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, 2019 to December 31, 2019 by the Constitutional Court of Korea.

This volume contains the full texts of the Court's decisions in three cases, including the *Case on the Crimes of Abortion*, and the summaries of the Court's decisions in 29 cases, including the *Case on Rejecting Visitation Request of Person Who Desires to Become Defense Counsel*. The contents of this volume are also available on the English website of the Court.

I hope that this volume will enhance understanding of the constitutional adjudication in Korea and become a useful resource for many foreign readers and researchers. Lastly, I would like to thank all those who made possible the publication of this work.

October 30, 2020

Park Jongmun
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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I. Full Opinions

1. Case on the Crimes of Abortion

[2017Hun-Ba127, April 11, 2019]

Case

Constitutional Complaint against Article 269 Section 1 of the Criminal Act, etc.
Case No. 2017Hun-Ba127

Petitioner

Jeong ___-Won
Legal representatives listed in Appendix

Original Case

Gwangju District Court, 2016GoDan3266
Violations of the Medical Act, etc.

Decided

April 11, 2019

Holding

Both Article 269 Section 1 and the part concerning "doctor" in Article 270 Section 1 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) are nonconforming to the Constitution. These provisions are to be applied until the legislature amends them by December 31, 2020.

Reasoning

I. Overview of the Case

The Petitioner is an obstetrician-gynecologist who obtained her medical license on March 31, 1994. The Petitioner was indicted for performing

69 abortions from November 1, 2013 to July 3, 2015, upon the request or with the consent of the pregnant women (abortion by the medical profession with the woman's consent) (Gwangju District Court 2016 GoDan3266). While her case was still pending before the trial court, the Petitioner filed a motion to request the trial court to refer the case to the Constitutional Court for constitutional review, advancing (1) a primary argument that Article 269 Section 1 and Article 270 Section 1 of the Criminal Act were unconstitutional and (2) a secondary argument that it would be unconstitutional to interpret the object of an abortion in these provisions as including that of a fetus within the first three months (Gwangju District Court 2016ChoGi1322). As such motion was rejected on January 25, 2017, the Petitioner filed this constitutional complaint against the above provisions on February 8, 2017 based on the same grounds.

II. Subject Matter of Review

The Petitioner's primary argument is that Article 269 Section 1 and Article 270 Section 1 of the Criminal Act are unconstitutional. As a secondary argument, the Petitioner asserts that it is unconstitutional to interpret the object of an abortion in these provisions as including that of a fetus within the first three months. However, since this secondary argument is merely a qualitative partial argument of the primary argument, it does not constitute a separate subject matter of review; but it will be addressed when the Court considers the constitutionality of above provisions (*see* 2015Hun-Ba176, May 26, 2016; 2016Hun-Ma47, September 29, 2016, etc.).

Meanwhile, although the Petitioner seeks to challenge the constitutionality of the whole text of Article 270 Section 1 of the Criminal Act, the Court will limit the scope of the review to the part concerning "doctor" therein, since this is the part that applies to the Petitioner.

Thus, the subject matter of review in this case is whether (1) Article

269 Section 1 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (hereinafter referred to as the "Self-Abortion Provision") and (2) the part concerning "doctor" in Article 270 Section 1 of this Act (hereinafter referred to as the "Abortion by Doctor Provision") violate the Constitution.

A. Provisions at Issue

Criminal Act (amended by Act No. 5057 on December 29, 1995)

Article 269 (Abortion)

(1) A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won.

Article 270 (Abortion by Doctor, etc., Abortion without Consent)

(1) A doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a woman upon her request or with her consent, shall be punished by imprisonment for not more than two years.

B. Related Provisions

Mother and Child Health Act (amended by Act No. 9333 on January 7, 2009)

Article 14 (Limited Permission for Induced Abortion Operations)

(1) A medical doctor may perform an induced abortion operation with the consent of the pregnant woman herself and her spouse (including persons in a *de facto* marital relationship; hereinafter the same shall apply) only in the following cases:

1. Where she or her spouse suffers from any eugenic or genetic mental disability or physical disease prescribed by Presidential Decree;
2. Where she or her spouse suffers from any contagious disease prescribed by Presidential Decree;
3. Where she is impregnated by rape or quasi-rape;

4. Where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry;
5. Where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons.

Article 28 (Exemption from Application of the Criminal Act)

No person who undergoes or performs an induced abortion operation under this Act shall be punished, notwithstanding Articles 269 (1) and (2) and 270 (1) of the Criminal Act.

Enforcement Decree of the Mother and Child Health Act (amended by Presidential Decree No. 21618 on July 7, 2009)

Article 15 (Limited Permission for Induced Abortion Operations)

(1) Only those who have been pregnant for not more than 24 weeks may undergo an induced abortion operation under Article 14 of the Act.

III. Petitioner's Arguments and the Trial Court's Reason for Rejecting the Petitioner's Motion to Request for Constitutional Review

A. Petitioner's Arguments

1. Self-Abortion Provision

The Self-Abortion Provision restricts (1) a woman's right to determine her own destiny by abridging the freedom to decide whether and when to become pregnant and give birth, (2) a pregnant woman's right to health by limiting her access to a safe abortion procedure at an early stage of pregnancy, (3) a pregnant woman's right to bodily integrity and right to protection of motherhood by forcing her to maintain the unwanted pregnancy and to give birth and thus impairing her biological and psychological health, and (4) a woman's right to equality by imposing the burdens of unwanted pregnancy and childbirth on her alone.

A fetus does not have the same level of existence as its mother and is not a being distinct from her, because it is completely dependent on her for its life and growth. Thus, the fetus is not entitled to right to life. Moreover, the Self-Abortion Provision is not an appropriate means of protecting the life of the fetus and the life and body of the pregnant woman, because the imposition of punishment for an abortion does not influence a decision to terminate pregnancy, and because abortion is rarely penalized under this Provision in practice. Additionally, with only a few exceptions referred to in the Mother and Child Act, the Self-Abortion Provision imposes indiscriminately uniform punishment on all abortions procured by pregnant women; as a result, it violates the rule against excessive restriction, as well as a pregnant woman's right to self-determination, right to health, right to bodily integrity, right to protection of motherhood, and right to equality.

2. Abortion by Doctor Provision

An abortion procured by a non-medical professional is more dangerous and greater in its illegality than one performed by a doctor. However, the Abortion by Doctor Provision stipulates only imprisonment for the doctor who procures an abortion, while the abortion with the woman's consent provision (Article 269 Section 2 of the Criminal Act) provides a fine or imprisonment. As a result, the Abortion by Doctor Provision violates the principle of equality and infringes the freedom of occupation of a doctor.

B. Trial Court's Reason for Rejecting the Petitioner's Motion to Request for Constitutional Review

The Constitutional Court has already held that Article 270 Section 1 of the Criminal Act does not violate the Constitution based on the conclusion that the Self-Abortion Provision is constitutional. Further, we see no change in circumstances sufficient to warrant reconsideration of the constitutionality of these provisions.

IV. Review

A. Crimes of Abortion: General

1. Meaning of "Abortion"

"Abortion" means the artificial expulsion of a fetus from the mother's body before the due date, or the killing of the fetus inside the mother's body. Such an act constitutes the crimes of abortion, and whether the fetus is dead or alive as a result of that act is not material to the establishment of the crimes of abortion (*see* Supreme Court Decision 2003Do2780, April 15, 2005). "Abortion" has a wider meaning than "induced abortion operation" referred to in the Mother and Child Health Act, because it includes the artificial expulsion of the fetus from the mother's body at the point of viability.

2. History of the Crimes of Abortion

(a) History of the Criminal Act

Article 269 Section 1 of the Criminal Act was enacted by Act No. 293 on September 18, 1953. It punished abortions procured by pregnant women by providing that "A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding ten thousand hwan." Section 2 of the same Article provided the same penalties as Section 1 thereof for a person who procured the miscarriage of a woman upon her request or with her consent, and Section 3 of the same Article imposed aggravated punishment on a person who in consequence of the commission of the crime as referred to in Section 2, caused the injury or death of a woman. Article 270 Section 1 of the same Act criminalized abortions performed by doctors or other medical professionals by stipulating that "A doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a woman upon her request or with her

consent, shall be punished by imprisonment for not more than two years." Section 2 of the same Article penalized a person who procured the miscarriage of a woman without her request or consent, and Section 3 of the same Article imposed aggravated punishment on a person who in consequence of the commission of the crimes as referred to in Section 1 or 2, caused the injury or death of a woman. All the above provisions did not provide exceptions under which an abortion is not criminalized.

On December 29, 1995, the Criminal Act was amended by Act No. 5057 to make minor revisions to Articles 269 and 270, including replacement of the phrase "a fine not exceeding ten thousand hwan" in Article 269 Section 1 with "a fine not exceeding two million won" and the term "accoucheuse" in Article 270 Section 1 with "midwife." However, that amendment did not alter the substantive content of Articles 269 and 270, and the content has remained unmodified to the present day.

(b) History of the Mother and Child Health Act

The Mother and Child Health Act was enacted by Act No. 2514 on February 8, 1973. It granted limited permission for induced abortion operations. Article 2 Item 4 of the above Act defined the term "induced abortion operation" as "an operation to artificially remove an embryo and any of its appendages from a mother's body at a time when the embryo is deemed unable to survive outside the mother's body," and Article 8 Section 1 of the same Act provided that "A doctor may conduct an induced abortion operation with the consent of the pregnant woman herself and her spouse (including a person having a de facto marital relation) only in cases (1) where she or her spouse suffers from any eugenic or genetic mental disability or physical disease prescribed by Presidential Decree; (2) where she or her spouse suffers from any contagious disease prescribed by Presidential Decree; (3) where she is impregnated by rape or quasi-rape; (4) where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; and (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical

reasons." Article 12 of the same Act prescribed that "No person who undergoes or performs an induced abortion operation under this Act shall be punished, notwithstanding Article 269 Sections 1 and 2 and Article 270 Section 1 of the Criminal Act." Article 3 Section 1 of the Enforcement Decree of the same Act prescribed that "Only those who are within 28 weeks from the date of conception may undergo an induced abortion operation under Article 8."

The Mother and Child Health Act was wholly amended by Act No. 3824 on May 10, 1986 by moving the above provision on limited permission for induced abortion operations in Article 8 Section 1 to Article 14 Section 1 and making only minor changes in its style and wording. And on January 7, 2009, Article 14 Section 1 of the same Act was amended by Act No. 9333 to make minor revisions, including replacement of the phrase "severely injures or is likely to injure the health of the pregnant woman" in Item 5 of the same Article with "severely injures or is likely to injure the health of the pregnant woman." The substantive content of the amended provision has remained unmodified to the present day.

The amendment to Article 15 of the Enforcement Decree of the Mother and Child Health Act by Presidential Decree No. 21618 on July 7, 2009, changed the legal time limit for induced abortion operations from 28 to 24 weeks. The amendment also slightly narrowed the scope of permissible induced abortion operations by deleting diseases considered as curable or lacking a medical basis for their existence from the list of eugenic or genetic mental disabilities, physical diseases, and infectious diseases.

3. Crimes of Abortion under Current Law

(a) While Chapter 27 "Crimes of Abortion" of the Criminal Act imposes a complete ban on abortions, the Mother and Child Act permits abortions in several cases where a person undergoes or performs an induced abortion operation for certain medical, eugenic, or moral indications by exempting those cases from the abortion ban under the

Criminal Act. In other words, our legal system regulating abortions operates as a dualized system: the Criminal Act, which sets forth the crimes of abortion, and the Mother and Child Health Act, which enumerates several justifications by which abortions are legally permitted.

(b) The crime of self-abortion (Article 269 Section 1 of the Criminal Act) penalizes the procurement of an abortion by a pregnant woman herself. The commission of this crime constitutes the basic element of abortion offenses, and the crime of abortion with the consent of a pregnant woman (Article 269 Section 2 of the Criminal Act) is established when a person procures the miscarriage of the pregnant woman upon her request or with her consent. The crime of abortion by a health professional with the consent of a pregnant woman (Article 270 Section 1 of the Criminal Act) is established when a doctor, herb doctor, midwife, pharmacist, or druggist procures the miscarriage of the pregnant woman upon her request or with her consent, and the commission of this offense is an aggravating element of the crime of abortion with the consent of a pregnant woman because these abortion providers bear increased culpability based on their professions. The crime of abortion by a health professional with the consent of a pregnant woman and the crime of self-abortion are classified as "two-way criminality," a theoretical concept involving two or more perpetrators who approach the same goal—the commission of an abortion—by fulfilling constituent elements of the crime from different directions (*see* 2010Hun-Ba402, August 23, 2012). The commission of the crime of abortion without the consent of a pregnant woman (Article 270 Section 2 of the Criminal Act) aggravates the unlawfulness of the crime of self-abortion, and the crime of abortion causing injury or death of a pregnant woman (Article 269 Section 3 and Article 270 Section 3 of the Criminal Act) severely penalizes the consequently aggravated crime of abortion with the consent of a pregnant woman, the crime of abortion by a health professional with the consent of a pregnant woman, and the crime of abortion without the consent of a pregnant woman.

As this shows, the Self-Abortion Provision provides punishment for an

abortion procured by a pregnant woman who desires it, and other forms of abortion, including one performed without the consent of a pregnant woman, are punishable under provisions other than the Self-Abortion Provision. Therefore, hereinafter, the term "abortion" used in relation to the Self-Abortion Provision will mean an abortion procured by a pregnant woman who desires it.

(c) Article 14 Section 1 of the Mother and Child Health Act allows exceptions to the ban on abortions only under the following five cases: A doctor may conduct an induced abortion operation with the consent of the pregnant woman herself and her spouse only (1) where the pregnant woman and her spouse suffers from any eugenic or genetic mental disability or physical disease; (2) where she and her spouse suffers from any contagious disease; (3) where she is impregnated by rape or quasi-rape; (4) where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; and (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons. Only those who have been pregnant for not more than 24 weeks may undergo an induced abortion operation in these cases (Article 15 Section 1 of the Enforcement Decree of the Mother and Child Health Act), and they shall not be punished notwithstanding Article 269 Sections 1 and 2 and Article 270 Section 1 of the Criminal Act (Article 28 of the Mother and Child Health Act).

B. Precedent

On August 23, 2012, the Court, by a vote of four constitutional and four unconstitutional, declared the Self-Abortion Provision and the part of Article 270 Section 1 of the Criminal Act relating to "midwife"—one that provides punishment of imprisonment for not more than two years for a midwife who procures the miscarriage of a woman upon her request or with her consent—constitutional, because it determined that (1) the former did not infringe the right to self-determination of a pregnant

woman; and (2) the latter did not violate the principle of proportionality between criminal culpability and punishment, or the principle of equality (2010Hun-Ba402, on August 23, 2012).

Four Justices dissented from that decision on the grounds that (1) the Self-Abortion Provision was unconstitutional because it infringed the right to self-determination of a pregnant woman by imposing a complete and uniform ban on abortions, even those procured in the early stages of pregnancy; and that (2) the part of Article 270 Section 1 of the Criminal Act relating to "midwife" was unconstitutional for the same reason that the Self-Abortion Provision was unconstitutional. One Justice wrote a separate concurring opinion to the dissenting opinion by noting an additional view that abortions should be legal in the early stages of pregnancy and this legalization must be accompanied by legislation (1) requiring a pregnant woman to make an abortion decision after careful consideration and (2) ensuring the pregnant woman's access to a medically safe abortion procedure.

C. Constitutional Nonconformity Opinion of Justice Yoo Namseok, Justice Seo Ki-Seog, Justice Lee Seon-ae, and Justice Lee Youngjin

1. Opinion on the Self-Abortion Provision

(a) Fundamental rights restricted

The first sentence of Article 10 of the Constitution provides that "All citizens shall be assured of human worth and dignity and have the right to pursuit of happiness." The general right to personality is derived from human dignity protected by this provision (*see* 89Hun-Ma160, April 1, 1991; 2002Hun-Ka14, June 26, 2003). The general right to personality provides extensive protection to the basic conditions for free development of personality which is closely related to human dignity, and the right of an individual to self-determination is derived from such general right to personality (*see* 2009Hun-Ba17, etc., February 26, 2015; 2010Hun-Ba402, August 23, 2012; 2012Hun-Ma940, November 26, 2015). All citizens are

entitled to the right to freely create their own private sphere of life based on their dignified right to personality (*see* 95Hun-Ka14, etc., March 27, 1997).

The right to self-determination is a means of realizing human dignity and is the right of humans to freely make fundamental decisions regarding the development of their personality and their mode of life within their own private sphere of life. The concept of human dignity, which serves as both the basis and purpose of the right to self-determination, imposes a duty on the State to respect and protect human dignity. Human beings must never be treated as a means to enhance some values, attain other purposes, or promote legal interests but must be respected as ultimate ends and values of themselves.

It is evident that this right to self-determination and the "relationship between human beings and the State" should be applied equally to men and women. This is particularly evident given the fact that women, unlike men, can become pregnant and give birth to a child and their decisions regarding pregnancy and childbirth have a profound impact on their lives.

Therefore, the right to self-determination includes the right of a woman to freely create her own private sphere of life based on her own dignified right to personality, and the right of a pregnant woman to determine whether to continue her pregnancy and give birth is included in such right as well (*see* 2010Hun-Ba402, August 23, 2012).

With a few exceptions set forth in the Mother and Child Health Act, the Self-Abortion Provision imposes a complete and uniform ban on all abortions throughout pregnancy, regardless of the developmental stage or viability of the fetus, and provides criminal punishment for violations of this ban. In other words, it compels a pregnant woman to continue her pregnancy and give birth by relying on the criminal sanctions and their deterrent effect. Therefore, it restricts the pregnant woman's right to self-determination.

(b) Whether a pregnant woman's right to self-determination is infringed

The debate over the legalization of abortion closely concerns ultimate

issues relating to developing or unborn human life. Thus, this debate contains extensive discussions of ethical, religious, scientific, medical, sociological, and other diverse aspects of abortion. Such extensive discussions are affected by various factors, including one's sense of values, one's experiences, one's attitude toward human life, one's ethical standards, and historical and social realities. One's opinion and conclusion regarding the abortion must be respected in themselves, as one's own belief, and whether they are right or wrong cannot be decided easily. In this case, the Court will decide only "whether the Self-Abortion Provision violates the Constitution by infringing a pregnant woman's right to self-determination," in accordance with its role conferred by the Constitution.

1) Premises of review

a) A fetus's right to life and the State's obligation to protect human life

Human life is invaluable; it is the source of dignified human existence, which cannot be replaced by anything else in this world. Although the right to life is not expressly stipulated in the text of the Constitution, it is a natural right that transcends times and places, rooted in the human instinct to survive and the purpose of human existence. It is unquestionably clear that the right to life is the most fundamental right and the foundation of all rights provided under the Constitution (*see* 92Hun-Ba1, November 28, 1996).

Every human being has the constitutional right to life. A fetus, in the stage of development to become a human, must have this right as well. Although the fetus has to rely upon the mother to maintain its life, it is a living being that has an existence separate from the mother and is likely to become a human being unless special circumstances exist. Therefore, the fetus is entitled to the right to life, and the State is obligated to protect the life of the fetus in accordance with the second sentence of Article 10 of the Constitution (*see* 2004Hun-Ba81, July 31, 2008; 2004Hun-Ma1010, etc., July 31, 2008; 2005Hun-Ma346, May 27, 2010; 2010Hun-Ba402, August 23, 2012).

b) Related legislation of other countries

Most European civil law countries have decriminalized abortions under certain conditions and regulate abortions through a combination of two models: the "periodic model" and "indications model." The periodic model usually exempts from criminal punishment abortions within 14 weeks from the first date of the last menstrual period when they are performed under certain conditions. In the United Kingdom, abortions within the 24 weeks from the first date of the last menstrual period are excluded from criminal punishment under certain conditions. In the United States, each state has different laws and regulations regarding abortion, including those that provide no criminal penalties for abortions performed before fetal viability and under certain circumstances in accordance with the holding in *Roe v. Wade*.

According to the United Nations, as of 2013, the proportion of countries in the "more developed regions," which comprised all regions of Europe plus Northern America, Australia, New Zealand, and Japan, that allow abortion on legal grounds was as follows: to save a pregnant woman's life (96%); to protect a pregnant woman's physical health (88%); to preserve a pregnant woman's mental health (86%); in case of rape or incest (86%); because of fetal impairment (86%); for economic or social reasons (82%); and upon pregnant woman's request (71%). In 2013, compared with 1996, the proportion of these countries that permitted abortion increased in all these categories except the category "to protect a pregnant woman's physical health," which remained the same. Between these periods, the proportion of countries in the "less developed regions" that allow abortion rose in all these categories as well, except the category "to save a pregnant woman's life," which declined slightly.

2) Standard of review

This case concerns whether the Self-Abortion Provision, a definitive provision enacted by the State for the protection of the life of a fetus, violates the rule against excessive restriction by abridging a pregnant

woman's right to self-determination. In this case, we will not address a direct conflict between a pregnant woman's right to self-determination and a fetus's right to life, based on disregard of the existence and role of the Self-Abortion Provision.

The Court will below examine whether the Self-Abortion Provision—which, with a few exceptions set forth in the Mother and Child Health Act, imposes a complete and uniform ban on all abortions throughout pregnancy regardless of the developmental stage or viability of a fetus, and thus limits a pregnant woman's right to self-determination—satisfies the tests of legitimacy of legislative purposes; appropriateness of the means to achieve those legislative purposes; least restrictive means; and balance of interests between a public interest to be served by the means and the harm it causes to a private interest.

3) Legitimacy of legislative purposes and appropriateness of means

The Self-Abortion Provision serves the legitimate purpose of protecting the life of a fetus. Further, imposing criminal punishment for an abortion procured by a pregnant woman is an appropriate means to deter abortion and thus to accomplish this legislative purpose.

4) Least restrictive means and balance of interests

a) Complete and uniform ban on all abortions throughout pregnancy

Life is the source of dignified human existence, which cannot be replaced by anything else in this world. Thus, there are important public interests in protecting the life of a fetus that is developing into a human. The State has chosen the Self-Abortion Provision as a means for preserving the life of a fetus.

The Self-Abortion Provision, with certain exceptions set forth in the Mother and Child Health Act, imposes a complete and uniform ban on all abortions throughout pregnancy regardless of the developmental stage or viability of the fetus. In doing so, it compels a pregnant woman to continue her pregnancy and give birth, and criminally punishes those

who violate the ban. In other words, by relying on criminal sanctions and their deterrent effect, the State forces the pregnant woman to bear the physical and emotional burdens of her pregnancy, face a physical or life-threatening risk inherent in childbirth, and establish a mother-child relationship with the child as a result of giving birth to him or her.

b) Nature of a pregnant woman's decision of terminating pregnancy based on her right to self-determination

A woman undergoes dramatic physical and emotional changes during about ten months of pregnancy. In the process of giving birth, she suffers a great deal of pain and, in extreme cases, even faces a risk of death. She must endure such physical burdens, as well as anxieties, pains of childbirth, and a risk of death as long as she remains pregnant. Under our legal system, a mother-child relationship is established by childbirth, which is an objective and positive fact (*see* 98Hun-Ba9, May 31, 2001). By giving birth, she establishes the legal relationship of mother and child. Accordingly she takes the parental responsibilities as a biological mother.

Parenting requires almost 20 years of continuous physical, psychological, and emotional efforts of a mother. In addition, it may impose on her a considerable financial burden, as well as difficulties in maintaining a professional or public life and in continuing with education, depending on her various and wide-ranging socioeconomic circumstances. Such burdens of parenting are further compounded by social problems such as a custom of gender discrimination, a patriarchal culture, and adverse child-rearing conditions. In our society, women still suffer substantial socioeconomic disadvantage by virtue of becoming pregnant or giving birth; they also shoulder more of the parental burden than men in many cases. As a result, they frequently encounter considerable difficulties in reconciling work and family life. When faced with those difficulties, some women quit their jobs and thus are excluded from socioeconomic life. According to the Statistics Korea, as of 2018, the percentage of married women in employment who experienced a career interruption due to marriage, pregnancy and childbirth, childrearing, child education,

or family care by age was as follows: 15-29 (2.9%), 30-39 (26.5%), 40-49 (46.7%), and 50-54 (23.9%).

In light of the above, we note that pregnancy, childbirth, and parenting are among the most important matters that may fundamentally and decisively affect the life of a woman. Thus, a pregnant woman's decision of whether to continue her pregnancy and give birth, one concerning the right to freely create one's private sphere of life, has its roots in her human dignity and autonomy. Further, we note that pregnant women experience physical, psychological, social, and economic consequences resulting from this decision—consequences that are complicated and varied by the women's physical, psychological, social, and economic circumstances. For these reasons, we conclude that a pregnant woman's decision whether to continue or terminate a pregnancy amounts to a decision reflecting profound consideration of all her physical, psychological, social, and economic circumstances, based on her own chosen view on life and society—a holistic decision central to her personal dignity.

c) Appropriate means or level of legal protection for life when considering the developmental stages of life and the exercise of the right to self-determination

The State has the duty to protect fetal life; however, that duty does not require the State to always afford uniform legal protection to a fetus at every stage of development. Under our legal order, it is not impossible for the State to divide the fetus's continuous process of development into certain stages and give different legal protection to the fetus depending on its developmental stage. For instance, under the Criminal Act, a fetus, during most of its development, is the object of an abortion crime but is considered a human being and turns into the object of a murder crime after the onset of labor. This example demonstrates that this Act provides a different level of punishment for violation of life depending on the developmental stage of the fetus. Further, because human life after implantation in the uterus of a woman is regarded as the object of an

abortion crime under this Act, human life before that point, or within around seven days of fertilization, is not given any protection under this Act. As these examples illustrate, our legal order does not always afford uniform legal protection to the fetus at every stage of development. Therefore, the State's legislation for the protection of fetal life with respect to its level or means may be different depending on the developmental stage of the fetus (*see* 2004Hun-Ba81, July 31, 2008; dissenting opinion in 2010Hun-Ba402, August 23, 2012).

The fetus becomes viable, or can survive independently outside the mother's body, after a certain period of time. Although that period varies according to the level of advancement of medical technology, the World Health Organization (WHO) considers it to be 22 weeks of gestation (here and hereinafter a period of gestation, such as "22 weeks of gestation," is measured from the first day of a woman's last menstrual period). Likewise, academic field of obstetrics and gynecology considers that the fetus becomes viable at around 22 weeks of gestation when provided with the best medical technology and staff available at present. We believe that a viable fetus after around 22 weeks is considerably more human than a non-viable one before this period.

Moreover, in light of the importance and nature of a pregnant woman's right to self-determination, we find that the State must guarantee this right by allowing the pregnant woman sufficient time to make and carry out a holistic decision whether to continue her pregnancy and give birth. Specifically, the pregnant woman must be given sufficient time to discover her pregnancy; to examine the socioeconomic circumstances surrounding her and see whether they are subject to change; to gather information concerning national policies supporting pregnancy, childbirth, and parenting; to receive counseling and advice from people near her; and to give careful consideration to her decision, and if she decides to abort her pregnancy, she must also be allowed enough time to find a clinic or hospital providing abortion services, to undergo a pregnancy test, and to actually obtain an abortion.

Given these considerations, we conclude that, during a sufficient amount

of time before the point of viability at around 22 weeks of gestation, during which the right to self-determination regarding whether to continue a pregnancy and give birth can be properly exercised (from the time of implantation to the end of this period will be hereinafter referred to as the "Determination Period"), the State's protection for fetal life may be different with respect to its level or means.

d) Appropriate protection for life when considering a special relationship between a pregnant woman and her fetus

If the State imposes a complete ban on abortions, a fetus retains its right to life, while a pregnant woman is completely deprived of her right to self-determination. Conversely, if the State fully legalizes abortions, the pregnant woman retains her right to self-determination, while the fetus is completely deprived of its right to life. Therefore, it could be inferred that these rights are, in this respect, in an adversarial relationship, which is being formed by the State's legislation.

However, this adversarial relationship is not simple because there is a special relationship between the pregnant woman and her fetus. Although the fetus is clearly a living being that has an existence separate from its mother, it is, at the same time, closely intertwined with its mother's body. It shares a special bond with her and is completely dependent on her for life and growth. The relationship between the pregnant woman and her fetus is very peculiar in that it is both independent and interdependent. The pregnant woman carries the burden of parenting her child after birth unless special circumstances such as adoption exist. Absent special and exceptional circumstances, the safety of the pregnant woman corresponds to the safety of her fetus, and their interests do not pull in different directions but they coincide.

The nature of this relationship often manifests itself even in the dilemma of abortion as well. In certain cases, pregnant women facing the abortion dilemma decide to abort and execute their decisions based on the conclusion that they cannot bear the burdens of pregnancy, childbirth, and parenting, considering their socioeconomic circumstances, and that

their child, as well as they themselves, will become miserable after birth. The fact that pregnant women make decisions of abortion based on such conclusions implies that viewing the maternal-fetal relationship as a "perpetrator-victim" relationship will rarely provide an ideal solution for protecting fetal life, regardless of whether such conclusions are right or wrong. This calls on the State to optimize two fundamental rights in accord with the principle of practical concordance, rather than abstractly comparing the two and abandoning one for the sake of the other.

The State imposes a complete and uniform ban on abortions and uses criminal sanctions and their deterrent effect to enforce the ban, while failing to make active efforts to remedy the social and institutional frameworks for protecting the life of the fetus.

Given that the safety of the pregnant woman bears a close relationship to the safety of the fetus and that the pregnant woman's cooperation is necessary for the protection of the life of the fetus, we find that this protection gains true significance when it includes the physical and social protection of the pregnant woman. This protection can be effectively served by proactive and retroactive measures aimed at, e.g., creating a social and institutional environment preventing unwanted pregnancies and reducing abortions (*see* dissenting opinion in 2010Hun-Ba402, August 23, 2012). In addition, the life of the fetus can be truly safeguarded if, during the Determination Period, the pregnant woman is able to make a carefully considered decision regarding whether to continue her pregnancy after consultation with professionals providing emotional support and adequate information about abortion; and if the State actively makes the effort to address the socioeconomic conditions that pose obstacles to pregnancy, childbirth, and parenting.

e) Effectiveness of the Self-Abortion Provision

Whether the Self-Abortion Provision serves the purpose of protecting the life of a fetus by adequately and effectively reducing the number of abortions will be examined below.

From a historical perspective, women have procured their own abortions

throughout numerous time periods and societies representing various ethical views. They have thereby terminated unwanted pregnancies, despite the threat of criminal punishment and even despite the risks to their health or lives. In cases where pregnant women seriously pondered on whether to have an abortion then decided to have one, we have to admit that the criminal sanction and its deterrent effect is limited in forcing the pregnant women to continue their pregnancies and give birth. We believe that this is because their decisions to terminate their pregnancies have been made after a careful evaluation of various factors, including the ethical problem of depriving a fetus of life, their own socioeconomic circumstances and their own physical, psychological, and ethical burdens of parenting, as well as the future life of the child to be born.

In 2011, the Korean Institute of Criminology conducted a survey among 1,000 South Korean women aged 16 or more. That survey elicited information from those who had considered having an abortion on (1) the factors that had negatively affected their consideration of abortion; and (2) the reasons that had actually led some of them to give birth. In relation to (1), "moral burden" and "physical burden" were the most cited factors; however, those factors played a minor role in actually deterring the respondents from having an abortion. In relation to (2), the most common reasons were practical reasons such as "change of mind to have and raise a baby after reconsideration," "male partner's desire to have the baby," and "fears about the effect of an abortion on subsequent pregnancies." It turned out that the illegality of abortion was not a significant factor in the consideration of abortion or in the decision to give birth.

The effectiveness of the Self-Abortion Provision is questionable considering the reality of prosecution for the crime of self-abortion as well. According to the 2011 National Survey on Trends in Incidence Rates of Induced Abortion Operations, conducted by Yonsei University and commissioned by the Ministry of Health and Welfare, with a representative sample size of 4,000 women of reproductive age (aged 15-44), it is estimated that around 170,000 abortions took place in Korea in 2010.

Meanwhile, the Supreme Prosecutors' Office reports that from 2006 to 2013, no more than 10 women were prosecuted annually for having an abortion. In light of these realities, it is no exaggeration to say that the Self-Abortion Provision is virtually a dead letter.

Although studies show that the estimated number or rate of abortions has steadily declined for years in our society, we cannot find evidence that this trend is attributable to the Self-Abortion Provision. Instead, we find that this trend is the result of a combination of various other factors, including the increased use of contraceptives, decline of son preference, and improvement of economic conditions.

In sum, considering that criminal sanctions have only a limited deterrent effect on the abortion decision of a pregnant woman facing the dilemma of abortion and that those who obtain an abortion are in reality rarely prosecuted, we conclude that the Self-Abortion Provision does not effectively protect the life of a fetus in situations in which pregnant women are caught in the dilemma of abortion.

f) Limitations and problems of criminal sanctions and their deterrent effect

As long as the Self-Abortion Provision exists to impose a complete and uniform ban on all abortions with certain exceptions set forth in the Mother and Child Health Act, the State can at any time expand a crackdown on abortions to investigate and punish them. Indeed, several years ago, the Ministry of Health and Welfare established a policy to receive reports on "clinics performing or advertising illegally induced abortion operations." However, before that time, the State turned a blind eye to abortions when it implemented a national population control policy. These examples show that the Self-Abortion Provision has been inconsistently enforced based on the State's population policy.

Moreover, the deterrent effect of criminal sanctions poses some problems. For one thing, pregnant women who face the dilemma of abortion are unlikely to have any necessary discussion or communication with society concerning a decision on whether to terminate a pregnancy. For another,

these pregnant women tend to be in need of emotional support as well as ample information, and tend to undergo an unsafe abortion. Since all abortions are completely and uniformly banned and criminalized with certain exceptions set forth in the Mother and Child Act, these pregnant women often cannot receive timely counseling or education regarding abortions, nor sufficient information about abortions. Further, they may have no choice but to seek out a clandestine abortion, thus paying a very high price for an illegal operation or even travelling abroad for an abortion. Legal remedies are often not available in cases of medical malpractice during an abortion or where the abortion causes complications, and proper medical services, counseling, or care are also not readily available before and after the abortion. Those who want to have an illegal abortion but are unable to afford one, namely underage or impecunious females, would probably not have one within the proper time. Where they fail to secure an abortion and end up giving birth, some of them even commit infanticide or abandon a baby.

The Self-Abortion Provision can be abused unrelated to its original purpose of protecting the life of a fetus when a woman's ex-male partner uses it as a means to retaliate against or harass the woman, or to put pressure on her to settle a family dispute or other civil disputes; for instance, a man might threaten his ex-female partner to sue her for the crime of self-abortion under the Self-Abortion Provision if she refuses to see him after having an abortion at a hospital; or a man may bring his ex-female partner to court for abortion in order to defend against a property settlement or a claim for alimony.

g) Seriousness of the abortion dilemma arising from socioeconomic circumstances

The Mother and Child Health Act set forth the circumstances under which self-abortion is justified as follows: (1) where the pregnant woman or her spouse suffers from any eugenic or genetic mental disability or physical disease; (2) where she or her spouse suffers from any contagious disease; (3) where she is impregnated by rape or quasi-rape; (4) where

pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons.

Some view that these circumstances are so limited and narrow that, under these circumstances, one may even raise the justification defense of necessity under Article 22 of the Criminal Act, the justification defense of justifiable act under Article 20 thereof, or an excuse defense based on the fact that there is no possibility of continuing a pregnancy and giving birth. We find that these circumstances do not include "various and wide-ranging socioeconomic circumstances that interfere with continuance of pregnancy and childbirth and thus create the abortion dilemma." Therefore, we conclude that the Mother and Child Health Act does not properly guarantee a pregnant woman's right to self-determination.

The Self-Abortion Provision compels, under threat of criminal sanctions, a pregnant woman to continue her pregnancy and give birth even if she faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, such as where pregnancy and child-rearing are likely to interfere with her education, career, or public activities; where she has inadequate or unstable income; where she lacks resources to care for another child; where she or her spouse cannot stay home to care for the child and both of them have to work, out of necessity; where she has no desire to continue a dating relationship or enter into a marital relationship with the fetus's biological father; where the fetus's biological father or the pregnant woman's male partner does not want her to give birth and insists on an abortion, or overtly refuses to assume the parental responsibilities; where she is pregnant by a man who is married to another woman; where she has discovered her pregnancy at a point when the marriage has in effect been broken irretrievably; where she breaks up with the fetus's biological father; or where she is an unwed minor with an unwanted pregnancy.

Because the Self-Abortion Provision does not recognize such various and wide-ranging socioeconomic circumstances as exceptions to imposing

criminal sanctions, a pregnant woman is compelled to endure not only the physical and psychological burdens of continuing pregnancy, as well as the physical pain and risks of childbirth, but also the hardships that such socioeconomic circumstances create, such as financial burdens of pregnancy and childcare, difficulties in maintaining a professional and public life, disruption to education, and interruption of a career.

h) Sub-conclusion

Considering the above factors, namely the nature of a pregnant woman's pregnancy termination decision based on her right to self-determination; appropriate means or level of legal protection for life when considering the developmental stages of life and the exercise of the right to self-determination; appropriate protection for life when considering a special relationship between a pregnant woman and her fetus; effectiveness of the Self-Abortion Provision; limitations and problems of criminal sanctions and their deterrent effect; seriousness of the abortion dilemma arising from socioeconomic circumstances, we conclude that the Self-Abortion Provision restricts a pregnant woman's right to self-determination to an extent going beyond the minimum necessary to achieve its legislative purpose by, with certain exceptions set forth in the Mother and Child Health Act, completely and uniformly compelling pregnant women who, during the Determination Period, face the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, to continue the pregnancies and give birth and criminally punishing those undergoing abortions. Thus, the Self-Abortion Provision does not use the least restrictive means to achieve its legislative purpose.

Indeed, as stated above, the Self-Abortion aims to serve a significant public interest in protecting the life of a fetus. Nevertheless, it cannot be said that prohibiting pregnant women from undergoing abortions even if they face, during the Determination Period, the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, and criminally punishing abortion effectively or adequately serve the public interest in protecting the life of a fetus. On the other hand, as noted earlier, criminally

penalizing pregnant women in accordance with the Self-Abortion Provision substantially restricts their right to self-determination.

Therefore, we conclude that the legislature, in enacting the Self-Abortion Provision, failed to harmonize and balance the public interest in protecting a fetus's life and the private interest in safeguarding a pregnant woman's right to self-determination and gave unilateral and absolute priority to the public interest in protecting fetal life. Accordingly, it failed to strike a proper balance between the public and private interests.

5) Conclusion

The Self-Abortion Provision restricts a pregnant woman's right to self-determination to an extent going beyond the minimum necessary to achieve its legislative purpose. Thus, it satisfies neither the least restrictive means test nor the balance of interests test. Accordingly, it violates the rule against excessive restriction and a pregnant woman's right to self-determination.

(c) Opinion on other claims

The Petitioner also claims that the Self-Abortion Provision violates a woman's right to health, right to equality, right to bodily integrity, and right to protection of motherhood. However, since we hold that the Self-Abortion Provision infringes a pregnant woman's right to self-determination, we will not further review these claims.

2. Opinion on the Abortion by Doctor Provision

As noted above, the crime of abortion by a health professional with the consent of a pregnant woman and the crime of self-abortion are classified as two-way criminality. Thus, if it is unconstitutional to punish a pregnant woman who procures her own abortion, then surely it is unconstitutional to criminally punish a doctor who performs an abortion at the request or with the consent of a pregnant woman.

The Self-Abortion Provision violates the Constitution by, with certain

exceptions set forth in the Mother and Child Health Act, compelling a pregnant woman to continue her pregnancy and give birth even if she faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances and by criminally punishing abortions procured in violation of the ban on abortion. By the same token, the Abortion by Doctor Provision, which penalizes a doctor who performs an abortion at the request or with the consent of a pregnant woman to achieve the same goal as hers, violates the Constitution.

3. Reasons for Decisions of Nonconformity to the Constitution and Orders for Temporary Application

As stated earlier, the Self-Abortion Provision and the Abortion by Doctor Provision are unconstitutional in that they unduly infringe a pregnant woman's right to self-determination by, with certain exceptions set forth in the Mother and Child Health Act, completely and uniformly compelling every pregnant woman to continue her pregnancy and give birth even if she faces, during the Determination Period, the abortion dilemma arising from various and wide-ranging socioeconomic circumstances and by criminally punishing abortions procured in violation of the ban on abortion. The prohibition and criminal punishment of abortion to protect fetal life are not unconstitutional in themselves or in all cases.

If we were to render decisions of simple unconstitutionality on these Provisions, we would be creating an unacceptable legal vacuum in which there is no punishment available for all abortions throughout pregnancy. Moreover, it is within the discretion of the legislature to remove the unconstitutional elements from these Provisions and decide how abortion is to be regulated: the legislature has, within the limits that we have discussed earlier, the prerogative (1) to decide the length and end date of the Determination Period; (2) to determine how to combine time limitations with socioeconomic grounds, including deciding whether to set a specific time point during the Determination Period until which abortion on socioeconomic grounds is permitted without an assessment

of those grounds, in optimally balancing the State's interest in protecting a fetus's life and a pregnant woman's right to self-determination; and (3) to decide whether to require certain procedures, such as the mandatory counseling or reflection period, before abortion.

For these reasons, we render, on the Self-Abortion Provision and the Abortion by Doctor Provision, decisions of nonconformity to the Constitution in lieu of decisions of simple unconstitutionality. We also order that these Provisions continue to be applied until the legislature amends them. The legislature shall amend these Provisions as early as possible, by December 31, 2020, at the latest, and if no amendment is made by then, these Provisions will be null and void as of January 1, 2021.

D. Simple Unconstitutionality Opinion of Justice Lee Seok-tae, Justice Lee Eunae, and Justice Kim Kiyoung

We concur with the constitutional nonconformity opinion that the Self-Abortion Provision and the Abortion by Doctor Provision (collectively, "Provisions at Issue") infringe a pregnant woman's right to self-determination (1) by completely and uniformly prohibiting abortion during a sufficient amount of time before the point of viability at around 22 weeks of gestation, during which the right to self-determination regarding a decision whether to continue a pregnancy and give birth can be properly exercised, even in cases where a pregnant woman faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances, and (2) by criminally punishing violations of the ban on abortion. Our opinion differs, however, from the constitutional nonconformity opinion in two respects. First, we believe that abortion should be permitted without restriction as to reason and be left to the deliberation and judgment of the pregnant woman during the "first trimester of pregnancy" (about 14 weeks from the first day of the last menstrual period). Second, we believe that decisions of simple unconstitutionality should be rendered on the Provisions at Issue. Therefore, we deliver the following opinion.

1. Pregnant Woman's Right to Self-Determination during the First Trimester of Pregnancy

(a) Meaning of a pregnant woman's right to self-determination

1) The Court previously stated that the image of a human posited by the Constitution is a citizen with the right to self-determination, as well as with creativity and maturity, and this citizen is a democratic citizen who, based on his or her own chosen view on life and society, responsibly determines and forms his or her life in society (*see* 96Hun-Ka5, May 28, 1998; 2004Hun-Ba80, February 23, 2006). The Court also stated that the right to self-determination or the general freedom of action, deriving from the right to pursue happiness under Article 10 of the Constitution, respects the determination or choice made by a reasonable and responsible person regarding his or her own destiny but presupposes that this person assumes the responsibility for such determination or choice (2008Hun-Ba146, etc., October 29, 2009). We find that the essence of this constitutional right to self-determination lies in a person's self-evaluation and self-determination of the meaning and implications of his or her action.

2) A "pregnant woman's right to self-determination" at issue in this case is no different from this right to self-determination in general. That a pregnant woman is guaranteed the right to self-determination means that she is also entitled to make a decision about whether to continue her pregnancy after careful evaluation of her circumstances, based on her view of life and society which has roots in her dignity and autonomy. In other words, a pregnant woman being guaranteed the right to self-determination means that she is entitled to make a decision about whether to continue her pregnancy and give birth, on her own and at any time during her pregnancy.

(b) Peculiarity of a pregnant woman's right to self-determination

1) As pointed out in the constitutional nonconformity opinion, a woman undergoes dramatic physical and emotional changes during approximately

ten months of pregnancy. In the process of giving birth, she suffers a great deal of pain and, in extreme cases, even faces a risk of death. She must endure by herself such anxieties, physical constraints, and pains as long as she remains pregnant. By giving birth, she establishes a mother-child relationship with her child and thereafter assumes parental responsibilities, which require almost 20 years of continuous physical, psychological, and emotional efforts and impose on her a financial burden and various other hardships, including difficulties in maintaining a professional and public life or in continuing with education. Such burdens of parenting are further compounded by social problems such as a custom of gender discrimination, a patriarchal culture, and adverse child-rearing conditions.

2) In light of the above, we note that pregnancy, childbirth, and parenting are crucial matters that have a fundamental and decisive impact on the life of a woman. Thus, the decision whether to continue a pregnancy is one of the most vital elements of a woman's right to self-determination.

Moreover, the decision whether to continue a pregnancy is not made in a vacuum. It carries different weight depending on the environment and circumstances of a pregnant woman. Therefore, if the option of terminating a pregnancy is not present, this may cause devastation in the life of a pregnant woman, as well as harm to her dignity.

In sum, a pregnant woman's right to self-determination regarding the decision whether to continue a pregnancy concerns her right to determine on her own matter that has a fundamental and decisive impact on her life, and is one of the most vital elements of a woman's right of personality.

(c) Full protection of a pregnant woman's right to self-determination

1) As pointed out in the constitutional nonconformity opinion, a pregnant woman's decision whether to continue or terminate her pregnancy amounts to her holistic and dignity-based decision which is made after careful evaluation of all her physical, psychological, social, and

economic conditions, based on her own chosen view of life and society. However, the Self-Abortion Provision restricts a pregnant woman's right to self-determination by, with certain exceptions set forth in the Mother and Child Health Act, imposing a complete and uniform ban on all abortions throughout pregnancy and by criminally punishing violations of this ban.

2) Abortion legislation that bans, in principle, abortion throughout pregnancy and specifies grounds for exceptions to this ban neither affords nor guarantees a pregnant woman the right to self-determination. Such legislation merely exempts a pregnant woman from liability for abortion if she falls within those exceptions by according her the status of "a person who has no other choice but to abort." The pregnant woman is never granted, throughout pregnancy, the status of a person entitled to freely and on her own choose and decide whether to continue a pregnancy; as a result, she is never guaranteed the fundamental right to self-determination. In effect, such legislation denies or deprives the pregnant woman of the right to self-determination, rather than guaranteeing her that right as it purports to do.

3) That a pregnant woman is guaranteed the right to self-determination means she, as a holder of this right, is, in principle, allowed to exercise it based on her own will. Thus, a pregnant woman's holistic and dignity-based decision about whether to continue or terminate her pregnancy, in itself, amounts to the exercise of her right to self-determination and should be in principle allowed to be made throughout pregnancy. This decision may be restricted, however, for the reasons below.

(d) Restrictions on a pregnant woman's right to self-determination

1) Restrictions based on the stage in the continuous process of life development

a) Despite its reliance upon its mother, a fetus is still a living being that has an existence separate from its mother. Since it gradually grows into a human being in the mother's uterus and becomes one at birth, it

constitutes a stage in the continuous process of human life development.

Whether this living fetus is a human being with fundamental rights has been the subject of many discussions around the world. Some judicial institutions and commissions have denied, in their respective judgments and opinions, a fetus the status of a human being with fundamental rights; however, they have not denied that fetal life is valuable and merits protection. In our opinion, regardless of whether the fetus qualifies as a holder of fundamental rights, the fetus itself amounts to life that has the potential to gradually develop into a human being. Thus, it is self-evident that the State should pursue the significant public interest in safeguarding fetal life in accordance with the Constitution's normative, objective value system respecting life and with Article 10 of the Constitution which proclaims human dignity and worth.

b) Therefore, we note that the State may restrict a pregnant woman's right to self-determination to protect the life of a fetus, which has the potential to gradually develop into a human being. This does not mean, however, that the State should, in pursuing the public interest in safeguarding fetal life, always afford uniform legal protection to the fetus at every stage of development. Under our legal order, it is not impossible for the State to divide the fetus's continuous process of development into certain stages and give different legal protection to the fetus depending on its developmental stage. Therefore, the State's legislation for the protection of fetal life with respect to its level or means may be different depending on the developmental stage of the fetus (*see* 2004Hun-Ba81, July 31, 2008).

c) As pregnancy progresses, the fetus gradually develops into a human being and becomes viable after a certain period of time. Although that period varies according to the level of advancement of medical technology, WHO considers it to be 22 weeks of gestation. Likewise, academia in the field of obstetrics and gynecology consider that the fetus becomes viable at around 22 weeks of gestation when provided with the best medical technology and staff currently available. Since we believe that a viable fetus after around 22 weeks of gestation is considerably more human than

the previously non-viable one before this period, we find that the State may impose general restrictions on abortions after this period and permit abortions only in very exceptional cases where a pregnant woman is unlikely to continue her pregnancy.

