CONSTITUTIONAL COURT DECISIONS

2021

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Preface

The publication of this volume is aimed at introducing to foreign readers important cases decided from January 1, 2021 to December 31, 2021 by the Constitutional Court of Korea.

This volume contains the full text of the Court's decision in the Case on Crime of Factual Defamation, and the summaries of the Court's decisions in 18 cases, including the *Case on Real-Name Verification on the Internet During Periods of Election Campaigns*. The contents of this volume are also available on the English website of the Court (https://english.ccourt.go.kr).

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 28, 2022

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 Crime of Factual Defamation

[2017Hun-Ma1113, 2018Hun-Ba330 (consolidated)]

Complainants

1. L.G. (2017Hun-Ma1113)
   Represented by State-appointed Attorney Kim Beongchul
2. K.M. (2018Hun-Ba330)
   Represented by Attorney Ahn Hongik

Original Case

Supreme Court 2018Do2371 Defamation (2018Hun-Ba330)

Decided

February 25, 2021

Holding

1. The complaint of Complainant L.G. is rejected.
2. Article 307, Section (1) of the Criminal Act (amended by Act No. 5057 on December 29, 1995) does not violate the Constitution.

Reasoning

Ⅰ. Overview of the Case

A. 2017Hun-Ma1113

On August 27, 2017, Complainant L.G. had his companion dog treated by a veterinarian. Believing that the veterinarian's improper diagnosis and treatment at that time resulted in the dog having an unnecessary

surgery and putting it at a risk of vision loss, Complainant L.G. sought to publish, *inter alia*, the name of the veterinarian and the details of the misdiagnosis and mistreatment through a book, information and communication network, or other means. However, Complainant L.G. believed that if he publicly alleged such facts, he would not be excused from a criminal penalty, since Article 307, Section (1) of the Criminal Act provided for sanctions against a person who defames another by publicly alleging facts. On October 6, 2017, Complainant L.G. filed the constitutional complaint in this case under Article 68, Section (1) of the Constitutional Court Act, asserting that the above provision of the Criminal Act infringes his freedom of expression and other rights.

B. 2018Hun-Ba330

On February 14, 2016, Complainant K.M. was charged with defaming another person, whose name was K.K., by publicly alleging facts. On January 26, 2018, the Busan District Court imposed on Complainant K.M. a fine of 500,000 won (2017No4468). Subsequently, Complainant K.M. appealed to the Supreme Court. While his appeal was pending (2018Do2371), Complainant K.M. petitioned the Supreme Court to request constitutional review of Article 307, Section (1) of the Criminal Act, but the petition was rejected on June 28, 2018 (2018ChoGi240). Thereafter, on July 30, 2018, Complainant K.M. filed the constitutional complaint in this case under Article 68, Section (2) of the Constitutional Court Act, maintaining that the aforesaid provision of the Criminal Act infringes his freedom of expression and is, thus, unconstitutional.

Ⅱ. Subject Matter of Review

The subject matter of review in this case is whether Article 307, Section (1) of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (hereinafter referred to as the “Provision at Issue”) infringes the

fundamental rights of Complainant L.G. and whether the Provision at Issue is in violation of the Constitution. The Provision at Issue and related provisions read as follows:

A. Provision at Issue

Criminal Act (amended by Act No. 5057 on December 29, 1995)
Article 307 (Defamation)
(1) A person who defames another by publicly alleging facts shall be punished by imprisonment, with or without labor, for not more than two years, or by a fine not exceeding five million won.

B. Related Provisions

Criminal Act (enacted by Act No. 293 on September 18, 1953)
Article 310 (Justification)
The act under Article 307(1) shall not be punishable if the facts alleged are true and if solely concerned with the public interest.

Criminal Act (amended by Act No. 5057 on December 29, 1995)
Article 312 (Criminal Complaint and Will of Victim)
(2) The crimes in Articles 307 and 309 may not be prosecuted if there are express objections of the victims to their prosecution.

Ⅲ. Arguments of Complainants

A. 2017Hun-Ma1113

The Constitution exists to guarantee fundamental rights by the assimilatory integration of the State-level society. Stating true facts contributes to this purpose. At the core of freedom of expression is the freedom to speak truth. This is the foundation of a citizen’s right to

know and accords, in principle, with the public interest serving present and future generations of humanity. Thus, speaking truth, per se, should not be a crime in the liberal democratic basic order. However, the Provision at Issue includes, in principle, the act of stating true facts as an element of defamation. As a consequence, this Provision infringes—through a chilling effect associated with the risk of investigation and criminal penalties—the freedom of expression, right to know, freedom of conscience, and bodily freedom, and is therefore unconstitutional.

B. 2018Hun-Ba330

The Provision at Issue stipulates punishment for stating true facts that defame another person. In consequence, the Provision at Issue restricts a citizen's freedom of expression. However, because stating true facts merely damages "standing erroneously acquired through unawareness of facts," or "vain reputation," abridging freedom of expression to protect this reputation cannot be recognized as serving a legitimate purpose. Nor can the least restrictive means and the balance of interests be recognized, because, *inter alia*, the means employed are criminal rather than civil. Therefore, the Provision at Issue violates the Constitution by infringing freedom of expression.

Ⅳ. Assessment

A. Issue of This Case

The first sentence of Article 21, Section (4) of the Constitution provides that "Neither the press nor any publication shall violate the honor or rights of other persons, or public morals or social ethics." This is merely a clause reiterating the responsibilities and duties flowing from the freedoms of the press and of publication while simultaneously

specifying the conditions for restrictions on those freedoms; this clause cannot be understood as delineating the limits of the constitutionally protected sphere of freedom of expression (*see* Constitutional Court 2006Hun-Ba109 etc., May 28, 2009; Constitutional Court 2012Hun-Ba37, June 27, 2013). For this reason, defamatory factual statements are indeed within the protected sphere of freedom of expression (*see* Constitutional Court 2013Hun-Ba105 etc., February 25, 2016). In this context, the issue is whether the Provision at Issue infringes freedom of expression in violation of the rule against excessive restriction, because this Provision abridges the freedom of expression by prescribing punishment for defamation of another person through publication of factual statements. Although Complainant L.G. asserts that the Provision at Issue infringes his right to know, freedom of conscience, and bodily freedom, these rights will not be discussed since freedom of expression is most relevant to the Provision at Issue and is curtailed to a great degree.

B. Whether Freedom of Expression Is Infringed

1. Legitimacy of the Purpose and Appropriateness of the Means

Even if a defamatory statement is recognized as being protected by freedom of expression, if a possibly defamatory fact is alleged publicly, the reputation of the individual defamed, or the social evaluation of the value of him or her, can be injured and his or her right to personality can be violated. Reputation can be understood as a core right safeguarding our existence by ensuring that we are not excluded from forums of social conversation, because the reputation of an individual tends to function, especially in modern society, as a minimum qualification that allows him or her to participate in communication. There is an increased need to impose restrictions on defamatory expression, given that defamatory statements spread rapidly and have a far-reaching effect as the mediums of communication become very diverse nowadays, and given the characteristic nature of reputation to not

be fully and easily restored once harmed. Because the Provision at Issue, by prohibiting factual defamation, serves the goal of protecting the reputation of individuals, i.e. their right to personality, the Court recognizes the legitimacy of this legislative purpose. Additionally, because inflicting criminal sanctions on a person who violates the abovementioned prohibition may have a considerable deterrent effect on defamatory expression, the Court also recognizes the appropriateness of this means.

2. Least Restrictive Means

(a) Since reputation is a basic condition for an individual's development and expression of his or her personality, the protection of reputation contributes not only to the free development of personality and the safeguarding of human dignity but also to the realization of democracy. If reputation is not properly protected, it can be burdensome for individuals to openly voice an opinion different from that of the majority, and freedom of expression is more likely to be stifled. Therefore, the precedence between freedom of expression and the right to personality is not a matter that can be determined easily (*see* Constitutional Court 2009Hun-Ma747, December 26, 2013).

Since the characteristic nature of the reputation of an individual is that it is difficult to be fully restored once harmed, there is a risk that, as long as made publicly, defamatory expression will render an individual's personality devoid of value and unlikely to be restored. Further, in our society, which places importance on reputation and public image, defamatory expression has serious social consequences, such as cases where the defamed makes the extreme choice of suicide. Therefore, while the Court recognizes a need to guarantee freedom of expression, it cannot be disregarded, given the legally protected interest of personal reputation and the unique nature of our society, that there is also the need for the protection of the right to personality by regulating factual

defamation.

To decriminalize factual defamation, each and every individual should be sufficiently cognizant of the weight of freedom of expression, an atmosphere should prevail that one ought to bear responsibility for the consequences of such freedom, and a general climate of opinion should be created in which it is presumed that the value of protection of personal reputation would not be sacrificed even if criminal sanctions were not employed as means. However, currently, where cases of prosecution and punishment for defamation are gradually on the rise and where defamation is causing greater harm as the channels of distribution of defamatory statements become diverse, it is difficult to find among citizens a consensus or climate of opinion that factual defamation should not be criminally punished.

Taking into account the above considerations—namely, the need for protection of the right to personality concerning the reputation of an individual, the characteristic nature of the personal reputation that it is virtually impossible to be fully restored once harmed, the unique nature of our society, which places importance on reputation but suffers increasing harm as a result of defamation, and the lack of consensus among citizens to decriminalize factual defamation—the Court cannot say with certainty that prohibiting factual defamation and prescribing criminal sanctions for this prohibition inevitably amount to excessive restrictions.

(b) Victims of factual defamation may file a civil claim for damages (Article 751, Section (1) of the Civil Act), and the court may, upon motion by the defamed, order measures suitable to restore the reputation of the defamed in lieu of or in addition to damages (Article 764 of the Civil Act). However, under our law—unlike other legal systems that recognize punitive damages, which can replace criminal penalties and achieve through civil damages prevention or deterrence—civil remedies alone cannot provide the same level of prevention or deterrence as criminal sanctions. Further, due to the problems of cost and delay in

civil litigation, it is not easy through civil remedies, even if won, to restore the reputation that has been injured thus far and rectify the harm caused by the injury.

Recently, the channels of distribution of defamatory statements are not only confined to speech, documents, paintings, or publications, but also include information and communications networks. Because the data in these networks are repeated and reproduced immediately and extensively, it is virtually impossible for the defamed to identify and rebut every defamatory statement or to demand removal thereof (*see* Constitutional Court 2013Hun-Ba105 etc., February 25, 2016). For this reason, a preliminary injunction etc. cannot be regarded as an effective remedy for defamation. Moreover, the remedies under Articles 14 through 17-2 of the Act on Press Arbitration, Damage Remedies, Etc., such as the requests for issuance of a correction, publication of a rebuttal, or publication of a subsequent clarification, are not appropriate remedies for defamation made by ordinary individuals, as opposed to the press etc.

In this situation, where there are no effective remedial methods available for defamation, the victim in today's reality has no choice but to rely on an offense of criminal defamation as a means to encourage, *inter alia*, immediate suspension of the defamatory act, voluntary disposal of publications etc., and voluntary deletion of posts in information and communications networks.

In view of these considerations, we do not find that there is a less restrictive alternative that would serve the same legislative purpose as the Provision at Issue, which prohibits factual defamation and prescribes criminal sanctions for this ban.

(c) Article 310 states that the act prohibited by the Provision at Issue shall not be punishable if the facts alleged are true and if solely concerned with the public interest.

As regards this provision, the Court observed that "Firstly, even absent a proof of truth of the defamatory statement, when the charged acted with mistaken but justified belief in its truth, the crime of defamation is not established. Secondly, the requirement of 'if solely concerned with the public interest' should be broadened in its application when viewed from the perspective of guaranteeing freedom of the press. Public value of the facts that objectively need to be known by citizens ought to be recognized with due regard to the citizens' right to know, and the public interest with respect to a private person may be acknowledged by considering the nature of the societal activities this person is involved with and the societal implications of such involvement." (*See* Constitutional Court 97Hun-Ma265, June 24, 1999.) By this language, the Court has declared that chilling freedom of expression should be minimized through a flexible application of Article 310 of the Criminal Act.

Likewise, the Supreme Court observed that "'true facts' in Article 310 of the Criminal Act means facts, considering the purport and intent of their general content, whose major thrust accords with objective facts and whose details can be slightly different from the truth or somewhat exaggerated, and 'if solely concerned with the public interest' in the above provision indicates the facts alleged must be, from an objective standpoint, concerned with the public interest and the defamer must have, from a subjective perspective, alleged the facts for that interest. Here, facts 'concerned with the public interest' include not only those facts concerned with the interests of the State, society, and the majority of members of the general public, but also those facts concerned with the agendas and interests of a particular social group or all members thereof. Article 310 of the Criminal Act may not be excluded from being applied so long as the primary motive or purpose of the defamer is concerned with the public interest, even if his or her ancillary purposes or motives include personal benefit." (Supreme Court 2006Do2074, December 14, 2007.) By this language, the Supreme Court has broadly construed the scope of application of the above Article 310,

thus minimizing restrictions placed by the Provision at Issue on freedom of expression.

Additionally, our Court, concerned about the possibility of the abusive use of criminal punishment for factual defamation as a means to restrict and suppress criticism of public figures or State agencies, has minimized the possibility of such risk by articulating how to construe and apply the Provision at Issue and Article 310 of the Criminal Act. The specific criteria for such construction and application are as described below.

Namely, in construing and applying positive law related to defamation, and in light of the specific content and manner of defamation, the limits to freedom of expression need to be decided by balancing the two conflicting rights on a categorical basis—in consideration of, *inter alia*, whether the defamed person is a public figure or a private individual; whether the statement in question bears on a matter of public concern or is within the purely private sphere; whether the defamed person voluntarily exposed himself or herself to the risk of being defamed; and whether the statement in question objectively has public and social value (the right to know) and contributes to the formation of popular opinion or to public discourse. There should be a difference in standard of review between public and private figures and between issues of public concern and within the private sphere. Restrictions on defamatory statements against a public figure concerning his or her public activities should be more relaxed. Some matters concerning a public official's private personal life, even if they have no direct connections to the public official's public activities, may fall within the scope of public concern in certain cases. Matters relating to a public official’s qualifications, ethics and integrity can offer information necessary for the public to criticize and evaluate social activities of the public official and, depending on the contents, might have relevance to his or her official duties. Therefore, questions and criticisms on such matters should be allowed (*see* Constitutional Court 97Hun-Ma264, June 24, 1999; Constitutional Court 2009Hun-Ma747, December 26, 2013).

Likewise, the Supreme Court observed that “The press report concerning the government or state agency's policy determination or conduct in the course of official duties may negatively affect social evaluation of a public official involved in policy determination or performing his or her official duties. However, unless the contents of a report are evaluated as substantially inadequate as a malicious or extremely careless attack against a public official, the report cannot be deemed as directly constituting defamation against a public official as an individual.” (*See* Supreme Court 2010Do17237, September 2, 2011.) The Supreme Court further observed that “By punishing the offense of defamation, the Criminal Act aims to protect a person’s reputation, i.e., the social evaluation of a person’s value. Therefore, the State or a local government, as public authorities with the responsibility and obligation to either protect or realize the fundamental rights of citizens, is not the subject but merely the addressee of fundamental rights. Furthermore, matters pertaining to the State or a local government’s policy decision-making and performance should constantly come under broad public scrutiny and criticism. Such scrutiny and criticism can be properly carried out if the freedom of expression regarding them is sufficiently guaranteed. Accordingly, in the relationship between the State or a local government and citizens, the former cannot be the bearer of reputation that is protected via means of punishment, and thus, cannot be the victim of defamation.” (Supreme Court 2014Do15290, December 27, 2016.) By this language, the Supreme Court interprets the crime of factual defamation in such a way that it is prevented from being abused as a means to suppress criticism of public figures or State agencies.

(d) If our Court, concerned about a chilling effect on freedom of expression, declares the Provision at Issue wholly unconstitutional, then infringement of personal reputation, or social evaluation of a person’s value, will be overlooked. In fact, such a declaration would involve a serious risk that publicly alleging facts, even if true, will constitute a grave violation of secrecy and freedom of private life if they amount to

information an individual would wish to keep confidential, such as his or her medical history, sexual orientation, or family matters.

Some may argue that, to guard against this danger, the Court can render a decision of partial unconstitutionality; that the word “facts” in the Provision at Issue violates the Constitution to the extent that it includes “facts that do not amount to secrecy of private life,” and can thereby harmonize the protection of secrecy of private life and the guarantee of freedom of expression. This view suggests that issuing such decision would guarantee secrecy and freedom of private life by leaving intact an element in the Provision at Issue which is the alleging of “facts that amount to secrecy of private life,” and would simultaneously minimize restrictions on freedom of expression by excluding the alleging of “facts that do not amount to secrecy of private life” from the elements in the Provision at Issue.

The view supporting the partial unconstitutionality decision notes that, because “if solely concerned with the public interest” in Article 310 of the Criminal Act is overly broad and vague, an individual intending to allege facts cannot predict in advance whether his or her statement will fall within the ground for justification. For the individual who can foresee that his or her expressive activity will establish the elements in the Provision at Issue, but cannot foresee whether unlawfulness will be justified under Article 310 of the Criminal Act, this individual would forego alleging facts necessary for society, considering the possibility of criminal sanctions based on the Provision at Issue, and the ensuing chilling effect. In this regard, the view supporting the partial unconstitutionality decision opines that, to resolve the problem of unpredictability at the stage of justification for unlawfulness, the element of “alleging facts that do not amount to secrecy of private life” should be excluded at the stage of establishment of elements.

Nonetheless, it is likewise difficult to clearly determine what constitutes “facts that amount to secrecy of private life,” because there

are many instances in which it is difficult to draw a sharp line to distinguish acts of individuals that are within the private sphere and those that are within the public sphere. Even if the partial unconstitutionality decision were to be rendered, there would still be a possibility that a chilling effect would result from the vagueness between alleging "facts that amount to secrecy of private life" and alleging "facts that do not amount to secrecy of private life."

(e) Taking all of the above considerations together—namely, the need for protection of the right to personality concerning the reputation of an individual; that there is no less restrictive alternative that would serve the same legislative purpose as the Provision at Issue; that the restrictions on freedom of expression are minimized by the ground for justification under Article 310 of the Criminal Act as well as by the Court's and the Supreme Court's constructions and application of that ground for justification; that if a decision of partial unconstitutionality were rendered, there would be a possibility that the vagueness of "facts that amount to secrecy of private life" would lead to a new chilling effect—the least restrictive means prong is also satisfied.

3. Balance of interests

Article 21 of the Constitution guarantees, in Section (1), freedom of expression, but at the same time prescribes, in Section (4), that neither the press nor any publication shall violate the honor or rights of other persons, thereby declaring the "honor or rights of other persons" as a limit to freedom of expression. Since true facts are the foundation of healthy debate and discussion, the members of society should be guaranteed free expression of those facts; yet, if defamatory statements against a specific person are indiscriminately permitted only by reason of the truthfulness of those statements, the reputation and personality of individuals may not be properly protected.

1. Case on Crime of Factual Defamation

For individuals who believe that they have been unjustly harmed by others, it is desirable for them to resolve their problem pursuant to civil or criminal procedures, such as damages claims or criminal complaints. Publicly alleging facts to injure the reputation of the perpetrator without first pursuing the legal procedures can be abused as a means of retaliation that is not commensurate with the liability of the perpetrator. For this reason, it is necessary to curb the possibility of such abuses.

Absent a public nature required by Article 310 of the Criminal Act, publicly alleging the weaknesses and errors of an individual simply to reveal that his or her reputation is a vain one is inconsistent with the purpose of freedom of expression, which is to encourage the formation of a democratic will through free discussion and competition of ideas. Additionally, as examined earlier, the restrictions placed by the Provision at Issue on freedom of expression are minimized by the ground for justification under Article 310 of the Criminal Act as well as by the Court's and the Supreme Court's constructions thereof.

Having regard to these considerations, the Court finds that the Provision at Issue does not upset the balance of interests by excessively restricting freedom of expression in order to protect personal reputation.

4. Sub-conclusion

Therefore, the Provision at Issue does not infringe freedom of expression by violating the rule against excessive restriction.

Ⅴ. Conclusion

The complaint of Complainant L.G. is rejected as unjustified, and the Provision at Issue is not in violation of the Constitution. Accordingly, the Court renders its decision as set forth in Holding. This decision was made with a unanimous opinion of participating Justices except Justices

Yoo Namseok, Lee Suk-tae, Kim Kiyoung, and Moon Hyungbae, who filed a dissenting opinion, as set forth in Ⅵ below.

Ⅵ. Dissenting Opinion of Justices Yoo Namseok, Lee Suk-tae, Kim Kiyoung, and Moon Hyungbae

We disagree with the opinion of the Court and believe that the Provision at Issue infringes the freedom of expression of Complainants in violation of the rule against excessive restriction. The reasons for our opinion are explained below.

A. Legitimacy of the Purpose and Appropriateness of the Means

Because the Provision at Issue serves the goal of protecting the reputation of individuals, namely their right to personality, by prohibiting factual defamation, we recognize the legitimacy of this legislative purpose. Additionally, because inflicting criminal sanctions on a person who violates such prohibition may have a considerable restrictive effect on factual defamation, we also recognize the appropriateness of this means.

B. Least Restrictive Means

1. Article 21, Section (1) of the Constitution guarantees freedom of expression by providing that “All citizens shall enjoy freedom of the press and freedom of publication . . . .” Freedom of expression allows the members of society to freely exchange diverse thoughts and ideas and to openly debate and freely criticize public issues. The resultant free discussion and competition of ideas enable the formation of a democratic will, and in this connection freedom of expression is an essential component of democracy.

1. Case on Crime of Factual Defamation

Meanwhile, in order to ensure an exchange of diverse thoughts and ideas as well as debate, an individual must have knowledge of facts as a precondition for the exchange and debate. Thus, a constitutional basis of the right to know also lies in Article 21, Section (1) of the Constitution. Promoting the right to know guarantees freedom of expression, and promoting freedom of expression guarantees the right to know. Because democracy cannot properly operate without individual's and society's free formation of popular opinion based on sufficient information, the right to know is also an essential component of democracy, along with freedom of expression.

In sum, since freedom of expression, which guarantees an exchange of diverse thoughts and ideas and promotes the right to know of citizens, is a core fundamental right that is the foundation of our constitutional democracy, we note that in cases where restrictions on freedom of expression are inevitable for the protection of reputation, such restrictions should be imposed to the minimum extent possible.

2. The first sentence of Article 21, Section (4) of the Constitution states that "Neither the press nor any publication shall violate the honor or rights of other persons, or public morals or social ethics," thereby declaring the "honor of other persons" as a limit to freedom of expression. However, the second sentence of Article 21, Section (4) of the Constitution prescribes that "Should the press or publication violate the honor or rights of other persons, the victims may claim compensation for the damage suffered," thereby expressly providing as a remedy for defamation only civil compensation and not criminal punishment. For this reason, we do not believe that the Constitution obviously envisions criminal sanctions as a remedy for defamation, even though its Article 21, Section (4) specifies the violation of the honor of other persons as a limit to freedom of expression.

