increase in abuse by draft evaders feigning conscience and the difficulties in determining whether a refusal of military service is based on genuine conscience, will be solved. Accordingly, it is possible to retain the equity of military duty even after the introduction of Alternative service.

As long as the introduction of the Alternative service system does not have significant influence on national defense, and it does not reduce the effectiveness of the military service system, as stated earlier, reserving or preventing the introduction of the Alternative service system for reasons of the unique security situation of the nation cannot be justified. Therefore, the Categories of Military Service Provision runs against the rule of minimum restriction for categorizing military service that entails military training only and excluding the Alternative service program.

Although the public interests, such as ‘national security’ and ‘equity or fairness in the allocation of military duties’ are significantly important, they also might be accomplished by adding the Alternative service system to the Categories of Military Service Provision. By contrast, without stipulating the Alternative service program in the Provision, conscientious objectors have to be imprisoned for at least a year and a half, and are left to suffer immense disadvantages, such as dismissal and restriction from working as public officials; loss of patent rights, permission, approval, licenses, etc. issued by the Government; disclosure of personal information; implicit and inadvertent bias upon ex-convicts; and difficulties in finding jobs, etc. Provided that conscientious objectors are assigned to public service work, it will have broader meaning of realizing national security and provide more efficient means to accomplish public interests than just imprisoning the objectors for

punishment. Additionally, the societal and national levels of integration and diversity will be increased as well. Thus, it is considered that the Categories of Military Service Provision does not fulfill the requirement of balance between the public and private interests.

Accordingly, the Categories of Military Service Provision, which failed to stipulate the Alternative service program for conscientious objectors, infringes on objectors' freedom of conscience by violating the principle against excessive restriction.

In 2004, the Court urged the legislature to review the alternatives that can ensure the public interest of national security as well as conscientious objectors' freedom of conscience. However, the legislature has not made legislative progress thereon for the past 14 years. During that time, several governmental organizations, such as the National Human Rights Commission of Korea, the Ministry of National Defense, the National Assembly, etc. have reviewed or recommended the introduction of the Alternative service program. Also, an increasing number of ordinary lower courts' judgments have declared conscientious objectors not guilty. By considering all these circumstances, the Government shall not put aside such issue and is obliged to alleviate the situation of infringement of fundamental rights by introducing the Alternative service program.

In a democratic decision making system where majority decides, the legitimate means to realize the spirit of democracy that upholds tolerance and diversity is to accord conscientious attention to the 'Minorities,' people who think differently from the majority regarding particular issues.

2. Aftermath of the case

After the Court's decision, active and heated discussion over introducing

an alternative service system for conscientious objectors has increased. The media reported that setting an objective and fair preliminary examination and a strict post-management procedure regulated by the Government; and determining an adequate duration and the level of difficulty that can ensure equity between Active military service and Alternative service are the primary concerns of the public (Yonhap News, July 5, 2018).

The deadline for amending the Military Service Act, which ought to stipulate the introduction of an alternative service system for those who refuse to join the military based on their religious beliefs or conscience, is set at no later than December 31, 2019.

14. Case on Restriction on Business Hours of Discount Stores

[2016Hun-Ba77 · 78 · 79 (consolidated), June 28, 2018]

In this case, the Court held that the provisions of the Distribution Industry Development Act, which allow the mayor of a Special Self-Governing City or the head of a district, *Si/Gun/Gu* to order discount stores or quasi-superstores to restrict business hours or designate a day for compulsory closure, do not violate the Constitution.

Background of the Case

The Complainants are corporations operating discount stores or quasi-superstores ("Discount Stores, etc.") in Jung-gu of Incheon Metropolitan City, Bucheon City, and Cheongju City, under the Distribution Industry Development Act.

The heads of Jung-gu of Incheon Metropolitan City, Bucheon City, and Cheongju City imposed a disposition on Discount Stores, etc. to designate compulsory closure on every second and fourth Sundays of each month pursuant to Article 12-2 of the Distribution Industry Development Act and relevant ordinances of the local governments. Also, dispositions restricting business hours were imposed as follows: from 00:00 am to 08:00 am by the head of Jung-gu, Incheon; and from 00:00 am to 10:00 am by the heads of Bucheon and Cheongju, respectively.

The Complainants filed a lawsuit to revoke the aforementioned dispositions and moved to request a constitutional review of Article 12-2 of the Distribution Industry Development Act. But upon rejection, they filed a constitutional complaint.

Subject Matter of Review

The subject matter of review in this case is whether Sections 1, 2, and 3 of Article 12-2 (the "Instant Provision") of the Distribution Industry

Development Act (amended by Act No. 11626 on January 23, 2013) violate the Constitution.

Provisions at Issue

Distribution Industry Development Act (amended by Act No. 11626 on January 23, 2013)

Article 12-2 (Restrictions, etc. on Business Hours of Superstores, etc.)

(1) The Mayor of a Special Self-Governing City or the head of a Si/Gun/Gu may order discount stores (including a store established within a superstore, that meets the requirements for a discount store) and quasi-superstores to restrict business hours or suspend business, designating a date for compulsory closure as prescribed in the following subparagraphs, where deemed necessary for establishing sound practices in distribution, employees' health rights, and win-win development for both superstores, etc. and the small and medium distribution industry: *Provided*, That the foregoing shall not apply to a superstore, etc. prescribed by ordinance of the relevant local government, in which the sales of agricultural and fishery products under the Act on Distribution and Price Stabilization of Agricultural and Fishery Products account for at least 55 percent of the annual turnover:

1. Restrictions on business hours;
2. Designation of a date for compulsory closure.

(2) The Mayor of a Special Self-Governing City or the head of a *Si/Gun/Gu* may place restriction on business hours from 0 a.m. to 10 a.m. pursuant to paragraph (1) 1.

(3) The Mayor of a Special Self-Governing City or the head of a *Si/Gun/Gu* shall designate two days for compulsory closure each month pursuant to paragraph (1) 2. In such cases, a day for compulsory closure shall be designated from among holidays, but it shall be possible to designate a day which is not a holiday, for compulsory closure through agreement with interested parties.

Summary of the Decision

1. Whether the principle of clarity has been violated

Taking into account comprehensively the background and purpose of legislation of the Instant Provision as well as the related provisions, the Instant Provision may be sufficiently interpreted as requiring the mayor of a Special Self-Governing City, etc. to either restrict business hours or designate a date for compulsory closure; or to apply both measures based on the necessity of regulating business operation. It can be sufficiently interpreted that when applying a compulsory closure measure, two days shall be designated for each month. This would also be sufficiently understood as such by ordinary people with sound common sense and general legal sentiments. Thus, the Instant Provision does not violate the principle of clarity.

2. Whether the rule against excessive restriction has been violated

The legislative purpose of the Instant Provision to establish sound practices in distribution; to promote win-win development for both superstores, etc. and the small and medium distribution industry; and to protect employees' health rights, is legitimate. Also, the appropriateness of means can be acknowledged in restricting the business hours of Discount Stores, etc. and designating a day for compulsory closure. Leaving the competition between Discount Stores, etc. and small and medium retailers to take its own course based on the principle of free market economy would disrupt fair competition in the distribution market, and undermine checks and balance among economic players and normal market operation. It would also pose a threat to the very survival of small and medium retailers, eventually hampering social justice in the economy. To prevent this, the State may regulate and coordinate such practices according to Article 119 Section 2 of the Constitution. Considering the rapid decline of small and medium retailers, it is likely

that they may have withdrawn from the market or find it extremely difficult to recover competitiveness before a long-term national support policy takes effect. Therefore, the lawmakers' decision to support the small and medium retailers secure for their competitiveness by imposing direct restrictions on the business of Discount Stores, etc. cannot be deemed unreasonable. The Instant Provision requires the mayor of a Special Self-Governing City, etc. to limit the restriction of business hours from midnight until early morning when there are relatively fewer consumers, and to designate two days for compulsory closure among statutory holidays. The Instant Provision also allows the mayor of a Special Self-Governing City, etc. to impose the business restrictions or other necessary measures according to the specific circumstances of the local distribution market. Considering all these aspects, the minimum restriction requirement is also met. Due to the Instant Provision, Discount Stores, etc. may encounter economic losses, and the consumers may experience the inconvenience, however, such consequences are limited to the minimum scope necessary to serve the legislative purpose. Meanwhile, the legislative purpose is very significant, and thus the Instant Provision fulfills the balance of interests. Hence, the Instant Provision does not violate the rule against excessive restriction nor does it infringe upon the freedom to conduct one's occupation.

3. Whether the principle of equality has been violated

Although the Instant Provision discriminates Discount Stores, etc., which are subject to business restrictions, from other types of superstores not subject to such restrictions, it is reasonable for it is based upon the fact that they have different impacts on the local economy. In addition, the Instant Provision discriminates between Discount Stores, etc. with sales of agricultural and fishery products accounting for at least 55 percent of the annual turnover, and Discount Stores, etc. which do not fall into such criteria. However, such discrimination also can be considered reasonable, since it is based on the specialty of agricultural

and fishery products and the State's duty to protect such industries. Therefore, the Instant Provision does not violate the principle of equality.

Dissenting Opinion of Justice Cho Yong-Ho

The Instant Provision is an economic regulation aimed to protect the 'competitors' rather than promote 'competition'. Accordingly, restricting business hours of Discount Stores, etc. and designating a day for compulsory closure cannot be deemed the appropriate measures as they interrupt free and fair competition as well as threatening the foundation of free a market economy. In order to revive and recover the competitiveness of traditional markets, the State has already implemented relevant policies, such as investing public money for modernizing the facilities of the traditional markets; providing tax benefits on money spent in the traditional markets; issuing various gift certificates to be used in the local markets and economy pursuant to the 'Special Act on the Development of Traditional Markets and Shopping Districts'. Such measures can be less encroaching and be even more effective to achieve the legislative purpose of the Instant Provision. Employees' health rights can be ensured by enhancing the Labor Standards Act and other relevant statutes on labor, for instance, by adopting a shift work system or guaranteeing break times during work hours; and offering regular leaves to each employee; or with more fundamental social welfare policies. The Instant Provision can only be justified when there is not enough time to wait for the effect of other supporting measures for the traditional markets. However, there is no specific sunset law for regulating or terminating imposing such restrictions on business hours. Considering all these aspects, the Instant Provision fails to satisfy the minimum restriction requirement. There are no significant findings from empirical surveys to show that implementation of the Instant Provision was effective in inducing more sales to traditional markets, etc. from Discount Stores, etc. Contrary to the lawmakers' legislative intent, the benefits from such regulations go to convenience stores, multi shopping

malls, online shopping malls, etc. The business restrictions by the Instant Provision considerably limit the freedom of the owners of Discount Stores, etc. to engage in their occupation, which leads to reduced sales. They also weaken the international competitiveness of the domestic distribution industry, and damage small and medium traders, farmers, fishers and livestock breeders that supply goods, who suffer from loss of business and jobs. In addition, the losses suffered by individual shops in Discount Stores, etc. and nearby micro enterprises selling goods to the consumers visiting Discount Stores, etc. are enormous as well. Rising operating costs at Discount Stores, etc. resulting from declining business efficiency will be reflected in the increase in consumer price. This will have a significant impact on the right of choice of consumers who prefer Discount Stores, etc. and cause the reduction in tax revenues due to the decrease of consumption. As a whole, it is a crucial issue of public interests. While the effects of public interest of protecting traditional markets gained through the Instant Provision are almost nothing or very insignificant, public interests restricted or infringed upon by the Instant Provision are exceptionally immense. When all these aspects are taken into account collectively, the Instant Provision fails to satisfy the balance of interests. Therefore, the Instance Provision violates the rule against excessive restriction, thus infringing upon the freedom of the owners of Discount Stores, etc., to engage in their occupation.

15. Case on Location Tracing Data under Protection of Communications Secrets Act

[2012Hun-Ma191 · 550, 2014Hun-Ma357 (consolidated), June 28, 2018]

In this case, the Court held that: 1) the provision under the Protection of Communications Secrets Act, which stipulates that an investigative agency may request location tracing data from a telecommunications business entity when deemed necessary, violates the principle against excessive restriction, thus infringing upon information subjects' right to informational self-determination and freedom of communications; and, 2) the provision under the same Act requiring the investigative agency to notify that the location tracing data has been provided after the investigation, violates the principle of due process, therefore infringing upon information subjects' right to informational self-determination.

Background of the Case

(1) In the process of investigation and execution of arrest warrant against the Complainants on charges of violating the Assembly and Demonstration Act, the investigative agency obtained permission from the court to request a communications business entity to provide communication confirmation data of the Complainants pursuant to Article 2 Item 11 Sub-Items (f) and (g) of the Protection of Communications Secrets Act, and received such information.

(2) Following the event, the Complainants were notified by the investigative agency that such communication confirmation data had been provided.

(3) The Complainants filed a constitutional complaint, claiming that the related provisions under the Protection of Communications Secrets Act infringe upon their basic rights, such as freedom of communications, privacy rights, and the right to informational self-determination.

Subject Matter of Review

The subject matter of review in this case is whether the part of Article 13 Section 1 of the Protection of Communications Secrets Act (amended by Act No. 7503 on May 26, 2005) concerning "any prosecutor or any judicial police officer may, when he/she deems it necessary to conduct any investigation or to execute any punishment, ask any telecommunications business entity under the Telecommunications Business Act for the perusal or the provision of the communication confirmation data according to Article 2, Item 11 Sub-items (f) and (g)" (the 'Requesting Provision'); and, the part of Article 13-3 Section 1 of the Protection of Communications Secrets Act (amended by Act No. 7503 on May 26, 2005) concerning communication confirmation data of Article 2, Item 11 Sub-items (f) and (g) (the 'Notifying Provision') infringe upon the basic rights of the Complainants. The Instant Provisions read as follows:

Provisions at Issue

Protection of Communications Secrets Act (amended by Act No. 7371 on January 27, 2005)

Article 2 (Definitions)

The definitions of terms used in this Act shall be as follows:

...

11. The term "communication confirmation data" means the data on the records of telecommunications falling under any one of the following:

...

(f) The data on tracing the location of an information communications apparatus connecting to information communications networks;

(g) The data on tracing the locations of connectors capable of confirming the location of information communications apparatus to be used by the users of computer communications or of the Internet for connecting with the information communications networks;

Protection of Communications Secrets Act (amended by Act No. 7503 on May 26, 2005)

Article 13 (Procedures for Provision of Communication Confirmation Data for Criminal Investigation)

(1) Any prosecutor or judicial police officer may, when he/she deems it necessary to conduct any investigation or to execute any punishment, ask any telecommunications business entity under the Telecommunications Business Act (hereinafter referred to as "telecommunications business entity") for the perusal or the provision of the communication confirmation data (hereinafter referred to as "provision of the communication confirmation data").

Article 13-3 (Notification of Provision of Communication Confirmation Data for Criminal Investigations)

(1) When any public action is taken against a case receiving the provision of communication confirmation data under the provisions of Article 13, or a disposition to not institute any public action or prosecution (excluding a decision to suspend prosecution) is made, a written notice of the fact that communication confirmation data has been provided, the agency requesting the provision and the relevant period, etc. shall be made within 30 days from the date the said disposition is made.

Summary of the Decision

1. Regarding the Requesting Provision

In a bid to assure investigative activities, the Requesting Provision allows an investigative agency to request a telecommunications business entity to provide the location tracing data of a telecommunication service subscriber, the information subject, with the court's permission, when deemed necessary to conduct a criminal investigation. Therefore, legitimacy of its legislative purpose and appropriateness of the means can be acknowledged. However, 1) as the investigative agency may have access

to the information subjects' whereabouts and movements at a certain period of time by acquiring the location tracing data, such information is sensitive information warranting sufficient security; 2) the Requesting Provision unreasonably restricts the basic rights of the information subjects by allowing the investigative agency to request such wide range of location tracing data; 3) there are less intrusive measures of requesting the location tracing data that do not interfere with investigative activities while less infringing upon the basic rights of the information subjects such as adding the requirement of exhaustion of prior remedies for real-time location tracking or location tracking on the general public, or applying such requirement differently depending on the gravity of the relevant crimes; and, 4) the investigative agency is required to obtain permission from the court before requesting the location tracing data, but as the only requirement of the request is the "necessity for investigation", procedural controls cannot function properly. Considering all these aspects, minimum restriction and balance of interests in the Requesting Provision cannot be met. Hence, the Requesting Provision violates the principle against excessive restriction, and it infringes upon the information subjects' right to informational self-determination and freedom of communications.