2) Restrictions for the safety of a woman's life and body

a) Abortion is an invasive procedure, posing a risk of harm to a woman's body and life. Thus, even if a pregnant woman's right to self-determination is guaranteed, reducing the abortion-related risk factors for pregnant women's lives and bodies by ensuring access to safe abortion is another substantial and important task involved in the matter of abortion. In relation to this, WHO opined that regulatory, policy and programmatic barriers that hinder access to and timely provision of safe abortion care should be removed.

b) Factors influencing the safety of abortion include fetuses' developmental stages (period of gestation), competence of medical practitioners, a medical environment, post-abortion care, and availability of information about abortion. The cost of abortion is also one of such factors, because women with no or low income hesitate to seek an abortion and fail to obtain a timely one if this cost is high.

As a general rule, a pregnant woman's risk of death from abortion increases with gestational age. The rate of maternal complications or mortality from abortion is extremely low during the first nine weeks of gestation, when a medical abortion is available, and at 12 to 13 weeks of gestation, when an abortion is a relatively simple surgical procedure. The International Federation of Gynecology and Obstetrics (FIGO) Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health stated that "Abortions for non-medical reasons when properly performed, particularly during the first trimester ... are in fact safer than full-term deliveries." After eight weeks of gestation, however, the relative risk of maternal mortality from abortion increases by two times for every two weeks, according to medical societies.

Therefore, in order to ensure access to safe abortion, it is significant that women have access to first trimester abortions performed by trained medical professionals and to adequate pre- and post-abortion care. Additionally, abortion education or counseling needs to be facilitated so that information about abortion can be made available in a timely manner.

c) Abortions after the first trimester of pregnancy, even before fetal viability, use a more complicated method of abortion and are more likely to produce complications or side effects than abortions before this stage, resulting in a higher risk of harm to a pregnant woman's life or health. Thus, with respect to abortions after the first trimester of pregnancy, the public interests in protecting a fetus's life and the pregnant woman's life and health may take precedence over private interests.

3) Necessary periodic restrictions on a pregnant woman's right to self-determination

a) Most pregnant women discover their pregnancies between four and six weeks of gestation, by around eight weeks of gestation at the latest. From that discovery, it takes some time until they, after careful deliberation over an abortion decision, find a medical institution that provides abortion services. (The 2011 National Survey on Trends in Incidence Rates of Induced Abortion Operations, commissioned by the Ministry of Health and Welfare, found that about 94% of induced abortion operations are performed during the first three months of pregnancy.) Therefore, setting a short time frame for legal abortion would, in effect, preclude pregnant women from having abortions, or lead them to make rash decisions to terminate pregnancies.

b) On the other hand, because the sex or disability of a fetus can be detected at some point during the second trimester (from the end of the first trimester to 28 weeks of gestation), we cannot exclude the possibility that allowing abortion on request after that point might lead to selective abortions based on the sex or disability of the fetus.

c) For these reasons, the time frame within which abortion on request

is legal should be long enough to ensure that a pregnant woman makes a decision whether to terminate her pregnancy after serious and careful evaluation of all her physical, psychological, social, and economic conditions, based on her own chosen view of life and society; but, at the same time, that time frame should be limited in order to prevent a pregnant woman's deliberation on abortion from resulting in wrong decisions, such as decisions to have selective abortions.

2. Whether the Provisions at Issue Infringe a Pregnant Woman's Right to Self-Determination

With the above in mind, we examine whether the Self-Abortion Provision and the Abortion by Doctor Provision violate the rule against excessive restriction and thus infringe a pregnant woman's right to self-determination.

(a) As pointed out in the constitutional nonconformity opinion, criminal sanctions have only a limited deterrent effect on a pregnant woman's decision whether to terminate a pregnancy, and pregnant women undergoing unlawful abortions are, in practice, rarely subjected to criminal punishment. Therefore, the Self-Abortion Provision does not significantly serve the public interest in protecting fetal life. As a matter of fact, the Self-Abortion Provision has been inconsistently enforced based on the State's population policy. Further, it does not serve its original purpose of protecting fetal life; rather, it is abused by a woman's ex-male partner or by those close to her as a means to retaliate against or harass the woman, or it drives pregnant women to obtain an unsafe abortion by preventing them from having any necessary discussion or communication with society concerning the decision whether to terminate a pregnancy. Given this reality, we find that banning abortion and imposing criminal sanctions against violations of this ban have not significantly furthered the purpose of protecting fetal life. In our opinion, this purpose can be significantly advanced by other more desirable and

effective means, such as promotion of sex education and counseling; provision of social welfare benefits and other kinds of State assistance for pregnancy, childbirth, and parenting; and removal of a series of institutional and sociostructural obstacles that interfere with childbirth and parenting (*see* dissenting opinion in 2010Hun-Ba402, August 23, 2012).

(b) A complete and uniform ban on abortion places barriers between women who seek abortions and their access to accurate information about abortion. This ban also leaves them no choice but to resort to a clandestine abortion, which is costly and rarely provides them with proper medical services or care. Further, medical professionals, including obstetrician-gynecologists, lack adequate training in abortion procedures, because medical training programs do not provide sufficient abortion training on the ground that abortion is illegal; thus, this leads to the increased risk of medical malpractice or the resulting complications in clandestine abortions. For these reasons, we find that the complete and uniform ban on abortion fails to sufficiently protect a pregnant woman's life and health.

(c) As discussed above, abortion legislation that bans, in principle, abortion throughout pregnancy and specifies grounds for exceptions to this ban simply gives precedence to the protection of a fetus's life over the protection of a pregnant woman's right to self-determination. In effect, such legislation denies or deprives the pregnant woman of her right to self-determination.

In relation to abortion, the legislature should decide how to protect pregnant women's right to self-determination while reducing abortions and protecting the lives of fetuses, instead of simply deciding which interest prevails.

If abortion is allowed during the period when it is safe for pregnant women and in exceptional cases, this will lead to allowing abortion for those pregnant women who have justifiable grounds to terminate their pregnancies. This type of abortion regulation could pose the same problem as the one permitting abortion only for certain grounds, virtually depriving a pregnant woman of her right to self-determination by permitting

abortion only in dire and exceptional circumstances.

(d) For the above reasons, we conclude that the State should respect the right to self-determination of a pregnant woman as much as possible during the first trimester of pregnancy—when the fetus has not grown much; abortion is safe; and careful deliberation can be given to the decision whether to terminate a pregnancy—by allowing her to make a decision whether to continue the pregnancy after careful evaluation of her circumstances, based on her view of life and society which has roots in her dignity and autonomy. Additionally, during this stage of pregnancy, the State can serve the public interests that are equally or more important than the pregnant woman's right to self-determination by means that are less restrictive of this right, such as the provision of opportunities for the pregnant woman to collect sufficient information or receive counseling services regarding the meaning, process, consequences, and risks of abortion.

In consideration of the foregoing, we find that the Self-Abortion Provision violates the least restrictive means test. The Abortion by Doctor Provision, which is based on the Self-Abortion Provision, violates the least restrictive means test as well.

(e) It is self-evident that there is a vital public interest in protecting the life of a fetus. However, as noted earlier, the Self-Abortion Provision does not effectively serve the public interest in protecting the fetus's life. Rather, in effect, it totally deprives a pregnant woman of the right to self-determination by imposing a complete and uniform ban on abortion even during the first trimester of pregnancy, when abortion is safe. Further, it even forces the pregnant woman to continue the pregnancy, give birth, and suffer the consequences of these actions. For these reasons, the private interest restricted by the Self-Abortion Provision is no less significant than the public interest served by this Provision. The Self-Abortion Provision and the Abortion by Doctor Provision violate the balance of interests test.

(f) In consideration of the foregoing, we find that the Provisions at Issue violate the rule against excessive restriction and infringe a pregnant

woman's right to self-determination by imposing a uniform and complete ban on abortion even during the first trimester of pregnancy, when abortion is safe.

3. Legitimate Necessity of a Decision of Simple Unconstitutionality

(a) The constitutional nonconformity opinion has issued a decision of nonconformity to the Constitution and an order for continued application, in lieu of a decision of simple unconstitutionality, for reasons (1) that the Provisions at Issue, without exceptions, completely and uniformly prohibits every pregnant woman who faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances from having an abortion during a sufficient amount of time before the point of viability, during which the deliberation regarding, and the actual exercise of the right to self-determination regarding whether to continue a pregnancy and give birth take place; that the Provisions at Issue criminally punish violations of the ban on abortion; and that the prohibition and punishment of abortion to protect fetal life are not unconstitutional in themselves or in all cases; (2) that the rendition of a decision of simple unconstitutionality would lead to creating an unacceptable legal vacuum fully permitting all abortions; and (3) that the legislature must exercise its discretion in deciding the details of abortion legislation, such as when and on what grounds abortion should be permitted; how to combine the periodic model with the indications model; and whether to require the mandatory counseling or reflection period before abortion.

The reasons (1) and (2) are linked to the problems caused by rendering a simple unconstitutionality decision: the absence of regulation of acts warranting criminal punishments, and the provision of a remedy as a result of a retrial, against constitutionally permissible imposition of punishment.

(b) We will first examine whether a decision of nonconformity to the Constitution can be rendered in this case for the reason that the prohibition and punishment of abortion to protect fetal life are not unconstitutional in

themselves or in all cases. Generally, statutes that restrict fundamental rights contain both constitutional and unconstitutional parts. This is particularly true of statutes restricting rights of freedom, and the decisions on these statutes are normally issued based on the Court's assessment of whether the restrictions imposed by them are so severe as to violate the Constitution. Thus, if the Court were to simply declare a statute nonconforming to the Constitution for the reason that the statute's restrictions on a fundamental right go beyond the constitutionally permissible limits, this would eliminate the grounds for the existence of a rule that the Court must declare an unconstitutional law null and void, as well as the existence of the type of decision rendered based on this rule—a decision of simple unconstitutionality.

Moreover, a decision of nonconformity to the Constitution limits the temporal effect of a decision of simple unconstitutionality and allows the court, until a certain time point, to find a person convicted under a blatantly unconstitutional penal provision guilty although that person should be judged not guilty. In this regard, the a decision of nonconformity to the Constitution runs counter to the spirit of our institutional framework recognizing the retrospective effect of the decision of simple unconstitutionality on a penal provision. We are of the opinion that, where a penal provision is so broad in scope that the unconstitutional part cannot be separated from it, the Court should deliver the decision of simple unconstitutionality on that penal provision, thereby imposing the burdens associated with invalidating the constitutional part of that penal provision on the State. Only where the decision of simple unconstitutionality is likely to create a legal vacuum and cause serious confusion, as well as harm to a public interest, the decision of nonconformity to the Constitution may be issued on a penal provision, even though this means that the part of the penal provision which forms the basis for the State's abuse of authority to enforce criminal sanctions remains effective.

(c) Thus, we will next examine whether the decision of simple unconstitutionality creates an unacceptable legal vacuum in this case. Where it is clearly expected that the absence of an existing unconstitutional

statute will be more inimical to the constitutional order than its presence, it is more conducive to the maintenance of the general legal order to maintain the unconstitutional statute until its amendment is made than to abrogate it instantly. This does not mean, however, that the decision of nonconformity to the Constitution may be easily rendered based solely on the simple weighing of the social costs of confusion to be caused by a legal vacuum against the constitutional rights to be restored by instant repeal of an unconstitutional law, when the former outweighs the latter. Because criminal punishment, regardless of its form, puts its recipient at a greater disadvantage than any other punishment, requiring the State to bear the harm caused by a legal vacuum following an instant repeal of an unconstitutional law is more compatible with the spirit of the Constitution than leaving individuals to suffer from that unconstitutional law, even if that instant repeal creates a significant legal vacuum. We believe that, even in case of a request for the continuation of the constitutional order, the State should first and foremost seek to provide a remedy for those individuals who are subject to an unconstitutional law unless refusing to grant that request causes extreme social confusion that cannot be resolved by existing personal and material resources.

(d) More specifically, as noted in the constitutional nonconformity opinion, most pregnant women make decisions whether to terminate a pregnancy after careful evaluation of various factors, including affection for the fetus and the ethical problem of depriving the fetus of life, along with the social, economic, physical, and emotional burdens of parenting, as well as the future life of the fetus. Their decisions are made based on comprehensive and in-depth reflection on the future life of themselves and their fetus and based on recognition of the profound impact of their decisions on the life of themselves and their fetus. Given the weight of those decisions, we observe that the possibility of criminal punishment has a limited effect on those decisions. Further, there is little solid evidence that imposing no punishment for abortion will lead to an increase of abortions, but there is substantial empirical evidence that the rate of abortions in countries that impose no punishment for abortion is

relatively lower than that in countries that impose punishment for abortion. Additionally, the penal provisions for abortion have not served their original legislative purpose of protecting fetal life. For instance, as stated in the constitutional nonconformity opinion, the Self-Abortion Provision has been abused by a woman's ex-male partner as a means to retaliate against or harass the woman, or to put pressure on her to settle a family dispute or other civil disputes. Considering that most of the women who have been prosecuted and received criminal penalties for self-abortion were reported by their ex-male partner with such malicious intent, and that self-abortion crimes have been very rarely prosecuted, which means the Self-Abortion Provision has become virtually a dead letter, we find that the Provisions at Issue have a limited effect on deterring abortion. Further, given that there have been very few cases in which criminal punishment has been imposed under the Provisions at Issue, and that most of these cases have been occasioned by women's ex-male partners with malicious intent to abuse the Provisions at Issue in such a way that is inconsistent with the original legislative intent thereof, we find that the Provisions at Issue do not function properly as penal clauses. For these reasons, we conclude that the repeal of the Provisions at Issue is unlikely to give rise to extreme social confusion or social costs.

On the other hand, even if it is difficult to draw the line between unconstitutional and constitutional parts of a penal provision, instituting prosecution based on this penal provision, which includes an unconstitutional part, and later imposing punishment based on retrospective legislation containing the constitutional part of this penal provision run counter to the legislative intent to afford retrospective force to decisions of unconstitutionality as discussed above, and, at the same time, demonstrate the fact that this penal provision before its amendment was vague. Further, we find that applying this vague provision to individuals is harsh, because this amounts to forcing them to suffer the burdens associated with the deficiency in regulation.

(e) Next, as clearly noted in the constitutional nonconformity opinion,

the Provisions at Issue violate the rule against excessive restriction and thus infringe the right to self-determination of a pregnant woman (1) by, without exceptions, completely and uniformly prohibiting every pregnant woman who faces the abortion dilemma arising from various and wide-ranging socioeconomic circumstances from having an abortion during a sufficient amount of time before the point of viability, during which the deliberation regarding and the actual exercise of the right to self-determination regarding whether to continue a pregnancy and give birth take place; and (2) by criminally punishing violations of the ban on abortion. We believe that a decision of simple unconstitutionality rendered based on this clear rationale will provide the basis for the National Assembly's amendment of the Provisions at Issue, producing the same result as the rendition of a decision of nonconformity to the Constitution. Therefore, the rendition of the decision of simple unconstitutionality is unlikely to give rise to extreme legal confusion or social costs.

(f) Moreover, as stated above, we find that the Provisions at Issue violate the Constitution, because they prohibit a pregnant woman from having an abortion during the first trimester of pregnancy, although abortion should be permitted without restriction as to reason and be left to the deliberation and judgment of the pregnant woman during this period. Since the parts of the Provisions at Issue concerning penalties for abortions performed during the first trimester of gestation are unquestionably in violation of the Constitution, and since the legislature has no discretion to decide whether to impose punishment for abortions performed during the first trimester of gestation, we do not find it necessary or essential to issue decisions of nonconformity to the Constitution on the Provisions at Issue.

(g) Therefore, because the Provisions at Issue contravene the rule against excessive restriction and thus infringe the right to self-determination of a pregnant woman, we declare that the Provisions at Issue violate the Constitution.

V. Conclusion

The three Justices' declaration of simple unconstitutionality of the Provisions at Issue and the four Justices' declaration of constitutional nonconformity of the Provisions at Issue satisfy the quorum requirement for an unconstitutionality decision under the proviso of Article 23 Section 2 Item 1 of the Constitutional Court Act. Therefore, the Court declares the Provisions at Issue nonconforming to the Constitution, and orders that they continue to be applied until the legislature amends them not later than December 31, 2020. If amendment is not made by that date, the Provisions at Issue will become null and void as of January 1, 2021.

In addition, the Court modifies the August 23, 2012 decision in 2010Hun-Ba402, in which it was held that the Self-Abortion Provision and the part concerning "midwife" in Article 270 Section 1 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) did not violate the Constitution, to the extent that it conflicts with the Court's decision in this case.

Dissenting from this decision, Justice Cho Yong-Ho and Justice Lee Jongseok deliver the following constitutionality opinion in Ⅵ.

VI. Constitutionality Opinion of Justice Cho Yong-Ho and Justice Lee Jongseok

For the following reasons, we are of the opinion that the Provisions at Issue do not violate the Constitution.

A. Opinion on the Self-Abortion Provision

Being born from a mothers' womb without being aborted enables us to debate the constitutionality of the Self-Abortion Provision in this case. This means that we were once all fetuses.

1. Case on the Crimes of Abortion

1. Human Dignity, Fetal Life, and the State's Protection Duty

(a) All citizens shall be assured of human worth and dignity (Article 10 of the Constitution). In previous cases, the Court opined that the ideal human image posited by our constitutional order was "that of a mature democratic citizen who decides on and shapes each one's life under his or her responsibility within the social community on the basis of his or her view on life and society" (*see* 96Hun-Ka5, May 28, 1998; 98Hun-Ka16, etc., April 27, 2000); or "that of a human being with a personality who is neither a subjective individual isolated from society nor a mere member of a community, but who is associated with, and tied to the community and, at the same time, remains intact from its intrusion of his or her intrinsic value and strikes a balance between maintaining a personal life and a community life" (*see* 2002Hun-Ma518, October 30, 2003). Nevertheless, this does not mean that individual and specific humans who present human images different from the above ones possess no dignity.

Our Constitution requests that all human beings have dignity simply by virtue of being human. Human life is invaluable; it is the source of dignified human existence, which cannot be replaced by anything else in this world. Although the right to life is not enshrined in the Constitution, it is a natural right, transcending time and space, rooted in the human instinct to survive and the purpose of human existence. It is unquestionably clear that the right to life is the most fundamental right and the foundation of all rights provided under the Constitution (*see* 92Hun-Ba1, November 28, 1996). Wherever human life exists, it should be accorded human dignity; it is not significant whether the bearer of life is conscious of this dignity and capable of safeguarding the life of his or her own. The potential abilities of the earliest human being would be sufficient to justify this dignity (BVerGE, 39, 1, 41).

(b) The nature of a maternal-fetal relationship is very unique. The pregnant woman can view her fetus both as herself and as a separate individual at the same time. It is neither possible to identify the fetus and

its mother as one person nor two, and they build a special association where they cannot oppose each other despite the possibilities of them violating each other's interests. They both deserve respect based on human dignity.

The fetus possesses the internal value of life as it develops into a complete human being. This is not just because the fetus is part of the human species with the same genetic makeup, but rather it is because the fetus has the potential to grow naturally to develop into a unique human being that cannot be replaced by anyone else. The fetus receives nutrients and oxygen from the mother, but its cell division and growth occur independently. It has a separate immune system from the mother and can move independently by its own will while being able to feel pain after a certain period. Thus, as an independent living organism, the fetus grows to be a dignified human in the future unless there is an unfortunate case of natural miscarriage. Although the fetus depends on the mother for survival, it can survive independently before natural birth if more than a certain period of time (about 22 weeks of pregnancy with current medical technology) has elapsed. Considering that the fetus develops more and more human features before childbirth and is recognized as a real human after childbirth, both the fetus and the person born are considered to be undergoing a series of continuous developmental stages of life. Thus, there is no fundamental difference between a fetus and a newborn in relation to the degree of human dignity or the need for protection of life.

The question is at what point life should receive constitutional protection as a dignified being. Although it is impossible for experts in medicine, philosophy, and theology to reach a consensus on this matter, if life before birth is excluded from the protection of the right to life by the Constitution, the protection of the right to life should be regarded as incomplete, as the fetus must also be regarded as the subject of the constitutional right to life (*see* 2004Hun-Ba81, July 31, 2008; 2010Hun-Ba402, August 23, 2012). Because the development of the embryo has been an ongoing process since the implantation of the embryo, the exact stage of development cannot be established, and while the developmental

process of the embryo, especially the mental aspect, is still lacking, it can be predicted that the time for the fetus to survive independently from the mother is advanced. We also cannot rule out the possibility that someday the embryo might grow from the beginning in an artificial uterus. Thus, when we are doubtful, we have no choice but to choose the interpretation method that maximizes the protection of right to life. Therefore, at least when embryos are implanted in the uterus, the embryo, until birth, should be able to enjoy human dignity as a life with intrinsic human value regardless of the gestational period.

(c) We have fundamental doubts about whether the freedom of abortion, which may terminate the physical existence and life of a fetus, can possibly be protected by the right to self-determination. Even if we accept the premise that the fetus is a part of its mother's body, we do not see that a woman's right to self-determination includes the positive freedom to terminate a fetus's life, because the fetus itself possesses at least the internal value of life. In principle, a pregnant woman is a dignified human being and is clearly entitled to the right not to be used as a means to sustain and develop the life of a fetus (right of personality) and the right not to have her bodily integrity interfered with (freedom of bodily integrity).

On the other hand, the right to abortion is written nowhere in the Constitution, and the citizens who were vested with the constituent power did not intend to endow women with that right as well. It is fair to say that a fetus's right to life and a woman's right to self-determination cannot be weighed against each other. Abortion is not a matter of free choice, but a matter of unethical act of taking the life of a living being. Our legal order neither requires nor allows anyone to sacrifice another's life for the sake of one's own freedom of bodily integrity. In general, a pregnant woman's exercise of the right to self-determination is limited to the extent that it does not infringe another being's freedom or right. Therefore, a pregnant woman's right to self-determination does not include the right to terminate the internal value of a life, which means to take the life of a fetus.

However, the Court found in a previous case (2010Hun-Ba402, August 23, 2012) that a pregnant woman's right to self-determination includes her right to decide whether to continue or terminate her pregnancy, and the majority opinion in this case reached its conclusion based on this finding. Although we are doubtful, as noted above, of the validity of this finding, we proceed to determine the merits of this case based on the premise, which has been adopted in the above precedent and majority opinion in this case, that the Self-Abortion Provision restricts a pregnant woman's right to self-determination, namely the freedom of abortion.

(d) Human dignity is a supreme constitutional value and a normative goal sought by the State. It binds all government institutions, and the State is entrusted with the duty and task to realize human dignity. Since Article 10 of the Constitution stipulates that "It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals," the State has the duty to protect a fetus's right to life, which is a fundamental and inviolable human right (*see* 2004Hun-Ba81, July 31, 2008).

The most important duty of the State is to protect the life, safety, and interests of all members of the community. This is especially true with respect to the members who are not capable of protecting themselves. A fetus has no means to defend itself, and because it is developing into a human life, it is vulnerable to external threats. Since life cannot be restored once lost, and since it is impossible to impose limited restrictions on life, a fetus's life cannot be protected unless there is a ban on depriving fetuses of life. Thus, the State may impose a ban on abortion, which can deprive fetuses of life, in order to perform its task to realize human dignity.

Pursuant to its duty and task to realize human dignity, the State holds the duty to protect life, and this duty prohibits not only the State from posing a direct harm to a fetus but also a third party from endangering the fetus's life as well, which is the source of human dignity (*see* 2006Hun-Ma788, August 30, 2011). Because abortion is intentional destruction of life, the State should enforce its life protection duty to

safeguard fetuses carried by pregnant women. Although it is apparent that the fetus and the pregnant woman stand in a very special relationship with each other, yet the fetus is a living being that has an existence separate from its mother, and therefore we find that there is a need to protect the fetus's life where its mother takes its life by obtaining self-abortion, just as in cases involving other third parties endangering the fetus's life. The fetus should be guaranteed the right to life by the legal order solely based on its existence, not based on its mother's approval for that right.

Yet, it is also the duty and task of the State to protect the fundamental rights of a pregnant woman who is forced to continue her pregnancy and give birth. Thus, the issue of whether the pregnant woman's fundamental rights are unduly infringed by the Self-Abortion Provision may be determined by the Court.

(e) In view of the above, we conclude that the Self-Abortion Provision serves the legitimate legislative purposes of deterring pregnant women from having abortions and thus of protecting fetuses' right to life. Further, because it prohibits, with exceptions, pregnant women from obtaining abortions and criminally punishes violations of this prohibition, it also is an appropriate means of achieving the above purposes.

2. Criminal Punishment and Least Restrictiveness of Means

(a) Since a fetus possesses human dignity, the State has the duty to protect its life and also should afford the fetus legal protection even from its mother. The legislature has no alternative but to resort to criminal means if other means cannot provide fetal protection as demanded by the Constitution. Fetal life can be protected by the imposition of a general ban on abortion and by the imposition of criminal punishment on violations of this ban, and this protection is afforded by the Self-Abortion Provision.

As a general rule, in determining whether a law infringes a fundamental right, the Court uses the "least restrictive means" test to decide whether

a less restrictive alternative means could equally achieve the same legislative purpose. However, this test is of less importance in relation to a prohibition of abortion. What is of more importance is to determine whether the use of criminal punishment is necessary to enforce the prohibition of abortion.

Imposing a general ban on abortion and criminally punishing violations of this ban are the most feasible and effective means of protecting fetal life among the options available to the legislature. Because criminal penalties are the most potent and feasible means of achieving a legislative purpose, we have doubts about whether other means would equally be effective in deterring abortion. Admittedly, the State needs to refrain from deploying criminal sanctions due to their strong legal effect and their effect of restricting fundamental right(s)—the extent of the effect of which is incomparably powerful in comparison to other legal means; therefore, the legislature must pursue means other than criminal punishment, if possible (*see* 2008Hun-Ka22, etc., August, 30, 2011). Nonetheless, given the Self-Abortion Provision is vital for the legislative purpose of protecting a fetus's right to life and given the peculiar nature of the infringement of the right to life, we recognize the necessity of strictly prohibiting abortion by criminal means. Further, considering that abortion is widely performed in practice despite the Self-Abortion Provision regulating it by criminal penalties, we cannot rule out the possibility that, if abortion is not punished at all or is punished by sanctions lighter than criminal penalties, this may result in more abortions—in failure to achieve the Self-Abortion Provision's legislative purpose of protecting a fetus's right to life, nor do we see that abortion can be effectively deterred by other means such as promotion of sex education or contraceptive-related education; provision of abortion-related counseling; and implementation of national and community-level safeguards for motherhood. For these reasons, we cannot postulate the existence of alternative means less restrictive of the woman's right to self-determination than, but equally effective in protecting fetal life as, the imposition of a general abortion ban and criminal punishment for violations of this ban.

(b) The majority opinion asserts that the Self-Abortion Provision as a criminal penalty provision does not have the practical effect of serving the legislative purpose of protecting fetal life on the ground, among others, that the numbers of prosecutions for abortion have been much lower than the estimated numbers of abortions. However, it is widely accepted that criminal punishment, by its very existence, has a measurable deterrent effect on criminal behavior. Because the pregnant woman who procures an abortion and the doctor who performs it are both punished for their actions, the procedure is conducted very secretly and is thus rarely reported; therefore, the fact that there have been few prosecutions for abortion does not directly support a conclusion that the provisions on crimes of abortion do not have any practical effect. It is true that a number of studies indicate that the estimated numbers of abortions and the rates of induced abortion operations in our society have been in steady decline. Admittedly, this trend is in part the result of a combination of various factors, including the increased use of contraception, decline of son preference, and improvement of economic conditions. However, it cannot be denied that the prohibition of abortion by criminal means is also one of such factors.

The majority opinion also asserts that abortion should not be punished by criminal means, on the grounds, among others, that the Self-Abortion Provision has in effect become a dead letter; it does not have a deterrent effect on pregnant women who are desperate to have an abortion; it disregards the health risks and harm that abortion poses to pregnant women; it is used by a biological father of a fetus, who does not want an abortion, as a means of threatening pregnant women; or it is used as a means of putting pressure on pregnant women to settle a family dispute or other civil disputes. However, the existence of such an abuse does not lead to the conclusion that the Self-Abortion Provision fails to serve the purpose of protecting fetal life; instead, the existence thereof leads to the conclusion that we require measures that prevent such an abuse of the Self-Abortion Provision. Although the Self-Abortion Provision has in effect become a dead letter, its existence would be justified if it can save

the life of only one fetus. The assertion that abortion poses health risks and harm to pregnant women is based on the premise that abortion is permitted, and thus is not relevant to this case, which addresses the issue of whether abortion should be allowed. Further, the grounds for allowing abortion, number of abortions, or rate of abortions in each country are influenced by a combination of various social and cultural factors as well as tradition and custom of their own and thus cannot be compared with other countries' grounds in a facile manner.

(c) We find it hard to believe that there are alternative means less restrictive of a pregnant woman's right to self-determination than, but equally effective in protecting a fetus's life as, the imposition of a general ban on abortion and criminal punishment for violations of this ban. As a result, the balance of interests test, which weighs the public interests to be achieved by the Self-Abortion Provision against the private interests to be infringed by it, lies at the crux of determining the constitutionality of the Self-Abortion Provision.

3. Balance of Interests

(a) Conflict between a fetus's right to life and a pregnant woman's right to self-determination

Life is the source of dignified human existence, which cannot be replaced by anything else in this world. Thus, there is a vital and imperative public interest in protecting the life of a fetus. Further, the right to life, because of its nature, cannot be partly restricted; any restriction of this right means a complete deprivation thereof, and an aborted fetus forever loses the opportunity to grow into a human being. Given the importance of protecting a fetus's life and given the peculiar nature of the infringement of the right to life, we find that the legislature should make its utmost effort to protect the fetus's life and prevent infringement of its right to life.

A fetus's right to life and a pregnant woman's right to self-determination

are in an adversarial relationship. It is impossible to reconcile these two rights in any situation. Therefore, deciding when and which right should prevail is a very difficult philosophical, ethical, normative, medical, and sociological question.

The legislature has the discretion to specifically determine how and to what extent the State should protect the fetus where the fetus's right to life and the pregnant woman's right to self-determination are in conflict with each other. We note, however, that the fetus will not receive the same level of protection as the pregnant woman if the legislature determines to sacrifice the fetus's right to life in order to afford the pregnant woman the freedom of bodily integrity or the right to self-determination.

The Self-Abortion Provision bans abortion and allows exceptions only for emergencies, set forth in the Mother and Child Health Act. These emergencies include, *inter alia*, the need to protect the life and health of the pregnant woman, or pregnancy as a result of a crime. This legislation provides broad protection for the life of a fetus and thereby basically intended to give precedence to a fetus's right to life over a woman's right to self-determination. This determination of the legislature to prioritize the fetus's right to life over the pregnant woman's right to self-determination should be honored.

(b) Relationship between the State and its duty of protection

The Self-Abortion Provision serves the public interest in protecting a fetus's life and thus in defending the constitutional value system deriving from human dignity. The State has a legitimate public interest in protecting the fetus, which is valuable by virtue of its potential to grow into a human being. That the Self-Abortion Provision prohibits a pregnant woman from having an abortion is not because it regards her as a means for sustaining and developing the life of the fetus. It is because our constitutional order does not allow the pregnant mother to sacrifice the life of the fetus, which is in a unique communal relationship with her and has an inherent value of a human being, and because our constitutional

order cannot but pursue a normative goal of protecting the unborn life, which does not have any means to defend itself.

All legislative, executive, and judicial institutions of the State have the duty to protect a fetus, and must establish a legal order protecting the fetus and inducing its birth. Indeed, the Court is one of these institutions. Thus, the Court should not recklessly disregard the legislature's determination to protect the life of the fetus through the Self-Abortion Provision. A decision on whether and when to allow abortion should be made by the legislature, an institution of representative democracy, after majority public opinion is aroused through serious and extensive public debate.

(c) Regarding the developmental stage of a fetus

The Self-Abortion Provision bans abortion in principle and thereby gives, regardless of a fetus's developmental stage, precedence to a pregnant woman's right to self-determination over a fetus's right to life throughout pregnancy.

We do not see that the importance of the public interest in protecting fetal life varies according to the stages of fetal development, nor do we see that a pregnant woman's right to dignity or right to self-determination prevails at certain stages of pregnancy and is outweighed by a fetus's right to life at later stages. As noted above, the Constitution protects the life of a fetus because it is a dignified living being that is expected to become human, not because it has the ability to survive independently, or has the mental capacity, *inter alia*, for thought or self-awareness. Every human being is equally entitled to the protection of his or her life, regardless of his or her physical condition or developmental status, and by the same token, a fetus as a subject of the right to life is entitled to that protection as well, regardless of its developmental stage (*see* 2010Hun-Ba402, August 23, 2012).

In particular, given that there is an increasing probability of the fetus's survival outside the mother's womb due to the rapid advancement of medicine, and given that each fetus has a different speed of development,

there is no justification for affording a varying degree of protection to the life of a fetus depending on its developmental stage, viability, or on the period of "safe abortion."

The development of life is a set of continuous process. It cannot be distinctly separated into stages according to gestational age. Therefore, we have doubts about setting a certain time point—for instance, 12 weeks of gestation—after which abortion is banned and punished, because we do not observe that a 12-week fetus and a 13-week fetus have any fundamental difference requiring a different degree of protection. We also have concerns about banning and punishing abortion after viability, because the same rationale may be applied to patients in a vegetative state and others who are lying in intensive care units of hospitals. As the majority opinion noted, different legal protection is conferred to fetuses at different developmental stages under the Criminal Act; however, we believe that this rule cannot be extended to cases concerning the constitutional protection of fetal life, because this rule is based on the categorization of crimes unique to the Criminal Act which classifies crimes by the type of legally protected interest that they invade. If, as suggested by the majority opinion, abortion is allowed during the Determination Period or the first trimester of gestation, such allowance will create a vacuum in protecting a fetus's right to life during either of these periods, leading to the State's failure to fulfill its duty to protect fundamental rights. We therefore find that the Self-Abortion Provision has reasonable grounds for banning and punishing abortion not depending on the fetus's developmental stage, viability, or on the period of safe abortion.

(d) Regarding socioeconomic indications

The majority opinion argues that the Self-Abortion Provision unduly restricts a pregnant woman's right to self-determination by not allowing abortion on socioeconomic grounds. The socioeconomic grounds cited by the majority opinion include career interruption; parenting; reproductive

rights; interference with education, career, or public activities; financial burden; premarital or out-of-wedlock pregnancy; divorce, separation, or termination of relationship. However, the concept and scope of socioeconomic grounds are very vague, and it is difficult to objectively verify whether a woman falls under any of those grounds. Allowing abortion on socioeconomic grounds is equivalent to allowing abortion depending on the convenience of pregnant women, and such allowance leads to the same result as fully legalizing abortion. If abortion is permitted based on the notion that one can remove inconveniences from one's life at any time, there will be no reason to deter abortion, and, moreover, such permission may be a general disregard for human life. Simply put, permitting abortion on socioeconomic grounds establishes the right to take human life based on "convenience." The preamble to the Constitution declares that "To help each person discharge those duties and responsibilities concomitant to freedoms and rights." In keeping with this spirit of the Constitution, a woman who chooses to have sexual intercourse must bear the responsibility for pregnancy and childbirth, which are the effects of the cause chosen by herself. A pregnant woman must find happiness not by terminating the pregnancy, but by saving the fetus. The image of such a woman corresponds to the above-mentioned ideal human image posited by our Constitution. If our generation legalizes abortion by jumping on the bandwagon of the current zeitgeist and ideological orthodoxy characterized by the removal of relative inconveniences in life, even we may someday be an inconvenience for the next generation and be eliminated in the name of euthanasia or *goryeojang*.

The socioeconomic grounds advanced by the majority are related to social problems that have existed from the outset and have not arisen as the result of prohibition and punishment of abortion. Even if those social problems faced by pregnant women are in some respects caused by not allowing abortion, the focus should be on resolving their root structural causes, namely, the lack of support for and negative perception of unwed mothers; an unfavorable environment for parenting; and sexually

discriminative and patriarchal cultures at home and in the workplace.

A question may arise as to whether the Self-Abortion Provision violates a woman's reproductive rights, which include the right to make decisions about family planning, namely, the number, spacing, and timing of children, and the right to have the information and means to do so. We believe that violations of such reproductive rights can be substantially prevented by the use of contraceptives instead of abortion. There is an obvious and important difference between destroying life by *abortion* and preventing life by *contraception*; this difference is the most compelling public reason why abortion, and not contraception, is prohibited. The State cannot but choose the Self-Abortion Provision in order to provide more protection to a fetus's right to life than to a woman's reproductive rights.

Therefore, we find that the socioeconomic grounds advanced by the majority opinion do not provide a compelling reason for us to hold that the Self-Abortion Provision unduly restricts a woman's right to self-determination.

(e) Regarding the grounds for legal abortion

The prohibition of abortion may result in infringing not only a pregnant woman's right to self-determination but also her right to personality, human dignity and worth, or right to health in some cases, depending on her circumstances. If no exceptions are made to the prohibition and punishment of abortion in these cases, this could be contrary to the spirit and value of the Constitution. Generally recognized grounds for legal abortion (induced abortion operation) include medical, eugenic, or ethical: where it is patently unreasonable to expect in light of social norms that the mother can continue the pregnancy, such as in cases of a serious risk to her life and health, or pregnancy as a result of a crime.

Likewise, the Mother and Child Health Act provides that a doctor may perform an induced abortion operation within 24 weeks with the consent

of the pregnant woman herself and her spouse in the following cases: (1) where she or her spouse suffers from any eugenic or genetic mental disability or physical disease; (2) where she or her spouse suffers from any contagious disease; (3) where she is impregnated by rape or quasi-rape; (4) where pregnancy is taken place between relatives by blood or by marriage who are legally unable to marry; or (5) where the maintenance of pregnancy severely injures or is likely to injure the health of the pregnant woman for health or medical reasons. Further, under this Act, the doctor and the pregnant woman in these cases are not punished (Articles 14 and 28 of the Mother and Child Health Act and Article 15 of the Enforcement Decree of the Mother and Child Health Act). Therefore, we find that this Act shows consideration for women by preventing the Self-Abortion Provision from violating their human dignity and worth, right to life, and other values.

The Petitioner asserts that Article 14 Section 1 of the Mother and Child Health Act recognizes very narrow exceptions to the abortion ban and violates the void-for-vagueness doctrine by not setting out the standard and process of review in determining whether the pregnant woman is impregnated by rape or quasi-rape. The Petitioner also contends that the part of this statutory provision concerning requiring the consent of the pregnant woman's spouse discriminates against pregnant women on account of their gender or marriage status and thus violates their right to equality and right to self-determination. However, we do not proceed to these arguments, because they center around the unconstitutionality of Article 14 Section 1 of the Mother and Child Health Act, and not of the subject matter of review in this case.

(f) Regarding gender-based discriminatory effect

The Petitioner's claim of indirect discrimination that the Self-Abortion Provision has a *gender-based discriminatory effect* because only women can become pregnant is incorrect in that, in reality, gender-based discriminatory harm occurs not due to the Self-Abortion Provision;

unwed, underage, or socioeconomically vulnerable pregnant women are disadvantaged, not on account of the absence of the freedom of abortion, but on account of gender-based discrimination; prejudice against individual circumstances of a pregnant woman; insufficient safeguards for motherhood; and other factors in our society.

Contrary to the Petitioner's claim, we observe that the legalization of abortion could have a gender-based discriminatory effect in reality. Currently, recommendation of or incitement to abortion cannot be easily or legally made in a public manner by the man who desires to relieve himself from the duty to care for the child or from the responsibility of the biological father, or by the pregnant woman's family and friends who are concerned about the social prejudice and financial constraints that she may face. If abortion becomes a mere matter of choice, recommendation of or incitement to abortion will be made without hesitation and this will have disadvantageous consequences for the pregnant woman. This is the same reason given by early feminists as to why they were opposed to abortion.

The Self-Abortion Provision punishes the man and woman involved in the performance of, incitement to, and complicity in abortion, but it does not have any effect on non-pregnant women. Thus, it amounts to gender-neutral regulation and does not discriminate against anyone. The Self-Abortion Provision is an inevitable measure to protect the life of a fetus; there is no hidden intention to discriminate against women behind this Provision. On the other hand, allowing abortion on the basis of the pregnant woman and her family's preference for a child of a particular gender clearly causes a gender-based discriminatory effect.

(g) Sub-conclusion

It is true that the Self-Abortion Provision restricts a pregnant woman's right to self-determination to some extent, but the degree of such restriction is no more significant than the important public interests in protecting a fetus's life to be served by this Provision. Although this

Provision does not make a substantial contribution to eradicating abortion, we find that it serves a compelling public interest, considering the deterrent effect resulting from it and the disregard for human life that may result from its absence (*see* 2010Hun-Ba402, August 23, 2012).

Therefore, the Self-Abortion Provision does not violate the balance of interests test.

4. The Legislature's Deliberation and the Necessity of the Protection of Motherhood

In 1973, the Supreme Court of the United States rendered a decision in *Roe v. Wade* in which it overturned state laws regulating abortion. Has a social consensus on abortion been reached and controversy over it been resolved in the Unites States since that decision? On the contrary, as we have seen throughout history, the controversy over abortion has continued unabated. Even the plaintiff in the above case, Norma McCorvey, later became an activist in the anti-abortion movement, and the regulation of and disputes over abortion still continue to exist in many American states. Further, after the above decision and other relevant court decisions, groups supporting and opposing each decision have become organized and politically powerful with more solidarity, resulting in the subsequent change of the political landscape in the United States, even influencing the composition of its Supreme Court.

In order to determine what actions the State should take in fulfilling its duty to protect the life of a fetus, constitutionality of the exercise of governmental powers can be reviewed and such review is necessary, because the State should not be subject to either the common sense of justice shared by citizens or the will of a majority but should be subject to the constitutional order of values. As the primary guardian of the constitutional order of values, the legislature should actively and carefully deliberate on the regulation of deeply divisive issues, such as abortion, requiring an analysis of the essence of human dignity. However, disengagement from the political process and reliance on judicial review

cannot be the ultimate solution to all problems.

Our Constitution provides in Article 36 Section 2 that “The State shall endeavor to protect mothers.” Yet, pregnant women do not receive sufficient protection from the State. In reality, not every woman can share parenting with the father of the child, nor can every dual-income household receive enough support from family or the social system in raising a child. Some women may find themselves fortunate enough not to face discrimination and bias based on pregnancy. If this social environment does not change, those who claim that the rights to deny abortion and to take the life of a fetus are necessary to raise the social status of women will not refrain from voicing their opinions.

The State has the duty to improve through legislation the reality that may threaten human dignity. In addition to imposing criminal penalties for abortion, it should dissuade women from having abortions by introducing legislative policies, such as placing more parental responsibility on men, including unwed fathers, through enactment of the “Parental Responsibility Act” since pregnancy concerns not only women but also men; establishing social protection system for unwed mothers; relieving women of the burdens of pregnancy, childbirth, and parenting through formulation of maternity protection policy; providing sufficient support for expectant, married couples; and increasing childcare facilities. Only women can give birth, however, government, society, and men can and should shoulder the financial burden of parenting. Such efforts to enact legislation and to improve the institutional framework will effectively guarantee a fetus the right to life and, at the same time, protect a woman’s right to self-determination.

5. Conclusion

As seen above, the fact that the Self-Abortion Provision does not allow abortion in the early stages of pregnancy or for socioeconomic reasons is not contrary to the rule against excessive restriction. Thus, the Self-Abortion Provision does not unduly restrict a pregnant woman’s

right to self-determination.

The Court already decided on August 23, 2012, that the Self-Abortion Provision was constitutional. Now, less than seven years after that decision, we see no change in circumstances sufficient to warrant its reversal. This is also why we conclude that the declaration of constitutionality of the Self-Abortion Provision must be affirmed.

B. Opinion on the Abortion by Doctor Provision

"I will maintain the utmost respect for human life from the time of conception, even under threat; I will not use my medical knowledge contrary to the laws of humanity." (Declaration of Geneva based on the Hippocratic Oath)

Aside from the claim regarding the constitutionality of the Self-Abortion Provision, the Petitioner raises a separate claim that the Abortion by Doctor Provision (Article 270 Section 1 of the Criminal Act) imposes excessive punishment of not more than two years of imprisonment on a doctor who performs an abortion with the woman's consent. Hence, we will discuss below whether (1) the Abortion by Doctor Provision violates the principle of proportionality between criminal liability and punishment by providing that a doctor who performs the abortion upon the request or with the consent of the pregnant woman, shall be punished by imprisonment for not more than two years; and whether (2) it upsets the balance in the system of penalties and thus contravene the constitutional principle of equality by not setting forth any monetary penalty like the one for abortion with the woman's consent provision in Article 269 Section 2 of the Criminal Act.

1. Whether the Principle of Proportionality Between Criminal Liability and Punishment Is Violated

Defining what act constitutes a crime and affixing the penalty for it are matters of the State's legislative policy. The Court must recognize the

fact that the legislature is vested with broad legislative discretion, or freedom to make law, in relation to those matters because it needs, in principle, to consider a variety of factors, including our history and culture; contemporary conditions; citizens' common values or common sense of justice; the reality and nature of crimes; interests to be protected; and crime prevention effect. Moreover, the Court should not readily conclude that a statutory penalty for a crime is unconstitutional unless that penalty clearly violates the constitutional principles of equality and proportionality —for instance, unless it is grossly disproportionate to the nature of the crime and to the criminal liability of the perpetrator by upsetting the balance in the system of penalties, or unless it goes beyond the degree necessary to serve its original purpose and function (*see* 2009Hun-Ba29, February 24, 2011).

We find that the legislature concluded that a doctor who performed an abortion had a higher degree of criminal liability than a non-medical professional, because the performance of the abortion was contrary to a doctor's duty to provide medical care and advice in order to sustain and protect life and in order to recover and promote health; and that it feared that a doctor would abuse his or her ability to perform an abortion operation and his or her professional medical knowledge in order to make profits for himself or herself. These findings explain why the legislature intended to protect the life of a fetus by prescribing only imprisonment for an abortion by a doctor. That legislative intent is legitimate, and the imposition of imprisonment for the abortion by the doctor is an appropriate means to achieve it.

The Abortion by Doctor Provision provides that a doctor shall be punished only by imprisonment when the doctor performs an abortion upon the request or with the consent of a pregnant woman. However, we cannot find that the Abortion by Doctor Provision prescribes an excessive punishment: the upper limit is not so high because the statutory penalty should not exceed two year imprisonment; and, as for the crime of abortion that is not so serious, the court may impose a deferred judgment or suspended sentence even if it does not reduce the sentence or make

a statutory sentence reduction.

For these reasons, we cannot find that the Abortion by Doctor Provision does not comply with the principle of proportionality between criminal liability and punishment (*see* 2010Hun-Ba402, August 23, 2012).

2. Whether the Principle of Equality Is Violated

We find that an abortion is likely to result in the deprivation of the life of a fetus, regardless of the types of abortion; that most abortions are carried out by healthcare professionals who have knowledge about abortion, because it is difficult for a lay person to perform an abortion; so blameworthiness of healthcare professionals who deprive the life of a fetus by performing an abortion by trade is high, because they should be engaged in the business of protecting fetuses' lives; and that a small fine has little deterrent effect on a doctor who abuses his or her ability to perform an abortion and his or her professional medical knowledge in order to make profits for himself or herself.

Given these findings, we conclude that the Abortion by Doctor Provision, where the legislature did not set forth any monetary penalty like the one for abortion with the woman's consent provision (Article 269 Section 2 of the Criminal Act), does not hinder the balance in the system of penalties and thus does not violate the constitutional principle of equality (*see* 2010Hun-Ba402, August 23, 2012).

3. Sub-Conclusion

The Abortion by Doctor Provision does not violate the principle of proportionality between criminal liability and punishment. It also does not upset the balance in the system of penalties and thus does not contravene the constitutional principle of equality.

The Petitioner claims that the Abortion by Doctor Provision infringes the freedom of occupation. However, because she fails to provide specific information to establish that claim and merely alleges that the freedom of

occupation is infringed as a result of violations of other fundamental rights, we do not review that claim.

C. Conclusion

The Self-Abortion Provision and the Abortion by Doctor Provision do not violate the Constitution.

Justices Yoo Namseok (Presiding Justice), Seo Ki-Seog, Cho Yong-Ho, Lee Seon-ae, Lee Seok-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, and Kim Kiyoung

[Appendix]

List of Legal Representatives

(Omitted)

2. *Case on the Omission of Dispute Settlement under Article III of the Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Cooperation between the Republic of Korea and Japan*

[2012Hun-Ma939, December 27, 2019]

Complainants

Han OO and 2295 others

Represented by Law Firm In and In

Attorneys in charge: Gyeong Su-geun, An Ji-hyeon, Im Wung-chan, and Jeong Eun-a

Respondent

Minister of Foreign Affairs

Decided

December 27, 2019

Holding

All requests for adjudication in this case are hereby dismissed.