The problem of criminally penalizing the expressive activity of publicly alleging facts is that the penalty is enforced by the State. An

important value of freedom of expression is the monitoring and criticizing of the State, which monopolizes force, and of public servants, who run the State. In this regard, if public servants, who are the object of such monitoring and criticism, impose and enforce criminal penalties for stating true facts, healthy monitoring and criticism may be inevitably chilled. The abolishment of the crime of truthful defamation is a global trend reflecting repentance of past history in which it was utilized as a means to constrain civic monitoring of those in power, and reflecting consideration of a chilling effect on civic monitoring and criticism of public figures and matters.

To justify criminal punishment for the expressive activity of publicly alleging facts, such activity must be "wrongful behavior" that results in an "unjust outcome." However, it is difficult to recognize such activity as wrongful behavior, because stating true facts, as opposed to false ones, is generally not likely to be considered a negative act under the order of law. Additionally, criminal punishment for stating true facts intends to protect the reputation of a person that is established based on concealment of truth and, as such, merely amounts to a vain one earned among people having no knowledge of that truth. It is also difficult to recognize the expressive activity of stating true facts as resulting in an unjust outcome, because such activity damages a vain reputation that is false or exaggerated and should probably be changed by truth. Criminally punishing such activity in order to protect the vain reputation is hardly constitutionally justifiable.

3. Even if there is a need to protect personal reputation, which could be impaired by the expressive activity of publicly alleging facts, there are, in reality, less restrictive alternatives to criminal sanctions.

In principle, it is most desirable to guarantee an opportunity to respond to an expressive activity with another expressive activity. Nowadays, the mediums of expression are becoming diverse and the distribution of data through information and communications networks is

becoming more common. Since the features of such mediums and networks include openness and interaction, the defamed person himself or herself can actively respond to factual allegations about him or her by means including publishing a rebuttal on the same medium or network. Further, in cases where factual allegations about a person are made through reports by media outlets, etc., the person defamed can respond to them by requesting issuance of a correction or publication of a rebuttal (Articles 14 through 17-2 of the Act on Press Arbitration, Damage Remedies, Etc.).

If the consequences of defamation arising from the expressive activity of alleging facts cannot be adequately eliminated by responding with another expressive activity, the defamed person may receive monetary compensation for damage suffered as a result of a tort, by filing a claim for damages under Article 764 of the Civil Act. Additionally, the Civil Act, in Article 764, provides for a special rule that "The court may, upon motion by the defamed, order measures suitable to restore the reputation of the defamed, in lieu of or in addition to damages, against a person who defamed him or her." By means of this rule, the defamed person may seek measures suitable to restore his or her reputation, including preliminary injunctions.

Imposing criminal penalties through the Provision at Issue despite the existence of the above less restrictive remedies available for defamation can create a chilling effect on freedom of expression that is excessive and goes beyond that necessary to protect reputation. For example, if a person writes text or an article to report or criticize public figures or matters, its content may include true facts underlying the report and criticism. However, because the Criminal Act, in Article 312, Section (2), provides that the defamation under the Provision at Issue is an offense prosecutable without a criminal complaint by the victim—as opposed to an offense prosecutable only upon a criminal complaint by the victim—a criminal investigation into a claim involving such defamation may be initiated not only upon a criminal complaint by the

defamed person, but also upon an accusation by any ordinary citizen. As a result, “Strategic Lawsuits Against Public Participation” can be filed, meaning that any third party can make an accusation regarding the expressive activity of stating true facts, for the purpose of suppressing monitoring and critical reportage of public figures and matters, and not for the purpose of restoring the reputational damage suffered by the victim. Thus, since there is an increased possibility of being embroiled in criminal proceedings involving the defamation under the Provision at Issue, the freedom to express true facts is significantly chilled.

4. The opinion of the Court takes the position that Article 310 of the Criminal Act already minimizes the restrictions placed on freedom of expression by the Provision at Issue. More specifically, this opinion suggests that because Article 310 of the Criminal Act sets forth the ground of justification for the conduct under the Provision at Issue and because the unlawfulness of such conduct is negated in many cases by this Court’s and the Supreme Court’s constructions regarding that ground of justification, freedom of expression can be sufficiently guaranteed even if criminal proceedings are conducted for the crime of defamation under the Provision at Issue.

It is indeed a fact that the restrictions on freedom of expression are alleviated to some extent. Article 310 of the Criminal Act lays out the ground of justification for a violation of the Provision at Issue by providing that “The act under Article 310(1) shall not be punishable if the facts alleged are true and if solely concerned with the public interest,” and the Court and the Supreme Court interpret this justification as broadly as possible. However, where a person intends to make a statement of true fact concerned with the public interest, if that fact can impair the reputation of another, then making the statement may constitute the elements of defamation under the Provision at Issue. Consequently, the person faces the risk of being the subject of a criminal complaint or an accusation, or the risk of being subjected to a

sua sponte investigation by a State investigative agency or to a criminal trial. Thus, we observe that the possibility of being under investigation and trial proceedings alone suffices to have a chilling effect on freedom of expression, even if the expressive activity could be later found by a court to fall within the ground of justification under Article 310 of the Criminal Act. Further, Article 310 of the Criminal Act imposes no punishment "if the facts alleged are true and if solely concerned with the public interest" and, in this regard, a chilling effect on freedom of expression is more likely to occur given the burden of proving, in criminal investigation and trial proceedings, the public interest.

In relation to this, the Minister of the Ministry of Justice, an interested person, argued that the crime of factual defamation does not, through Article 310 of the Criminal Act, produce a chilling effect on freedom of expression. The minister cited as representative examples (1) a case in which the petitioner was found not guilty after being charged with defamation under Article 70, Section (1) of the Act on Promotion of Information and Communications Network Utilization and Information Protection for publishing on an internet forum a disparaging statement about the unacceptable treatment the petitioner received from an animal hospital, and (2) a case in which the petitioner was found not guilty after being charged with defamation under Article 61, Section (1) of a former version of the same Act for posting on a Q&A board of an internet portal a one-sentence comment making a subjective evaluation that the result of the plastic surgery on the petitioner was unsatisfactory (*see* "Summary of Oral Argument" of August 13, 2020, pp. 14-16).

It is correct that the Supreme Court entered findings of not guilty in both cases. However, according to relevant records, prosecutors filed charges after determining that the conduct of the petitioners constituted defamation under the above versions of the Act, and the appellate courts sustained the defamation charges after finding that the statements were made for the purpose of disparagement, and not for the public interest ((1) Seoul Eastern District Court 2009No1721, June 11, 2010; (2) Seoul

Central District Court 2008No1719, September 11, 2008). Later, the Supreme Court vacated the judgments of those courts and remanded the cases. It found the petitioners not guilty, recognizing that their acts were for the public interest ((1) Supreme Court 2010Do8143, January 26, 2012; (2) Supreme Court 2008Do8812, May 28, 2009).

These examples indicate that it is very difficult, even for legal professionals such as prosecutors and judges and for the appellate courts and the Supreme Court, to evaluate the presence of defamation, or to assess the "public interest." Indeed, ordinary citizens will not be able to accurately predict whether their expressive activities meet the "public interest" requirement of Article 310 of the Criminal Act. We note in this respect a problem with the current structure of the Criminal Act: this structure—under which stating true facts initially constitutes an element of the crime under the Provision at Issue and its unlawfulness is later excluded in exceptional cases where the "public interest" requirement of Article 310 of the Criminal Act is satisfied—makes it difficult for ordinary citizens to foresee what expressive activity will be subjected to criminal penalties, thereby chilling even legitimate expressive conduct. Where the structure of the Provision at Issue on defamation consists of "general prohibition and exceptional permission," not to mention that the exception is vague, a reasonable person would choose not to express facts that he or she is aware of in order to avoid the risk of, and suffering from being subjected to, investigation and trial proceedings. With this in mind, we cannot help but note the concern that even true facts concerning the public interest may eventually disappear from the forum of public debate.

5. Taking these considerations together, we disagree that the Provision at Issue satisfies the least restrictive means test.

C. Balance of Interests

Although we concur in the view that the expressive activity of alleging facts should not be used as a means to retaliate against another person, we believe that the freedom of expression of citizens and their right to know can be rendered meaningless if too much emphasis is placed solely on that view and the rule that expression of true facts about public figures or matters constitutes an element of defamation. The free formation of will and popular opinion through debate and deliberation based on true facts is the foundation of democracy; and in this connection, penalizing true factual statements for defamation can be contrary to this democratic principle and to the guarantee of freedom of expression. That personal reputation is lowered by a true factual statement cannot be viewed as an unjust result, because a true fact is one that underlies a social evaluation of a person. Nor do we see that a false or exaggerated reputation built based on concealment of truth is a legal interest warranting protection that comes at the expense of a chilling effect on freedom of expression. Article 21, Section (4) of the Constitution prescribes as a limit to freedom of expression the honor of other persons, yet it expressly provides as a remedy only civil compensation and not criminal punishment. Freedom of expression is still being chilled due to the vagueness of the ground for justification under Article 310 of the Criminal Act. Taking these considerations into account, we find it difficult to say that the Provision at Issue meets the balance of interests test.

D. Need for the Decision of Partial Unconstitutionality

Accordingly, we conclude that the Provision at Issue infringes freedom of expression in violation of the rule against excessive restriction. For the reasons below, however, we find that the part of the Provision at Issue concerning “the true facts that do not amount to secrecy of private life” should be declared unconstitutional.

1. The Constitution, in Article 21, Section (1), guarantees freedom of expression by prescribing that “All citizens shall enjoy freedom of the press and freedom of publication.” Meanwhile, the main sentence of Section (4) of this article expressly provides the honor or rights of other persons as a limit to freedom of expression by stating that “Neither the press nor any publication shall violate the honor or rights of other persons.” Thus, a way should be found to guarantee freedom of expression and at the same time to harmonize this freedom with the honor or rights of other persons.

2. Even if the facts alleged correspond to objective truth, if they concern information an individual wishes to keep confidential, such as his or her medical history, sexual orientation, or family matters, communicating such information may constitute a grave violation of secrecy and freedom of private life, which are proclaimed by Article 17 of the Constitution. Moreover, disclosing such information that is irrelevant to the public interest and only amounts to an individual’s secrecy of private life may be incompatible with the original purport and intent of guaranteeing freedom of expression, which is to further reasonable decision-making in the community through debate and deliberation as well as to further constructive criticism and improvement of matters of public concern. Therefore, although the Provision at Issue violates freedom of expression, we view that the scope of a declaration of its unconstitutionality should be limited to the minimum necessary.

3. With reference to this view, we note that the German Criminal Code prescribes criminal penalties only for cases where an asserted or disseminated fact is untrue or is not proven to be true. This code seeks to harmonize the two interests by exempting from criminal punishment those cases where an asserted or disseminated fact is proven to be true. We also note that one of our Criminal Act amendment bills proposed to establish criminal penalties only for cases where the facts alleged violate secrecy of private life. This bill proposed to harmonize the two interests

by excluding from criminal sanctions those cases where the facts alleged do not infringe secrecy of private life.

4. In a country of modern constitutionalism, communal decision-making, including political activities, is conducted through free expression and exchange of thoughts and ideas. As such, if freedom of expression, including freedom of the press and freedom of publication, is not guaranteed, neither democracy nor popular sovereignty can be realized. In cases where “the facts alleged are true,” emphasis needs to be placed more on freedom of expression concerning true facts than on an individual’s reputation based on falsities, since a true fact provides a basis for the free formation of will and the discovery of truth in the community. Further, in cases where “the facts alleged do not amount to secrecy of private life,” emphasis needs to be given more to the freedom of expression concerning true facts than to an individual’s reputation based on falsities, for the free formation of communal will and the development of democracy.

5. The opinion of the Court points out that a chilling effect on freedom of expression could result from the decision of partial unconstitutionality because, even if the stating of facts “that are true and do not amount to secrecy of private life” was excluded from the elements of the crime in the Provision at Issue, the meaning of “secrecy of private life” would still be vague.

Admittedly, the term “secrecy of private life” can be seen as somewhat vague, but it is a constitutional right enshrined in Article 17 of the Constitution. In fact, it is a legal term currently used in a great number of statutes, including Article 14, Section (4) of the Act on the Registration, Etc. of Family Relationships; Article 18, Section (3) of the Framework Act on Health Examination; Article 29-2, Section (2) of the Infection Control Act; Article 9, Section (1), Item 6, Sub-item (b) of the Official Information Disclosure Act; Article 27, Section (2), Item 1 of

the Multi-family Housing Management Act; Article 50 of the National Human Rights Commission of Korea Act; Article 51-3, Section (2), Item 4 of the Monopoly Regulation and Fair Trade Act; Article 11, Section (2) of the Act on the Safeguarding and Promotion of Intangible Cultural Heritage; Article 8, Section (7) of the Cultural Heritage Protection Act; Article 60, Section (6) of the Special Act on Private Rental Housing; Article 13, Section (4) of the Act on Door-to-door Sales, Etc.; Article 44, Section (2) of the Crime Victim Protection Act; Article 13 of the Framework Act on Health and Medical Services; Article 53 of the Act on the Prevention of Corruption and the Establishment and Management of the Anti-corruption and Civil Rights Commission; Article 1 of the Credit Information Use and Protection Act; Article 31, Section (2) of the Fishing Vessels Act; Article 5, Section (1) of the Act on Press Arbitration, Damage Remedies, Etc.; Article 1 of the Act on the Protection, Use, Etc. of Location Information; Article 12-4, Section (3), Item 1 of the Distribution Industry Development Act; Article 69, Section (3) of the Motor Vehicle Management Act; Article 23, Section (1) of the Framework Act on Treatment of Foreigners Residing in the Republic of Korea; Article 7-2, Section (2) of the Special Act on the Preferential Purchase of Products Manufactured by Persons with Severe Disabilities; Article 44, Section (1), Item 3 of the Framework Act on Intelligent Informatization; Article 7-3, Section (2), Item 4 of the Act on Fair Labeling and Advertising; Article 18, Section (5) of the Installment Transactions Act; and Article 39-2, Section (1), Item 3 of the Constitutional Court Act. Because constitutional and legal practice offers concrete and comprehensive standards of interpretation of the term “secrecy of private life,” we find it difficult to believe that this term produces a chilling effect on freedom of expression.

If, as a consequence of a partial unconstitutionality decision, the stating of facts “that are true and do not amount to secrecy of private life” is excluded from the elements of the crime in the Provision at Issue, an assessment will be made at the stage of investigation on

whether the true factual statement, against which an accusation or criminal complaint is made, represents “secrecy of private life.” If that statement is considered as not amounting to secrecy of private life, then there will be an increased number of cases in which the investigation does not proceed further or result in a prosecution because the statement is insufficient to establish a crime from the outset. Consequently, the partial unconstitutionality decision will certainly reduce the present chilling effect on freedom of expression.

6. Finally, taking together the purpose and intent of Article 21 of the Constitution, guaranteeing freedom of expression and its boundaries limited by the honor of other persons and the protection of the right to personality, the need to harmonize freedom of expression with the secrecy and freedom of private life guarantee in Article 17 of the Constitution, and the fact that striking down only an unconstitutional part of a provision does not interfere with legislative power and reflects judicial respect for such power, we conclude that the part of the Provision at Issue concerning the stating of facts “that are true and do not amount to secrecy of private life” violates the Constitution.

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

II. Summaries of Opinions

1. Case on Real-Name Verification on the Internet During Periods of Election Campaigns

[2018Hun-Ma456, 2020Hun-Ma406, 2018Hun-Ka16 (consolidated), January 28, 2021]

In this case, the Court declared that the following provisions of the Public Official Election Acts violate both the right to anonymous free speech and informational self-determination of users on bulletin boards, etc. and the freedom of the press of internet news sites: the provision requiring internet news sites to take technical measures to verify that a person is using his/her real name if posting information concerning his/her support for or opposition to political parties or candidates on the bulletin board, etc. of an internet news site; the provision requiring the Minister of the Interior and Safety and a credit information business operator to manage the data on real-name verification results and, if requested by the National Election Commission, to immediately furnish it with the requested data; and, the provision imposing an administrative fine for failing to take technical measures for real-name verification or for failing to delete information which does not carry the real name verification mark.

Background of the Case

Petitioner of Case No. 2018Hun-Ka16, who is a legal person running an internet news site, was fined for failing to take technical measures to verify a user's real name, as provided by the Minister of the Interior and Safety or a credit information business operator, where the user was allowed to post information concerning his/her support for or opposition to political parties or candidates on the bulletin board, etc. of its website during election campaigns. While the case was pending, Petitioner appealed the decision and filed a motion requesting constitutional review

of the provisions of the Public Official Election Act under which the fine was imposed. The requesting court accepted the motion and requested constitutional review.

Complainants of Cases No. 2018Hun-Ma456 and No. 2020Hun-Ma406, who are voters and legal persons operating internet news sites, both filed constitutional complaints, arguing that the provisions of the Public Official Election Act infringe upon their fundamental rights. These provisions require internet news sites to take technical measures to verify a user's real name if the person posts information expressing support for or opposition to political parties or candidates on the bulletin board, etc. of their websites during election campaign periods and to delete such postings if they do not carry the real name verification mark.

Subject Matter of Review

The subject matter of this case is whether the following provisions of the Public Official Election Act infringe upon the fundamental rights of Petitioners and Complainants in violation of the Constitution: (1) Article 82-6, Section (1) of former Public Official Election Act (amended by No. 12844 on November 19, 2014 and before amended by Act No. 14839 on July 26, 2017), Article 82-6, Section (1) of former Public Official Election Act (amended by No. 14839 on July 26, 2017 and before amended by Act. 16957 on February 4, 2020), Article 82-6, Section (1) of Public Official Election Act (amended by No. 16957 on February 4, 2020) and Article 82-6, Sections (4), (6), and (7) of Public Official Election Act (amended by Act No. 9974 on January 25, 2010) (hereinafter referred to as the "Provision on Real-Name Verification"); (2) Article 82-6, Section (3) of former Public Official Election Act (amended by No. 14839 on July 26, 2017 and before amended by Act No.16957 on February 4, 2020) and Article 82-6, Section (3) of Public Official Election Act (amended by Act No. 16957 on February 4, 2020) (hereinafter referred to as the "Provision on Managing Real-Name

Verification Data"); and (3) Article 261, Section (3), Item 3 of former Public Official Election Act (amended by Act No. 13497 on August 13, 2015 and before amended by Act. 14556 on February 8, 2017), Article 261, Section (3), Item 4 of Public Official Election Act (amended by Act No. 14556 on February 8, 2017) and Article 261, Section (6), Item 3 of Public Official Election Act (amended by Act No. 12393 on February 13, 2014) (hereinafter referred to as the "Provision on Fine") (The Provision on Real-Name Verification, the Provision on Managing Real-Name Verification Data, and the Provision of Fine are hereinafter collectively referred to as the "Provisions at Issue").

Summary of the Decision

The Provisions at Issue restrict, among other aspects of freedom of expression, the freedom of anonymous speech. Under this freedom, a user of a bulletin board, etc. may anonymously express and disseminate his/her thoughts and opinions without disclosing his/her identity. These Provisions at Issue, consequently, also restrict both the freedom of the press for internet news sites that seek to form and disseminate public opinion based upon users' free expression of opinion on the bulletin board, etc. of their websites, and the right to informational self-determination of the users of the bulletin board, etc., with respect to the data on real-name verification results being collected and managed.

The legislative objectives of the Provisions at Issue are to avoid the possible social and economic damages and side effects caused by personal attacks and negative propaganda against political parties or candidates, and to ensure a fair election. The Court acknowledges the necessity of regulations to prevent any negative effect that may arise from allowing anonymous expression of opinion.

However, where anonymous political speech expressed on the bulletin board, etc. of a website is restricted as specified in the Provisions at Issue, the general public will self-censor and refrain from expressing

criticism out of fear of political retaliation. Even if a person, overcoming such fear, anonymously expresses critical opinions, such expression may be deleted for failing to have his/her real name verified in accordance with the Provisions at Issue. This will suppress the exchange of different opinions in the 'free market of ideas' shaped by the Internet, which may ultimately create a chilling effect on the people's expression of opinion and hinder the free formation of public opinion upon which democracy depends. Aside from anonymity, other elements contribute to the negative effects of anonymous political expression during the period of an election campaign. These include the content of the anonymous expression, the relevant system regulating political expression, and other political and social circumstances. Therefore, preemptive and comprehensive regulation of all anonymous expressions will excessively restrict the freedom of anonymous expression and the right to informational self-determination by prioritizing administrative and regulatory convenience over freedom of expression.

Because the restrictions on anonymous freedom of expression are imposed during an election campaign period when free political expression is most critical, because the restrictions are based on abstract possibilities that the Provisions at Issue may lead to a decline in unlawful expression rather than concrete risks, and because the restrictions apply a broad definition of "internet news site", these restrictions on fundamental rights are no less important than the public interest objectives that the Provisions at Issue seek to achieve.

The fairness of elections, an objective of the real-name verification system, can be sufficiently achieved by other means that do not restrict internet users' freedom of expression or their right to informational self-determination. The Public Official Election Act prohibits the distribution of information in violation of the Act by regulating election campaigns that utilize information and communications networks. Thus, persons whose privacy was intruded upon or who were defamed may make use of means or temporary measures stipulated in the Act on

Promotion of Information and Communication Network Utilization and Information Protection, Etc., including request for deletion of information. Further, new measures to secure a fair election can be introduced that do not obstruct internet users' freedom of expression and the right to informational self-determination, while at the same time preventing the distortion of public opinion brought about by disinformation.

Above all, various reactive sanctions, including prohibition of defamation and slander against candidates, are already in effect against election crimes using the internet. At the current level of technology, measures specified in the Public Official Election are sufficient to identify the personal information of persons who acted in violation of the Act, thereby ensuring a fair election. Despite the reactive sanctions already in place, preemptive and comprehensive restriction of all anonymous expressions through proactive and preventative regulations that are primarily for the convenience of investigation and technological expediency to ensure the effective management of elections is tantamount to treating a vast majority of the people who want to express themselves anonymously as potential criminals.

The Provisions at Issue restrict the freedom of anonymous expression and the freedom of the press by forcing users to verify their names on the bulletin board, etc. of an internet news site during an election campaign period when political expressions are most crucial. They also broadly limit the general public's right to informational self-determination by regulating all anonymous expressions to prevent their negative effects. Such harm should never be underestimated when balanced against the public interest of maintaining fairness in elections.

Therefore, the Provisions at Issue violate the rule against excessive restriction, consequently infringing upon the freedom of anonymous expression, the freedom of the press, and the right to informational self-determination, etc.