2. Regarding the Notifying Provision

The confidentiality of an investigation needs to be guaranteed, however, the information subjects must be properly notified of the provision of location tracing data as well as given an actual opportunity to make a practical statement to prevent the investigative agency from abusing its power by applying the principle of due process prescribed in the Constitution; and to protect the basic rights of the information subject. However, the Notifying Provision fails to state any obligation to notify the information subjects that the location tracing data has been provided when the investigation is protracted or suspension of prosecution is decided. Additionally, even when there is notification of

such provision, the exact ground for such provision of data is not provided. Furthermore, the Notifying Provision does not assure whether the data concerned was duly discarded after the investigation purpose has been served. Therefore, it is impossible for the information subjects to properly respond to investigative agency's abuse of authority regarding the location tracing data. These matters can possibly be addressed by the following measures: obliging the investigative agency in principle to notify the information subjects that the data has been provided after a certain lapse even when the investigation is prolonged or prosecution is suspended, and such notification can only be suspended with permission from a neutral agency when deemed to interrupt the investigation; allowing the information subjects to request formal notice on what ground the data has been provided under certain conditions; and imposing sanctions on the investigative agency that violates the notification obligation. When all of these aspects are considered, the Notifying Provision violates the Complainants' right to informational self-determination by disregarding the principle of due process prescribed in the Constitution.

3. Order for provisional application following a decision of nonconformity to the Constitution

The Requesting Provision and Notifying Provision are unconstitutional as they infringe upon the basic rights of the Complainants. However, if they are immediately declared unconstitutional, a legal vacuum would occur upon removing legal grounds that allow the investigative agency to request the location tracing data or require it to notify that the data has been provided. It is at the discretion of the legislators in principle to remove the unconstitutional elements by taking into account specific criteria and conditions. Therefore, the Court delivers a decision of nonconformity to the Constitution regarding the Requesting Provision and Notifying Provision but orders they continue to be applied until proper amendment is made by March 31, 2020.

Dissenting Opinion of Three Justices

1. Regarding the Requesting Provision

The Requesting Provision does not violate the principle against excessive restriction, and it does not infringe upon the Complainants' right to informational self-determination and freedom of communications considering the following grounds: 1) given the characteristics of communication confirmation data used at the early stage of an investigation, the location data is used to track suspects or locate their whereabouts; 2) the investigative agency should be able to request the communication confirmation data of all criminal suspects, etc., to promptly solve and prevent crimes; 3) the communication confirmation data, such as location data, does not seriously infringe the basic rights as such data does not contain substantial information; 4) it is ambiguous to distinguish the crimes that absolutely require the prerequisite of exhausting prior remedies from those which do not, and enforcing such requirement would make it difficult to identify the whereabouts or movements of suspects, subsequently leading to delayed investigation and additional crimes; and 5) pursuant to the related provisions, the investigative agency shall obtain court permission to be able to request the communication confirmation data by presenting a written document that includes grounds for the request, relevance with the information subject(s), and the scope of information needed.

2. Regarding the Notifying Provision

Allowing the investigative agency to request communication confirmation data aims to assure its investigation activities, which requires confidentiality. However, if the information subjects are notified during the investigation that their communication confirmation data has been provided, the Court cannot rule out the possibility that suspects and individuals related with the suspects stop using their mobile phones or

the Internet and flee; or destroy evidence, which can disrupt the investigation or make it difficult to deal with additional crimes. On the other hand, even if such notification is made after prosecution or non-prosecution, the information subjects' private interest restricted by the notification is deemed insignificant given that the communication confirmation data is not substantial. Meanwhile, when the information subjects are criminal suspects, they will be notified of the fact that their communication confirmation data has been provided by the service of indictment or non-prosecution disposition. Whereas, when the information subjects are not criminal suspects, it may be desirable not to inform them of the ground for requesting the communication confirmation data, in order to protect the honor and privacy or the suspects. Moreover, the information subjects can resort to post-remedial procedures such as denying evidence admissibility of the communication confirmation data obtained in violation of the Requesting Provision and Notifying Provision according to the exclusionary rule of criminal procedure or claiming damages against a responsible investigator or the State. As such, it is hard to find that the Notifying Provision, which specifies that the investigative agency shall notify the provision of communication confirmation data after the investigation, while not disclosing the ground for such provision, violates the principle of due process.

16. Case on Investigation Using Base Station under Protection of Communications Secrets Act

[2012Hun-Ma538, June 28, 2018]

In this case, the Court held that the provisions under the Protection of Communications Secrets Act, which allow using base stations for investigation when deemed necessary, violate the principle against excessive restriction and, therefore, infringe upon information subjects' right to informational self-determination and freedom of communications.

Background of the Case

An unknown person was suspected to have provided money and valuables to party members during the primary to elect the leader of the Democratic United Party held at the Seoul Educational Culture Center on December 26, 2011. The investigative agency, upon commencing the investigation, monitored footage from CCTV installed near the area; and based on the time of telephone call made by the unknown person using a mobile phone and by obtaining a court's permission at 18:10 on January 25, 2012, requested telecommunications service carriers to provide the following communication confirmation data using base stations covering the Seoul Educational Culture Center: incoming and outgoing phone numbers; the time of incoming and outgoing calls made; and duration of the conversations between 17:00 and 17:10 on December 26, 2011. The agency received the communication confirmation data of 659 people in total, including the Complainant.

The Complainant, a journalist, was covering the primary at the Seoul Educational Culture Center at the time of the incident, and was notified by the investigative agency on March 20, 2012 that his communication data had been collected by the agency.

The Complainant filed a constitutional complaint on June 14, 2012, claiming that Article 13 Sections 1 and 2 of the Protection of Communications Secrets Act, which provided the legal ground for the

above investigation, infringe upon the basic rights such as freedom of communications, privacy rights, and the right to informational self-determination.

Subject Matter of Review

The subject matter of review in this case is whether: 1) the part of Article 13 Section 1 of the Protection of Communications Secrets Act (amended by Act No. 7503 on May 26, 2005) concerning "[A]ny prosecutor or judicial police officer may, when he/she deems it necessary to conduct an investigation or to execute a punishment, ask any telecommunications business entity under the Telecommunications Business Act for access to the perusal or provision of communication confirmation data according to Article 2 Item 11 Sub-items (a) through (d)" (the "Request Provision"); and, 2) the part of Article 13 Section 2 of the Protection of Communications Secrets Act (amended by Act No. 7503 on May 26, 2005) concerning communication confirmation data under Article 2 Item 11 Sub-items (a) through (d) (the "Permission Provision") infringe upon the basic rights of the Complainant. The provisions at issue read as follows:

Provisions at Issue

Protection of Communications Secrets Act (amended by Act No. 7503 on May 26, 2005)

Article 13 (Procedures for Provision of Communication Confirmation Data for Criminal Investigation)

(1) When any prosecutor or judicial police officer deems it necessary to conduct any investigation or to execute any punishment, he/she may request any telecommunications business entity under the Telecommunications Business Act (hereinafter referred to as "telecommunications business entity") for the perusal or the provision of the communication confirmation data (hereinafter referred to as "provision of the communication confirmation

data").

(2) Any prosecutor or judicial police officer shall, when he/she asks for the provision of the communication confirmation data under paragraph (1), obtain permission therefor from the competent district court (including any ordinary military court; hereinafter the same shall apply) or branch court with a document in which the ground for such request, the relationship with the relevant subscriber, and the scope of necessary data are entered: Provided, That if the urgent grounds exist that make it impossible to obtain permission from the competent district court or branch court, he/she shall obtain permission immediately after asking for the provision of the communication confirmation data and then send it to a telecommunications business entity.

Summary of the Decision

1. The Request Provision

The Request Provision in this case, in a bid to assure investigative activities, allows an investigative agency, by obtaining a court's permission, to request a telecommunications business entity to provide communication confirmation data of the relevant subscriber when it is deemed necessary to conduct criminal investigation. Therefore, its legislative purpose is legitimate, and the appropriateness of means is satisfied. However, 1) the communication confirmation data inevitably originated by use of mobile communication services, although not containing substantive information, in and of itself, is still sensitive information, as knowledge regarding the information subject may be inferred from a combination or analysis of the data and other information; 2) while the investigative agency is required to obtain a court's permission before requesting the communication confirmation data, as the only requirement for the warrant is "necessary for investigation," it is indeed difficult to limit the use of such request; and, 3) less restrictive measures infringing upon the basic rights of the

general public to a lesser degree that do not interfere with investigative activities are available, i.e., limiting the scope of investigation using base stations to crimes such as kidnapping, abduction and sexual violence and crimes amounting to threats to national security that necessitate the communication confirmation data of suspects or victims; or adding the requirement of exhaustion of prior remedies when there are no other feasible means of investigation. As such, the Request Provision does not satisfy the rule of minimum restriction and balance of interests test. Hence, the Request Provision violates the principle against excessive restriction and infringes upon the Complainant's right to informational self-determination and freedom of communications.

2. The Permission Provision

As investigation using base stations amounts to a compulsory disposition set forth in the Protection of Communications Secrets Act, the constitutional principle of arrest by permission applies. The principle, in nature, requires a specific determination by an independent judge in ordering a compulsory disposition. The Permission Provision stipulates that the investigative agency must obtain a permission from the competent district court or branch to request any telecommunications business entity to provide the communication confirmation data. Therefore, the Permission Provision does not violate the principle of arrest by warrant and does not infringe upon the Complainant's right to informational self-determination and freedom of communications.

3. Order for continued application following a decision of nonconformity to the Constitution

The Request Provision of this case is unconstitutional as it infringes upon the basic rights of the Complainant. If they are declared unconstitutional immediately, however, a legal vacuum would occur in criminal investigations and victims' relief upon removing the legal

ground that allows the investigative agency to request the communication confirmation data of suspects and/or victims. Besides, how unconstitutional elements of the Request Provision should be removed and which specific criteria and conditions would be adopted in that process, in principle, must be left at the discretion of the legislators. Therefore, the Court delivers a decision of nonconformity to the Constitution regarding the Request Provision and orders its continued application until an amendment is made by March 31, 2020.

Dissenting Opinion of Three Justices

The Request Provision does not violate the principle against excessive restriction and does not infringe upon the Complainant's right to informational self-determination and freedom of communications, based upon the following reasons: 1) given the characteristics of communication confirmation data used at the early stage of an investigation, investigation using base stations is generally used for the purpose of locating a suspect; 2) it is considered necessary that the investigative agency should be allowed to request the communication confirmation data of the general public who happened to be present within the coverage of certain base stations at a certain time in order to prevent crimes and expedite solving crimes; 3) the data obtained from base stations is not substantial, thus collection of such data does not seriously restrict the basic rights; 4) limiting the scope of investigation using base stations to certain crimes or adding the requirement of exhaustion of prior remedies, as the majority opinion reads, would make investigative activities difficult and subsequently encourage additional crimes that can put people in danger; and, 5) under the relevant provisions, the investigative agency is required to submit a written document stating the grounds for request, relevance with the subscriber and the scope of information needed to obtain a court's permission to request the communication confirmation data, suggesting that an investigation using base stations is allowed for the minimum scope necessary.

17. Case on Election District for a City/Do Council Member

[2014Hun-Ma189, June 28, 2018]

In this case, the Court held that the part including "Songpa-gu Constituency 3 of Seoul" and "Songpa-gu Constituency 4 of Seoul" specified in Table 2 regarding the Election District for a *City/Do* council member under the former Public Official Election Act does not infringe upon the Complainants' rights to vote and the right to equality as the population deviation is within the acceptable limit.

Background of the Case

The Complainants have their addresses respectively in "Songpa-gu Constituency 3 of Seoul" and "Songpa-gu Constituency 4 of Seoul" specified in Table 2 regarding the Election District for a *City/Do* council member (the "Constituency Table"), prescribed in Article 26 Section 1 of the former Public Official Election Act (amended by Act No. 12393 on February 13, 2014, and prior to amendment made by Act No. 15424 on Mar 9, 2018). They planned to exercise their rights to vote for members of the Seoul Metropolitan Council at the 6th Local Election to be held on June 4, 2014. On March, 2014, the Complainants filed a constitutional complaint claiming that the two constituencies for the Seoul Metropolitan Council specified in the Constituency Table infringe upon their rights to vote and the right to equality.

Subject Matter of Review

The subject matter of review in this case is whether "Songpa-gu Constituency 3 of Seoul" and "Songpa-gu Constituency 4 of Seoul" specified in Table 2 regarding the Election District for a *City/Do* council member, redistricted by Article 26 Section 1 of the former Public Official Election Act (amended by Act No. 12393 on February 13, 2014, and prior to amendment made by Act No. 15424 on Mar 9, 2018) (the

'Constituency Table at Issue') infringes upon the Complainants' basic rights. The Provision at issue reads as follows.

Provision at Issue

Former Public Official Election Act (amended by Act No. 12393 on February 13, 2014, and prior to amendment made by Act No. 15424 on Mar 9, 2018)

Article 26 (Demarcation of Constituencies for Local Council Members)

(1) The election district for a *City/Do* council member (hereinafter referred to "constituency for a *City/Do* council member") shall be demarcated by making the autonomous *Gu/Si/Gun* a zone or dividing the autonomous *Gu/Si/Gun* (if an autonomous *Gu/Si/Gun* consists of at least two constituencies for the National Assembly members, it refers to the constituency for the National Assembly member; and if the election district does not coincide with the administrative district due to a territorial change in the administrative district, it refers to the administrative district), based upon the population, administrative districts, geographical features, traffic, and other conditions, but the fixed number of the *City/Do* council members of local constituency to be elected in the single constituency for a *City/Do* council member shall be one and the names and districts of the constituencies for the *City/Do* council members are shown in attached Table 2.

[Table 2] The Election District constituency for a *City/Do* council member

Number of local constituency members: 663

Constituency	Electoral Areas
Seoul Metropolitan Council members (Number of local constituency members: 96)	
Songpa-gu Constituency 3	Samjeon-dong, Jamsilbon-dong, Jamsil 2-dong, Jamsil 3-dong, Jamsil 7-dong
Songpa-gu Constituency 4	Seokchon-dong, Garak1-dong, Moonjung2-dong

Summary of the Decision

The 2005Hun-Ma985, etc. case decided on March 29, 2007 set 60% as the population deviation permissible in redistricting the constituency for a *City/Do* council member. However, the standard, adopted 11 years ago, may cause one vote to have four times greater weight than another, which is excessively unequal in their respective weight. Also when considering that the standard proposed in this ruling will be applied to the local election to be held in 2022, a stricter limit for permissible maximum population deviation needs to be established at present.

Nevertheless, council members of a *City/Do* represent their respective regions at local councils that address mainly regional issues; and special circumstances exist as the country holds huge population disparity between urban and rural areas and notably unbalanced development in many areas. Therefore, secondary elements such as administrative districts and local representativeness along with the population proportion should also be taken into account in redistricting a constituency for a *City/Do* council member.

Setting the maximum permissible population deviation at 50% means that the voting weight ratio should be less than 3 to 1, which adds 50% to the ratio of 2 to 1, the limit of the equal weight based on the population proportion. This standard allows wide consideration of the secondary elements compared with setting it at 33⅓%. Furthermore, adopting the 33⅓% population deviation immediately from the 60% population deviation would very likely bring unexpected challenges in coordinating the constituency for a *City/Do* council member. Thus, it will be reasonable at the moment to adjust the maximum permissible population deviation at 50% (population proportion of 3:1) in redistricting the constituency for a *City/Do* council member.

The Constituency Table at Issue shows population deviation within 50% from the average population of the constituency for the Seoul Metropolitan Council. In consequence, it is not deemed to infringe upon the Complainants' rights to vote and the right to equality.

18. Case on Provisions Regarding Prohibiting Investigation on Certain Individuals' Private Matters and Use of Titles Similar to Detective as well as Punishing Violators Thereof

[2016Hun-Ma473, June 28, 2018]

In this case, the Court held that provisions of the Credit Information Use and Protection Act prohibiting anyone from engaging in services to investigate private matters, etc. of certain individuals and using the title of detective or similar, do not violate the Constitution.

Background of the Case

The Complainant is a retired police officer (senior superintendent), who wishes to be engaged in the field of private detective service. He filed a constitutional complaint on June 13, 2016, claiming that Items 4 and 5 of Article 40 of the Credit Information Use and Protection Act infringe upon his freedom of occupation and right to equality by prohibiting anyone other than credit information companies from engaging in services like finding missing children and people, runaways, fraudsters, etc. or using the title of detective or similar.