Reasoning

1. Case Overview

A. The Complainants are persons who permanently returned to the Republic of Korea after having been mobilized to Sakhalin for forced labor, etc. under the Japanese colonial rule, and their family members, all of whom maintain the nationality of the Republic of Korea. The Complainants have not been paid wages that they received during their forced labor in coal mines, etc. run by companies belonging to Japan, although they compulsorily deposited the wages in the form of postal

savings or postal life insurance in Japan. The Respondent is a state agency that administers affairs relating to diplomacy, economic diplomacy, diplomacy for international economic cooperation, coordination of affairs regarding international relations, treaties and other international agreements, protection of and support for overseas Korean nationals, formulation of policies for overseas Koreans, and research and analysis of international circumstances.

B. The Republic of Korea signed the Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172) with Japan on June 22, 1965.

C. The Complainants have stated that, as to whether the claims for refund and damages that they have against Japan have been extinguished by the aforementioned Agreement, Japan holds that such claims have already been extinguished while the Republic of Korea does not believe that they have been extinguished, which indicates that there exists a dispute between the two countries over the interpretation of the claims. Arguing that the Respondent was not fulfilling its duty to take action to resolve the interpretation dispute in accordance with the procedures specified in Article III of the aforementioned Agreement, the Complainants filed a constitutional complaint in this case on November 23, 2012 seeking confirmation that such omission by the Respondent infringed on their basic rights and thus violated the Constitution.

2. Subject Matter of Review

The subject matter of review in this case is whether the Complainants' basic rights are infringed by the omission by the Respondent that fails to resolve the dispute between Korea and Japan over the interpretation of whether the Complainants' claims against Japan have been extinguished pursuant to Article II, paragraph 1 of the Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172;

hereinafter referred to as the "Agreement in this case"), according to the procedures specified in Article III of the aforementioned Agreement.

The text of the Agreement is as follows:

[Related Provisions]

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

Japan and the Republic of Korea,

Desiring to settle the problem concerning property of the two countries and their nationals and claims between the two countries and their nationals; and

Desiring to promote the economic cooperation between the two countries;

Have agreed as follows:

Article I

1. To the Republic of Korea Japan shall:
   (a) Supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars ($300,000,000) at present computed at one hundred and eight billion yen (¥108,000,000,000), in grants on a non-repayable basis within the period of ten years from the date of the entry into force of the present Agreement. The supply of such products and services in each year shall be limited to such amount in yen as shall be equivalent to thirty million United States dollars ($30,000,000) at present computed at ten billion eight hundred million yen (¥10,800,000,000); in case the supply of any one year falls short of the said amount, the remainder shall be added to the amounts of the supplies for the next and subsequent years. However, the ceiling on the amount of the supply for any one year can be raised by agreement between the Governments

of the Contracting Parties.

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

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

Article II

1. The Contracting Parties confirm that the problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for

in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

2. The provisions of the present Article shall not affect the following (excluding those subject to the special measures which the respective Contracting Parties have taken by the date of the signing of the present Agreement):
   (a) Property, rights and interests of those nationals of either Contracting Party who have ever resided in the other country in the period between August 15, 1947 and the date of the signing of the present Agreement;
   (b) Property, rights and interests of either Contracting Party and its nationals, which have been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 15, 1945.
3. Subject to the provisions of paragraph 2, no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals which are within the jurisdiction of the other Contracting Party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other Contracting Party and its nationals arising from the causes which occurred on or before the said date.

Article III

1. Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.
2. Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the

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

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

Article IV

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

3. Arguments of the Complainants

A. The Complainants were not included in those subject to the Agreement in this case because they did not have the nationality of the Republic of Korea at the time the Agreement in this case was signed. It was only the Korean government's right of diplomatic protection of its people that was agreed upon by the Agreement in this case; Korean people's individual

reparation claims against Japan have not been waived.

Japan insists that the Complainants' claims against Japan have been extinguished pursuant to Article II, paragraph 1 of the Agreement in this case because the Complainants recovered Korean nationality. On the other hand, the Korean government holds that the Complainants' claims remain intact without having been extinguished by the Agreement in this case. This indicates that there exists a dispute between Korea and Japan over the interpretation of the claims.

B. Article III of the Agreement in this case imposes, on the contracting parties, the obligation to settle a dispute relating to the interpretation of the Agreement, by prescribing that any dispute between Korea and Japan concerning the interpretation and implementation of the Agreement shall be settled through diplomatic channels or arbitration proceedings. Therefore, the Korean government has a duty to act to settle a dispute relating to the interpretation of the Agreement in this case, which is based on the Preamble of the Constitution clarifying that the people of Korea uphold the cause of the Provisional Republic of Korea Government; Article 10 of the Constitution proclaiming human dignity and worth and the State's duty to guarantee fundamental human rights; Article 23 of the Constitution governing the guarantee of the right of property; and the principle of administrative protection of confidence as the contracting party to the Agreement in this case.

C. The Korean government is not taking a concrete action to effectively guarantee the basic rights of the Complainants. This administrative omission violates the Constitution.

4. Background of This Case

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

A. How the Agreement in this case was signed, and subsequent process of compensation

(1) The United States Army Military Government in Korea, which was stationed in Korea after Korea's liberation from the Japanese colonial rule, vested former Japanese property in Korea, whether public or private, in the United States Army Military Government in Korea by promulgating Military Government Ordinance No. 33 on December 6, 1945, and such former Japanese property was subsequently transferred to the Korean government by the Initial Financial and Property Settlement Agreement between the Government of the Republic of Korea and the Government of the United States of America that took effect on September 20, 1948, immediately after the establishment of the government of the Republic of Korea.

(2) Meanwhile, the Treaty of Peace signed between the Allied Powers and Japan in San Francisco on September 8, 1951 did not recognize Korea's right to claim damages against Japan. But, paragraph (a) of Article 4 of the Treaty provides that the disposition of property and claims, including debts, between Japan and its nationals and the authorities presently administering the areas freed from the Japanese rule and the residents thereof shall be the subject of special arrangements between such authorities and Japan, and paragraph (b) of Article 4 of the Treaty stipulates that Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by the United States Military Government in any of the aforementioned areas.

(3) In order to dispose of the property and claim, including debts between Korea and its nationals and Japan and its nationals according to the purpose of paragraph (a) of Article 4 of the aforementioned Treaty, the talks for normalization of diplomatic relations between Korea and Japan began in full swing, with preliminary talks on October 21, 1951 and the main meeting of the first Korea-Japan Talks on February 15, 1952. Following seven main meetings and subsequent dozens of preliminary talks, political talks, meetings by sub-committee, etc., four side agreements—the Agreement in this case, the Agreement on Fisheries between the Republic of Korea and Japan, the Agreement between the Republic of Korea and Japan concerning the Legal Status and Treatment

of the Korean Residents in Japan, and the Agreement concerning Cultural Assets and Cultural Cooperation between the Republic of Korea and Japan —were signed on June 22, 1965.

(4) At the 1st Korea-Japan Talks (February 15–April 25, 1952), the Korean government submitted 'eight items of the Outline of the Claims of the Republic of Korea against Japan' (hereinafter referred to as the "eight items"), which were as follows: (i) returning the old books, art works, antiques, other national treasures, original copies of maps, and 90 percent gold and silver transferred from Korea; (ii) repaying the Japanese government' debts owed to the Government-General of Chosen as of August 9, 1945; (iii) returning the money transferred or wired from Korea after August 9, 1945; (iv) returning the property in Japan of corporations having headquarters or main offices in Korea as of August 9, 1945; (v) settling the claims of Korean corporations or natural persons against Japan and its people on Japanese government bonds, public bonds, banking notes, and accounts receivable of the drafted Koreans, and other claims belong to Koreans; (vi) legally recognizing the stocks of Japanese corporations or other securities possessed by Korean corporations or natural persons; (vii) returning the proceeds generated from the aforementioned property or claims; and (viii) commencing the aforementioned return and settlement immediately after the conclusion of the Agreement in this case, and completing them within no later than six months.

(5) However, the 1st Korea-Japan Talks failed as Japan insisted on its property claims against Korea, as well as its people's property claims, in response to the eight items claimed above, and no practical discussions on the claims took place until the 4th Korea-Japan Talks due to a difference of opinion over the issues of Dokdo and the Peace Line, the improper remark of Kubota Kanichiro, chief delegate of Japanese government, that "36 years of Japanese colonial rule was beneficial to Korea", and the political situations, etc. between the two countries.

(6) It was not until the 5th Korea-Japan Talks (October 25, 1960–May 15, 1961) that practical discussions on the eight items took place. Japan's position on each of the eight items was as follows: regarding item (i), the

90 percent gold and silver were transferred under legitimate procedures and thus there was no legal basis for their return; regarding items (ii), (iii), and (iv), the property, etc. to which Korea could claim ownership were limited to those on or after December 6, 1945, when U.S. Military Government Ordinance No. 33 was promulgated; and regarding item (v), Japan strongly opposed Korea raising the issue of compensation for individual damages and demanded that Korea provide an accurate basis, such as the specific number of persons drafted for labor or military service or the evidential materials thereof. As such, discussions on the first five of the eight items progressed at the claims committee of the 5th Korea-Japan Talks until the Talks were suspended by the May 16 military coup d'etat in 1961. However, the two countries only confirmed their fundamental differences in perception and failed to actually close the gap between the two opinions.

(7) After the 6th Korea-Japan Talks resumed on October 20, 1961, the two sides sought a political approach, judging that detailed discussions on the claims were only time-consuming and the settlement thereof was remote. At the Foreign Ministers' meeting in March 1962 following the talks between then Korean President Park Chung-hee and then Japanese Prime Minister Hayato Ikeda on November 22, 1961, it was agreed that the amount demanded by Korea and the amount Japan was willing to pay would be informally presented. As a result, the difference between them was identified as Korea demanded US$700 million in pure repayment while Japan was willing to pay US$74,000 in pure repayment and US$200 million in loans.

(8) Under these circumstances, Japan first proposed to raise the sum to a considerable level in the form of grants and loans for economic cooperation, in exchange for abandoning the right to claims, arguing that the pure repayment of claims would not only require a thorough examination of legal and factual relations but would also reduce the amount by limiting its applicability to the area below the 38th parallel, which Korea would not be able to accept after all. In response, Korea said at first that, although it wanted the pure repayment of claims, it would seek to settle

them in the form of pure repayment and grants to address this issue from a broader perspective. Thereafter, retreating from its initial position, Korea proposed that, within the boundaries of settling claims, payment would take the form of pure repayment and grants, by specifying only the total amount without indicating the precise amount for each category.

(9) Afterwards, Kim Jong-pil, then Director of the Korean Central Intelligence Agency, had a meeting with then Japanese Prime Minister Hayato Ikeda and Foreign Minister Masayoshi Ohira in Japan, and at the meeting with Foreign Minister Ohira on November 12, 1962, both sides agreed basically to an agreement to be proposed to their governments regarding the amount of claims to be settled, payment categories and conditions, etc. Following a more fine-tuning process, then Foreign Minister Lee Dong-won and then Japanese Foreign Minister Etsusaburo Shiina agreed to the Agreement between Korea and Japan concerning the Settlement of Claims and Economic Cooperation on April 3, 1965, when the 7th Korea-Japan Talks were in progress. On June 22, 1965, the Agreement in this case was concluded, which states that Japan shall pay a designated amount to Korea in the form of grants and loans without specifying the category and that the problems concerning property, rights and interests of the two contracting parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals shall be settled completely and finally.

(10) Thereafter, the Korean government enacted the Act on Operation and Management of Claim Funds on February 19, 1966 (repealed by Act No. 3613 on December 31, 1982) to provide a legal basis for private compensation among grants, and then enacted the Act on Reporting of Civil Claims against Japan on January 19, 1971 (repealed by Act No. 3614 on December 31, 1982) and received applications for compensation. However, the beneficiaries were limited to the deceased from among the persons who had been forcibly drafted for labor or military service under the Japanese colonial rule, and to the holders of civil claims, such as private bonds or bank deposits, who had been discussed and known as the holders of civil claims against Japan during the aforementioned talks.

Afterwards, the Act on Compensation for Civil Claims against Japan was enacted on December 21, 1974 (repealed by Act No. 3615 on December 31, 1982), pursuant to which a total of 9,187.693 million won was paid from July 1, 1975 to June 30, 1977 (2006Hun-Ma788, August 30, 2011).

Meanwhile, the issue of Sakhalin Koreans was not dealt with in the process of signing the Agreement in this case.

B. Positions of Korea and Japan on the issue of claims relating to Sakhalin Koreans

(1) Japan came to rule South Sakhalin in accordance with the 1905 Treaty of Portsmouth after winning the Russo-Japanese War in 1904 and took Koreans there and forced them to work in coal mines or munitions facilities by enacting the National Mobilization Law in 1938. After the War ended, Sakhalin was incorporated into the Soviet Union, which caused these Koreans to remain in Sakhalin without returning to Japan.

Japan compelled the forced laborers to deposit their wages in the form of postal savings, postal life insurance, etc. on the pretext of encouraging savings, etc. The laborers could not receive such deposited savings, etc. in postwar Sakhalin.

(2) On September 25, 2007, some of the Koreans remaining in Sakhalin filed a lawsuit regarding postal savings, etc. that they had forcibly deposited but could not get back. In the lawsuit, Japan insisted that the issue of claims between Korea and Japan and of their nationals was settled completely and finally in accordance with the Agreement in this case; although the Koreans remaining in Sakhalin who had claims against Japan, and their heirs did not hold Korean nationality in 1965, they permanently returned to Korea afterwards and acquired Korean nationality, from which point of time, their claims against Japan were all extinguished by the Agreement in this case. On the contrary, the Korean government stated its position, to the effect that the claims of the Koreans remaining in Sakhalin were not extinguished by the Agreement in this case, and furthermore, it was unjust to interpret that their claims

were extinguished just because they acquired Korean nationality after the signing of the Agreement in this case.

5. Review

A. Constitutional complaint against administrative omission

A constitutional complaint against an omission by the administrative power is permitted only when, although a duty to act derived from the Constitution is specifically defined for the holder of governmental power, and based on this, the bearer of basic rights is entitled to request an administrative action or the exercise of governmental power, the holder of governmental power neglects such duty. It can be viewed that the above-mentioned phrase "a duty to act derived from the Constitution is specifically defined for the holder of governmental power" comprehensively includes cases where such duty is (i) provided in the Constitution in express terms, (ii) derived from interpreting the Constitution, and (iii) specifically provided in statutes (2006Hun-Ma788, August 30, 2011).

B. The Respondent's duty to act

A constitutional complaint becomes unjustifiable if the holder of governmental power does not have a duty to act as stated above. Thus, it will be reviewed whether the aforementioned duty to act exists for the Respondent in this case.

The Agreement in this case is a treaty signed and promulgated under the Constitution, and holds the same effect as domestic laws pursuant to Article 6 (1) of the Constitution. Yet, Article III, paragraph 1 of the Agreement provides that "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels," and paragraph 2 of the same Article stipulates that "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed

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

According to the aforementioned provisions governing the settlement of disputes, where a dispute between Korea and Japan arises over the interpretation of the Agreement in this case, the respective governments shall settle it first through diplomatic channels and then through arbitration. Thus, it will be examined whether this falls under the aforementioned "cases where, such duty is ... (iii) specifically provided in statutes."

The Complainants were forcibly mobilized during the Japanese colonial rule and compelled to work in coal mines, etc. run by companies belonging to Japan. Although they compulsorily deposited wages they received in return for their labor, in the form of postal savings, etc., they have yet to get their wages back. Japan refuses to return the wages or pay damages to the Complainants, arguing that the Complainants' claims for the above deposits and damages have all been extinguished by the Agreement in this case. On the other hand, the Korean government takes the position that the Complainants' claims still remain because they have not been settled by the Agreement in this case, as examined above. After all, a dispute between Korea and Japan has occurred over the interpretation of the Agreement in this case.

Article 10 of the Constitution of Korea states that "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." The human dignity herein is a supreme constitutional value and state norm binding on all state agencies, which means that the State is entrusted with the

duty and task to realize human dignity. Therefore, human dignity is not only a 'limit to state power', which ensures the right to defense to individuals who should be protected from infringement by the State, but is also a 'task of state power' for which the State should bear the duty to protect its people when their human dignity is threatened by a third party.

Moreover, Article 2 (2) of the Constitution provides that "It shall be the duty of the State to protect citizens residing abroad as prescribed by Act." Regarding this duty to protect citizens residing abroad, the Constitutional Court has already recognized that the State's duty to protect citizens residing abroad is derived from the Constitution, by deciding that "the protection that citizens residing abroad receive during their stay in the country of their residence according to the State's duty to protect such citizens as provided in Article 2 (2) of the Constitution refers to diplomatic protection, which is offered by the State in its relationship with the citizens' country of residence for their fair treatment in all areas guaranteed by treaties, other generally accepted international laws and rules, and statutes of the country of residence concerned, and support in legal, cultural, educational and other various areas that is specially determined and provided by law in political consideration for citizens residing abroad" (89Hun-Ma189, December 23, 1993).

Meanwhile, the Constitution declares in the Preamble that it upholds the "cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919." Therefore, the duty to restore the damaged human dignity and worth of the persons who were compulsorily mobilized and forced to labor but were not even rewarded for their labor during the Japanese colonial rule, when the State could not perform its most basic duty to protect the safety and lives of its people although this had happened before the enactment of the Constitution, is one of the most fundamental duties that the present government upholding the cause of the Provisional Government of the Republic of Korea should bear for its people.

In light of the aforementioned provisions of the Constitution and

Article III of the Agreement in this case, the Respondent's duty to seek dispute settlement pursuant to Article III of the Agreement stems from a constitutional mandate to assist and protect its people, who had their human dignity and worth seriously impaired by Japan's organized and continued unlawful acts, in realizing their claims for the property they have yet to get back and for damages caused by the unlawful acts. Since the failure to perform this duty might seriously infringe on the basic rights of the Complainants, the Respondent's duty to act can be seen as a duty to act derived from the Constitution and specifically provided in statutes.

Furthermore, although the Korean government did not perform any act to directly violate the basic rights of the Complainants, it is hard to deny that the Respondent has a specific duty to act to remove the current disruption in the realization of the Complainants' damage claims against Japan and the restoration of their dignity and worth as human beings, noting that the government is also liable for such disruption because it concluded the Agreement in this case by using the inclusive term 'all claims' without clarifying the substance of claims.

C. Non-exercise of governmental power

Even if it can be recognized that the Respondent has a duty to act derived from the Constitution, a constitutional complaint against an omission by the Respondent is unjustified if the Respondent is fulfilling the duty. The fulfillment of the duty to act by the Respondent indicates only the act of fulfillment itself; it does not mean guaranteeing even the result the Complainants want, through the act.

According to the records, however, it is recognized that the Respondent has endeavored to settle the issue of claims of Sakhalin Koreans by utilizing various diplomatic channels stated below. In other words, in its oral statement dated June 3, 2013, the Korean government expressed its intent to suggest to Japan consultation between the Korean and Japanese diplomatic authorities under Article III of the Agreement in this case

because the two countries had conflicting positions on the issue of Sakhalin Koreans' claims against Japan. Through director general-level meetings dated November 27, 2014, March 16, 2015, September 18, 2015, and December 15, 2015 respectively and working-level consultation dated January 21, 2016, the Korean government urged Japan to make a sincere response to its request for consultation, as suggested in the oral statement dated June 3, 2013 (Note Nos. 32, 35, 39, 41, and 42), and it has never withdrawn such stance up to date.

Considering the fact that the Respondent suggested the commencement of diplomatic consultation to the Japanese government through the oral statement dated June 3, 2013, as a dispute settlement procedure under Article III of the Agreement in this case, and that the Respondent requested Japan to make a sincere response to the aforementioned suggestion on several occasions, even if this has not produced enough tangible results, it cannot be viewed that the Respondent has not been fulfilling the duty to act imposed on the Respondent. Even if the Respondent did not make as positive efforts as the Complainants desired, it is recognized that the Respondent has considerable discretion as to when and how to implement dispute settlement procedures under Article III of the Agreement in this case, when considering the characteristics of diplomatic acts that deal with the relationship between countries in the international environment where values and laws differ from country to country and considering that Article III, paragraphs 1 and 2 of the Agreement in this case all require diplomatic acts. Under these circumstances, it can hardly be viewed that the Respondent is in a state of omission of failing to implement dispute settlement procedures under Article III of the Agreement in this case.

If so, it cannot be said that the Respondent has failed to fulfill its duty to act in relation to dispute settlement procedures under Article III of the Agreement in this case even if the Respondent has not been as rapid and active in the issue of the Complainants' claims against Japan as the Complainants expected. Therefore, the request for adjudication in this case, which insists on the violation of the Constitution on the premise of the Respondent's non-fulfillment of the duty to act, is unjustifiable.

6. Conclusion

It is therefore ordered that all requests for adjudication in this case be unjustifiable and thus dismissed, as specified in the holding. This decision is based on the consensus of all Justices, except for the concurring opinion of Justice Lee Jong-seok as presented in Section 7 below.

7. Concurring Opinion of Justice Lee Jongseok

I concur with the conclusion that all requests for adjudication in this case are unjustifiable, but I have a different opinion from that of the Court on the reasons therefor. The following is my opinion:

A. Eligibility of administrative omission as the subject of constitutional complaint

Although the non-exercise as well as exercise of governmental power can be subject to a constitutional complaint in accordance with Article 68 (1) of the Constitutional Court Act, a person whose basic rights are infringed due to the non-exercise of governmental power is entitled to file a constitutional complaint. Thus, a constitutional complaint against an omission by the administrative power is permitted only when, although a duty to act derived from the Constitution is specifically defined for the holder of governmental power, and based on this, the bearer of basic rights is entitled to request an administrative action or the exercise of governmental power, the holder of governmental power neglects such duty. The phrase "a duty to act derived from the Constitution is specifically defined for the holder of governmental power" herein means cases where such duty is provided in the Constitution in express terms, is derived from interpreting the Constitution, or is specifically provided in statutes (*see* 2003Hun-Ma898, October 28, 2004; 2016Hun-Ma795, March 29, 2018). In addition, the holder of governmental power's specific duty to act means the duty "for citizens, the bearer of basic rights" (*see* 89Hun-Ma163, September 16,

1991; 98Hun-Ma206, March 30, 2000, etc.).

B. Whether it is recognized that the Respondent has a constitutional duty to act to settle a dispute according to the procedures specified in Article III of the Agreement in this case

(1) Firstly, it will be examined whether a "specific duty to act derived from the Constitution" can be inferred from the provisions of Article 10, Article 2 (2), and the Preamble of the Constitution themselves or the interpretation thereof.

Article 10 of the Constitution, which stipulates the "duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals," and Article 2 (2) of the Constitution, which states the "duty of the State to protect citizens residing abroad as prescribed by Act," merely define a general and abstract duty of the State to guarantee the basic rights of citizens and protect them, and the State's duty to perform a specific act for its citizens is not derived from these provisions themselves. Although the Preamble of the Constitution prescribes guiding ideas and principles concerning the establishment of state tasks and order, as well as embodying the national consensus on the State's basic order of values, and has the highest normative power and thus serves as a guideline to statutory interpretation and legislation, the State's specific duty to act for its people cannot be derived from the Preamble of the Constitution itself. For this reason, the State's duty to perform a specific act for its people is neither derived from the phrase of the Preamble of the Constitution, "uphold the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919" (*see* 97Hun-Ma282, May 28, 1998; 98Hun-Ma206, March 30, 2000; 2004Hun-Ma859, June 30, 2005, etc.). Therefore, however serious and urgent the state of infringement on the basic rights of the Complainants may be, the State's specific duty to act for the Complainants cannot be drawn from Article 10, Article 2 (2), and the Preamble of the Constitution alone.

(2) Next, it will be reviewed whether the provision concerning dispute settlement procedures prescribed in Article III of the Agreement in this case falls under cases where the above mentioned "duty to act is specifically provided in statutes," and thus, a "duty to act derived from the Constitution" can be inferred therefrom.

(a) Firstly, a "specific duty to act prescribed in statutes" in a case where a duty to act is specifically provided in statutes means a case where the content that the State shall bear a specific duty to act for its people is included in statutes (98Hun-Ma206, March 30, 2000). This is a premise also required, as a matter of course, to acknowledge the possibility of infringement on basic rights or the causal relations thereof in a constitutional complaint claiming that basic rights have been infringed by the State's failure to fulfill a specific duty to act as stated above.

Basically, if the granting of a specific right to the people is included in Acts enacted by the National Assembly or administrative laws and rules binding on the people, this can be seen to fall under cases where a "duty to act is specifically provided in statutes." In the adjudication of constitutional complaints against omissions by the administrative power, the Constitutional Court has acknowledged specific duties to act when the specific duty to act that is at issue in the statute concerned is defined as the administrative power's binding act on the people (*see* 96Hun-Ma246, July 16, 1998; 2003Hun-Ma851, May 27, 2004) or when such duty, though defined as a discretionary act, should be interpreted as a binding act for the reason that the non-exercise of governmental power resulted in a serious infringement on the basic rights of the complainants, etc. (*see* 94Hun-Ma136, July 21, 1995). On the contrary, when the duty is defined as an administrative agency's pure discretionary act, the Constitutional Court has judged that a specific duty to act for the complainants cannot be acknowledged (2004Hun-Ma859, June 30, 2005).

However, if treaties and other diplomatic documents like the Agreement in this case stipulate the details and procedures as to how to settle disputes between the contracting parties, this is basically premised on

mutual accountability between the two parties, which means that even if a specific duty is stated therein, it can only be demanded by a contracting party from the other party. Therefore, to enable the people to request their government to 'fulfill the rights and duties it may hold against the other country based on the treaty concerned,' the treaty must specifically include the phrase that 'the people have the right to make such request.' As long as there is no such explicit phrase in the treaty, it should be construed that the fact that the treaty deals with the legal relationship of the people alone does not give rise to the right to request the government to take procedural measures specified in the treaty.

Since the Agreement in this case concerns the issue concerning "property, rights and interests" of the two contracting parties and their nationals as well as "claims" between the contracting parties and their nationals (Article II, paragraph 1 of the Agreement in this case), it can be viewed that a "dispute" has occurred over whether or not Japan's compensation for forced labor victims in Sakhalin such as the Complainants in this case is subject to the Agreement in this case. However, unless the Agreement in this case grants the people of the country concerned the right to request dispute settlement procedures under Article III of the Agreement in this case, a specific right to request their government to implement dispute settlement procedures under the Agreement in this case cannot be recognized just because it relates to the basic rights of the Complainants.

Therefore, the State's specific duty to act for its people cannot be drawn from the contents of the Agreement in this case, which is the same even when comprehensively considering the Agreement in this case and Article 10, Article 2 (2), and the Preamble of the Constitution (*see* the dissenting opinion of Justices Lee Gang-guk, Min Hyeong-gi, and Lee Dong-heup in 2006Hun-Ma788, August 30, 2011).

(b) Next, given the contents of Article III of the Agreement in this case themselves, the 'duty to perform a diplomatic act pursuant to Article III to settle a dispute over the interpretation of the Agreement in this

case' cannot be construed as a 'duty' to perform a 'specific' act, either.

1) Article III of the Agreement in this case provides that "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels" (paragraph 1) and that "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of ... from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute" (paragraph 2). Yet, no provision states that a dispute 'must' be settled through diplomatic procedures or a deadlock in diplomatic settlement 'must' be resolved through arbitration proceedings. The phrase "shall be settled through diplomatic channels" cannot be interpreted as meaning more than a diplomatic pledge between the two contracting parties to settle disputes diplomatically. The phrase "shall be referred for decision to an arbitration board" also becomes effective 'upon receipt of a note requesting arbitration of the dispute,' and nowhere here can be found the grounds to interpret that referral for arbitration is 'compulsory.' In conclusion, it cannot be interpreted that Article III paragraphs 1 and 2 of the Agreement in this case contain the 'duty' to seek diplomatic settlement procedures or the 'duty' to seek arbitration proceedings when a dispute cannot be settled diplomatically (*see* the dissenting opinion of Justices Lee Gang-guk, Min Hyeong-gi, and Lee Dong-heup in 2006Hun-Ma788, August 30, 2011).

2) Furthermore, even if 'diplomatic settlement' and 'referral for arbitration' specified in Article III of the Agreement in this case are considered somewhat compulsory in nature, it cannot be viewed either that this implies a 'specific' act.

Even if the 'duty to settle a dispute through diplomatic channels' can be derived from the Agreement in this case, it is nothing more than a general and abstract duty of the State like the State's duties to guarantee basic rights; protect nationals residing abroad; endeavor for the inheritance and development of traditional culture and the promotion of national

culture; endeavor to improve the welfare of the physically disabled, etc.; and protect public health, although it is a duty sought by the State continuously. This general and abstract duty of the State is in itself not a 'specific' duty to act, that is to say a duty to act which contains 'specific details.' Thus, even if such duty is stated in the Constitution in express terms, it cannot be transformed into a 'specific' duty to act that the people can directly request the State to fulfill (*see* the dissenting opinion of Justices Lee Gang-guk, Min Hyeong-gi, and Lee Dong-heup in 2006Hun-Ma788, August 30, 2011).

In addition, we must acknowledge that, due to the special characteristics of diplomatic issues, the 'duty of diplomatic settlement' falls basically within the realm of the administration that has the authority to judge, formulate, and execute policies on political and diplomatic acts. These highly political and diplomatic characteristics make it hard to establish objective standards for reviewing judicially by whom or how and to what extent the duty is fulfilled and whether the duty is completely fulfilled. Thus, it is also very hard for the Constitutional Court to judicially evaluate whether the duty has been unfulfilled eventually. In other words, it is very difficult to set judicial standards for evaluating whether the Respondent has fulfilled its duty of diplomatic settlement, such as whether the Respondent endeavored for diplomatic settlement at first but is not doing so now after the lapse of over 50 years since the signing of the Agreement in this case, or the Respondent's efforts have not reached a level satisfactory to the Complainants, or no results satisfactory to the Complainants have been produced despite the Respondent's efforts. Accordingly, we can hardly find or determine clear standards for judging whether the duty to refer a dispute to arbitration under Article III, paragraph 2 of the Agreement in this case has been fulfilled or not, including when such duty should be seen to have arisen. It is indeed questionable whether this 'diplomatic duty' can be said to be a "specific" duty to act that the people may request the State to fulfill. Requesting the fulfillment of a duty by considering it as a specific duty to act merely because it is stated in the treaty concerned is nothing but the Constitutional

Court just vaguely ordering the government to 'make diplomatic efforts,' without determining the details of the specific duty.

Furthermore, if the Respondent implemented dispute settlement procedures under the Agreement in this case as ordered by the Constitutional Court but this has rather brought disadvantageous results to the Complainants and our country, it is also questionable whether, even at that time, we would evaluate that the Respondent "made diplomatic efforts" or that the basic rights of the Complainants were not infringed since dispute settlement procedures were implemented anyhow. After all, the Constitutional Court's order to make diplomatic efforts under the Agreement in this case creates only the possibility of infringing on the administration's authority to judge, formulate, and execute policies on diplomatic acts contrary to the principle of separation of powers under the Constitution, without the details of the duty to act determined specifically, while it is also hard to predict that any result helpful to the Complainants and the State as a whole will certainly be produced.

C. Sub-conclusion

The Complainants are forced labor victims in Sakhalin who were compelled to work there on the pretext for waging a war of aggression during the Japanese colonial rule but could return to the Republic of Korea after a long period of time and with considerable difficulty, or their family members. Any citizen of the Republic of Korea will sympathize with the desperateness of the Complainants who have not received any sincere apology nor compensation from Japan. It is also all Korean citizens' desperate hope that the Korean government will make national and diplomatic efforts to resolve this issue. However, the methods of settling disputes over the interpretation and implementation of the Agreement in this case through diplomatic channels are very diverse and the scope of discretion of the administration is considerably large. For this reason, even if the Constitutional Court compulsorily imposes the duty to 'make diplomatic efforts' on the administration, this can hardly be seen to have

more than a vague and declarative meaning. If the Constitutional Court imposes the duty to perform a specific act, such as implementation of arbitration proceedings specified in Article III, paragraph 2 of the Agreement in this case, on the administration in relation to the Complainants, this will rather create the risk that the Constitutional Court may, beyond its authority vested by the Constitution, infringe on the authority of the administration that is authorized to judge, formulate, and execute policies on political and diplomatic acts. If so, the Constitutional Court cannot but confirm that the State has a general and abstract duty with respect to the request for adjudication in this case.

As reviewed above, since it cannot be recognized that the Respondent has a constitutional duty to act as the Complainants insist, the omission by the Respondent that the Complainants are contesting cannot be viewed as the 'non-exercise of governmental power' that is subject to a constitutional complaint. Therefore, the Complainants' requests for adjudication on this are all unjustified.

Justices Yoo Namseok (Presiding Justice), Lee Seon-ae, Lee Suk-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison

3. Case on Announcement of Agreement on the "Comfort Women" Issue

[2016Hun-Ma253, December 27, 2019]

Complainants

The same as listed in Appendix 1

The Complainants' counsel The same as listed in Appendix 2

Respondent

Minister of Foreign Affairs

Counsel Bae, Kim & Lee LLC

Attorneys-at-Law Han Wi-su, Oh Jeong-min, and Moon Byeong-seon

Decided

December 27, 2019

Holding

1. The requests for adjudication on this case filed by the Complainants Gang ○○, Gil ○○, Kim ○○, Kim ◎◎, Park □□, Park △△, Park ▽▽, Lee ▽▽, Lee ◇◇, Lee ◎◎, Lee ▷▷, Jung ○○, Ha ○○, Ham ○○, Nam ○○, Hong ○○, Kim ◁◁, Seo ○○, Song ○○, Yang ○○, Wang ○○, Lee ◁◁, Lee ♤♤, Lim ○○, Lim □□, and Lim △△ are all dismissed.

2. The adjudication proceedings involving the other Complainants have been concluded as stated in Appendix 3.

Reasoning

1. Overview of the Case

Complainants Nos. 1 through 29 are the "comfort women" victims of the Japanese military (hereinafter referred to as "'comfort women'

victims”) who were forced to serve as “comfort women” sexually abused by the Japanese soldiers; Complainants Nos. 30 and 31 are the children of the surviving “comfort women” victims; and Complainants Nos. 32 through 41 are the children of the “comfort women” victims who passed away.

On March 27, 2016, the Complainants filed a constitutional complaint to request the confirmation of unconstitutionality of the agreement announced at a joint press conference by the Foreign Ministers of Korea and Japan on December 28, 2015, claiming that the details of the agreement infringe upon their human dignity and value.

2. Subject Matter of Review

The subject matter of review in this case is whether the “details of the agreement on the issue of ‘comfort women’ victims jointly announced on December 28, 2015, by the Respondent and the Minister for Foreign Affairs of Japan (hereinafter referred to as the “Agreement”)” violate the Complainants’ basic rights.

The Agreement posted on the official website of the Ministry of Foreign Affairs of the Republic of Korea is as follows.

[Remarks at the Joint Press Availability]

1. Good afternoon. Today, I had in-depth consultations with Minister Kishida on matters of mutual interest, including the “comfort women” issue.

2. First of all, I would like to thank Minister Kishida for taking the time out of his busy schedule to attend this meeting today.

3. As you are well aware, this year marks the 50th anniversary of the normalization of diplomatic ties between Korea and Japan. My government has been sparing no efforts to work out an early resolution of the “comfort women” issue, the most crucial history-related issue between Korea and Japan, in this historic year.

4. In particular, thanks to the political decision made by President Park and Prime Minister Abe at the November 2nd summit to "accelerate consultations to settle the 'comfort women' issue at the earliest possible date, bearing in mind that this year marks a turning point in the relations between the two countries as we celebrate the 50th anniversary of the normalization of diplomatic ties," bilateral consultations have been further expedited centering around the Director-General level meetings as a major channel.

5. Minister Kishida and I held an intensive round of consultations today, based on the results of the consultations held through various channels, including yesterday's 12th Director-General level meeting. As a result, we have been able to reach an agreement acceptable to both sides. So, here today, we would like to announce the results of our meeting today.

6. First, Minister Kishida will state the position of the Government of Japan on today's agreement on behalf of the Government of Japan, and then, I will share with you the position of the Government of the Republic of Korea.

First of all, I am pleased to visit Seoul at the end of this year, which marks the 50th anniversary of the normalization of diplomatic ties between Japan and Korea, and to have an opportunity to hold a Japan-Korea Foreign Ministers meeting of great importance with Minister Yun Byung-se.

The issue of "comfort women" has been intensively discussed so far between Japan and Korea, including through the Director-General level meetings. Based on those outcomes, the Government of Japan states the following.

① The issue of "comfort women" was a matter which, with the involvement of the military authorities of the day, severely injured the honor and dignity of many women. In this regard, the Government of Japan painfully acknowledges its responsibility. Prime Minister Abe, in

his capacity as Prime Minister of Japan, expresses anew sincere apologies and remorse from the bottom of his heart to all those who suffered immeasurable pain and incurable physical and psychological wounds as “comfort women.”

② The Government of Japan has been seriously dealing with this issue, and on the basis of such experience, will take measures with its own budget to heal the psychological wounds of all the former “comfort women.” More specifically, the Government of the Republic of Korea will establish a foundation for the purpose of providing assistance to the former “comfort women.” The Government of Japan will contribute from its budget a lump sum funding to this foundation. The Governments of Korea and Japan will cooperate to implement programs to restore the honor and dignity and to heal the psychological wounds of all the former “comfort women.”

③ Along with what was stated above, the Government of Japan confirms that through today’s statement, this issue will be finally and irreversibly resolved on the condition that the above-mentioned measures are faithfully implemented. Also, the Government of Japan, along with the Government of the Republic of Korea, will refrain from mutual reprobation and criticism in international forums, including at the United Nations in the future.

Regarding the above-mentioned budgetary measure, the expected amount will be around 1 billion Yen. What I have stated is the outcome of consultations held under the instruction of the leaders of both countries, and I am confident that Japan-Korea relations will thereby enter a new era.

Thank you.

⇒ Remarks Made by Minister Kishida:

7. Now, I would like to state the position of the Government of the Republic of Korea on today's agreement.

The issue of "comfort women" has been intensively discussed so far between Korea and Japan, including through the Director-General level meetings. Based on those outcomes, the Government of Korea states the following.

① The Government of the Republic of Korea takes note of the statement by the Government of Japan and the measures leading up to the statement, and, along with the Government of Japan, confirms that through today's statement, this issue will be finally and irreversibly resolved on the condition that the above-mentioned measures stated by the Government of Japan are faithfully implemented. The Government of the Republic of Korea will cooperate in the measures to be taken by the Government of Japan.

② The Government of the Republic of Korea is aware of the concern of the Government of Japan over the memorial statue placed in front of the Embassy of Japan in Seoul with respect to the maintenance of the peacefulness and respectability of its mission, and will make efforts to appropriately address the concern, including through consultations with relevant groups on possible responses.

③ The Government of the Republic of Korea, along with the Government of Japan, will refrain from mutual reprobation and criticism in international forums, including at the United Nations in the future, on the condition that the measures stated by the Government of Japan are faithfully implemented.

8. This concludes the position of the Government of the Republic of Korea.

9. I am very pleased to announce here today that, working together, Minister Kishida and I have finally wound up the long and difficult negotiations on this issue before the end of this year, the 50th

anniversary of the normalization of diplomatic ties between Korea and Japan.

10. I sincerely hope that the measures to follow up on today’s agreement will be faithfully implemented and thereby restore the honor and dignity and heal the psychological wounds of the victims who have had to endure so many years of agony.

11. It is also my sincere desire that, with the conclusion of the negotiations on the “comfort women” issue, the most challenging and difficult issue over history between Korea and Japan, we will be able to open a new chapter in the Korea-Japan relations in the new year with a new spirit of cooperation.

12. Thank you.

3. Complainants' Arguments

A. If the Complainants were to file a lawsuit against the Government of Japan seeking damages, the Agreement could be cited by Tokyo as a ground for avoiding its obligations. Given such possibility, the Agreement is tantamount to the exercise of governmental power, which could have direct implications for the Complainants’ basic rights, and thus shall be subject to adjudication on a constitutional complaint.

B. In the Agreement, the meaning of the wording “... confirms that this issue will be finally and irreversibly resolved” is vague. If, however, this expression indicates that: (i) the Korean government would abdicate its duty to provide diplomatic protection for the Complainants, that would mean that the Respondent not only failed to comply with its concrete duty to act in realizing the claims for damages of “comfort women” victims, but also actually made it more difficult for them to realize their claims, thereby violating their right to property, their right to personality, their right to request diplomatic protection, and, potentially, other rights. Meanwhile, if this phrase indicates that: (ii) the Complainants’ claims for

damages would be extinguished, that would amount to expropriatory or quasi-expropriatory encroachments on their claims for damages, which constitute infringement of their property rights.

C. The Agreement violates the Complainants' right to property, their right to personality, and other rights, in that it fails to include Japan's acknowledgement of its legal obligations, sincere apology, and full payment of damages; and cannot be considered as the fulfillment of its duty to move toward resolving disputes under Article III of the "Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between the Republic of Korea and Japan" (hereinafter referred to as the "Korea-Japan Claims Agreement"). In addition, the Respondent's outright exclusion of the Complainants in the course of negotiation to reach the Agreement infringed upon the Complainants' procedural right of participation as well as their right to be kept informed.

4. Review

A. Existence of a dispute regarding interpretation of the claims for damages of "comfort women" victims and of the Korea-Japan Claims Agreement.

On the issue of the alleged unconstitutionality of omission by the Respondent, which is its failure to resolve the dispute between Korea and Japan in accordance with the process set forth in Article III of the Korea-Japan Claims Agreement, over interpretation as to whether the claims for damages of "comfort women" victims against Japan had been extinguished under Article II, paragraph 1 thereof, the Constitutional Court of Korea held as follows (see 2006Hun-Ma788, August 30, 2011):

While Japan's position is that the claims for damages of "comfort women" victims were extinguished by the Korea-Japan Claims Agreement, the Korean government's view is that the claims resolved under the Korea-Japan Claims Agreement did not involve the claims for damages of

“comfort women” victims. Therefore, such conflicting interpretation constitutes a “dispute” set forth in Article III of the Korea-Japan Claims Agreement. The harm inflicted upon the “comfort women” victims is unprecedented and unique, as it stemmed from forced mobilization and sexual slavery by Japan and its military under their supervision; and the claims for damages of “comfort women” victims against Japan for the crimes against humanity perpetrated extensively by Japan are not just part of their property rights enshrined in the Constitution, but also imply the post-facto restoration of the human dignity, sense of self-worth, and bodily freedom which were ruthlessly and repeatedly violated. Therefore, anything impeding the realization of said claims is not just confined to the constitutional right to property; it is also directly associated with the infringement of fundamental dignity and value of human beings. In accordance with Article III of the Korea-Japan Claims Agreement, the Respondent’s duty to pursue a dispute resolution process is a duty to act which originates from the Constitution and is expressly stipulated in statutes. Therefore, an omission, which is, in this case, a failure to resolve the dispute over the interpretation of the Agreement through the process set forth in Article III of the Korea-Japan Claims Agreement, constitutes an infringement of the “comfort women” victims’ basic rights, in contravention of the Constitution.

B. The Agreement and progress on follow-up measures

(1) In a separate Korea-U.S.-Japan trilateral summit held on the sidelines of the Nuclear Security Summit on March 25, 2014, Korea and Japan agreed to initiate Director-General level consultations to discuss the “comfort women” issue. Twelve rounds of bilateral consultations were held from April 16, 2014 until the day before the announcement of the Agreement on December 28, 2015 between the Director-General for Northeast Asian Affairs of the Ministry of Foreign Affairs of the Republic of Korea and the Director-General of the Asian and Oceanian Affairs Bureau of the Ministry of Foreign Affairs of Japan.

From February 2015, high-level behind-the-scenes consultations were held, along with the above-stated Director-General level consultations; and at a summit meeting between Korea and Japan held on November 2, 2015, the leaders of both countries agreed to resolve the "comfort women" issue at the earliest possible date given that the year marked the 50th anniversary of normalization of diplomatic relations between the two countries. On December 28, 2015, the Foreign Ministers of Korea and Japan provided oral confirmation regarding the contents of the agreement reached in the high-level consultations and made an announcement at a joint press conference, which was then endorsed by the two Heads of State by telephone.

(2) On July 28, 2016, as a follow-up measure to the agreement, the Reconciliation and Healing Foundation was established with full funding by the Japanese government's budget, and some of the contributions were paid to those who expressed their intent to receive contributions among the surviving victims and the family members of the deceased victims.

(3) On July 31, 2017, the Ministry of Foreign Affairs (MOFA) established the Task Force on the Review of the Korea-Japan Agreement on the Issue of "Comfort Women" Victims (consisting of a chairperson, two vice chairpersons, three non-governmental members, and three MOFA members) directly under the jurisdiction by the Minister; and began assessing the Agreement.

The report published by the Task Force on December 27, 2017 views the Agreement as follows: "The Agreement is an official undertaking that is jointly announced by the Foreign Ministers and endorsed by the leaders of both countries, and thus it is not a treaty but a political agreement in nature."

(4) On January 9, 2018, the Respondent announced the Korean government's opinions on what to do with the Agreement as stated in Appendix 4.

C. The nature of the Agreement and its possible infringement on basic rights

(1) A constitutional complaint is a legal tool by which a person, whose basic rights guaranteed under the Constitution are infringed upon by an exercise or a failure to exercise governmental power, requests adjudication before the Constitutional Court to seek the relief for such infringement. However, if the exercise of governmental power, the subject matter of review, cannot affect the legal status of the person intending to file a constitutional complaint, no possibility of infringement of basic rights is recognized to exist, and thus the person is not allowed to file a constitutional complaint on that ground (see 2014Hun-Ma926, May 28, 2015).

(2) There is no explicit provision in the Constitution referring to the concept of a treaty. However, Article 60 (1) of the Constitution stipulates that "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 on sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters." At the same time, Article 73 of the Constitution grants the President the authority to enter into treaties; and subparagraph 3 of Article 89 of the Constitution provides that a proposed treaty shall be referred to the State Council for deliberation.

Under international law, a treaty is an international agreement entered into by actors in international law to produce certain legal effects, and is governed by international law. Treaties are mostly in written form, but exceptionally, oral agreements can be a treaty as well.

A state may enter into agreements with no legal effect or with no binding effects, as the case may be, which differ from treaties. In many cases, such agreements are too abstract or non-specific in substance to be binding, like those affirming certain common goals or declaring

principles; and they generally do not go through formal procedures, unlike in the signing of a treaty. As these agreements are also concluded in the expectation that the agreement will be mutually adhered to, a non-adhering state may be subject to protest or criticism. However, this differs from having a legally binding force.

In distinguishing a treaty from a non-binding agreement, one shall comprehensively take into account not only its form (such as the title of the agreement; whether the agreement is in written form; and whether the agreement has gone through procedures required by domestic law), but also its substance (such as whether one can recognize the parties' intent to make the agreement legally binding in light of the procedures, contents, and wording of the agreement; and whether the agreement creates specific rights and obligations with actual legal effects). Based on such considerations, when an agreement is recognized as non-binding, it can be said that the agreement has no effect on the people's legal status, and thus such agreement may not be the subject matter of a request for adjudication on a constitutional complaint.

(3) In light of the progress of the Agreement, it is obvious that the Agreement is an official commitment jointly announced by the Foreign Ministers of Korea and Japan and then endorsed by the leaders of the two countries. Nevertheless, the Agreement was not made in writing; and it uses neither a title usually given to treaties nor any form of provisions mainly used in treaties. Moreover, the Agreement neither manifests the intention of both parties as to the validity of the agreement nor includes any content creating specific legal rights and obligations.

Specifically, the Agreement is, first of all, an oral agreement, unlike treaties generally concluded in writing. According to what is published on the websites of the Ministries of Foreign Affairs of the two countries, the Republic of Korea uses "press availability" and Japan, "announcement at the press occasion," both adopting a title different from that of any ordinary treaty. In addition, while taking the form of stating their own positions, Korea and Japan have numbered their positions ①, ②, and ③, which is not the form of provisions usually used for treaties. In their oral

statements, as examined in section "Subject Matter of Review," the Minister for Foreign Affairs of Japan mentions that the issue of "comfort women" victims will be resolved on the condition that the "above-mentioned measures" are faithfully implemented, and the Minister of Foreign Affairs of the Republic of Korea, on the condition that the "above-mentioned measures" are faithfully implemented. However, in the statement posted on the website of the Ministry of Foreign Affairs of Japan, it states that the issue will be resolved on the condition that the "measures specified in ② above" are faithfully implemented, while the Minister of Foreign Affairs of the Republic of Korea, on the condition that the "measures specified in 1. ② above" are faithfully implemented. This shows that there is an inconsistency in expression even between the oral statement and the statement published on the website. Moreover, although the statement does not expressly specify any non-binding intent regarding the validity of the agreement, it does not use any expression, from which binding intent can be inferred under international law, either, and adopts vague and everyday language in the entire text.