Summary of Dissenting Opinion of Three Justices

Although the Provisions at Issue may restrict anonymous expression by verifying the real name of a user who posts information, they only do so when such information contains 'his/her support for or opposition to candidates or political parties' and is posted 'on the bulletin board, chat room, etc. of an internet news site' 'during an election campaign period.' 'During an election campaign period' political parties and candidates compete with each other for the concrete goal of winning an election and voters competitively express their political opinions regarding the election. Such intense competition may lead to negative propaganda or attempts to manipulate public opinion. As an 'internet news site' is part of the mass media wielding influence in forming public opinion, it has a greater public responsibility for ensuring a fair election during an election campaign period. The Provisions at Issue broadly define an internet news site because of the low entry barrier in its establishment and operation. If an internet news site serves the role of the press, it has a responsibility to maintain objectivity and impartiality commensurate with its status. 'A person's support for or opposition to candidates or political parties' is political expression, which directly relates to the election results and fiercely competes with the political expression of others during election campaign periods. Under such distinctive features and circumstances, where false or distorted information expressing a person's support for or opposition to political parties and candidates is irresponsibly posted on the bulletin board, etc. of a renowned internet news site, the effects can be compounded by the negative consequences that may occur in the internet environment. These include the rapid and widespread dissemination and reproduction of the posting, the acquisition of biased information, and the reinforcement of bias. These factors make it difficult to facilitate autonomous correction of such information through discussion, etc. and, thereby, undermine a fair election.

If a verified person posts information, etc. on the bulletin board, chat

room, etc. of an internet news site, the posting does not disclose his/her personal information. It only shows the sign of a verified real name. Therefore, the person's 'anonymity' is guaranteed. Data on real-name verification results is separately managed to provide the information as requested by the National Election Commission for ensuring a fair election process. Thus, the verification requirement creates a chilling effect only to this extent. It is a preventive measure that makes a person who wishes to post information anonymously aware of the risk of possible unlawful acts.

Therefore, the restrictions on the freedom of anonymous expression imposed by the Provisions at Issue are indispensable in terms of their scope and extent, and it is difficult to come up with less restrictive alternatives on the right to self-determination over personal information, which are inseparable as the means to guarantee such freedom.

For an internet news site characterized by openness and interactivity, the formation and dissemination of public opinion based on information and expression of opinion provided by users on the bulletin board, etc. of a website form an integral part of its press activities. Accordingly, an internet news site has public responsibility for managing information, etc. freely posted by users on the bulletin boards, etc. in order to secure the fairness of elections. Therefore, the restrictions on the freedom of the press granted to internet news sites, or the restrictions on the freedom of anonymous expression of the users of the bulletin boards, etc., do not violate the principle of the least restrictive means test.

The Provisions at Issue limit their application to the minimum extent necessary to prevent the risk of undermining a fair election in consideration of the influence and responsibility of internet news sites; it is hard to conceive of other means that can achieve the legislative intent to the same extent as the Provisions at Issue. Notably, the provision on imposing a fine cannot be deemed to impose excessive restrictions on the freedom of the press for internet news sites. For the foregoing

reasons, the Provisions at Issue do not violate the principle of the least restrictive means test and the balance of interests are in their favor.

Since the Provisions at Issue do not violate the rule against excessive restriction, we find that they do not infringe upon the freedom of anonymous expression and the right to self-determination over personal information of users of the bulletin boards, etc. of internet news sites or the freedom of the press of internet news sites.

2. Case on Crime of Factual Defamation

[2017Hun-Ma1113, 2018Hun-Ba330 (consolidated), February 25, 2021]

In this case, the Court held that Article 307, Section (1) of the Criminal Act, which provides for factual defamation imprisonment, with or without prison labor, of not more than two years, or a fine not exceeding five million won, does not infringe freedom of expression.

Background of the Case

1. On August 27, 2017, Complainant in Case No. 2017Hun-Ma1113 had his companion dog treated by a veterinarian. Believing that the veterinarian's improper diagnosis and treatment resulted in the dog having an unnecessary surgery and putting it at a risk of vision loss, the Complainant sought to publish the name of the veterinarian and the details of the misdiagnosis and mistreatment. However, the Complainant was not permitted to do so under Article 307, Section (1) of the Criminal Act, which provides for criminal sanctions for a person who defames another by publicly alleging facts. On October 6, 2017, the Complainant filed a constitutional complaint under Article 68, Section (1) of the Constitutional Court Act, asserting that the above provision of the Criminal Act infringes his freedom of expression.

2. On February 14, 2016, Complainant in Case No. 2018Hun-Ba330 was charged with defaming another by publicly alleging facts. On January 26, 2018, the Busan District Court imposed on the Complainant a fine of 500,000 won. The Complainant appealed to the Supreme Court. While his appeal was pending, the Complainant petitioned the Supreme Court to request constitutional review of Article 307, Section (1) of the Criminal Act, but the petition was rejected on June 28, 2018. On July 30, 2018, the Complainant filed a constitutional complaint under Article 68, Section (2) of the Constitutional Court Act, maintaining that the aforesaid provision of the Criminal Act infringes his freedom of

expression and is, thus, unconstitutional.

Subject Matter of Review

The subject matter of review in this case is whether Article 307, Section (1) of the Criminal Act (amended by Act No. 5057 on December 29, 1995) (hereinafter referred to as the "Provision at Issue"), which provides for criminal sanctions for a person who defames another by publicly alleging facts, infringes freedom of expression. The Provision at Issue reads as follows:

Provision at Issue

Criminal Act (amended by Act No. 5057 on December 29, 1995)
Article 307 (Defamation)
(1) A person who defames another by publicly alleging facts shall be punished by imprisonment, with or without prison labor, for not more than two years, or by a fine not exceeding five million won.

Summary of the Decision

1. Whether freedom of expression is infringed

Defamatory statements spread rapidly and have a far-reaching effect as the mediums of communication become very diverse nowadays. Additionally, the characteristic nature of reputation is that it is difficult to be fully restored once harmed. Under these circumstances, there is an increased need to impose restrictions on defamatory expression. The Provision at Issue safeguards the reputation of individuals, namely their personality rights, by inflicting criminal sanctions on a person who defames another by publicly alleging facts.

Since reputation is a basic condition for an individual's development

and expression of his or her personality, the precedence between freedom of expression and the right to personality is not a matter that can be determined easily. Further, our law, unlike other legal systems, does not recognize punitive damages. In this context, civil remedies alone cannot provide the same level of crime-prevention effect as criminal penalties, and there is no less restrictive alternative that would serve the same legislative purpose as the Provision at Issue.

Article 310 of the Criminal Act states that the act prohibited by the Provision at Issue shall not be punishable if the facts alleged are true and if solely concerned with the public interest. Regarding this provision, both the Court and the Supreme Court have broadly construed the scope of application of the provision so as to minimize restrictions it places on freedom of expression, but at the same time to deter the abusive use of the crime of defamation as a means to suppress critics of public figures or State agencies.

If our Court, concerned about a chilling effect on freedom of expression, declares the Provision at Issue wholly unconstitutional, then infringement of personal reputation will be overlooked. In fact, such a declaration would involve a serious risk that publicly alleging facts, even if true, will constitute a violation of secrecy of private life amounting to information an individual would wish to keep confidential, such as his or her medical history, sexual orientation, or family matters. To guard against this danger, the Court can render a decision of partial unconstitutionality; that the word “facts” in the Provision at Issue violates the Constitution to the extent that it includes “facts that do not amount to secrecy of private life.” However, even if the partial unconstitutionality decision were to be rendered, there would still be a possibility that a chilling effect would result from the vagueness between alleging “facts that amount to secrecy of private life” and alleging “facts that do not amount to secrecy of private life.”

In addition to the foregoing considerations, the Court also notes the

following: Article 21 of the Constitution guarantees freedom of expression, but at the same time declares the “honor or rights of other persons” as a limit thereto; it is necessary to regulate individuals who, believing that they have been unjustly harmed by others, use defamation to retaliate without first pursuing civil or criminal actions; and, absent a public nature required by Article 310 of the Criminal Act, publicly alleging the weaknesses and errors of an individual simply to reveal that his or her reputation is a vain one is inconsistent with the purpose of freedom of expression, which is to encourage the formation of a democratic will through free discussion and competition of ideas. Consequently, the Provision at Issue does not violate the rule against excessive restriction, and thus, does not infringe freedom of expression.

Summary of Dissenting Opinion of Four Justices

1. Whether freedom of expression is infringed

Freedom of expression, which guarantees an exchange of diverse thoughts and ideas and promotes the right to know of citizens, is a core fundamental right that is the foundation of our constitutional democracy. Thus, we note that in cases where restrictions on freedom of expression are inevitable, such restrictions should be imposed to the minimum extent possible. The first sentence of Article 21, Section (4) of the Constitution declares the “honor of other persons” as a limit to freedom of expression. However, the second sentence of this section expressly provides only civil compensation as a remedy for defamation. For this reason, we do not believe that the Constitution obviously envisions criminal sanctions as a remedy for defamation.

An important role of freedom of expression is the monitoring and criticizing of public servants. In this regard, if public servants, who are the object of such monitoring and criticism, impose and enforce criminal penalties for stating true facts, healthy monitoring and criticism may be

inevitably chilled. To justify criminal punishment for the expressive activity of publicly alleging facts, such activity must be "wrongful behavior" that results in an "unjust outcome." However, it is difficult to recognize such activity as wrongful behavior, because stating true facts is generally not likely to be considered a negative act under the order of law. It is also difficult to recognize the expressive activity of stating true facts as resulting in an unjust outcome, because such activity damages a vain reputation that is false or exaggerated.

Even if there is a need to protect reputation from the expressive activity of alleging facts, victims may obtain remedies other than criminal sanctions. They may request issuance of a correction and publication of a rebuttal, file a claim for damages, and seek measures suitable to restore his or her reputation. Moreover, the defamation under the Provision at Issue is an offense whose investigation may be initiated not only upon a criminal complaint by the defamed person, but also upon an accusation by any ordinary citizen. Thus, any third party can make an accusation regarding the expressive activity of stating true facts to suppress monitoring and criticism of public figures and matters. In other words, such accusation may be used for "Strategic Lawsuits Against Public Participation."

It is possible that the expressive activity of stating true facts could be later found by a court to fall within the ground of justification under Article 310 of the Criminal Act. However, since that activity constitutes an element of the offense under the Provision at Issue, the speaker or writer is likely to be subjected to criminal investigation and court proceedings. That possibility alone suffices to have a chilling effect on freedom of expression. A chilling effect on freedom of expression is more likely to occur given the burden of proving, in criminal investigation and trial proceedings, the public interest.

Along with these considerations, we also note that a false or exaggerated reputation built based on concealment of truth is not a legal

interest warranting protection that comes at the expense of a chilling effect on freedom of expression. In view of these factors, we conclude that the Provision at Issue violates the rule against excessive restriction by infringing the freedom of expression.

2. Need for the decision of partial unconstitutionality

A true fact provides a basis for the free formation of will and the discovery of truth in the community. For this reason, in cases where "the facts alleged are true," emphasis needs to be placed more on freedom of expression concerning true facts than on an individual's reputation based on falsities. Further, in cases where "the facts alleged do not amount to secrecy of private life," emphasis needs to be given more to the freedom of expression concerning true facts than to an individual's reputation based on falsities, given the need for protection of secrecy of private life declared by Article 17 of the Constitution. Moreover, striking down only an unconstitutional part of a provision does not interfere with legislative power and reflects judicial respect for such power. Taking these considerations together, we conclude that the part of the Provision at Issue concerning the stating of facts "that are true and do not amount to secrecy of private life" violates the Constitution.

3. Case on "Crime of Online Defamation" Prosecutable without Criminal Complaint by Victim

[2018Hun-Ba113, April 29, 2021]

In this case, the Court held that the part concerning Section (2) in Article 70, Section (3) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. does not upset the balance in the criminal punishment system, and thus, does not violate the principle of equality. The relevant part provides that the crime of defamation by disclosing a false fact to the public through an information and communications network is an offense prosecutable without a criminal complaint by the victim.

Background of the Case

Complainant was charged with "defamation of another person by disclosing a false fact to the public through an information and communications network to disparage the reputation of such person (crime of defamation under Article 70, Section (2) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.)" and was fined by the court.

During the trial, Complainant petitioned the court to request constitutional review of Article 70, Section (3) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. This section provides that the crime of defamation under Article 70, Section (2) of this Act is an offense prosecutable without a criminal complaint by the victim, as opposed to an offense prosecutable only upon a criminal complaint by the victim. Following rejection of the petition, Complainant filed a constitutional complaint, asserting the unconstitutionality of Article 70, Section (3) of the above Act.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning Section (2) (such part hereinafter referred to as the “Provision at Issue”) in Article 70, Section (3) of the Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc. (amended by Act No. 9119 on June 13, 2008) (hereinafter referred to as the “Network Act”) violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Network Act (amended by Act No. 9119 on June 13, 2008)
Article 70 (Penalty Provisions)
(3) The crimes in Sections (1) and (2) may not be prosecuted if the victims explicitly object to the prosecutions (emphasis added).

Summary of the Decision

Article 312, Section (1) of the Criminal Act[1] provides that the “crime of defamation of a dead person (Article 308 of the Criminal Act)”[2] and the “crime of insult (Article 311 of the Criminal Act)”[3] are both *chingojoe*[4]. Conversely, the Provision at Issue stipulates that the “crime

1) Article 312 (Criminal Complaint and Will of Victim) of the Criminal Act
(1) The crimes in Articles 308 and 311 shall be prosecuted only upon criminal complaint.

2) Article 308 (Defamation of a Dead Person) of the Criminal Act
A person who defames a dead person by publicly alleging false facts shall be punished by imprisonment with or without prison labor for not more than two years or by a fine not exceeding five million won.

3) Article 311 (Insult) of the Criminal Act
A person who publicly insults another shall be punished by imprisonment with or without prison labor for not more than one year or by a fine not exceeding two million won.

of online defamation by disclosing a false fact (Article 70, Section (2) of the Network Act)"[5] is *baneuisabulbeoljoe*[6]. Accordingly, the issue is whether this stipulation in the Provision at Issue upsets the balance in the criminal punishment system, violating the principle of equality.

Criminal prosecution is divided into two types based on who initiates the criminal lawsuit: state prosecution and private prosecution. Article 246 of our Criminal Procedure Act provides that "A prosecution shall be instituted and executed by a public prosecutor" and thereby declares the principle of state prosecution. This principle is reasonable in that it assures the appropriateness and balance of prosecutions. *Chingojoe* and *baneuisabulbeoljoe* are understood as exceptions to, or limitations on, the public prosecution principle. In prosecution for those types of crimes the will of victims or other persons is respected and the exercise of the authority of the state to impose criminal penalties is thereby restricted. The legislature decides which offenses should be included in the category of *chingojoe* or *baneuisabulbeoljoe* by considering the severity of damage resulting from the crime, the degree of social harm caused by the crime, the benefit of exercising prosecutorial authority, and the benefit of restricting that authority upon request of the victim. In other words, that decision is a matter within the broad discretion of the legislature.

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4) *Chingojoe* is a type of offense that requires a criminal complaint by the victim or other person in order for a prosecutor to institute the prosecution.

5) Article 70 (Penalty Provisions) of the Network Act
(2) A person who commits defamation of another person by disclosing a false fact to the public through an information and communications network to disparage the reputation of such person shall be punished by imprisonment with labor for up to seven years, by suspension of qualification for up to 10 years, or by a fine not exceeding 50 million won.

6) *Baneuisabulbeoljoe* is a type of offense that a prosecutor may charge without the victim's or other person's expressed preference for punishment of the offender but may not do so if the victim or other person makes a clear objection to such punishment.

3. Case on "Crime of Online Defamation" Prosecutable without Criminal Complaint by Victim

The "crime of insult" and the "crime of defamation of a dead person" under the Criminal Act and the "crime of online defamation" under the Network Act all share the common feature of protecting interests in "reputation," i.e. social evaluation of the value of an individual. At the same time, there is a difference between the first two crimes and the latter crime. The first two are less severe offenses than the latter. The "crime of insult" is the expression of abstract opinion and emotion, rather than concrete fact, about the victim, and the "crime of defamation of a dead person" is the publication of false facts about a dead person as opposed to a live one. In comparison, the "crime of online defamation" under the Network Act is more wrongful behavior and produces a more unjust outcome because it is the disclosure of a false fact through an information and communications network for purposes of disparagement.

Since an investigation of and prosecution for *chingojoe* may be instituted only upon a criminal complaint by the victim, the enlargement of the scope of *chingojoe* provides greater respect for the will of victims. This enlargement, however, may dissuade those victims who are in fear of retaliation by the offender or of injury to their reputations from filing criminal complaints. Conversely, the enlargement of the scope of *baneuisabulbeoljoe* facilitates damage compensation by perpetrators, as well as agreement between perpetrators and victims, because an investigation of and prosecution for *baneuisabulbeoljoe* may be initiated without a criminal complaint by the victim. However, an investigation of a relatively minor offense might run counter to the will of the victim if commenced without a criminal complaint by him or her. For these reasons, it cannot be assumed that the enlargement of either type of crime is necessarily reasonable.

The legislature decided whether an offense should be included in the category of *chingojoe* or *baneuisabulbeoljoe,* based on the above-mentioned considerations and the balancing of various factors, such as harmony of the benefit of exercising prosecutorial authority and the benefit of

restricting that authority upon request of the victim. Therefore, the Provision at Issue, which provides that the "crime of online defamation" under the Network Act is *baneuisabulbeoljoe*, does not upset the balance in the criminal punishment system, and thus, does not violate the principle of equality. Accordingly, the Provision at Issue does not violate the Constitution.

4. Case on Age Limit for Jurors

[2019Hun-Ka19, May 27, 2021]

In this case, the Constitutional Court held that the age requirement of Article 16 of the Act on Citizen Participation in Criminal Trials, which provides that a juror shall be not less than 20 years of age, does not violate the principle of equality.

Background of the Case

On 24 October, 2018, the defendant of the original case was charged with committing an indecent act under the Act on the Protection of Children and Youth Against Sex Offenses, and requested a participatory trial. After taking preparatory proceedings as prescribed in the Act on Citizen Participation in Criminal Trials (hereinafter referred to as the "Participatory Trial Act"), the ordinary court of the original case *sua sponte* requested constitutional review of Article 16 of the Participatory Trial Act, which limits jurors to citizens of the Republic of Korea who are not less than 20 years of age.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning "not less than 20 years of age" (hereinafter referred to as the "Provision at Issue") of Article 16 of the Act on Citizen Participation in Criminal Trials (enacted by Act No. 8495 on June 1, 2007) violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Act on Citizen Participation in Criminal Trials (enacted by Act No. 8495 on June 1, 2007)

Article 16 (Qualifications of Jurors) Jurors shall be selected from

among citizens of the Republic of Korea who shall be not less than 20 years of age, as provided by this Act (emphasis added).

Summary of the Decision

The age requirement, as provided by the Participatory Trial Act, is the minimum eligibility required for a juror to perform his or her jury service. This requirement presumes that, by reaching the minimum age, one has the capacity to perform his or her required roles and responsibilities as a juror.

Jury duty is a public service that is directly related to criminal trial proceedings. Thus, although the "general age for legal capacity and the minimum level of intelligence and understanding required to complete secondary education" serves as a guide, in setting the minimum age for jury service it is reasonable to take into consideration the additional "minimum amount of time that one needs to gain first-and second-hand experiences so as to understand and reasonably perform a juror's responsibility and duty – from reaching a verdict to giving an opinion on sentencing – in criminal trials for felony cases."

The minimum age to be eligible to serve as a juror need not be the same as that of the capacity to act as provided by the Civil Act, the capacity to exercise voting rights, the capacity to perform military service, or the capacity to be employed in the framework of minor protection. Lawmakers may set different age requirements for different capacities in accordance with the legislative objectives reflected in the respective Acts, the particular circumstances of each capacity, and the balance of the relevant conflicting interests.

The Provision at Issue that assigns jury duty to citizens not less than 20 years of age with sufficient education and experience was developed in consideration of the objective of the participatory trial system, the power and duty of jurors, and various other factors. In this context, the

Provision at Issue does not exceed the limitation of legislative formative power, and thus, does not constitute arbitrary discrimination.

Summary of Dissenting Opinion of Two Justices

Bearing in mind that the participatory trial system aims to enhance the democratic legitimacy and confidence of the judicial system, it is reasonable to assign jury duty to people in various age groups under the condition that they fulfill the minimum requirements to perform the roles and responsibilities of a juror. If the minimum age requirement for jury service has been set to disqualify people in a certain age group who are capable of performing jury service, the lawmakers would have exceeded the limitation of their legislative formative power.

The participatory trial system aims to bring the public's common knowledge and experience into trial proceedings and does not expect jurors to have a specialized legal knowledge or capacity for professional judgment. Thus, the capacity to act as provided by the Civil Act could work as a first indicator in determining whether or not a person has the capacity to perform jury service. The "not less than 20 years of age" requirement for jurors of the Provision at Issue was adopted to match the age requirement for jurors to that of the majority (becoming an adult) who, by that age, attain full capacity to act as provided by the Civil Act. As such, since the age requirement of the majority has been revised to 19 years of age, there is no reasonable explanation to retain the status quo regarding the age requirement for jurors.

Meanwhile, the age limit for voting rights has been lowered to 18 years of age. Considering that the capacity to make a political judgment at one's own discretion could vouch for having the minimum qualification for jury service, and that a number of countries select jurors from among citizens above the age of 18 on the electoral register, it is difficult to find a rational explanation for disqualifying 18 years old

citizens from jury service.

As such, the Provision at Issue discriminates against citizens less than 20 years of age – 19 and 18 year old citizens in particular – without a justifiable cause, and therefore, violates the principle of equality.

5. Case on Inspection Period of Accounting Records Reported under Political Funds Act

[2018Hun-Ma1168, May 27, 2021]

In this case, the Court held that the "three months" requirement of Article 42, Section (2) of the Political Funds Act infringes Complainant's right to know, and thus, is unconstitutional. This requirement provides that accounting records reported in accordance with the Political Funds Act shall be made available for public inspection for three months,

Background of the Case

Under the Political Funds Act, certain persons must appoint an individual to be responsible for the accounting of political funds revenues and expenditures. These persons include the representatives of a political party or a supporters' association, a National Assembly member who has a supporters' association, and a candidate for election to public office. Such persons must also report to an election commission the appointed individual and the established deposit account for the receipt and disbursement of political funds. Political funds must be received and disbursed by the appointed individual only through the established deposit account. This individual is required to report, *inter alia*, a statement of political funds revenues and expenditures to the election commission once or twice a year. In doing so, he or she must accompany the report with, *inter alia*, receipts for political funds revenues and expenditures and bankbooks containing details of political funds revenues and expenditures.

Complainant will seek to inspect accounting records that are reported to a competent election commission, including statements of political funds revenues and expenditures ("Statements"), receipts for political funds revenues and expenditures ("Receipts"), and bankbooks containing details of political funds revenues and expenditures ("Bankbooks")

(hereinafter collectively referred to as "Accounting Records").

Complainant filed the constitutional complaint in this case on December 5, 2018, asserting that her right to know is infringed by a provision of the Political Funds Act, which limits the period of inspection of Accounting Records to three months.