Subject Matter of Review

The subject matter of review in this case is whether the latter part of Article 40 (the 'Prohibiting Provisions') of the Credit Information Use and Protection Act (amended by Act No. 9617 on April 1, 2009) infringes upon the basic rights of the Complainant. The provision at issue reads as follows.

Provision at Issue

Credit Information Use and Protection Act (amended by Act No. 9617 on April 1, 2009)

Article 40 (Prohibited Matters for Credit Information Company, etc.)

No credit information company, etc. shall engage in any of the acts defined in the following subparagraphs, and no person, other than a credit information company, etc., shall engage in any act defined in the main sentence of subparagraph 4 as its business or engage in any act defined in subparagraph 5:

4. Finding out a certain person's whereabouts and contacts (hereinafter referred to as "whereabouts, etc.") or investigating his/her private life, other than commercial transaction relationships, including financial transactions: Provided That, where a credit information company permitted to engage in claims collection business ascertains a certain person's whereabouts, etc. to conduct its business or it is allowed to ascertain a certain person's whereabouts, etc. pursuant to other statutes, the same shall apply;

5. Using titles, including "intelligence service agent", "detective", or other titles similar thereto;

Summary of the Decision

1. Whether the provision banning investigation on private matters, etc. infringes upon the freedom of occupation

Item 4 in the latter part of Article 40 (the ‘Provision Prohibiting Investigating Private Matters, etc’) of the Credit Information Use and Protection Act (amended by Act No. 9617 on April 1, 2009) not allowing anyone to be engaged in services to investigate private matters, etc. of certain individuals was legislated to prevent illegal conduct that may take place in the course of investigating the whereabouts, contact information and private background of certain individuals as well as to protect secrecy and enjoyment of their privacy from abuse and misuse of personal information, etc.

At present, private companies in Korea, upon request from their clients, freely engage in services that investigate incidents and accidents;

collect information anyone can access; and provide the results of their investigation. However, it is hard to ascertain the exact statistics of such business. Some of the service providers were recently caught illegally gathering and providing private information with hidden cameras or vehicle GPS by investigative agencies, and caused social problems. When considering the domestic condition, it is difficult to look for another option that can serve the legislative purpose of the aforementioned Provision to the same level other than prohibiting such services of investigating individuals' whereabouts, contact details, private matters, etc.

It is not impossible for the Complainant to carry out his work that is within the domain of a private detective service but not banned by the above Provision. For example, the Complainant can be engaged in an occupation of finding out missing or stolen items, or work similarly to the private detective service within the permissible scope upon meeting certain conditions set forth by specific laws such as credit investigation service, security guard, claim adjuster, etc. Therefore, the Provision Prohibiting Investigating Private Matters, etc. neither violates the principle against excessive restriction nor infringes upon the freedom of occupation.

2. Whether the provision banning the use of titles as detective, etc. infringes upon the Complainant's freedom to perform an occupation

Item 5 in the latter part of Article 40 (the 'Provision Prohibiting Using Titles as Detective, etc.') of the Credit Information Use and Protection Act (amended by Act No. 9617 on April 1, 2009) that prohibits anyone from using the title of detective or similar was legislated to prevent infringement upon secrecy of private matters that may occur in the course of collecting personal information, etc. with the title of detective or similar and also to establish the credibility of the personal information investigation service that is permitted by specific laws.

The State bans anyone engaging in identifying an individual's

whereabouts and contact details, or investigating his/her private matters, etc. If the use of titles similar to detective were allowed, nevertheless, it would mislead the public to believe that the title user is legitimately authorized to conduct such prohibited activities or qualified to perform them based on national law. Thus, the public may subsequently request him/her to investigate personal information, such as private matters of certain people or provide personal information, which would very likely infringe upon individuals' privacy.

Investigation-related works among so-called private detective jobs that are acknowledged in foreign countries are already adopted in Korea under different names, like credit investigation services, security guard, claim adjuster, etc. through specific laws. Allowing the use of titles similar to detective without limit would cause confusion in the work scope among jobs similar to private detective services, possibly hampering the credibility of the information investigation services permitted by specific laws.

The legislature made this Provision Prohibiting Using Titles as Detective, etc. apart from the other Provision with the notion that banning investigation on private matters, etc. alone without this Provision is insufficient to curb the above side effects from occurring and eventually to fulfill the legislative purpose, and it is difficult to find that such decision is obviously wrong. The Complainant's disadvantage arising from the Provision Prohibiting Using Titles as Detective, etc. is that he cannot use the title while engaging in services similar to those of a private detective. Since using different titles, such as credit information companies, clearly presents the kind of service the Complainant provides while helping to avoid unnecessary misunderstanding, the public interests served by the Provision Prohibiting Using Titles as Detective, etc. is not insignificant compared with the disadvantage the Complainant may suffer. Hence, the aforementioned Provision neither violates the principle against excessive restriction nor infringes upon the freedom to perform the Complainant's occupation.

19. Case on Banning Outdoor Assembly in the Vicinity of All Levels of Courts

[2018Hun-Ba137, July 26, 2018]

In this case, the Court held that the part "all levels of courts" in Article 11 Item 1 of the Assembly and Demonstration Act stating that any person holding any outdoor assembly or demonstration anywhere within a 100-meter radius from the boundary of any level of court shall be subject to criminal punishment; and also the part concerning "all levels of courts" in Article 11 Item 1 under Article 23 Item 1 of the same Act - violate the rule against excessive restriction, thereby infringing upon the freedom of assembly.

Background of the Case

The Complainant was prosecuted for holding an assembly at the front gate of the Supreme Prosecutors' Office located within a 100-meter radius from the boundary of the Supreme Court and found guilty at the trial court. The Complainant appealed and filed a motion to request a constitutional review; and upon rejection, filed a constitutional complaint.

Subject Matter of Review

The subject matter of review in this case is whether the part "all levels of courts" in Article 11 Item 1 and the part concerning "all levels of courts" in Article 11 Item 1 under Article 23 Item 1 (the "Provisions at issue") of the Assembly and Demonstration Act (wholly amended by Act. No. 8424 on May 11, 2007) violate the Constitution.

Provisions at Issue

Assembly and Demonstration Act (wholly amended by Act No. 8424 on May 11, 2007)

Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)

No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences:

1. The National Assembly building, all levels of courts, and the Constitutional Court

Article 23 (Penal Provisions)

Any person who violates the main sentence of Article 10 or Article 11, or who violates the ban as provided for in Article 12, shall be punished according to the following classification of offenders:

1. The organizer shall be punished by imprisonment for not more than one year, or by a fine not exceeding one million won.

Summary of the Decision

1. Whether the freedom of assembly was infringed upon

Independence of judges, the key to a fair trial, includes independence from any influence or pressure of society as well as independence from intervention of other Government institutes or the judiciary itself. The legislative purpose of the Provisions at issue is to prevent the attempt to affect the independence of the courts by holding an assembly in front of courts. Such a purpose is justifiable based on the demand of the Constitution to ensure independence of judges and a fair trial. In the meantime, establishing places to ban assemblies and demonstrations in the proximity of all levels of courts is an appropriate means of serving the legislative purpose.

If a general presumption that outdoor assemblies or demonstrations held near the courts may affect their ongoing trials can be repudiated in specific circumstances, the legislature is required to amend related provisions so that outdoor assemblies or demonstrations can be permitted under exceptional conditions even in the vicinity of the courts.

Some assemblies, even when they are held near the courts, are unlikely to threaten the independence of judges or affect trials. For example, assemblies held against other national agencies near the courts such as the prosecutors' offices, or those targeting corporate entities or individuals have little concern of influencing the courts. And even if they are held with the courts in mind, they may merely intend to make their voices heard about judicial administration that is irrelevant to the independence of judges or trials on specific cases.

The Provisions at issue aim to protect the courts from multiple pressures and to deter all possible influences on cases under trial. However, the Assembly and Demonstration Act has other restrictive provisions besides the Provisions at issue, to protect the courts depending on the nature and conditions of the assemblies and demonstrations. The legislative purpose of the Provisions at issue will be served by the above-mentioned provisions even if outdoor assemblies and demonstrations are exceptionally permitted in the vicinity of all levels of courts.

As the Provisions at issue uniformly and totally ban outdoor assemblies and demonstrations including those which do not need to be restricted or which may be given exceptional permission, beyond the minimum scope needed to serve the legislative purpose, they violate the principle of minimum restriction.

By restricting not only assemblies and demonstrations that are likely to affect the independence of judges or the courts' trials, but by totally banning all outdoor assemblies in the proximity of all levels of courts, the Provisions at issue violate the balance of interests.

The Provisions at issue infringe upon the freedom of assembly by violating the principle against excessive restriction.

2. Decision of nonconformity to the Constitution

The Provisions at issue banning outdoor assemblies and demonstrations in the vicinity of all levels of courts have both constitutional and

unconstitutional elements. It is within the discretion of the lawmakers to take into account circumstances that are certain not to affect the independence of judges or cases under trial, and determine which outdoor assemblies and demonstrations are exceptionally permissible.

Therefore, as the Provisions at issue have constitutional aspects, the Court delivers a decision of nonconformity to the Constitution and orders continued application of the Provision at issue until the legislature amends it by December 31, 2019. If amendment is not made by such date, the Provisions at issue shall lose effect as of January 1, 2020.

20. Case on the Provisions That Ban Seizure of Public Officials Pension

[2016Hun-Ma260, July 26, 2018]

In this case, the Court held that the provision which bans seizure of the entitlement to receive pension benefits and also restricts seizure of the pension benefits already paid under the Public Officials Pension Act, does not violate the Complainant's property rights, thereby rejecting the constitutional complaint.

Background of the Case

Daejeon Family Court ruled that the father of the Complainant's daughter should pay child support to the Complainant, and this decision was finalized. The father of the Complainant's daughter is a recipient of the pension for public officials. The Complainant filed a constitutional complaint against Article 32 of the Public Officials Pension Act that bans or restricts seizure of the entitlement to receive the pension benefits or seizure of the benefits already paid.

Subject Matter of Review

The subject matter of review in this case is whether: 1) the part concerning "transferred, seized" in Article 32 Section 1 of the Public Officials Pension Act (amended by Act No. 13387 on June 22, 2015 and prior to amendment made by Act No. 14476 on December 27, 2016); 2) the part concerning "transferred, seized" in Article 32 Section 1 of the Public Officials Pension Act (amended by Act No. 14476 on December 27, 2016) (the "Seizure Banning Provision"); and 3) Article 32 Section 2 of the Public Officials Pension Act (amended by Act No. 13387 on June 22, 2015) (the "Seizure Restricting Provision") infringe upon the basic rights of the Complainant.

Provision at Issue

Former Public Officials Pension Act (amended by Act No. 13387 on June 22, 2015 and prior to amendment made by Act No. 14476 on December 27, 2016)

Article 32 (Protection of Rights)

(1) No entitlement to receive benefits shall be transferred, seized or provided as collateral: Provided that, the entitlement to receive pensions may be provided as collateral to financial institutions designated by Presidential Decree and may be the object of a disposition for arrears as prescribed in the National Tax Collection Act, the Local Tax Collection Act, and other Acts.

Public Officials Pension Act (amended by Act No. 14476 on December 27, 2016)

Article 32 (Protection of Rights)

(1) No entitlement to receive benefits shall be transferred, seized or provided as collateral: Provided that, the entitlement to receive pensions may be provided as collateral to financial institutions designated by Presidential Decree and may be the object of a disposition for arrears as prescribed in the National Tax Collection Act, the Local Tax Collection Act, and other Acts.

Public Officials Pension Act (amended by Act No. 13387 on June 22, 2015)

Article 32 (Protection of Rights)

(2) Among benefits paid to a recipient, no benefits not more than the amount prescribed by subparagraph 3 of Article 195 of the Civil Execution Act shall be seized.

Summary of the Decision

1. Whether the right to property was infringed upon

The Court ruled on March 30, 2000 in 98Hun-Ma401, etc. that Article

32 of the former Public Officials Pension Act, the provision banning seizure the same as the Seizure Banning Provision, does not violate the Constitution.

"Since the pension benefits prescribed by the Public Officials Pension Act is intrinsically a social security benefit paid for the stable livelihood and welfare of retired public officials and their families, it is a highly exclusive right to a specific person. Therefore, it is inappropriate to see it as a subject of private transaction and thus necessary to ban seizure thereof. As the Act does not ban seizure after the benefit has been paid, it does not infringe upon the fundamental property rights beyond the legislative limit of restricting the basic rights."

After the above-mentioned decision, the Seizure Restricting Provision was inserted, prescribing that the amount not more than that specified by the Presidential Decree as a living cost for one month needed by a debtor, etc. shall not be seized from the benefits already paid to a recipient. However, the Civil Procedure Act prohibited seizing half of the pension credit or the amount needed to maintain livelihood for one month from the pension even before the Seizure Restricting Provision was enacted. Therefore, insertion of the new Seizure Restricting Provision alone cannot be reason enough to change the preceding judgment. The Seizure Banning Provision does not infringe upon the property rights of the Complainant.

The Seizure Restricting Provision aims to protect livelihood cost for one month, which only confirms the provision of the same content stipulated in the Civil Execution Act. As the Seizure Banning Provision is ruled constitutional like the precedent, there is no reason to hold that the Seizure Restricting Provision violates the rule against excessive restriction.

The Provisions at issue do not violate the rule against excessive restriction or infringe upon the property rights of the Complainant.

2. Necessity to amend the Seizure Banning Provision

The Court pointed out the need to amend the Seizure Banning Provision

in the aforementioned 98Hun-Ma401, et al.

"The Public Officials Pension Act bans any creditor from seizing the full entitlement to the pension benefits in order to ensure the dignity and basic livelihood of a retired public official and his/her family who is a debtor. However, circumstances of debtors significantly vary and it is also possible that a creditor has a poorer living condition than a debtor. This implies that uniformly banning such seizure without taking into account the circumstances of the debtor and creditor could overprotect the debtor at the expense of the creditor. And this outcome hardly agrees with the spirit in the Constitution even if it does not completely disagree with the Constitution. Therefore, it will be desirable for the legislature to create a system and policy that can change the scope of banning seizure stipulated in the Public Officials Pension Act by considering diverse circumstances of the creditor and debtor, such as in Article 579-2 of the former Civil Procedure Act (and Article 246 Section 3 of the current Civil Execution Act), in order to reasonably conciliate the conflict of interests between the two parties.

Although the Court made the above decision 18 years ago, any provision that reasonably balances the interests of the creditor and debtor has yet to be legislated. As a result, the creditor is not protected even when the recipient of the pension receives an amount exceeding his or her living expenses, and when the credit is damage compensation caused by intentional illegal acts. While the credit for child support in this case must be protected by the Seizure Banning Provision, the interests of the creditor for child support or their children might be infringed upon by the Seizure Banning Provision when the recipient of the pension benefits evades the responsibility of child support.

Thus, the legislature is required to urgently create a system that can resolve the conflict of interests between the pension recipient and creditor, under which ordinary courts can fine-tune the scope of restricting seizure by considering living conditions and specific circumstances of the creditor and debtor, or grant exception to seize part of the credit that needs special protection.

Summary of Unconstitutionality Opinion of Five Justices Regarding Seizure Banning Provision

1. Meaning of the credit for child support

Child custody, one of the basic rights specified in the Constitution, is defined from Article 36 Section 1 that requires the State to ensure freedom of marriage and family life; Article 10 that assures all citizens have the right to pursue happiness; and Article 37 Section 1 that guarantees other the basic rights not enumerated in the Constitution. At the same time, parents have the constitutional duty to care for their children in rearing them to become decent members of society. The interests the children enjoy based on the parents' care are also protected by the Constitution.

The credit for child support is a property right that constitutes the material foundation of child rearing under the joint responsibility of the father and mother when they cannot practically raise the child together.

2. Distinctiveness of the credit for child support

The pension benefits under the Public Officials Pension Act aim to enable both the recipient and the family he/she has to support to have a stable livelihood. Thus, the legislative purpose of the Seizure Banning Provision also includes protecting the livelihood of the recipient's child and family.

However, an exceptional conflict of interests arises between the recipient and the child, the subject of care, when the recipient refuses to provide child support, leading the spouse to seek seizure of the entitlement to the pension benefits under the Public Officials Pension Act as credit for child support. Under such circumstance, the Seizure Banning Provision only protects the recipient and the family he/she is living with, while neglecting the purpose of protecting the livelihood of the child.

Meanwhile, ordinary courts consider income and property of the parents as well as other contexts when they determine child support. Therefore, even if the credit for child support is forcibly executed, it is less likely to bring a result harsh enough to pose a threat to the livelihood of the recipient compared to other credits.