In addition, while the Agreement addresses the issue of redressing harm inflicted upon "comfort women" victims, which involves a sharp conflict between Korea and Japan and also is related to the people's basic rights, the Agreement did not undergo any procedures for entering into a treaty pursuant to the Constitution, as examined in paragraph (2) above, such as deliberation by the State Council or approval from the National Assembly. Also, unlike treaties effected by notice, the treaties with simple contents which are dealt with in accordance with practice, the Agreement neither uses any treaty number nor gives notice thereof. The same is also true of Japan.

Above all, considering the contents of the Agreement, it is unclear whether any specific rights and obligations for Korea and Japan have been created.

Regarding the part of the Agreement in which Japanese Prime Minister expresses apologies and remorse to "comfort women" victims, it is uncertain whether this part is aimed toward providing remedies for the

infringements of their rights, making it difficult to determine its legal implications. The Agreement also fails to clearly stipulate the cause of damages sustained by the "comfort women" victims or the liability of the state for any violation of international law; and also fails to recognize coercive or unlawful involvement by the Japanese military. Moreover, even after reaching this Agreement, the Government of Japan has maintained its position that it does not have any legal liability because the issue of "comfort women" victims was already resolved under the Korea-Japan Claims Agreement in 1965. Therefore, the aforementioned expression of apologies can hardly be viewed as legal measures to redress harm inflicted upon "comfort women" victims.

Regarding the establishment of a foundation for providing assistance to "comfort women" victims and contributions by the Government of Japan to the foundation, the relevant part may be interpreted as creating legal relations depending on how specified its contents are. However, as revealed in such expressions as "will take measures," "implement," and "cooperate," the Agreement consists of only abstract and declarative provisions without prescribing any specific plan, timing and method of meeting the obligations, and consequences for non-compliance. This Agreement never uses the word "must," an expression imposing legal obligations. Although "around 1 billion Yen" has been stated as the rough amount of expected contributions from the Government of Japan, the exact amount, timing, and method of providing the contributions were not mentioned; and reference to the amount of such contributions was not even included in the statement published on the website of the Ministry of Foreign Affairs of Japan. The Government of Japan has actually provided contributions and established the foundation, as examined above, but it is hard to conclude that such measures were taken because it is actually legally bound by an agreement. That is because any cooperative measures may be taken under a political agreement between countries and the Government of Japan has previously used the "Asian Women's Fund" for the purpose of funding medical treatment and welfare of "comfort women" victims.

Regarding the stance of the Government of the Republic of Korea about the memorial statue placed in front of the Embassy of Japan in Seoul, the Government of the Republic of Korea states only that it “is aware of the concern of the Government of Japan ... and will make efforts to appropriately address the concern, including through consultations with relevant groups,” without specifying such groups, the meaning, method, and timing of “appropriately address[ing]” it, and consequences for non-compliance. Therefore, nothing in this part is regarded as specifying any rights and obligations of both countries.

In addition, as to the two countries’ remarks that the issue of “comfort women” victims will be “finally and irreversibly resolved” and that they will “refrain from mutual reprobation and criticism in international forums,” it is hard to believe that Korea and Japan had clear intentions to create legal relations, considering the factors mentioned below. The two countries have no common perception of exactly what the issue of “comfort women” victims is. Also, as described above, the oral statement at the press conference does not match the statement posted on the website of the Ministry of Foreign Affairs of Japan in connection with implementing the measures stated as a condition for “finally and irreversibly [resolving]” the issue and for “[refraining] from mutual reprobation and criticism,” thereby making the meaning of the condition unclear. Moreover, the meaning of “reprobation and criticism in international forums,” the meaning of “refrain,” or sanctions or consequences for any violation have not been clearly stated.

(4) Given all the circumstances examined above, the Agreement is hardly considered a legally binding treaty. Moreover, no circumstances indicate that the Agreement deals with any relinquishment or disposal of the claims for damages of “comfort women” victims because the Agreement does not stipulate any specific procedures for relinquishing their claims for damages, or any waiver of rights in judicial procedure or legal measures, etc., which are often found in general lump-sum settlements.

(5) Since the conclusion of the Agreement, the Respondent has stated that it will make every effort to do what the Government has to do, to

restore the honor and dignity of the "comfort women" victims as well as to heal their psychological wounds; and that it will seek victim-centered solutions, while comprehensively gathering consensus from the victims, etc. The Respondent has also expressed its position that it expects Japan to acknowledge the truth and continue to work to restore the honor and dignity of the victims and heal their psychological wounds; and that it will endeavor to provide future-oriented cooperation on the premise that the Agreement is not a genuine solution to the issue of "comfort women" victims. Considering these circumstances, it cannot be concluded that through the Agreement, the Respondent has abandoned, or has intended to abandon, the exercise of the diplomatic protection rights.

(6) To ensure complete and effective recovery from harm corresponding to the severity of the harm suffered by "comfort women" victims and the historical context in which such harm occurred, it is crucial to take victim-centered approaches. Nevertheless, there was a lack of endeavors to gather consensus from the victims in the course of reaching the Agreement. In light of such circumstances, the pain the "comfort women" victims have suffered from the Agreement would never be considered minor. As stated above, however, the Agreement is both a political agreement reached in the course of making diplomatic negotiations to resolve the issue of "comfort women" victims and a foreign policy decision made to address historical problems and maintain cooperative relations between Korea and Japan. Hence, various evaluations of the Agreement fall within the realm of politics. Considering the procedures, form, and contents of the Agreement, no specific rights and obligations are recognized as having been created. In addition, it cannot be said that the Agreement has led to abrogating the rights of the "comfort women" victims or to extinguishing the diplomatic protection rights of the Government of the Republic of Korea. In light of the above, the legal status of the "comfort women" victims is hardly considered to be affected by the Agreement. It is therefore hard to say that the Agreement is able to infringe on the basic rights of the victims, such as their claims for damages. Thus the request for adjudication on a constitutional complaint

against the Agreement is non-justiciable.

5. Review of the requests filed by the Complainants Gong ○○, Gwak ○○, Kim □□, Kim △△, Kim ▽▽, Kim ✕✕, Kim ◇◇, Kim ▷▷, Park ○○, Ahn ○○, Yu ○○, Lee ○○, Lee □□, Lee △△, and Lee ✕✕

After filing the requests for adjudication on this case, the 15 Complainants listed above, including Gong ○○, died as stated in Appendix 3; and their heirs have not applied for taking-over of the relevant adjudication proceedings. Therefore, the adjudication proceedings for the above-mentioned Complainants have been concluded upon the death of the above-mentioned Complainants.

6. Conclusion

Accordingly, the requests for adjudication on this case filed by the Complainants Gang ○○, Gil ○○, Kim ○○, Kim ◎◎, Park □□, Park △△, Park ▽▽, Lee ▽▽, Lee ◇◇, Lee ◎◎, Lee ▷▷, Jung ○○, Ha ○○, Ham ○○, Nam ○○, Hong ○○, Kim ◁◁, Seo ○○, Song ○○, Yang ○○, Wang ○○, Lee ◁◁, Lee ♤♤, Lim ○○, Lim □□, and Lim △△ are all dismissed on procedural grounds. Each of the adjudication proceedings involving the other Complainants has been closed as stated in Appendix 3. Therefore, the Court renders its unanimous decision as set forth in section "Holding" above.

Justices Yoo Namseok (Presiding Justice), Lee Seon-ae, Lee Suk-tae, Lee Eunae, Lee Jongseok, Lee Youngjin, Kim Kiyoung, Moon Hyungbae, and Lee Mison

[Appendix 1]

List of the Complainants

(Omitted)

[Appendix 2]

List of the Legal Representatives of the Complainants

(Omitted)

[Appendix 3]

Causes and Dates of Termination of Adjudication Proceedings

(Omitted)

[Appendix 4]

Full Text of the Respondent's Statement Dated January 9, 2018

My fellow Koreans:

Prior to publishing a report on the findings of review by the Task Force on the Issue of "Comfort Women" on December 27 last year, I have stated that the Korean government will humbly listen to the opinions of the victims, among others, and take into account the potential impact on the relationship between Korea and Japan, while carefully forming our position on the 2015 agreement on the "comfort women"

issue.

Even though for a short while thereafter, the Ministry of Foreign Affairs and the Ministry of Gender Equality and Family sought opinions from the victims and other relevant groups, while seriously considering ways to normalize and further develop relations with neighboring Japan.

In this process, restoring the victims' honor and dignity was the first and foremost consideration. We also stressed that the "comfort women" issue, an issue of universal human rights as a form of wartime sexual violence against women which goes beyond a bilateral relation between Korea and Japan, should serve as a lesson in human history and as an international milestone in the movement to improve women's rights.

Furthermore, we have carefully reviewed the Korean government's position, bearing in mind that Korea and Japan should restore normal diplomatic relations for peace and prosperity in Northeast Asia.

Against this backdrop and based on the findings presented by the Task Force on the Review of the Agreement on the "Comfort Women" Issue at the end of last year, I would like to state this government's basic direction in addressing the Agreement.

First, the government will make every effort to do what we have to do, in order to restore the honor and dignity of the "comfort women" victims as well as to heal their psychological wounds.

Second, in the process, we will seek victim-centered solutions while comprehensively gathering consensus from the victims, other relevant groups, and the general public.

Meanwhile, the government will replace one billion yen contributed to the Reconciliation and Healing Foundation by the Japanese government with the funds covered by the Korean government's budget, and will consult with the Japanese government on what to do with the funds contributed by Japan.

With regards to the future operation of the Reconciliation and Healing Foundation, the relevant Ministries will comprehensively gather consensus from the victims, relevant groups, and members of the public to devise follow-up measures.

Third, the 2015 agreement cannot be a genuine solution to the issue of "comfort women" victims since this agreement has failed to appropriately reflect consensus of the victims.

Fourth, it is an undeniable fact that the 2015 agreement was an official agreement between the two countries. Taking that into account, this government will not ask the Japanese government to renegotiate the agreement.

However, we hope to see the Japanese government voluntarily acknowledging the full truth according to universal international standards and continuing to work to restore the honor and dignity of the victims and to heal their psychological wounds.

What the victims have consistently wished for is a voluntary and sincere apology.

Fifth, the government will address historical issues on the basis of truth and principles. We will continue our endeavors to resolve the historical issues wisely while continuously working toward future-oriented cooperation with Japan.

Lastly, I do not believe that what I have stated today satisfies all the wishes of the victims. In that regard, I would like to express deep regret. My government will continue to exert our best efforts wholeheartedly to listen to the opinions of the victims and devise additional follow-up measures.

II. Summaries of Opinions

1. Case on Rejecting Visitation Request of Person Who Desires to Become Defense Counsel

[2015Hun-Ma1204, February 28, 2019]

Upon request of the suspect's family, the Complainant in this case, an attorney-at-law, asked for permission from the prosecutor in charge to visit the suspect against whom an arrest warrant was filed during the interrogation, but the prosecutor did not take any steps to accept the request. The Court held that such inaction by the prosecutor infringed upon the right to visitation and communication of the Complainant who desired to become the defense counsel, stating that such right is one of the basic rights guaranteed under the Constitution and, therefore, the Complainant can file a constitutional complaint seeking adjudication with respect to this alleged violation.

Background of the Case

Suspect OOO was arrested at 19:00 on October 5, 2015, and a detention warrant against him was filed. The Complainant, an attorney-at-law, went to the Busan District Prosecutors' Office at 19:00 on October 6, 2015 upon the request of the suspect's family, to ask for permission to visit the suspect from the prosecutor in charge (hereinafter referred to as "respondent prosecutor"). The respondent prosecutor notified a correctional officer at the Busan Detention Center (hereinafter referred to as "respondent guard") of the Complainant's visitation request. The respondent guard asked an officer responsible for visitation of outside persons about the process before informing the Complainant that the visitation request was denied as the visitation was requested to be held after the working hours (09:00-18:00) stated in the State Public Officials Service Regulations according to Article 58 Section 1 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act.

The respondent prosecutor did not take any further action about the visitation request, and the Complainant left the respondent prosecutor's office without meeting with the suspect. The respondent prosecutor continued to interrogate the suspect after such event, and the Complainant was not appointed as the suspect's defense counsel.

The Complainant filed a constitutional complaint on December 28, 2015, claiming that such an act of denial by the respondents and Article 58 Section 1 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act cited by the respondent guard as a legal ground for the denial infringed upon his basic right.

Subject Matter of Review

The subject matter of review in this case is whether the basic right of the Complainant was infringed upon by (1) the respondents' failure to take action to address the Complainant's request to visit the suspect at 19:00 on October 6, 2015 at the Busan District Prosecutors' Office No. OO (hereinafter the respondent prosecutor's act of denial of visitation being referred to as "denial by the prosecutor"; the respondent guard's act of denial of visitation as "denial by the correctional officer"; and these two acts collectively as "denial in this case"); and, (2) Article 58 Section 1 of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates Act (wholly amended by Presidential Decree No. 21095, October 29, 2008) (hereinafter referred to as "provision regarding the visitation hour" and the Administration and Treatment of Correctional Institution Inmates Act being hereinafter referred to as the "Criminal Administration Act").

Provision at Issue

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

Article 58 (Visitation)

(1) Visitation of a detainee shall only be permitted during working hours every day (excluding holidays and other days determined by the Minister of Justice) under Article 9 of the State Public Officials Service Regulations.

Summary of the Decision

1. Whether Right to Visitation and Communication of a "Person Who Desires to Become the Defense Counsel" Is a Basic Right under the Constitution

The visitation and communication right of the suspect and the defendant (hereinafter referred to as "suspect, etc.") with a "person who desires to become the defense counsel" should be protected as a basic right under the Constitution. The visitation and communication right of a "person who desires to become the defense counsel" is designed, in effect, to enhance the right of the suspect, etc. to retain a defense counsel to obtain legal assistance. If this right to visitation and communication is not ensured, it would be difficult for the suspect, etc. to receive sufficient legal assistance by retaining an attorney. Thus, the visitation and communication right of a "person who desires to become the defense counsel" is the essence of legal assistance for the suspect, etc. and must be viewed in the same context as the right of the suspect, etc. to visitation and communication with a "person who desires to become the defense counsel," which is a basic right under the Constitution. Hence, the visitation and communication right of a "person who desires to become the defense counsel" should also be guaranteed as a basic right under the Constitution, to essentially ensure the right of the suspect, etc. to receive legal assistance from a "person who desires to become the defense counsel" (hereinafter, "defense counsel" and "person who desires to become the defense counsel" being collectively referred to as "counsel, etc.").

2. Whether to Allow Exception to Rule of Exhaustion of Prior Remedies

If the Complainant files a quasi-appeal in a bid to cancel the denial by the prosecutor for the case, which was completed on the day it was filed, under Article 417 of the Criminal Procedure Act, it is objectively uncertain whether the Court would decide that it lacks legal interests or it would make a substantive decision. Subsequently, it is hard to expect the Complainant to undergo all pre-trial procedures. Therefore, the constitutional complaint filed by the Complainant against the denial stated above should be accepted as an exception to the rule of exhaustion of prior remedies.

3. Whether to Accept Self-Relatedness

The provision regarding the visitation hour restricts visitation and communication between the suspect and the counsel, etc. by allowing detainees to meet with visitors only during the working hours specified in the State Public Officials Service Regulations. This provision is applicable to visitation requests made by the counsel, etc. and is subject to approval by the warden of the prison or jail. As this provision is not applicable to the request of the counsel, etc. to be present during the interrogation of a suspect, which is subject to approval by the prosecutor or judicial police officer according to Article 243-2 Section 1 of the Criminal Procedure Act, this provision cannot constitute a ground to decline or to restrict the request for visitation during the interrogation of a suspect. Thus, if a correctional officer informs that the visitation request of a “person who desires to become the defense counsel” during the interrogation of a suspect has been declined based on the provision regarding the visitation hour, self-relatedness of the infringement on basic right under this provision cannot be acknowledged.

4. Whether Visitation and Communication Right of the Complainant Is Infringed upon

First, it is reasonable to believe that the Complainant's visitation and communication right with regard to the suspect was restricted, as the Complainant made a request to visit suspect OOO to the respondent prosecutor, stayed at the prosecutor's office, and left the office without meeting with the suspect after learning of denial by the prosecutor. Second, it appears that the visitation and communication of the Complainant with the suspect could have been allowed in the prosecutor's office or a separate counsel consultation room before the interrogation took place since the interrogation of the suspect was set to continue during the night. Furthermore, given the specific time and place at the time the alleged violation occurred, the Complainant who desired to become the defense counsel is not deemed to have tried to abuse the right to visitation and communication with the suspect by going beyond the practical limits or circumventing the intended purpose of physical incarceration. Third, while the right to visitation and communication of the counsel, etc. can be restricted both under the Constitution and the statutes (see CC 2009Hun-Ma341, May 26, 2011; and, CC 2015Hun-Ma243 Apr. 28, 2016), neither the Constitution nor the Criminal Procedure Act has a provision which restricts or declines the visitation request of the counsel, etc. during the interrogation of a suspect. Fourth, the provision regarding the visitation hour cannot be a legal ground to decline or to restrict the visitation request of the counsel, etc., as it does not apply to such request of the counsel, etc. during the interrogation of the suspect, which is subject to approval by a prosecutor or judicial police officer. Given all of these factors, the Complainant's request to meet with suspect OOO falls within the right to visitation and communication guaranteed for a "person who desires to become the defense counsel," and the denial by the prosecutor infringed upon the Complainant's right to visitation and communication as it limited said right without valid constitutional or legal grounds.

Dissenting Opinion of Three Justices on the Denial by the Prosecutor

1. Whether Right to Visitation and Communication of a "Person Who Desires to Become the Defense Counsel" Is a Basic Right under the Constitution

As three Justices presented separate opinions for the decision of 2012Hun-Ma610 on July 30, 2015, the right to visitation and communication of a "person who desires to become the defense counsel" is an indirect and collateral effect coming from recognizing the right of an arrestee, etc. to receive legal assistance as a basic right. It is merely a *de jure* right formed in detail by individual laws such as the Criminal Procedure Act and, therefore, cannot be deemed as an "independent basic right" guaranteed under the Constitution.

First, a "person who desires to become the defense counsel" intends to visit and to communicate with the suspect, etc. mainly for the purpose of taking a case rather than providing legal assistance to the suspect, etc. Second, the disadvantage to a "person who desires to become the defense counsel" resulting from a failure to visit the suspect, etc. or take a criminal case is simply indirect, factual, and economic interests (see CC 2002Hun-Ma756, Apr. 29, 2004). Third, the right to visitation and communication of a "person who desires to become the defense counsel" is a right granted to that "person who desires to become the defense counsel" before any legal assistance is actually provided for the suspect, etc., regardless of the intention of the suspect, etc. Given all of these factors, the right of a "person who desires to become the defense counsel" to visitation and communication and the right of the suspect, etc. to receive legal assistance cannot be viewed in the same context. It cannot be argued that a failure to guarantee the right of a "person who desires to become the defense counsel" to visitation and communication as a basic right guaranteed under the Constitution would make the right of the suspect, etc. to receive sufficient legal assistance null and void.

Consequently, even when we are of the view that the essence of the right of the defense counsel to provide legal assistance for the suspect, etc. should be protected as a basic right under the Constitution, this does not necessarily mean, as the majority opinion states, the right to visitation and communication of a "person who desires to become the defense counsel" also needs to be regarded as the right of defense, which constitutes a basic right under the Constitution.

2. Whether to Allow Exception to Rule of Exhaustion of Prior Remedies

First, the denial by the prosecutor stopped the Complainant from visiting suspect OOO, participating in the interrogation thereof and being appointed as the defense counsel, and the suspect was prosecuted while being detained by the detention warrant. Second, there was no circumstance to indicate that the Court would rule that the legal interest is absent or extinguished if a quasi-appeal is filed by the Complainant for the denial by the prosecutor under Article 417 of the Criminal Procedure Act. Third, when the presence of the defense counsel was denied during the interrogation of a suspect, the Supreme Court has reviewed on merits on the assumption that the legal interest is recognized even when the interrogation was over (*see* Supreme Court Decision 2008Mo793, Sep. 12, 2008). The same principle should apply when visitation was denied during the interrogation of a suspect. Given all of these considerations, the Complainant has grounds to argue in court by filing a quasi-appeal under Article 417 of the Criminal Procedure Act, even though the denial by the prosecutor already took place. Therefore, the constitutional complaint raised by the Complainant for denial of visitation fails to meet the requirements for the rule of exhaustion of prior remedies.

2. Case on Aggravated Punishment for Preparation for Smuggling Goods into Korea

[2016Hun-Ka13, February 28, 2019]

In this case, the Court held that the part concerning "Article 269 Section 2 referred to in Article 271 Section 3 of the Customs Act" in Article 6 Section 7 of the Act on Aggravated Punishment, etc. of Specific Crimes—the part under which the preparation for smuggling goods into Korea is subject to punishment equivalent to that for the commission thereof—was in violation of the Constitution, because it (1) contravenes the principle of proportionality between culpability and punishment and (2) is arbitrary legislation that runs counter to the principle of equality by providing an unreasonable penalty disrupting the balance in the criminal punishment system.

Background of the Case

The Defendants were indicted for preparing to smuggle goods into Korea with intent to import them into this country under a false manifest or without declaring them to the customs.

While adjudicating the Defendants' appeal, the Seoul High Court *sua sponte* requested the Court on August 22, 2016, to review the constitutionality of the part concerning "Any person who commits a crime referred to in Article 271 of the Customs Act shall be sentenced to punishment equivalent to that for a principal offender or principal crime in accordance with Section 2" in Article 6 Section 7 of the Act on Aggravated Punishment, etc. of Specific Crimes (hereinafter referred to as the "Aggravated Punishment Act") on the grounds that it violates the principles of culpability and equality.

Subject Matter of Review

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

concerning "Article 269 Section 2 referred to in Article 271 Section 3 of the Customs Act" in Article 6 Section 7 of the Aggravated Punishment Act (amended by Act No. 10210, March 31, 2010) (hereinafter referred to as the "Provision at Issue") violates the Constitution. The Provision at Issue and the related provisions read as follows:

Provision at Issue

Act on Aggravated Punishment, etc. of Specific Crimes (amended by Act No. 10210, March 31, 2010)

Article 6 (Aggravated Punishment of Offense against the Customs Act)

(7) Any person who commits a crime referred to in Article 271 of the Customs Act shall be sentenced to punishment equivalent to that for a principal offender or principal crime in accordance with Sections 1 through 6.

Related Provisions

Act on Aggravated Punishment, etc. of Specific Crimes (amended by Act No. 10210, March 31, 2010)

Article 6 (Aggravated Punishment of Offense against the Customs Act)

(2) Any person who commits a crime referred to in Article 269 Section 2 of the Customs Act shall be punished aggravatingly as follows:

1. Where the cost of the imported goods exceeds five hundred million won, the person shall be punished by imprisonment for life or by imprisonment for not less than five years;
2. Where the cost of imported goods is not less than two hundred but less than five hundred million won, the person shall be punished by imprisonment for a limited term of not less than three years.

(6) In the case of Sections 1 through 5, a fine shall be concurrently imposed as follows:

2. In the case of Section 2, two times the cost of imported goods.

Summary of the Decision

1. Whether the principle of proportionality between culpability and punishment has been violated

"Preparation for a crime," an act that has not reached the commencement stage for the commission of a crime, differs from "consummation of a crime," an act that results in an actual infringement of or endangerment to interests—in terms of form, the risk of infringing interests, and degree of danger. Given these differences, it is clear that the two acts also vary in the degree of illegality and culpability of the actor, and therefore the two shall be evaluated differently. Nevertheless, preparation for a crime is subject to punishment equivalent to that for commission of that crime under the Provision at Issue. The Court finds that the Provision at Issue thereby imposes grossly excessive punishment for preparation for a crime.

The Court further notes that even though the degree of danger that preparation for a crime poses to society varies in each case, the Provision at Issue inflicts the same punishment for both commission of a crime and its preparation presenting a low degree of social danger. As a result, a person who makes such preparation is sentenced to excessive punishment disproportionate to his or her culpability.

Moreover, the Customs Act and the Aggravated Punishment Act provide a number of provisions to regulate customs offenders, who possess certain characteristics that pose a danger to society. Thus, it is not necessary to impose the same punishment for both preparation for a crime and commission of that crime in order to regulate customs offenders.

For the above reasons, the Court concludes that the Provision at Issue provides harsh punishment for preparation for a crime, foreclosing the possibility of meting out a penalty based on consideration of the individuality and distinctiveness of each act of preparation. Thus, the Provision at Issue violates the principle of proportionality between culpability and punishment.

2. Whether the balance in the criminal punishment system has been lost and the principle of equality has been violated

If a person prepares to smuggle goods that cost less than two hundred million won into Korea, such person is sentenced to one-half the term of imprisonment or the amount of fine prescribed for the commission of smuggling under the Customs Act. However, if a person makes the above preparation to smuggle goods that cost two hundred million won or more into Korea, the person is sentenced to punishment equivalent to that for the commission of smuggling under the Provision at Issue; and the Court finds that there are no reasonable grounds to inflict aggravated punishment on him or her.

Moreover, the Aggravated Punishment Act has no provision imposing aggravated punishment for the preparation for a drug offense since its amendment deleted that provision. It also has no separate provision inflicting aggravated punishment for the preparation for a tax offense. In light of these facts, the Court questions whether it is necessary to mete out aggravated punishment for the preparation for smuggling.

Furthermore, the statutory punishment on a ringleader who prepares for insurrection or the statutory punishment for preparing to commit homicide for purpose of insurrection, to commit inducement of foreign aggression, to take side with enemy, or to commit homicide, is less severe than one for the preparation for smuggling, notwithstanding that the illegality and culpability of the actor of the first five acts are no lighter than those of the last mentioned. Taking such fact into account, the Court finds that the punishment prescribed by the Provision at Issue is devoid of equity and is unduly severe.

Accordingly, the Provision at Issue disrupting the balance in the criminal punishment system violates the constitutional principle of equality.

3. Case on the Annulment of the Supreme Court Judgment That Refused to Recognize the State's Liability for Damages Resulting from the Issuance of Emergency Measures

[2016Hun-Ma56, February 28, 2019]

In this case, the Court held that: (1) the phrase "excluding judgment of the courts" in Article 68 Section 1 of the Constitutional Court Act, which prohibits filing of constitutional complaints against judgment of the courts, does not violate the Constitution; and (2) the Complainants' claim challenging the Supreme Court judgment that refused to recognize the State's liability for damages resulting from the issuance of Presidential Emergency Measure on the Protection of National Safety and Public Order (hereinafter referred to as "Emergency Measure") is non-justiciable.

Background of the Case

Around 1974, Complainants Yoon __, Kim D__, and Kim K__ were arrested and detained for suspected violations of Emergency Measure Nos. 1 and 4, No. 4, and No. 9, respectively. The Complainants were thereafter given the disposition of suspended prosecution of their criminal charges.

Around 2013, the Complainants filed a lawsuit against the State, seeking damages for illegal investigations of violations of emergency measures as well as for physical abuse and coercion of confessions they were subjected to during those investigations. The trial court ruled partially in favor of the Complainants (Seoul Central District Court Case No. 2013Ga-Hap544058). The intermediate appellate court and the Supreme Court, however, both ruled against the Complainants on all of their claims (Seoul High Court Case No. 2015Na2006058 and Supreme Court Case No. 2015Da236523).

On January 22, 2016, the Complainants filed this constitutional complaint, alleging the unconstitutionality of the above Supreme Court

judgment and the phrase "excluding judgment of the courts" in the main text of Article 68 Section 1 of the Constitutional Court Act—the phrase that prohibits filing of constitutional complaints against judgment of the courts.

Subject Matter of Review

The subject matter of review in this case is whether (1) the phrase "excluding judgment of the courts" in the main text of Article 68 Section 1 of the Constitutional Court Act (amended by Act No. 10546 on April 5, 2011) (hereinafter referred to as the "Phrase at Issue") and (2) the Supreme Court judgment in Case No. 2015Da236523, rendered on December 24, 2015 (hereinafter referred to as the "Supreme Court Judgment at Issue"), infringe the fundamental rights of the Complainants.

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 are infringed due to exercise or non-exercise of the governmental power, excluding judgment of the courts, may request adjudication on a constitutional complaint with 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 phrase 'judgment of the courts' 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 one exclusive of the unconstitutional part, and the Court recognizes neither a change in circumstances nor necessity to justify departure from the above precedent.

2. Regarding the Supreme Court Judgment at Issue

Because the Court has never held Emergency Measure No. 4 unconstitutional, there is no question that the part of the Supreme Court Judgment at Issue concerning Emergency Measure No. 4 does not amount to "judgment of the courts" subject to constitutional complaints.

As regards Emergency Measure Nos. 1 and 9, the Court held them unconstitutional in Case No. 2010Hun-Ba132, etc., on March 21, 2013. However, in the Supreme Court Judgment at Issue, the Supreme Court neither held those measures constitutional in conflict with the Court's decision in Case No. 2010Hun-Ba132, etc., nor applied them to the case by presuming them to be constitutional. It refused to recognize the State's liability for damages resulting from the issuance of Emergency Measure Nos. 1 and 9, not because it construed those measures as constitutional, but because, despite noting their unconstitutionality, it reached that conclusion based on different reasoning.

Thus, the Supreme Court Judgment at Issue does not constitute an exception to the rule excluding "judgment of the courts" from the subjects of constitutional complaints. Therefore, the Complainants' claim regarding the Supreme Court Judgment at Issue is non-justiciable.

Summary of Dissenting Opinion of Two Justices

1. Regarding the Phrase at Issue

We hold that judgment of the courts must be reviewed under the doctrine of fundamental rights protection if it produces an unjust result that cannot be condoned under any circumstances by refusing to hold the State liable even when the State authorities have collectively committed an illegal act of "intentional and active" infringement of the citizens' rights and freedoms through abuse of their power. In light of the essence of the judiciary posited by the State and the Constitution, we find such judgment constitutes an exception to the principle of prohibition of constitutional complaints against judgment of the courts.

Although the Phrase at Issue is not fundamentally contrary to the values of the Constitution, the following part of it violates the Constitution—the part concerning the "judgment that refuses to hold the State liable even when the State authorities have collectively committed an illegal act of 'intentional and active' infringement of the citizens' rights and freedoms through abuse of their power," as well as the part concerning the "judgment that infringes the fundamental rights of citizens through the application of laws and regulations declared unconstitutional by the Court."

2. Regarding the Supreme Court Judgment at Issue

The parts of the Supreme Court Judgment at Issue concerning Emergency Measure Nos. 1 and 9 run contrary to the binding power of the Court's decision in Case No. 2010Hun-Ba132, etc. Thus, these parts infringe the fundamental rights of the Complainants.

As regards Emergency Measure No. 4, it has not been declared unconstitutional by the Court. However, it is evident from the language of this measure itself that this measure infringed the fundamental rights of citizens, as demonstrated by a Supreme Court judgment that held it

unconstitutional (Supreme Court judgment in Case No. 2011Do2631, rendered on May 16, 2013). The unconstitutionality of Emergency Measure No. 4 is clear without the need for further scrutiny by the Court.

Moreover, we view that the investigations of the Complainants which were conducted under Emergency Measure Nos. 1, 4, and 9 and the illegal acts committed against them during those investigations, including coercion of confessions, were the means of enforcing the norms issued with the clear intention to infringe the freedoms and rights of citizens. Those investigations and illegal acts were prime examples that the power vested by the people in the State was used, contrary to the essence of that power, to intentionally and actively suppress and infringe the freedoms and rights of the people.

In light of the above, we find that the Supreme Court Judgment at Issue is contrary to the Court's decision in Case No. 2010Hun-Ba132, etc. or has refused to hold the State liable even when the State authorities "collectively" committed an illegal act of "intentional and active" infringement of the citizens' rights and freedoms through abuse of their power. Therefore, the Supreme Court Judgment at Issue constitutes an exception to the rule excluding judgment of the courts from the subjects of constitutional complaints. Since the Supreme Court Judgment at Issue is contrary to the binding power of the Court's decision of unconstitutionality in Case No. 2010Hun-Ba132, etc. or has infringed the constitutional fundamental right to claim for State compensation to such an extent that we cannot condone the injustice that has resulted from the infringement, we conclude that the Supreme Court Judgment at Issue must be annulled.

4. Case on the Crimes of Abortion

[2017Hun-Ba127, April 11, 2019]

In this case, the Court held that both (1) Article 269 Section 1 of the Criminal Act which penalizes a pregnant woman who procures her own miscarriage and (2) the part concerning "doctor" in Article 270 Section 1 of the Criminal Act which penalizes a doctor who procures the miscarriage of a woman upon her request or with her consent are nonconforming to the Constitution, and ordered temporary application of these provisions until the legislature amends them by December 31, 2020.

Background of the Case

The Petitioner is an obstetrician-gynecologist who was indicted for performing 69 abortions from November 1, 2013 to July 3, 2015, upon the request or with the consent of the pregnant women.

While her case was pending before the trial court, the Petitioner filed a motion to request the trial court to refer the case to the Court for constitutional review of Article 269 Section 1 and Article 270 Section 1 of the Criminal Act. As such motion was rejected, the Petitioner filed this constitutional complaint against the above provisions on February 8, 2017.

Subject Matter of Review

The subject matter of review in this case is whether (1) Article 269 Section 1 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (hereinafter referred to as the "Self-Abortion Provision") and (2) the part concerning "doctor" in Article 270 Section 1 of this Act (hereinafter referred to as the "Abortion by Doctor Provision") violate the Constitution. The Provisions at Issue read as follows:

Provisions at Issue

Criminal Act (amended by Act No. 5057 on December 29, 1995)
Article 269 (Abortion)
(1) A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won.

Article 270 (Abortion by Doctor, etc., Abortion without Consent)
(1) A doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a woman upon her request or with her consent, shall be punished by imprisonment for not more than two years.

Summary of the Decision

1. Summary of constitutional nonconformity opinion of four Justices

The first sentence of Article 10 of the Constitution provides for the protection of human dignity. The general right to personality is derived from human dignity protected by this provision, and the right of an individual to self-determination stems from the general right to personality. The right to self-determination includes the right of a pregnant woman to determine whether to continue her pregnancy and give birth.

With a few exceptions set forth in the Mother and Child Health Act, the Self-Abortion Provision imposes a complete and uniform ban on all abortions throughout pregnancy, regardless of the developmental stage or viability of the fetus and provides criminal punishment for violations of this ban, thereby compelling a pregnant woman to continue her pregnancy and give birth. Therefore, the Self-Abortion Provision restricts the pregnant woman's right to self-determination.

The Self-Abortion Provision serves the legitimate purpose of protecting the life of a fetus, and imposing criminal punishment for an abortion procured by a pregnant woman is an appropriate means to deter abortion

and thus to accomplish this legislative purpose.

Pregnancy, childbirth, and parenting are among the most important matters that may fundamentally and decisively affect the life of a woman. Therefore, we believe that a pregnant woman's decision whether to continue or terminate a pregnancy amounts to a decision reflecting profound consideration of all her physical, psychological, social, and economic circumstances and based on her own chosen view on life and society—a holistic decision central to her personal dignity.

A fetus is considered to be viable at around 22 weeks of gestation when provided with the best medical technology and staff available at present. Moreover, we find that the State must guarantee a pregnant woman's right to self-determination by allowing the pregnant woman sufficient time to make and carry out a holistic decision whether to continue her pregnancy and give birth. Given these considerations, we conclude that, during a sufficient amount of time before the point of viability at around 22 weeks of gestation, during which the right to self-determination regarding whether to continue a pregnancy and give birth can be properly exercised (from the time of implantation to the end of this period will be hereinafter referred to as the "Determination Period"), the State's protection for fetal life may be different with respect to its level or means.

Considering that criminal sanctions have only a limited deterrent effect on the abortion decision of a pregnant woman facing the dilemma of abortion and that those who obtain an abortion are in reality rarely prosecuted, we conclude that the Self-Abortion Provision does not effectively protect the life of a fetus in situations in which pregnant women are caught in the dilemma of abortion.

Due to the Self-Abortion Provision, pregnant women cannot receive timely counseling or education regarding abortions, or sufficient information about abortions. Those who seek out an abortion have to pay a very high price for it, and legal remedies are often not available in cases of medical malpractice during an abortion. Further, the Self-Abortion Provision can be abused when a woman's ex-male partner uses it as a means to

retaliate against the woman, or to put pressure on her to settle a family dispute or other civil disputes.

Although the Mother and Child Health Act set forth the circumstances under which self-abortion is justified, such circumstances do not include various and wide-ranging socioeconomic circumstances that interfere with continuance of pregnancy and childbirth and thus create the abortion dilemma. Such various and wide-ranging socioeconomic circumstances include where pregnancy and child-rearing are likely to interfere with a woman's education, career, or public activities; where a woman has inadequate or stable income; where a woman lacks resources to care for another child; where a woman has no desire to continue a dating relationship or enter into a marital relationship with the fetus's biological father; where a woman has discovered her pregnancy at a point when the marriage has in effect broken down irretrievably; where a woman breaks up with the fetus's biological father; or where a woman is an unwed minor with an unwanted pregnancy.

With certain exceptions set forth in the Mother and Child Health Act, the Self-Abortion Provision completely and uniformly compels pregnant women who, during the Determination Period, face the abortion dilemma arising from various and wide-ranging socioeconomic circumstances to continue the pregnancies and give birth and criminally punishes those undergoing abortions.

The Self-Abortion Provision does not satisfy the least restrictive means test because it restricts a pregnant woman's right to self-determination to an extent going beyond the minimum extent necessary to achieve its legislative purpose. It also does not satisfy the balance of interests test because it gives unilateral and absolute priority to the public interest in protecting fetal life. Accordingly, it violates the rule against excessive restriction and a pregnant woman's right to self-determination.

By the same token, the Abortion by Doctor Provision, which penalizes a doctor who performs an abortion at the request or with the consent of a pregnant woman to achieve the same goal as the woman, violates the Constitution.

The prohibition and criminal punishment of abortion to protect fetal life are not unconstitutional in themselves or in all cases. If we were to render decisions of simple unconstitutionality on the Self-Abortion Provision and the Abortion by Doctor Provision, we would be creating an unacceptable legal vacuum in which there is no punishment available for all abortions throughout pregnancy.

Moreover, it is within the discretion of the legislature to remove the unconstitutional elements from these Provisions and decide how abortion is to be regulated: the legislature has, within the limits that we have discussed earlier, the prerogative (1) to decide the length and end date of the Determination Period; (2) to determine how to combine time limitations with socioeconomic grounds, including deciding whether to set a specific time point during the Determination Period until which abortion on socioeconomic grounds is permitted without an assessment of those grounds, in optimally balancing the State's interest in protecting a fetus's life and a pregnant woman's right to self-determination; and (3) to decide whether to require certain procedures, such as the mandatory counseling or reflection period, before abortion.

For these reasons, we render, on the Self-Abortion Provision and the Abortion by Doctor Provision, decisions of nonconformity to the Constitution in lieu of decisions of simple unconstitutionality. We also order that these Provisions continue to be applied until the legislature amends them.

2. Summary of simple unconstitutionality opinion of three Justices

We concur with the constitutional nonconformity opinion that the Self-Abortion Provision and the Abortion by Doctor Provision (collectively, "Provisions at Issue") infringe a pregnant woman's right to self-determination (1) by completely and uniformly prohibiting abortion during the period and under the circumstances pointed out by the constitutional nonconformity opinion, and (2) by criminally punishing violations of the ban on abortion. Our opinion differs, however, from the

constitutional nonconformity opinion in two respects. First, we believe that abortion should be permitted without restriction as to reason and be left to the deliberation and judgment of the pregnant woman during the "first trimester of pregnancy" (about 14 weeks from the first day of the last menstrual period). Second, we believe that decisions of simple unconstitutionality should be rendered on the Provisions at Issue.

A pregnant woman's holistic and dignity-based decision about whether to continue or terminate her pregnancy, in itself, amounts to the exercise of her right to self-determination and should be in principle allowed to be made throughout pregnancy. This decision may be restricted, however, for reasons including the developmental stage of a fetus and the high risk of harm that an abortion after the first trimester of pregnancy poses to a pregnant woman's life or health.

If abortion is allowed during the period when it is safe for pregnant women and in exceptional cases, this will lead to permitting abortion only in dire and exceptional circumstances and thereby could result in virtually depriving a pregnant woman of her right to self-determination.

Therefore, the State should respect the right to self-determination of a pregnant woman as much as possible during the first trimester of pregnancy—when the fetus has not grown much; abortion is safe; and careful deliberation can be given to the decision whether to terminate a pregnancy—by allowing her to make a decision whether to continue the pregnancy after careful evaluation of her circumstances, based on her view of life and society which has roots in her dignity and autonomy.

The Provisions at Issue violate the rule against excessive restriction and infringe a pregnant woman's right to self-determination by imposing a uniform and complete ban on abortion even during the first trimester of pregnancy, when abortion is safe.

If the Court were to simply declare a statute restricting rights of freedom nonconforming to the Constitution for the reason that the statute's restrictions on fundamental rights go beyond the constitutionally permissible limits, this would eliminate the grounds for the existence of a rule that the Court must declare an unconstitutional law null and void,

as well as the existence of the type of decision rendered based on this rule—a decision of simple unconstitutionality. Further, the repeal of the Provisions at Issue is unlikely to give rise to extreme social confusion or social costs because the Provisions at Issue have a limited effect on deterring abortion and do not function properly as penal clauses. On the other hand, rendering the decisions of nonconformity to the Constitution on the Provisions at Issue and later imposing punishment based on retrospective legislation run counter to the legislative intent to afford retrospective force to decisions of unconstitutionality and amount to forcing individuals to suffer the burdens associated with the deficiency in regulation. As stated above, the parts of the Provisions at Issue concerning penalties for abortions performed during the first trimester of gestation are unquestionably in violation of the Constitution. Therefore, the decisions of simple unconstitutionality should be rendered on the Provisions at Issue.

3. Conclusion

The three Justices' declaration of simple unconstitutionality of the Provisions at Issue and the four Justices' declaration of constitutional nonconformity of the Provisions at Issue satisfy the quorum requirement for an unconstitutionality decision under the proviso of Article 23 Section 2 Item 1 of the Constitutional Court Act. Therefore, the Court declares the Provisions at Issue nonconforming to the Constitution and orders that they continue to be applied until the legislature amends them.

Summary of Constitutionality Opinion of Two Justices

Both the fetus and the person born are considered to be undergoing a series of continuous developmental stages of life. Thus, there is no fundamental difference between a fetus and a newborn in relation to the degree of human dignity or the need for protection of life. Therefore, the fetus must also be regarded as the subject of the constitutional right to

life.

Given the Self-Abortion Provision is vital for the legislative purpose of protecting a fetus's right to life and given the peculiar nature of the infringement of the right to life, we recognize the necessity of strictly prohibiting abortion by criminal means.

We do not see that the importance of the public interest in protecting fetal life varies according to the stages of fetal development, nor do we see that a pregnant woman's right to dignity or right to self-determination prevails at certain stages of pregnancy and is outweighed by a fetus's right to life at later stages.

The concept and scope of the "socioeconomic grounds" cited by the majority opinion are very vague, and it is difficult to objectively verify whether a woman falls under any of those grounds. Allowing abortion on socioeconomic grounds could lead to the same result as fully legalizing abortion and could create a general disregard for human life.

It is true that the Self-Abortion Provision restricts a pregnant woman's right to self-determination to some extent, but the degree of such restriction is no more significant than the important public interests in protecting a fetus's life to be served by the Provision. Therefore, the Self-Abortion Provision does not violate the balance of interests test.

Since in reality pregnant women do not receive sufficient protection, the State should, in addition to imposing criminal penalties for abortion, dissuade women from having abortions by introducing legislative policies, such as placing more parental responsibility on men, including unwed fathers, through enactment of the "Parental Responsibility Act"; establishing social protection system for unwed mothers; and relieving women of the burdens of pregnancy, childbirth, and parenting through formulation of maternal protection policy.

Since the upper limit of the statutory penalty prescribed under the Abortion by Doctor Provision is not so high, and since the court may impose a deferred judgment or suspended sentence, the Abortion by Doctor Provision does not violate the principle of proportionality between criminal liability and punishment. Moreover, blameworthiness of healthcare

professionals who deprive the life of a fetus by performing an abortion by trade is high because they should be engaged in the business of protecting fetuses' lives, and therefore, the Abortion by Doctor Provision, where the legislature did not set forth any monetary penalty like the one for abortion with the woman's consent provision (Article 269 Section 2 of the Criminal Act), does not hinder the balance in the system of penalties and thus does not violate the constitutional principle of equality.

Therefore, the Self-Abortion Provision and the Abortion by Doctor Provision do not violate the Constitution.

5. Case on Determination of Maritime Boundary between Local Governments

[2016Hun-Ra8, 2018Hun-Ra2 (consolidated), April 11, 2019]

In this case, the Court established the maritime boundary between Gochang-gun and Buan-gun of Jeollabuk-do in consideration of factors such as geographic natural conditions like the land, inhabited islands, uninhabited islands, and mud flat near the disputed waters, relevant laws and regulations, history, executive authority exercised, administrative work and social and economic benefits of the residents, and held that the disposition issued by Buan-gun that crossed the maritime boundary at issue infringes upon the autonomous authority of Gochang-gun and, therefore, shall be null and void.

Background of the Case

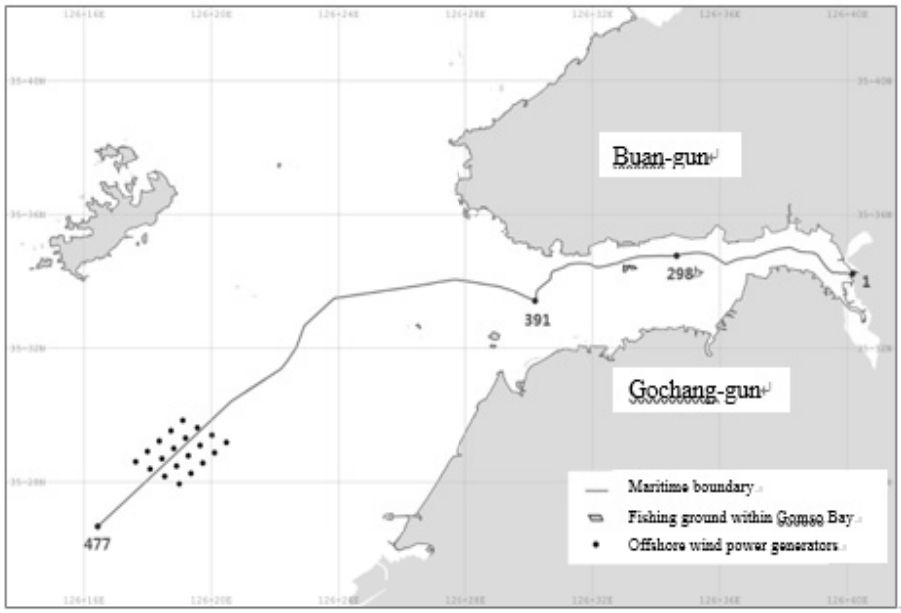
1. Gochang-gun, the plaintiff and respondent (hereinafter referred to as the "Plaintiff"), and Buan-gun, the respondent and plaintiff (hereinafter referred to as the "Respondent"), are the local governments of Jeollabuk-do located south and north along the coastal line of the West Sea. Between the Plaintiff and the Respondent is Gomso Bay, a long bay stretching from east to west, which borders Buan-gun to the north and Gochang-gun to the south. Wi-do and Juk-do are inhabited islands under the jurisdictions of the Respondent and the Plaintiff, respectively.

2. [2016Hun-Ra8] The Korean government announced a comprehensive plan to develop Southwest Offshore Wind Farm by phase in November 2010, based upon which the Korea Offshore Wind Power was established on December 7, 2012. The Minister of Trade, Industry and Energy provided public notice of approving an execution plan to develop electric power sources for the Southwest Wind Farm Test Site Construction Project on March 4, 2016. In the document attached to such notice, it is indicated that the wind farm is to be located on the public waters of

Buan-gun. Accordingly, the Respondent imposed on the Korea Offshore Wind Power the fees for occupancy and use for the public waters that include the location of the offshore wind power generators on the map attached below, on January 9, 2017, January 16, 2018 and June 26, 2018. The Plaintiff filed a competence dispute, claiming that the Respondent's disposition to impose occupancy and use fees for the public waters infringed upon its autonomous authority.