Subject Matter of Review

The subject matter of review in this case is whether the "three months" requirement of Article 42, Section (2) of the Political Funds Act (amended by Act No. 9975 on January 25, 2010) (hereinafter referred to as the "Provision at Issue") infringes the right to know of Complainant. The Provision at Issue reads as follows:

Provision at Issue

Political Funds Act (amended by Act No. 9975 on January 25, 2010)

Article 42 (Inspection of Accounting Reports, etc. and Provision of Copies thereof)

(2) The competent election commission shall keep in its office records that have been reported pursuant to the provisions of Article 40, Sections (3) and (4)—namely a record of property status, a record of details of political funds revenues and expenditures, and accompanying documents—and shall make such records available for public inspection for three months (hereinafter referred to as "inspection period") from the date on which they are published under Section (1). From among such records, only the portion of the revenues and expenditures statement under Article 40, Section (4), Item 1 relating to election expenses may be offered for public inspection through the Internet website of an election commission, but may not be so offered during any period other than the inspection period.

Summary of the Decision

The Provision at Issue limits the inspection period of Accounting Records to three months to promote early resolution of legal relationships or disputes surrounding political funds and to reduce the workload of election commissions that maintain, and make available for public inspection, a vast amount of records. In these respects, the Provision at Issue serves legitimate legislative ends and is an appropriate means to such ends.

Allowing citizens free access to records concerning political funds and providing them with an opportunity to examine the transparency of political funds by themselves is consistent with the legislative objectives and fundamental principles of the Political Funds Act. This is all the more so in this era where the improvement of political funds transparency and the elimination of corruption have become part of the zeitgeist. Further, records of details of political funds expenditures and other records concerning the funds are key indicators showing how politicians have performed, and as such, are possible sources for assessing politicians. Thus, there is a need to provide citizens with such records adequate for their wants. Moreover, guaranteeing free access to the records may improve citizens' trust in politics and encourage their active engagement in political funds contribution, voting, etc., and may ultimately increase their political participation. In view of these considerations, the Court finds that restrictions on citizens' access to the records concerning political funds should only be imposed to the minimum extent necessary.

While requests may be made for copies of Statements and other Accounting Records, it is important to also ensure the accessibility of Receipts and Bankbooks. Citizens can discover problems with political funds revenues and expenditures by inspecting these documents, which are sources of verification. Under current law, Receipts and Bankbooks are not subject to a request for copies, and thus, can only be accessed

by inspection. However, because the transcription of Receipts and Bankbooks is not permitted during inspection, and because of the short three-month inspection period, it is difficult for citizens to comprehend and analyze the content of the documents. Additionally, the inspection period, which expires three months from the date when Accounting Records are published, is unduly short. Whereas the Public Official Election Act sets forth a special rule that a short prescription period of six months commencing after the relevant election day shall apply to prosecutions of election crimes for prompt resolution of situations of legal uncertainty arising from elections, there is no such rule under the Political Funds Act for prosecutions of violations of this Act. Further, the inspection period is even shorter than the prescription period under the Public Official Election Act. In addition, by utilizing technological advancements in data creation and storage, election commissions have considerably decreased their workload for maintaining records, making them available for public inspection, etc., and it seems that they will continue to be capable of handling the workload. Although an inspection period restriction *per se* may be necessary to prevent prolonged disputes surrounding political funds and to alleviate the administrative workload, when considering all of these factors, it is apparent that the current inspection period is unreasonably short.

Admittedly, the Court recognizes that the Provision at Issue promotes early resolution of legal relationships or disputes surrounding political funds and relieves the workload of election commissions. However, due to the short inspection period, Complainant is deprived of a practical opportunity to study and analyze Accounting Records or to discover problems with them. When balanced against the public interests served by the Provision at Issue, this deprivation is significant in light of the implications of transparent publication of political funds to promote democracy.

Accordingly, the Provision at Issue violates the rule against excessive restriction, and thus, infringes the right to know of Complainant.

Summary of Dissenting Opinion of Three Justices

Determining an inspection period of Accounting Records is basically a matter that lies within the sphere of legislative discretion. Thus, it cannot be assumed that the inspection period places restrictions that are greater than necessary on the right to know unless the time frame is so short as to essentially violate citizens' access to information.

It is true that citizens are not allowed to request copies of Receipts and Bankbooks and that inspection is the only way to examine these documents. Nevertheless, they may request copies of other Accounting Records, including Statements, which contain, *inter alia*, the dates and amounts of receipts and disbursements, as well as the sources and entities that provided and received political funds. They may also access Statements through the Internet website of an election commission for a certain period of time. Thus, citizens can obtain detailed information as to how political funds are received and disbursed. The Political Funds Act endows an election commission, an independent body under the Constitution, with the authority to receive an accounting report and to investigate and verify the information concerning it. This Act also provides certain safeguards to promote truthful and accurate reporting of details of political funds revenues and expenditures. Among these safeguards are criminal penalties for those who have failed to submit or have falsely submitted Receipts, Bankbooks, or other documents or who have entered falsely, counterfeited, or forged Receipts. In sum, given that the details of political funds expenditures can be obtained through copies of Statements and other Accounting Records or through the Internet, and that there are legal mechanisms in place to prevent the submission of false Receipts and Bankbooks, we disagree that limiting the inspection period to three months essentially violates citizens' access to accounting materials.

Therefore, the Provision at Issue does not violate the rule against excessive restriction, and thus, does not infringe the right to know of Complainant.

6. Case on Legislative Omission of Not Providing for Deletion of Criminal Investigation Data regarding Juveniles Whose Court Cases Ended by Ordinary Court's Decision Not to Impose Disposition

[2018Hun-Ka2, June 24, 2021]

In this case, the Court held that Article 8-2, Sections (1) and (3), of the Act on the Lapse of Criminal Sentences violate the rule against excessive restriction and thus infringe the right to informational self-determination because they failed to provide for the retention period and deletion of criminal investigation data regarding juveniles whose cases ended without a disposition after being transferred to the Juvenile Department of a court.

Background of the Case

The defendant in this case was charged with violation of the Punishment of Violence Act and was transferred to the Juvenile Department of the Changwon District Court by the Changwon District Prosecutor's Office. Subsequently, on March 26, 2002, the District Court rendered a decision not to impose a disposition for the above juvenile protection case. On April 18, 2016, the defendant in this case requested deletion of the criminal investigation data by the Commissioner General of the Korean National Police Agency, who is responsible for managing criminal investigation data. The request was denied because there is no provision for such deletion in the Act on the Lapse of Criminal Sentences. Therefore, the defendant lodged an administrative complaint against the Commissioner General of the Korean National Police Agency to request the annulment of this denial on May 18, 2016.

During the pendency of the above proceeding, the Seoul Administrative Court, on its own motion, decided to request adjudication on the constitutionality of Article 8-2 of the Act on the Lapse of Criminal

Sentences.

Subject Matter of Review

The subject matter of review in this case is whether Article 8-2, Sections (1) and (3), of the former Act on the Lapse of Criminal Sentences (amended by Act No. 10211, March 31, 2010 and before amended by Act No. 17937, March 16, 2021, hereinafter referred to as the "Former Act Provisions at Issue"), violate the Constitution because they fail to provide for the retention period and deletion of criminal investigation data regarding juveniles whose cases were transferred to the Juvenile Department and ended without taking measures.

Furthermore, Article 8-2, Sections (1) and (3), of the current Act on the Lapse of Criminal Sentences (hereinafter referred to as the "Current Act Provisions at Issue") still do not provide for the retention period and deletion of such criminal investigation data, and thus, they will obviously draw the same conclusion as the Former Act Provisions at Issue regarding their constitutionality, and they are also subject to the constitutionality review. The Provisions at Issue of the Former and Current Acts read as follows.

Provisions at Issue

Former Act on the Lapse of Criminal Sentences (amended by Act No. 10211, March 31, 2010 and before amended by Act No. 17937, March 16, 2021)

Article 8-2 (Clearing of Investigation Record Materials) (1) Where it falls under any of the following Items, the relevant matters in the computerized investigation record materials shall be deleted when the relevant retention period pursuant to the classifications set forth in each Item of Sections (2) and (3) has elapsed:

1. Where the prosecutor renders a disposition not to institute a public action based on being cleared of suspicion, having no right of arraignment, non-constitution of a crime, or suspension of prosecution;

2. Where the judgment of innocence, dismissal of a case or dismissal of a public action by the court becomes final and conclusive;

3. Where the decision of the court for dismissal of a public action becomes final and conclusive.

(3) Notwithstanding Section (2), the period of retaining investigation record materials on juveniles under Article 2 of the Juvenile Act at the time when a disposition was taken or when a judgement or decision became final and conclusive shall be pursuant to the classifications set forth in each of the following Items:

1. In cases of a disposition not to institute a public action based on the suspension of prosecution: Three years from the date of such disposition;

2. In cases of a disposition not to institute a public action based on being cleared of suspicion, having no right of arraignment, non-constitution of a crime under Section (1) 1: Until the time such disposition is taken;

3. In cases of judgement under Item 2 of Section (1) or decision under of Item 3 of the same Section: Until the time judgement or decision becomes final and conclusive.

Act on the Lapse of Criminal Sentences (amended by Act No. 17937, March 16, 2021)

Article 8-2 (Arrangement of Investigation Record Materials) (1) Where it falls under any of the following Items, the relevant matters in the computerized investigation record materials shall be deleted when the relevant retention period pursuant to the classifications set forth in each Item of Sections (2) and (3) has elapsed:

6. Case on Legislative Omission of Not Providing for Deletion of Criminal Investigation Data regarding Juveniles Whose Court Cases Ended by Ordinary Court's Decision Not to Impose Disposition

1. Where the judicial police officer renders a non-transfer decision of being cleared of suspicion, having no authority to prosecute, or non-constitution of a crime;

2. Where the prosecutor renders a non-prosecution disposition of being cleared of suspicion, having no authority to prosecute, or suspension of prosecution;

3. Where the judgment of being not guilty, or acquittal or rejection of a prosecution by the court becomes final and conclusive;

4. Where the decision of the court for rejection of a prosecution becomes final and conclusive.

(3) Notwithstanding Section (2), the period of retaining investigation record materials on juveniles under Article 2 of the Juvenile Act at the time when a non-transfer decision or non-prosecution disposition under Section (1) 1 and 2 was made or when a judgement or decision under Items 3 and 4 of the same Section became final and conclusive shall be pursuant to the classifications set forth in each of the following Items:

1. In cases of a non-transfer decision under Section (1) 1: Four months from the date of such decision

2. In cases of a non-prosecution disposition based on the suspension of prosecution under Section (1) 2: Three years from the date of such disposition;

3. In cases of a non-prosecution disposition based on being cleared of suspicion, having no right of arraignment, or non-constitution of a crime under Section (1) 2: Until the time such disposition is taken

4. In cases of a judgement under Section (1) 3 or a decision under Section (1) 4: Until when the judgement or decision becomes final and conclusive.

Summary of the Decision

1. Whether the Right to Informational Self-determination is Violated

The Provisions at Issue provide for the retention period and deletion of criminal investigation data regarding juveniles, but not for juveniles whose cases were transferred to the Juvenile Department of a court and ended without a disposition by decision of the court. Thus, their personal information recorded in the criminal investigation data is preserved until their death. If the juvenile is investigated or tried for other cases, criminal investigation data can be used as basic material for future investigations or for decisions on whether to prosecute or how to sentence. Therefore, the retention of such criminal investigation data is deemed to have a legitimate purpose and the means that are used are appropriate to achieve that purpose.

However, the intent of the Juvenile Act is to ensure sound fostering of juveniles with antisocial behavior by allowing juvenile cases to be tried as a protection case instead of as a criminal case so that they can receive a protective disposition. When the judge of the Juvenile Department deems that it is unable or unnecessary to make a protective disposition, it is only natural that the future status of the juvenile who was transferred to the Juvenile Department and received no disposition should not be affected by such fact.

Also, as time passes after the commission of a crime, the value of the criminal investigation data decreases as either a clue in an investigation or as material for determining habitualness and sentencing. Thus, the Court find it difficult to accept the need to uniformly preserve the criminal investigation data for all cases transferred to the Juvenile Department until the death of the parties, without regard to factors such as the gravity of the case or the time elapsed from the decision. Regarding the investigation records of the cases ended without a disposition by the Juvenile Department and reply thereto, the public

interest of discovering substantial truth and achieving criminal justice is outweighed by the substantial or psychological damage that may be suffered by the parties and the resultant obstacle to rehabilitation and return to society.

Therefore, the Provisions at Issue violate the rule against excessive restriction and thus infringe the right to informational self-determination of juveniles who received no disposition by the Juvenile Department of the court.

2. Decision of Nonconformity to the Constitution

If we were to declare the Provisions at Issue simply unconstitutional, it would lead to the unreasonable result of eliminating provisions that provide the grounds for the retention period and deletion of criminal investigation data regarding juveniles. Legislators are acknowledged to have discretion to determine the means to be employed in eliminating unconstitutional elements of the Provisions at Issue. Accordingly, as for the Former Act Provisions at Issue, we declare them nonconforming to the Constitution and suspend their application out of concern that their continued application may prevent the unconstitutionality decision from taking effect in this case. As for the Current Act Provisions at Issue, we deliver a decision of nonconformity to the Constitution and order that these Provisions continue to be applied until an amendment is made by June 30, 2023.

7. Case on Passenger Transport Service Act Provisions Restricting Arrangement of Drivers for Van Renters

[2020Hun-Ma651, June 24, 2021]

In this case, the Constitutional Court held that two portions of Item 1, Sub-item (f) of the proviso of Article 34, Section (2) of the Passenger Transport Service Act do not violate the principle against excessive restriction, and thus, do not infringe on the freedom of occupation of a car rental business. The relevant portions allow a car rental business to arrange a driver for a person who rents an 11-15 passenger van for purposes of tourism only in cases where that van is rented for six hours or more or where the rental or return location is at an airport or in a harbor area.

Background of the Case

Complainant Socar, Inc. is a company established for the purposes of providing car rental, car-sharing, related intermediary services, and etc., and Complainant VCNC, Inc. is a company established for the purposes of software development, database searching, development and sales, content creation and development, and etc. (hereinafter collectively referred to as "Complainant Companies"). In around October 2018, Complainant VCNC, Inc. created an app called "Tada." This app combines Socar, Inc.'s 11-passenger Carnival van rental service and driver arrangement service to form a mobility service called "Tada Basic," which provides ride hailing service to users on a real-time basis (hereinafter referred to as "Tada Service") via the app.

Complainants H.J. and K.S.W. are employees of Complainant Companies in charge of Tada Service related works (hereinafter collectively referred to as "Complainant Employees") and Complainants J.J. and C.W. are Tada Service drivers (hereinafter collectively referred to as "Complainant Drivers"). Complainants C.S., K.S.Y, H.S., and S.A.

are previous users of Tada Service (hereinafter collectively referred to as "Complainant Users").

Article 34, Section (2) of the Passenger Transport Service Act was amended on April 7, 2020 to add the phrase "for purposes of tourism" and other specifics on rental hours and rental/return locations, which serve as requirements for car rental businesses to arrange a driver for motor vehicles. Complainants filed this complaint on May 1, 2020 and argued that the amendment infringes upon Complainants' fundamental rights, including their freedom of occupation.

Subject Matter of Review

The subject matter of this case is whether (1) the "for purposes of tourism" of the first portion and (2) the second portion of Item 1, Sub-item (f) of the proviso of Article 34, Section (2) (hereinafter collectively referred to as the "Provisions at Issue") of the Passenger Transport Service Act (amended by Act No. 17234 on April 7, 2020) infringe upon the fundamental rights of Complainants.

Provisions at Issue

Passenger Transport Service Act (amended by Act No. 17234 on April 7, 2020)

Article 34 (Prohibition of Transport with Compensation, etc.) (2) No person shall arrange a driver for a person who rents a commercial motor vehicle from a car rental business entity: *Provided*, that a person may arrange a driver for any person who falls under any of the following cases:

1. Where a car rental business entity arranges a driver for any lessee of cars who falls under any of the following cases:
   (f) A lessee who rents from that business entity an 11-15 passenger van for purposes of tourism, only in cases where that van is rented

for six hours or more or where the rental or return location is at an airport or in a harbor area

Summary of the Decision

1. Assessment on Complainant Employees, Complainant Drivers and Complainant Users (Dismissed)

The Provisions at Issue caused changes in the work scope of Complainant Employees, prevented Complainant Drivers from working as a Tada Service driver and Complainant Users from using the van rental with a driver service. Nevertheless, such harms are an indirect and factual consequence of the Provisions at Issue's process of regulating the business model of Complainant Companies. Therefore, the constitutional complaint of Complainant Employees, Drivers, and Users is nonjusticiable for lack of relevance between their fundamental rights infringement and the Provisions at Issue.

2. Assessment on Complainant Companies (Rejected)

○ Whether the rule of clarity under the principle of *nulla poena sine lege* is violated

Considering the dictionary definition of "tourism" and the use of the word in the context of the Tourism Promotion Act, it is clear that passenger movement for work, study, etc., is excluded from the scope of tourism. Further, since the Provisions at Issue additionally prescribe limits as to rental hours and rental/return locations, one can clearly understand the meaning of the phrase "for purposes of tourism." Therefore, the aforesaid phrase does not violate the rule of clarity under the principle of *nulla poena sine lege*.

○ Infringement on the freedom of occupation: whether the principle

against excessive restriction is violated

Arranging a driver from a car rental business entity has been prohibited in principle since the amendment of the Passenger Transport Service Act on January 28, 2000. In order to improve convenience of small and medium sized tourist groups, an exception to allow arranging a driver to a lessee of an 11-15 passenger van was introduced by the October 15, 2014 amendment of the Enforcement Decree of the Passenger Transport Service Act. Nonetheless, a car rental business entity's provision of 'car rental with driver service for an extremely short period of time' caused fierce dispute between relevant industries and sparked intense social conflict; the service was effectively analogous to the traditional service provided by the taxi transportation business, but it has not been subject to the same regulation as the taxi business. The Provisions at Issue require tour purposes in arranging a driver with the aim of establishing fair order in passenger transportation, ensuring overall development of passenger transport service, and offering convenience to small and medium sized tourist groups. In this sense, legitimacy of the purpose and appropriateness of means are recognized.

The original operation of the car rental business is to provide a rental vehicle to a lessee – with the premise that the lessee drives the vehicle for his/her own purpose and not for passenger transportation – who will return the vehicle to a car rental business operator after using it for a certain period of time. Because a car rental with driver service may generate concerns that it will become a passenger transportation service that is effectively analogous to that provided by the taxi transportation business, the Passenger Transport Service Act prescribes different requirements and regulations for permitting the car rental with driver service in accordance with the objectives and functions of the car rental and taxi transportation businesses, respectively. The Court finds that the Provisions at Issue adjusted the function and scope of the car rental business with the intention to do the following: prevent regulation imbalance between the car rental and taxi businesses caused by the

emergence of car rental with driver service; clarify the requirements for driver arrangement in a way that meets the original tour purposes; and, keep the operation of the car rental business in alignment with the newly established passenger transportation platform business. Not prescribing minimum hours for a passenger van rented out or to be returned at an airport or a harbor area, and prescribing six hours – equivalent to a quarter of a day – as the minimum rental hours if such geographical condition is not met, is not an excessive restriction. Furthermore, the Provisions at Issue provide a one year and six month grace period, within which car rental businesses may minimize the damage caused by changes in the legal landscape, and allow the possibility of incorporating the conventional operation of the car rental business into the newly established passenger transportation platform business. Thus, the Provisions at Issue satisfy the least restrictive means test.

As there is a strong public interest in passenger transport services to operate smooth transport of passengers, achieve overall development of passenger transport services, and provide adequate transportation service, it is necessary for the State to take appropriate regulatory actions over driver arrangement by car rental businesses. Hence, the public interest issues that the Provisions at Issue aim to achieve are significant. Meanwhile, Complainant Companies not only can continue car rental service with driver arrangement during the grace period, but also have the possibility of operating the newly created passenger transportation platform business. Thus, the private interest infringed by the Provisions at Issue do not outweigh the aforesaid public interest. The Provisions at Issue satisfy the principle of balance of interests.

Therefore, the Provisions at Issue do not violate the principle of excessive restriction and do not infringe on the freedom of occupation of Complainant Companies.

○ Infringement on the freedom of occupation: whether the principle

of the protection of legitimate expectation is violated

Complainant Companies claim there is a legitimate expectation that the exception clause on car rental with driver service – which leaves room for Complainant Companies to provide transportation service that is effectively analogous to that of taxi transportation, while not being regulated to the extent of the taxi transportation business – should remain as is, allowing their business to continue under the status quo. After comprehensively considering various factors, such as the legislative intent of the Passenger Transportation Act, the legislative intent behind the exception allowing car rental businesses to arrange a driver for passenger vans, the legislative delegation to lower-level rules, and the serious conflict between the transport businesses at issue, the Court finds that such expectation of Complainant Companies cannot be protected. Therefore, the Provisions at Issue do not violate the principle of the protection of legitimate expectation and do not infringe on the freedom of occupation of Complainant Companies.

8. Case on Imposition of Reporting Obligations on Persons Who May Be Subject to Post-Release Supervision

[2017Hun-Ba479, June 24, 2021]

The Court held that portions of Article 6, Section (1) of the former "Post-Release Supervision Act (hereinafter referred to as the "PRSA")" and Article 27, Section (2) of the current PRSA, concerning post-release reporting obligations, do not violate the Constitution. Specifically, the Court reviewed 1) the relevant part of the first sentence of Article 6, Section (1) of the former PRSA, which imposes an obligation on a person who may be subject to post-release supervision to report, within seven days after his or her release from a correctional institution or other place of confinement, the fact of such release, and 2) the relevant part of Article 27, Section (2) of the current PRSA concerning "the post-release reporting obligation in the first sentence of Article 6, Section (1) of the former PRSA," which provides a penalty for violation of the post-release reporting obligation.

It also ruled that portions of Article 6, Section (2) of the current PRSA, and Article 27, Section (2) of the current PRSA, concerning change reporting obligations, do not conform to the Constitution. Specifically, the Court reviewed 1) the relevant part of the first sentence of Article 6, Section (2) of the current PRSA, which imposes an obligation on a person who may be subject to post-release supervision to report, after his or her release from a correctional institution or other place of confinement, any changes in the information reported under Article 6, Section (1) of this PRSA, including a change in his or her intended place of residence, within seven days from the date of such changes and 2) the relevant part of Article 27, Section (2) of the current PRSA concerning "the first sentence of Article 6, Section (2) of the current PRSA," which provides a penalty for violation of the change reporting obligation. The Court ordered the temporary application of these provisions until the legislature amends them before June 30, 2023.

8. Case on Imposition of Reporting Obligations on Persons Who May Be Subject to Post-Release Supervision

Background of the Case

Complainant received sentences of five years' imprisonment with labor and five years' suspension of qualifications and completed his term at the Andong Correctional Institution. Because Complainant was a "person who may be subject to post-release supervision" within the meaning of the PRSA, he was obligated under Article 6 of this act to report the fact of his release and a change in his home address that he had previously reported. Despite that obligation, Complainant failed to report the information without any justifiable reason and was charged with violating the PRSA.

While his case was pending before the trial court, Complainant filed a petition to request a constitutional review of Articles 2 and 3, Article 6, Sections (1) and (2), and Article 27, Section (2) of the PRSA. On November 1, 2017, that petition was rejected, and on the same date he was fined of one million won. On November 30, 2017, he filed the constitutional complaint in this case.