3. Unconstitutionality of the Seizure Banning Provision when the credit to be executed is the credit for child support

The Seizure Banning Provision meets legitimacy of the legislative purpose, appropriateness of means and minimum restriction.

We can determine whether there is a balance between the protected livelihood of the recipient and the family he/she is living with that the Seizure Banning Provision aims to maintain, and the interests of the creditor for child support and the child, by comparing the degree of protected interests between when the Seizure Banning Provision is in force and when it is not.

Even without the Seizure Banning Provision, the recipient and the family he/she is living with are protected by the Civil Execution Act. The amount of the credit for child support is rarely determined excessively enough to harm the livelihood and welfare of the recipient and the family he/she is living with. Therefore, infringement of their interests, without the Seizure Banning Provision, is insignificant. On the other hand, the disadvantage against the child custody and property rights of the creditor caused by the Seizure Banning Provision is considerable. It is because the Seizure Banning Provision does not allow the entitlement to the pension benefits to be seized at all, or leave any possibility for ordinary courts to arbitrate or make any exception even when the pension benefits far exceed the minimum living cost.

In particular, the restriction upon child custody and property rights of the Complainant by the Seizure Banning Provision is substantial in the perspective of the norm. This is because assurance of marriage and family life provided in Article 36 Section 1 of the Constitution involves

the State's duty to protect child rearing by parents so that young children can learn and grow in a sound environment; and the credit for child support is the indispensable material foundation of child rearing and also an element that helps parents fulfill the duty of child rearing specified in the Constitution.

Therefore, when the credit to be executed is the credit for child support, the Seizure Banning Provision violates the Constitution since it does not meet the balance of interests and violates the rule against excessive restriction, infringing upon the child custody and property rights of the Complainant.

21. Case on Korea Professors Union

[2015Hun-Ka38, August 30, 2018]

In this case, the Court held that the main sentence of Article 2 of the Act on the Establishment and Operation of Teachers' Unions (the "Teachers' Union Act"), which defines those subject to the Teachers' Union Act as teachers referred to in Article 19 Section 1 of the Elementary and Secondary Education Act, thereby denying the university faculty who are regulated by the Higher Education Act the right to organize, infringes upon their right to organize and, therefore, does not conform to the Constitution.

Background of the Case

The Movant is a national-level union with teachers of schools under the Higher Education Act as its members. The Movant submitted an application for approval to establish a labor union to the Minister of Employment and Labor on April 20, 2015. However, the approval was not granted on April 23, 2015, on the ground that the proviso to Article 5 of the Trade Union and Labor Relations Adjustment Act (the "Labor Union Act") and the main sentence of Article 2 of the Teachers' Union Act prescribe only the teachers referred to in Article 19 Section 1 of the Elementary and Secondary Education Act can join the teachers' union and, therefore, disallow creating such a union of teachers under the Higher Education Act.

The Movant filed an administrative lawsuit against the Minister of Employment and Labor to revoke the aforesaid disposition, and raised a motion to request a constitutional review of the proviso to Article 5 of the Labor Union Act and Article 2 of the Teachers' Union Act while the case is pending. Accordingly, the requesting court referred the case to the Court on December 30, 2015.

Subject Matter of Review

The subject matter of review in this case is whether the main sentence of Article 2 of the Act on the Establishment and Operation of Teachers' Union (amended by Act No. 10132 on March 7, 2010) (the "Instant Provision") violates the Constitution.

Provision at Issue

Act on the Establishment and Operation of Teachers' Union (amended by Act No. 10132 on March 7, 2010)

Article 2 (Definition)

The term "teacher" means a teacher referred to in Article 19 Section 1 of the Elementary and Secondary Education Act

Summary of the Decision

1. Whether the infringement upon the right to organize has violated the Constitution, should be examined in two categories: university faculty members who are education public officials and faculty members who are not.

First, the right to organize denied to the university faculty members who are not education public officials under the Instant Provision is an essential and fundamental right among the three labor rights guaranteed by the Constitution. The legislative purpose of the Instant Provision to recognize the union of elementary and secondary school teachers in service is legitimate in that it helps them secure independence and autonomy. However, since it allows only the elementary and secondary school teachers to establish or join a union, thereby denying university staff members who are not education public officials the right to organize, which is one of the basic labor rights, neither the legislative purpose is legitimate nor the means is appropriate. Even if taking into

account the nature of university faculty members distinguished from ordinary workers or elementary and secondary school teachers, given that it is also possible to grant the university staff members the right to organize while, for example, constraining the rights of their union more strongly than those of other unions, outright denial of the right to organize is hardly deemed in compliance with the principle of least restriction. Moreover, the university staff members are subject to great disadvantages when they are allowed to improve their working condition only by making individual efforts without being able to resort to the right to organize, under the recent multi-layered changes in the college community and increasing demand for a better social and economic status of university staff. Thus, the Instant Provision violates the principle against excessive restriction.

For the university staff members who are education public officials, taking into account the characteristics of education public officials' work and the essence of the Article 33 Sections 1 and 2 of the Constitution, the outright denial of the three labor rights is unjustified and unreasonably excessive beyond the scope of the legislative formation power, and therefore, violates the Constitution.

2. Although the Instant Provision infringes upon the university staff's right to organize and violates the Constitution, declaring it unconstitutional and instantly making it null and void would remove the ground for the teachers under Article 19 Section 1 of the Elementary and Secondary Education Act to establish teachers' unions, and therefore create a legal vacuum which makes it difficult to serve the legislative purpose of ensuring independence and autonomy of teachers' unions. Furthermore, as for the removal of unconstitutionality of the Instant Provision, it is at the discretion of the legislature within the purpose of the Court's decision to consider the nature of university staff and reasonably define the scope of their right to organize. Thus, the Instant Provision shall remain effective and applicable until amended.

Summary of Dissenting Opinion of Two Justices

As the denied right of university faculty to organize is attributed to the discrimination resulting from the Instant Provision, which limits the teachers under the Teachers' Union Act to teachers referred to in the Elementary and Secondary Education Act, the issue in this case is whether the Instant Provision violates the principle of equality. However, not only are the university faculty members guaranteed by the Constitution and the laws their job security and their working conditions such as wages, but they are also granted independence and autonomy as distinguished from the elementary and secondary school teachers, through institutional assurance for their academic freedom, and are involved in the decision making process for overall educational management as principal members of the college autonomy. They can also join a political party and participate in an election campaign, unlike the elementary and secondary school teachers. This suggests that they can widely engage in formulating social policies and systems through political activities and research for various government committees and institutes, and find ways to promote their social and economic status through an expert group or professors' association, if not a union. Therefore, based on the reasons aforementioned, the Instant Provision does not violate the principle of equality.

22. Case on Deeming a Ruling of Judicial Compromise Issued Concerning the Claim for State Compensation for Past Incidents

[2014Hun-Ba180 and 38 other cases (consolidated), August 30, 2018]

In this case, the Court held that, even if compensation money and other allowances for harm suffered in relation to democratization movements has been paid, deeming psychological harm suffered in relation to democratization movements not covered by the compensation and other allowances has been also settled through judicial compromise constitutes infringement of the right to claim compensation from the State and thus violates the Constitution.

Background of the Case

The Complainants and Movants include (1) persons who were dismissed from employment or were unable to obtain employment because of State agencies that interfered with their existing or prospective employment relations on the grounds of their involvement in labor union activities or in demonstrations against the suppression of press freedom, and their bereaved family members; (2) persons who were sentenced to imprisonment with labor upon conviction for violating the Presidential Emergency Measure Nos. 1, 4, and 9 and whose conviction became final, or who were thereafter given a ruling on dismissal of public prosecution or judgment of judicial exemption from prosecution, and their bereaved family members; and (3) persons who were sentenced to imprisonment with labor upon conviction for violating laws such as the former Martial Law and whose conviction became final, and their bereaved family members.

Acknowledging the above facts, the Commission for Democratization Movement Activists' Honor Restoration and Compensation (the "Commission"), established under the Act on the Honor Restoration of and Compensation to Persons Related to Democratization Movements (the "Compensation Act"), reviewed cases of the Complainants and

Movants and determined to recognize them or their decedents as democratization movement-related persons (the "Related Persons"). The Commission released decisions to pay compensation and other allowances to the Complainants and Movants between 2002 and 2012. They approved the Commission's decisions and then received the compensation.

The Court held the Presidential Emergency Measure Nos. 1, 2, and 9 unconstitutional (Case No. 2010Hun-Ba70, etc.), and the Supreme Court decided the Measure Nos. 1, 4, and 9 were unconstitutional (Case Nos. 2010Do5986, 2011Cho-Gi689, and 2011Do2631). Thereafter, the initial convictions based on violations of the Measures and the former Martial Law were quashed in retrials, and the Complainants and Movants were acquitted accordingly.

The Complainants and Movants filed lawsuits against the Republic of Korea to claim compensation for psychological and other harm suffered from the acts of the State, including interference with their labor union activities; acts that led up to their forced termination from employment; interference with their employment opportunities; brutal acts against them such as unlawful arrest, detention, and torture; constant surveillance of them even after they have been discharged from prison; and rendition of judgment of conviction for them under the Presidential Emergency Measures that were held unconstitutional and invalid. While such lawsuits were pending, the Complainants and Movants filed motions to request constitutional review of Article 18 Section 2 of the former Compensation Act which provided that, "If an applicant approves a determination for payment of compensation and other allowances under this Act, a ruling of judicial compromise is deemed issued concerning harm suffered in relation to democratization movements." Some courts granted and referred such motions to the Court, whereas the other courts dismissed them. Upon dismissal, the Complainants filed constitutional complaints pursuant to Article 68 Section 2 of the Constitutional Court Act.

Subject Matter of Review

The subject matter of review in this case is whether Article 18 Section 2 of the former Compensation Act (enacted by Act No. 6123 on January 12, 2000, and before amendment by Act No. 13289 on May 18, 2015) (the "Instant Provision") violates the Constitution.

Summary of the Decision

1. Issues

The Court considers that the following issues need to be reviewed in this case: (1) whether the part "harm suffered in relation to democratization movements" in the Instant Provision violates the principle of legal clarity required by the Constitution; (2) whether the Instant Provision, under which a ruling of judicial compromise is deemed issued when the applicant approves the Commission's decision to pay compensation, restricts the right to trial by judge who decides cases based on laws and thus infringes the right to trial; and (3) whether the Instant Provision, by deeming a ruling of judicial compromise issued when the applicant approves payment of compensation, limits prospective claims for State compensation and thus infringes the right to claim State compensation.

2. Violation of the principle of legal clarity

According to a comprehensive review of the legislative purpose of the Compensation Act; the substance of the relevant provisions of the Compensation Act; the written applications filed by the applicants for payment of compensation; as well as the written approval of the applicants for the Commission's determination to grant them compensation, it is reasonable to construe that the part "harm suffered in relation to democratization movements" in the Instant Provision means

any and all harm suffered in relation to democratization movements for which the applicants were granted compensation, including psychological harm suffered due to an unlawful act committed by public officials in performing their public duties. Therefore, the Instant Provision does not violate the principle of legal clarity.

3. Infringement of the right to trial

The Compensation Act, through relevant provisions therein, guarantees neutrality and independence of the Commission that deliberates on and determines the payment of compensation; provides the Commission with measures to promote its expertise and impartiality in its deliberative process; and allows the applicants the freedom to choose whether to approve the Commission's determination to grant them compensation. Therefore, the Instant Provision does not infringe the right to trial of the Related Persons and their bereaved family members.

4. Infringement of the right to claim State compensation

While Article 23 Section 1 of the Constitution defines the property rights of all citizens in general, Article 29 Section 1 of the Constitution, by specifically providing the right to claim State compensation, expressly guarantees the right to claim legitimate compensation from the State for direct, indirect, and psychological harm suffered due to an unlawful act committed by a public official in performing his or her public duties.

The Compensation Act was passed by unanimous consent of the ruling and opposition parties at a plenary session of the National Assembly on December 28, 1999. The legislation was based on a social consensus that it is unjust for the State to refuse its duty to compensate the persons who, by risking their own lives and limbs, fought against the rule of authoritarian regimes that infringed the fundamental rights of all citizens guaranteed by the Constitution and thus contributed to the establishment of democratic constitutional order; and restored and expanded freedoms

and rights that people enjoy today, and to their bereaved family members. Against this backdrop, the Instant Provision was implemented on the basis of the presumption that due restoration of honor and payment of compensation to the Related Persons and their bereaved family members are the first step to realizing social justice; it was implemented in order to provide the Related Persons and their bereaved family members with an immediate legal remedy and to accord stability to the Commission's payment decision by speeding up the implementation and completion of the process for the payment of compensation after their approval of the Commission's determination to pay the compensation.

Since the part "harm suffered in relation to democratization movements" in the Instant Provision includes "loss" suffered due to a lawful act and "harm" suffered due to an unlawful act, the Court finds that the compensation defined in the Compensation Act has the nature of compensation not only for loss suffered but also for harm suffered. Further, according to the description of the persons entitled to the compensation and the criteria for calculating different types of compensation set out in the Compensation Act and the Enforcement Decree thereof, the compensation, medical allowances, and living allowances under the Compensation Act amount to payments provided to the above persons for the purpose of compensating direct and indirect harm suffered due to unlawful and lawful acts and ensuring their social protection.

In light of the foregoing, the Court first assessed whether the Instant Provision infringes the right to claim State compensation for direct and indirect harm suffered in relation to property. As mentioned above, the compensation has the nature of reparation for direct and indirect harm suffered. Accordingly, restricting the right of the Related Persons and their bereaved family members, who considered the Commission's determination to grant them compensation appropriate, approved such determination, and received the compensation, to claim State compensation for direct and indirect harm suffered amounts to barring them from bringing the same claim again, for which they have already

been paid appropriate compensation, on the basis of the same fact and harm. Therefore, the Court finds that such restriction is not too excessive.

The Court then assessed whether the Instant Provision infringes the right to claim State compensation for psychological harm suffered. As examined above, the compensation set out in the Compensation Act does not include compensation for psychological harm suffered. Thus, the Related Persons and their bereaved family members who received the compensation have not been awarded appropriate reparation for psychological harm suffered. Taking this into account, the prohibition of the right to claim State compensation for psychological harm suffered on the mere ground that compensation for direct and indirect harm suffered has been paid does not comply with the legislative purpose of the Compensation Act which intended to limit the right to claim State compensation for harm on the premise that appropriate compensation for that harm has been paid; nor is such prohibition thereof in conformity with the purpose of the second sentence of Article 10 of the Constitution which provides the State's duty to guarantee the fundamental rights of individuals. The prohibition of the right to claim State compensation for psychological harm suffered hence constitutes an unduly excessive restriction of the right to claim State compensation.

Therefore, the part concerning psychological harm in the Instant Provision infringes the right of the Related Persons and their bereaved family members to claim State compensation for harm.

5. Conclusion

In conclusion, the part "psychological harm suffered due to an unlawful act" pertaining to the "harm suffered in relation to democratization movements" in the Instant Provision violates the Constitution.

Summary of Dissenting Opinion of Two Justices

In view of the legislative purposes of the Compensation Act and the Instant Provision, the part "harm suffered in relation to democratization movements" means any harm, including psychological harm, suffered due to an unlawful act committed by public officials in performing their public duties.

In reviewing constitutionality of a provision regarding a ruling of a judicial compromise issued as in the Instant Provision, the Court has held in a number of prior cases that the right to trial is the fundamental right being violated by such provision. However, whereas it is true that the Instant Provision limits the right to trial in some aspects, it still guarantees neutrality and independence of the Commission; provides the Commission with measures to promote its expertise and impartiality in its deliberative process; and gives the applicants the freedom to choose whether to approve the Commission's determination to grant the compensation. Therefore, we conclude that the Instant Provision does not infringe the right to trial.

Given that the Instant Provision which merely prescribes when a ruling of judicial compromise is deemed issued does not directly limit the right to claim State compensation; and that the right to trial serves the purpose of guaranteeing other fundamental rights, we find that it is sufficient for the Court to restrict its review to whether the Instant Provision infringes the right to trial, and do not see practical benefits of examining whether the Instant Provision infringes the right to claim State compensation.