3. [2018Hun-Ra2] The Respondent argued that the fishing licenses issued by the Plaintiff on August 10, 2018, which cover the fishing ground within Gomso Bay indicated on the map below, infringed upon its autonomous authority and subsequently filed a competence dispute seeking confirmation of the jurisdiction over the waters and invalidation of the fishing licenses.

※ [Attachment 1] Map



Summary of the Decision

1. Principle to Determine Local Government's Jurisdiction over the Public Waters

A local government's jurisdiction over the public waters shall be determined by specific laws and regulations if they exist, or by customary law if they do not exist. When there is no customary law to follow, it is unacceptable that any jurisdiction of a local government is left without a boundary in light of the nature of a local government that comprises residents, area, and autonomous authority. Therefore, the Court authorized to adjudicate on a competence dispute must demarcate the maritime boundary reasonably and fairly under the principle of equity.

2. Criteria for Determining Maritime Boundary According to Customary Law, and Denial of Maritime Boundary over Disputed Waters under Customary Law

Determining a maritime boundary between local governments according to customary law requires local governments and residents involved to have certain custom over the boundary that is agreed upon and continued for a long time and also legal conviction that the custom over the maritime boundary is the legal norm. According to documents, however, it is hard to believe that the two local governments and residents have longstanding custom and legal conviction that the disputed waters fall under the jurisdiction of the Plaintiff or the Respondent. Hence, the submitted documents alone are insufficient to support the argument that the maritime boundary over the disputed waters has been determined by customary law.

3. Maritime Boundary over Disputed Waters Drawn by the Principle of Equity with All Circumstances Considered

As a customary maritime boundary between the Plaintiff and the

Respondent does not exist, the Court is in the position to reasonably and fairly determine the maritime boundary under the principle of equity. Taking into account the geographic natural conditions surrounding the disputed waters, relevant laws and regulations, history, executive authority exercised, administrative work, and social and economic benefits of the residents, etc., it is reasonable to determine the boundary based on the equidistance principle starting from the land of Gochang-gun and Buan-gun including Gamak-do and each costal line of inhabited islands like Juk-do, Daejuk-do, Wi-do, Shik-do, Jeonggeum-do, Georyun-do, Sangwangdeung-do, and Hawangdeung-do and uninhabited islands like Sojuk-do, Ddansireum-do, Dojeham-do, Imsu-do, Soeuichi-do, Euichi-do, Tokiseom, Gaeseom, Sori, Soyeo, and Solseom under the current law. However, it would be reasonable to put the public waters west of Juk-do that is the mud flat south of the tidal channel of Gomso Bay under the Plaintiff's jurisdiction as an exception to the equidistance principle, because a mud flat is created at low tide which adjoins the Plaintiff's land, providing its residents with an essential basis of livelihood while the Respondent's land is separated from them by the tidal channel. Therefore, the dots from 1 to 477 in Attachment 1 shall be connected to each other as shown on the map that create the maritime boundary, from which the southern part falls under the Plaintiff's jurisdiction while the northern part falling under the Respondent's jurisdiction.

4. Declaring Respondent's Disposition to Impose Occupancy and Use Fees Partially Invalid

The disposition to impose fees for occupancy and use for the zone of the public waters falling under the jurisdiction of the Plaintiff was issued by the Respondent outside the scope of authority. Therefore, the disposition infringed upon the Plaintiff's local autonomy and shall be null and void.

5. Declaring Fishing Licenses Issued by the Plaintiff Valid

The Plaintiff issued fishing licenses for the zone which falls under its jurisdiction within its authority. Therefore, the issuance does not infringe upon the Respondent's local autonomy and shall be valid and effective.

Summary of Dissenting Opinion of One Justice

The majority opinion can be understood as indicating that inhabited islands should be considered in demarcating the maritime boundary, while uninhabited ones might be considered only when they have important installations for which the local government is responsible or unique natural or geographic features such as adjoining the land at low tide. However, it is still possible that uninhabited islands are closely related to the lives of the residents and also have significant impacts on the operation of the local government even though they do not meet the above requirements. Therefore, excluding such possibility in drawing the maritime boundary is unreasonable. For Ssangyeo-do in particular in this case, there is a possibility that it was not arbitrarily uninhabited without any significant installations but was inevitably left uninhabited as it began to be used as a firing range for the air force. Disregarding this circumstance in determining the maritime boundary provides grounds for criticism. Hence, all uninhabited islands within the disputed waters should be taken into account in demarcating the maritime boundary.

6. Case on Applying Provision That Bans Unfair Dismissal under the Labor Standards Act to Small Workplaces

[2017Hun-Ma820, April 11, 2019]

In this case, the Court held that excluding Article 23 Section 1 that restricts dismissal without any reasonable ground and Article 28 Section 1 regarding remedial process of the National Labor Relations Commission (hereinafter referred to as the "NLRC") from attached Table 1 referred to in Article 7 of the Enforcement Decree of the Labor Standards Act, which specifies the provisions of the Labor Standards Act that apply to a business or workplace with not more than four employees, does not infringe upon the right to equality and right to work.

Background of the Case

The Complainant was dismissed by a business that employs four or fewer employees. Claiming that the dismissal was without any reasonable ground, as prohibited by Article 23 Section 1 of the Labor Standards Act (hereinafter referred to as "unfair dismissal"), the Complainant thereafter petitioned for remedy from the Seoul Regional Labor Relations Commission, which dismissed the petition.

The Complainant filed a constitutional complaint, arguing that his right to equality and right to work are infringed upon by Article 11 Section 1 of the Labor Standards Act providing that all provisions of the Act only apply to businesses or workplaces that have five or more employees (hereinafter referred to as "workplaces with five or more employees"); by Article 11 Section 2 of the Act stating that certain provisions of the Act applicable to businesses or workplaces that have four or fewer employees (hereinafter referred to as "workplaces with four or fewer employees") shall be prescribed by Presidential Decree; and by Table 1 of Article 7 of the Enforcement Decree of the Labor Standards Act that lists the provisions of the Act applicable to workplaces with four or fewer employees.

Subject Matter of Review

The subject matter of review in this case is limited to whether Table 1 of Article 7 of the Enforcement Decree of the Labor Standards Act, which is most closely related to the Complainant's argument (hereinafter referred to as the "Provision at Issue"), infringes upon the basic rights of the Complainant. Article 11 Sections 1 and 2 of the Labor Standards Act are excluded from the review.

Provision at Issue

Enforcement Decree of the Labor Standards Act (wholly amended by Presidential Decree No. 20142, June 29, 2007)

Article 7 (Scope of Application)

The provisions of the Act applicable pursuant to Article 11 Section 2 of the Act to any business or workplace that employs four or fewer regular workers shall be as specified in attached Table 1.

Former Enforcement Decree of the Labor Standards Act (wholly amended by Presidential Decree No. 20142, June 29, 2007; and in force until being amended by Presidential Decree No. 29010, June 29, 2018)

[Table 1] Provisions applicable to any business or workplace that employs four or fewer regular workers (in relation to Article 7)

Item	Applicable Provisions
Chapter 1. General Provisions	Articles 1 through 13
Chapter 2. Labor Contracts	Articles 15, 17, and 18; Article 19 Section 1; Articles 20 through 22; Article 23 Section 2; and Articles 26 and 35 through 42
Chapter 3. Wages	Articles 43 through 45 and 47 through 49

6. Case on Applying Provision That Bans Unfair Dismissal under the Labor Standards Act to Small Workplaces

Item	Applicable Provisions
Chapter 4. Work Hours and Recess	Articles 54, 55, and 63
Chapter 5. Women and Minors	Article 64; Article 65 Sections 1 and 3 (limited to pregnant women and those under 18); Articles 66 through 69; Article 70 Sections 2 and 3; and Articles 71, 72, and 74
Chapter 6. Safety and Health	Article 76
Chapter 8. Accident Compensation	Articles 78 through 92
Chapter 11. Labor Inspector, etc.	Articles 101 through 106
Chapter 12. Penalty Provisions	Articles 107 through 116 (limited to any violation of the provisions that apply to any business or workplace that employs four or fewer regular workers under Chapters 1 through 6, 8, and 11)

Summary of the Decision

1. Issue of the Case

While the Labor Standards Act in entirety, including Article 23 Section 1 that bans unfair dismissal, is applicable to workplaces with five or more employees, the Provision at Issue does not specify that Article 23 Section 1 applies to workplaces with four or fewer employees. Accordingly, the issue is whether the Provision at Issue infringes upon the right to equality of the Complainant, an employee of a workplace with four or fewer employees. Another issue is whether the Provision at Issue infringes upon the Complainant's right to work by failing to establish standards for working conditions reasonable enough to provide workers with minimum safeguards.

2. Infringement of Right to Equality

Workplaces with four or fewer employees generally have smaller sales volume and operating profit and thus tend to have lower financial and management capacity than workplaces with five or more employees. If workplaces with four or fewer employees are bound by the strict grounds and procedures for dismissal based on the Labor Standards Act, those workplaces, most of which are small-scale self-employed individuals, may find it difficult to readily adjust the number of employees and to withstand an economic recession.

Although the unfair dismissal provision of Article 23 Section 1 of the Labor Standards Act does not apply to workplaces with four or fewer employees, they are still banned from discharging any employee during suspension from work due to injury, disease, or medical treatment as well as pre-natal or post-natal period under Article 23 Section 2 of the Act. In addition, other statutes clearly state that even workplaces with four or fewer employees are not allowed to dismiss an employee on such grounds as age, disability, gender, and marriage, pregnancy, childbirth, and childcare leave of female employees, as well as joining a labor union or legitimate collective action.

The Provision at Issue is a policy decision made to practically secure the normative power of the Labor Standards Act in consideration of the reality faced by small businesses. Therefore, there is a reasonable ground in treating workplaces with four or fewer employees differently from workplaces with five or more employees. Thus, the fact that the Provision at Issue excludes Article 23 Section 1 regarding the ban on unfair dismissal and Article 28 Section 1 regarding remedies of the NLRC from application to workplaces with four or fewer employees (pseudo legislative omission) does not infringe upon the Complainant's right to equality.

3. Infringement of Right to Work

Article 32 Section 3 of the Constitution mandates the legislature to establish standards for working conditions in compliance with the principle of human dignity. Based on such mandate, whether the Provision at Issue infringes upon the right to work is determined by whether the lawmakers completely failed to fulfill the obligation to protect workers from dismissal in establishing a system that bans unfair dismissal, or by whether such obligation, though fulfilled to a certain extent, was performed in a way creating a substantially unreasonable system.

As workplaces with four or fewer employees are governed by the Civil Act, in lieu of the Labor Standards Act, in terminating employees, they are, in principle, entitled to terminate their employees at will. However, the relevant provisions in the Civil Act are neither imperative nor mandatory, and any dismissal becomes void where an individual business signed a special agreement stipulating the grounds for dismissal and such dismissal is in violation of the agreement (refer to the Supreme Court's decision).

As the provisions prohibiting termination based on specific grounds as provided in aforementioned individual statutes regarding labor relations also apply to workplaces with four or fewer employees, these provisions partially fill the gap in protecting workers possibly created by non-application of Article 23 Section 1 of the Labor Standards Act. Furthermore, the requirement for prior notice of dismissal in Article 35 of the Labor Standards Act applies to workplaces with four or fewer employees, and therefore the workers can request wages for 30 days of work from the date they are notified of dismissal. Such notice requirement also shows that minimum protection is being provided to the employees of workplaces with four or fewer employees.

The remedial process of the NLRC has practical effect only when the provisions banning unfair dismissal apply. Such remedial process inevitably accompanies higher legal costs on the part of the employer. Moreover, the NLRC's decision ordering an employer to pay monetary

compensation to its employees might impose an undue financial burden on the employer. As the administrative legislators and those who amended the legislation already decided that conditions are not yet in place to compel workplaces with four or fewer employees to conform to the remedies of the NLRC under the Labor Standards Act, the Court has no ground to conclude that such decision was an evidently irrational one.

While the Provision at Issue does not include the provisions banning unfair dismissal (Article 23 Section 1) or those on remedial process of the NLRC (Article 28 Section 1) in the provisions of the Labor Standards Act applicable to workplaces with four or fewer employees, it is not deemed that such exclusion goes beyond the scope of constitutionally acceptable discretion.

The failure of the Provision at Issue to include Article 23 Section 1 and Article 28 Section 1 in the provisions applicable to workplaces with four or fewer employees does not infringe upon the Complainant's right to work.

4. Conclusion

The Provision at Issue does not violate the Constitution.

Summary of Dissenting Opinion of Two Justices

1. Infringement of Right to Equality

The Labor Standards Act classifies workplaces based on a uniform standard of whether a workplace has five employees without considering individual business types or sales volume, and stipulates that only certain provisions thereof apply to workplaces with four or fewer employees. However, small scale should not be the only standard in deciding which provisions should apply to workplaces with four or fewer employees. Rather, considerations for such application should be balanced with the interests of the need to protect their employees.

The provision banning unfair dismissal does not completely deny the freedom to terminate employees but only restricts dismissal without a reasonable ground. Unlike other provisions of the Labor Standards Act inapplicable to workplaces with four or fewer employees, the provision neither generates the effect of increasing wages nor imposes an undue burden on the businesses. Thus, we do not find a reasonable ground to discriminate against workplaces with four or fewer employees from workplaces with five or more employees in applying the provision banning unfair dismissal.

The remedial process of the NLRC is an administrative procedure provided by the State. Whether to make the NLRC remedies available to workplaces with four or fewer employees is by its nature irrelevant to their small economic scale. Therefore, a failure to apply the remedial process to such workplaces constitutes unjustifiable discrimination.

The failure of the Provision at Issue to include Article 23 Section 1 and Article 28 Section 1 in the provisions applicable to workplaces with four or fewer employees infringes upon the Complainant's right to equality.

2. Infringement of Right to Work

Protection from dismissal is an essential condition of labor and is most closely related to the protection of workers, from among the purposes of the Labor Standard Act. Thus adequate regulation therefor is required to govern workplaces with four or fewer employees.

If only Article 660 Section 1 of the Civil Act on terminating employment contract applies, in lieu of Article 23 Section 1 of the Labor Standards Act, the workers of workplaces with four or fewer employees are likely to be put in an unstable position where they can be dismissed anytime without cause.

The remedial process of the NLRC should also apply to workplaces with four or fewer employees as a practical measure to ensure the effect of the provision banning unfair dismissal.

The failure of the Provision at Issue to include Article 23 Section 1 and Article 28 Section 1 in the provisions applicable to workplaces with four or fewer employees infringes upon the Complainant's right to work.

7. Case on Banning Unauthorized Military Uniforms

[2018Hun-Ka14, April 11, 2019]

In this case, the Court ruled that Article 8 Section 2 of the Act on the Control of Military Uniforms and Accouterments, which prohibits possession of unauthorized military uniforms with intent to sell, and Article 13 Section 1 Item 2 of said Act providing the grounds for criminal punishment do not violate the rule of clarity within the principle of punishment by statute or infringe upon the freedom of occupation and the general freedom of action, and therefore, do not violate the Constitution.

Background of the Case

The Defendant is a seller of unauthorized military uniforms. Possessing those uniforms with intent to sell is prohibited by Article 8 Section 2 of the Act on the Control of Military Uniforms and Accouterments, and violating the regulation will lead to criminal punishment of imprisonment for not more than one year or a fine not exceeding 10 million won according to Article 13 Section 1 Item 2 of said Act. The Defendant requested a constitutional review on the grounds for the criminal punishment, during his pending criminal proceedings on charges of possessing unauthorized military uniforms with intent to sell. Accepting the request, the Busan District Court applied for a constitutional review on this case.

Subject Matter of Review

The subject matter of review in this case is whether Article 8 Section 2 of the Act on the Control of Military Uniforms and Accouterments (wholly amended by Act No. 7933, April 28, 2006) and Article 13 Section 1 Item 2 of said Act (amended by Act No. 12555, May 9, 2014) (hereinafter referred to as the “Provisions at Issue”) violate the Constitution.

Provisions at Issue

Act on the Control of Military Uniforms and Accouterments (wholly amended by Act No. 7933, April 28, 2006)

Article 8 (Prohibition of Manufacturing or Distribution of Military Uniforms)

(2) No one shall manufacture or distribute unauthorized military uniforms or possess unauthorized military uniforms with intent to sell those military uniforms: *Provided*, That the foregoing shall not apply where it is intended to use such uniforms for any of the following purposes:

1. Where unauthorized military uniforms are used for cultural or art activities or a ceremonial event specified by Ordinance of the Ministry of National Defense;
2. Where wearing, using, or carrying unauthorized military uniforms is permitted by other statutes;
3. Where unauthorized military uniforms are used for an activity specified by Ordinance of the Ministry of National Defense as one for public interest, such as an activity conducted pursuant to a policy of a State agency or a local government.

Act on the Control of Military Uniforms and Accouterments (amended by Act No. 12555, May 9, 2014)

Article 13 (Penalty Provisions)

(1) A person who falls under any of the following shall be punished by imprisonment for not more than one year or by a fine not exceeding 10 million won:

2. A person who violates Article 8.

Summary of the Decision

1. Issue of the Case

The Provisions at Issue prohibit possession of unauthorized military

uniforms with intent to sell; however, it is hard to distinguish "unauthorized military uniforms" from "genuine battle dress uniforms" by their appearance with the naked eye. Therefore, the subject matter is whether the Provisions at Issue violate the rule of clarity within the principle of punishment by statute.

The other matter is whether the Provisions at Issue violate the rule against excessive restriction by unduly limiting the sellers' freedom of occupation or one-off sellers' general freedom of action (freedom of contract) while banning the possession of unauthorized military uniforms with intent to sell beyond its legislative purpose of preventing military forces from weakening.

2. Violation of the Rule of Clarity within the Principle of Punishment by Statute

Article 2 Item 3 of the Act on the Control of Military Uniforms and Accouterments defines the term "unauthorized military uniforms" as "articles specified by Ordinance of the Ministry of National Defense among those which are similar to military uniforms in form, colors, or style which are extremely difficult to discern from military uniforms by appearance." In the meantime, the Provisions at Issue do not ban the military look all together because the military look in general mostly copies the symbol of battle dress uniforms, but is completely different from the genuine military uniforms in form, colors, or style. Any person with a sound common sense and general legal sentiment would be able to discern what the "unauthorized military uniforms" that must not be possessed with intent to sell are.

Thus, the Provisions at Issue do not violate the rule of clarity within the principle of punishment by statute.

3. Infringement upon the Freedom of Occupation or General Freedom of Action

Battle dress uniforms, copied by the makers of unauthorized military uniforms, are special products delicately designed and manufactured to serve military purposes. Non-military people wearing unauthorized military uniforms and impersonating soldiers would undermine people's trust in the military and soldiers, thereby impeding an effective response to the need of the national security. Since prohibiting people from wearing unauthorized military uniforms alone is insufficient to serve the legislative purpose, it is inevitable to have a preemptive regulation in place that bans even possessing those uniforms with intent to sell. The scope of prohibition against unauthorized military uniforms is strictly and narrowly defined as applying to articles that are difficult to discern from the genuine ones by appearance.

The freedom of occupation or general freedom of action restricted by the ban on possessing unauthorized military uniforms with intent to sell does not outweigh the public interest. Therefore, the Provisions at Issue neither violate the rule against excessive restriction, nor do they infringe upon the freedom of occupation or general freedom of action.

4. Conclusion

The Provisions at Issue do not violate the Constitution.

Dissenting Opinion of Three Justices

The Provisions at Issue do not violate the rule of clarity within the principle of punishment by statute but infringe upon the freedom of occupation or general freedom of action.

Since the decision over whether to buy and how to use unauthorized military uniforms depends on individual freedom, it is hard to suppose

that all such acts affect the national security. However, the Provisions at Issue impose a blanket ban on possession of unauthorized military uniforms, disallowing it even when it is only to generate economic profits with no intent to threaten the national security. Also, under the Provisions at Issue, even those who are not likely to undermine the legislative purpose may become the subjects of criminal punishment.

People's perception has changed and they are accepting what others wear as personal individuality and freedom as long as no direct or indirect harm is inflicted on others. Under the circumstances, the Provisions at Issue are not regarded to have the reason for existence that they had when they were first legislated.

Even if possessing unauthorized military uniforms with intent to sell is allowed, national security can surely be protected through other criminal provisions such as the charges of espionage or false impersonation of a public official.

The Provisions at Issue violate the rule against excessive restriction and infringe upon the freedom of occupation or the general freedom of action. Therefore, the Provisions at Issue violate the Constitution.

8. Case on Designating Autonomous Private High Schools (APHS) as Schools of the Second Term and Banning APHS Applicants from Reapplying to Schools of the Second Term in High School Equalization Policy Areas

[2018Hun-Ma221, April 11, 2019]

In this case, the Court held that the provision of the Enforcement Decree of the Elementary and Secondary Education Act banning applicants for autonomous private high schools from reapplying to schools of the second term in high school equalization policy areas violates the Constitution by infringing upon the right to equality of the students and their parents. On the other hand, the Court ruled that the provision of the Enforcement Decree of the Elementary and Secondary Education Act designating the autonomous private high schools as schools of the second term does not violate the Constitution because such provision does not infringe upon the school foundations' freedom to operate private schools and their right to equality.

Background of the Case

The Complainants are school foundations (hereinafter referred to as "complaining foundations") that operate autonomous private high schools (hereinafter referred to as "APHS"), middle school students who reside in high school equalization policy areas (hereinafter referred to as "HSEPA") and want to be admitted to APHS (hereinafter referred to as "complaining students"), and their parents (hereinafter referred to as "complaining parents"). Since APHS were included in the category of the schools selecting students in the first term (hereinafter referred to as "schools of the first term") under the high school admission schedule of 2018, students could reapply to the schools selecting students in the second term (hereinafter referred to as "schools of the second term") until 2018, if he or she fails to be admitted to APHS in the first term,

pursuant to Article 85 Section 2 of the Enforcement Decree of the Elementary and Secondary Education Act. As the Enforcement Decree was amended on December 29, 2017, however, Item 5 from Article 80 Section 1 was deleted to classify APHS into the category of schools of the second term, and the following phrase "excluding ... autonomous private high schools under Article 91-3" was inserted to Article 81 Section 5 to prohibit APHS applicants from reapplying to schools of the second term in HSEPA (hereinafter referred to as the "Amendment"). The Complainants filed a constitutional complaint on February 28, 2018, arguing that the Amendment infringes upon the students' and their parents' right to select the schools as well as the school foundations' right to select their students by making it difficult for the students and parents to apply to APHS, and APHS find it challenging to select their students. The Complainants also argued that the Amendment infringes upon their right to equality and violates the principle of protection of confidence.

Subject Matter of Review

The subject matter of review in this case is whether Article 80 Section 1 (hereinafter referred to as the "Provision for Simultaneous Selection") and the phrase "excluding ... autonomous private high schools under Article 91-3" in Article 81 Section 5 (hereinafter referred to as the "Provision Banning Multiple Applications"; both Provisions being hereinafter collectively referred to as the "Provisions at Issue") of the Enforcement Decree of the Elementary and Secondary Education Act (amended by Presidential Decree No. 28516, December 29, 2017) (hereinafter referred to as the "Enforcement Decree") infringe upon the basic rights of the Complainants.

Provisions at Issue

The Enforcement Decree of the Elementary and Secondary Education

Act (amended by Presidential Decree No. 28516, December 29, 2017)

Article 80 (Classification of Selection Time)

(1) The time for selecting new high school students shall be divided into the first term and the second term; and schools or departments selecting students in the first term (hereinafter referred to as "schools of the first term") mean the following high schools or departments, and schools or departments selecting students in the second term (hereinafter referred to as "schools of the second term") mean the high schools, other than schools of the first term:

1. Deleted;
2. Art and athletic high schools (referring to high schools which mainly provide technical education, such as arts and athletics; hereinafter the same shall apply) among general high schools;
3. Special purpose high schools under Article 90 except for the special purpose high schools under Article 90 Section 1 Item 6;
4. Specialized high schools under Article 91;
5. ~~Autonomous private high schools pursuant to Article 91-3~~ Deleted; *<by Presidential Decree No. 28516, December 29, 2017>*
6. Departments determined by the Superintendent of an Office of Education among departments established in general high schools (limited to departments established for the purposes of training artists and athletics or training talented persons in a specific field corresponding to specialized high schools under Article 91).

Article 81 (Application for Admission)

(5) Notwithstanding the text of Section 1, a person who intends to enter a day session of a school of the second term (excluding special purpose high schools under Article 90 Section 1 Item 6 and autonomous private high schools under Article 91-3) in the area prescribed by ordinance of the relevant City/Do pursuant to Article 77 Section 2 may select and apply to at least two schools

according to the methods and procedures determined by the competent Superintendent of the Office of Education.

Summary of the Decision

1. Whether the codification of education system is violated (the Provisions at Issue)

The Elementary and Secondary Education Act prescribes basic matters such as purpose (Article 45), term of school years (Article 46), qualifications for admission (Article 47), and departments, subjects, and curricula (Article 48) regarding the high school education system and its operation. However, matters concerning the admission, such as methods and procedures of entering high schools, are delegated to administrative legislation according to Article 47 Section 2 due to the need to take into account, among other things, the situation of supply of and demand for high school education, which varies by region and time, and the characteristics of each high school. Thus, it is difficult to find that the Provisions at Issue, which stipulate the time of selecting new students and the method of application in the form of Presidential Decree according to the characteristics and needs of each high school, constitutes in and of itself a violation of the codification of education system.

The Provisions at Issue enabled individual schools to select new students at different times reflecting their own purpose and needs, since various types of special purpose high schools were recognized in ways to complement the national policy of high school equalization. In addition, application methods were decided differently considering the characteristics of schools of the second term in HSEPA, where students can practically be allocated by the draw regardless of which school they want to attend, and those of APHS where the admission process consists of draw, admission interview, and the like depending on a student's choice and application.

Therefore, the Provisions at Issue were formulated based on such

considerations as the situation of supply of and demand for high school education as well as the characteristics of various high schools, and are consistent with the delegation purpose of Article 47 Section 2 of the enabling statute, the Elementary and Secondary Education Act.

2. Judgment on the Provision for Simultaneous Selection

(1) Whether the restriction on basic rights has gone too far, infringing upon the freedom to operate private schools

Since private schools cannot differ in essence from national or public schools in that they play a role in public education, the State has the authority and responsibility to supervise and control the operation of private schools within a certain scope; and the degree of regulation will depend on circumstances of the time and conditions of respective schools. Constitutionality of the Provision for Simultaneous Selection, despite its restriction on the complaining foundations' freedom to operate their schools, should be determined by whether it arbitrarily infringes upon the essence beyond the limit of restricting the basic rights under Article 37 Section 2 of the Constitution.

The Provision for Simultaneous Selection was enacted to "discourage a handful of schools from picking excellent students before other schools can make a choice as well as ease high school rankings," and "relieve excessive competition for prestigious high schools" through the operation of equal and fair admission process. The original purpose of designating APHS as schools of the first term was to reflect the expectation that they would provide differentiated education from that of general high schools under autonomous operation by selecting students suitable for their foundation philosophy and curricula before schools of the second term. Despite the original intention, however, the curricula of APHS were not so different from those of general high schools, and selecting students in the first term was exploited to pick excellent students before other schools can make a choice. Some argued that it is an unfair discrimination between general high schools and APHS based on the

school type, and the gap in academic performance between them is widening. Under such circumstances, it is no longer justifiable to classify APHS in the category of schools of the first term.

The key element in selecting students fit for individual APHS is the selection method, and the principals of each school can decide the admission process even if APHS and general high schools select their students at the same time. Therefore, APHS would not face difficulty in selecting students fit for their own education program, and the Enforcement Decree minimized restrictions on the APHS' freedom to operate private schools by keeping intact the administrator of admission process, the size of students to select, or the like. Furthermore, it cannot be concluded that enhancing competitiveness of general high schools alone is good enough to ease high school rankings and competition for prestigious high schools.

Thus, the Provision for Simultaneous Selection is within discretion and authority of the State that establishes the school system.

(2) Whether the principle of protection of confidence is violated and the freedom to operate private schools is infringed

It is increasingly necessary to flexibly implement the education policy to properly respond to a changing education environment. Further, if any unexpected side effect emerges from an education system put in place, the State must redress the problem as it formulates the education policy.

APHS are governed by Article 61 of the Elementary and Secondary Education Act, and the provision cannot be deemed to have granted them special confidence as to the time of selecting new students. In addition, the admission process needs to be determined based on supply of and demand for the high school education and characteristics of respective high schools. Moreover, designating them as schools of the first term depends on whether one recognizes their need to select students with certain gifts or aptitude in a particular field ahead of schools of the second term.

As stated earlier, APHS have been operated in deviation from their original purpose of introduction. The expectation or confidence that

APHS would remain as schools of the first term is based on the premise that they would run their curricula in faithful ways serving the original purpose. As long as such premise is not met, the value or need for protection of the confidence of the complaining foundations diminishes naturally.

Easing high school rankings and competition for school entrance exam is significant public interests. Keeping APHS under the category of schools of the first term would make it difficult to address the issue of APHS' picking excellent students before other schools can make a choice, and consequently would make it hard to ease the phenomenon of high school rankings. Besides, the value of protecting confidence of the complaining foundations is negligible. When the facts above are taken into account, the Provision for Simultaneous Selection does not violate the principle of protection of confidence.

(3) Whether the right to equality of the complaining foundations is infringed upon

Classifying certain schools under the category of schools of the first term should be determined based on whether they need to select students with certain gifts or aptitude in specific areas before schools of the second term do. It can be acknowledged that science high schools need to select students with gifts or aptitude in science in order to fulfill its foundation philosophy of "nurturing talents in science or specialized curricula" before schools of the second term do. On the other hand, it is deemed less necessary for APHS to select students with certain gifts or aptitude before schools of the second term do when considering their curricula and the like. Thus, the Provision for Simultaneous Selection does not infringe upon the right to equality of the complaining foundations as there is a reasonable cause to designate APHS as schools of the second term and treat them like general high schools but unlike science high schools.

3. Judgment on the Provision Banning Multiple Applications

The issue in the Provision Banning Multiple Applications is a matter of equal opportunity for high school admission. Though high school education is not compulsory, it is considered a general education that everyone is provided with. When such fact is taken into account, restricting the opportunity for high school admission has a significant impact on the students. Therefore, whether the purpose and degree of discrimination conform to the principle of proportionality should be examined strictly.

Applicants for APHS and those for general high schools either did not apply to schools of the first term or did not pass the entrance exam. Therefore, the two are in the same position where they all have only one chance to apply to attend a high school of the second term.

It may vary by cities and provinces, but if an applicant's ranking based on his or her middle school records falls within the total quota of schools of the second term in each area, his or her admission to a school of the second term is guaranteed in HSEPA.

However, the unsuccessful applicants for APHS in HSEPA in principle do not have the chance to apply to general high schools in their areas because of the Provision Banning Multiple Applications; and whether to assign them to other schools is up to the Superintendent of the Office of Education of the respective area. Under the circumstances, some of the unsuccessful applicants for APHS in HSEPA cannot attend a general high school in their own school district as the local education authorities do not provide a general high school assignment process for them. Those students might have to attend schools in non-HSEPA far from home or need to wait for applying to schools whose admission process is conducted by their principals for the purpose of filling the vacancies when such schools fail to meet their full student quota. In a worst case scenario, if nothing above mentioned is available, students might have to spend another year to attend high school. In light of the meaning of high school education and the high school entrance ratio in Korea, it is

certainly questionable if the disadvantage possibly coming from applying to APHS is justifiable.

If students are faced with difficulties in being assigned to a school of the second term after failing to be admitted to APHS, due to the fact that the admission processes for the APHS and schools of the second term in HSEPA are implemented by their own respective administrators, the State should have provided other solutions for them. Nevertheless, the Provision Banning Multiple Applications simply stated the principle of banning multiple applications without presenting any measure for the unsuccessful applicants for APHS to enter high school. Consequently, the Provision Banning Multiple Applications infringes upon the right to equality of both the complaining students and complaining parents as it is not deemed to have proportionality between the purpose and degree of discrimination to a level that justifies discrimination against the applicants for APHS as for the chance to enter high school.

Opinion of Unconstitutionality by Five Justices on Provision for Simultaneous Selection

(1) Whether the principle against excessive restriction is violated and the freedom to operate private schools is infringed

Ensuring the autonomy and independence of private schools is the essence of the private school system. In this context, the State's interference in private school education should be confined to what is necessary to ensure the soundness of the public education provided by private schools, or the education necessary to recognize the educational attainment of their students. Autonomous operation of school foundations or private schools can be limited only when the conditions of Article 37 Section 2 of the Constitution are met.

The controversy over APHS boils down to a matter of educational philosophy centering on the question of which one is more important: autonomy or publicness in private education; and excellence or equity in

education. When such consideration is taken into account, the legislative purpose itself is acceptable and the Provision for Simultaneous Selection is deemed an appropriate measure that contributes to achieving the purpose.

APHS are financially independent from the State or local governments in return for a greater autonomy than general private high schools and as little regulation as possible on the right to select their own students. When high tuition fees, specialized educations according to individual founding philosophy, and dormitories of APHS that recruit students from all across the country are taken into account, it is critical for APHS to select students in the first term for school operation before general high schools do.

In order to discourage a handful of schools from picking excellent students before other schools can make a choice and ease high school rankings, the ultimate solution is to enhance competitiveness of general high schools. The Provision for Simultaneous Selection, however, settled on an easy choice by choosing to regulate APHS, possibly resulting in a uniform mediocrity for all high schools. Further, it is not regarded to particularly overheat competition for high school entrance as the admission process for APHS disallows testing textbook knowledge. Such issue implies that it is uncertain to what extent its legislative purpose is served. As mentioned above, unsuccessful applicants for APHS are not guaranteed to be assigned to schools of the second term in HSEPA due to the Provision for Simultaneous Selection and the Provision Banning Multiple Applications. Consequently, students are likely to avoid applying to APHS, which can even threaten the very existence of such schools. If any of APHS fails to meet the legal requirement or achieve its foundation purpose, the legislative purpose can be served through less restrictive regulations for the APHS concerned such as revocation of designation by the competent Superintendent of the Office of Education. Accordingly, the Provision for Simultaneous Selection violates the principle of minimum restriction. Furthermore, the public interest to achieve is greatly outweighed by the infringed private interest of the

complaining foundations, making it difficult to acknowledge the balance of interests. Against this backdrop, the Provision for Simultaneous Selection violates the principle against excessive restriction and infringes upon the complaining foundations' freedom to operate private schools.

(2) Whether the principle of protection of confidence is violated

If an action of an individual under a statute or regulation is induced by the State in a certain direction and goes beyond the use of opportunities reflectively provided by the statute or regulation, the reliance interest that is particularly worth protecting can be acknowledged. Further, there is room to believe that protecting individual confidence should take precedence over the State's interest coming from legal amendment. Foundation and operation of APHS by the complaining foundations is not solely for their private interests; rather, it is induced and encouraged by the State in certain ways to realize the public interests of diversity, autonomy, excellence, and responsibility of high school education. Furthermore, their foundation and operation was realized as the State assured the complaining foundations of "selecting students in the first term" as prescribed by "Presidential Decree" (Article 80 Section 1 Item 5 of the Enforcement Decree before the amendment on December 29, 2017). Such confidence of the complaining foundations is especially worth protecting under the Constitution.

Contribution of the Provision for Simultaneous Selection to achieving the legislative purpose is slight or uncertain. Meanwhile, given that the provision has made students avoid applying to APHS and that the complaining foundations operate with corporate contributions, tuition fees, and the like without receiving the government subsidy, the provision presents a considerable difficulty to the complaining foundations in their school operation and leaves them no choice but to turn into general high schools when they can no longer sustain the loss. The complaining foundations in particular that recruit students nationwide have made a heavy physical and human capital investment, such as dormitories and

other facilities that would be unnecessary in general high schools. Simply turning them into general high schools cannot address the loss and disadvantage of the complaining foundations. Moreover, it is hard to see that the government went through sufficient review and hearings about changing the admission period of APHS. The State suddenly amended the Enforcement Decree on December 29, 2017 and enforced the amendment from the school year of 2019 immediately without any grace period. All in all, the Provision for Simultaneous Selection violates the principle of protection of confidence, infringing upon the school foundations' freedom to operate private schools.

9. Case on Presidential Decree Prescribing Provisions of the Labor Standards Act Applicable to Small Workplaces

[2013Hun-Ba112, April 11, 2019]

In this case, the Court held that Article 11 Section 2 of the Labor Standards Act, which states that some provisions of this Act applicable to businesses or workplaces with four or fewer employees may be prescribed by Presidential Decree, does not violate the principle of the rule against blanket delegation.

Background of the Case

The Petitioner was dismissed by a business with four or fewer employees a week after the beginning of employment. Arguing that it was an unfair dismissal prohibited by Article 23 Section 1 of the Labor Standards Act, the Petitioner filed a suit against the employer to claim damages. During the final appeal, the Petitioner requested a constitutional review of Article 11 Section 2 of the Labor Standards Act, which stipulates that some provisions of this Act applicable to workplaces that have four or fewer employees (hereinafter referred to as "workplaces with four or fewer employees") may be prescribed by Presidential Decree. After the request was rejected, the Petitioner filed a constitutional complaint with this Court.

Subject Matter of Review

The subject matter of review in this case is whether Article 11 Section 2 of the Labor Standards Act violates the Constitution.

Provision at Issue

Labor Standards Act (wholly amended by Act No. 8372, April 11, 2007)
Article 11 (Scope of Application)

(2) With respect to a business or workplace in which not more than four employees are regularly employed, some provisions of this Act may apply as prescribed by Presidential Decree.

Summary of the Decision

1. Issue of the Case

The issue is whether the Provision at Issue violates the principle of statutory reservation, which suggests that basic rights can only be restricted by law. The Provision at Issue states that some provisions of the Labor Standards Act may apply to workplaces with four or fewer employees as prescribed by a presidential decree of the Executive, not by law of the Legislative.

The issue is whether the Provision at Issue violates the principle of the rule against blanket delegation under Article 75 of the Constitution, by going beyond the limit of the blanket delegation. The Provision at Issue delegates to the Executive the task of determining the provisions of the Labor Standards Act by issuing presidential decrees without specifying any legal standards.

2. Violation of Principle of Statutory Reservation

According to the Provision at Issue, it is not law but a presidential decree that determines which provisions of the Labor Standards Act apply to workplaces with four or fewer employees. However, Article 11 Section 1 of the Act provides that the whole Act shall apply to all workplaces with five or more employees, while the Provision at Issue stipulates that only some provisions of the Act shall apply to workplaces with four or fewer employees. Whether specific provisions shall apply is not deemed a matter that must be regulated by law.

Thus, the Provision at Issue that delegates to the Executive the task of determining specific provisions of the Labor Standards Act applicable to

certain workplaces subject to partial application of the Labor Standards Act with a presidential decree complies with the principle of statutory reservation, as long as it conforms to the limit of the blanket delegation prohibited by Article 75 of the Constitution.

3. Violation of Principle of Rule against Blanket Delegation

In the past, the number of employees which serves as a basis for determining the scope of workplaces subject to partial application of the Labor Standards Act was stipulated not by law, but by a presidential decree. After the Labor Standards Act was amended on March 29, 1989, the Act specifies that workplaces with five or more employees are subject to full application while workplaces with four or fewer employees are subject to partial application, providing the standards for distinguishing the workplaces that are subject to partial application of the Act.

Although the Provision at Issue does not specifically offer the standard regarding which provisions of the Act shall apply to workplaces with four or fewer employees, the Act has expanded the scope of the workplaces that the Act governs in its entirety for practical assurance of the normative power since it was legislated. In the past, workplaces with four or fewer employees were not subject to the Act at all, but such workplaces are now governed by at least some provisions of the Act.

The Provision at Issue delegates authority to a presidential decree based on a standard suggesting that the provisions of the Act that are first applicable should be decided in the perspective of reducing the burden on employers, as well as protecting employees. Those bound by the provision will be able to predict which provisions would apply to workplaces with four or fewer employees according to this standard.

Hence, the Provision at Issue does not violate the principle of the rule against blanket delegation.

4. Conclusion

The Provision at Issue does not violate the Constitution.

Summary of Dissenting Opinion of Two Justices

The two Justices contend that the Provision at Issue does not violate the principle of statutory reservation but violates the principle of the rule against blanket delegation.

The Provision at Issue fails to provide any legal standard on the provisions that apply to workplaces with four or fewer employees and gives full authority to a presidential decree. Even when the provisions with relevance are interpreted comprehensively, it is unpredictable which provisions will be prescribed by a presidential decree. The Executive that creates presidential decrees cannot find any standard in the Provision at Issue about which provisions of the Labor Standards Act it has to choose to apply to workplaces with four or fewer employees.

The Provision at Issue delegates the legislative power of the National Assembly to a presidential decree of the Executive as to which provisions should apply without providing any standard. Therefore, it goes beyond the limit of delegation, amounting to the blanket delegation prohibited by Article 75 of the Constitution. It also violates the principle of establishing standards of working conditions by law under Article 32 Section 3 of the Constitution, and Article 40 stating that the legislative power shall be vested in the National Assembly, as well as the principle of separation of powers between the Executive and the Legislative.

The Provision at Issue violates the Constitution. However, it should remain effective as it provides the legal ground under which some of the provisions apply to workplaces with four or fewer employees. The lawmakers should establish a concrete standard regarding which provisions of the Act shall be prescribed by a presidential decree, to eliminate its unconstitutionality as soon as possible. They are also required to reexamine the standard if the provisions inapplicable to workplaces with four or fewer employees were determined according to reasonable grounds.

10. Case on Punishing Door-to-Door Visitors for Election Campaign "during the Period Provided for by the Articles of Incorporation of Community Credit Cooperatives"

[2018Hun-Ka12, May 30, 2019]

In this case, the Court ruled that the provision of Article 22 Section 2 Item 5 referred to in Article 85 Section 3 of the Community Credit Cooperatives Act, which punishes anyone making door-to-door visits to members "during the period provided for by the articles of incorporation" for an election campaign of executive officers, violates the Constitution.

Background of the Case

No person shall visit members from door to door during the period provided for by the articles of incorporation in order to get himself or herself or a specific person elected or defeated as an executive officer of a credit cooperative. Despite such prohibition, the Movant visited the house of a representative of the Community Credit Cooperatives to ask the representative as a favor to help him win the election, which led to his indictment.

During the criminal appeal, the requesting court believed that the Movant filed a motion to request a constitutional review of statutes with regard to the provision of Article 22 Section 2 Item 5 referred to in Article 85 Section 3 of the Community Credit Cooperatives Act, and granted the motion, requesting the constitutional review on July 6, 2018.

Subject Matter of Review

The subject matter of review in this case is whether the provision of Article 22 Section 2 Item 5 (hereinafter referred to as the "Provision at Issue") referred to in Article 85 Section 3 of the Community Credit Cooperatives Act (amended by Act No. 12749, June 11, 2014) violates the Constitution.

10. Case on Punishing Door-to-Door Visitors for Election Campaign "during the Period Provided for by the Articles of Incorporation of Community Credit Cooperatives"

Provision at Issue

Community Credit Cooperatives Act (amended by Act No. 12749, June 11, 2014)

Article 85 (Penalty Provisions)

(3) A person who violates Article 22 Section 2 or 3 (including where it is applied *mutatis mutandis* in Article 64-2 Section 6) shall be punished by imprisonment for not more than two years or by a fine not exceeding 20 million won.

Related Provisions

Community Credit Cooperatives Act (amended by Act No. 10437, March 8, 2011)

Article 22 (Restrictions on Election Campaign of Executive Officers)

(2) No person shall do any of the following acts for the purpose of getting himself or herself or a specific person elected or defeated as an executive officer of a credit cooperative in an election:

5. Visiting members from door to door (including their places of business) or having them assemble at a specific place during the period provided for by the articles of incorporation.

Summary of the Decision

1. Elements of Crime and Articles of Incorporation of Community Credit Cooperatives

Article 12 Section 1 of the Constitution prescribes the principle of *nulla poena sine lege* by saying no person shall be punished except as provided by law and through due process. The law here refers to a statute in a formal sense enacted by the legislature.

According to the Provision at Issue, no person shall visit members

from door to door in order to get himself or herself or a specific person elected or defeated as an executive officer of a credit cooperative in an election; and if the visit was made "during the period provided for by the articles of incorporation," the visitor shall be subject to criminal punishment, and if the visit was not made during the period prescribed, the visitor shall not be criminally punished. Thus, "the period provided for by the articles of incorporation" stipulated in the Provision at Issue constitutes an important element of the crime.

2. Principle of *Nulla Poena Sine Lege* and Principle by Statute

The articles of incorporation are self-governing norms that a juristic person voluntarily establishes for its own organization and activities and, in principle, are effective only internally without having a binding force on any third party. They differ in nature from legal orders in their creation and condition of effectiveness. The Provision at Issue delegates major issues regarding criminal punishment to the articles of incorporation of a special juristic person though the Constitution does not allow delegated rule-making. This essentially amounts to granting authority to make punitive laws and rules to the writers of the articles of incorporation. Therefore, the Provision at Issue delegating the elements of crime to the articles of incorporation is hardly justifiable based on the principle of *nulla poena sine lege*, which states that crimes and punishment shall be defined by statute in a formal sense enacted by the legislature.

Predictability in the principle of *nulla poena sine lege* can be inferred from statutory provisions. However, it is impossible for the general public bound by the law to predict specifically when a door-to-door visit is prohibited based only on the Provision at Issue.

3. Conclusion

Given all of the factors set forth above, the Provision at Issue violates

the Constitution as it goes against the principle of *nulla poena sine lege* saying that crimes and punishment shall be defined by statute in a formal sense enacted by the legislature.

11. Case on Reasons for Ineligibility under the Attorney-at-Law Act

[2018Hun-Ma267, May 30, 2019]

In this case, the Court ruled that Article 5 Item 2 of the Attorney-at-Law Act, which states that suspension of imprisonment without prison labor or heavier punishment is one of the reasons for ineligibility of an attorney-at-law, does not infringe upon the Complainant's freedom to conduct one's occupation and the right to equality and, therefore, does not violate the Constitution.

Background of the Case

The Complainant, an attorney-at-law, was prosecuted for violating the Attorney-at-Law Act by lending the attorney-at-law title to allow a non-attorney-at law to handle legal affairs.

The Seoul Central District Court sentenced the Complainant to one-year imprisonment with two-year suspension on May 2, 2017 (Seoul Central District Court 2016Go-Dan3698). As the appeals were all rejected at the next two levels of courts (Seoul Central District Court 2017No1705 and Supreme Court 2017Do15402), the decision was made final on December 7, 2017.

The Complainant filed a constitutional complaint on March 13, 2018, claiming that Article 5 Item 2 of the Attorney-at-Law Act, which states that a person who is sentenced to suspension of imprisonment without prison labor or heavier punishment and for whom two years have yet to elapse since the lapse of the suspension period shall be ineligible to become an attorney-at-law, infringes upon the Complainant's basic right.

Subject Matter of Review

The subject matter of review in this case is whether Article 5 Item 2 of the Attorney-at-Law Act (amended by Act No. 8991, March 28, 2008) infringes upon the Complainant's basic right.

Provision at Issue

Attorney-at-Law Act (amended by Act No. 8991, March 28, 2008)

Article 5 (Reasons for Ineligibility as Attorneys-at-Law)

Any of the following persons shall be ineligible to become an attorney-at-law:

2. A person who is sentenced to suspension of imprisonment without prison labor or heavier punishment and for whom two years have yet to elapse since the lapse of the suspension period.

Summary of the Decision

1. Precedent

The Constitutional Court found that the Provision at Issue and Article 5 Item 2 of the former Attorney-at-Law Act (wholly amended by Act No. 6207, January 28, 2000; and in force until being amended by Act No. 8991, March 28, 2008), which stipulates the same with the Provision at Issue, do not infringe upon the freedom to choose one's occupation or the right to equality (*see* CC 2008Hun-Ma432, Oct. 29, 2009; and CC 2015Hun-Ma916, Jun. 30, 2016). The Court explained the reasons as follows:

『(1) Whether Freedom to Choose One's Occupation Is Infringed upon

Attorneys-at-law are mandated to protect basic human rights and to realize social justice. Thus fulfilling the duty should be based on the people's trust in each individual attorney-at-law and the bar as a whole. An attorney-at-law being punished for a criminal act can damage not only the credibility of the attorney-at-law himself or herself individually but also all other attorneys-at-law as a profession, undermining the public interests. In this perspective, the Provision at Issue is deemed to have legitimacy of legislative purpose and appropriateness of means, since it specifies the existence of certain criminal sanctions as a reason

for ineligibility as an attorney-at-law, to protect and maintain the attorney-at-law system and also to promote their sense of ethics.