Subject Matter of Review

The subject matter of review in this case is whether the following provisions violate the Constitution:

1) the part of the first sentence of Article 6, Section (1) of the former PRSA (wholly amended by Act No. 4132 on June 16, 1989, and before amendment by Act No. 16928 on February 4, 2020) concerning the post-release reporting obligation; 2) the part of Article 27, Section (2) of the current PRSA (wholly amended by Act No. 4132 on June 16, 1989) concerning "the post-release reporting obligation in the first sentence of Article 6, Section (1) of the former PRSA (wholly amended by Act No. 4132 on June 16, 1989, and before amendment by Act No. 16928 on February 4, 2020)" (these two provisions are hereinafter collectively referred to as the "Post-Release Reporting and Penalty Provisions"); 3)

the first sentence of Article 6, Section (2) of the current PRSA (wholly amended by Act No. 4132 on June 16, 1989) (hereinafter referred to as the "Change Reporting Provision"); and 4) the part of Article 27, Section (2) of the current PRSA concerning "the first sentence of Article 6, Section (2) of the current PRSA" (referred to hereinafter, together with the Change Reporting Provision, as the "Change Reporting and Penalty Provisions") (all four provisions hereinafter collectively referred to as the "Provisions at Issue"). The Provisions at Issue read as follows:

Provisions at Issue

Former PRSA (wholly amended by Act No. 4132 on June 16, 1989, and before amendment by Act No. 16928 on February 4, 2020)

Article 6 (Reporting by Persons Who May Be Subject to Post-Release Supervision)

(1) Prior to his or her release from confinement, the person who may be subject to post-release supervision shall, as provided by Presidential Decree, report his or her intended place of residence and other matters prescribed by Presidential Decree to the chief of the police station having jurisdiction over his or her intended place of residence, via the warden of the place of confinement in which such person who may be subject to post-release supervision completes the sentence, namely a correctional institution, juvenile reformatory, detention center, police station cell, or military correctional institution or prison (hereinafter referred to individually as an "Institution"); within seven days after his or her release from confinement, such person who may be subject to post-release supervision shall report the fact of his or her release to the said chief of the police station having jurisdiction over his or her intended place of residence. (*Second sentence omitted.*)

8. Case on Imposition of Reporting Obligations on Persons Who May Be Subject to Post-Release Supervision

Current PRSA (wholly amended by Act No. 4132 on June 16, 1989)

Article 6 (Reporting by Persons Who May Be Subject to Post-Release Supervision)

(2) When there are any changes in the matters reported under Section (1) after the person who may be subject to post-release supervision is released from the Institution, he or she shall report the changes to the chief of the competent police station within seven days from the date when they are made: (*Second sentence omitted.*)

Article 27 (Penalty)

(2) A person who fails to file, or falsely files, a report under Article 6, Section (1) or (2) or Article 18, Section (1), (2), (3), or (4), or who fails to state in the report his or her intended place of residence or home address clearly without any justifiable reason, shall be punished by imprisonment with labor for not more than two years or by a fine not more than one million won.

Summary of the Decision

1. Assessment of Post-Release Reporting and Penalty Provisions

A. Whether the rule against excessive restriction is violated

The Post-Release Reporting and Penalty Provisions impose an obligation on a person who may be subject to post-release supervision (hereinafter referred to as "Person") to report his or her release to the chief of the police station having jurisdiction over the Person's intended place of residence within seven days after release from confinement. These provisions provide a penalty for violation of the post-release reporting obligation.

In light of the content of this obligation, the Court believes that no significant inconvenience is caused to the Person, that no unnecessary

and undue duty is imposed on citizens for administrative convenience, and that the seven-day reporting period is not excessively short. Considering, *inter alia*, that crimes eligible for post-release supervision have a substantial impact upon the protection of a democratic system, the maintenance of social order, and the survival and freedom of citizens, and that the PRSA sets out the post-release reporting obligation for the purposes of identifying Persons and obtaining data for assessing their risk of recidivism and other factors relevant to determining the necessity of their post-release supervision, the Court finds that the choice of criminal penalties as a sanction for violation of the post-release reporting obligation is not regarded as harsh, nor are the maximum punishments prescribed in the PRSA unusually high compared with those in other statutes.

Therefore, the Post-Release Reporting and Penalty Provisions do not violate the rule against excessive restriction and thus, do not infringe Complainant's secrecy and freedom of privacy and his right to informational self-determination.

B. Whether the principle of equality is violated

In light of the facts, *inter alia*, that the PRSA imposes reporting obligations suitable for the Person and the post-release supervisee (hereinafter referred to as the "Supervisee") and, in this regard, the imposition of those obligations is not deemed *per se* unreasonable; and that the Person's and the Supervisee's reporting obligations are similar in the sense that they are necessary for the collection of information by an administrative authority, imposing the reporting obligations on the Person and the Supervisee and prescribing the same maximum statutory penalties for violation of those obligations do not translate into a breach of the principle of equality. Moreover, the reason for the difference between post-release supervision, monitored treatment, and probation—in scope of and criteria to be a person subject to a reporting obligation and

in punishment for violation of the obligation—is that the systems of the three types of supervision are distinct in terms of their purposes and intent, legal nature, the status of persons subject to reporting obligations, and the content of supervision.

Therefore, the Post-Release Reporting and Penalty Provisions do not violate the principle of equality.

2. Assessment of Change Reporting and Penalty Provisions

A. Whether the Change Reporting Provision is violated

The Change Reporting Provision imposes on the Person the obligation to report, after his or her release from confinement, any changes in the information that he or she previously reported under Article 6, Section (1) of the PRSA, including his or her intended place of residence. The Court recognizes that to respond to social developments, it is necessary to delegate to the executive the task of prescribing in the subsidiary legislation of the PRSA concrete matters to be reported by the Person. Since the matters to be reported by the Person that are provided in the Change Reporting Provision and Article 6, Section (1) of the PRSA would be necessary for an evaluation of the Person's risk of reoffense, it is sufficiently predictable that the task delegated under Article 6, Section (1) of the PRSA will include prescribing in the Presidential Decree of the PRSA the reporting of information necessary in ascertaining the Person's living environment, personality, behavior, etc., such as information about his or her occupation, assets, relationship with family and friends. Therefore, the Change Reporting Provision does not violate the rule against blanket delegation.

B. Whether the rule against excessive restriction is violated

(1) Unconstitutionality opinion of Justices Lee Suk-tae, Kim Kiyoung,

Moon Hyungbae, and Lee Mison

The Change Reporting and Penalty Provisions impose on the Person, whose risk of re-offense is not determined, a reporting obligation similar to that imposed on the Supervisee, who is recognized as posing a risk of reoffense and is thus under post-release supervision—a preventive measure. The provisions also prescribe the same criminal penalty for violation of the Person's obligation as for violation of the Supervisee's obligation. In this regard, these Provisions not only run counter to a requirement flowing from the principle of *nulla poena sine lege* which requires that no preventive measure shall be imposed unless an individual poses a risk of reoffense, but also place limitations that are more restrictive than necessary to the achieve the Provisions' legislative purposes.

Whereas the decision whether to renew post-release supervision is made every two years upon an assessment of the Supervisee's risk of recidivism at the time of the evaluation, there is no regular review of the reporting obligation imposed on the Person. As a consequence, the Person indefinitely assumes that obligation. This regulatory scheme produces an unreasonable result in that the Person is placed in a similar position as the Supervisee before the former is given a final decision imposing post-release supervision.

For these reasons, the Change Reporting and Penalty Provisions are contrary to the rule against excessive restriction and thus, infringe Complainant's secrecy and freedom of privacy and his right to informational self-determination.

(2) Constitutional nonconformity opinion of Justices Yoo Namseok and Lee Eunae

The Change Reporting Provision imposes on the Person who is released from confinement the obligation to notify of any changes in the information that he or she previously reported, such as his or her intended place of residence, within seven days from the date when such

changes are made. However, because no maximum term is specified for performance of this obligation, the Person—who is not under post-release supervision—must fulfill it for an indefinite period of time. This treatment of the Person cannot be justified or permitted.

While it is true that the Person is relieved of the change reporting obligation if an exemption decision is issued, the existence of this extraordinary remedial procedure cannot alone rectify the fundamental unconstitutionality of that obligation.

In sum, we observe that in pursuit of the public interest in determining whether to initiate post-release supervision of the Person, the Change Reporting and Penalty Provisions impose on him or her for an abnormally long period a reporting obligation whose violation carries a criminal penalty. In this respect, they are contrary to the rule against excessive restriction and thus, infringe Complainant's secrecy and freedom of privacy and his right to informational self-determination.

The unconstitutionality of the Change Reporting and Penalty Provisions lies in the fact that the Person assumes the change reporting obligation for an unlimited period. We believe that the legislature can eliminate this unconstitutionality by setting a maximum term for performance of that obligation that is considered an appropriate time frame for determining the risk of reoffense of the Person.

If the Court rendered decisions of simple unconstitutionality on the above Provisions, a legal vacuum would arise from the immediate absence of change reporting obligations whose imposition on Persons is legitimate. Therefore, we find it reasonable to declare the above Provisions nonconforming to the Constitution and to order their temporary application until they are amended by the legislature.

3. Conclusion

The Post-Release Reporting and Penalty Provisions are not in violation

of the Constitution. As regards the Change Reporting and Penalty Provisions, an "unconstitutionality decision quorum requirement," requiring a vote of six or more Justices to issue an unconstitutionality decision, is satisfied by the four Justices' simple unconstitutionality opinions and the two Justices' constitutional nonconformity opinions. Accordingly, the Court declares the Change Reporting and Penalty Provisions nonconforming to the Constitution and orders their continued application until the legislature amends them before June 30, 2023.

Summary of Dissenting Opinion of Justices Lee Suk-tae, Kim Kiyoung, Moon Hyungbae, and Lee Mison as to Post-Release Reporting and Penalty Provisions

The Post-Release Reporting and Penalty Provisions impose a reporting obligation and a penalty for its violation on individuals who are not recognized as presenting a danger of reoffense, only on the ground that the individuals are Persons. In consequence, these Provisions are in noncompliance with a requirement flowing from the principle of *nulla poena sine lege* which applies in the context of preventive measures.

The chief of the competent police station is served with adequate information about the Person. The chief is informed of his or her intended place of residence and expected time and date of arrival at that place on the following occasions: through a notice about the Person at the time an individual becomes the Person; a notice about the Person before his or her release from confinement, which includes information reported by the Person in accordance with his or her pre-release reporting obligation; and, a notice about the Person at the time he or she is released from confinement. Given that a relatively limited number of Persons are newly reported to a local police station and that the Enforcement Decree of the PRSA requires reporting of their activities and circumstances, it is not difficult to discover, based on the existing data, their actual whereabouts. Therefore, the legislative goals of the

PRSA can be substantially achieved by less restrictive means.

Thus, the Post-Release Reporting and Penalty Provisions infringe Complainant's secrecy and freedom of privacy and his informational self-determination by violating the rule against excessive restriction.

Summary of Dissenting Opinion of Justices Lee Seon-ae, Lee Jongseok, and Lee Youngjin as to Change Reporting and Penalty Provisions

Crimes eligible for post-release supervision, which are contrary to national interests, have a substantial impact upon the protection of a democratic system, the maintenance of social order, and the survival and freedom of citizens. Thus, there is a special importance in guarding against recidivism. Since the reporting obligation of a Person that is discharged under the Change Reporting and Penalty Provisions is limited to changes in previously reported information, we find that this obligation is not excessive.

The change reporting obligation of the Person should be enforced in order to effectively manage and reduce his or her risk of recidivism. Because a crime eligible for post-release supervision may be committed on the basis of a long-running scheme, the legislative purposes of the PRSA would be frustrated by establishing a uniform maximum term for fulfillment of the change reporting obligation. Meanwhile, the Person may receive an exemption decision if he or she establishes a spirit of law-abidingness and if he or she meets other specific requirements. With these considerations in mind, we conclude that the imposition of the change reporting obligation is an acceptable restriction.

For the foregoing reasons, the Change Reporting and Penalty Provisions do not violate the rule against excessive restriction and thus, do not infringe Complainant's secrecy and freedom of privacy and his right to informational self-determination.

9. Case on the Qualification for a Certified Tax Accountant

[2018Hun-Ma279, 2018Hun-Ma344, 2020Hun-Ma961 (consolidated), July 15, 2021]

In this case, the Court held that the following provisions do not infringe upon the fundamental rights of Petitioners, who were qualified as attorneys-at-law after the enforcement date thereof: (1) Article 3 of the former Certified Tax Accountant Act (amended by Act No. 15288 on December 26, 2017, and before amended by Act No. 17339 on June 9, 2020), which no longer provided that an attorney-at-law shall be automatically qualified as a certified tax accountant, and (2) the part of Article 1 of the Certified Tax Accountant Act Addenda (December 26, 2017, Act No. 15288) concerning Article 3 of the above Certified Tax Accountant Act and Article 2 of this Addenda, which provide, respectively, for the enforcement date of the Provision, and for the transitional measure relating to the qualification of an attorney-at-law as a certified tax accountant.

Background of the Case

Petitioners in this case were qualified as attorneys-at-law after the enforcement date of Article 3 of the former Certified Tax Accountant Act (amended by Act No. 15288 on December 26, 2017, and before amended by Act No. 17339 on June 9, 2020).

Attorneys-at-law have been granted the qualification as a certified tax accountant under Article 3 of the Certified Tax Accountant Act for more than 50 years since its establishment on September 9, 1961. However, the Certified Tax Accountant Act, amended by Act No. 15288 on December 26, 2017, deleted Article 3, Item 3, which included an attorney-at-law in the category of persons qualified as a certified tax accountant (hereinafter referred to as the “automatic qualification as a certified tax accountant”) in addition to persons who passed a qualifying

examination for certified tax accountants. Also, Article 1 of the Addenda to the Certified Tax Accountant Act (Act No. 15288, Dec. 26, 2017) stipulates the enforcement date of the above Act as January 1, 2018, and Article 2 of the Addenda to the Act provides the transitional measure under which a person qualified as a tax accountant pursuant to the previous Item 3 of Article 3 at the time this Act enters into force shall be deemed qualified as a tax accountant, notwithstanding the amended provision of Article 3. Consequently, persons who acquired the qualification of an attorney-at-law after January 1, 2018, the enforcement date of the amended Act, are no longer automatically qualified as a certified tax accountant.

Therefore, Petitioners filed this constitutional complaint, arguing that Article 3 and Articles 1 and 2 of the Addenda to the Certified Tax Accountant Act infringed upon their fundamental rights, including the right to equality, the freedom of occupation, and the right to the pursuit of happiness.

Subject Matter of Review

The subject matter of review in this case is whether Article 3 of the former Certified Tax Accountant Act (amended by Act No. 15288 on December 26, 2017, and before amended by Act No. 17339 on June 9, 2020) (hereinafter referred to as the "Act Provision") and the part of Article 1 of the Addenda to the Certified Tax Accountant Act (December 26, 2017, Act No. 15288) concerning Article 3 of the above Act and Article 2 of the Addenda (hereinafter referred to as the "Addenda Provisions," and these all collectively referred to as the "Provisions at Issue") infringed upon the fundamental rights of Petitioners.

Provisions at Issue

The Provisions at Issue read as follows:

Former Certified Tax Accountant Act (amended by Act No. 15288 on December 26, 2017, and before amended by Act No. 17339 on June 9, 2020)

Article 3 (Qualifications for Certified Tax Accountants)

Any of the following persons shall be qualified as a certified tax accountant:

1. A person who has passed a qualifying examination for certified tax accountants referred to in Article 5;
2. Deleted; <by Act No. 11209, Jan. 26, 2012>
3. ~~A person qualified as a lawyer~~; <Deleted, by Act No. 15288, Dec. 26, 2017>

Addenda <Act No. 15288, Dec. 26, 2017>

Article 1 (Enforcement Date)

This Act shall enter into force on Jan. 1, 2018.

Article 2 (Applicability concerning Qualification for Certified Tax Accountant)

A person qualified as a tax accountant pursuant to the previous Item 3 of Article 3 at the time this Act enters into force shall be deemed qualified as a tax accountant, notwithstanding the amended provision of Item 3 of Article 3.

Summary of the Decision

1. Whether the Act Provision Infringes Upon Petitioners' Freedom of Occupation

The Act Provision is designed to resolve the dispute over whether it is a privilege to automatically grant the qualification of a tax accountant to attorneys-at-law, aside from persons who passed the qualifying examination for certified tax accountants, and to promote fairness for the general public who apply for the qualifying examination. Also, the above provision aims to enhance expertise in the field of tax services, thereby ensuring quality service for clients. These legislative objectives are legitimate and abolishing the system that automatically grants the qualification of a certified tax accountant to attorneys-at-law is the appropriate means to achieve these legislative objectives.

The fact that an attorney-at-law can handle legal issues regarding tax and accounting affairs does not necessarily mean that he/she should be automatically qualified as a certified tax accountant. The decision on whether to give the qualification of a certified tax accountant to attorneys-at-law should fall under the remit of legislative measures. In addition, as the certified tax accountant system has taken root in society and the demand and supply in the tax agent services market has stabilized, the Certified Tax Accountant Act has been amended toward gradually reducing the categories of persons who are automatically qualified as a certified tax accountant. Also, there may be other alternatives, in addition to practical training under the current Act, for attorneys-at-law to qualify as certified tax accountants conditioned on them completing additional hours of specialized training in tax agency services. However, these alternatives cannot achieve the legislative objectives of resolving the dispute over a privilege granted to attorneys-at-law, regarding them being automatically qualified as a certified tax accountant, and promoting fairness for the general public. Persons qualified as a lawyer can provide some of the tax agent services offered by certified tax accountants listed in the Items of Article 2 of the Certified Tax Accountant Act, and tax-related cases can only be brought by lawyers pursuant to the current Act. Given these, the Act Provision

cannot be deemed in violation of the principle of minimum restriction.

Further, although the Act Provision puts Petitioners at a disadvantage by reducing the scope of their work, as they cannot provide tax agent services other than the services offered as a qualified lawyer, these disadvantages are not found to outweigh the public interest served by the Act Provision.

Therefore, the Act Provision does not infringe upon Petitioner's freedom of occupation in violation of the principle of minimum restriction.

2. Whether the Addenda Provisions Infringe Upon Petitioner's Freedom of Occupation in Violation of the Principle of Legitimate Expectations

To achieve the public interest purpose of the Act Provision, the Addenda Provisions set the enforcement date of the Act Provision on January 1, 2018 and provide transitional measures relating to the qualification of an attorney-at-law as a certified tax accountant. Petitioners had legitimate expectations about the automatic qualification as a certified tax accountant, but the eligible categories were gradually reduced by the legislature. Thus, the need for protecting such a system is not found to be significant. Even if the legitimate expectations about the system need to be protected, Petitioners who are qualified lawyers can offer some of the tax agent services as an attorney-at-law, as provided for in Article 3 of the Attorney-At-Law Act. Thus, the severity of the infringement on Petitioners' legitimate expectations does not outweigh the public interest to be served by the Addenda Provisions. Therefore, the Addenda Provisions do not violate the principle of legitimate expectations and do not infringe upon Petitioners' freedom of occupation.

3. Whether the Addenda Provisions Infringe Upon Petitioners' Right to Equality

The purpose of setting the enforcement date of the Act Provision on January 1, 2018 in the Addenda Provisions amended on December 26, 2017 can be recognized as a legislative determination to achieve the legislative objectives of the Act Provision as soon as possible.

Further, the Addenda Provisions apply different standards between those who have acquired the qualification of an attorney-at-law and those who have not as of January 1, 2018. These two groups have a commonality in that they had the same expectations, when entering the Judicial Research and Training Institute or law school, that they would be automatically qualified as a certified tax accountant once they acquired the qualification of an attorney-at-law. However, while the former group has already acquired the qualification as an attorney-at-law, which is the requirement for awarding the qualification of a certified tax accountant in accordance with the former Certified Tax Accountant Act as of January 1, 2018, the latter group has not obtained such qualification as of the above date and had mere expectations that they would be given the qualification of a certified tax accountant when they became a qualified lawyer. There is a clear distinction between the former and the latter, as one cannot rule out the possibility that the latter may not complete the course at the Judicial Research and Training Institute or law school, or that they may not pass the bar exam upon graduation from law school.

Given the above, there are legitimate reasons for the Addenda Provisions distinguishing between those who have acquired the qualification of an attorney-at-law from those who have not as of January 1, 2018. Therefore, the Addenda Provisions do not infringe upon Petitioners' right to equality.

Summary of Dissenting Opinion of Four Justices regarding the Act Provision

Unlike the explicitly stated legislative objectives, the Act Provision

impedes both the State's obligation to cooperate in strengthening control over the tax agent services market of those who passed the certified tax accountants qualifying examination and to foster legal professionals befitting the educational philosophy of law schools. Consequently, the Court finds it difficult to believe that the Act Provision serves a legitimate legislative objective. Even if the Court finds that the legislative objective of the above Provision enhances expertise in tax services and recognizes its legitimacy, lawyers are recognized to have expertise in tax agent services offered by certified tax accountants. Therefore, the means employed are not appropriate.

Given the nature of the qualification system, in principle, such qualification should be given not only to those who already have the expertise, but also to anyone acknowledged to have the necessary ability and knowledge to practically perform the work. This includes those who are deemed capable of performing the work if they receive some training.

In this regard, the legislative objective can also be served by awarding the qualification of certified tax accountants to lawyers and establishing alternative measures that require them to take additional hours of training. The Act Provision, which failed to offer the qualification of certified tax accountants to lawyers regardless, does not meet the principle of minimum restriction.

The private interest restricted by the Act Provision is significant, as Petitioners cannot offer tax agent services as a certified tax accountant even if they have the ability and expertise in such services. Also, since the Act Provision narrows the range of client choice in tax agent services and prevents clients from receiving a consistent, one-stop service from bookkeeping to administrative proceedings, it is doubtful how well the above Provision can achieve the legislative objective of enhancing expertise in tax services. Thus, the Act Provision also does not meet the principle of balance of interests.

Therefore, the Act Provision violates the principle against excessive restriction and infringes upon the freedom of occupation.

Summary of Dissenting Opinion of Five Justices regarding the Addenda Provisions at Issue

Qualified lawyers have been granted the qualification of a certified tax accountant for more than 50 years since the enactment of the Certified Tax Accountant Act in 1961. There were no indications that this system would be abolished or changed in the near term. The amendment of the Act Provision was not accompanied by establishing provisions that offer certain exemptions or a grace period for the qualifying examination for certified tax accountants. Therefore, Petitioners' legitimate expectations were severely infringed by the Addenda Provisions. However, even if the Court deems it necessary to protect the public interest of enhancing expertise in tax services in the long term, it is hard to believe that the need is important enough to justify its urgent application to those who have already begun the process of acquiring the qualification as an attorney-at-law. Thus, the Addenda Provisions violate the principle of legitimate expectations and infringe upon the freedom of occupation.