However, even if we do proceed to examine whether the Instant Provision infringes the right to claim State compensation, the Instant Provision's restriction on the right to claim State compensation is not considered to be unduly harsh or to give rise to unreasonable results in light of the following facts: the Compensation Act gives the Related Persons and their bereaved family members the freedom to choose: (a) whether to approve the Commission's determination to grant them the

compensation; and (b) whether to receive the compensation; the application and approval forms for payment of the compensation provides a description of the Instant Provision to help them to precisely understand the meaning of the Instant Provision and to minimize any unforeseeable harm; the Related Persons and their bereaved family members may instantly file a claim for State compensation for harm suffered in relation to democratization movements without following the procedure for applying for the compensation under the Compensation Act; simple and prompt procedure of paying the compensation to the Related Persons and their bereaved family members in accordance with the Commission's determination does not necessarily put them at a disadvantage given the amount of time and money that could be spent in filing a claim for harm and the uncertainty in the outcome of trial; and the legislative purpose of the Instant Provision which is to resolve all compensation issues concerning the Related Persons and their bereaved families collectively, immediately, and completely would not be achieved if the Court decided that the part concerning psychological harm in the Instant Provision is unconstitutional and this decision led to dividing the process of seeking remedy for harm suffered in relation to democratization movements into two separate processes. Therefore, the Instant Provision does not infringe the right to claim State compensation.

23. Case on the Act of Filming Carried Out by the Police at Assembly and Demonstration

[2014Hun-Ma843, August 30, 2018]

In this case, the Court held that the police's act of filming persons participating at the scene of assembly and demonstration does not infringe the general right to personality, right to informational self-determination, and freedom of assembly of the Complainants.

Background of the Case

The Complainants are students of the __ Law School who participated in an assembly held on August 29, 2014, from 16:00 to 19:00 (the "Assembly at Issue"), in which the participants marched from the main gate of the __ Law School to Gwanghwamun Square in order to urge the legislation of the Special Act on Remedy for Damage Caused by the April 16 Sewol Ferry Disaster.

The Assembly at Issue was initially reported as a march from the main gate of the __ Law School to the main entrance of the __ Newspaper office building, scheduled to be held from 16:00 to 18:00. However, at around 17:50, the participants marched about 100 meters further from the main entrance of the __ Newspaper office building. Thereupon, the police started to film the participants, warning the participants that it was illegal to march to the unreported location, and stopped filming at around 18:15 as the participants dispersed voluntarily (the "Filming at Issue").

On October 2, 2014, the Complainants filed this constitutional complaint, claiming that the Filming at Issue and the Evidence Collection Rule (Established Rule of the National Police Agency) providing grounds for the Filming at Issue infringed their freedom of assembly and other fundamental rights.

Subject Matters of Review

The primary subject matter of review in this case is whether the former Evidence Collection Rule (amended by the Established Rule of the National Police Agency No. 472, on September 26, 2012) and the latter Evidence Collection Rule (amended by the Established Rule of the National Police Agency No. 495, on January 26, 2015) (collectively the "Rules at Issue") infringe the fundamental rights of the Complainants. The secondary subject matter of review in this case is whether the Filming at Issue conducted on August 29, 2014, infringes the fundamental rights of the Complainants.

Summary of the Decision

1. The Rules at Issue

The Rules at Issue merely amount to administrative rules of the National Police Agency, enacted without legislative delegation. In fact, it is a specific act of filming that infringed the fundamental rights of the Complainants. Therefore, the Court concludes that the Rules at Issue do not directly infringe the fundamental rights of the Complainants.

2. The Filming at Issue

Criminal investigation is an undertaking that involves searching for and apprehending a criminal suspect as well as collecting and preserving evidence. It is carried out by the State investigative agencies in order to accurately identify an alleged criminal offence and to decide whether to file and/or maintain indictment. As part of criminal investigation, the police may conduct filming in order to collect evidence of a crime, including evidence relating to the details of a crime or the circumstances before and after a crime.

Since the filming carried out by the police entails an abridgment of

the general right to personality; right to informational self-determination; freedom of assembly; and other freedom and rights, it should be limited to the minimum necessary, even if for the purpose of criminal investigation. Yet, in determining whether the Filming at Issue was limited to the minimum necessary, the Court may consider the fact that the police filmed the participants in an outside assembly or demonstration held in a public space, not in a private space; and that the current Assembly and Demonstration Act (the "Assembly Act"), unlike the Federal Law Concerning Assemblies and Processions in Germany, does not prohibit the participants in an outside assembly or demonstration from wearing a disguise to avoid being identified.

The filming of mere participants in an unreported outside assembly/ demonstration or an outside assembly/demonstration that deviated from its reported path is inevitably carried out to collect evidence for the violation of the Assembly Act committed by the organizer of such assemblies/demonstrations, although the participants have not committed any crimes. The information gathered through such filming not only constitutes direct and indirect evidence for the violation of the Assembly Act committed by the organizer but also provides details concerning the assembly/demonstration he or she organized, including the number of participants therein and the type and method thereof, which can be taken into consideration in determining the sentence of the organizer.

Moreover, the organizer of an unreported outside assembly/demonstration or an outside assembly/demonstration that deviated from its reported path could be replaced by new persons, or *de facto* leader may appear in the course of such assemblies/demonstrations. Therefore, the police need to film mere participants also in such assemblies/ demonstrations in order to search for and identify above-mentioned new persons violating the Assembly Act as well as to collect and preserve the evidence. Further, it is possible that an unreported outside assembly/ demonstration or an outside assembly/demonstration that deviated from its reported path may not comply with a lawful dispersal order issued by the police. Therefore, the police need to prepare for the possibility by filming such assemblies/

demonstrations, thus collecting information concerning the details of, and the circumstances before and after, an assembly/demonstration that has not complied with the police order.

The Complainants claim that the full shot taken from a long distance, which shows the entire scene of an assembly/demonstration, infringes their fundamental rights less compared to the close-up shot taken from a short distance. However, considering recent advancements in technology which have made it possible to take close-up shots from a long distance, the Court sees no considerable difference between the extent of infringement caused by a shot taken from a long distance and a shot taken from a short distance. Hence, the act of the police in taking a shot from a short distance in lieu of a shot from a long distance does not solely constitute a violation of the Constitution.

The filming of an outdoor assembly/demonstration carried out by the police is not in violation of the Constitution when the necessity and urgency for, and the appropriateness of the method of preservation of evidence are recognized; however, the preservation and use of information gathered through such filming should be strictly limited so as to minimize restrictions on the fundamental rights of the participants in an outdoor assembly/demonstration. The Personal Information Protection Act, the general law concerning the protection of personal information, can be applied to protect such information.

In this case, the filming of the participants in the Assembly at Issue that was carried out by the Respondent only during the time when the participants deviated from the reported path does not violate the rule against excessive restriction and thus does not infringe the general right to personality, right to informational self-determination, and freedom of assembly of the Complainants.

Dissenting Opinion of Five Justices on the Filming at Issue

Since the filming of the participants in an assembly can restrict the freedom of assembly of an individual, it should be carried out in

accordance with due process of law insofar as it is necessary to achieve the purpose of securing evidence. Therefore, such filming should be permitted only when an unlawful conduct is being committed or when the necessity and urgency for securing evidence right after the unlawful conduct are recognized.

Since the Assembly at Issue was held in a peaceful manner, we hardly see any necessity and urgency for securing evidence of unlawful conduct, except that deviation from the reported path constituted an unlawful conduct committed by the organizer of the Assembly at Issue. Moreover, we find that the dispersal order, which was issued to the Assembly at Issue after it deviated from its reported path, failed to fulfill requirements for its issuance.

The filming of the assembly may have been necessary to substantiate the fact that the assembly deviated from its reported path, but that purpose could have been sufficiently served by filming the entire scene of the assembly from a long distance. However, the Filming at Issue was carried out in a manner whereby several cameras filmed the faces of the assembly participants only a short distance away therefrom. We find that, in so doing, the police intended to disperse the Assembly at Issue unjustifiably, by imposing psychological pressure on its participants.

In conclusion, the Filming at Issue neglected to seek balance between the private interests and public interest, while focusing heavily on the public interest. Therefore, the Filming at Issue violated the rule against excessive restriction and thus infringed the general right to personality and freedom of assembly of the Complainants.

24. Case on the Interception of Internet Lines

[2016Hun-Ma263, August 30, 2018]

In this case, the Court held that Article 5 Section 2 of the Protection of Communications Secrets Act which provides a legal basis for the so-called "packet interception," the interception of telecommunications transmitted and received through Internet lines, infringes on the secrecy and freedom of communications and privacy of the Complainant, and thus is in violation of the Constitution.

Background of the Case

The director of the National Intelligence Service ("NIS") executed the communication-restriction measures 35 times with respect to the telecommunications made by a person named ___, including his mobile phone and Internet line, to investigate his alleged violation of the National Security Act pursuant to the permission granted by the court.

Among such measures were those executed six times from October 9, 2013, to April 28, 2015, with respect to the Internet line purchased in the name of the Complainant. Such six measures were the so-called "packet interception" through which State investigative agencies capture a "packet," a unit of data split into small pieces in the form of electrical signals to transmit information through the Internet, and learn the content thereof.

The Complainant filed this constitutional complaint, claiming that the permission for the communication-restriction measures granted by the court, the interception conducted by the director of NIS under such permission, and Article 5 Section 2 of the Protection of Communications Secrets Act infringed the Complainant's fundamental rights, including the secrecy and freedom of communications and privacy, and violated the warrant requirement and the due process of law stipulated by the Constitution.

Subject Matters of Review

The subject matters of review in this case are whether: 1) the permission granted by the court six times for the interception of telecommunications transmitted and received through the Internet line purchased in the name of the Complainant (the "Permission at Issue"); 2) the interception conducted six times by the director of NIS from October 9, 2013, to April 28, 2015, under the Permission at Issue (the "Interception at Issue"); and 3) the part concerning "telecommunications transmitted and received through Internet lines" of Article 5 Section 2 of the Protection of Communication Secrets Act (the "Provision at Issue") which provides a legal basis for the Permission at Issue and Interception at Issue, infringe on the fundamental rights.

Summary of the Decision

1. Regarding the Permission at Issue

The Permission at Issue amounts to the exercise of authoritative legal judgment by the court on a matter that is collateral to, but distinct from, the procedure of trials governed by the Protection of Communications Secrets Act (the "Act at Issue"). Such legal judgment falls under the scope of "judgment of the court" not subject to a constitutional complaint, as prescribed in Article 68 Section 1 of the Constitutional Court Act. Therefore, the Complainant's claim challenging the constitutionality of the Permission at Issue is non-justiciable.

2. Regarding the Interception at Issue

Since the Interception at Issue has already terminated, the protectable interest derived from subjective rights is extinguished. And since the Court will review the Provision at Issue in its judgment on the merits, the examination of the Interception at Issue is deemed to have no

practical benefit. Therefore, the Complainant's claim challenging the constitutionality of the Interception at Issue is non-justiciable.

3. Regarding the Provision at Issue

Interception of Internet lines is conducted through packet interception, through which data packets in the form of electrical signals travelling over Internet lines are captured and reassembled and the content thereof becomes accessible. This form of interception thereby restricts the secrecy and freedom of private life as well as communications.

Given the widespread use of the Internet in our daily lives, there is a need to permit the interception of telecommunications made through the Internet for preventing crimes that endanger national security, the public safety, or the safety of property, life, and limb of all citizens; or for investigating crimes that have already occurred. Thus, the Court recognizes that the Provision at Issue serves a legitimate legislative purpose and uses appropriate means.

Interception of Internet lines allows State investigative agencies to gain access to data pertaining to personal communications and the intimate realm of individual privacy. Therefore, legislative safeguards aimed at preventing the abuse of power and minimizing the interferences with the fundamental rights by State investigative agencies are required not only at the stage when the court grants permission for communication -restriction measures, but also at later stages, including during and after the execution thereof.

Article 5 of the Act at Issue stipulates that the communication -restriction measures shall be allowed only "when there is substantial ground to suspect that…crimes are being planned or committed or have been committed" and only as a last resort. In addition, Article 6 of the Act at Issue provides that the court shall grant permission only for an interception that targets the Internet line used by a specific suspect or person under investigation, to the extent necessary to investigate the crimes committed by the said persons.

However, when State investigative agencies conduct interception of an Internet line, all the data travelling through that line, including information on its unspecified users, are captured in the form of packets and transmitted intact to State investigative agencies. Thus, a wider range of data is collected through such packet interception by State investigative agencies than through other communication-restriction measures. Since the general public mostly shares one Internet line, the communications data not only of a suspect or a person under investigation but also of all the users sharing that line are collected and retained by State investigative agencies during the execution of interception, which goes beyond the scope of the permission granted by the court.

Hence, there is a strong need for supervisory or regulatory legal measures to ascertain whether State investigative agencies have not collected or retained information of a third party or information irrelevant to the criminal investigation during and after the execution of interception, and whether they have used and processed data in accordance with the original authorized purpose and scope of such acts. Nevertheless, the Act at Issue does not provide for any procedure for processing the vast amount of data collected through interception by State investigative agencies, apart from Article 11, which imposes a confidentiality obligation to related public officials or former public officials, and Article 12, which restricts the use of data acquired through communication-restriction measures.

Under Article 9-2 of the Act at Issue, the prosecutor should notify telecommunications subscribers of the communication-restriction measures executed but should not notify the subscriber of the grounds for such measures. Further, if the investigation is prolonged or when the prosecutor determines to suspend an indictment, there is no way for the subscriber to be informed of the above fact, making it all the more difficult to have objective and ex-post control. Additionally, under Article 12 Item 1 of the Act at Issue, the contents of telecommunications acquired through interception could be used to investigate, prosecute, or prevent crimes related to the crimes over which the court authorized the

execution of the communication-restriction measures. Therefore, there is possibility that State investigative agencies may abuse their power to collect information about a specific person, including his or her whereabouts.

There are a number of legislative cases in other countries that allow State investigative agencies to intercept Internet lines or other similar wiretapping for investigative purposes while setting out procedures that regulate the use of data acquired through such interception in order to minimize infringement on fundamental rights, such as: the requirement for submission of periodic reports on the progress of interception to the court after the execution; the requirement for submission of sealed data on interception to the judge who authorized such interception; and the judge's decision over the preservation and destruction of the data obtained through interception.

In light of the above, the Instant Provision does not satisfy the principle of least infringement, since it specifies interception of Internet lines as one of the communication-restriction measures merely on the ground that such interception serves criminal investigative purposes, although no legal safeguards are in place to prevent the abuse of power and to minimize infringement on the fundamental rights by State investigative agencies during and after the execution of such interception.

Moreover, the balance is not deemed to have been struck between the public interest to be attained by the Instant Provision and the private interests to be infringed by the Instant Provision, since authorizing the interception of Internet lines would pose a serious threat to the secrecy and freedom of communications and privacy of individuals.

Accordingly, the Instant Provision violates the rule against excessive restriction and thus infringes on the fundamental rights of the Complainant.

4. Conclusion

Although the Instant Provision violates the Constitution by infringing on the fundamental rights of the Complainant, the issuance of a decision

of unconstitutionality would remove the legal grounds that allow State investigative agencies to carry out investigations through the interception of Internet lines, thus creating a legal vacuum in investigating grave crimes that need to be stopped urgently or endanger the life, limb, and property of citizens.

The unconstitutionality of the Instant Provision lies in the fact that a provision monitoring or regulating the use of data obtained through the interception of Internet lines does not exist despite the peculiar nature of such interception. Thus, it is at the discretion of the legislature to determine the details of the amendment to the current legal framework governing such interception.

For these reasons, the Court issues a decision of nonconformity to the Constitution for the Instant Provision in lieu of a decision of unconstitutionality, and orders that the Instant Provision continue to be applied until the legislature resolves its unconstitutionality and makes reasonable amendments to the current legal framework.

Summary of Dissenting Opinion of Two Justices

The communication-restriction measures for criminal investigations, which provide access to the content of communications, amount to direct interference with the secrecy of communications. Thus, the Act at Issue sets out stricter conditions for such measures than for access to "communication confirmation data" that contains non-content information related to communications; and also tightly regulates the use of wiretapping equipment by State investigative agencies.

According to Article 5 Section 1 of the Act at Issue, the communication-restriction measures may only be applied to crimes that gravely endanger the property, or life and limb of all citizens, such as insurrection and treason; and permitted only when it is impractical to prevent the commission of such crimes, arrest the criminal, or collect the evidence relating to such crimes through measures other than the communication-restriction measures. In addition, as Article 5 Section 2

of the Act at Issue requires the court to decide whether to grant permission for the communication-restriction measures by examining the aforementioned substantive requirements for such permission, it is clear that the communication-restriction measures are under judicial control. Further, as the execution period of the communication-restriction measures has been limited to two-month in accordance with the Court's previous decision in the case of 2009Hun-Ka30, the extension of such period has become impossible unless the prosecutor files another application for the permission for the communication-restriction measures, indicating different grounds for such application.