If a court examined all circumstances and conditions and sentenced the suspected attorney-at-law to imprisonment without prison labor or heavier punishment, the suspect is very likely to be subjected to social condemnation. When the mandate of the attorneys-at-law to maintain social order and to realize social justice is taken into account, criminal acts leading to punishment which is a reason for ineligibility are not confined to crimes that concerns their professional work. The Provision at Issue does not permanently disbar the suspended attorney-at-law from practice. Rather, it aims to strengthen his or her sense of ethics by making him or her ineligible for two more years even after the suspension period. Consequently, the public interests that the Provision at Issue intends to protect outweigh the disadvantages in which the ineligible person cannot choose the occupation.

Lawmakers can institute sufficient amount of time for the public to restore confidence in the criminally penalized attorney-at-law and the entire group of attorneys-at-law as a standard separate from the Criminal Act. The Provision at Issue extends the ineligibility period for two more years to give the attorneys-at-law sentenced to suspension of imprisonment without prison labor or heavier punishment a chance to reflect on their behaviors in consideration of the public nature of their service, a strong sense of morality required of attorneys-at-law, and the importance of people's confidence in such qualities. Accordingly, this cannot be regarded as an excessive restriction on freedom to choose one's occupation, and the Provision at Issue neither violates the rule against excessive restriction nor infringes upon the freedom to choose one's occupation.

(2) Whether Right to Equality Is Infringed Upon

Medical doctors, pharmacists, and licensed customs brokers can only engage in the work of their own specific field, and the responsibility that follows under the related laws and regulations is also confined to the scope of their profession. On the other hand, attorneys-at-law are required

to protect basic human rights and to realize social justice, and their exclusive status covers all fields of legal affairs. Such is the reason why the Attorney-at-Law Act emphasizes the public nature of the work of attorneys-at-law by imposing duties on them such as maintaining dignity, serving public interests, and avoiding corrupt practices to ensure professionalism, fairness, and credibility of the legal work. Taking into account the characteristics and scope of the work of attorneys-at-laws, the legislature did not limit the type of crimes that constitutes reasons for ineligibility to those only related with their work unlike the Medical Service Act, the Pharmaceutical Affairs Act, and the Licensed Customs Brokers Act. Therefore, such a discriminatory treatment is not arbitrary running counter to rationality and fairness.』

2. This Case

The Complainant in this case claims that placing strict ethical responsibility on the attorneys-at-law as in the past is an unreasonable regulation that infringes upon the freedom to practice occupation when attorneys-at-law are produced in large numbers and their standing and roles are diminishing subsequently. However, the Provision at Issue, as aforementioned, aims to protect the public interests and trust in the attorney-at-law system mandating attorneys-at-law to protect the basic human rights and to realize social justice, and such mandate has nothing to do with how many attorneys-at-law the society has.

Thus, it is hard to believe that things have changed to the extent to be able to reverse the precedent; furthermore the ground of the precedent is valid in this case as well. The Provision at Issue does not infringe upon the freedom to choose one's occupation and right to equality of the Complainant.

12. Case on Keeping Air Guns

[2018Hun-Ba400, June 28, 2019]

In this case, the Court ruled that a provision under the Act on the Safety Management of Guns, Swords, Explosives, Etc. and a provision under the Addenda to said Act that compel a person permitted to possess an air gun to keep it at a place designated by a permitting agency, do not violate the principle against excessive restriction or principle of protection of confidence.

Background of the Case

The Petitioner was permitted to possess an air gun, which was kept in a police station. The Petitioner filed an application to the head of the police station for lifting the storage restriction, which was disapproved. Thus, the Petitioner filed a suit seeking to reverse the disapproval.

During the pending trial, the Petitioner filed a motion to request a constitutional review of Article 14-2 Section 1 of the Act on the Safety Management of Guns, Swords, Explosives, Etc. and Article 3 Section 1 of the Addenda to said Act that compel a person permitted to possess a gun to keep it at a place designated by a permitting agency. However, the motion was rejected and the Petitioner filed a constitutional complaint.

Subject Matter of Review

The subject matter of review in this case is whether the provision regarding air guns under Article 12 Section 1 Item 2 referred to in Article 14-2 Section 1 of the Act on the Safety Management of Guns, Swords, Explosives, Etc. (amended by Act No.13429, July 24, 2015) and the provision regarding air guns under Article 12 Section 1 Item 2 referred to in Article 3 Section 1 of the Addenda to the Act on the Safety Management of Guns, Swords, Explosives, Etc. (Act No. 13429, July 24, 2015) (hereinafter referred to as the “Provision of the Addenda”; both

provisions being hereinafter collectively referred to as the "Provisions at Issue") violate the Constitution.

Provisions at Issue

Act on the Safety Management of Guns, Swords, Explosives, Etc. (amended by Act No.13429, July 24, 2015)

Article 14-2 (Storage of Guns)

(1) A person permitted to possess a gun pursuant to Article 12 or 14 shall keep the gun and cartridges or blank cartridges at a place designated by a permitting agency.

Addenda to the Act on the Safety Management of Guns, Swords, Explosives, Etc. (Act No. 13429, July 24, 2015)

Article 3 (Transitional Measures concerning Storage of Guns)

(1) A person permitted to possess a gun pursuant to Article 12 or 14 as at the time this Act enters into force shall keep the gun and cartridges or blank cartridges at a place designated by a permitting agency within one month from the date this Act enters into force, in accordance with the amended provisions of Article 14-2. .

Summary of the Decision

1. Whether Principle against Excessive Restriction Is Violated

The Provisions at Issue aim to maintain public safety by managing air guns safely and preventing danger and disaster that can be caused by them. In this context, the regulation requiring air guns to be kept at a designated place is an appropriate means to fulfill the purpose. Air guns are dangerous enough to wound or kill people. There is a practical need to keep all air guns at separate places, to prevent crimes or accidents that can occur due to possession of air guns. The Provisions at Issue only limit the method of storage. They do not make any changes to the

permission itself nor do they prohibit the use of guns. The Petitioner can have the storage restriction lifted and get the air gun back with a justifiable ground, and the procedures are not so onerous. The public interest to serve with the Provisions at Issue significantly outweighs the disadvantage arising from the requirement to keep air guns at designated places.

Thus, the Provisions at Issue do not violate the principle against excessive restriction.

2. Whether Principle of Protection of Confidence Is Violated

It is difficult to consider that the confidence of a licensed gun owner that he or she can personally keep the licensed gun is worthy of being protected by the Constitution. Even though such confidence is worthy of protection under the Constitution, matters regarding the ways of keeping and safely managing air guns can change depending on the social environment or policy, and this makes the worth of protecting such confidence insignificant. In contrast, it is of great public value to protect people's safety by restricting personal gun storage. Therefore, the Provision of the Addenda does not violate the principle of protection of confidence.

13. Case of Ineligibility of Sex Offender to Serve as Teacher

[2016Hun-Ma754, July 25, 2019]

In this case, the Court decided that Article 10-4 of the Educational Officials Act, which provides that no person shall be appointed as a teacher defined in the Elementary and Secondary Education Act if he or she has committed a sex offense against a minor and his or her sentence has become final, or if he or she has committed a sexual assault against an adult and his or her sentence of a fine of one million won or more has become final, does not infringe upon the Complainant's right to hold public offices.

Background of the Case

The Complainant is a student of a university of education. The Complainant was prosecuted for violating the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes (filming with a camera, etc.) and the Act on the Protection of Children and Youth against Sex Offenses (possession of pornography) and was fined five million won by a high court, and the Supreme Court upheld the ruling.

The Complainant argued that his or her basic right was infringed upon by Article 10-4 of the Educational Officials Act stating that no person shall be appointed as a teacher if he or she has committed a sex offense against a minor and his or her sentence has become final, or if he or she has committed a sexual assault against an adult and his or her sentence of a fine of one million won or more has become final; and Article 4 of the Addenda to the Educational Officials Act prescribing transitional measures following the revision of above-stated Article 10-4, both of which prevent him or her from holding any public educational office. Accordingly, the Complainant filed a constitutional complaint on September 2, 2016.

Subject Matter of Review

The subject matter of review in this case is whether the provision stating that no person shall be appointed as a teacher defined in Article 2 of the Elementary and Secondary Education Act if he or she has committed an offense under Article 10-4 Item 2 (b) of the Educational Officials Act (amended by Act No. 13819, January 27, 2016) and his or her sentence has become final, or if he or she has been fined one million won or more and his or her sentence has become final under Item 3 of said Article (hereinafter referred to as the "Ineligibility Provision"); and Article 4 of the Addenda to the Educational Officials Act (Act No. 13819, January 27, 2016) (hereinafter referred to as the "Addenda Provision") infringe upon the Complainant's basic right.

Provisions at Issue

Educational Officials Act (amended by Act No. 13819, January 27, 2016)

Article 10-4 (Reasons for Ineligibility)

None of the following persons shall be appointed as a public educational official:

2. A person who is dismissed or removed from his or her office, or for whom a sentence of punishment or medical treatment and custody is imposed and becomes final (including a person for whom the suspension of a sentence is imposed and the suspension period has elapsed) due to any of the following acts against a minor:
   (b) A sex offense against children or youth defined in Article 2 Item 2 of the Act on the Protection of Children and Youth against Sex Offenses;
3. A person who has been dismissed or removed from his or her office, or for whom a sentence of a fine of at least one million won or a heavier punishment, or medical treatment and custody is imposed and becomes final (including a person for whom the suspension of a sentence is imposed and the suspension period has elapsed) due to

an act of sexual crime defined in Article 2 of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes.

Addenda to the Educational Officials Act (Act No. 13819, January 27, 2016)

Article 4 (Transitional Measures concerning Reasons for Ineligibility)

Where a person who serves as educational public official as at the time this Act enters into force is found ineligible as referred to in the amended provisions of Article 10-4 Item 2 due to an act he or she committed before this Act enters into force, with regard to appointment (excluding hiring and special hiring) and statutory retirement, the previous provisions shall apply notwithstanding the aforesaid amended provisions.

Summary of the Decision

1. Judgment on the Addenda Provision

The Addenda Provision specifies the transitional measures for those who currently serve as educational officials, not for those who have yet to graduate from a university of education. Such specification suggests that the Addenda Provision does not apply to the Complainant, who is currently a student of a university of education. Therefore, the request for adjudication on the Addenda Provision is unjustified since it has no legal relevance to the Complainant.

2. Judgment on the Ineligibility Provision

Elementary and secondary school teachers have a significant influence on laying the foundation for character development of children and youth by constantly interacting and doing everyday activities with them to provide education and guidance. Given this occupational uniqueness and importance, it is more imperative to exclude sex offenders at least from

elementary or secondary schools than any other official position. If we take into account the recidivism of sex offenses against children and youth, it is much needed to ban all sex offenders against minors from entering into the education field in the first place.

Sex offenders against adults, unlike those against minors, are banned from being appointed as a teacher not immediately after conviction but after their being sentenced to a fine of one million won or more and such sentence becomes final. Further, if the Supreme Court sentences sex offenders to a fine of one million won or more by taking into account all criminal circumstances and said sentence becomes final, that sexual violence crime can never be seen as a misdemeanor.

Furthermore, even if a person commits a sex offense prescribed in the Ineligibility Provision, such fact only forbids him or her from being a teacher defined in the Elementary and Secondary Education Act; it does not permanently deprive them of chances of holding other public offices in the national or local government. This suggests that the Ineligibility Provision, which prevents anyone from being appointed as a teacher if the person commits a certain sex offense against a minor and his or her sentence becomes final or if the person commits a sexual assault against an adult and his or her sentence of a fine of one million won or more becomes final, established a minimum set of qualification requirements for teachers with respect to the sex offense depending on who the victim is and how much the fine is. Nonetheless, it is hard to find alternative means to similarly serve the legislative purpose and, at the same time, be less restrictive of the basic right.

As the Ineligibility Provision permanently bans certain sex offenders from being a teacher defined in the Elementary and Secondary Education Act, the disadvantage is not insignificant to those who want to be a teacher defined in the Elementary and Secondary Education Act. However, such disadvantage is greatly outweighed by the public interests served by the Ineligibility Provision, which are protection of the physical and psychological health and safety of students and promotion of the free and stable development of their character during the school day through

blocking access to physically and socially vulnerable children and youth by certain sex offenders against minors or adults. Hence, the Ineligibility Provision does not violate the balance of interests. Thus, the Ineligibility Provision neither violates the principle against excessive restriction nor infringes upon the Complainant's right to hold public offices.

14. Case on Accounting Budget Items for Kindergartens

[2017Hun-Ma1038 · 1180 (consolidated), July 25, 2019]

In this case, the Court rejected all the applications for the constitutional complaint filed by the Complainants, who founded and have operated private kindergartens, explaining that the proviso of Article 15-2 Section 1 and Tables 5 and 6 of the Rules on Financial Affairs and Accounting of Private School Institutions, which classify the accounting budget items for kindergartens, do not infringe upon their freedom to operate private kindergartens, property right, and right to equality.

Background of the Case

The Complainants are private kindergarten operators obligated to report their budget and settlement of accounts to competent education authorities and to disclose the information pursuant to Article 31 Section 1 and Article 51 of the Private School Act.

Complainant Yeom ___ filed a constitutional complaint on September 15, 2017, claiming that Article 15-2 Section 1 and Tables 5 and 6 of the Rules on Financial Affairs and Accounting of Private School Institutions (amended by Ordinance of the Ministry of Education No. 122, February 24, 2017) classifying the accounting budget items that apply to schools infringe upon the freedom of occupation, property right, and right to equality of the Complainant and also violate the principle of protection of confidence and principle of statutory reservation (2017Hun-Ma1038). Complainant Kang ___ and 122 other Complainants filed a constitutional complaint on October 23, 2017, contending that Tables 5 and 6 of the Rules on Financial Affairs and Accounting of Private School Institutions above infringe upon their freedom of occupation, property right, and right to equality (2017Hun-Ma1180).

Subject Matter of Review

The subject matter of review in this case is whether the proviso of Article 15-2 Section 1 and Tables 5 and 6 (hereinafter referred to as the "Provisions at Issue") of the Rules on Financial Affairs and Accounting of Private School Institutions (amended by Ordinance of the Ministry of Education No. 122, February 24, 2017) (hereinafter referred to as the "Rules") infringe upon the fundamental rights of the Complainants.

Provisions at Issue

Rules on Financial Affairs and Accounting of Private School Institutions (amended by Ordinance of the Ministry of Education No. 122, February 24, 2017)

Article 15-2 (Classification of Budget Items)

(1) The accounting budget items for corporations and those for schools are specifically classified as shown in Tables 1 through 4: Provided, that the accounting budget items for kindergartens under Article 2 Item 2 of the Early Childhood Education Act are classified as shown in Tables 5 and 6.

Tables 5 and 6 are as specified in Attachment.

Summary of the Decision

1. Infringement of Freedom to Operate Private Kindergartens by Their Founders and Operators

Private kindergartens founded by private individuals play a role for public interests within the public education system as schools under the Private School Act and the Early Childhood Education Act. These institutions receive financial supports and tax benefits from the State and their competent local government. Subsequently, their financial and accounting transparency is directly related to the public nature of the

education they provide. The Provisions at Issue ensure financial soundness and transparency by prescribing financing and accounting requirements for the privately operated kindergartens to observe. Furthermore, the provisions have the legitimate purpose as private kindergartens aim to provide a quality early childhood education as education institutes getting financial supports from the State and local government without solely seeking personal gains and also to strengthen their financial status that will help maintain the publicness of early childhood education.

A failure of private kindergartens to make their finance sound and transparent could undermine the quality and public nature of early childhood education and people's confidence therein. Such failure could also jeopardize the fiscal soundness of the national education system. Thus, it is imperative that the State intervene in the operation of the private kindergartens, responsible for early childhood education and receiving financial supports from the State and local governments, to ensure publicness. In addition, the State's monitoring and supervision for their finance and accounting is an appropriate means to improve their operational transparency.

The budget items specified in the Provisions at Issue are necessary to secure financial soundness of the private kindergartens, guaranteeing the autonomy of their operation to a certain degree and promoting substantial justice by enabling the education superintendent to coordinate the classification of the items. It is true that the Provisions at Issue do not include in the revenue and expenditure tables, the items the Complainants claim such as the loan to build a kindergarten and repayment, dividend for the founder, and gas expenditure for the founder's personal vehicle besides the one for the students and work. However, such omission does not necessarily mean that it is remarkably unreasonable or arbitrary. Consequently, the Provisions at Issue do not infringe upon the freedom of the founders and operators to operate their kindergartens beyond the limits of the legislative discretion.

2. Restriction on Property Right

The Provisions at Issue simply stipulate the revenue and expenditure items for private kindergartens without affecting any of the Complainants' ownership of, or disposal right to, the facilities such as the school building. Furthermore, the founders and operators cannot get paid by leasing their own school site or school building because they provided them for themselves in a bid to meet the requirements to build a kindergarten under the Early Childhood Education Act. Thus, the Provisions at Issue do not restrict their property right.

3. Infringement of Right to Equality

As private kindergartens receive financial supports from the State and local governments, they are basically different from private medical clinics and, accordingly, cannot be compared. Also, childcare homes are subject to almost the same level of accounting management as that for private kindergartens unlike the argument made by the Complainants, implying that discriminatory treatment does not exist. Meanwhile, private kindergartens are also schools under the Private School Act that provide education with emphasis on publicness. They are not fundamentally different from public or State schools or other private schools and, therefore, treating them equally does not infringe the principle of equality.

4. Violation of Principle of Confidence Protection

Private kindergartens are schools according to the Framework Act on Education, the Elementary and Secondary Education Act, and the Early Childhood Education Act. These institutions have been governed by the Rules since the establishment thereof and their accounting budget items have been regulated by Tables 3 and 4 even before the enactment of the Provisions at Issue. This suggests it is hard to believe that confidence has

been built that the founders of private kindergartens can freely manage the kindergartens and seek profits or that the level of confidence is high enough to deserve protection. Accordingly, the Provisions at Issue do not violate the principle of protection of confidence.

5. Violation of Statutory Reservation Principle

The principle of statutory reservation on the restriction of fundamental rights calls for regulations based on statutes. The Provisions at Issue, in the meantime, are based upon Article 33 of the Private School Act stating that the accounting regulations of school juristic persons and other necessary matters concerning the budget and accounting shall be determined by the Minister of Education; and, Article 51 of said Act stipulating that Article 33 shall apply mutatis mutandis to managers of private schools. Therefore, it does not violate the principle of statutory reservation.

Summary of Concurring Opinion of Three Justices

The State and respective local governments are responsible for early childhood education, and common kindergarten courses should be free of charge in principle. Nevertheless, they allow private individuals to found kindergartens in consideration of the country's financial condition. Subsequently, private kindergartens play a substantial role in early childhood education. Even though recent monitoring and investigations found that some founders and operators committed irregularities and multiple violations of accounting rules, many of them still perform their duty as educators and make a great contribution to the nation's early childhood education on behalf of the education authorities.

The Ministry of Education needs to take heed to the founders and operators of private kindergartens to figure out their trouble in operation and to discuss possible solutions together in coming up with a "plan to enhance publicness of kindergartens" to address the recent scandals involving private kindergartens in ways that unite the society and to

prevent the public nature of the early childhood education from being tainted. Furthermore, it needs to consider policies that reflect the reality, i.e. providing a grace period or transitional support in applying the “plan to enhance publicness of kindergartens” to private kindergartens; or, exploring ways for the founders and operators of private kindergartens who wish to close their kindergartens to do so through a reasonable process while minimizing possible damage to the children’s right to education and economic loss they may suffer.

15. Case on Limitation on Period for Requesting Disclosure of Bar Examination Scores

[2017Hun-Ma1329, July 25, 2019]

In this case, the Court decided that the phrase "within six months after the enforcement date of this Act" in Article 2 of the Addenda to the National Bar Examination Act, which limits period for requesting disclosure of bar examination scores to six months from the enforcement date of the amended National Bar Examination Act, infringes upon the Complainant's right to request disclosure of information and, thus, violates the Constitution.

Background of the Case

The Complainant passed the fourth national bar examination on April 10, 2015, and served as a public-service advocate from August 2015 to July 2018.

Article 18 Section 1 of the National Bar Examination Act amended by Act No. 15154 on December 12, 2017 states that "a person who has applied for the Examination may request the Minister of Justice to disclose his or her score within one year from the date the successful candidates of the relevant Examination are announced." Article 2 of the Addenda to said Act says that "notwithstanding the amended provisions of Article 18 Section 1, a person who has passed the Examination before this Act enters into force may request the Minister of Justice to disclose his or her score within six months after the enforcement date of this Act."

The Complainant filed a constitutional complaint on December 12, 2017, claiming that Article 18 Section 1 of the National Bar Examination Act and Article 2 of the Addenda said Act infringe upon his or her right to know, freedom of expression, etc.

Subject Matter of Review

The subject matter of review in this case is whether the phrase "within one year from the date the successful candidates of the relevant Examination are announced" in Article 18 Section 1 of the National Bar Examination Act (amended by Act No. 15154, December 12, 2017) (hereinafter referred to as the "Score Disclosure Provision") and the phrase "within six months after the enforcement date of this Act" in Article 2 of the Addenda to the National Bar Examination Act (Act No. 15154, December 12, 2017) (hereinafter referred to as the "Special Case Provision") infringe upon the Complainant's basic right.

Provision at Issue

National Bar Examination Act (amended by Act No. 15154, December 12, 2017)

Article 18 (Disclosure of Examination Information)

(1) A person who has applied for the Examination may request the Minister of Justice to disclose his or her score within one year from the date the successful candidates of the relevant Examination are announced. In such cases, the Minister of Justice shall disclose the score of the person who has made such request.

Addenda to the National Bar Examination Act (Act No. 15154, December 12, 2017)

Article 2 (Special Cases concerning Disclosure of Examination Information)

Notwithstanding the amended provisions of Article 18 Section 1, a person who has passed the Examination before this Act enters into force may request the Minister of Justice to disclose his or her score within six months after the enforcement date of this Act.

Summary of the Decision

1. Legality of Request for Adjudication Challenging Score Disclosure Provision

The Score Disclosure Provision stipulates that a person who has applied for the Examination may request disclosure of his or her score within one year from the date the successful candidates are announced. Furthermore, the Special Case Provision specifies that a person who has passed the Examination before the amended Act enters into force may request disclosure of his or her score within six months after the enforcement date of the amended Act despite the Score Disclosure Provision. Thus, the Score Disclosure Provision applies to the applicants for the bar exam that was held after December 12, 2017, when the National Bar Examination Act was amended, while the Special Case Provision applies to those who passed the bar exam held before the amendment.

As the Complainant passed the fourth bar exam that took place in 2015, he is not bound by the Score Disclosure Provision; he is merely a third party. Therefore, the request for adjudication challenging the Score Disclosure Provision is unjustified as self-relatedness of infringement on basic right cannot be acknowledged.

2. Special Case Provision's Infringement on Basic Right

As the Special Case Provision limits the period for requesting disclosure of bar exam scores to six months from the enforcement date of the amended National Bar Examination Act, the restricted basic right is the right to know, more specifically, the right to request disclosure of information.

The legislative purpose of the Special Case Provision is legitimate, as it aims to reduce the risk of the information on scores being leaked and the State's burden of managing such information, etc. Therefore, limiting

the period for requesting score disclosure is a legitimate means to serve the legislative purpose.

The bar exam scores can represent the excellence of the applicants, and can serve as an objective indicator of their performance in the course of advancing into various areas of legal practice. The applicants are often asked to submit their bar exam scores in the job application process, and in some cases, job seekers voluntarily submit their scores. This indicates that those who have passed the bar exam have special interests in their scores.

Since the bar exam results are computerized and released on the Internet, there is a possibility that scores may be leaked in the case of a security accident. However, information leakage can be prevented through strict control over access to information internally and by establishing technological security measures externally.

The State's burden which directly increases by disclosing information on the bar exam scores for a considerable period of time is to store the information on scores, not to store answer sheets. Even if the burden of keeping the answer sheets increases by disclosing the bar exam scores for a considerable period of time, this can be considerably addressed using information technology such as scanning of the answer sheets.

Those who have passed the bar exam should be given a sufficient period of time to use their scores to secure a job. Given that, the period of "within six months after the enforcement date of this Act" is too short for them to access and use the information on their scores to their advantage in the job market. Since the Special Case Provision does not allow exceptions despite the short period for requesting disclosure of scores, those who end up unsuccessful in finding a job during the period stated above because of childbirth, child rearing, military service, disease, etc. would not be able to access their scores when they intend to enter the job market thereafter. Since those who have passed the bar exam may need the bar exam scores to find another employer, they should be allowed to gain access to their scores for a certain period of time after they begin practicing law.

They can personally keep the information on their scores by printing out the information they perused during the period for requesting score disclosure. However, the period for requesting score disclosure is unreasonably short, greatly limiting access to said information. It is also hard to see that the restriction on the basic right has been eased substantially.

To sum it all up, the Special Case Provision violates the principle against excessive restriction and, thus, infringes upon the Complainant's right to request disclosure of information.

Dissenting Opinion of Three Justices on Special Case Provision

The national bar examination is designed to test whether applicants can meet the minimum qualifications for a lawyer, not to rank the applicants with passing scores. If the score is understood as a key gauge of excellence of those who have passed the exam, the very nature of the exam might be misunderstood and the purpose of introducing the law school and bar examination system might be undermined.

The information on scores remains connected to the Internet during the period for requesting score disclosure, meaning that a longer period for requesting score disclosure might lead to a greater chance of information leakage and greater harm.

The Ministry of Justice keeps the original copy of answer sheets during the period for requesting score disclosure, for possible legal disputes over the bar exam scores. If the Ministry discloses the bar exam scores without limiting the period for request, its workload in keeping the original answer data would increase.

The period for requesting score disclosure needs to be limited to reduce the chance of score information leakage as well as the State's workload in maintaining data such as the information on scores. Setting up the duration of the request period basically falls within the discretion of the legislators.

Unless the period for requesting score disclosure is extremely short and

essentially infringing upon access to the information, it is hard to see it as infringement upon the right to request disclosure of information. The right to request disclosure of information is the right of any person with the legitimate interest in the information kept by the State or a public institution. The essence is accessibility to the information of interest. It is difficult to naturally conclude that the people of interest should be able to access the information at all times when they need to use it beyond the accessibility for a considerable period of time guaranteed as the right to request disclosure of information.

The period for requesting score disclosure under the Special Case Provision was established in consideration of the fact that most of those bound by the provision already began their career as legal professionals, and that the Ministry of Justice has disclosed the bar exam scores in practice since July 9, 2015 in deference to the gist of the Court's decision 2011Hun-Ma769, etc. on June 25, 2015, and, accordingly, the applicants who passed the sixth bar exam, the latest among those bound by the provision, also could have requested score disclosure for more than a year. Therefore, it is difficult to recognize that the period of six months from the enforcement date of the amended Act set by the Special Case Provision is short enough to essentially infringe upon access to the information.

Those who passed the bar exam can check their scores at the bar exam website of the Ministry of Justice free of charge for an unlimited number of times during the period for requesting score disclosure. Bar exam passers can also personally keep the information on their scores and use it anytime they want by printing it out or saving the screenshot they perused as an image file. The Complainant who passed the fourth bar exam could have requested disclosure of his or her score for nearly three years from July 9, 2015.

When all of the above are taken into account, the Special Case Provision neither violates the principle against excessive restriction nor infringes upon the Complainant's right to request disclosure of information.

16. Case on Operation of Two or More Medical Institutions

[2014Hun-Ba212, 2014Hun-Ka15, 2015Hun-Ma561, 2016Hun-Ba21 (consolidated), August 29, 2019]

In this case, the Court held that the provisions of the current and former Medical Service Acts prohibiting a medical professional from operating two or more medical institutions and penalizing violators of this prohibition, respectively, do not contravene the void-for-vagueness doctrine under the principle of *nulla poena sine lege,* the rule against excessive restriction, the principle of protection of confidence, or the principle of equality.

Background of the Case

The Petitioners, Movants, and Complainants were indicted on the charge of violating Article 33 Section 8 of the Medical Service Act prohibiting a medical professional from establishing or operating two or more medical institutions. Thereafter, some of said Petitioners, Movants, and Complainants received final convictions, and others are currently on trial.

Petitioner Park ___ (2014Hun-Ba212) filed a motion for a constitutional review of Article 33 Section 8 of the Medical Service Act while his case was pending before the trial court. After his motion was rejected, he filed this constitutional complaint on May 15, 2014.

The Movants (2014Hun-Ka15) filed a motion for a constitutional review of the part concerning “operate” in the text of Article 33 Section 8 of the Medical Service Act while their case was pending before the trial court. Finding that reasonable grounds existed for that motion, the trial court granted the motion and requested this constitutional review on August 24, 2014.

Complainants Jo ___, Lim ___, Kim M__, and Kim J__ (2015Hun-Ma561) filed this constitutional complaint on June 1, 2015, after being subjected to an investigation at a police station for violations of Article

33 Section 8 of the Medical Service Act.

Petitioner Choi ___ (2016Hun-Ba21) filed a motion for a constitutional review of the part concerning "operate" in the text of Article 33 Section 8 of the Medical Service Act while his case was pending before the trial court. After his motion was rejected, he filed this constitutional complaint on January 11, 2016.

Subject Matter of Review

The subject matter of review in this case is whether (1) the part concerning "operate" in the text of Article 33 Section 8 of the Medical Service Act (amended by Act No. 11252, February 1, 2012); and (2) the part concerning "operate" in the text of Article 33 Section 8 in Article 87 Section 1 Item 2 of the former Medical Service Act (amended by Act No. 11252, February 1, 2012; and in force until being amended by Act No. 13658, December 29, 2015) (collectively, hereinafter referred to as the "Provisions at Issue") violate the Constitution. The Provisions at Issue read as follows:

Provisions at Issue

Medical Service Act (amended by Act No. 11252, February 1, 2012)

Article 33 (Establishment, etc.)

(8) No medical personnel referred to in Section 2 Item 1 shall establish or operate two or more medical institutions under any pretext. (*Proviso Omitted.*)

Former Medical Service Act (amended by Act No. 11252, February 1, 2012; and in force until being amended by Act No. 13658, December 29, 2015)

Article 87 (Penalty Provisions)

(1) Any of the following persons shall be punished by imprisonment for not more than five years or by a fine not exceeding 20 million

won:

2. A person who violates Article 12 Section 2, Article 18 Section 3, Article 23 Section 3, Article 27 Section 1, and Article 33 Section 2 or 8 (including cases applied mutatis mutandis under Article 82 Section 3).

Summary of the Decision

1. Whether the void-for-vagueness doctrine under the principle of *nulla poena sine lege* is violated

When the dictionary meaning of "operate" the court's interpretation of this word, the intent of the amendment of the Medical Service Act, the language of the amended provisions, and so forth are comprehensively taken into account, the "operation of two or more medical institutions" prohibited under the Provisions at Issue can readily be understood as the "possession and exercise, or delegation, of the decision-making authority on matters concerning the operation of two or more medical institutions, including their existence or relocation; the performance of a medical act; the raising of finance; the provision and management of human resources, facilities, or equipment; or the allocation or distribution of operational profits." The specific meaning of this phrase can be further determined by its customary interpretation and application by judges. Thus, the Provisions at Issue do not violate the void-for-vagueness doctrine under the principle of *nulla poena sine lege*.

2. Whether the rule against excessive restriction is violated

The purposes of the Provisions at Issue are to: maintain the quality of medical care; prevent medical professionals' excessive pursuit of profits from undermining the publicness of health care and from creating imbalance between supply of and demand for medical services; and guard against medical professionals' monopoly and oligopoly of the health care

market and against a polarization of this market, by compelling a medical professional to perform medical acts in a responsible manner in only one medical institution.

The "operation of two or more medical institutions" prohibited under the Provisions at Issue refers mainly to the dominant control and management of more than one medical institution by one medical professional. It is highly likely that this form of operation will render medical acts vulnerable to external influences and will separate a medical practitioner performing medical acts in a medical institution from an operator of that institution, placing the medical practitioner under the control of the operator. As a result, this form of operation is highly likely to lead to the excessive pursuit of profits by medical professionals. With this concern in mind, the legislature enacted the Provisions at Issue, noting that existing regulation falls short of effectively regulating that pursuit. Further, for violations of the Provisions at Issue, only maximum penalties are prescribed, allowing the courts to impose a suspended sentence or fine; thus, the Court sees that the Provisions at Issue do not unduly limit a court's discretion to determine the type and degree of a criminal punishment.

Moreover, considering the importance of health care; the grim reality of public health care; the implications of operation of two or more medical institutions by one medical professional on health care circles, on finances of the national health insurance funds, and on other factors affecting the overall health care for citizens; and the social state responsibility to protect citizens' health and guarantee adequate medical benefits to them, the Court finds that the Provisions at Issue are not in violation of the rule against excessive restriction.

3. Whether the principle of protection of confidence is violated

The Court sees no special constitutional value in, or need to give constitutional protection to, medical professionals' expectation interest, which is undermined by the Provisions at Issue; this interest does not

override the public interest in establishing a sound medical system and in preventing harm to citizens' health. Therefore, the Provisions at Issue do not violate the principle of protection of confidence. \

4. Whether the principle of equality is violated

It is true that only medical professionals are subject to the Provisions at Issue; medical corporations and other entities are not subject to the Provisions at Issue and may operate more than one medical institution.

However, medical corporations and other entities are under the control of the State from their establishment. They also can be controlled by boards of directors or by articles of association. Further, they are explicitly prohibited from seeking profits. Therefore, the Court views that there exists a difference between medical professionals and medical corporations and other entities with respect to the necessity to prohibit the operation of two or more medical institutions. Thus, the Court recognizes the reasonableness of affording different treatment to medical professionals and to medical corporations and other entities. Accordingly, the Provisions at Issue do not violate the principle of equality.

17. Case on Restriction of Inmates' Voting Rights

[2017Hun-Ma442, August 29, 2019]

In this case, the Court dismissed the request for a constitutional complaint over the main text of Article 18 Section 1 Item 2 of the Public Official Election Act, which restricts the voting rights of any person whose sentence execution has not been completed after being sentenced to imprisonment with prison labor for at least one year, on the grounds that the Complainant was released at the expiration of his or her sentence after filing a constitutional complaint during the imprisonment and, thus, the justiciable interest or benefit from adjudication no longer exists.

Background of the Case

The Complainant was sentenced to imprisonment with prison labor for one and a half years and was imprisoned accordingly. Any person whose sentence execution has not been completed after being sentenced to imprisonment with prison labor for at least one year is banned from voting based on the main text of Article 18 Section 1 Item 2 of the Public Official Election Act (amended by Act No. 13497, August 13, 2015). Therefore, the Complainant was banned from exercising the voting right in the 19th presidential election scheduled on May 9, 2017, and subsequently filed a constitutional complaint against the provision.

However, the Complainant was released at the expiration of the prison term on September 22, 2017, when the case was under review.

Subject Matter of Review

The subject matter of review in this case is whether the clause concerning "A person who is sentenced to imprisonment with prison labor for at least one year, but whose sentence execution has not been terminated" of the main text of Article 18 Section 1 Item 2 of the Public Official Election Act (amended by Act No. 13497, August 13, 2015)

(the "Provision at Issue") infringes upon the Complainant's basic right.

Provision at Issue

Public Official Election Act (amended by Act No. 13497, August 13, 2015)

Article 18 (Disfranchised Persons)

(1) Any of the following persons, as of the election day, shall be disfranchised:

2. A person who is sentenced to imprisonment with or without prison labor for at least one year, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted: Provided, That a person who is under the suspension of the execution of said sentence shall be excluded therefrom;

Summary of the Decision

1. Extinction of Subjective Justiciable Interest

The 19th presidential election in which the Complainant intended to vote already took place on May 9, 2017 and the Complainant completed the term of imprisonment on September 22, 2017, which means that the restriction on the Complainant's basic right imposed by the Provision at Issue already ended. Therefore, even if the Complaint's complaint is upheld by the Court, it would be of no help in remedying the violation of the Complainant's right and, thus, the subjective justiciable interest has been extinguished.

2. Benefit from Adjudication

Article 18 Section 1 Item 2 of the former Public Official Election Act (before being amended by Act No. 13497, August 13, 2015) imposes a

blanket restriction on the right of all inmates to vote and the Court declared it nonconforming to the Constitution on January 28, 2014. It explained, "The blanket restriction on the right of all inmates to vote regardless of the type, elements, or degree of illegality of a crime infringes upon their right to vote. Removing this unconstitutionality basically lies upon the formative discretion of the legislator: With respect to the disenfranchisement for specific crimes, it is practical for respective governing statutes to impose restrictions on the voting rights by types of crime; while, in defining the category of the inmates whose voting rights are restricted in general, sentencing can be a reasonable standard to classify grave crimes. It would be desirable to make the law in ways that restrict the voting rights of only the inmates who have been sentenced to a certain period of prison term or longer."

The Court's decision was reflected when the Provision at Issue was amended to restrict the voting rights of only those who are sentenced to imprisonment for at least one year and still serving time.

After such amendment, a request for another constitutional complaint was made against the Provision at Issue, which the Court rejected on May 25, 2017. It explained that the people sentenced to imprisonment with prison labor for one year or more are recognized in the proceedings as having caused a grave harm to the community and, thus, need to be sanctioned socially and criminally to promote their law-abiding spirit in consideration of the gravity of the crime and subsequent possibility of social criticism, and that the sanction period ends upon expiration of the prison term, meaning that the period of voting right restriction is proportionate to the degree of criminal liability; therefore, the inmates' right to vote is not infringed upon.

It is hard to say that the constitutional values our society shares have changed after a lapse of time from the previous cases to this case. It is also difficult to believe that there have been changes in circumstances justifying modification of the previous decisions, such as changes in the degree of disturbance to the community's order caused by the inmates who are sentenced to imprisonment with prison labor for at least a year,

or the change of possibility of the society criticizing them. Therefore, the benefit from the adjudication of this case is not acknowledged.

Dissenting Opinion of Two Justices

1. Exceptional Acknowledgement of Benefit from Adjudication

The voting right restriction by the Provision at Issue is likely to repeat in future public official elections, and doubts are still cast over the unconstitutionality of voting right restriction. Judgment over constitutionality of the Provision at Issue is critical to protect and keep the constitutional order and, hence, it is reasonable to exceptionally acknowledge the benefit from adjudication.

2. Violation of Principle against Excessive Restriction

There should be public interests grave enough to tolerate exceptions to equality in the politics and principle of common election in order to restrict the voting rights. However, imposing social sanction for an anti-social behavior, seeking retribution for a crime, developing a sense of responsibility as a citizen, and promoting respect for the rule of law are the purpose and function of punishment but cannot be regarded as the legitimate legislative purpose to restrict the voting right.

Besides, such restriction on the right to vote may discourage any inmates from returning to the society as sound citizens and may give them a sense of deprivation and isolation, which would not help them develop a sense of responsibility or promote respect for the rule of law as citizens. Therefore, appropriateness of means is not acknowledged either.

Furthermore, the Provision at Issue imposes a blanket restriction on the voting rights, thereby satisfying neither the least restrictive means test nor the balance of interest test, since it only reflects the condition that the inmate did not complete the prison term after being sentenced to

imprisonment with prison labor for at least a year and does not consider the types of the crime, nature and degree of infringed interests, gravity of the crime and possibility of social criticism depending on the degree of liability.

Accordingly, the Provision at Issue infringes upon the voting right of the inmates who are sentenced to imprisonment with prison labor for at least a year.

18. Case on Non-Retroactive Application to Commuting Accidents

[2018Hun-Ba218, 2018Hun-Ka13 (consolidated), September 26, 2019]

In this case, the Court ruled that the part regarding "the amended provision of Article 37" of Article 2 of the Addenda to the Industrial Accident Compensation Insurance Act, which stipulates that the amendment acknowledging an ordinary commuting accident as an occupational accident shall apply beginning with the first accident occurred after the amended Act enters into force, does not conform to the Constitution.

Background of the Case

The Court ruled on September 29, 2016 for 2014Hun-Ba254 that Article 37 Section 1 Item 1 Sub-item (c) (the "Former Provision") of the former Industrial Accident Compensation Insurance Act (amended by Act No. 8694, December 14, 2007 and in force until being amended by Act No. 14933, Oct. 24, 2017), which acknowledged an occupational accident only when a worker suffered an injury or the like in an accident while commuting to or from work under the control and management of his or her employer, was not in conformity with the Constitution (the "Nonconformity Decision"). It explained that the failure to acknowledge an accident occurring while commuting to or from work using a worker's usual route and means as an occupational accident is not in conformity with the Constitution.

Article 37 of the Industrial Accident Compensation Insurance Act amended on October 24, 2017 (the "IACI Act") acknowledges any accident an employee suffers while commuting to or from work using his or her usual routes and means as an occupational accident. However, Article 2 of its Addenda states that the amended Article 37 (the "New Provision") shall apply beginning with the first accident occurred after the amended Act enters into force on January 1, 2018.

The Petitioner rolled off the road on his or her way home from work by bicycle on July 9, 2014 and was diagnosed with paralysis of both

legs and damaged spine, etc. The Petitioner filed a claim for benefit in kind to the Korean Workers' Compensation & Welfare Service, but the claim was denied on July 19, 2017. The Petitioner filed a suit to nullify this denial measure and filed a motion to request a constitutional review during the lawsuit, which was rejected. Subsequently, the Petitioner filed a constitutional complaint on May 25, 2018.

The Plaintiff of this case was riding a motorcycle on his or her way to work when he or she got into a traffic accident on November 12, 2016. Injured, the Plaintiff filed a claim for benefit in kind to the Korean Workers' Compensation & Welfare Service, but the claim was denied on March 8, 2018. Subsequently, the Plaintiff filed a lawsuit to nullify the denial measure before an ordinary court and the court requested this constitutional review *ex officio* on July 24, 2018.

Subject Matter of Review

The subject matter of review in this case is whether the part regarding "the amended provision of Article 37" of Article 2 of the Addenda (Act No. 14933, October 24, 2017) to the Industrial Accident Compensation Insurance Act (the "Provision at Issue") violates the Constitution.

Provision at Issue

Addenda (Act No. 14933, October 24, 2017) to the Industrial Accident Compensation Insurance Act

Article 2 (Applicability to Commuting Accidents)

The amended provisions of Articles 5 and 37 shall apply, beginning with the first accident occurred after this Act enters into force.

Summary of the Decision

1. Violation of Principle of Equality

The Court found with the Nonconformity Decision that the worker and his or her family suffered significant mental, physical or economic disadvantages as the Former Provision did not recognize ordinary commuting accidents as occupational accidents. As long as it is confirmed in the Nonconformity Decision that people deprived of the insurance benefits under the existing system faced considerable disadvantages, the Court ought to determine whether the discriminatory treatment is justifiable by sufficiently taking into account the financial impact of a retroactive application of the New Provision on the Industrial Accident Compensation Insurance (the "IACI") and restorable interests deriving from such constitutional condition.

Given the balance and the reserve of the IACI and the increase in insurance premium rates following the acknowledgement of ordinary commuting accidents as occupational accidents, it was questionable whether we need to protect the financial soundness of the IACI even by continuing to apply the Former Provision, already found unconstitutional, to workers who suffered an ordinary commuting accident after the Nonconformity Decision. Furthermore, the amendment arranges various ways to alleviate financial burdens on the IACI coming from acknowledgement of ordinary commuting accidents.

The Provision at Issue does not have a transitional clause to retroactively apply the New Provision, failing to take a minimum action necessary to protect the workers who are deprived of insurance benefits after suffering an ordinary commuting accident before the amended Act enters into force. Even considering practical or economic conditions of the IACI, it is hard to see a reasonable ground to justify such discrimination, and such failure runs counter to the purpose of the Nonconformity Decision. Thus, the Provision at Issue violates the principle of equality.

2. Order to Suspend Application through Constitutional Nonconformity Decision

Declaring the Provision at Issue unconstitutional and making it immediately void cannot eliminate its unconstitutionality as the amended Article 37 of the IACI Act begins to apply as of January 1, 2018, according to Article 1 of the Addenda, and it suggests that removing its unconstitutionality requires a nonconformity decision and subsequent legislative improvement. The legislature is obliged to get rid of the unconstitutionality by making it possible to retroactively apply the New Provision to workers who suffered an ordinary commuting accident at least from September 29, 2016 when the Nonconformity Decision was made.

The Provision at Issue shall be declared not in conformity with the Constitution and shall not apply until legislative amendment. The lawmakers must amend the Provision at Issue to be consistent with the decision as soon as possible and the amended provisions shall take effect no later than December 31, 2020.

19. Case on Identity Verification of Potential Subscribers to Mobile Communications Services

[2017Hun-Ma1209, September 26, 2019]

In this case, the Court held that Article 32-4 Sections 2 and 3 of the Telecommunications Business Act and Article 37-6 Section 1, Section 2 Item 1, and Sections 3 and 4 of the Enforcement Decree of the Telecommunications Business Act—the provisions requiring a person who desires to be a subscriber to telecommunications services to present a personal identification certificate or other proof of identity and requiring a telecommunications business operator to use an illegal contracting prevention system to verify such proof of identity when they enter into a contract for mobile phone services—do not infringe upon the right to informational self-determination and the freedom of communications, and thus are not in violation of the Constitution.

Background of the Case

Complainants, Kim ___ and Chu ___, each sought to enter into a contract for mobile phone services with a telecommunications business operator without identity verification, but were refused by their respective telecommunications business operator. Thereafter, on November 1, 2017, Complainants filed a constitutional complaint, asserting that Article 32-4 Sections 2, 3, and 4 and Article 32-5 of the Telecommunications Business Act—the provisions requiring a person who desires to be a subscriber to mobile communications services to go through identity verification when entering into a contract with a telecommunications business operator—had infringed upon their freedom of anonymous communications, secrecy and freedom of private life, and right to informational self-determination.

Subject Matter of Review

The subject matter of review in this case is whether Article 32-4 Sections 2 and 3 of the Telecommunications Business Act (amended by Act No. 12761 on October 15, 2014) and Article 37-6 Section 1, Section 2 Item 1, and Sections 3 and 4 of the Enforcement Decree of the Telecommunications Business Act (amended by Presidential Decree No. 26191 on April 14, 2015) (collectively referred to as the "Provisions at Issue") infringe upon the fundamental rights of Complainants.

Provisions at Issue

Telecommunications Business Act (amended by Act No. 12761 on October 15, 2014)

Article 32-4 (Prohibition against Unjust Use of Mobile Communications Terminals)

(2) In entering into a contract for the provision of telecommunications services (including contracts concluded through agents and consignees that enter into contracts for the provision of telecommunications services on behalf of, or outsourced by, telecommunications business operators), a telecommunications business operator prescribed by Presidential Decree, taking into account the type of telecommunications services, scale of business, protection of users, etc. shall, with the consent of the counterparty to the contract, verify whether the counterparty is the principal by utilizing illegal subscription prevention system, etc. referred to in Article 32-5 Section 1, and may reject a contract if the relevant person is not the principal or refuses to verify whether he or she is the principal. Where the user who is the principal is changed due to the transfer of telecommunications services provided, the succession to the user's position, or other reasons, the same shall also apply to a person who intends to receive telecommunications services following such change.

(3) In verifying the principal prescribed in paragraph (2), a

telecommunications business operator may request the counterparty to the contract to present a certificate or document, such as a resident registration certificate or driver's license, through which the relevant person can be verified as the principal.

Enforcement Decree of the Telecommunications Business Act (amended by Presidential Decree No. 26191, April 14, 2015)

Article 37-6 (Verification of Principal When Entering into Contracts)

(1) "Telecommunications business operator prescribed by Presidential Decree" in Article 32-4 Section 2 of the Act means a telecommunications business operator who provides mobile communications services defined in Article 2 Item 1 of the Mobile Device Distribution Improvement Act.

(2) A mobile communications business operator under Section 1 shall verify that the counterparty to a contract is the principal through any of the following certificates and documents submitted by the counterparty (including legal representatives; hereafter the same shall apply in this Article) under Article 32-4 Sections 3 and 4. In such cases, where any contract is entered into through an information communications network, such verification may be used in lieu of the verification made through a certified digital signature defined in Article 2 Item 3 of the Digital Signature Act:

1. An individual: Resident registration certificate, driver's license, registration certificate of the disabled, certificate of a person of distinguished service to the State, certificate of a person of distinguished service to independence, certificate of a person of distinguished service to the May 18 democratization movement, or passport of the Republic of Korea;

(3) A telecommunications business operator under Section 1 shall verify the authenticity of the certificates and documents referred to in Items of Section 2 through an illegal contracting prevention system referred to in Article 32-5 Section 1 of the Act (hereinafter referred to as "illegal subscription prevention system").

(4) Notwithstanding Sections 2 and 3, where the counterparty to a contract is unable to submit any certificate or document prescribed in Items of Section 2 or it is impracticable to verify the authenticity of a certificate or document prescribed in Items of Section 2 through an illegal subscription prevention system, a telecommunications business operator under Section 1 shall verify that the counterparty to the contract is the principal by means of a certificate, etc. prescribed by the relevant telecommunications business operator in the terms and conditions of the use as a certificate or document corresponding to that prescribed in Items of Section 2.