However, since rendering a decision of simple unconstitutionality would result in eliminating the legal basis for those who can obtain the qualification as a certified tax accountant, as provided for by the Addenda Provisions, the Court needs to declare a decision of nonconformity to the Constitution. As for amending the Addenda Provisions, legislative consideration should be given to ensure that persons who passed the bar exam or were admitted to law school before January 1, 2018, and acquired the qualification of an attorney-at-law thereafter, should be qualified as a certified tax accountant.

10. Case on Prohibition of and Punishment for Interference with Broadcast Programming

[2019Hun-Ba439, August 31, 2021]

In this case, the Constitutional Court held that (1) the part of Article 4, Section (2) of the Broadcasting Act concerning "interference," which prohibits interference with broadcast programming, and (2) the part of Article 105, Item 1 of the former Broadcasting Act relating to "interference" in Article 4, Section (2), which penalized violators of the above prohibition, are constitutional because they do not violate the rule of clarity or the rule against excessive restriction.

Background of the Case

On April 21, 2014 and April 30, 2014, Petitioner used his position as Senior Presidential Secretary for Public Affairs at the Office of the President to make a direct phone call to K.S., Director General for News & Sports Bureau at the Korean Broadcasting System (KBS). During the call, Petitioner complained about the news reports criticizing the coast guard in the Sewol ferry disaster, which aired on the above mentioned dates on "KBS News 9." Petitioner demanded that the news station stop producing such disparaging news and substitute the reports with other news in the future.

Consequently, a prosecutor filed a charge against Petitioner for the crime of interfering with broadcast programming in a manner not otherwise provided by law. On December 14, 2018, the court of first instance imposed a suspended sentence of imprisonment with labor for one year and placed Petitioner on probation for two years.

Petitioner appealed the above judgement and while the appeal was pending, petitioned the appellate court to request constitutional review of Article 4, Section (2) of the Broadcasting Act, which prohibits

interference with broadcast programming. When the appellate court dismissed the petition, Petitioner moved to file this constitutional complaint on November 14, 2019.

Subject Matter of Review

The subject matter of this case is whether (1) the part of Article 4, Section (2) of the Broadcasting Act (repealed and reenacted by Act No. 6139 on January 12, 2000) concerning "interference" (hereinafter referred to as the "prohibition clause"), and (2) the part of Article 105, Item 1 of the former Broadcasting Act (after repeal and reenactment by Act No. 6139 on January 12, 2000, and before amendment by Act No. 17347 on June 9, 2020) concerning "interference" in Article 4, Section (2) (hereinafter referred to as the "punishment clause") (the prohibition clause and the punishment clause are hereinafter collectively referred to as the "Provisions at Issue") violate the Constitution.

Provisions at Issue

Broadcasting Act (repealed and reenacted by Act No. 6139 on January 12, 2000)

Article 4 (Freedom and Independence of Broadcast Programming) (2) No one shall regulate or interfere with the broadcast programming unless as prescribed by this Act or other Acts.

Former Broadcasting Act (after repeal and reenactment by Act No. 6139 on January 12, 2000, and before amendment by Act No. 17347 on June 9, 2020)

Article 105 (Penalty Provisions) Any of the following persons shall be subject to imprisonment for not more than two years, or by a fine not exceeding thirty million won:

1. A person who regulates or interferes with the broadcast programming, in violation of Article 4, Section (2);

Summary of the Decision

1. Guarantee of the Freedom of Broadcast Programming and its Limitations

Article 21, Section (1) of the Constitution provides that "All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association." The Constitution guarantees the freedom of speech and the press as such, and the freedom of broadcasting is recognized as a branch of the freedom of speech and the press.

In particular, the freedom and independence of broadcast programming shall be guaranteed, and no one shall regulate or interfere with the broadcast programming unless as prescribed by the Broadcasting Act or other Acts (Broadcasting Act, Article 4).

Nevertheless, the freedom of broadcasting is restricted and regulated in various forms due to special characteristics, such as the public value of broadcasting. It is in this connection that a wide-ranging set of regulations exist under the Broadcasting Act, including the regulations on market entry, ownership, market shares, programming, and advertisement.

2. Whether the Principle of Clarity Under the *Nulla Poena Sine Lege* is Violated

A. The prohibition clause in this case – let alone the definition of "interference" – does not specify the issues concerning the subject and object of the interference, the time of the interference, the necessity of generating a result of interference, and etc. Hence, whether the meaning of the clause can be fully conveyed through interpretation is in question.

B. Because the prohibition clause provides that "no one" shall cause interference, there is no limitation as to the subject of interference.

However, the Court interprets the subject of interference to be primarily a state power, and that the subject also consists of an array of social forces, all of which may exert influence on the freedom of broadcast programming such as – not to mention political parties (ruling party and opposition parties) – civil groups, labor unions (press union and others), large enterprises, and advertisers.

With respect to the absence of a definition of the term "interference," the term is not defined under the Broadcasting Act because of the legislators' view that a separate definition clause is not necessary, as the term can be defined by its normal usage.

With respect to the time of the interference, an act prior to actual broadcasting shall constitute interference. Thus, pointing out a factual inaccuracy in broadcasting contents or expressing one's critical view or opinion about the contents after broadcasting cannot be regarded as an act of interference.

C. It can be easily foreseen that, under the objective of guaranteeing the freedom and independence of broadcast programming, the prohibition clause in this case prohibits all activities that may influence the free and independent nature of decision-making in broadcast programming. This would include an external person's specific request, concerning broadcasting programming, made to an internal person engaged in broadcast programming. Therefore, the prohibition clause does not violate the principle of clarity under the *nulla poena sine lege*.

3. Whether the Principle against Excessive Restriction is Violated

A. Petitioner argues that the Provisions at Issue violate fundamental rights. The provisions regard the viewers' acts of putting forth their opinion or expressing criticism for news distortion – even though the viewers are entitled to do so – as an interference with broadcast

programming and prohibit and punish these acts. This raises the question of whether freedom of expression is infringed by a violation of the principle against excessive restriction.

B. In comprehensive consideration of the legislative purpose and content of the provisions of the Broadcasting Act, the Court finds that the legislative intent of the Provisions at Issue is to strictly guarantee the freedom and independence of broadcast programming by preemptively preventing any attempt by a state power or various social forces to influence broadcast programming in a manner not otherwise provided by procedures established by law. Therefore, the Provisions at Issue serve a legitimate legislative purpose.

Furthermore, banning activities that are interfering with broadcast programming, and further imposing criminal punishment under the Provisions at Issue are effective and appropriate ways to achieve the aforementioned legislative purpose. Thus, the Provisions at Issue constitute a suitable means for achieving the legislative purpose.

C. The regulations provided by the Provisions at Issue are confined to situations where one exerts unjust influence by interfering with broadcast programming. In other words, the Provisions at Issue do not prohibit all forms of opinion or criticism towards broadcast programming, but do prohibit or penalize an act if it is considered an “interference” prescribed under the prohibition clause.

Moreover, the prohibition clause permits the regulation or interference as provided by the Broadcasting Act or other laws. In fact, the Broadcasting Act and other related laws provide for various institutional means that permit viewers to actively generate ideas about broadcast programming, and the broadcasting business entities can embrace these ideas.

In particular, people in a special position like Petitioner may make an

objection against the content of broadcasting by instituting a formal response, such as distributing a press release or explanatory materials or holding a news briefing. Therefore, the principle of least restrictive means is not violated.

D. The freedom of broadcasting is a backbone to the smooth operation of democracy. In this vein, if various social forces – not to mention state powers – including political parties, labor unions, and advertisers are to influence broadcast programming without going through procedures provided by law to disseminate and publicize their arguments and standpoints to the public, such acts would distort public opinion, aggravate distrust in society and fuel social conflicts, and inflict grievous harm to democracy as a consequence.

Such being the case, the harm to Petitioner is outweighed by the public interest in the freedom and independence of broadcast programming to be achieved by the Provisions at Issue, and thus, the Provisions at Issue meet the balance of interests. Therefore, the Court finds that the freedom of expression is not infringed and there is no violation of the principle against excessive restriction.

11. Case on Inaction to Settle Dispute in Accordance with Article Ⅲ of the Claims Agreement between Korea and Japan

[2014Hun-Ma888, August 31, 2021]

The Court, in a 5-to-4 decision, dismissed the argument against Respondent's failure to take action in settling a dispute between Korea and Japan in accordance with the procedures 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" (Treaty No. 172). This dispute involved the interpretation of whether the claims of Korean Class B and Class C war criminals against Japan have been extinguished by Article Ⅱ, paragraph 1 of the above Agreement.

Background of the Case

Complainants are a person who, after the Pacific War broke out during the Japanese occupation of Korea, was forcibly recruited as a prisoner-of-war guard by Imperial Japan and served as a guard of Allied detainees at a prisoner-of-war camp in a Southeast Asian country and, following the end of the war, was prosecuted in a war crimes trial convened by the Allied powers and was punished as a Class B and Class C war criminal (such a person is hereinafter referred to as a "Korean BC War Criminal"); and the family members of other Korean BC War Criminals who are deceased.

Respondent is an executive government agency that governs in the areas of diplomacy, foreign negotiation, and trade, as well as the relevant supervision and coordination thereof, coordination on international relations, treaties and other international agreements, protection and support for overseas Korean nationals, establishment of policies for overseas Koreans, and study and analysis of international affairs.

11. Case on Inaction to Settle Dispute in Accordance with Article Ⅲ of the Claims Agreement between Korea and Japan

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

Complainants filed the constitutional complaint in this case on October 14, 2014, arguing that, as to whether their compensation claims against Japan have been extinguished by the above Agreement, the Japanese government views that the claims have already expired while its Korean counterpart believes that those have not, and thus, there exists a dispute between these two governments over the interpretation of the compensation claims. Complainants challenged the constitutionality of a failure to act on the part of Respondent, arguing that it is not fulfilling its duty to settle the dispute in accordance with the procedures under Article Ⅲ of the above Agreement, and that this failure to act infringes their fundamental rights.

Subject Matter of Review

In this case, the subject matter of review is whether Complainant's fundamental rights have been infringed by Respondent's inaction to settle a dispute between Korea and Japan, in accordance with 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" (Treaty No. 172, hereinafter referred to as the "Agreement"), over the interpretation of whether the claims of Korean BC War Criminals against Japan have been extinguished by Article Ⅱ, paragraph 1 of the Agreement.

Summary of the Decision

1. Dismissal Opinion of Justices Yoo Namseok, Lee Seon-ae, Lee Youngjin, and Moon Hyungbae

A. Regarding Damage Arising from Punishments Following International War Crimes Trials

After World War Ⅱ, the war criminals of Nazi Germany and Imperial Japan were punished through the Nürnberg and Tokyo trials, which led to the establishment of an international rule of law requiring that the punishment of individuals who committed "crimes against peace," "crimes against humanity," or "war crimes" be imposed through an international war crimes trial. This principle was later affirmed in a UN General Assembly resolution adopted in 1946 and was recognized as customary international law. Thereafter, the International Criminal Court was created to deal with genocide, crimes against humanity, war crimes, and crimes of aggression.

Our Constitution declares in its preamble international pacifism, and in Article 5, Section (1), adopts the "prohibition against aggressive war" principle of international law, as well as expressing "respect for the international order of law." With the consent of the National Assembly, our country actively incorporated into domestic law treaties on customary international law which require that the punishment of individuals committing any crimes of aggression, crimes against humanity, or war crimes be imposed through an international war crimes trial. It also enacted and put into effect the "Act on Punishment, Etc. of Crimes under the Jurisdiction of the International Criminal Court." Taking these facts together, we believe that all domestic state agencies should respect the international law status of international war crimes tribunals and the force and effect of their judgments.

11. Case on Inaction to Settle Dispute in Accordance with Article Ⅲ of the Claims Agreement between Korea and Japan

It is regrettable that, during the Japanese occupation, Korean BC War Criminals were forcibly recruited as prisoner-of-war guards by Imperial Japan and guarded Allied detainees under the command of the Imperial Japanese military and then were prosecuted before international war crimes tribunals and sentenced to punishments in the absence of proper assistance. However, the judgments of those tribunals are valid as international law and, as seen above, should be respected by domestic state agencies, including Respondent. Thus, it is difficult to consider the issue of Korean BC War Criminals' damage claims—which stem from the punishments following the judgments of the international war crimes tribunal—as belonging to the same scope as the issue of the compensation claims held by comfort women victims, atomic bomb victims, or others—which arise from anti-humanitarian illegal acts of Imperial Japan—and as being subject to the Agreement.

Accordingly, since we do not find that Respondent has a concrete duty to follow the dispute settlement procedures in Article Ⅲ of the Agreement with regard to the Korean BC War Criminals' damage claims arising from the punishments following the international war crimes trials, the complaint in this case is non-justiciable with respect to such damage.

B. Regarding Damage Arising from Forced Recruitment by Imperial Japan

The records in this case indicate the following circumstances. First, it appears that, in relation to the question of Korean BC War Criminals, Complainants have concentrated on the issue of the damage arising from the punishments following the international war crimes trials. Second, *Dong___*, a group consisting of Korean BC War Criminals residing in Japan, demanded that the Japanese government pay for the damage arising from the punishments following the international war crimes trials, in which they were recognized as Class B and Class C war

criminals, and the Japanese government partly granted the demand and paid damages. Third, the Korean government has taken a position that Japan should, regardless of the Agreement, actively assume responsibility for the issue of the Korean BC War Criminals who suffered damage as a result of the punishments following the international war crimes trials, and has also constantly urged Japan to resolve this issue through legislation. Considering these circumstances together, it is unclear whether there is an actual dispute between Korea and Japan over the interpretation of the Agreement with respect to Japan's responsibility for Korean BC War Criminals' damage claims arising from the forced recruitment by Imperial Japan, unlike with respect to its responsibility for the damage claims arising from the punishments following the international war crimes trials.

Therefore, at least as to Japan's responsibility for Korean BC War Criminals' damage claims arising from the forced recruitment by Imperial Japan, a ripe dispute does not actually exist between Korea and Japan over the interpretation and implementation of the Agreement. Thus, we find that Respondent does not have a duty to follow the dispute settlement procedures in Article Ⅲ of the Agreement.

Even if a dispute over the interpretation of the Agreement does exist between Korea and Japan with respect to Japan's responsibility for Korean BC War Criminals' damage arising from the forced recruitment by Imperial Japan, it cannot be said—given Respondent's diplomatic discretion and its constant demands to Japan through diplomatic channels, including the demands for general settlement and damages concerning the issue of Korean BC War Criminals—that Respondent has failed to fulfill its duty derived from Article Ⅲ of the Agreement.

C. Sub-conclusion

Because Complainants' argument with respect to the damage arising from the punishments following the international war crimes trials bears

no relation to the Agreement, Respondent has no concrete duty to follow the dispute settlement procedures in Article Ⅲ of the Agreement. Further, because we find that no ripe dispute actually exists between Korea and Japan with respect to the damage claims arising from the forced recruitment by Imperial Japan, Respondent has no duty to follow the dispute settlement procedures in Article Ⅲ of the Agreement. Further, even if a dispute over the interpretation of the Agreement does exist between Korea and Japan, Respondent is deemed to have fulfilled its duty by means of constant diplomatic activity. Therefore, since the complaint in this case is in all these regards non-justiciable, we conclude that it is reasonable to dismiss this complaint.

2. Dismissal Opinion of Justice Lee Jongseok

It cannot be derived from Article 10 or Article 2, Section (2) of the Constitution or Preamble thereof that our government has a duty to take action for Complainants. Nor is it inferred from the Agreement that our government has a duty to follow the dispute settlement procedures in the Agreement.

Moreover, the state's duty to take concrete action for the people cannot be derived from the Agreement, nor can it be inferred from the content of Article Ⅲ of the Agreement that Respondent has a concrete duty to settle the issue of Korean BC War Criminals through diplomatic channels.

In sum, since Respondent's duty of action is not recognized either under the Constitution or the Agreement, the complaint in this case is non-justiciable.

Summary of Dissenting Opinion of Four Justices Regarding Complaint with respect to Damage Arising from Forced Recruitment by Imperial Japan

We concur in the majority opinion with respect to part of the damage suffered by Korean BC War Criminals during the Japanese occupation, namely the harm arising from the punishments following the international war crimes trials. However, as to the damage stemming from the illegal forced recruitment by Imperial Japan, we believe that Respondent's failure to follow the dispute settlement procedures in Article Ⅲ of the Agreement unconstitutionally violates the fundamental rights of Complainants. The reasons are as follows.

Under the Japanese occupation, during the Pacific War, Korean BC War Criminals, who were at that time between the late teens and 20s, were forcibly recruited in an anti-humanitarian and illegal manner as guards of Allied detainees at Japanese military prisoner-of-war camps in the Southeast Asian region. While serving at those camps, Korean BC War Criminals, following the repressive and violent commands of their Japanese supervisors, performed their assigned tasks of guarding and controlling the detainees and, in the process of such performance, suffered great psychological and physical damage. Following recognition of this damage incurred by Imperial Japan's anti-humanitarian and illegal acts, Korean BC War Criminals were acknowledged as "victims or casualties of forced recruitment" by a truth-seeking commission established under a Truth-Seeking Act. For this reason, we find that Korean BC War Criminals are entitled to claims against Japan for the damage they suffered as a result of the illegal forced recruitment by Imperial Japan. These claims cannot be viewed, in terms of their nature, as essentially different from the claims for the damage that comfort women victims of the Japanese military and victims of Imperial Japan's forced recruitment sustained in consequence of Imperial Japan's anti-humanitarian and illegal acts during the Japanese occupation.

11. Case on Inaction to Settle Dispute in Accordance with Article Ⅲ of the Claims Agreement between Korea and Japan

Because a dispute exists between Korea and Japan over the interpretation of whether Korean BC War Criminals' claims for the damage sustained as a result of Imperial Japan's forced recruitment have been extinguished by the Agreement; and because, in light of the language of Article 10 and Preamble of the Constitution and Article Ⅲ of the Agreement, there exists a concrete duty for Respondent to follow the dispute settlement procedures in Article Ⅲ of the Agreement, the justiciability requirements are satisfied and it is necessary to proceed to the merits.

On the basis of historical facts and experience, we recognize that Korean BC War Criminals suffered psychological and physical damage on account of Imperial Japan's illegal forced recruitment, and note that this damage is unique in the sense that such damage is nowhere to be found in other cases. We believe that blocking the claims for the harm of Korean BC War Criminals that was inflicted by Imperial Japan's illegal forced recruitment is directly associated with the infringement of the dignity and value of human beings.

Korean BC War Criminals lost their cases that had been pending in Japan since 1991; and it has become virtually impossible to expect voluntary apology and remedies from the Japanese government. Additionally, given that many Korean BC War Criminals have already died, including Complainant L.H. who passed away during the pendency of the adjudication of this case, further delay in the court proceedings may make it permanently impossible for Korean BC War Criminals to realize their claims against Japan, bring justice to history, and restore their dignity and value.

Taking together Complainants' active demand for Respondent's fulfillment of its duty to act in accordance with Article Ⅲ of the Agreement, the historical background of Korean BC War Criminals' damage that arose from Imperial Japan's illegal forced recruitment, the process of signing the Agreement as well as the circumstances before

and after it, the domestic and foreign views calling for Japan's apology and compensation, and the fact that Korean BC War Criminals have been officially recognized as victims or casualties of forced recruitment, the possibility should not be foreclosed that Respondent's undertaking the dispute settlement procedures in Article Ⅲ of the Agreement may lead to compensation by Japan. It would be consistent with major national interests to call on Japan, by Respondent's fulfillment of the duty of action, to assume legal responsibility, and thereby to deepen mutual understanding and trust between the two countries and their peoples and to prevent similar tragedies by taking this as a lesson learned. Additionally, because the damage arising from Imperial Japan's illegal forced recruitment bears no relation to the international war crimes trials, Respondent's duty of action, if fulfilled, would not be contrary to the judgments of the international war crimes trials.

After comprehensively considering the vital importance of fundamental rights, the urgency of remedy for fundamental rights infringement, the possibility of providing such remedy, and the question of whether national interests have been truly harmed, we conclude that, despite an existing dispute between Korea and Japan over the interpretation of the Agreement as to the Korean BC War Criminals' claim against Japan for the damage arising from Imperial Japan's illegal forced recruitment, Respondent has failed to follow the dispute settlement procedures in Article Ⅲ of the Agreement, and this failure unconstitutionally infringes the vital fundamental rights of Complainants.

12. Case on Property Required to Be Registered by a Married Woman Liable for Registration

[2019Hun-Ka3, September 30, 2021]

In this case, the Court held that Article 2 of the Public Service Ethics Act Addendum (February 3, 2009, Act No. 9402) unconstitutionally violates the principle of equality. This provision requires that a married woman liable for registration, who has already registered the property of her spouse's lineal ascendants and descendants in accordance with a provision of the Public Service Ethics Act before amendment, must continue to register such property, even though the amended Public Service Ethics Act mandates that all married persons liable for registration should register the property of their lineal ascendants and descendants, not the property of those of their spouses.

Background of the Case

Petitioner took office as a judge in February 2004. Since then, as a married woman liable for registration, she has registered the property of her spouse's lineal ascendants. On February 3, 2009, Article 4, Section (1), Item 3 of the Public Service Ethics Act was amended by Act No. 9402 to require all married persons liable for registration to register the property of their own lineal ascendants and descendants, and not the property of those of their spouses. In February 2017, when reporting changes in assets, Petitioner deleted the property of her spouse's lineal ascendants from the list of registered property and registered the possessions of her own lineal ascendants.

On December 28, 2017, the public service ethics committee of the Supreme Court issued a caution (warning) to Petitioner on the ground that she had failed to register the property of her spouse's lineal ascendants despite her liability to register such property in accordance with Article 2 of the Public Service Ethics Act Addendum (February 3,

2009, Act No. 9402).

Subsequently, Petitioner filed a lawsuit in the Seoul Administration Court (Case No. 2018GuHap58721) to revoke the caution issued to her. While the suit was pending, she petitioned that court to request constitutional review of Article 2 of the Public Service Ethics Act Addendum (February 3, 2009, Act No. 9402). On January 3, 2019, the court requested constitutional review of the above addendum provision.

Subject Matter of Review

The subject matter of review in this case is whether Article 2 of the Public Service Ethics Act Addendum (February 3, 2009, Act No. 9402) (hereinafter referred to as the "Addendum Provision") violates the Constitution. The provision at issue and related provisions read as follows:

[Hereinafter, Article 4, Section (1), Item 3 of the Public Service Ethics Act before amendment by Act No. 9402 on February 3, 2009—which requires a married man liable for registration to register the property of his lineal ascendants and descendants, while mandating a married woman liable for registration to register the property of those of her spouse—will be referred to as the "Pre-Amendment Provision"]

Provision at Issue

Public Service Ethics Act Addendum (February 3, 2009, Act No. 9402)

Article 2 (Transitional Measure)

Any married woman liable for registration whose property is registered pursuant to the former provisions at the time this Act enters into force shall, notwithstanding the amended provisions of Article 4 (1) 3, be governed by the former provisions.