We do not see that no legal safeguards are in place to regulate the abuse of power or serious infringement on the fundamental rights by State investigative agencies during the execution of the interception of Internet lines. The Act at Issue uniformly prohibits any public official or former public official of State investigative agencies who has been engaged in the interception of Internet lines from disclosing or divulging matters he or she has learned while conducting such interception; and imposes imprisonment of not more than ten years on the public official who has violated such obligation. It also prohibits the data obtained through interception from being used to investigate, prosecute, and prevent crimes when such data is irrelevant to criminal investigations. Further, under the Personal Information Protection Act, if special provisions do not exist in other laws or if consent has not been obtained from a data subject, the State investigative agencies conducting interception are not allowed to preserve the information of a data subject obtained through such interception or to provide such information to a third party; and should destroy such information without delay.

Moreover, the interception of Internet lines does not essentially differ from intercepting other communications in transit, although there are relative differences in their mechanics and target.

On all the foregoing grounds, we find that the Provision at Issue satisfies the principle of the least restrictive means since the fact that there are no procedural safeguards in place to allow the court to

supervise the execution of the interception of Internet lines does not necessarily constitute a failure of the Provision at Issue to comply with the said principle.

We also find that the Provision at Issue satisfies the principle of the balance of interests since the fact that a wider range of information is obtained through the interception of Internet lines than through other communications; and a mere concern that State investigative agencies may not follow the measures provided by law, do not constitute a sufficient basis for the conclusion that the private interests to be infringed by the Instant Provision are dwarfed by the public interest to be attained by the Instant Provision.

Accordingly, the Provision at Issue does not violate the rule against excessive restriction and thus does not infringe on the secrecy and freedom of communications and privacy.

Summary of Dissenting Opinion of One Justice

Since the Provision at Issue merely prescribes one of the requirements for the permission for the communication-restriction measures, which is the object of such permission, the violation of the fundamental rights asserted by the Complainant occurs only through the permission for the communication-restriction measures granted by the court and the execution of such measures pursuant to such permission. Therefore, the Complainant's claim challenging the constitutionality of the Provision at Issue is non-justiciable as it lacks the requirement of directness of the infringement of the fundamental rights.

25. Case on the Extinctive Prescription of the Right to Claim State Compensation for Past Incidents

[2014Hun-Ba148 · 162 · 219 · 223 · 290 · 466, 2015Hun-Ba50 · 440, 2016Hun-Ba419 (consolidated), August 30, 2018]

In this case, the Court held that, as to the past incidents concerning the "civilian massacres" and "grave human rights abuses and sham trials," applying a period of extinctive prescription which starts to run from an objective starting point, to the right to claim damages of the victims of crimes committed by the State, infringes upon the right to claim State compensation, and thus violates the Constitution.

Background of the Case

Some of the Complainants are persons who were sentenced to imprisonment during 1982 and 1986 for criminal offences including violation of the National Security Act, and their families and successors. These Complainants were found to be victims of the abovementioned past incidents by the Truth and Reconciliation Commission, Republic of Korea (the "Commission"), which was established under the Framework Act on Settling the Past History for Truth and Reconciliation (the "Framework Act") enacted in 2005. The initial convictions were overturned in subsequent retrials, and the above Complainants were acquitted accordingly.

Other Complainants include successors of the victims who were apprehended by the police and other forces and lost their lives during the Bodo League Massacre in 1950, and successors of the victims who died during the shore bombardment by the U.S. forces. These Complainants were found to be victims of the aforesaid past incidents by the Commission.

After the Commission's decisions, all Complainants filed lawsuits in courts against the Republic of Korea to claim damages and while their

proceedings were pending, they filed motions to request constitutional review of the provisions on extinctive prescription. Upon rejection or dismissal of such motions, the Complainants filed this constitutional complaint under Article 68 Section 2 of the Constitutional Court Act.

Subject Matter of Review

The Framework Act, the purpose of which is to reconcile the past and thus to move towards the future by investigating and revealing the truth behind human rights violations, and violent incidents and massacres committed in crimes against democracy and humanity (Article 1), stipulates that the following two incidents shall be subject to investigation: the "civilian massacres," which occurred prior to and after the Korean War (Article 2 Section 1 Item 3), and the "grave human rights abuses and sham trials," which took place during the rule of authoritarian regimes (Article 2 Section 1 Item 4). The Complainants fall under either the victims of the civilian massacres prescribed in Article 2 Section 1 Item 3 of the Framework Act, or the victims of the grave human rights abuses and sham trials prescribed in Article 2 Section 1 Item 4 of the same Act.

The subject matter of review in this case is whether Article 166 Section 1 and Article 766 of the Civil Act, Article 96 Section 2 of the National Finance Act, and Article 96 Section 2 of the former Budget and Accounts Act (the "Instant Provisions") violate the Constitution.

Summary of the Decision

1. Issue

While Article 23 of the Constitution defines the right of property of all citizens in general, Article 28 and Article 29 Section 1 of the Constitution prescribe the right of all citizens to claim criminal compensation and State compensation as special provisions to Article 23.

The purpose of the two special provisions is to reinforce protection of relevant fundamental rights by guaranteeing a constitutional remedy for citizens whose right to physical freedom and other rights have been infringed by the State's criminal justice system and exercises of power.

Since Article 28 and Article 29 Section 1 of the Constitution provide that the terms regarding the right to claim criminal compensation and State compensation shall be prescribed by law, implying the specific content of such terms is at the discretion of the legislature. Yet, such legislation should not be limited to merely granting a procedural right to claim compensation or allowing a theoretical prospect of claiming compensation; it should significantly guarantee an effective remedy for violation of the rights of citizens.

In principle, the legislature is entrusted with determining the starting point of computing extinctive prescription and the period of prescription. However, it goes beyond the limits of legislative discretion and is considered unconstitutional if a prescription period is unreasonably short or it starts to run from an unreasonable date, thus seriously impeding or making it practically impossible to claim State compensation.

2. Constitutionality of the Instant Provisions in principle

As prescribed by Article 8 of the National Compensation Act, the Instant Provisions set out that, regarding the extinctive prescription of the right to claim State compensation, a "short prescription period" of three years (Article 766 Section 1 of the Civil Act) shall elapse from the "subjective starting point," date on which the injured party or his/her legal representative becomes aware of such harm and of the identity of the person who caused it (Article 766 Section 1 of the Civil Act); and a "long prescription period" of five years (Article 96 Section 2 of the National Finance Act and Article 96 Section 2 of the former Budget and Accounts Act) shall elapse from the "objective starting point," date on which the unlawful act was committed (Article 166 Section 1 and Article 766 Section 2 of the Civil Act).

Generally, the purposes of extinctive prescription governed by the Civil Act are: (1) to ensure legal stability; (2) to prevent the debtor from repeatedly repaying his/her debt; and (3) to sanction the non-exercise of rights by the creditor and to protect the legitimate trust held by the debtor. Such purposes of the extinctive prescription in the Civil Act are mostly valid for the right to claim State compensation as well; a short prescription period, in particular, is needed to identify liabilities of the State at an early stage and to remove the instability of budgeting accordingly. Therefore, it is reasonable to stipulate in the Instant Provisions the starting points and periods of extinctive prescription regarding the right to claim State compensation of the persons harmed by a general unlawful act committed by public officials performing their public duties.

3. Exceptional unconstitutionality of applying Article 166 Section 1 and Article 766 Section 2 of the Civil Act to the incidents stipulated in Article 2 Section 1 Items 3 and 4 of the Framework Act

Even if there are reasonable grounds for applying the starting points of prescription and periods of extinctive prescription to the general right to claim State compensation, directly applying an objective starting point under Article 166 Section 1 and Article 766 Section 2 of the Civil Act to the incidents concerning the civilian massacres referred to in Article 2 Section 1 Item 3 of the Framework Act and the grave human rights abuses and sham trials referred to in Article 2 Section 1 Item 4 of the same Act, without considering the exceptional nature of the incidents, exceeds the limits of legislative discretion for the reason stated below.

As to the incidents involving the civilian massacres and the grave human rights abuses and sham trials, State agencies and their public officials falsely accused citizens through unlawful acts systematically and fabricated and concealed evidence afterwards. Hence, the truth behind the said incidents was impossible to uncover for a long time, and this gave rise to problems that they are difficult to resolve reasonably

through the general legal principle of extinctive prescription. Thereupon, in 2005, the ruling and opposition parties agreed to enact the Framework Act, and given the background and purpose of this legislation, the foregoing incidents fall under a fundamentally different type from the incidents concerning the "crimes between private persons" or "State compensation in general."

For the reason stated above, it is not appropriate to apply the general extinctive prescription to the type of two incidents provided in the Framework Act. Since the State apparently has not paid compensation to the victims of this type of incidents so far, the legislative purpose of the extinctive prescription "to prevent the debtor from repeatedly repaying his/her debt" does not serve as a ground for limiting the right to claim State compensation (*see* (2) *above*). In addition, since the State committed crimes through mobilization of public officials and, for a long time, undermined the rights of victims through fabrication and concealment of evidence, the legislative purpose of a prescription period "to sanction the non-exercise of rights by the creditor and to protect the legitimate trust of the debtor" does not constitute a ground for restricting the right to claim State compensation as well (*see* (3) *above*). Consequently, this leaves only the purpose of "legal stability" to be examined for this type of incidents. However, considering that the purpose of the right to claim State compensation, a special fundamental right guaranteed under Article 29 Section 1 of the Constitution, is not simply limited to safeguarding the right of property but to provide a post-remedy for the citizens who have been harmed by the crimes committed by the very State, who has a duty to protect fundamental rights of its citizens pursuant to the second sentence of Article 10 of the Constitution, it is difficult to find that the importance of protecting legal stability through extinctive prescription to the right to claim State compensation completely outweighs the "obligation of the State to protect fundamental rights" under Article 10 of the Constitution and the "necessity to guarantee the right to claim State compensation" under Article 29 Section 1 of the Constitution (*see* (1) *above*).

When examined in detail, there is a reasonable ground to apply a subjective starting point under Article 766 Section 1 of the Civil Act to the incidents stipulated in Article 2 Section 1 Items 3 and 4 of the Framework Act, since the intention of requiring a victim of a crime to file a claim for State compensation within three years "from the date on which the injured party or his/her legal representative becomes aware of such harm and of the identity of the person who caused it" is to promote balance in protecting the victim and offender in claiming damages by an unlawful act.

However, computing the extinctive prescription period from the date on which an unlawful act was committed regardless of the fact that the State harmed a large number of civilians illegally through mobilization of public officials systematically; or that guilty verdicts were rendered based on false confessions induced under long-term illegal detention and torture; and that the State afterwards continued to impede truth-seeking processes through fabrication and concealment of evidence, hardly promotes balance in safeguarding the victim and offender; nor does this comply with the guiding principle of the compensation system, which is equitable and reasonable apportionment of damages which have arisen.

Consequently, applying the objective starting point under Article 166 Section 1 and Article 766 Section 2 of the Civil Act to the incidents concerning the civilian massacres and the grave human rights abuses and sham trials respectively stated in Article 2 Section 1 Items 3 and 4 of the Framework Act is tantamount to, without reasonable cause, neglecting the necessity to guarantee the right to claim State compensation for the foregoing type of incidents by overemphasizing legal stability and protection of the offender through the extinctive prescription period. This crosses the limits of legislative discretion and thus violates the right of the Complainants to claim State compensation.

4. Conclusion

In conclusion, the parts in Article 166 Section 1 and Article 766

Section 2 of the Civil Act, which are applicable to the cases specified in Article 2 Section 1 Items 3 and 4 of the Framework Act, violate the Constitution; and Article 766 Section 1 of the Civil Act, Article 96 Section 2 of the National Finance Act, and Article 96 Section 2 of the former Budget and Account Act do not violate the Constitution.

Summary of Dissenting Opinion of Three Justices

The essence of the Complainants' argument is that the civilian massacres and the grave human rights abuses and sham trials under the Framework Act constitute grave human rights violations committed by the State power and thus have a unique nature different from other cases on the general right to claim compensation; hence, the Instant Provisions, general provisions concerning extinctive prescription, should not be applied to the incidents provided in the Framework Act. In other words, the Complainants argue that the provisions on extinctive prescription should not apply to such incidents as the civilian massacres and the grave human rights abuses and sham trials where there are special circumstances in which it is impossible to expect the right to be exercised before completion of extinctive prescription as there is a de facto impediment objectively preventing the exercise of such right, or that the running of extinctive prescription should be tolled until an acquittal has been granted in a retrial. However, this amounts to nothing more than claiming that the interpretation and application of law by the Supreme Court or lower courts that heard the Complainants' cases, counter to the Complainants' arguments, was wrong and such construction of law infringes upon the right of property of the Complainants and therefore is in violation of the Constitution. Simply put, the Complainants did not request this Court to review the constitutionality of the Instant Provisions *per se* but sought to argue against the recognition or assessment of the facts underlying this case or to dispute the courts' interpretation and application concerning the simple subsumption and application of provisions in individual and specific

cases or the outcome of trial. Therefore, in view of the purpose of Article 68 Section 1 of the Constitutional Court Act, which prohibits reviewing the constitutionality of the court's judgment, this constitutional complaint is non-justiciable.

26. Case on the Annulment of the Supreme Court Judgment That Refused to Recognize the Liability of the State to Pay Compensation for Damages Regarding the Issuance of Emergency Measures

[2015Hun-Ma861 and 53 other cases (consolidated), August 30, 2018]

In this case, the Court held that (1) the phrase "excluding judgment of the court" in Article 68 Section 1 of the Constitutional Court Act does not violate the Constitution; and (2) the Supreme Court judgment that refused to recognize the liability of the State to pay compensation for damages regarding the issuance of the Presidential Emergency Measures on the Protection of National Safety and Public Order (the "Emergency Measures") is non-justiciable.

Background of the Case

*Since 54 cases with similar major issues have been consolidated in the present case, only a summary of the earliest filed case will be outlined below.

Complainant Baek ___ was indicted on the charge of violating Emergency Measure No. 1 and was rendered a final judgment of conviction (Emergency Ordinary Court-Martial Case No. 74Bibogun-Hyeong-Gong1, Emergency High Court-Martial Case No. 74Bigogun-Hyeong-Hwang1, and Supreme Court Case No. 74Do1123). The Complainant was thereafter acquitted in a retrial (Seoul High Court Case No. 2009Jae-No56). Complainant Kim ___ is the spouse of the above-mentioned person.

In 2013, the Complainants filed a lawsuit against the State, seeking compensation for damages they had suffered from the issuance of Emergency Measure No. 1; illegal arrest as well as detention, indictment and trial based on Emergency Measure No. 1; and inhumane acts committed by the State investigative agencies in the course of the above process before and during the trial. Although their claim was partially accepted by the trial court (Seoul Central District Court Case No.

2013Ga-Hap544065), the Complainants lost their case both at the intermediate appellate court (Seoul High Court Case No. 2014Na2025168) and the highest court (Supreme Court Case No. 2015Da212695).

On August 24, 2015, the Complainants filed this constitutional complaint, alleging that the above Supreme Court judgment and the phrase "excluding judgment of the court" in the main sentence of Article 68 Section 1 of the Constitutional Court Act infringed their fundamental rights and thus violated the Constitution.

Subject Matter of Review

The subject matter of review in this case is whether (1) the phrase "excluding judgment of the court" in the main sentence of Article 68 Section 1 of the Constitutional Court Act (the "Phrase at Issue"), and (2) the Supreme Court judgment in Case No. 2015Da212695, rendered on July 23, 2015, and other Supreme Court judgments (the "Supreme Court Judgments at Issue"), infringe the fundamental rights of the Complainants. The Phrase at Issue reads as follows:

Phrase at Issue

Constitutional Court Act (amended by Act No.10546 on April 5, 2011)
Article 68 (Causes for Request)

(1) Any person whose fundamental rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the public authority, excluding judgment of the court, may request adjudication on constitutional complaint to the Constitutional Court (*Proviso omitted*).

Summary of the Decision

1. Regarding the Phrase at Issue

The Court held in a previous case that the Phrase at Issue had limited

unconstitutionality, stating that "it would be unconstitutional if the part 'judgment of the court' was interpreted to include the judgment that has infringed the fundamental rights of the citizens through the application of laws and regulations declared unconstitutional by the Court." In holding so, the Court severed the unconstitutional part from the Phrase at Issue, thereby leaving the remainder of the Phrase at Issue to stand as constitutional.