Summary of the Decision

1. Issues in this case

The Provisions at Issue impose a "principal identity verification obligation" on a telecommunications business operator, namely an obligation to verify a subscriber's real name and other personal information when entering into a contract for mobile communications services with the subscriber (the "Potential Subscriber"). As a result, the Provisions at Issue restrict the freedom of communications of those persons who desire to subscribe to mobile communications services anonymously to accomplish mobile communications while not disclosing his or her identity.

In principle, the Provisions at Issue stipulate that a telecommunications business operator shall identify the Potential Subscriber by requesting him or her to present a personal identification certificate on which his or her resident registration number is indicated. Further, under the Provisions at Issue, a mobile carrier may reject to enter into the contract for telecommunications services if the Potential Subscriber does not agree to provide such personal information. The Court notes that, in this regard, the Provisions at Issue abridge the right to decide, on one's own, whether to provide one's personal information to another person or entity and whether to allow another person or entity to use such personal

information. Thus, the Provisions at Issue limit the right to informational self-determination.

The personal information of the Potential Subscriber amounts to "information irrelevant to contents" which is not associated with any content of or circumstances surrounding his or her communications. The Potential Subscriber does not communicate with others by mobile phone during the process of identity verification. Additionally, even if a telecommunications business operator discloses the personal information of such counterparty, such disclosure does not, by itself, enable the third party to learn the existence and content of the Potential Subscriber's private communication. Therefore, the Provisions at Issue limit the freedom of communications but do not diminish the secrecy of communications.

For these reasons, the Court finds that the issues in this case are: (1) whether the Provisions at Issue infringe upon the freedom of communications in respect that a mobile service contract can only be entered into only when the Potential Subscriber provides his or her personal information; and (2) whether they infringe upon the right to informational self-determination in regards of the collection scope of and handling procedures for personal information.

2. Whether the right to informational self-determination and the freedom of communications are infringed

The Provisions at Issue serve the legitimate legislative purposes of (1) deterring criminals from using mobile phones registered under others' names or false names to commit a crime such as voice phishing; and (2) preventing harm caused by identity theft, such as subscribing to mobile phone services or making small mobile payments under the stolen identity. Requiring the identity verification process is an appropriate means to accomplish these legislative purposes.

Although the Potential Subscriber who enters into a subscription contract with a mobile carrier must submit his or her 13-digit resident registration number, the last six digits of such number are deleted after

the identification. In this way, the 13-digit resident registration number will not be continuously used by the mobile carrier. In fact, the Potential Subscriber may not directly provide the resident registration number by choosing to enter into the subscription contract with the mobile carrier online, in which his or her identity is verified by a certified digital signature instead of the resident registration number.

Furthermore, the Personal Information Protection Act and the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. aim to prevent harm, including data leakage, caused by the collection of the personal information, including any person's name, address, date of birth, and resident registration number. To this end, these Acts prescribe technological and managerial standards that a personal information controller must meet in protecting personal information, and grant to administrative agencies a prerogative to supervise whether the personal information controller complies with those standards. In this way, limitations on the right to informational self-determination are reduced to the minimum.

The identity verification process shall be made under the Provisions at Issue in a process of the contract for mobile communications services, through which the Potential Subscriber has not yet made any communications. As a result, this identity verification process does not enable a third party to immediately obtain specific information, such as with whom, when, and for how long the user has communicated. Therefore, the Provisions at Issue do not place the Potential Subscriber in a situation where he or she cannot readily subscribe to mobile phone services out of fear that he or she may be punished because of the content of and circumstances surrounding communications made through the mobile phone services.

The Provisions at Issue serve substantial public interests in preventing harm caused by identity theft and deterring criminals from using mobile phones registered under false names to commit a crime such as voice phishing, as well as in maintaining order existing in a communications network. These public interests outweigh the disadvantages to the

Complainants' right to informational self-determination and the freedom of communications.

For the forgoing reasons, the Court finds that the Provisions at Issue do not infringe upon the Complainants' right to informational self-determination and the freedom of communications.

3. Conclusion

The Provisions at Issue do not violate the Constitution.

Summary of Dissenting Opinion of Two Justices

We are of the opinion that the Provisions at Issue violate the Constitution, because they infringe upon the freedom of anonymous communications and the right to informational self-determination.

Freedom of communications includes the freedom to choose whether to communicate under a real name or anonymously. The Provisions at Issue require a telecommunications business operator to verify the identity of the Potential Subscriber when entering into a contract for mobile communications services with him or her. They thereby limit the right to informational self-determination, as well as the freedom of anonymous communication to use mobile communications services without revealing personal identity to anyone.

Not all persons using anonymous mobile phones have an intention to commit a crime. Since anonymous communications are morally neutral, prohibition of anonymous mobile phones itself does not serve a legitimate legislative purpose.

The general rule for contracts for subscription to mobile communications services is that the Potential Subscriber provides the minimum personal information necessary to use those services. Despite this rule, the Provisions at Issue prescribe that, with an exception to the Potential Subscriber signing such contracts online, every Potential Subscriber shall

provide personal information included in a personal identification certificate, even containing a resident registration number which warrants the highest degree of protection. The Provisions at Issue in this regard seriously infringe upon the right of the Potential Subscriber to informational self-determination.

The prospect of a telecommunications business operator's acquisition of information transmitted and received through its telecommunications services and the prospect of a third party's utilization of that information to identify the user of the telecommunications services suffice to cause a chilling effect on the subscription to mobile communications services. Anonymous communications have important implications as one of the few means to protect the secrecy and freedom of communications. Nevertheless, the Provisions at Issue completely preclude the anonymous use of mobile communications services, imposing significant limitations on the freedom of anonymous communications.

Despite the availability of alternative means, such as personal identification without presentation of a personal identification certificate, identity theft protection services that can prevent subscription to mobile communications services under someone else's identity, and other preventive means suitable for each crime, the Provisions at Issue treat all citizens as potential criminals by compelling the Potential Subscribers to use traceable communications. For these reasons, the Provisions at Issue fail to satisfy the least restrictive means test.

Although the Provisions at Issue bring to some citizens the benefits of preventing harm caused by identity theft and of deterring crimes involving the use of someone else's identity to subscribe to telecommunication services, those benefits do not outweigh the broad restrictions on the fundamental rights of a large number of innocent citizens. Thus, the Provisions at Issue fail to meet the balance of interests test as well.

The Provisions at Issue infringe upon the right to informational self-determination and the freedom of anonymous communications, thereby violating the rule against excessive restriction. Accordingly, the Provisions at Issue violate the Constitution.

20. Case on Restricting Online Media from Publishing Columns, etc. Written by Candidates for Public Official Election

[2016Hun-Ma90, November 28, 2019]

In this case, the Court decided that the complaint over a provision of the Public Official Election Act, which states that the Internet Election News Deliberation Commission shall determine and make a public announcement of matters necessary to ensure the fairness of online election news reports, is inadmissible as it does not fulfill the directness requirements for constitutional fundamental right infringement, and that the former and current provisions of the Regulation on Deliberation Standard, etc. for Internet News Reporting of Election, which restrict online media from publishing columns, etc. written by any candidate for 90 days until the election day, infringe upon the freedom of speech and, therefore, violate the Constitution.

Background of the Case

Complainant, who is the joint operational chairman of a political party, published a column under his or her own name on the website of an online news outlet.

Complainant was registered as a preliminary candidate to run for the 20th General Election. The Internet Election News Deliberation Commission (the "Deliberation Commission") requested the aforementioned online news outlet to cooperate for fair news reporting stating that the columns published by Complainant on January 29, 2016 violated the Public Official Election Act, etc. that restrict such publication for 90 days until the election day. Upon learning of the request, Complainant stopped publishing columns.

Complainant filed a constitutional complaint on February 2, 2016, arguing that Article 8-5 Section 6 of the Public Official Act and Article 8 Section 2 of the former Regulation on Deliberation Standard, etc. for Internet News Reporting of Election, which restrict online media from

publishing columns, etc. written by any candidate, infringe upon the freedom of speech.

Subject Matter of Review

The subject matter of review in this case is whether Article 8-5 Section 6 of the Public Official Election Act (amended by Act No. 7189, March 12, 2004) (the "POEA Provision"); the main text of Article 8 Section 2 of the former Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (enacted by Directive No. 9 of the Internet Election News Deliberation Commission, December 23, 2011 and before amendment by Directive No. 10 of the Internet Election News Deliberation Commission, December 8, 2017) (the "Former Deliberation Standard Provision"); and Article 8 Section 2 of the current Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (amended by Directive No. 10 of the Internet Election News Deliberation Commission, December 8, 2017) (the "Deliberation Standard Provision") (the two provisions above are collectively referred to as the "Time Restriction Provisions") infringe upon Complainant's fundamental right.

Provisions at Issue

Public Official Election Act (amended by Act No. 7189, March 12, 2004)

Article 8-5 (Internet Election News Deliberation Committee)

(6) The Internet Election News Deliberation Committee shall determine matters necessary for guaranteeing the political neutrality, equality, and objectivity of Internet election reports, and redress of injuries of rights and impartiality of other election reports and make a public announcement thereof.

Former Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (enacted by Directive No. 9 of the Internet Election

News Deliberation Commission, December 23, 2011 and before amendment by Directive No. 10 of the Internet Election News Deliberation Commission, December 8, 2017)

Article 8 (Special Restriction on Timing)

(2) No internet media shall publish any column or writing written by any election candidate for 90 days until the election day: *Provided*, that this shall not apply where the publication continued more than 180 days before the election day and the candidate's name is not shown on the contribution.

Regulation on Deliberation Standard, etc. for Internet News Reporting of Election (amended by Directive No. 10 of the Internet Election News Deliberation Commission, December 8, 2017)

Article 8 (Special Restriction on Timing)

(2) No internet media shall publish any column, comment, contribution, writing, etc. written by any election candidate for 90 days until the election day.

Summary of the Decision

1. Judgment on the POEA Provision

The POEA Provision mandates that the Deliberation Commission determine and make a public announcement of matters necessary to ensure the fairness of online election news reports. Banning online media from publishing columns, etc. written by election candidates for a certain period and subsequently limiting Complainant's freedom of speech is based on the Time Restriction Provisions. The POEA Provision itself cannot be regarded to have directly infringed upon the fundamental right of Complainant. Thus, the complaint over the POEA Provision is inadmissible as it does not fulfill the directness requirement for constitutional fundamental right infringement.

2. Judgment on the Time Restriction Provisions

A. Whether principle of statutory reservation is violated

The Time Restriction Provisions were grounded in law, being mandated by the POEA Provision, and Article 8-5 Section 9, etc. of the Public Official Election Act. The Time Restriction Provisions do not preemptively prohibit online media from publishing columns, etc. written by an election candidate. Instead, they require the online media to voluntarily follow the rules and correct violations, if any, afterwards. Such measure is to widely ensure both the freedom of election news reports and the fairness of online election news reports. Therefore, it is acknowledged that the mother law needs to somehow broadly mandate the matters to be included in the Deliberation Standard Provision. In the meantime, publishing columns, etc. that a candidate wrote for the online media when the election day nears would likely undermine the fairness of election news reports and, accordingly, the Deliberation Standard Provision needs to impose restrictions on such publication. The Public Official Election Act has various restrictions 90 days before the election day and the Time Restriction Provisions are regulated by the 90-day time limit to respect the purpose. Thus, the Time Restriction Provisions do not violate the principle of statutory reservation or infringe upon Complainant's freedom of speech.

B. Whether principle against excessive restriction is violated

The Time Restriction Provisions are legislated to ensure the fairness of both online election news reports and elections, suggesting that the legislative purpose is legitimate and they are appropriate means to serve such purpose.

However, the Time Restriction Provisions simply regard such election news reports unfair without specifically reviewing whether they could be seen unfair. The Time Restriction Provisions restrict the publication of columns, etc. written by election candidates that have nothing to do with

an election or political speech or that are necessary to satisfy people's right to know about such issues of enormous public interests. This situation implies that the Time Restriction Provisions uniformly and comprehensively restrict even the reports that would not hamper the fairness of the election.

Very broad is the concept of the online media that are subject to deliberation of the online news reports under the Public Official Election Act. Combined with the broad concept of the online media, the Time Restriction Provisions would impose greater restrictions on freedom of speech.

Online media have high degree of accessibility, openness, autonomy and spontaneity and are expanding their influences in the media market with the development of information technology. It would be desirable to guarantee as much autonomy as possible while minimizing restrictions on freedom of speech.

It is necessary to prevent candidates from writing columns, etc. for the online media and using them to help their election campaign to circumvent the law when the election nears. The Deliberation Standard Provision entails various provisions to regulate such practice, however, and the Public Official Election Act also has many provisions to prevent the press from exerting unfair influences over elections.

Hence, the Time Restriction Provisions violate the principle of minimum restrictions.

In conclusion, they violate the principle against excessive restriction and infringe upon Complainant's freedom of speech.

Summary of Dissenting Opinion of Three Justices

The legislative purpose of the Time Restriction Provisions is to root out the possibility of unequal access or exposure to the online media among candidates at a sensitive time related to election and eventually ensure the fairness of online election news reports. Therefore, legitimacy of the purpose and appropriateness of means are recognized.

It is necessary to take action to discourage the online media from enhancing the image of specific candidates in order to assure the fairness of election news reports. The Time Restriction Provisions ban publication on the 'online media', not on the website operated by the candidates. Furthermore, they ban the publication of the columns, etc. written by the candidates only 'for 90 days until the election day.' The effect of the Time Restriction Provisions comes into force only after the Deliberation Commission decides to prohibit such publication. This suggests that the Time Restriction Provisions conform to both the principle of minimum restrictions and balance of interests and, accordingly, do not infringe upon Complainant's freedom of speech.

Given the negative aspects of the internet and the strong influences of the online media, it is necessary to address issues of unequal opportunities among candidates that may arise from the media's publication of columns, etc. written by specific candidates.

Summary of Concurring Opinion of One Justice

The Court opinion, unlike the point made in the dissenting opinion, demonstrates that the Time Restriction Provisions violate the principle against excessive restriction as they uniformly and broadly restrict Complainant's freedom of speech. Further, the Court opinion points out that the Time Restriction Provisions are not appropriate regulations for the online media since they fail to take into account the characteristics of the internet environment. The Time Restriction Provisions impose comprehensive and blanket restrictions on Complainant's freedom of speech without specifically examining the fairness of election news reports or considering the characteristics of the online media and, consequently, violate the principle of minimum restrictions.

21. Case on Restrictions on Authors' Right of Public Performance, etc. under the Copyright Act

[2016Hun-Ma1115, 2019Hun-Ka18 (consolidated), November 28, 2019]

In this case, the Court held that (1) the main text of Article 29 Section 2 of the Copyright Act providing that it shall be permissible to play and perform publicly any phonograms made public for commercial purposes (hereinafter, "Commercial Phonograms") or any cinematographic works made public for commercial purposes (hereinafter, "Commercial Cinematographic Works" and collectively, "Commercial Phonograms, etc.") if no benefit in return for the relevant public performance is received from audience or spectators (hereinafter, "Audience, etc."); and (2) the part "the main text of Article 29 Section 2" in Article 87 Section 1 of the Copyright Act providing that the main text of Article 29 Section 2 of the Copyright Act shall apply mutatis mutandis to performances, phonograms, or broadcasts that are the objects of neighboring rights do not infringe the rights to property of authors and the holders of neighboring rights (collectively, "Authors, etc.").

Three Justices filed a dissenting opinion, concluding that the above provisions infringe upon the rights to property of Authors, etc. They reasoned that, in light of daily experience, the above provisions do not increase the level of cultural benefits enjoyed by the public and that, even if they do increase this level, the infringement of the rights to property of Authors, etc. outweighs those cultural benefits.

Background of the Case

1. 2016Hun-Ma1115

Complainants are incorporated associations that have obtained authorization from the Minister for Culture, Sports, and Tourism to provide a copyright trust service. They manage authors' property rights related to musical and cinematographic works, or performers' neighboring rights.

On December 21, 2016, Complainants filed this constitutional complaint, alleging that Article 29 Section 2 of the Copyright Act violated their fundamental rights by providing that it shall be permissible to play and perform publicly any Commercial Phonograms, etc. if no benefit in return for the relevant public performance is received from the Audience, etc.

2. 2019Hun-Ka18

On January 1, 2012, __, Inc. (the "Petitioner") entered into a contract with __ Co., Ltd. ("Company 1") for use of musical works. This contract provided that the Petitioner would allow Company 1 to use the musical works managed by the Petitioner (the "Works at Issue") (excluding the use of the Works at Issue for public performances in stores) for the purpose of making them accessible to the public, only in a way that Company 1 would transmit them to stores, etc. via webcasting; and that the Petitioner would collect royalties from Company 1. Thereafter, the parties have continued to renew this contract.

On February 23, 2017, __ Co., Ltd. ("Company 2") entered into a contract with Company 1 for provision of an in-store music service. This contract provided that Company 1 would offer a service to Company 2 whereby Company 2 would, through Company 1's software, receive background music and play it in Company 2's own stores; and that Company 1 would collect royalties from Company 2. The Works at Issue provided by Company 1 were played and used as background music in Company 2's stores in accordance with such contract.

On June 12, 2018, the Petitioner filed a lawsuit for damages against Company 2, claiming that Company 2 had violated authors' right of public performance by using the Works at Issue without the Petitioner's permission. While that lawsuit was pending, the Petitioner filed a motion to request a constitutional review of Article 29 Section 2 of the Copyright Act. On May 17, 2019, the trial court granted the motion and requested this constitutional review of the above provision.

Subject Matter of Review

The subject matter of review in 2016Hun-Ma1115 is whether (1) the main text of Article 29 Section 2 of the Copyright Act (amended by Act No. 14083 on March 22, 2016) (the "Public Performance Right Restriction Provision"); and (2) the part "main text of Article 29 Section 2" in Article 87 Section 1 of the Copyright Act (amended by Act No. 11110 on December 2, 2011) infringe upon the fundamental rights of Complainants.

The subject matter of review in 2019Hun-Ka18 is whether the Public Performance Right Restriction Provision violates the Constitution.

Provisions at Issue

Copyright Act (amended by Act No. 14083 on March 22, 2016)
Article 29 (Public Performance and Broadcasting for Non-Profit Purposes)
(2) It shall be permissible to play and perform publicly any commercial phonograms or cinematographic works made public for commercial purposes for the general public if no benefit in return for the relevant public performance is received from audience or spectators: *Provided*, That the same shall not apply to the cases as prescribed by Presidential Decree.

Copyright Act (amended by Act No. 11110 on December 2, 2011)
Article 87 (Limitations on Neighboring Rights)
(1) Articles 23, 24, and 25 Sections 1 through 3, Articles 26 through 32, Article 33 Section 2, and Articles 34, 35-2, 35-3, 36 and 37 shall apply mutatis mutandis to the use of performances, phonograms or broadcasts that are the objects of neighboring rights.

Summary of the Decision

The Provisions at Issue serve a legitimate legislative purpose, which is to ensure that the public enjoys cultural benefits through use of

copyrighted works. Further, permitting any person to play and perform publicly any Commercial Phonograms, etc., under a certain condition, and thereby improving the public's access to Commercial Phonograms, etc. are appropriate means of achieving such a legislative purpose.

Authors, etc. are not allowed to exercise their rights with regard to the relevant Commercial Phonograms, etc. if a public performance is permitted under the Provisions at Issue, regardless of whether such performance makes a profit or not; however, they may exercise those rights if the public performance falls under the proviso of Article 29 Section 2 of the Copyright Act and under the exceptions prescribed in the Enforcement Decree of the Copyright Act. The Court believes that the form of regulation under the Provisions at Issue and the above proviso—general restrictions imposed on the right to property first and exceptions thereto—was chosen by the legislature to reconcile, in individual cases, the interests of Authors, etc. in protecting their property rights with the interest of the public in enjoying cultural benefits. In addition, Authors, etc. could indirectly profit from, inter alia, an increase in sales of their works if the relevant Commercial Phonograms, etc. are made public to a wider audience through a public performance. For the foregoing reasons, the Court concludes that the Provisions at Issue cannot be said to be in violation of their property rights, especially in terms of the least restrictive means test.

Moreover, the disadvantages to Authors, etc. who are not allowed to exercise their rights to authorize public performances in which Commercial Phonograms, etc. are played, or who are not paid the royalties of those public performances are no more significant than the public interest in ensuring that the public enjoys cultural benefits through public performances in which Commercial Phonograms, etc. are played. Thus, the Provisions at Issue satisfy the balance of interests as well.

Accordingly, the Provisions at Issue do not infringe upon the rights to property of Authors, etc. by violating the principle of proportionality.

Summary of Dissenting Opinion of Three Justices

From a comparative law perspective, Article 29 Section 2 of the Copyright Act is unusual; the lack of similar provision in a country does not mean that the level of cultural benefits enjoyed by the public in such country is low. Further, we cannot find evidence substantiating that the recent amendment of the Enforcement Decree of the Copyright Act, which added business establishments, including coffee shops, to the list of exceptions to the application of the above provision and required them to pay royalties on Commercial Phonograms, etc. played during public performances at their places of business, has led to the cessation of public performances in which Commercial Phonograms, etc. are played. Our daily experience does not testify to this fact, either. Therefore, the Provisions at Issue are not appropriate means of accomplishing the legislative purpose of ensuring that the public enjoys cultural benefits.

Considering the language of Article 22 Section 2 of the Constitution stating that the rights of authors shall be protected by statutes, we conclude that the Provisions at Issue violate the principle of the least restrictive means. This conclusion is not altered even if the exceptions to the application of the Provisions at Issue are broadly recognized under the Enforcement Decree of the Copyright Act—a type of law which is subordinate to statutory law. Additionally, since it is not probable whether indirect profits will arise from the Provisions at Issue, we find that indirect profits do not qualify as sufficient grounds to conclude that the Provisions at Issue are in violation of the least restrictive means principle.

The Provisions at Issue significantly infringe upon private interests, because Authors, etc. would normally expect that their legitimate interests would include not only direct profits from sales of their Commercial Phonograms, etc., but also indirect profits from public performances in which their Commercial Phonograms, etc. are played for profit-making purposes. On the other hand, the public interest in ensuring that the public enjoys cultural benefits—which is sought to be achieved by the

Provisions at Issue—does not exist, or if it does exist, it does not exist to a sufficient degree. Therefore, the Provisions at Issue do not satisfy the balance of interests.

Accordingly, the Provisions at Issue infringe upon the rights to property of Authors, etc. by violating the principle of proportionality.

22. Case on Resignation Requirement for Teachers to Become Candidates in Public Official Elections and Education Superintendent Elections, and Ban on Teachers Engaging in Election Campaigns

[2018Hun-Ma222, November 28, 2019]

In this case, the Court decided that the part regarding the educational public official from "State public official provided for in Article 2 of the State Public Officials Act" of the main text of Article 53 Section 1 Item 1 of the Public Official Election Act, and Article 53 Section 1 Item 7, etc. of the same Act, which requires teachers intending to run for a public official election or educational superintendent election to resign his or her post at least 90 days before the election day and bans teachers from engaging in an election campaign, do not infringe upon the teachers' right to hold public offices, freedom of election campaign, or the like and, subsequently, do not violate the Constitution.

Background of the Case

Complainants are public and private primary/secondary school teachers. They wanted to run for the 7th Nationwide Simultaneous Local Elections scheduled on June 13, 2018 or freely engage in election campaigns. According to Article 53 Section 1 Items 1 and 7 as well as Article 60 Section 1 Items 4 and 5 of the Public Official Election Act, and Article 47 Section 1, etc. of the Local Education Autonomy Act, however, teachers may not engage in any election campaign as a general voter, let alone run for a public official election or educational superintendent election, unless they resign their post at least 90 days before the election day.

Subsequently, the Complainants filed a constitutional complaint against the above provisions on February 28, 2018, arguing that they infringed upon the teachers' right to hold public offices, freedom of political speech, right to equality, and so forth.

Subject Matter of Review

The subject matter of review in this case is whether (1) the part regarding the educational public official from "State public official provided for in Article 2 of the State Public Officials Act" of the main text of Article 53 Section 1 Item 1 and Article 53 Section 1 Item 7 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) and the part regarding the educational public official from "State public official provided for in Article 2 of the State Public Officials Act" of the main text of Article 53 Section 1 Item 1 and Article 53 Section 1 Item 7 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) from the main text of Article 47 Section 1 of the Local Education Autonomy Act (amended by Act No. 14372, December 13, 2016) (collectively, the "Candidate Resignation Provisions"); (2) the part regarding the educational public official from "State public official provided for in Article 2 of the State Public Officials Act" of the main text of Article 60 Section 1 Item 4 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) and the part regarding the *mutatis mutandis* application of the provisions concerning Mayor/*Do* Governor elections to the educational public official from "State public official provided for in Article 2 of the State Public Officials Act" of Article 60 Section 1 Item 4 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) from Article 49 Section 1 of the Local Education Autonomy Act (amended by Act No. 10046, February 26, 2010) (collectively, the "Election Campaign Banning Provisions for Educational Public Officials"); and (3) the part regarding Article 53 Section 1 Item 7 from Article 60 Section 1 Item 5 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) and the part regarding the *mutatis mutandis* application of the provisions concerning Mayor/*Do* Governor elections to a person who falls under Article 53 Section 1 Item 7 from Article 60 Section 1 Item 5 of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) from the former part of Article 49 Section 1 of the Local Education Autonomy

Act (amended by Act No. 10046, February 26, 2010; regardless of the amended year, the "Education Autonomy Act") (collectively, the "Provisions Banning Private School Teachers from Engaging in Election Campaigns") infringe upon Complainants' fundamental right.

Provisions at Issue

Public Official Election Act (amended by Act No. 9974, January 25, 2010)

Article 53 (Candidacy of Public Officials)

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

1. A State public official provided in Article 2 of the State Public Officials Act and a local public official provided in Article 2 of the Local Public Officials Act (proviso left out); and,

7. A private school teacher who is ineligible for a party membership as provided in Article 22 Section 1 Item 2 of the Political Parties Act.

Article 60 (Persons Barred from Election Campaign)

(1) Any of the following persons shall not engage in an election campaign: Provided, That the foregoing shall not apply where a person referred to in Item 1 is the spouse of a preliminary candidate or candidate, or where a person referred to in any of Items 4 through 8 is the spouse of a preliminary candidate or candidate, or a lineal ascendant or descendant of a candidate:

4. A State public official as provided in Article 2 of the State Public Officials Act and a local public official as provided in

Article 2 of the Local Public Officials Act (proviso left out); and,

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

Local Education Autonomy Act (amended by Act No. 14372, December 13, 2016)

Article 47 (Candidacy of Public Officials)

(1) Any person falling under any of the Items of Article 53 Section 1 of the Public Official Election Act who intends to be a candidate shall resign his or her post not later than 90 days before the election day (or before such person files an application for the registration of candidate in a special election held under Article 35 Section 4 of the Public Official Election Act applicable *mutatis mutandis* under Article 49 Section 1) (proviso left out);

Local Education Autonomy Act (amended by Act No. 10046, February 26, 2010)

Article 49 (Application Mutatis Mutandis of the Public Official Election Act)

(1) Except as provided in this Act, Articles ..... 58 through 60 ..... of the Public Official Election Act concerning Mayors/*Do* Governors and Mayor/*Do* Governor elections shall apply *mutatis mutandis* to the superintendent of education elections.

Summary of the Decision

1. Judgment on Provisions Banning Private School Teachers from Engaging in Election Campaigns

Complainants, who are private school teachers, were subject to the provisions above by the 20th General Election Day of April 13, 2016 after they became school teachers. Furthermore, more than a year elapsed thereafter before they filed the request for adjudication, meaning that the

request is non-justiciable since the filing time limit has been exceeded.

2. Judgment on Candidate Resignation Provision

A. Violation of principle against excessive restriction

The Candidate Resignation Provision requires teachers to leave their post at least 90 days before the election in which they intend to run, to ensure their continued dedication to work. Hence, the legitimacy of the legislative purpose and appropriateness of means is acknowledged.

We need a system that can help the teachers faithfully fulfill their duty of dedication to work and separate the schools from politics, to prevent the schools from turning into a political stage and guarantee the students' right to learn. Therefore, a measure like the one at issue here is inevitable to ensure the teachers' fulfillment of the duty of dedication to work. Allowing unpaid leave or temporary leave of absence for candidacy would not only undermine the continuity of education, but also is likely to leave the students under an unstable educational environment without an efficient guarantee of their right to learn.

The provisions alone, which ban improper election campaigns under the Public Official Election Act, are not enough to ensure the teachers to fulfill their duty of dedication to work. Further, when the election campaign period and preliminary candidacy registration period are taken into account, it is hard to think that the lawmakers' decision to designate the resignation deadline as 90 days before the election day is unreasonable. As the students' right to learn would also likely be infringed upon, even in the educational superintendent election, the Candidate Resignation Provision does not fail the test of least restrictive means.

It is hard to see that the restriction on private interests imposed by having to resign their current post is significantly more onerous than the public interests that the provision above seeks to realize. Therefore, the Court finds that the balance of interests is satisfied, and thus the Candidate Resignation Provision does not violate the principle against excessive restriction.

B. Infringement upon equality right

Given the nature of elected office, it is impossible to find replacement for the members of the National Assembly or the chairman and members of each local council until the next election if they were required to resign. Then, it would be impossible to form the assembly or council until then, rendering them unable to function as representative bodies. Even if their candidacy is permitted, the job that they are carrying out is not so different in nature from the one they will take on. Therefore, the resignation requirement that applies to the teachers unlike the members of the National Assembly or the chairman and members of each local council is not regarded as unreasonable discrimination.

The employment relations of the employees of government-invested institutions belongs to the area of private laws and it is easy to classify them based on their ranks. Therefore, even though the resignation requirement is imposed on the teachers regardless of their ranks, unlike the employees of government-invested institutions, it is difficult to regard this requirement as unreasonable discrimination.

The main job of college professors is research and there is a difference in their influence over students especially when the age and level of education of the students, among other things, are taken into account. Therefore, allowing the college professors to run for a public official election or the like without quitting, unlike the elementary and secondary school teachers, cannot be perceived as unreasonable discrimination.

Educational superintendents, general supervisors of the educational administration, differ from general teachers in terms of the level of influence on students, and the meaning of the duty of dedication to work is also inevitably different. If they are required to resign under the circumstance where they are allowed to seek reelection, it would effectively reduce their term of office and undermine the work continuity and efficiency. Accordingly, imposing the obligation to resign their post to be a candidate in an educational superintendent election only on general teachers, not incumbent educational superintendents, is not

regarded as unreasonable discrimination.

3. Judgment on Election Campaign Banning Provisions for Educational Public Officials

A. Violation of principle against excessive restriction

The Constitutional Court ruled for 2009Hun-Ba298 on July 26, 2012 as follows:

「Banning an election campaign by educational public officials is part of the effort to protect political neutrality of public officials and that of education, which are guaranteed by the Constitution, and thus such ban is recognized to have legitimacy in its legislative purpose and deemed to be appropriate means.

Imposing a ban by means of specifying prohibited activities such as "the use of one's position for election campaign" and "individual acts that affect an election" might weaken the effectiveness or normative power as a banning provision. It is impossible to enumerate every single act of educational public officials and put them under control in the legislation system. Furthermore, the educational public officials have critical impacts on the students, including the formation of their characters and basic habits, both during and outside work hours. Thus, the Election Campaign Banning Provisions for Educational Public Officials do not fail the test of least restrictive means.

As the public interest deriving from protecting political neutrality of public officials and that of education outweighs the freedom of election campaigns, the balance of interests is also satisfied. Therefore, the Election Campaign Banning Provisions for Educational Public Officials neither violate the principle against excessive restriction nor infringe upon the freedom of election campaigns.」

The constitutional values that the local education autonomy wants to realize include autonomy, expertise, and political neutrality of education as in the public official election. As in the public official election, the

need to ban the election campaign for the educational superintendent elections is still recognized. Thus, the grounds of the decision for 2009Hun-Ba298 is valid for this case as well.

Consequently, the Election Campaign Banning Provisions for Educational Public Officials neither violate the principle against excessive restriction nor infringe upon Complainants' freedom of election campaigns.

B. Infringement upon equality right

As college professors and primary/secondary school teachers have different jobs and different impacts on their students from each other, treating the two groups differently does not infringe upon the right to equality.

Dissenting Opinion of Three Justices on Election Campaign Banning Provisions for Educational Public Officials

Since the purpose of the Election Campaign Banning Provisions for Educational Public Officials is to protect political neutrality of public officials and that of education, which are guaranteed by the Constitution, the legitimacy of their legislative purpose is acknowledged. However, allowing them to engage in the election campaign does not immediately undermine the neutrality of education, and accordingly it is hard to recognize the appropriateness of the means.

According to the Framework Act on Education, it is already a ground for discipline for a school teacher to instigate students to support or oppose any particular political party or faction. Further, allowing engagement in the election campaign outside the performance of official duties cannot be a ground to believe that politically biased education would be provided for the students. In addition, the Public Official Election Act bans the use of a public official's position for election campaign, and the interpretation over it is well established. The educational public officials are prohibited from engaging in any kind of election

campaign, even for the educational superintendent election. These measures make it hard for the message of the educational field to be effectively delivered to the candidates and others, generate illicit election campaigns, and discourage free discussion and criticism, eventually failing the test of least restrictive means.

The public interest deriving from banning the educational public officials' engagement in the election campaign is relatively ambiguous and the category is very broad. Meanwhile, the resulting restriction on the freedom of the election campaign is so onerous as to upset the balance of interests.

23. Case on Surcharges Imposed on Users of Membership-Based Golf Courses

[2017Hun-Ka21, December 27, 2019]

In this case, the Court held that Article 20 Section 1 Item 3 of the former and current National Sports Promotion Acts imposing surcharges that form part of the National Sports Promotion Fund only on users of membership-based golf courses violate the Constitution by contravening the principle of equality.

Background of the Case

On December 2007, Korea Sports Promotion Foundation (hereinafter referred to as "KSPO") obtained approval from the Minister of Culture and Tourism to collect surcharges from users of membership-based golf courses. Since then, at the beginning of each year, KSPO has notified membership-based golf course operators of its yearly plan to collect surcharges. In response, the company at issue, one of those operators, has collected surcharges from the users of its golf courses and remitted them to KSPO until 2012.

On January 1, 2013, the Minister of Culture, Sports, and Tourism directed KSPO to suspend collection of surcharges, on the grounds, *inter alia*, that economy needed to be stimulated. On October 2013, during the parliamentary inspection of the administration of the government offices, this suspension of surcharge collection without amending any Acts or Orders was criticized as conferring special benefits on operators or users of membership-based golf courses and thus as violating the National Sports Promotion Act. In response, on January 21, 2014, KSPO obtained approval from the Minister of Culture, Sports, and Tourism to resume the previous practice of collecting surcharges. Thereupon, KSPO notified the company at issue and other membership-based golf course operators of its plan to collect surcharges for 2014.

The company at issue paid only part of the surcharges from February 2014 to November 2014, on the ground that it would collect surcharges in compliance with the wishes of its golf course users. KSPO thereafter filed a lawsuit against the company at issue seeking damages in the amount of all surcharges that should have been collected from February 1, 2014, to November 30, 2014, along with damages for delay of payment. The trial court ruled in favor of KSPO on all of its claims. The company at issue appealed and, while the appeal was pending, filed a motion to request a constitutional review of Article 20 Section 1 Item 3 and other provisions of the National Sports Promotion Act. The requesting court granted the motion, deciding to request a constitutional review of Article 20 Section 1 Item 3 of the National Sports Promotion Act.

Subject Matter of Review

The subject matter of review in this case is whether (1) Article 20 Section 1 Item 3 of the former National Sports Promotion Act (wholly amended by Act No. 8344 on April 11, 2007, and before amendment by Act No. 15261 on December 19, 2017) and (2) Article 20 Section 1 Item 3 of the current National Sports Promotion Act (amended by Act No. 15261 on December 19, 2017; hereinafter referred to as the "Act" regardless of the date of amendment) (collectively referred to as the "Provisions at Issue") violate the Constitution. The Provisions at Issue read as follows:

Provisions at Issue

Former National Sports Promotion Act (wholly amended by Act No. 8344 on April 11, 2007, and before amendment by Act No. 15261, December 19, 2017)

Article 20 (Formation of Fund)

(1) The Fund shall be created with each of the following financial resources:

3. Surcharges imposed on admission fees to golf courses (referring to golf courses operated with a membership system; hereinafter the same shall apply);

Current National Sports Promotion Act (amended by Act No. 15261 on December 19, 2017)

Article 20 (Formation of Fund)

(1) The National Sports Promotion Account shall be created with each of the following financial resources and the Account for Prevention and Treatment of Gambling Addiction shall be created in compliance with Article 14-4 of the National Gambling Control Commission Act:

3. Surcharges imposed on admission fees to golf courses (referring to golf courses operated with a membership system; hereinafter the same shall apply);

Summary of the Decision

1. Legal character of surcharges imposed on admission fees to membership-based golf courses

Surcharges under the Provisions at Issue which are imposed on admission fees to membership-based golf courses (hereinafter referred to as "Surcharges") form part of the National Sports Promotion Fund (the "National Sports Promotion Account" on and after January 1, 2018; the National Sports Promotion Fund before January 1, 2018 and the National Sports Promotion Account on and after January 1, 2018 will hereinafter be referred to as the "National Sports Promotion Account" collectively). Surcharges are different from fees for the use of golf course facilities; they are imposed mandatorily and uniformly only on a specific category of persons, namely users of membership-based golf courses (hereinafter referred to as "Persons Liable for Surcharges"). In addition, Surcharges must be included in the National Sports Promotion Account and be used

for the purposes specified in the Act. They must also be operated and managed as a separate accounting by KSPO.

Considering the above, the Court finds that Surcharges are distinct from taxes and are equivalent to charges. Further, considering, *inter alia*, that the sole purpose of imposing Surcharges is to secure financing for the National Sports Promotion Account and that the imposition of Surcharges *per se* does not serve the purpose of encouraging Persons Liable for Surcharges to perform acts in a certain manner, or the purpose of rectifying inequality between Persons Liable for Surcharges and other categories of persons, the Court concludes that Surcharges are equivalent to "charges imposed for financing purposes."

2. Whether the constitutional principle of equality is violated

Persons Liable for Surcharges pay Surcharges under the Provisions at Issue, which subject them to discriminatory treatment in comparison with other citizens who do not use the sports facilities subject to collection of Surcharges.

Considering that Surcharges under the Provisions at Issue form part of the funds of the National Sports Promotion Account based on the purpose of the Act, *inter alia*, it can be said that the public goal to be accomplished by imposing Surcharges is the "promotion of national sports" by securing stable funding for the National Sports Promotion Account. However, in light of the meaning and scope of the term "sports", appropriations of the National Sports Promotion Account, etc. under the Act, the Court finds that this public goal concerns extensive regulation of matters pertaining to general sports policy and that it can hardly be deemed related to a specific public goal.

Persons liable for payment of surcharges under the Provisions at Issue are limited to users of golf course facilities subject to collection of Surcharges. These users share a common specific characteristic in that they form a group which uses membership-based golf courses among the many sports facilities available to them. However, it can hardly be said

that the public goal of "promoting national sports," which is so broad as to encompass various matters of regulation, is more proximate to a particular group than to other groups of citizens. It appears that the legislature, while eliminating surcharges imposed on admission fees to swimming pools and other sports facilities to ease the burden on citizens, maintained Surcharges, considering that the main users of the membership-based golf courses are high-income earners. Yet, not only are there a lot of costly sports activities besides golf, it cannot be concluded that the objective proximity of sports facilities users to the public goal of "promoting national sports" is determined by the amount of costs involved in their use of sports facilities. Therefore, the Court finds that there is no objectively special and close relation between Persons Liable for Surcharges and the purpose of imposing Surcharges, the "promotion of national sports."

It is unreasonable to designate only users of facilities subject to collection of Surcharges, among users of numerous sports facilities, as those responsible for additional financial burdens other than taxes for the creation of National Sports Promotion Account. Moreover, in light of the fact that the purpose of establishing the National Sports Promotion Account, which is funded through Surcharges, etc., is related to the general matters of national sports promotion, the Court finds that the collection of Surcharges provides wide-ranging and extensive benefits to all citizens and thus cannot be said to satisfy the group beneficialness requirement for justifying the imposition of surcharges.

In conclusion, Surcharges under the Provisions at Issue do not have an objectively special and close relation to the users of facilities subject to collection of Surcharges and result in unreasonable discrimination against them. Therefore, Surcharges under the Provisions at Issue violate the constitutional principle of equality.

24. Case on Rebuilding Charges

[2014Hun-Ba381, December 27, 2019]

In this case, the Court held that Article 3 of the former Restitution of Excess Rebuilding Gains Act—providing for an imposition of rebuilding charges for excess rebuilding gains made from a rebuilding project—and other provisions do not infringe upon the property right and other rights of Petitioner and thus do not violate the Constitution.

Background of the Case

Petitioner is an association for housing rebuilding and improvement project, which was established to demolish a building erected on land in Yongsan-gu, Seoul, and to construct a new building on the same site. On September 25, 2012, the head of Yongsan-gu imposed on Petitioner rebuilding charges as an administrative measure in the amount of 1,718,727,300 won.

Petitioner subsequently filed a lawsuit (Seoul Administrative Court 2012GuHap42281) to nullify the above administrative measure. While the lawsuit was pending, Petitioner filed a motion (Seoul Administrative Court 2013Ah1039) to request a constitutional review of Articles 3, 5, 7, and 9 of the former and current Restitution of Excess Rebuilding Gains Acts. As the motion was denied on July 25, 2014, Petitioner filed this constitutional complaint on September 3, 2014.

Subject Matter of Review

The subject matter of review in this case is whether (1) Article 3 of the former Restitution of Excess Rebuilding Gains Act (amended by Act No. 8852 on February 29, 2008, and before amendment by Act No. 11690 on March 23, 2013) (hereinafter referred to as the "Recapture Provision"); (2) Article 5 of the former Restitution of Excess Rebuilding Gains Act (enacted by Act No. 7959 on May 24, 2006, and before

amendment by Act No. 14569 on February 8, 2017) (hereinafter referred to as the "Projects Provision"); (3) the phrase "prices of sale of housing at the time of sale of housing" in Article 7 of the current Restitution of Excess Rebuilding Gains Act (enacted by Act No. 7959 on May 24, 2006) (hereinafter referred to as the "Provision of Sale of Housing to General Public"); and (4) Article 9 of the former Restitution of Excess Rebuilding Gains Act (amended by Act No. 8852 on February 29, 2008, and before amendment by Act No. 11690 on March 23, 2013) (hereinafter referred to as the "Housing Prices Calculation Provision," and collectively referred to as the "Provisions at Issue") violate the Constitution. The Provisions at Issue read as follows:

Provisions at Issue

Former Restitution of Excess Rebuilding Gains Act (amended by Act No. 8852 on February 29, 2008, and before amendment by Act No. 11690 on March 23, 2013)

Article 3 (Recapturing of Excess Rebuilding Gains)

The Minister of Land, Transport, and Maritime Affairs shall recapture excess rebuilding gains made from a rebuilding project as rebuilding charges, as prescribed by this Act.

Former Restitution of Excess Rebuilding Gains Act (enacted by Act No. 7959 on May 24, 2006, and before amendment by Act No. 14569 on February 8, 2017)

Article 5 (Projects Subject to Imposition of Rebuilding Charges)

A housing rebuilding project under Article 2 Item 2 Sub-item (c) of the Act on the Improvement of Urban Areas and Residential Environments shall be subject to imposition of rebuilding charges.

Current Restitution of Excess Rebuilding Gains Act (enacted by Act No. 7959 on May 24, 2006)

Article 7 (Standards for Imposition)

A standard amount for imposition of rebuilding charges shall be the

remainder after deducting the sum of the following amounts from the sum of the prices of housing subject to imposition at the time of completion (Provided, That the value of housing at the time of completion of housing for general sale among houses subject to imposition shall be the sum of the prices of sale of housing at the time of sale of housing; hereinafter referred to as "value of housing at the time of completion"):

1. The sum of the prices of housing subject to imposition at the time of commencement (hereinafter referred to as "value of housing at the time of commencement");
2. The sum of the normal increases in prices of housing subject to imposition at the time of commencement during the period of imposition;
3. Development costs, etc. under Article 11.

Former Restitution of Excess Rebuilding Gains Act (amended by Act No. 8852 on February 29, 2008, and before amendment by Act No. 11690 on March 23, 2013)

Article 9 (Calculation of Housing Prices)

(1) The value of housing as at the time of commencement under Article 7 shall be the value calculated by reflecting the normal increases in prices of housing from the base date for a public notice to the time of commencement in the sum of housing prices subject to imposition publicly noticed (where there are no housing prices publicly noticed, referring to housing prices as at the time of commencement of imposition calculated by the Minister of Land, Transport, and Maritime Affairs according to the procedures prescribed in Section 2) in accordance with the Act on the Public Announcement of Values and Appraisal of Real Estate.

(2) The value of housing as at the time of completion under Article 7 shall be the value that the Minister of Land, Transport, and Maritime Affairs decided upon after investigating and calculating the sum of housing prices as at the time of completion by entrustment to an institution specialized in investigation and calculation of real estate

prices (hereinafter referred to as "institution specialized in investigation of real estate prices") and referring the sum to the Real Estate Assessment Commission under the Act on the Public Announcement of Values and Appraisal of Real Estate (hereinafter referred to as "public announcement committee of real estate values") for deliberation, as prescribed by Presidential Decree. In such cases, housing prices as at the time of completion calculated in accordance with the provisions of the main sentence shall be deemed housing prices publicly noticed pursuant to Articles 16 and 17 of the Act on the Public Announcement of Values and Appraisal of Real Estate.

Summary of the Decision

1. Regarding the Recapture Provision and the Projects Provision

A. Whether the rule against excessive restriction is violated

Considering the facts that (1) the imposition of rebuilding charges for some of the excess rebuilding gains made from a housing rebuilding project, under the Recapture Provision and the Projects Provision (collectively referred to as the "Provisions"), bears a close relation to the public goals of contributing to the stabilization of housing prices and to social equality, and a rebuilding association conducting a housing rebuilding project also has a close relation to the above public goals and has a collective responsibility for attaining them; (2) accordingly, the State may choose to impose public charges such as rebuilding charges in order to encourage the balanced use and development of land and the preservation thereof, and in order to shape housing rebuilding projects in such a way as to contribute to the stabilization of housing prices and to social equality; (3) when calculating the rebuilding gains, development costs, etc.—including the cost of construction, fees for design and supervision, incidental expenses, and other expenses; and taxes and public charges,

infrastructure charges, metropolitan transport infrastructure charges, or other charges paid to the State or a local government—will be deducted, and as a result, costs borne by a rebuilding association and reflecting its housing rebuilding efforts are deducted from excess rebuilding gains; (4) rebuilding charges are not imposed in all cases where excess rebuilding gains occur after deducting the amount of development costs, etc., and more specifically are exempted where the average of such gains per member of a rebuilding association does not exceed 30 million won; and the amount of rebuilding charges imposed is not excessive because the Act provides that the rate of rebuilding charges shall increase proportionally depending on the amount of excess rebuilding gains, where the average excess rebuilding gains of the members of a rebuilding association per person exceed 30 million won, and that the rate of rebuilding charges shall not be higher than 50 percent where such per-member gains exceed 110 million won; (5) the Act provides that a period from the time of commencement to the time of completion of imposition of rebuilding charges shall not exceed 10 years and thereby prevents imposition of an excessive amount of rebuilding charges where a housing rebuilding project has been delayed for a long period since the approval of a committee for the promotion of establishment of a rebuilding association; and (6) the Provisions do not completely prohibit housing rebuilding projects, but rather indirectly regulate them by recapturing part of an increase in housing prices occurring from those projects if the amount of the increase exceeds the amount of the normal increases in housing prices, the Court does not find that the Provisions—imposing certain rates of rebuilding charges only where the average excess rebuilding gains of the members of a rebuilding association per person exceed 30 million won after deducting development costs, etc. that are borne by a rebuilding association and reflect its housing rebuilding efforts—violate the Constitution by running afoul of the rule against excessive restriction.

B. Whether the principle of equality is violated

A housing rebuilding project and a housing redevelopment project cannot be deemed the same with respect to the need for recapture of excess gains; they are different in purpose and selection of target buildings, detailed implementation method and procedure for a project, and method and degree of recapture of gains. Therefore, they cannot be considered comparable from a constitutional perspective. Accordingly, the Provisions that impose rebuilding charges for housing rebuilding projects, but not for housing redevelopment projects, do not violate the constitutional principle of equality.