Related Provisions

The former Public Service Ethics Act (amended by Act No. 9402 on February 3, 2009, and before amendment by Act No. 10982 on July 29, 2011)

Article 4 (Property Required to Be Registered)

(1) The property required to be registered by a person liable for registration shall be the property (including the property in *de facto* possession, regardless of the name of its owner, property contributed to a nonprofit corporation, and property located in a foreign country; hereinafter the same shall apply) of any of the following individuals:

3. The lineal ascendants and descendants of the person liable for registration, excluding this person's lineal descendants who are married women, his or her maternal great-grandparents, his or her maternal grandparents, his or her daughter's children, and his or her daughter's grandchildren.

The former Public Service Ethics Act (amended by Act No. 8435 on May 17, 2007, and before amendment by Act No. 9402 on February 3, 2009)

Article 4 (Property Required to Be Registered)

(1) The property required to be registered by a person liable for registration shall be the property (including the property in *de facto* possession, irrespective of the name of its owner, property contributed to a nonprofit corporation, and property located in a foreign country; hereinafter the same shall apply) of any of the following individuals:

3. The lineal ascendants and descendants of the person liable for registration, excluding this person's daughters who are married into other families, his or her maternal grandparents, and his or her daughter's children, or if such person liable for registration is married, the lineal ascendants and descendants of the spouse of this person.

The former Public Service Ethics Act (amended by Act No. 4853 on December 31, 1994, and before amendment by Act No. 8435 on May 17, 2007)

Article 4 (Property Required to Be Registered)

(1) The property required to be registered by a person liable for registration shall be the property (including the property in *de facto* possession, irrespective of the name of its owner, property contributed to a nonprofit corporation, and property located in a foreign country; hereinafter the same shall apply) of any of the following individuals:

3. The lineal ascendants and descendants of the person liable for registration, excluding this person's daughters who are married into other families, his or her maternal grandparents, and his or her daughter's children, or if such person liable for registration is married into the family of her husband or his wife, the lineal ascendants and descendants of his or her spouse.

Summary of the Decision

1. Issue

The Addendum Provision treats differently a married man liable for registration and a married woman liable for registration who has already registered property in accordance with the Pre-Amendment Provision.

2. Standard of review

Article 11, Section (1) of the Constitution prohibits discrimination on account of sex, and Article 36, Section (1) of the Constitution specially directs equal treatment of the sexes in marriage and family life. Thus, in determining whether the Addendum Provision violates the principle of equality, the Court should apply the standard of strict scrutiny and

conduct a proportionality review.

3. Whether the principle of equality is violated

The Pre-Amendment Provision was amended in recognition that it was based upon a discriminatory perception about men and women in marital relationships. Despite this amendment, the Addendum Provision requires some married women liable for registration to continue to comply with the former provision, which came from a sex discriminatory perception, on the mere ground that those women have already registered property in accordance with the Pre-Amendment Provision.

However, imposing an obligation to register the property of their spouses' lineal ascendants and descendants, and not the property of their own lineal ascendants and descendants only on the married women liable for registration and not their male counterparts, is likely to perpetrate an erroneous idea of women's social status, consolidate among family members a discriminatory structure of dichotomy between the husband's family and the wife's family, and create a societal culture of male supremacy and misogyny. Given that this outcome is in direct conflict with the Constitution, which prohibits discrimination on account of sex and proclaims equality between the sexes in marriage and family life, the Court finds that imposing the registration obligation only on married women liable for registration serves no legitimate purpose.

Therefore, the Addendum Provision violates the principle of equality.

13. Case on Opening and Reading of Inmate Correspondence

[2019Hun-Ma919, September 30, 2021]

In this case, the Court held that the following acts did not infringe Complainant's freedom of communications: (1) the opening by Respondent, warden of a correctional institution, of letters sent to Complainant by the Korea Legal Aid Corporation and the National Human Rights Commission of Korea; and (2) Respondent's reading of documents, including a judgment, sent by, *inter alia*, courts and a prosecutor's office.

Background of the Case

Complainant filed lawsuits against Respondent, et al. while incarcerated at a correctional institution. In his lawsuits, Complainant sought revocation of, *inter alia*, de facto exercise of powers regarding inmate treatment, and revocation of an information non-disclosure decision. He communicated with an attorney-at-law through letters and prosecuted those lawsuits. During the pendency of the cases, Respondent opened seven letters sent to Complainant by the Korea Legal Aid Corporation and one letter sent to Complainant by the National Human Rights Commission of Korea, and read five documents sent to Complainant, one judgment sent by the Suwon District Court, and four other documents sent by the Suwon District Prosecutor's Office, etc.

On August 20, 2019, Complainant filed the constitutional complaint in this case, arguing that his fundamental rights were infringed by the above-mentioned acts of Respondent.

Subject Matter of Review

The subject matter of review in this case is whether the following acts of Respondent infringed the fundamental rights of Complainant: (1) the

opening of seven letters sent to Complainant by the Korea Legal Aid Corporation and delivered to the Andong Correctional Institution on February 7, 2019; March 12, 2019; April 10, 2019; April 18, 2019; May 27, 2019; June 5, 2019; and July 5, 2019, respectively, and the opening of one letter sent to Complainant by the National Human Rights Commission of Korea and delivered to the Andong Correctional Institution on August 9, 2019 (hereinafter collectively referred to as the "Acts of Opening the Letters"); and (2) the reading of five documents delivered to the Andong Correctional Institution, namely a Notice to Disclose Information issued by the Suwon District Prosecutor's Office and a written judgment of the Suwon District Court that were delivered on June 26, 2019; a written decision to appoint a public defender that was issued by the administrative appeals commission of the Suwon High Prosecutor's Office and was delivered on June 28, 2019; an "Answer brief responding to the arguments in Complainant's appellate brief" sent by the Seoul High Court and delivered on July 1, 2019; and an "Answer brief of the respondent (Suwon High Prosecutor's Office)" sent by the administrative appeals commission of the Suwon High Prosecutor's Office and delivered on July 15, 2019 (hereinafter collectively referred to as the "Acts of Reading the Documents").

Summary of the Decision

1. Meaning of opening and reading

Censorship of inmate correspondence became prohibited, in principle, with amendment of a former version of the Act on Execution of Sentences and Treatment of Inmates (hereinafter referred to as "AESTI"). Against this backdrop, Article 67 of the AESTI Enforcement Decree (hereinafter referred to as "AESTIED") amended the word "open" in Article 64 of former AESTIED to "read." The purpose of this amendment was to require the warden of a correctional facility to read, before the inmate does, documents whose main thrust needs to be ascertained, for

the protection of the rights and interests of prisoners, the preparation of inmate transportation, etc. In consideration of this purpose, under AESTIED, the word “open” means to open an envelope simply to see what is inside. The word “read,” on the other hand, goes beyond “open” and means to learn, in part or whole, the specific contents of the document inside.

Under Article 67 of AESTIED, the warden of a correctional facility must, after reading a document, forward it to the inmate to whom it is addressed, with no exception. The warden of the correctional facility in this connection has no authority to examine the content of the document to decide whether to forward or not. Therefore, “read” in Article 67 of AESTIED differs from “censor” in the proviso of Article 43, Section (4) of former AESTI, which allowed censorship of inmate correspondence in exceptional cases.

2. Whether the Acts of Opening the Letters infringed the freedom of communications

The Acts of Opening the Letters, which were acts of opening envelopes containing the correspondence addressed to an inmate, were performed on the basis of Article 43, Section (3) of former AESTI and Article 65, Section (2) of former AESTIED to prevent contraband from entering the correctional institution through the mail.

The Acts of Opening the Letters served the legitimate purposes of maintaining safety and order in a correctional facility and promoting the rehabilitation of inmates and their reentry into society. Further, opening and inspecting prisoner correspondence was an appropriate means of pursuing those goals.

The prevention of contraband from entering a correctional facility cannot be achieved satisfactorily by, *inter alia*, excluding incoming attorney mail, etc. from being opened or by using X-ray devices, etc. to

detect banned items. Thus, the Acts of Opening the Letters met the least restrictive means test.

There is a vital public interest in maintaining safety and order in a correctional facility. By contrast, although Respondent opened the letters addressed to Complainant, no substantial restriction was imposed on Complainant's interest because censorship of their content was prohibited in principle. Therefore, the Acts of Opening the Letters met the balance of interests test as well.

For the foregoing reasons, the Acts of Opening the Letters did not infringe Complainant's freedom of communications.

3. Whether the Acts of Reading the Documents infringed the freedom of communications

The Acts of Reading the Documents were acts of reading, on the basis of Article 67 of AESTIED, documents sent by courts or investigation agencies including police stations, or by other bodies, such as the State, local governments, or public authorities (such courts, investigation agencies, and other bodies are hereinafter referred to individually and collectively as "Body"). These entities may send documents that are relevant to the legal status of inmates and the treatment thereof and require proof of receipt, or may send documents relevant to the transportation of inmates outside a correctional facility, including their transfer to other facilities or their transportation to court.

The Acts of Reading the Documents served the purposes of ensuring an accurate forwarding of documents sent by Body to an inmate, suiting the inmate's convenience, and providing the basis for official documentation of information necessary for ascertaining whether delivery of documents was within the period provided by statute or regulation. In this regard, the Acts of Reading the Documents are recognized as having pursued legitimate ends and as having employed an appropriate means to achieve

those ends.

Considering, *inter alia*, that Article 67 of AESTIED allows reading of documents only to the extent not prohibited by any special provision of law, and that it is difficult to record objective information on delivery by, *inter alia*, having an inmate voluntarily notify the correctional facility of the content that needs to be documented, the Court finds the Acts of Reading the Documents met the least restrictive means test.

There is a major public interest in the accurate forwarding of documents sent by Body to inmates, and thereby, preventing disadvantage or confusion to the legal relationships concerning inmates. By contrast, because documents, after being read, must inevitably be forwarded intact to a prisoner, such reading places minimal restrictions on his or her interests. Therefore, the Acts of Reading the Letters met the balance of interests test as well.

For the foregoing reasons, the Acts of Reading the Letters did not infringe Complainant's freedom of communications.

14. Case on Sentenced Inmate Visitation Restrictions Imposed on Attorney

[2018Hun-Ma60, October 28, 2021]

In this case, the Constitutional Court held unconstitutional that part of Article 29-2, Section (1), Item 2 of the Enforcement Rules of the Act on Execution of Sentence and Treatment of Inmates concerning "sentenced inmate visitation" − which stipulates that even an attorney-at-law who is retained as a representative of a sentenced inmate in a litigation case cannot make attorney visits to the inmate if he or she cannot submit materials substantiating the fact that the litigation is pending – on the ground that this provision violates the rule against excessive restriction, and thus, infringes the freedom of an attorney-at-law to pursue his/her occupation.

Background of the Case

Complainant is an attorney-at-law retained as a representative of a sentenced inmate for a petition for retrial. Complainant made a request to Hwaseong Correctional Institution for Vocational Training for an attorney visit with the sentenced inmate, as provided by Article 59-2 of the former Enforcement Decree of the Act on Execution of Sentence and Treatment of Inmates (hereinafter, the "Act on Execution of Sentence and Treatment of Inmates" is referred to as the "Sentence Execution Act," and the Enforcement Decree and Enforcement Rules of the said Act are, respectively, referred to as the "Enforcement Decree of the Sentence Execution Act" and the "Enforcement Rules of the Sentence Execution Act").

However, the warden at the Hwaseong Correctional Institution for Vocation Training refused to allow the attorney visit on the grounds of Article 29-2, Section (1), Item 2 of the Enforcement Rules of the

Sentence Execution Act, which specifies that if an attorney-at-law retained as a representative in a litigation case wishes to make an attorney visitation to a sentenced inmate, the attorney-at-law should submit materials substantiating the fact that "the litigation is pending." As a consequence, the Complainant had no choice but to visit the sentenced inmate in the form of a general visitation.

As a result, the Complainant filed this complaint on January 18, 2018, alleging the unconstitutionality of the aforementioned provision of the Enforcement Rules of the Sentence Execution Act.

Subject Matter of Review

The subject matter of this case is whether the part of Article 29-2, Section (1), Item 2 of the Enforcement Rules of the Act on Execution of Sentence and Treatment of Inmates (amended by Ordinance of the Ministry of Justice No. 870 on June 29, 2016) concerning "sentenced inmate visitation" (hereinafter referred to as the "Provision at Issue") violates the fundamental rights of the Complainant. The relevant text of which is as follows:

Provision at Issue

Enforcement Rules of the Act on Execution of Sentence and Treatment of Inmates (amended by Ordinance of the Ministry of Justice No. 870 on June 29, 2016)

Article 29-2 (Request for attorney visit by an attorney-at-law who is a litigator of a litigation case) (1) Where an attorney-at-law who is a litigator of a litigation case applies for an attorney visit to a sentenced inmate, the attorney-at-law shall submit the application form as prescribed in Annex No. 32 with the following attachments to a warden:

1. Materials substantiating the fact that the litigation case is pending.

Summary of the Decision

1. Standard for Review

Whether the freedom of an attorney-at-law to pursue his occupation has been infringed is reviewed under the rule against excessive restriction. However, an attorney-client visitation by an attorney retained as a representative of a sentenced inmate in a litigation case goes beyond the self-interest of the attorney. It also encompasses the guarantee of the right to trial of sentenced inmates, and further extends to the public interest of providing a remedy by judicial review in a State founded on the rule of law. Considering the above, the level of scrutiny in reviewing such a case should be stricter than that of general cases, since it should be considered that the restriction on the occupational freedom of an attorney-at-law may also have a restrictive effect on the right to trial of a sentenced inmate, the other party of the visitation, as an outcome.

2. Whether the Principle against Excessive Restriction is Violated

The purpose of the Provision at Issue is to prevent the abuse of attorney visitation by the so-called ‘butler attorney’ who visits his/her sentenced client in prison for reasons not relevant to a litigation case. Preventing such visits helps to maintain order and rules in a correctional facility where resources are limited and to execute smooth operation of the visitation between attorneys and sentenced inmates. Therefore, the Provision at Issue has a just legislative purpose.

It is true that submission of materials substantiating the fact that the litigation is pending, as required in the Provision at Issue, prevents butler attorneys from abusing visitation rights by making an attorney-client visit without filing a litigation. However, as a butler attorney or his/her sentenced client in prison would not necessarily hesitate to file a

litigation, they would find no difficulty in filing an inessential litigation and make use of attorney visitation thereafter. On the other hand, for attorneys and sentenced inmates in a position to seriously think about whether to file a litigation and how to present their case at the hearing, general visitation is insufficient: the attorneys could not provide enough assistance to sentenced clients, and the sentenced clients would find the limited visitation opportunity insufficient to trust the attorney and proceed with trial proceedings under circumstances where an outcome of a trial is uncertain. Therefore, the Provisions at Issue do not constitute a suitable means of pursuing the objectives of the legislation.

In contrast to visitation by an attorney-at-law to an unsentenced inmate, where attorneys are not restricted by the duration and frequency of the visit, the duration and the number of attorney visits to a sentenced inmate are already restricted to 60 minutes and four times a month, respectively (former Enforcement Decree of the Sentence Execution Act Article 59-2, Sections (1) and (2)). Thus, there is a limitation on a butler attorneys' use of attorney visitation as a profit-seeking activity. Even supposing that the abuse of visitation rights by an attorney-at-law may occur, such a situation could be fully prevented by taking *a posteriori* measures once relevant causes are verified. Legal grounds for taking these measures are already stipulated in Section (1) of Article 41, Article 42 etc. of the Sentence Execution Act, which provide that visits to an inmate may be restricted or suspended in cases where it is likely to do harm to the rehabilitation of sentenced inmates etc., or do harm to the security or order of a correctional facility.

In several of its prior decisions, the Constitutional Court has ruled in favor of strong enforcement of attorney visitation relative to general visitation in order to prevent unjust infringement of a sentenced inmate's right to trial. Meanwhile, the Provision at Issue requires an attorney-at-law retained as a representative of a sentenced inmate in a litigation case to submit materials substantiating the pendency of litigation in order to make attorney visitation, leaving attorneys who cannot submit such

materials with no option but to make use of general visitation. This is a situation that, consequently, stands in contrast to the purpose of the Constitutional Court's decisions mentioned above.

Therefore, the Provision at Issue violates the rule of minimum restriction.

The problem caused by the Provision at Issue goes beyond simply causing personal inconvenience to attorneys in conducting their occupational activity. Where an attorney has no choice but to make use of general visitation to visit his/her sentenced client in prison, the visit is held in a general visiting room where partitions to prevent physical contact are installed, and the visit lasts for a short period of time, approximately 10 minutes, which is only one-sixth that of an attorney visitation. Furthermore, as a conversation during general visitation may be listened to, registered, audio recorded and video recorded, one cannot rule out the possibility of a sentenced inmate whose issue concerns maltreatment in the correctional institution etc. being intimidated by such a condition and dissuading themselves from seeking a legal remedy. Since such a high degree of restriction is imposed at the very time when the assistance from an attorney is most needed, the right to trial of sentenced inmates would be extremely limited and potentially lead to an outcome that goes against the justice that the rule of law aims to achieve. Hence, the Provision at Issue violates the principle of the balance of interest.

Therefore, the Provision at Issue violates the rule against excessive restriction, and thus, infringes the freedom of an attorney-at-law to pursue his/her occupation.

Summary of the Dissenting Opinion of One Justice

The Provision at Issue is not intended to restrict the meeting between a sentenced inmate and an attorney retained as a litigator in a litigation

case. It is part of a set of requirements to apply for attorney visitation that was set forth, in accordance with the objectives of the Constitutional Court's past nonconformity decision, at the time the visitation program was introduced as distinct from general visitation. Submission of the materials substantiating the pendency of litigation, as provided in the Provision at Issue, is a method of verifying that the attorney-at-law retained as a representative of a sentenced inmate in a litigation case applies for attorney visitation for the sole purpose of representing the sentenced inmate. As the Court recognized, the Provision at Issue has a just legislative purpose.

Under the Provision at Issue, attorneys who attained documents only as a mere proof of their appointment as a representative of a sentenced inmate are preemptively banned from taking advantage of the inmate visitation to enter correctional facilities for profit-making purposes. Further, "pendency of a litigation" is a generally used legal term in various laws, including the Civil Procedure Act and the Administration Litigation Act. Attorneys have no trouble substantiating the fact that a litigation is pending in various ways, such as from the search results of the Supreme Court's My Case Search service. Therefore, the Provision at Issue constitutes a suitable means of pursuing the objectives of the legislation.

As the visit between an attorney in a litigation case and a sentenced inmate will vary according to the type of litigation (civil, administration, etc.), status of a party to a case (plaintiff, defendant), and litigation process (before filing a lawsuit, a lawsuit in progress), etc., correctional facilities are required to look over materials that can objectively substantiate the pendency of a lawsuit. Otherwise, it would be challenging to smoothly handle numerous visits between an unsentenced inmate and his/her attorney as well as the visits between sentenced inmates and their appointed attorneys with the letter of the power of attorney in a correctional facility where resources are limited. Furthermore, although the duration and the number of attorney visits to

a sentenced inmate are limited, for sentenced inmates who are challenging life under confinement that is expected to last for a long time, they could be as motivated as unsentenced inmates to appoint an attorney as a way to enjoy conveniences, such as being exempted from labor.

Whereas attorney visitation is highly needed during a pending litigation, since preparations for the litigation should be done in line with the court's trial schedule, before then there is a relatively lesser need for attorney visitation. As it takes some time from the point a written complaint is filed for a court to render a judgment or decision, a sentenced inmate would be able to receive enough assistance from an attorney if they make use of this time to effectively communicate with one another.

Therefore, the Provision at Issue satisfies the rule of minimum restriction.

An attorney may assist a sentenced inmate in various ways not limited to visitation, such as by correspondence and phone call. It generally does not take much time for a sentenced inmate to file a lawsuit after meeting with his/her attorney, and after filing a lawsuit, attorney visitation is allowed four times a month. In consideration of the above, the Provision at Issue satisfies the principle of the balance of interest.

Therefore, the Provision at Issue does not violate the principle against excessive restriction or infringe the freedom of an attorney-at-law to pursue his/her occupation.

15. Case on Aggravated Punishment for Repeated Driving While Intoxicated

[2019Hun-Ba446, 2020Hun-Ka17, 2021Hun-Ba77 (consolidated)]

In this case, the Court held that the part of Article 148-2 (1) of the former Road Traffic Act concerning "Any person who violates Article 44 (1) at least two times" does not violate the rule of clarity under the principle of *nulla poena sine lege,* but contravenes the principle of proportionality between liability and punishment, and thus is in violation of the Constitution.

The relevant part provides that any person who violates, at least two times, the prohibition on driving while intoxicated shall be punished by imprisonment with labor for not less than 2 years but not more than 5 years, or by a fine not less than 10 million won but not exceeding 20 million won.

Background of the Case

Petitioners (2019Hun-Ba446 and 2021Hun-Ba77) were charged with violating more than two times the prohibition on driving while intoxicated (on August 17, 2019 and November 7, 2019, respectively). During the criminal proceedings, they filed a motion to request a constitutional review of Article 148-2 (1) of the Road Traffic Act and Article 148-2 (1) of the former Road Traffic Act. After their motions were denied, Petitioners each filed this constitutional complaint.

The Gunsan Branch of the Jeonju District Court (2020Hun-Ka17), while hearing the criminal case on Defendant who was charged with violating more than two times a prohibition on drunk driving on November 28, 2019, *sua sponte* requested for the constitutional review of Article 148-2 (1) of the Road Traffic Act.

Subject Matter of Review

The subject matter of this case is whether the part of Article 148-2 (1) of the former Road Traffic Act (amended by Act No. 16037 on December 24, 2018 and before amended by Act No. 17371 on June 9, 2020) concerning "Any person who violates Article 44 (1) at least two times" (hereinafter referred to as the "Provision at Issue") violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Former Road Traffic Act (amended by Act No. 16037 on December 24, 2018 and before amended by Act No. 17371 on June 9, 2020)

Article 148-2 (Penalty Provisions) (1) Any person who violates Article 44 (1) or (2) at least two times (limited to a person who drives a motor vehicle, etc. or tram) shall be punished by imprisonment with labor for not less than 2 years but not more than 5 years or by a fine not less than 10 million won but not exceeding 20 million won.

Summary of the Decision

1. Whether the rule of clarity under the principle of *nulla poena sine lege* is violated

Given the plain meaning of the text, legislative purpose and history of the Provision at Issue, its relationship with related provisions, and judicial interpretation, "Any person who violates Article 44 (1) at least two times" is understood as "a person who was found to have driven while intoxicated in violation of Article 44 (1) of the Road Traffic Act after June 1, 2006" and it is sufficient to ascertain that it refers to "a person who drove again while intoxicated in violation of Section (1) of the same Article." Therefore, the Provision at Issue does not violate the

rule of clarity under the principle of *nulla poena sine lege.*

2. Whether the proportionality between liability and punishment is violated

The Provision at Issue is aimed to impose heavier punishment on repeat offenders violating the prohibition on driving while intoxicated. However, it stipulates no time limit between past violations of drunk driving that constitute aggravating factors and the act of recidivism subject to punishment. For example, if the previous offence occurred more than 10 years ago, the act of repeat drunk driving subject to punishment cannot be regarded as an act markedly lacking in law-abiding spirit or an act that "repeatedly" threatens traffic safety. Therefore, there seems hardly a need to require aggravated punishment for the repeat offence that would distinguish it from a general violation of the prohibition on driving while intoxicated. Even if heavier responsibility can be recognized for a person who commits a crime again after being previously convicted, it is difficult to find examples of imposing, for an unlimited period, additional punishment for a subsequent offence on the basis of the prior offence. It is also not in line with the purpose of recognizing the statute of limitation and the lapse of criminal sentences.