Based on the above precedent, it is clear that the substance of the Phrase at Issue has been reduced to exclude the unconstitutional part, and the Court sees no reason to depart from the above precedent.

2. Regarding the Supreme Court Judgments at Issue

In the Supreme Court Judgments at Issue, the Supreme Court did not hold that Emergency Measures Nos. 1 and 9 were constitutional in opposition to the Court's decision that had held these Measures unconstitutional, nor did it apply these Measures to the cases presuming them to be constitutional. The Supreme Court refused to recognize the liability of the State to pay compensation for damages regarding the issuance of these Measures, not because it construed them as constitutional, but because it reached that conclusion despite noting their unconstitutionality.

In conclusion, the Supreme Court Judgments at Issue do not constitute an exception to the rule excluding judgment of the court in adjudication on constitutional complaint. Therefore, the Supreme Court Judgments at Issue are non-justiciable.

Dissenting Opinion of Two Justices on the Supreme Court Judgments at Issue

The Court, in previous cases, opined that "even an executive prerogative action, given that it is an exercise of State authority, should be carried out only to the extent that it serves as an instrument for

realizing the values of the fundamental rights of all citizens." It further noted that "although the issuance of Emergency Measures Nos.1 and 9 amounts to a high-level political action of the State, judicial review of these Measures should be permitted" and held that "Emergency Measures Nos. 1 and 9 are in violation of the Constitution (Court Case No. 2010Hun-Ba132, etc.)." A judgment that has infringed the fundamental rights of citizens through the application of laws and regulations declared as unconstitutional by the Court constitutes an exception to the Phrase at Issue and thus is subject to a constitutional complaint. We believe that the judgments of the Supreme Court and lower courts which defy the logic of the main reasoning employed by the Court to determine the unconstitutionality of a statute should also be regarded as such judgment.

The Supreme Court, in a prior case, held that the State had the liability to pay compensation for legislative actions "in special cases, such as when legislation has been enacted albeit the apparent unconstitutionality of its content," but that "the President only assumes political responsibility toward the people for the exercise of his or her right to adopt Emergency Measures, since the exercise of such a right is a high-level political action of the State." Because an Emergency Measure has the same effect as an Act, it is the liability of the State to pay compensation for the legislation of an Emergency Measure. Nonetheless, the Supreme Court, in the Supreme Court Judgments at Issue, did not examine whether the legislation of Emergency Measures Nos. 1 and 9 fall under the above special case in which the legislature passed Emergency Measures Nos. 1 and 9 albeit knowing the apparent unconstitutionality thereof.

The essence of the Court's decision in Case No. 2010Hun-Ba132, etc. was that: (1) the exercise of State authority related to the infringement of the fundamental rights of all citizens cannot be exempted from judicial review; (2) the unconstitutionality of Emergency Measures Nos.1 and 9 is apparent and grave since they provided grounds for the prohibition of calls to amend the Yushin Constitution, the prohibition of criticism of the Yushin Constitution and Emergency Measures, and the

arrest as well as detention of the offender of Emergency Measures without warrant issued by a judge; (3) and Emergency Measures Nos. 1 and 9 were enforced with the intent of suppressing the freedom and rights of all citizens while failing from the beginning to meet the requirements for issuance thereof.

If the Supreme Court Judgments at Issue mean that the issuance of Emergency Measures Nos. 1 and 9 is equivalent to high-level political action taken by the State and thus not subject to judicial review, this is against the binding decision of the Court in Case No. 2010Hun-Ba132, etc., in which the Court ruled that "the exercise of State authority related to the infringement of the fundamental rights of citizens, cannot be exempted from judicial review." If the Supreme Court Judgments at Issue mean that the issuance of Emergency Measures Nos. 1 and 9 does not fall under the special case in which the legislature passed these Measures albeit knowing the apparent unconstitutionality thereof, this runs counter to the binding decision of the Court in Case No. 2010Hun-Ba132, etc., in which the Court acknowledged the apparent and grave unconstitutionality of Emergency Measures Nos. 1 and 9 and stated that such unconstitutionality was not inevitably entailed in the process of making efforts to accomplish a legitimate purpose, but arisen from issuance of the Measures with a clear intention of the President to suppress the freedom and rights of all citizens.

In conclusion, the Supreme Court Judgments at Issue are contrary to the binding decision of unconstitutionality issued by the Court and thus infringe the fundamental rights of the Complainants. Therefore, the Supreme Court Judgments at Issue must be annulled.

27. Case on the Procedure for the Issuance of a Warrant to Collect DNA Samples

[2016Hun-Ma344, 2017Hun-Ma630 (consolidated), August 30, 2018]

In this case, the Court held that Article 8 of the Act on Use and Protection of DNA Identification Information, which does not provide for any procedure by which a person subject to collection of DNA samples may express his/her opinion or appeal against the issuance of a warrant, does not conform to the Constitution since it violates the rule against excessive restriction and thus infringes on the Complainants' right to trial.

Background of the Case

The Complainants were indicted and found guilty of a crime specified in Article 5 of the Act on Use and Protection of DNA Identification Information (the "DNA Act").

After the conviction, the prosecutors obtained and executed a warrant issued by the courts to collect DNA samples for the identification of the Complainants. The Complainants filed a constitutional complaint against Article 8 of the DNA Act, which prescribes the procedure for issuing warrants to collect DNA samples.

Subject Matter of Review

The subject matter of review is whether Article 8 of the DNA Act (enacted by Act No. 9944 on January 25, 2010) (the "Instant Provision"), which does not provide for any procedure by which a person subject to collection of DNA samples may express his/her opinion or appeal against the issuance of a warrant, infringes on the Complainants' fundamental rights to trial.

Summary of the Decision

1. Whether the Instant Provision infringes on the Complainants' right to trial

The Instant Provision empowers a neutral judge to issue a warrant for collecting DNA samples, which is an act of restricting physical freedom, after detailed review of the application for such warrant, thus enabling judicial regulation by judges concerning collection of DNA samples. Therefore, the Instant Provision is deemed to serve a legitimate purpose and to be an appropriate means.

The issuance of a warrant to collect DNA samples is a grave matter for a person subject to such collection; it is a matter of restricting that person's fundamental rights, including physical freedom and right to informational self-determination, through the forcible collection of DNA samples from him/her and the permanent storage and management of relevant information. Nevertheless, the Instant Provision fails to guarantee the procedural opportunity for the person subject to collection of DNA samples to express his/her opinion during the procedure for the issuance of a warrant to collect DNA samples; it further fails to provide for procedural remedies by which the person subject to collection of DNA samples may appeal against the warrant after its issuance, or to request a review on the constitutionality of collection of DNA samples. The Instant Provision, marked by such legislative deficiencies, unduly limits the right to trial of the Complainants, who are subject to collection of DNA samples, and thus violates the principle of minimum restriction.

Although it is true that a warrant issued under the Instant Provision enables gathering of DNA identification information, which serves the public interest by contributing to crime investigation and to its prevention in the future, the legislative incompleteness as well as inadequacy of the Instant Provision render the right to trial nugatory and treat the person subject to collection of DNA samples as only a subject of crime investigation and prevention. In this regard, the balance of

interests is deemed not to have been reached.

Therefore, the Instant Provision violates the rule against excessive restriction and thus infringes on the Complainants' right to trial.

2. Decision of nonconformity to the Constitution and order for continued application

The Court finds it desirable to entrust the legislature to decide how to correct the legislative deficiencies of the Instant Provision–whether to merely establish a procedure by which the person subject to collection of DNA samples may express his/her opinion, or to establish a procedure for appeal against the issuance of a warrant as well, or to further establish a request procedure for constitutional review of the act of collecting DNA samples along with the above two procedures–and to determine the specific content and method of the said procedures. Notwithstanding the fact that the amendment of the Instant Provision can remove the aforesaid legislative deficiencies, declaring the Instant Provision unconstitutional and instantly void through the decision of unconstitutionality would create a serious legal vacuum, namely the absence of legal grounds for collection of DNA samples. Therefore, with respect to the Instant Provision, the Court issues a decision of nonconformity to the Constitution in lieu of a decision of unconstitutionality; and also orders that the Instant Provision continue to be applied until the legislature amends it.

Summary of Dissenting Opinion of Three Justices

Collecting DNA samples from convicted persons, including the Complainants, amounts to inflicting additional legal punishment on a person who has already been imposed of a criminal punishment. Such legal punishment may be administered directly through laws without the permission of the court as long as it does not violate the principle of proportionality. In order to examine whether legal punishment breaches

the principle of minimum restriction, various factors should be taken into account separately, such as the nature and extent of the benefit and protection of the law that have been undermined by legal punishment; the values of society and efficiency of State action that are likely to be promoted through legal punishment; the requirements and procedure for legal punishment; the cost of the procedure for legal punishment; the opportunity for appeal; the type of the crime and its relevance to that legal punishment; the type and severity of criminal punishment imposed on the convicted persons; and public sentiments.

The DNA Act sets out a couple of provisions for DNA sample collection methods and procedures, thus limiting physical freedom to a minimal degree; it also strictly regulates the disposal of DNA samples and the management of the information derived from such samples, thus reducing the risk of infringing on the right to informational self-determination to a minimal level as well.

We do not deem that the person subject to collection of DNA samples does not have the opportunity to express his/her opinion during the procedure for the issuance of a warrant to collect DNA samples, since the prosecutor must submit to the court an application for issuance of a warrant, which includes grounds for application as well as material establishing a prima facie case, and the court thereafter decides on the issuance of the warrant based on the application, examining whether the person subject to collection of DNA samples was convicted for a crime prescribed by law; whether, given the severity of criminal punishment imposed on the person subject to collection of DNA samples, the issuance of the warrant to collect DNA samples violates the principle of proportionality; and whether the person subject to collection of DNA samples consented to such collection.

The person subject to collection of DNA samples does not need to be provided with strict due process guarantees, as in the case of the procedure for the issuance of an arrest warrant, nor should he/she be necessarily given the procedural opportunity to seek a remedy after the issuance of the warrant to collect DNA samples, since DNA samples are

collected from convicted persons and such collection does not severely limit their fundamental rights. Moreover, the storage and management of DNA samples only partly restrict the fundamental rights of the person subject to collection of DNA samples.

In light of the foregoing considerations, the Instant Provision does not violate the rule against excessive restriction and thus does not infringe on the Complainants' right to trial.

28. Case on Technical Protection Measures in Copyright Act

[2017Hun-Ba369, November 29, 2018]

In this case, the Court held that Article 2 Item 28 et al. of the former Copyright Act, which define technical protection measures governed by the Copyright Act as "the technical measures taken by a holder of right or a person who has obtained the said holder's consent, in order to effectively prevent the acts infringing on copyrights and other rights protected under this Act," do not violate the principle of legal clarity.

Background of the Case

The Complainant was the head of ___ Inc. (liquidated as of August 3, 2010), a company established for the development, manufacture, and wholesale and retail business of digital video/image processing modules.

The Complainant invented a digital satellite broadcasting receiver and its applicable firmware that decode an encrypted control word used for satellite broadcasting services so that viewers can watch satellite broadcasting free of charge without having to subscribe to such services. The Complainant was thereby indicted for violating the Copyright Act by producing and reprocessing a technology which aims at incapacitating, including removing, altering or circumventing, the technical protection measures for the copyrights or neighboring rights protected under the Copyright Act, such as the right of reproduction, distribution, disclosure and performance, for profit-making purpose without any lawful rights. The Supreme Court thereafter imposed a fine on the Complainant.

According to Article 2 Item 28, Article 124 Section 2, and Article 136 Section 2 Item 5 of the former Copyright Act, a person who has produced technology which aims mainly at incapacitating the technical protection measures for the copyrights and other rights protected under this Act (the "copyrights and other rights"), such as removing, altering, circumventing, etc., for profit-making purpose without any lawful rights,

are subject to criminal punishment. While the Complainant's appeal was pending before the Supreme Court, the Complainant filed a motion to request constitutional review of the abovementioned provisions, claiming that they are in violation of the principle of legal clarity. The Complainant argued that it is unclear whether the meaning of "technical protection measures" includes measures to prevent accessing satellite broadcasting services by decoding of an encrypted control word used for the services, an act that does not directly infringe on the copyrights and other rights. Upon dismissal of such motion, the Complainant filed this constitutional complaint.

Subject Matters of Review

The subject matters of review in this case are whether the part "technical protection measures" in Article 2 Item 28 and Article 124 Section 2; and the part "technical protection measures" in Article 124 Section 2 referred to in Article 136 Section 2 Item 5 of the former Copyright Act (wholly amended by Act No. 8101 on December 28, 2006, but prior to amendment by Act No. 10807 on June 30, 2011) (the "Instant Provisions") violate the Constitution. The Instant Provisions read as follows:

Provisions at Issue

Copyright Act (wholly amended by Act No. 8101 on December 28, 2006, but prior to amendment by Act No. 10807 on June 30, 2011)

Article 2 (Definitions)

The definitions of the terms used in this Act shall be as follows:

28. The term "technical protection measures" means the technical measures taken by a holder of right or a person who has obtained the said holder's consent, in order to effectively prevent the acts infringing on copyrights and other rights protected under this Act.

Article 124 (Act Considered to be Infringement)

(2) Any acts, without any lawful rights, to furnish, produce, import, transfer, lease or transmit the technology, service, products, apparatus, or their major parts which aim mainly at incapacitating the technical protection measures for the copyright and other rights protected under this Act, such as removing, altering, circumventing, etc., shall be considered as the infringement on the copyright and other rights protected under this Act.

Article 136 (Crime of Infringement of Rights)

(2) Any person who falls under any of the following subparagraphs shall be punished by imprisonment for a term not more than three years or a fine not more than 30 million won, or may be punishable by both imprisonment and a fine.

5. A person who has performed an act deemed an infringement pursuant to the provisions of Article 124 (2) for business or for profit-making purpose.

Summary of the Decision

The Instant Provisions define technical protection measures as the technical measures taken by a holder of right or a person who has obtained the said holder's consent, in order to effectively prevent the acts infringing on "copyrights and other rights protected under this Act." Copyrights include the right of disclosure, attribution, integrity, reproduction, public performance, public transmission, exhibition, distribution, rental, and production of derivative works (Article 10 Section 1 of the former Copyright Act). The term "other rights protected under this Act" means publication right, neighboring right, and right of database producers prescribed in Chapters 2 through 4. The term "holder of right" means the holder of the aforesaid rights.

The question that needs to be examined in this case is whether the meaning of the phrase "the technical measures taken by a holder of right

or a person who has obtained the said holder's consent, in order to effectively prevent the acts infringing on" can be understood clearly. Holders of the copyrights and other rights adopted technical protection measures as a means to act against wide-ranging infringement activities on the copyrights and other rights arising from the advancement of digital technology. The former Computer Program Protection Act and the former Copyright Act were designed to punish incapacitation and/or preliminary action to incapacitate technical protection measures so as to ultimately protect the copyrights and other rights. Considering the legislative history, legislative intent, and the fact that the copyrights and other rights do not include the holders' right to control access to works, stage performances, phonograms, broadcasts or database ("works, etc."), the term "technical protection measures" prescribed in the Instant Provisions shall be construed not to include technical protection measures that simply control access to works, etc. and are irrelevant from preventing the acts of infringing on the copyrights and other rights. However, it may be construed to comprehensively include technical protection measures or measures equivalent in effect that prevent the very act of infringing on copyright and other rights.

As technical protection measures should "effectively" prevent the acts of infringing on the copyrights and other rights, the term "technical protection measures" prescribed in the Instant Provisions is interpreted to exclude measures that could be too easily or accidentally circumvented.

In view of the foregoing considerations, the Instant Provisions do not violate the principle of clarity under the *nulla poena sine lege*, since they provide the persons subject to the Instant Provisions with predictability and rule out arbitrary interpretation or enforcement thereof by the institutions responsible for legal interpretation and enforcement.

29. Case on the Three-Day Period Allowed for Immediate Complaint under the Criminal Procedure Act

[2015Hun-Ba77, 2015Hun-Ma832 (consolidated), December 27, 2018]

In this case, the Court held that Article 405 of the Criminal Procedure Act, which limits the period allowed for an immediate complaint to three days, infringes on the right to trial, and thus does not conform to the Constitution.