2. Regarding the Provision of Sale of Housing to General Public

A. Whether the rule of clarity is violated

In view of the general principle of protection of property rights, legislative purpose of the Act, and standards for imposing rebuilding charges for housing for sale to the members of a rebuilding association, the Court finds that the phrase “prices of sale of housing at the time of sale of housing” in the Provision of Sale of Housing to General Public may be clearly understood as the “actual selling prices of housing”. Therefore, the Provision of Sale of Housing to General Public does not violate the rule of clarity.

B. Whether the principle of equality is violated

The Provision of Sale of Housing to General Public merely amounts to a technical provision providing for a middle stage in the calculation of the final rebuilding charges. There is a rebuilding association, which is a person liable for final payment, arguing that this Provision infringes upon property rights, but that is another issue. Thus, the Court finds that there is no discrimination against rebuilding associations with respect to the calculation method of housing prices used in computing the final rebuilding charges. Since there is no discrimination under the Provision of Sale of

Housing to General Public, this Provision does not violate the principle of equality.

3. Regarding the Housing Prices Calculation Provision

The "value of housing at the time of commencement" and the "value of housing at the time of completion," calculated under the Housing Prices Calculation Provision, are computed based on essentially the same standards and procedures. Therefore, it cannot be said, as Petitioner claims, that this Provision infringes upon Petitioner's property right and thus violates the Constitution by calculating housing prices under different conditions.

Summary of Dissenting Opinion of Two Justices

Whereas (1) since the Provisions at Issue not only calculate unrealized excess rebuilding gains based on arbitrary determination of the "time of commencement" and the "time of completion," but also determine in most cases the base price of housing, excluding housing for sale to the general public, based on an appraisal price, not on an actual selling price, there is a risk that such calculation and determination may be influenced by executive agencies' arbitrary decisions, or the accuracy of such calculation and determination is not guaranteed; (2) because a considerable part of profits arising from an increase in the value of housing subject to rebuilding projects is already recaptured through various forms of taxation, such as property tax, and particularly because an owner of a house completed under a rebuilding project who transfers the house to a new owner must pay a transfer tax, which is calculated based on the selling price of the house reflecting excess rebuilding gains, owners of houses subject to rebuilding projects face an undue financial burden associated with the accumulative and overlapping burdens of rebuilding charges and various taxes; and (3) because the specific circumstances of a house owner subject to a rebuilding project, such as the time of

acquisition of the house and the purpose of such acquisition, are not considered at all in determining whether to impose and collect rebuilding charges or in calculating the amount of rebuilding charges, situations may arise where a “household owning one house” or “actual resident” who occupies the house subject to rebuilding project cannot afford to pay rebuilding charges and thus cannot help but procure a large loan to retain ownership or inevitably sell such house, we conclude that the Provisions at Issue infringe upon the property rights of house owners by contravening the rule against excessive restriction. Accordingly, the Provisions at Issue violate the Constitution.

25. Case on Penalizing Profanation of National Flag

[2016Hun-Ba96, December 27, 2019]

In this case, the Court held that the part relating to the "national flag" in Article 105 of the Criminal Act—the provision imposing a penalty for damaging, removing, or staining the national flag for the purpose of insulting the Republic of Korea (hereinafter referred to as "Flag Profanation")—does not contravene the rule of clarity and the rule against excessive restriction and thus is not in violation of the Constitution.

Background of the Case

On April 2015, while attending an assembly, Petitioner pulled out a paper Korean flag wedged between the glass windows of a nearby parked police bus and raised it toward a police officer who was deployed to maintain order at the assembly. Petitioner then used his cigarette lighter, which he had been carrying for the purpose of smoking a cigarette, to set that flag on fire. Thereafter, the prosecutor filed an indictment against Petitioner for setting the national flag on fire for the purpose of insulting the Republic of Korea in violation of Article 105 of the Criminal Act. However, the court of first instance acquitted Petitioner of the above charge, reasoning that it could not find that he had the purpose to insult the Republic of Korea. The prosecutor appealed, and such appeal is still pending.

While his case was pending at the court of first instance, Petitioner filed a motion to request a constitutional review of Article 105 of the Criminal Act, claiming that such provision was unconstitutional because it violated the rule of clarity and the rule against excessive restriction and thus infringed upon his freedom of expression. That motion was denied. Petitioner then filed this constitutional complaint, raising the same claims as those presented in the motion.

Subject Matter of Review

The subject matter of review in this case is whether the part relating to the "national flag" in Article 105 of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (hereinafter referred to as the "Provision at Issue") violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Criminal Act (amended by Act No. 5057 on December 29, 1995)

Article 105 (Profanation of National Flag or National Emblem)

A person who damages, removes, or stains the national flag or the national emblem for the purpose of insulting the Republic of Korea shall be punished by imprisonment or imprisonment without labor for not more than five years, by suspension of qualifications for not more than 10 years, or by a fine of not more than seven million won.

Summary of the Decision

1. Whether the rule of clarity is violated

The principle of *nulla poena sine lege*, which is derived from the second sentence of Article 12 Section 1 and the former part of Article 13 Section 1 of the Constitution, means that offenses and punishment must be defined by law. The rule of clarity, which stems from this principle, requires the elements of a crime to be defined clearly so that people can foresee what conduct is punished by law and what penalty it may bring and then decide whether to perform an act.

The Court notes that the statutory provisions regulating the freedom of expression should define offenses with particular precision and clarity. However, it is also true that even those provisions cannot be framed in purely descriptive terms by legislative techniques; therefore, even if the

terms used in those provisions are broad enough to require supplementary interpretation by a judge, those provisions are not in violation of the rule against clarity as long as their language allows a person of common knowledge and sense of justice to know what legal interests are protected, what acts are proscribed, and what the penalties are, as well as how severe those penalties are, by employing general methods of interpretation.

The Provision at Issue requires as an element of the crime of flag profanation the "purpose of insulting the Republic of Korea." The Court finds that the phrase "insulting the Republic of Korea" means expressing abstract or specific judgment or derogatory emotion that may undermine the social reputation of the Republic of Korea, which is a national community. Even if the terms used in the Provision at Issue are somewhat broad, it is not in violation of the rule of clarity as long as its language allows a person with common knowledge and sense of justice to know what legal interests are protected, what act is proscribed, and what the penalty is, as well as how severe that penalty is, by employing general methods of interpretation.

2. Whether the rule against excessive restriction is violated

The Court will determine whether the Provision at Issue infringes upon the freedom of expression by violating the rule against excessive restriction.

A national flag reflects the history and ideals of a country and the character of its citizens, and represents the country's constitutional order and values, as well as its identity. It also symbolizes the country's independent and sovereign existence in relation to other countries. Further, national flags show the nationality of participants in international conferences and other international activities and convey the participants' sense of belonging to their country during such international gatherings. Most of the citizens of a country have respect for their national flag and recognize its unique value and status as a national symbol. This value and status of a national flag are only limited to those that are publicly

used.

If the desecration of the Korean National Flag (the "Flag") is not prohibited and penalized as more emphasis is put on freedom of expression, such measure will damage the authority and public image of this country and impair the citizens' sense of respect for the Flag. Therefore, in order to preserve the authority and public image of this country and to protect the citizens' sense of respect for the Flag, it is inevitable that the desecration of the Flag must be penalized. The legislative purpose of the Provision at Issue cannot be served effectively if such desecration is merely regarded as a minor offense or is punished by means other than punishment.

The Provision at Issue considerably narrows the scope of the crime of flag profanation by requiring the element of the "purpose of insulting the Republic of Korea." Indeed, the fact that there have been very few cases in which a person has been prosecuted or penalized for Flag Profanation since the enactment of the Criminal Act indicates that desecrating the Flag unintentionally without the purpose of insulting the Republic of Korea or desecrating it as a form of political expression is not subject to punishment. Moreover, a judge may impose a reasonable statutory sentence as prescribed by the Provision at Issue, on the basis of the specific situations of each case.

Summary of Partly Dissenting Opinion of Two Justices

The issue before us is whether the Provision at Issue violates the Constitution by contravening the rule against excessive restriction.

We note that the desecration of the Flag must be prohibited and penalized in order to preserve the authority and public image of this country and to protect the citizens' sense of respect for the Flag. However, we also note, considering the importance of the freedom of expression, that there is a need to reasonably restrict the scope of punishable conduct under the Provision at Issue.

Because the "publicly used Flag" assumes a particularly important status

as a national symbol, it is reasonable to impose a penalty for the desecration of such Flag and to impose no penalty for the desecration of the Flag used for other purposes. The phrase "publicly used" means used by State agencies or public offices.

State agencies or public offices are the means of achieving the purposes and performing functions of the State. Further, they both use and manage the Flag in accordance with the size requirements and the methods specified in the relevant statutes and regulations. Given these facts, it is clear that a publicly used Flag has a special symbolic value and special status. In fact, its value and status is also the reason why Article 109 of the Criminal Act regarding profanation of a foreign flag provides a penalty only for desecration of a foreign country's national flag publicly used by that country.

If the Provision at Issue is applicable only to the desecration of the publicly used Flag, a considerable number of acts of Flag Profanation—which are considered merely deviant—will not be subject to punishment. As a result, the freedom of expression will be given wider protection.

Summary of Dissenting Opinion of Three Justices

The issue before us is whether the Provision at Issue violates the Constitution by contravening the rule against excessive restriction.

Citizens may choose to desecrate the Flag in order to effectively express their political views. Since desecration of the Flag is, by and large, a method of expressing one's political beliefs or opinions, we believe that imposition of a penalty for such desecration does not amount to regulation of the means of expression, but is regulation of the content of expression. It is a general rule that the regulation of the content of expression should be allowed only under circumstances compelling such action to achieve vital public interests and only under strict conditions.

The term "insult" is very broad. Therefore, there is a possibility that "criticism" expressed in a somewhat derogatory manner may be regarded as an insult. In addition, an insult directed at a particular group of

government officials may be considered an insult to the “country” as well. Because the Supreme Court has held that a showing of willful negligence is sufficient to satisfy the element of purpose in a crime of purpose, there is a legalistic limit to saying that the “purpose of insulting the Republic of Korea” significantly narrows the scope of the crime of flag profanation.

Because citizens’ expression of political views plays a crucial role in the formation of the political will of the State, only minimum regulations should be imposed on such expression. The imposition of a penalty for Flag Profanation is incompatible with the spirit of democracy defending the right to freely criticize the State and unduly infringes upon the freedom of expression. It may be true that with respect to the publicly used Flag, which has a particularly important status as a national symbol, a penalty needs to be imposed for the desecration of that Flag. In most cases, however, such acts of desecration can be punished as the crime of destruction and damage and other crimes under the Criminal Act. Therefore, there is no absence of punishment for the acts of desecration in such cases.

26. Case on Public Notices of Minimum Wages for 2018 and 2019

[2017Hun-Ma1366, 2018Hun-Ma1072 (consolidated), December 27, 2019]

In this case, the Court rejected the complaint over the public notices of the minimum wages for 2018 and 2019 that respectively set the minimum hourly wage at 7,530 won and 8,350 won, explaining that such public notices do not infringe upon Complainants' freedom of contract and freedom of business.

Background of the Case

On July 15, 2017, the Minimum Wage Commission under the Ministry of Employment and Labor set the minimum wage for 2018 at 7,530 won, up by 16.4% from the previous year. Respondent, who is the Minister of Employment and Labor, approved this setting of the minimum wage and publicly notified the minimum hourly wage of 7,530 won that applies to all industries in 2018 on August 4, 2017 [For 40-hour work per week, monthly amount of 1,573,770 won based on 209 hours per month (which includes 8-hour paid leave per week)] (1. Minimum Wage specified in the Public Notice of Minimum Wage Applying in 2018).

On July 14, 2018, the Minimum Wage Commission set the minimum wage applying in 2019 at 8,350 won, which is a 10.9% increase year on year. Respondent, who is the Minister of Employment and Labor, approved this measure and publicly notified the minimum hourly wage of 8,350 won that applies to all industries in 2019 on August 3, 2018 [For 40-hour work per week, monthly amount of 1,745,150 won based on 209 hours per month (which includes 8-hour paid leave per week)] (1. Minimum Wage specified in the Public Notice of Minimum Wage applying in 2019).

Complainants filed a constitutional complaint over the public notice of the minimum wage that was scheduled to apply in 2018 on December 22, 2017 (2017Hun-Ma1366) and another constitutional complaint over the public notice of the minimum wage that was scheduled to be

effective as of 2019 on November 1, 2018 (2018Hun-Ma1072), arguing that both notices infringe upon their property rights and also violate Article 119 Section 1 (Basics of Economic Order), Article 123 Section 3 (Protecting Small and Medium Enterprises), and Article 126 (Ban on Controlling or Administering Private Enterprises) of the Constitution.

Subject Matter of Review

The subject matter of review in this case is whether 1) 1. Minimum Wage specified in the 'Public Notice of Minimum Wage Applying in 2018' (Public Notice No. 2017-42 of the Ministry of Employment and Labor, August 4, 2017), and 2) 1. Minimum Wage specified in the 'Public Notice of Minimum Wage Applying in 2019' (Public Notice No. 2018-63 of the Ministry of Employment and Labor, August 9, 2018) (hereinafter collectively referred to as the "Public Notices") infringe upon Complainants' fundamental rights.

Provision at Issue

Public Notice of Minimum Wage Applying in 2018 (Public Notice No. 2017-42 of the Ministry of Employment and Labor, August 4, 2017)

1. Minimum Wage

Calculation / Unit / Type of Business	Hourly Wage
All Industries	7,530 won

◈ Calculated monthly wage of 1,573,770 won: for 40-hour work per week, 209 hours per month (which includes 8-hour paid leave per week)

Public Notice of Minimum Wage Applying in 2019 (Public Notice No. 2018-63 of the Ministry of Employment and Labor, August 9, 2018)

1. Minimum Wage

Unit / Calculation / Type of Business	Hourly Wage
All Industries	8,350 won

◈ Calculated monthly wage of 1,745,150 won: for 40-hour work per week, 209 hours per month (which includes 8-hour paid leave per week)

Summary of the Decision

1. Whether Governmental Authority Is Exercised over the Part Regarding Calculated Monthly Wage

The calculated monthly wage is the amount obtained by multiplying the minimum hourly wage of each year by the working hours that include the legal working hours and paid weekly leave, suggesting that such wage is merely an administrative interpretation or administrative guideline of the Minimum Wage Commission and Respondent without any legal effect that binds the people or the courts. Therefore, the calculated monthly wages of the Public Notices are not an 'exercise of governmental authority' that can be subject to the constitutional complaint as they do not have a direct impact on the people's right or duty.

2. Whether Parts excluding Calculated Monthly Wages of Public Notices (hereinafter referred to as the "Public Notices of Minimum Wages") Infringe upon Freedom of Contract or Freedom of Business

The Public Notices of Minimum Wages determined the minimum hourly wage that would apply to all industries in a bid to serve the legislative purpose of the minimum wage system and, therefore, is a valid and appropriate means to ensure the lowest wage level.

The Minimum Wage Commission's processes of reviewing and determining the minimum wage for each year showed that they reflected the voices of both employers and employees during the comprehensive discussions before deciding the minimum wage.

In addition, investigation and examination were carried out over the key labor and economic indices referred to by the Minimum Wage Commission for deliberation on the minimum wages for 2018 and 2019. Even when the trend of the key labor and economic indices such as the actual living cost of all unmarried single workers on monthly average, hourly labor productivity, economic growth rate as well as the relative minimum hourly wage level compared with the average of the ordinary wage is taken into account, it is hard to say that the minimum wages for 2018 and 2019 provided in the Public Notices of Minimum Wages remarkably lack reasonableness or deviate from the freedom of legislative discretion.

Meanwhile, the Minimum Wage Commission discussed the option that applies different minimum wages by type of business and by region when reviewing the minimum wage for 2018 and vetoed that option. It also discussed the possibility of applying different minimum wages by business when reviewing the minimum wage for 2019 and rejected the option. The above decisions should be respected comprehensively considering the Commission's discussion process, the grounds for its policy-making and other factors. Even if the Public Notices of Minimum Wages allowed the minimum wages for 2018 and 2019 to be applied to all places of business across the nation regardless of business type and region, this measure cannot be deemed utterly unreasonable.

The public interest that the Public Notices of Minimum Wages intend to serve is providing a certain level of stability for the wage of low-income workers under poor working conditions, helping them have a better life and eventually improving the labor quality. Therefore, the public interest is not less serious than restricted private interest.

Accordingly, the Public Notices of Minimum Wages do not violate the principle against excessive restriction or infringe upon Complainants'

freedom of contract and freedom of business.

3. Whether Public Notices of Minimum Wages Infringe upon Property Right

The property right protected by the Constitution is a specific right with economic value that involves private usefulness and the right to dispose of property in principle. Therefore, simple opportunities to gain profits or factual/legal conditions for business activities, not a specific right, are not subject to property right protection though they may be significant to businesses. The Public Notices of Minimum Wages establish the lowest wage rate that the employers have to pay to the employees eligible for the minimum wage. Even if such Notices limit Complainants' freedom of contract or freedom of business, raise the wage for the employees, bring about disadvantages such as declining productivity or profit, or cause other trouble to the businesses, they have to do with the factual/legal conditions for the business activities and thus do not infringe upon the property right.

Summary of Concurring Opinion of Three Justices to the Court Opinion

Determining the minimum wage requires transparent and open procedural discussions based on objective analysis of the key economic indices and the realities. In this process, companies should be assured of predictability and conflicting interests of both the employers and employees need to be fine-tuned.

Small business owners and self-employed people need to be taken into account in organizing the Minimum Wage Commission as they may be isolated from meaningful engagement or underrepresented in light of their proportion within the current employment structure. In addition, experts who have expertise in analyzing the economy and long-term market prospects and who are able to make decisions consistent with the purpose and point of the minimum wage system should be appointed as neutral

public interest members of the Minimum Wage Commission.

Related systems should also be improved to clearly disclose and present the process of determining the minimum wage and the grounds and reasons for such determination.

The Commission has other options of setting the minimum wage based on objective economic indices, such as the case of France which reflects increase in the purchasing power of its workers or Canada which links the minimum wage rate to the commodity price increase that is measured with the consumer price index.

It is not enough to expressively place various economic indices in the deliberation process of determining the minimum wage. Specific grounds and reasons for such determination should be rationally verified such as which economic indices and how many of them were reflected and if reliable statistics were made, submitted, analyzed, and used.

Determining the minimum wage uniformly without considering business type, region or workers' skill at all may not be the most appropriate option available though it may not be utterly unreasonable. For instance, the minimum wage is determined by age in the UK, by region and industry in Japan, and by age, industry, and skill in Australia. Korea also needs to think about other ways to coordinate interests.

Positive and negative impacts of soaring minimum wage on employment and economy should be assessed with care and balance. How much we can serve the purpose of the minimum wage system depends on how rationally the minimum wage is determined. Further, the minimum wage system should be implemented wisely to harmoniously coordinate the conflicting interests of the employers and employees in line with the economic conditions.

Summary of Dissenting Opinion of Three Justices

The legal nature of a public notice is not to be a subject of a uniform judgment, but rather, its judgment varies by specific cases that each public notice states. When a public notice is general or abstract in nature,

it corresponds to a legal order or administrative rule, but when it is closer to a specific rule, it corresponds to an administrative disposition.

It is hard to find from related provisions including the Minimum Wage Act any act of enforcement which is expected to be served as an instrument to individually and specifically regulate the employers who hired the employees pursuant to the Public Notices of Minimum Wages. Meanwhile, Article 6 Section 1 of the Minimum Wage Act states that each employer shall pay employees covered by the minimum wage at least the minimum wage amount or more, and Section 3 states that where a labor contract between an employer and an employee covered by the minimum wage provides for a wage below the minimum wage amount, the relevant stipulation concerning the wage shall be null and void and the invalidated part shall be considered to stipulate that the same wage as the minimum wage amount determined under this Act shall be paid. Article 28 Section 1 specifies that a person who has paid to one's employee a wage below the minimum wage amount or who has reduced previously-paid wages because of the minimum wage rates, in violation of Article 6 Section 1 or 2, shall be punished by imprisonment with labor for not more than three years, or by a fine not exceeding 20 million won. Given the effect of the Public Notices of Minimum Wages and the Minimum Wage Act, as well as possible criminal punishment coming after the violation, it is reasonable to believe that the Public Notices of Minimum Wages itself directly and specifically regulate rights, obligations, and legal relations with regard to the wage to be paid to the employees by the employers without an instrument of any act of enforcement.

Complainants could have filed a lawsuit challenging the Public Notices of Minimum Wages before an ordinary court as a legal remedy, but they failed to do so. Consequently, the complaint over the Public Notices of Minimum Wages is inadmissible as it failed to have exhausted prior remedies.

27. Case on Designation Authority of Supporters' Association under the Political Funds Act

[2018Hun-Ma301 · 430 (consolidated), December 27, 2019]

In this constitutional complaint over a provision under the Political Funds Act that excludes preliminary candidates of the election for Special Metropolitan City Mayor, Metropolitan City Mayor, Special Self-Governing City Mayor, head of Do and Special Self-Governing Province Governor (hereinafter referred to as the "head of a metropolitan local government") from the designation authority of a supporters' association (hereinafter referred to as the "part concerning the preliminary candidates of the election for the head of a metropolitan local government") and also excludes preliminary candidates of the election for the local council members of an autonomous gu (hereinafter referred to as the "autonomous local council members") from the designation authority of a supporters' association (hereinafter referred to as the "part concerning the preliminary candidates of the election for the autonomous local council members"), the Court ruled that:

1. although the part concerning the preliminary candidates of the election for the head of a metropolitan local government violates the Constitution as it infringes upon Complainants' right to equality, it shall apply until a legislative amendment is made by December 31, 2021 (nonconforming to the Constitution); and,

2. the complaint over the part concerning the preliminary candidates of the election for the autonomous local council members shall be rejected as the Justices could not reach the quorum of six required for an upholding constitutional complaint decision as stipulated in the Constitution and Constitutional Court Act, with five opinions upholding and four rejecting the decision.

Background of the Case

Complainant *A* was a preliminary candidate registered to be nominated

as a candidate for Gyeonggi Province Governor in the 7th National Local Election that took place on June 13, 2018, and Complainant *B* was a would-be supporter in case the supporters' association for Complainant *A* is composed. However, the supporters' association for Complainant *A* was not able to be formed, since Article 6 of the Political Funds Act did not include preliminary candidates of the election for the head of a metropolitan local government election as the designation authority of a supporters' association. Accordingly, Complainants *A* and *B* filed this complaint on March 22, 2018, contending that the provision above infringes upon their fundamental right.

For the 7th National Local Election that took place on June 13, 2018, Complainant *C* was a preliminary candidate registered to be nominated as a candidate for Gwangju Metropolitan City Mayor while Complainants *D, E, F*, and *G* were candidates registered for Gwangsan-gu local council members of Gwangju. Meanwhile Complainant *H* was a candidate registered for Buk-gu local council members of Gwangju and Complainants *I* and *J* were candidates for Seo-gu local council members of Gwangju. Complainant K, a resident in Dong-gu of Gwangju, was a would-be supporter of the above preliminary candidates in case supporters' associations are built for them. However, Article 6 of the Political Funds Act did not include preliminary candidates of the election for the head of a metropolitan local government and preliminary candidates of the election for the autonomous local council members as the designation authority of a supporters' association, making it impossible for supporters' associations for the above preliminary candidates to be formed. Accordingly, they filed the complaint on April 24, 2018, contending that the provision above infringes upon their fundamental right.

Subject Matter of Review

The subject matter of review in this case is whether Article 6 Item 6 of the Political Funds Act (amended by Act No. 9975, January 25, 2010), which excludes the preliminary candidates of the election for the head of

a metropolitan local government and the preliminary candidates of the election for the autonomous local council members from the designation authority of a supporters' association, infringes upon Complainants' fundamental right.

Provision at Issue

Political Funds Act (amended by Act No. 9975, January 25, 2010)

Article 6 (Designation Authority of Supporters' Association)

Any of the following persons (hereinafter referred to as "designation authority of supporters' association") may designate each one supporters' association:

6. Any candidate to run in an election for the head of each local government (hereinafter referred to as "candidate to run in an election for each local government").

Summary of the Decision

1. Whether the Part concerning the Preliminary Candidates of the Election for the Head of a Metropolitan Local Government Infringes Upon Equality Right

Given the limited amount of election expenses, actual expenditures, and limited amount of contributions collected by a supporters' association, the election for the head of a metropolitan local government requires a greater amount of election expenses than the general election and, therefore, there is a greater need to raise election money through a supporters' association. Nevertheless, the period during which a candidate for such election is allowed to collect contributions is limited to less than 20 days. In addition, preliminary candidates of minor or new political parties and independent ones desperately need to raise election funds through supporters' associations as they may find it difficult to have election expenses compensated. Restriction on using the supporters'

association system can not only discourage various new political groups from emerging but also obstruct political development through free competition.

The supporters' association system itself cannot be deemed to undermine the integrity of the work performance of the head of a metropolitan local government, and such integrity can be ensured through the transparent operation of the supporters' association system in accordance with relevant provisions of the Political Funds Act to prevent it from being abused as a means of exercising illegitimate political influences, such as provisions regarding setting the limit on contributions made by supporters to a supporters' association as provided in Article 11 and specific methods of collecting campaign contributions as specified in Articles 14 through 18, and penalty provisions for violation of provisions related to supporters' associations as stipulated in Sections 1 and 2 of Article 45, Article 46, and Article 51.

Though multiple amendments of the Political Funds Act have continued to widen the scope of the designation authority of a supporters' association, the Act differentiates preliminary candidates for the general election and their potential contributors from those of the election for the head of a metropolitan local government and their potential contributors. Such differentiation amounts to unreasonable discrimination and obvious abuse of legislative discretion or deviation from its limit.

Thus, the part concerning the preliminary candidates of the election for the head of a metropolitan local government infringes upon the equality right of the preliminary candidates of the election for the head of a metropolitan local government and their potential contributors.

2. Declaring Decision of Nonconformity to the Constitution

However, immediately invalidating the effect of the above provision by declaring it simply unconstitutional would also eliminate the legal ground for election candidates for the positions of the head of each local government to designate their supporters' association, creating a legal

vacuum. Such invalidation results in a same situation as a decision that declares the system itself unconstitutional, though it is not exactly the case. For this reason, the part concerning the preliminary candidates of the election for the head of a metropolitan local government of the Provision at Issue is ruled nonconforming to the Constitution in lieu of simply unconstitutional and shall continue to apply until the legislature removes the above unconstitutional factor and makes a reasonable amendment by December 31, 2021.

3. Whether the Part concerning the Preliminary Candidates of the Election for the Autonomous Local Council Members Infringes Upon Equality Right

Autonomous local council members are essentially different from the President or members of the National Assembly in the aspects of the status, character, function, scope of activities and political role. As the scope of activities of autonomous local council members is confined to the local affairs of the relevant autonomous gu, the need for or the amount of political funds is remarkably different. Furthermore, how much of the difference we should reflect in legislation regarding the scope of those who are qualified to have a supporters' association is a matter of national legislative policy that has to be decided by the legislature and, therefore, is in the realm of legislative discretion or the freedom of discretion of the legislature.

The autonomous local council members do not need an excessive amount of political funds except for election expenses. In addition, in light of the fact that they spend less funds than candidates for a presidential election or general election with the relatively shorter campaign period, it is reasonable not to allow the preliminary candidates of the election for the autonomous local council members to finance political funding through supporters' associations, in contrast to those of the general election.

Thus, the part concerning the preliminary candidates of the election for the autonomous local council members of the Provision at Issue does not

infringe upon the equality right of the preliminary candidates of the election for the autonomous local council members and their potential contributors.

Summary of Upholding Opinion of Five Justices on the Part concerning the Preliminary Candidates of the Election for the Autonomous Local Council Members of Provision at Issue

Elections for autonomous local council members also require political funds to open an election campaign office and to pay election deposits and potential expenses for election campaign. Hence, it is extremely harsh to deprive election candidates for autonomous local council members of chances to receive contributions in the first place.

Preliminary candidates of minor or new political parties and independent ones running for an election for autonomous local council members are also in desperate need of financing their election campaign by using the supporters' association system.

Autonomous local council members are to integrate separate, individual, and various opinions and interests of local citizens as well as to formulate opinions for the community. Therefore, giving the designation authority of a supporters' association to the candidates would rather serve the legislative purpose and philosophical foundation of the supporters' association system. In addition, the integrity of the work performance of autonomous local council members can be ensured by relevant provisions of the Political Funds Act.

This suggests that treating preliminary candidates for the general election differently from those of the election for the autonomous local council members amounts to not only unreasonable discrimination but obvious abuse of legislative discretion or deviation from its limit.

Therefore, the part concerning the preliminary candidates of the election for the autonomous local council members of the Provision at Issue infringes upon the equality right of the preliminary candidates of the election for the autonomous local council members and their potential

contributors.

Summary of Dissenting Opinion of One Justice on the Part concerning the Preliminary Candidates of the Election for the Head of Metropolitan Local Government of Provision at Issue

The head of a metropolitan local government is an executive office that performs local affairs regarding the people's welfare and, accordingly, is essentially different from the President or members of the National Assembly in the status, character, and function. In addition, individual preliminary candidates may have varying needs to finance political funds through supporters' associations.

Considering that the heads of metropolitan local governments have to carry out their work in frequent contacts with local residents, it can also be expected that people may approach preliminary candidates from the early onset of the campaign to be able to have political influences when they are elected by offering contributions in return for something. Therefore, political fund raising through supporters' associations needs to be restricted to a certain degree.

Since the preliminary candidates of the election for the head of a metropolitan local government are able to form their own supporters' association after registering as a candidate of the election, they are not completely banned from receiving contributions or political donations, but only the timeline of the contributions may be different.

Consequently, there is a reasonable ground to prohibit the preliminary candidates of the election for the head of a metropolitan local government from raising political funds through supporters' associations unlike the preliminary candidates of the general election, and it is hard to find this prohibition obvious abuse of legislative discretion or deviation of its limit.

28. Case on Absence of Regulatory Standards for Noise Caused by Loudspeaker Use during Public Official Election Campaign

[2018Hun-Ma730, December 27, 2019]

In this case, the Court ruled that the part concerning "the election of the Mayor/Do Governor" in Article 79 Section 3 Item 2, Item 3 of the same Section, and Article 216 Section 1 of the Public Official Election Act, which allow candidates to use loudspeakers during nationwide simultaneous local election campaigns without providing regulatory standards for noise, do not conform to the Constitution.

Background of the Case

Complainant filed this constitutional complaint on July 16, 2018, contending that he or she suffered physical and psychological pain due to the noise caused by candidates who used loudspeaker or the like near Complainant's residential area during the 7th National Local Election, on the grounds that Article 79 Section 3, Article 102 Section 1 and Article 216 Section 1 of the Public Official Election Act are insufficient, among other things, in its substance and scope by failing to provide regulatory standards for noise such as maximum output and hours of use for the local election campaign and thus infringe upon Complainant's environmental rights, rights to health, rights not to suffer bodily harm, and so forth.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning "the election of the Mayor/Do Governor" in Article 79 Section 3 Item 2 and Item 3 of the same Section of the Public Official Election Act (amended by Act No. 9974, January 25, 2010) and Article 216 Section 1 of the Public Official Election Act (amended by Act No. 7681, August 4, 2005) are unconstitutional as they infringe upon Complainant's fundamental rights.

28. Case on Absence of Regulatory Standards for Noise Caused by Loudspeaker Use during Public Official Election Campaign

Provision at Issue

Public Official Election Act (amended by Act No. 9974, January 25, 2010)

Article 79 (Campaign Speeches or Interviews at Open Places)

(3) A motor vehicle, loudspeaker system attached thereto, or portable loudspeaker for a campaign speech or interview may be used at an open place according to the classification of the following subparagraphs:

1. In the presidential election: one unit and one set per each candidate and each City/Do and Gu/Si/Gun election campaign liaison office;
2. In the election of the National Assembly member of local constituency and the Mayor/Do Governor: one unit and one set per each candidate and each Gu/Si/Gun election campaign liaison office; and,
3. In the elections of the local council member of local constituency and the head of autonomous Gu/Si/Gun: one unit and one set per each candidate.

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

Article 216 (Special Cases on Holding Four or More Elections Simultaneously)

(1) In four or more simultaneous elections, the candidate for the election of the autonomous Gu/Si/Gun council members of local constituency may use one motor vehicle and one set of portable loudspeakers for an election campaign speech or interview as provided in Article 79.

Summary of the Decision

When this Court examines whether the State fulfilled its duty to protect the people's right to enjoy life in a healthy and pleasant environment, the criterion for judgment shall be whether the State, at least, took the minimum protective measures in an adequate and efficient manner, meaning

whether the principle against excessive non-protection was violated.

The Public Official Election Act stipulates that candidates in the election of the Mayor/Do Governor and their Gu/Si/Gun election campaign liaison offices may use only one loudspeaker attached to a motor vehicle and one portable loudspeaker and, each candidate in the election of the local council member of local constituency and the head of autonomous Gu/Si/Gun may use only one loudspeaker attached to a motor vehicle and one portable loudspeaker, but the Act does not provide regulatory standards for their maximum output or noise level. Reasonable regulatory standards for the maximum output or noise level that is necessary to conduct the election campaign and that conforms to the principle against excessive non-protection of fundamental rights should be introduced. Having a specific and realistic clause in the Provision at Issue that regulates the maximum noise level of a loudspeaker and still allows its use would certainly assure the freedom to conduct the election campaign.

The Public Official Election Act restricts speeches and interviews during nighttime only. As most workplaces and schools run from 9 a.m. to 6 p.m., however, quiet and peaceful living conditions are all the more required in a residential area before and after these hours. Considering that the use of loudspeakers also needs to be restricted from 6 a.m. to 7 a.m. before people go to work or school and from 7 p.m. and 11 p.m. after people leave the work or school, it is doubtful whether the legislation is sufficient in its substance.

The Public Official Election Act does not have regulatory standards for areas highly in need of quiet and peaceful living conditions, such as residential areas. However, as the Noise and Vibration Control Act, the Assembly and Demonstration Act, and other statutes provide specific standards for noise restriction by area and by time of day, it is possible to have an equivalent regulation in the Public Official Election Act. Considering the freedom of election campaign, public interest in allowing the use of loudspeakers in the election campaign is acknowledged. Nevertheless, the Provision at Issue failed to establish regulatory standards for the maximum output or noise level of the loudspeakers by

time of day and by area within endurance limit, in such ways as restricting their maximum output or noise level before or after office hours or school hours in the residential areas that should be assured of quiet and peaceful living conditions, and this suggests that the State has underperformed in its duty to protect fundamental rights as it did not take the minimum protective measures in an adequate and efficient manner in light of Article 35 Section 3 of the Constitution which specifies the State's duty to make efforts to provide favorable residential environment where its people can enjoy healthy and pleasant life.

Accordingly, the Provision at Issue underperformed the State's duty to protect the fundamental rights of the people and thus infringes upon Complainant's right to enjoy life in a healthy and pleasant environment.

However, declaring the Provision at Issue unconstitutional and immediately invalidating its effect would eliminate the legal basis for the election campaign to use the loudspeakers and result in a legal vacuum where the candidates cannot use the loudspeakers for their campaign. Its unconstitutionality does not lie in the use of the loudspeakers for the public official election campaign but in the absence of the regulatory standards for noise level emitted therefrom. In addition, the substance and scope of legislation shall be subject to the decisions of legislators. Thus, the Provision at Issue is ruled nonconforming to the Constitution and shall apply temporarily until legislative amendment.

Dissenting Opinion of Two Justices

The Public Official Election Act strictly restricts the time period, areas, time of day, and purpose of the use of the loudspeakers, and also the number of loudspeakers to one attachable to a motor vehicle and one portable. With these measures, the noise level coming from the loudspeakers can be regulated.

Furthermore, an excessive regulation on the election campaign could become an obstacle to efficient delivery of information about the candidates to the voters in the public official election that realizes the principle of

popular sovereignty. In this regard, it is hard to conclude that the State has underperformed in its duty to protect the people's fundamental rights simply because the Provision at Issue does not have specific regulatory standards for the maximum output or noise level of the loudspeakers by time of day and by place of use.

It is also difficult to believe that there have been significant changes in constitutional reality sufficient to justify more strict examination on the constitutionality of the Provision at Issue since the Court decided that it does not violate the Constitution in 2006Hun-Ma711 on July 31, 2008, nor is there a necessity for a new interpretation.

Hence, the absence of the regulatory standards for noise level generated by the use of loudspeakers does not suggest that the legislators have underperformed in their duty to protect Complainant's right to enjoy life in a healthy and pleasant environment.

29. Case on Provisions Concerning Adjudication on Commencement of Adult Guardianship

[2018Hun-Ba130, December 27, 2019]

In this case, the Court held that (1) Article 9 Section 1 of the Civil Act setting forth the requirements for adjudication on the commencement of adult guardianship and enumerating persons entitled to file an application for said adjudication and (2) the parts concerning "an incompetent to be placed under adult guardianship" in the main text of Article 45-2 Section 1, the proviso of Article 45-3 Section 1, and the proviso of Article 45-3 Section 2 of the Family Litigation Act—the parts providing appraisal and hearing procedures for adjudication on the commencement of adult guardianship—do not infringe upon the right to self-determination and the general freedom of action of an incompetent to be placed under adult guardianship, and thus do not violate the Constitution.

Background of the Case

The father of Petitioner Park C__, Park D__, filed an application for adjudication on the commencement of adult guardianship of his adult son. On May 17, 2016, Daegu Family Court issued a final adjudication allowing the commencement of adult guardianship of Petitioner Park C__ and appointing his parents, Park D__ and Petitioner Noh __, as his legal guardians. In that final adjudication, the court granted both parents the authority to make personal decisions for their son, while awarding only Park D__ the authority to void a legal act performed by his son and to become the legal representative of his son. Petitioner Noh __ subsequently filed an immediate appeal (Daegu Family Court 2016Beu1021) against that final adjudication. While the appeal was pending, Petitioners filed a motion to request a constitutional review of Article 9 Section 1 and Article 12 Section 1 of the Civil Act and the main text of Article 45-2 Section 1, proviso of Article 45-3 Section 1, and proviso of Article 45-3

Section 2 of the Family Litigation Act (Daegu Family Court 2017 JeuGi405).

On January 19, 2018, Daegu Family Court rejected the motion, while modifying part of the final adjudication on adult guardianship so as to grant both parents the authority to void a legal act performed by Petitioner Park C__, to become legal representatives of him, and to make his personal decisions on his behalf.

On January 25, 2018, Petitioners were served with the decision rejecting the motion. On February, 23, 2018, they filed a constitutional complaint seeking review of the constitutionality of the above provisions.

Subject Matter of Review

The subject matter of review in this case is whether (1) Article 9 Section 1 of the Civil Act (amended by Act No. 10429 on March 7, 2011) (the "Adult Guardianship Adjudication Provision"); (2) the part concerning "an incompetent to be placed under adult guardianship" in the main text of Article 45-2 Section 1 of the Family Litigation Act (amended by Act No. 11725 on April 5, 2013) (the "Appraisal Provision"); and (3) the parts concerning "an incompetent to be placed under adult guardianship" in the proviso of Article 45-3 Section 1 and the proviso of Article 45-3 Section 2 of the above Family Litigation Act (collectively, the "Statement Hearing Exception Provisions," and collectively with all the above provisions, the "Provisions at Issue") violate the Constitution. The Provisions at Issue read as follows:

Provisions at Issue

Civil Act (amended by Act No. 10429 on March 7, 2011)

Article 9 (Adjudication on Commencement of Adult Guardianship)

(1) The Family Court shall adjudicate on the commencement of adult guardianship for a person who continuously lacks the capacity to manage his or her affairs because of mental impairment due to

disease, disability, old age, or any other cause upon the application of the person himself or herself, his or her spouse, his or her first cousin or closer relative, a guardian of a minor, a supervisor of guardianship for a minor, a limited guardian, a supervisor of limited guardianship, a specific guardian, a supervisor of specific guardianship, the head of a local government, or a public prosecutor.

Family Litigation Act (amended by Act No. 11725 on April 5, 2013)
Article 45-2 (Appraisal of Mental State)

(1) For adjudication to commence adult guardianship or limited guardianship, the family court shall have a doctor to appraise the mental state of an incompetent to be placed under adult guardianship or quasi-incompetent to be placed under limited guardianship: Provided, That the same shall not apply where sufficient data exists to judge the mental state of an incompetent to be placed under adult guardianship or limited guardianship.

Article 45-3 (Hearing Statement in Adjudications Concerning Adult Guardianship, Limited Guardianship or Specific Guardianship)

(1) For any of the following adjudications, the family court shall hear the statement of a person stipulated by relevant provision: Provided, That the same shall not apply where an incompetent under adult guardianship (including an incompetent to be placed under adult guardianship) or guardianship at will (including a person to be placed under guardianship at will) is unconscious or cannot express his or her own opinion for other reasons. (The subparagraphs left out.)

(2) When the family court listens to a statement pursuant to Section 1 Item 1 or 2, it shall examine an incompetent under adult guardianship (including a person to be placed under adult guardianship), a quasi-incompetent under limited guardianship (including a quasi-incompetent person to be placed under limited guardianship) or a person under specific guardianship (including a person to be placed under specific guardianship): Provided, That the same shall apply in any special circumstance preventing the examination,

including where the relevant person cannot express his or her own opinion or refuses to appear.

Summary of the Decision

1. Whether the Adult Guardianship Adjudication Provision infringes upon the right to self-determination and the general freedom of action

In addition to an incompetent to be placed under adult guardianship (the "prospective ward"), the Adult Guardianship Adjudication Provision grants persons such as the incompetent person's spouse the right to file an application for adjudication on the commencement of adult guardianship (the "right of application"). If the right of application is accorded only to the prospective ward, the prospective ward may suffer interference with the practical protection of his or her rights and interests because of limitations in decision-making capacity or because of any undue influence upon him or her. By bestowing the right of application upon the prospective ward's spouse, his or her first cousin or closer relative, a guardian, a supervisor of guardianship, the head of a local government, and a public prosecutor, as well as the prospective ward himself or herself, the Adult Guardianship Adjudication Provision serves the legislative purpose of the adult guardianship system, which seeks to provide practical protection to a person who lacks the capacity to manage his or her affairs because of mental impairment due to old age, disability, or any other cause. Further, the Civil Act and the Family Litigation Act have procedures in place to prevent adult guardianship from being established contrary to the true intents and interests of the prospective ward.

Additionally, the Adult Guardianship Adjudication Provision requires a ward to continuously lack the capacity to manage his or her affairs because of mental impairment—a fact demonstrating his or her necessity of adult guardianship to manage his or her affairs.

Therefore, given the necessity to bestow the right of application upon a prospective ward, his or her spouse, his or her first cousin or closer relative, a guardian, a supervisor of guardianship, the head of a local government, and a public prosecutor, and given the existence of statutory safeguards against undue restrictions on the prospective ward's right to self-determination, the Court does not find that the Adult Guardianship Adjudication Provision fails the least restrictive means test.

Moreover, the Adult Guardianship Adjudication Provision satisfies the balance of interests test, because its restriction on the fundamental rights of a ward is no more significant than the interests it serves in safeguarding the ward's personal well-being and property, optimizing social costs associated with protecting the ward, and enhancing the security of transactions.

For all the foregoing reasons, the Court does not see that the Adult Guardianship Adjudication Provision infringes upon a prospective ward's right to self-determination and general freedom of action by violating the rule against excessive restriction.

2. Whether the Appraisal Provision infringes upon the right to self-determination and the general freedom of action

Since causes of mental impairment vary and appraisal of the mental state of a prospective ward may require the appraiser to consider factors such as the prospective ward's stage of treatment and illness and its symptoms related to the cause of mental impairment, a psychiatrist may not always be the appropriate person to perform the appraisal of the prospective ward's mental state. Further, the methods and procedures for conducting a mental state appraisal cannot be specified by statutes because professional expertise is required in determining which methods and procedures should be used in each mental state appraisal concerning a different type of mental impairment. In order for a court to adjudicate an adult guardianship case based on accurate medical judgment and information regarding a prospective ward, the methods and procedures for

conducting a mental state appraisal should be determined individually for each type of mental impairment, by a doctor with relevant expertise.

For these reasons, the Court does not find that the Appraisal Provision, which provides for a mental state appraisal by a doctor, fails the least restrictive means test.

Moreover, by allowing a judge to appoint in each case an appropriate doctor to conduct a mental state appraisal, the Appraisal Provision helps the judge to scrupulously examine the necessity of guardianship and helps the prospective ward to gain increased access to guardianship services. As a result, the Appraisal Provision serves the interest of protecting a prospective ward, and the Court finds that this interest outweighs his or her fundamental rights restricted by the Appraisal Provision. Therefore, this provision satisfies the balance of interests test as well.

Accordingly, the Court does not see that this provision infringes upon a prospective ward's right to self-determination and general freedom of action by violating the rule against excessive restriction.

3. Whether the Statement Hearing Exception Provisions infringe upon the right to self-determination and the general freedom of action

To afford practical protection to wards, it is necessary to recognize exceptions such as those to hearing a prospective ward's statement where he or she is unconscious or cannot express his or her own opinion for other reasons, and to allow omitting examination proceedings where he or she cannot express his or her own opinion or refuses to appear. In addition, because a court factors in a prospective ward's inferred intent based on an investigation into his or her domestic relations, his or her right to self-determination and general freedom of action are protected from undue restrictions by the Statement Hearing Exception Provisions. For these reasons, these provisions do not fail the least restrictive means test.

Moreover, by recognizing exceptions to hearing a prospective ward's statement and examining him or her where he or she cannot make a statement and take part in an examination, the Statement Hearing Exception

Provisions guarantee those who cannot express their opinions and are in need of guardianship services access to those services and thus serve the significant interest of protecting wards while causing little harm to them. Therefore, these provisions satisfy the balance of interests test.

Accordingly, the Court does not see that these provisions infringe upon a prospective ward's right to self-determination and general freedom of action by violating the rule against excessive restriction.

Summary of Concurring Opinion of Two Justices as to Provisions at Issue Excluding Part of Article 9 Section 1 of Civil Act Concerning Persons Entitled to Right of Application

The right to self-determination is a means of realizing human dignity and is the right of humans to freely make fundamental decisions regarding their own mode of life. We believe that a self-made decision should be respected as much as possible even if that decision is made by a person who has moderate difficulty in making or executing decisions.

We recognize that the adult guardianship system serves the legitimate purpose of protecting the human rights, welfare, and interests of a ward. However, given the significant burden placed on the ward's right to self-determination, we also note that the requirements and procedures concerning the commencement of adult guardianship should be interpreted and applied in a strict manner.

Disease, old age, and disability *per se* are not signs demonstrating the necessity of adult guardianship; rather, a person is subject to adult guardianship only if he or she continuously lacks the capacity to manage the ordinary affairs of his or her life for a considerable period of time because of such causes of mental impairment. We further opine that in determining the need of adult guardianship of an individual, a court should proceed with the appraisal process by a doctor; such process should not be simplified or bypassed on the grounds that there is no dispute as to it between the parties or because of the burden of cost. We also opine that the court needs to conduct a domestic relations investigation to gather

sufficient information about the prospective ward and other relevant persons in a guardianship case. Moreover, the court should respect the prospective ward's intent as much as possible; unless it is manifestly impossible for the court to examine him or her, the court should conduct an examination on him or her to ascertain his or her intent and consider them in making the decisions regarding the type of guardianship, scope of guardianship authority, and the like. To avoid unnecessary adult guardianship, the court should interpret and apply the statutory requirements and procedures concerning the commencement of adult guardianship in a strict manner.

Summary of Dissenting Opinion of One Justice as to Part of Article 9 Section 1 of Civil Act Concerning Persons Entitled to Right of Application

I view that it is possible to have provisions allowing persons other than prospective wards to file an application for commencement of adult guardianship in order to protect the prospective wards; however, given the practical burdens faced by a prospective ward in a guardianship proceeding, I believe there is a need for safeguards against the excessive filing of guardianship applications.

Yet, Article 9 Section 1 of the Civil Act grants the right of application to a prospective ward's distant relatives such as his or her first cousins, to providers and supervisors of guardianship services, and to the authorities. In view of the facts that the legislative purpose of Article 9 Section 1 of the Civil Act can be achieved either by a subsidiarity approach, which extends the right of application to the above persons only when the prospective ward cannot file an application for adult guardianship; or by an approach allowing only public agencies to file, *sua sponte*, an application for adult guardianship upon the request of a prospective ward's relatives and other persons; and that the interest in speedy proceedings does not outweigh the harm to prospective wards, I conclude that the part of Article 9 Section 1 of the Civil Act concerning the

persons entitled to the right of application fails both the least restrictive means test and the balance of interests test and thus infringes upon the right to self-determination. Therefore, this part of Article 9 Section 1 of the Civil Act does not comply with the Constitution.

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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