Background of the Case

The Complainant in Case No. 2015Hun-Ba77 was prosecuted for defamation for violating the Act on Promotion of Information and Communications Network Utilization and Information Protection and for other offences. While the aforementioned case was pending at the trial court, the Complainant filed a motion to challenge the presiding judge, and, on Friday, was served with a written copy of the ruling refusing such motion. On the following Tuesday, the Complainant filed an immediate complaint, which was subsequently rejected on the ground that the three-day time limit for filing an immediate complaint had expired. The Complainant thereafter further appealed to the Supreme Court. While the case was pending, the Complainant filed a motion to request constitutional review of Article 405 of the Criminal Procedure Act. When such motion was denied, the Complainant filed this constitutional complaint.

The Complainant in Case No. 2015Hun-Ma832 was the criminal Complainant in a case where a public prosecution was not instituted by the prosecutor. After the prosecutor's disposition, the Complainant filed an application for adjudication. On Friday, the Complainant was served with a written copy of the ruling refusing such application. The Complainant thereafter sought to file an immediate complaint with the Supreme Court. However, public institutions providing legal counseling

were closed on the weekend, and, on Monday, the Complainant was unable to seek legal advice due to personal reasons. The Complainant brought this constitutional complaint to the Court, claiming that it was impossible to observe the three-day time limit for the above reasons.

Subject Matter of Review

The subject matter of review in this case is whether Article 405 of the Criminal Procedure Act (enacted by Act No. 341 on September 23, 1954) (the "Instant Provision") violates the Constitution. The Instant Provision reads as follows:

Provision at Issue

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

Article 405 (Period Allowed for Immediate Complaint)

The period allowed for an immediate complaint shall be three days.

Summary of the Decision

Given that an immediate complaint is a procedure entailing a brief and speedy judgment, the Court acknowledges the necessity for a short time limit for such complaints. However, criminal proceedings, which are the subject of an immediate complaint, involve various matters that significantly affect the legal status of parties, such as a ruling on the dismissal of an application for formal trial and a ruling regarding an application for the recovery of the right of appeal. Therefore, a time limit that effectively guarantees the right to trial is required in order to protect the right of the person entitled to file a complaint.

The Instant Provision fails to reflect the following facts pertaining to present-day situations: as parties in criminal proceedings are not notified

in advance of the date of the ruling, they need sufficient time to prepare an immediate complaint; as criminal cases nowadays have become complicated, the parties involved require more time to decide whether to file an immediate complaint; and when the parties in criminal proceedings are served with a written copy of the ruling on Friday afternoon, it is not easy for them to seek legal assistance from public institutions or lawyers on the weekend due to the widespread 40-hour work week introduced by the amendment of the Labor Standards Act, and considering the principle of arrival, they have in effect only Monday during which an application for an immediate complaint by post should be sent and arrived. Accordingly, this leads to the unjust result of precluding the parties in criminal proceedings from exercising the right to file an immediate complaint if there is a moment of delay.

Even if not detained, there may be circumstances where the parties in criminal proceedings are not capable of submitting an application for an immediate complaint to the court. Further, special rules for persons in prison or a detention house under Article 344 of the Criminal Procedure Act apply *mutatis mutandis* only to specific provisions that are subject to such application; and Articles of the Criminal Procedure Act regarding the extension of a legal period and the demand for the recovery of the right of appeal alone do not adequately supplement the extremely short three-day time limit for filing an immediate complaint.

Further, the three-day time limit is considered particularly short compared with the one-week time limit for filing an immediate complaint under the laws concerning civil procedure, civil execution, administrative litigation, and criminal compensation procedure; or compared with the time limits for filing an immediate complaint in the United States, Germany, and France. The Court finds that a time limit that is less than half the period set out in the abovementioned laws does not properly reflect the unique features of criminal proceedings.

Therefore, the Instant Provision, which prescribes an extremely short time limit for filing an immediate complaint, reduces the immediate complaint system to an illusory and hypothetical right. The Instant

Provision thereby goes beyond the limits of legislative discretion, thus infringing on the right to trial.

The Court holds that the earlier decisions of constitutionality regarding the Instant Provision (2010Hun-Ma499, May 26, 2011, and 2011Hun-Ma789, October 25, 2012) should be overruled to the extent they conflict with the Court's decision in this case.

However, if the Instant Provision is declared unconstitutional and the time limit for filing an immediate complaint disappears accordingly, this is likely to create legal disorder; moreover, determination of an appropriate time limit should be made by the legislature through extensive discussion. Thus, the Court rules that the Instant Provision does not conform to the Constitution, but orders that the Instant Provision continue to be applied until the legislature amends it by December 31, 2019.

Dissenting Opinion of Two Justices

We find it difficult to see that the circumstances recognized by the majority opinion as providing grounds for overruling the earlier decisions, occurred after the rendering of such decisions. Nor do we see that such circumstances amount to sufficient grounds for overruling such. Therefore, the earlier decisions, which ruled that the Instant Provision did not infringe on the right to trial, should be upheld.

30. Case on Provisions on School Closure Order and School Corporation Dissolution Order

[2016Hun-Ba217, December 27, 2018]

In this case, the Court held that Article 62 Section 1 Items 1 and 2 of the former Higher Education Act, which provide that the Minister of Education, Science, and Technology may order a school to close down where it is impractical for that school to manage basic school affairs; and Article 47 Section 1 Item 2 of the former Private School Act, which provides that the Minister of Education, Science, and Technology may order a school corporation to dissolve itself if it is impossible for that school corporation to achieve its objectives, do not violate the principle of clarity and the rule against excessive restriction, and thus are not in violation of the Constitution.

Background of the Case

The Complainants were chief director and directors of the __ Educational Foundation, a school corporation that established and operated __ School. On August 1, 2011, the Minister of Education, Science, and Technology issued a correction order requiring the __ Educational Foundation to remedy its violations of the education-related statutes, including improper management of school affairs. The __ Educational Foundation, however, failed to substantially remedy such violations. Consequently, on December 16, 2011, the Minister of Education, Science, and Technology issued two orders directing the closure of __ School and the dissolution of the __ Educational Foundation. Thereafter, the Complainants filed a lawsuit to seek revocation of the aforementioned closure and dissolution orders, but their case was dismissed by the trial court and their appeals were also dismissed by the appellate court and the Supreme Court. While their case was pending before the Supreme Court, the Complainants filed a motion to request constitutional review of Article 62 Section 1 of the

former Higher Education Act and Article 47 of the former Private School Act, which provided grounds for the orders for school closure and for dissolution of the school corporation, respectively. When their motion was denied, the Complainants moved to file this constitutional complaint on June 2, 2016.

Subject Matters of Review

The subject matters of review in this case are whether Article 62 Section 1 Items 1 and 2 of the former Higher Education Act (amended by Act No. 10866 on July 21, 2011, and before amendment by Act No. 11690 on March 23, 2013) ("the Closure Order Provisions"); and Article 47 Section 1 Item 2 of the former Private School Act (amended by Act No. 8852 on February 29, 2008, and before amendment by Act No. 11690 on March 23, 2013) ("the Dissolution Order Provision") violate the Constitution. The aforesaid provisions at issue read as follows:

Provisions at Issue

The former Higher Education Act (amended by Act No. 10866 on July 21, 2011, and before amendment by Act No. 11690 on March 23, 2013)

Article 62 (Closing of Schools, etc.) (1) Where it is impractical for a school to manage basic school affairs as it falls under any of the following subparagraphs, the Minister of Education, Science and Technology may order the relevant school foundation to close it:

1. Where the head, founder, or operator of a school violates this Act or any order issued under this Act intentionally or by gross negligence;

2. Where the head, founder or operator of a school repeatedly violates this Act or any order issued by the Minister of Education, Science and Technology under other education-related statutes;

The former Private School Act (amended by February 29, 2008, by Act No. 8852 and before amendment by Act No. 11690 on March 23,

2013)

Article 47 (Order of Dissolution) (1) If the Minister of Education, Science and Technology deems that a school corporation falls under any of the following subparagraphs, he/she may order the relevant school corporation to dissolve itself:

2. If it is impossible for the school corporation to achieve its objectives.

Summary of the Decision

1. Whether the Provisions at Issue Violate the Principle of Clarity

(1) The Closure Order Provisions

Although the Closure Order Provisions do not specifically enumerate occasions where a school is subject to closure, the language of the Closure Order Provisions, including "the head, founder, or operator of a school," "where it is impractical for a school to manage basic school affairs," "order," or "repeatedly," can reasonably be construed in light of their relevant provisions.

Accordingly, the Court concludes that the Closure Order Provisions do not violate the principle of clarity.

(2) The Dissolution Order Provision

The Dissolution Order Provision reads: "If it is impossible for the school corporation to achieve its objectives," and this refers to the circumstances in which it is impossible for the relevant school corporation to continue to operate a private school. Whether the circumstances of the relevant school corporation fall within the scope of the Dissolution Order Provision should be determined by considering various factors, such as the objectives and financial status of that corporation; the operational status of the school and causes leading to the failure of its operation; and the possibility of remedying that failure. In this regard, the Court observes that the Dissolution Order Provision

has to be written in language that is somewhat broad in scope so as to encompass various circumstances. Although the Dissolution Order Provision employs the language, "if it is impossible for the school corporation to achieve its objectives," the specific content thereof can reasonably be read under normal rules of construction.

Accordingly, the Court concludes that the Dissolution Order Provision does not violate the principle of clarity.

2. Whether the Provisions at Issue Violate the Rule against Excessive Restriction

(1) The Closure Order Provisions

The ultimate purpose of the Closure Order Provisions is to ensure that private schools provide quality education to students. To fulfill that purpose, the Closure Order Provisions require private schools to comply with the Higher Education Act and other education-related statutes in managing school affairs, thereby ensuring minimum standards of educational quality in private schools.

The Court sees that a private school that has reached a point where it is absolutely incapable of managing basic school affairs has no reason to exist; and that the continued existence of such school would create more havoc in society than closing it. The Court also notes that the closure order can be issued under the Closure Order Provisions only if the violation committed by that school is serious enough to completely disrupt the management of basic school affairs and only after a hearing regarding the issuance thereof has been held.

Moreover, the Court finds that the public interest in protecting the citizens' right to education to be served by the closing of a private school under the Closure Order Provisions, is no less significant than the disadvantages to the school corporation and other relevant parties which may result from such closing.

Accordingly, the Court concludes that the Closure Order Provisions do not violate the rule against excessive restriction.

(2) The Dissolution Order Provision

The purpose of the Dissolution Order Provision is to maintain consistent quality in general education. To fulfill that purpose, the Dissolution Order Provision requires a school corporation to achieve its objectives of establishing and operating private schools, and prevents an incompetent school corporation from establishing a private school and managing it improperly.

The fact that a school corporation is absolutely incapable of achieving the aforementioned objectives is, by itself, a sufficient ground to support the conclusion that that corporation has no reason to exist. Such a conclusion is justified especially in light of the fact that the State provides considerable financial support and various other benefits, as well as guidance and supervision, to private schools which function as part of the public education system, in order to ensure that they fulfill their function and objectives. For these reasons, the Court finds that a school corporation that is absolutely incapable of achieving its objectives needs to be dissolved through due process, and that it is socially undesirable to allow that corporation to continue to exist. The Court also notes that the order of dissolution is the ultimate sanction which should be imposed only after the school corporation has not rectified its violations and has thereby failed to achieve and maintain its objectives despite being given the opportunity to do so; and that such an order cannot be issued unless a hearing regarding the issuance thereof has been held.

Moreover, the Court finds that the public interest in dissolving a school corporation to be served under the Dissolution Order Provision is no less significant than the disadvantages to that corporation which may result from such dissolution.

Accordingly, the Court concludes that the Dissolution Order Provision does not violate the rule against excessive restriction.

31. Case on Arrangement of Pseudo-Sexual Intercourse

[2017Hun-Ba519, December 27, 2018]

In this case, the Court held that a provision on punishing arranging pseudo-sexual intercourse, of the Act on the Punishment of Arrangement of Commercial Sex Acts, does not violate the rule of clarity under *nulla poena sine lege*.

Background of the Case

On June 16, 2017, the Complainant was convicted on the charge of violating the Act on the Punishment of Arrangement of Commercial Sex Acts (the "Instant Act") for arranging sexual trafficking as a profession, by, with an accomplice named "Lee OO," arranging pseudo-sexual intercourse between a large number of unspecified persons and female employees hired by the Complainant in exchange for receiving 40,000 to 60,000 won from such unspecified persons, respectively. The trial court sentenced the Complainant to imprisonment for ten months with labor, suspension of execution for two years, and a fine of six million won.

The Complainant and the prosecutor thereafter appealed the above judgment, but the intermediate appellate court dismissed the case. The Complainant subsequently appealed to the Supreme Court, and while the case was still pending, filed a motion to request the Supreme Court to refer the case to the Court for constitutional review of Article 19 Section 2 Item 1 and Article 2 Section 1 Item 1 of the Instant Act. When the Supreme Court denied both the appeal and motion, the Complainant moved to file this constitutional complaint on December 20, 2017.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning "engaging in arranging sexual trafficking, etc." of Article 2 Section 1 Item 1 Sub-item (b) of Article 19 Section 2 Item 1 of the

Instant Act (amended by Act No. 10697 on May 23, 2011) (the "Instant Provision") violates the Constitution. The Instant Provision reads 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 19 (Penalty Provisions)

(2) Any of the following persons shall be punished by imprisonment with labor for not more than seven years or by a fine not exceeding 70 million won:

1. A person who has engaged in arranging sexual trafficking, etc. as a profession;

Summary of the Decision

The Instant Act was enacted for the purpose of eradicating sexual trafficking and acts of arranging sexual trafficking and similar acts. The term "sexual trafficking" under the Instant Act is defined to include "pseudo-sexual intercourse," as well as "sexual intercourse" meaning penetration of the vagina by the penis. Based on this definition, pseudo-sexual intercourse receives the same treatment as sexual intercourse under the Instant Act.

Recognizing the nature of sexual trafficking that regards a person selling sex as a sexual product and takes away the person's control over his or her own body and mind, the Court finds that sexual trafficking is not merely confined to sexual intercourse, or pseudo-sexual intercourse involving insertion of any of his or her body parts or any implement into the mouth or anus of another person. The Court sees that the Instant Provision aims to regulate various forms of sexual trafficking that takes away from the person selling sex control over his or her own body and mind; and that such forms thereof cannot be limited to the sexual

trafficking involving insertion of any of his or her body parts or any implement into the mouth or anus of another person, because, in defining "pseudo-sexual intercourse," the Instant Provision employs the phrase "…intercourse using a part of the body, such as the mouth and anus, or implements" rather than the phrase "insertion of any of his or her body parts or any implement into the mouth or anus of another person."

In line with the above, the Supreme Court set forth the definition of the term "pseudo-sexual intercourse" and the criteria for determining whether any conduct falls within the scope of "pseudo-sexual intercourse" in its decision in Case No. 2005Do8130 issued on October 26, 2006. It held that "the term 'pseudo-sexual intercourse' of Article 2 Section 1 Item 1 Sub-item (b) of the Instant Act refers to 'insertion of any of his or her body parts or any implement into the mouth or anus of another person' or 'physical contact for the purpose of obtaining sexual gratification similar to that arising from sexual intercourse,' " and noted that "various factors must be considered in determining whether certain conduct falls within the scope of 'physical contact for the purpose of obtaining sexual gratification similar to that arising from sexual intercourse,' such as the place where that conduct was conducted, the attire of the persons, the body parts touched as well as the degree of touching, the specific nature of that conduct, and the level of sexual gratification arising from such conduct."

In light of the reality of sex business where the development and expansion of new forms of sex business have led to the creation of various types of commercial sexual conduct, it is impossible to either enumerate all the different types of pseudo-sexual intercourse in the Instant Act or to provide a more specific provision than the Instant Provision. Moreover, the Court sees that the definition and criteria established by the Supreme Court with respect to pseudo-sexual intercourse are sufficient to preclude arbitrary interpretation of law or enforcement thereof by law enforcement agencies.

In conclusion, considering the legislative purpose of the Instant Act;

31. Case on Arrangement of Pseudo-Sexual Intercourse

Article 2 Section 1 Item 1 of the Instant Act under which "pseudo-sexual intercourse" receives the same treatment as "sexual intercourse"; the definition and criteria established by the Supreme Court with respect to pseudo-sexual intercourse; and the reality of sex business, the meaning of the term "pseudo-sexual intercourse" in the Instant Provision can be construed as "insertion of any of his or her body parts or any implement into the mouth or anus of another person" or "physical contact for the purpose of obtaining sexual gratification similar to that arising from sexual intercourse." Accordingly, a person of common knowledge and common sense of justice would readily understand what conduct is specifically prohibited by the Instant Provision.

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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