Furthermore, under the Provision at Issue, the minimum statutory sentence of imprisonment with labor for not less than 2 years or a fine not less than 10 million won applies uniformly even to a repeat drunk driving offense which poses a relatively low risk to the interest protected by law given the past history of violations and blood alcohol level.

Heavy punishment on repeated drunk driving could correspond to the prevailing public sentiment on the law. However, it could foster immunity and insensitivity towards heavy punishments, possibly tarnishing the authority of law and destabilizing the legal order. Therefore, intensifying punishment as a preventive measure against repeat

drunk driving should be used as a last resort. The Provision at Issue neither takes sufficient account of non-penal approaches such as alcohol treatment programs and preventative measures against drunk driving nor establishes any restrictions regarding the record of violations. Also it imposes uniformly aggravated punishment even for relatively minor forms of repeat drunk driving offences.

Therefore, the Provision at Issue violates the principle of proportionality between liability and punishment.

Summary of Dissenting Opinion of Two Justices

1. Whether the proportionality between liability and punishment is violated

Traffic accidents caused by repeat offenders account for about 40% of all drunk driving related traffic accidents occurring in Korea. The Provision at Issue was enacted to strictly punish and prevent repeat drunk-driving offences after the so-called “Yoon Chang-ho” incident which was named after a victim who was hit by a drunk driver. A repeat drunk driving offence has a high culpability. Even if the past violation occurred ten years ago, the offence might be so severe as to cause death by driving while intoxicated. Also, the opinion of the legislature that it is unfair to impose the same level of punishment on a driver with such a record who again drove while intoxicated, thereby disturbing traffic safety and threatening the lives and safety of innocent citizens, and a first-time drunk driving offender cannot be seen as beyond its discretion.

The Provision at Issue provides for a fine as an optional sentence, and allows the imposition of probation or a deferred sentence in a specific case. Therefore, setting the minimum statutory sentence of imprisonment with labor for not less than 2 years or a fine not less than 10 million won cannot be considered deviating from the principle of proportionality to the point of being declared unconstitutional.

Alcohol treatment or other additional administrative sanctions may be considered to prevent repeat drunk driving. However, when considering the harmful effects of drunk driving and the realities of recidivism in our society, drunk-driving recidivism can be strictly prevented through enhancing the penalty, together with establishing facilities and systems to introduce non-criminal measures. The legislature's decision to strengthen the penalty in consideration of such circumstances must be duly respected when determining the statutory sentence for which extensive legislative discretion or formative power should be acknowledged.

Accordingly, the Provision at Issue does not contravene the principle of proportionality between liability and punishment.

2. Whether the principle of equality is violated

The minimum statutory sentence can be increased to preemptively prevent a willful act of repeat drunk driving, thereby enhancing the admonitory function of a penalty. Therefore, there are acceptable and reasonable grounds for the Provision at Issue to set the minimum statutory sentence higher than that of dangerous driving resulting in injury or death under the Act on the Aggravated Punishment of Specific Crimes. In addition, repeat driving while intoxicated specified in the Provision at Issue is distinct from other offences such as the hit-and-run crime under the Act on the Aggravated Punishment of Specific Crimes and the violation of the Act on Special Cases Concerning the Settlement of Traffic Accidents in terms of the seriousness and manner of the crime and the interest protected by law, and thus, the severity of the statutory sentence cannot be assessed in comparison to these offences. Therefore, it cannot be deemed that the Provision at Issue loses its balance in the criminal punishment system. Further, given the need to come up with measures to prevent repeat driving while intoxicated, the Provision at Issue does not unreasonably discriminate in its relationship to repeat offenders of other laws.

Therefore, the Provision at Issue is not in violation of the principle of equality.

16. Case on Marginal Part-time Employees

[2015Hun-Ba334, 2018Hun-Ba42 (consolidated), November 25, 2021]

In this case, the Constitutional Court held that the part of the proviso of Article 4, Section (1) of the "Act on the Guarantee of Employees' Retirement Benefits" concerning "employees whose contractual average weekly working hours over a four-week period are less than 15 hours" does not violate Article 32, Section (3) and the equality principle of the Constitution. The relevant part excludes so-called "marginal part-time employees," those whose contractual average weekly working hours over a four-week period are less than 15 hours, from the retirement benefit scheme.

Background of the Case

Petitioners, who had worked as a part-time workers, each filed a lawsuit to request the payment of retirement benefits after their retirement. However, their cases were denied because the contractual weekly working hours of both Petitioners were less than 15 hours, and thus, they were not eligible for the retirement benefit scheme in accordance with the proviso of Article 4, Section (1) of the Act on the Guarantee of Employees' Retirement Benefits. During pendency of their appeals, Petitioners each filed a motion for constitutional review of the part of the proviso of Article 4, Section (1) of the above-mentioned Act concerning "employees whose contractual average weekly working hours over a four-week period are less than 15 hours." After their motions were denied, they filed this constitutional complaint.

Subject Matter of Review

The subject matter of review in this case is whether the part concerning "employees whose contractual average weekly working hours over a

four-week period are less than 15 hours" in the proviso of Article 4, Section (1) of the Act on the Guarantee of Employees' Retirement Benefits (hereinafter referred to as the "Provision at Issue") violates the Constitution. The Provision at Issue reads as follows:

Provision at Issue

Act on the Guarantee of Employees' Retirement Benefits (amended by Act No. 7379, January 27, 2005)

Article 4 (Establishment of Retirement Benefit Schemes)

(1) Each employer shall establish at least one retirement benefit scheme in order to pay benefits to retiring employees: Provided that this shall not apply to employees whose continuous service period is less than one year, nor employees whose contractual average weekly working hours over a four-week period is less than 15 hours.

Summary of the Decision

1. Whether Article 32, Section (3) of the Constitution is violated

Employee working conditions can only be guaranteed when harmoniously ensuring both sufficient protection for employees and also the efficient operation of business and corporate productivity. This is the intent of Article 32, Section (3) of the Constitution, which stipulates that working condition standards shall be determined by Act. However, requiring employers to pay retirement benefits for all of their employees may be too much of a burden for them. This may not only impose an economic burden that employers cannot afford to shoulder, but also fail to achieve the original goal of ensuring the stable livelihoods of employees in later life, which would end up adversely affecting working conditions. The retirement benefit scheme has the character of a social

security payment and the function of encouraging long and faithful service of employees. In legislating a retirement benefit scheme that imposes a burden on employers, excluding certain workers who are less exclusive or provide less service to the business or workplace concerned cannot be seen as being clearly unfair or unreasonable to the extent that it deviates from the limit of legislative policy-making power. Notably, the so-called "marginal part-time employment," whose contractual weekly working hours are less than 15 hours, is generally a more casual and temporary employment. It is not in line with the essence of a retirement payment scheme that is premised on employee service to the business or workplace concerned. Likewise, given the fact that employment with shorter contractual working hours usually lasts for a short-term period, we find the stipulation that an employee's exclusivity or service to the business or workplace concerned shall be reviewed based on his/her "contractual working hours" is reasonable. Accordingly, the Provision at Issue cannot be seen as a violation of Article 32, Section (3) of the Constitution.

2. Whether the principle of equality is violated

As reviewed above, it is deemed reasonable for the Provision at Issue to treat marginal part-time workers differently from full-time workers or other part-time workers by excluding them from the retirement benefit scheme. Even if there was discriminatory treatment for marginal part-time workers when they were excluded from the application of the legislation which provides for the retirement benefit scheme, legislative efforts have been made to enhance protection for employees by expanding the scope of application of the retirement benefit scheme, and legislators are acknowledged to have a reasonable ground for coordinating employee's interest with employers' interest in the process of gradually seeking to achieve a higher legal value. It is within the legislator's discretion and thus does not appear to be arbitrary. Therefore, the Provision at Issue does not violate the principle of equality.

Summary of Dissenting Opinion of Three Justices

1. Whether the right to work is infringed

Under the current Act, retirement benefits have the nature of deferred compensation as they are provided regardless of whether or how much the employee has contributed to the business concerned or whether the retiree has a stable source of income. Given that marginal part-time employees also provide labor for the business or workplace concerned, excluding them from the payment of retirement benefits which have the character of remuneration for labor service is not justifiable. Also, considering that the retirement benefit scheme was introduced to ensure the stable livelihoods of employees in later life and to serve the function of unemployment insurance, it is clear that marginal part-time workers also need such protection. Even if we partly acknowledge that the retirement benefit scheme has the character of compensation for services rendered, contractual working hours cannot be deemed the single reasonable standard for evaluating an employee's exclusivity or their service to the business or workplace concerned, and thus, it is not regarded as a reasonable standard for evaluating the services rendered by employees. Meanwhile, excluding them from payment of retirement benefits on the "contractual working hours," rather than on the actual working hours, ignores the reality of labor relations. Such a standard gives more discretion to employers, making it hard to prevent them from using loopholes, such as job splitting. In addition, measures are already in place to guarantee the proportionality of retirement benefits, even for marginal part-time workers. They may receive retirement benefits in proportion to a rate determined based on the hours worked. It is thus difficult to believe that including marginal part-time workers in the application of the retirement benefit scheme seriously affects employers. In light of the above, as the Provision at Issue fails to meet the standard for working conditions worthy of human dignity, it violates Article 32, Section (3) of the Constitution and infringes upon the right to work for

marginal part-time workers.

2. Whether the right to equality is infringed

Given that retirement benefits have the character of deferred compensation and serve the function of a social security payment, we find it difficult to believe that there is a fundamental difference between marginal part-time workers and other employees in determining the application of the retirement benefit scheme. As discussed above, the contractual working hours cannot be a reasonable standard in determining whether or not retirement benefits can be paid, considering its character as compensation for services rendered by employees. Notably, the Act on the Protection, Etc. of Fixed-term and Part-time Employees bans discriminatory treatment for part-time employees relative to full-time employees (see Article 8, Section (2) of the Act), and Article 18, Section (1) of the Labor Standard Act stipulates that the terms and conditions of employment of part-time employees shall be determined in proportion to the work hours of full-time employees. In view of the above, it is difficult to find a reasonable ground for differential treatment of marginal part-time workers relative to other part-time workers. Hence, without any reasonable ground, the Provision at Issue treats workers whose contractual weekly working hours are less than 15 hours differently from those whose contractual weekly working hours are 15 hours or more, and it thus violates the principle of equality.

17. Case on Special Provision on Admissibility of Video Recorded Statement Made by Sexual Crime Victim under Age of 19

[2018Hun-Ba524, December 23, 2021]

In this case, the Court held unconstitutional the part of Article 30, Section (6) of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes (wholly amended by Act No. 11556 on December 18, 2012) relating to a "sexual crime victim under the age of 19" of the portion "A victim's statement in a video recording that was made under Section (1) may be admitted as evidence if, during a preparatory hearing or a trial, that statement is authenticated by the testimony of a trusted person or intermediary who sat with the victim during the investigative interview process." The relevant part prescribes that a video recording of a statement made by a sexual crime victim under the age of 19 during an investigative interview process may be admitted as evidence if that statement is authenticated by the testimony of a trusted person or intermediary who sat with the victim during that interview process. The Court reasoned that this relevant part violates the rule against excessive restriction, and thus, infringes the right of Complainant to a fair trial.

Background of the Case

Complainant received judgments of conviction (providing six years' imprisonment with hard labor, etc.) in the trial and appellate courts for counts including committing by use or threat of force several acts of indecency with a victim under the age of 13. Complainant objected during the trial court proceedings to the admission as evidence of the victim's statements in video recordings. The trial court, however, used those statements as evidence of guilt after, *inter alia*, examining trusted persons as witnesses. Likewise, the appellate court used the statements as evidence of guilt. Neither of these courts conducted an examination of the victim, the original declarant of the statements, as a witness.

In response, Complainant appealed to the Supreme Court. While the appeal was pending, he petitioned the Supreme Court to request constitutional review of provisions of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes and of another statute. After the petition was rejected, he filed the constitutional complaint in this case on December 27, 2018.

Subject Matter of Review

The subject matter of review in this case is the constitutionality of the part of Article 30, Section (6) of the Act on Special Cases concerning the Punishment, etc. of Sexual Crimes (such part hereinafter referred to as the "Provision at Issue") relating to a "sexual crime victim under the age of 19" of the portion "A victim's statement in a video recording that was made under Section (1) may be admitted as evidence if, during a preparatory hearing or a trial, that statement is authenticated by the testimony of a trusted person or intermediary who sat with the victim during the investigative interview process." The Provision at Issue reads as follows:

Provision at Issue

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

Article 30 (Taking, Keeping, Etc. of Videos)

(6) A victim's statement in a video recording that was made under Section (1) may be admitted as evidence if, during a preparatory hearing or a trial, that statement is authenticated by the testimony of the victim or of a trusted person or intermediary who sat with the victim during the investigative interview process.

17. Case on Special Provision on Admissibility of Video Recorded Statement Made by Sexual Crime Victim under Age of 19

Summary of the Decision

The Provision at Issue serves a legitimate purpose in that it prevents a sexual crime victim under the age of 19 (hereinafter referred to as a "Minor Victim") from experiencing secondary victimization during testimony and other proceedings. It aims to minimize, *inter alia*, the examination of Minor Victims in court by admitting as evidence their video-recorded statements authenticated by the testimony of a trusted person or intermediary who sat with them during the investigative interview process (hereinafter referred to as a "Trusted Person or Intermediary"). Such admission contributes to the achievement of the legislative purpose of the Provision at Issue, and is an appropriate means of furthering that purpose.

Due to the nature of sexual crimes, there are no few instances in which the video-recorded statement of a Minor Victim is the core evidence of the case. Nonetheless, the Provision at Issue fails to guarantee, or provide a substitute for, the right of a defendant to cross-examination, which is an effective method of impeachment to demonstrate misrepresentation or falsity of a major statement evidence. Specifically, the Court observes that video-recorded statements of the Minor Victim is not evidence of a filmed crime scene and process, but evidence of accounts made by that Victim during the investigative process in which the defendant took no part. Considering the limitations of the filmed statements, it cannot be said that there is little need for testing, through cross-examination, the video recording of the scene where the Minor Victim gives statements, even though the recording can represent that scene as it is. A substitute for the cross-examination of the defendant has certain inevitable limitations as well, due to the inadequate data provided by the video recording. The Court also observes that a Trusted Person or Intermediary, who sat with the Minor Victim in the investigative interview, is not the one who directly experienced or witnessed the crime process, etc. Thus, the cross-examination of the

Trusted Person or Intermediary cannot properly function as a substitute for that of the original declarant. It is true that, despite the Provision at Issue, the court, on its own motion or on application of a defendant or another, may summon Minor Victims as witnesses in consideration of surrounding circumstances. However, there is no guarantee that such application will be granted or the original declarant will be present in court. For this reason, the defendant continues to face a risk of conviction due to the statement evidence not impeached by himself or herself. Taking these considerations together, the Court finds that the right of a defendant to present a defense is restricted to a very significant degree by the Provision at Issue.

In contrast, the purpose of the Provision at Issue can be satisfactorily attained by actively employing harmonious methods for preventing secondary victimization of the Minor Victim during testimony and for guaranteeing the right of the defendant to cross-examine that Victim. First, Minor Victims may experience secondary harm in consequence of being asked to repeatedly remember and recount their experience of crime. However, the risk of unnecessarily repeating statements can be avoided by actively carrying out from the initial stages of investigation of a sexual crime an evidence preservation procedure, which secures early on the testimony of the Minor Victim while ensuring the defendant the opportunity for cross-examination. Second, the legislature has established a number of schemes, including closed court proceedings, which aim to preclude the risk of exposure of personal information or private life; procedures for preventing divulgence, etc. of personal information; and the defendant's withdrawal from the courtroom, the witness cross-examination using video or other means of transmission, and other safeguards against shock that could be engendered by a courtroom environment and confrontation with the defendant or his or her family. Further, to prevent victims from suffering distress during cross-examination, there are legislative schemes in place such as allowing them to sit with a trusted person as well as providing them

with an intermediary and an attorney. In the case of the witness examination by video or other means of transmission, victims appear in a separate room and testify by means of transmission. Therefore, a young victim does not need to be present in the courtroom or to directly confront the defendant. Moreover, the defense is prohibited from, *inter alia*, intimidating and harassing victims during cross-examination beyond the legitimate scope of the right to present a defense, and the presiding judge may exercise the authority to lead proceedings in a process of questioning in order to protect witnesses.

It is unquestionable that preventing secondary victimization of Minor Victims amounts to an important public interest in our society. Nevertheless, given the substantial restrictions placed by the Provision at Issue on a defendant's right to present a defense, and given the existence of a number of harmonious alternatives that can shield a Minor Victim from secondary victimization, it is difficult to conclude with certainty that the public interest this Provision intends to serve overrides the private interests of the defendant. Therefore, the Provision at Issue fails to meet the least restrictive means and balance of interests tests.

Accordingly, the Provision at Issue infringes the right of Complainant to a fair trial by violating the rule against excessive restriction.

Summary of Dissenting Opinion of Three Justices

A criminal defendant enjoys the status of a party that forms and maintains the proceedings in a criminal suit, and has the constitutional right to a proceeding in which equality of arms with the prosecutor is ensured. However, it is initially the task of the legislature to further specify the procedures of a fair trial which are guaranteed under the Constitution. The legislature continues to reserve the legislative-formative power unless it, in regulating criminal proceedings, creates a procedure ignoring elements that cannot be abandoned under the Constitution, such as one reducing the criminal defendant citizen to nothing more than the

subject of a penalty, or a procedure violating Article 32, Section (2) of the Constitution.

The Provision at Issue prescribes an exception to the hearsay rule, which embodies the right of a defendant to a fair trial in criminal proceedings. Since this Provision restricts the constitutional right to a fair trial, the issue before us is whether this restriction exceeds constitutional limits.

Traditionally, in criminal procedure, victims did not occupy the center of attention, and were merely the subject of a lawsuit and judicial consideration. Although the Constitution has long guaranteed the right of victims to testimony during trial, it is only recently that responding to the phenomenon of their exposure to new risks of harm in the judicial process has gained attention. Given the goal of the exercise of the state's punitive authority, the protection of victims should not be disregarded in criminal proceedings.

The Provision at Issue is recognized as meeting the legitimate purpose and appropriate means tests, because it minimizes examination and questioning of Minor Victims in court to shelter them from new additional damage, such as psychological and emotional shock, during the course of their testimony.

In cases where the defendant of a sexual crime denies the criminal act and cross-examines the victim, going through the process of recalling the harm inflicted by that crime and of aggressive impeachment may cause strong psychological shock and humiliation to that victim similar to the original criminal conduct. This is more likely to occur if cross-examination attacks the credibility of the victim by creating prejudice against his or her character or usual behavior. In comparison with an adult, a Minor Victim is very highly likely to suffer secondary victimization by giving evidence in court. On the other hand, the Minor Victim's testimony may contribute only modestly to the discovery of the substantive truth. There are also great risks that a child or juvenile

victim's memory or statements will be distorted by leading or suggestive questions and so on; that a Minor Victim will experience mental or psychological shock due to a persistent or intrusive attack—irrelevant to the discovery of the substantive truth—made on the partial inaccuracy of his or her statement or the consistency of its details by the defense having no expertise in children's characteristics and sexual crime; and that when the defendant is a relative of the Minor Victim, that Victim will suffer further harm because of dual emotions or of persuasion or pressure from those around him or her. Bearing these considerations in mind, we find there is a probability that a Minor Victim will experience during testimony such psychological or emotional shock that cannot be borne by himself or herself, or will suffer from the resultant disability. Therefore, we recognize the need to specially protect the Minor Victim from the abuse of the judicial process by, *inter alia*, minimizing their in-court testimony.

The video-recorded statements that may be admissible under the Provision at Issue are made at an early stage of the case or investigation by a Minor Victim having a vivid memory of the crime. In light of the features of video evidence, not only is there relatively little need to test such statements through cross-examination when compared with general hearsay evidence of other types, but the statements by themselves include sufficient information necessary to determine the credibility of the Minor Victim's accounts.

The Provision at Issue aims to achieve harmony between guaranteeing the right of a defendant in criminal proceedings and protecting a Minor Victim. The defendant can defend himself or herself by, *inter alia*, impeaching the lawfulness of the video recording and the credibility of the Minor Victim's statements, or questioning a Trusted Person or Intermediary. The probative value of the video-recorded statements can certainly be negated, and the defendant is still afforded, depending on an individual assessment of the court, the opportunity to exercise his or her right to cross-examination.

In view of the following considerations, we find it difficult to believe that using an evidence preservation proceeding to examine the Minor Victim would be an alternative for advancing the legislative purpose of the Provision at Issue to the same degree as this Provision: that witness examination in the evidence preservation proceeding does not have any significant effect in reducing secondary victimization arising from the repeating of statements because such examination is conducted after an interview with an investigative agency, at the very least; that unilaterally exposing Minor Victims to cross-examination in the evidence preservation proceeding, regardless of whether the defendant objects to the admission into evidence of their statements, would impose a greater burden on them; and that because adversarial examination in the evidence preservation proceeding is identical to that in the criminal trial proceedings, the essence of such examination is to impeach the accounts of victims and it is impossible to prevent secondary victimization resulting from leading questions, which are as a rule allowed during cross-examination. The Provision at Issue was enacted in recognition that Minor Victims were not sufficiently protected from the risk of secondary victimization, despite the different schemes—enumerated by the opinion of the Court—available for protection of Minor Victims during witness examination in trial or evidence preservation proceedings. This recognition of the legislature cannot be viewed lightly.

There is a very vital public interest in shielding criminal victims, who have the constitutional right to testimony at trial, from secondary victimization during criminal proceedings that are conducted to guarantee their fundamental rights. Considering that the importance of this public interest has only recently received attention, we need to give more careful consideration to the issue of whether the right of a defendant to a fair trial is unduly restricted by the legislative safeguards established for the protection of a Minor Victim from secondary victimization during the defendant's cross-examination in a sexual crime trial. In light of the vital public interest the Provision at Issue aims to secure, it cannot be

said, merely because this Provision prescribes an exception to the hearsay rule, that it renders the defendant's right to present a defense practically inefficacious by placing only the protection of the Minor Victim at the forefront. In conclusion, the Provision at Issue meets the least restrictive means and balance of interests tests. Therefore, it does not infringe the right of Complainant to a fair trial.

18. Case on Restrictions for Foreign Workers on Changing Workplaces

[2020Hun-Ma395, December 23, 2021]

In this case, the Court held that both a statutory provision that restricts foreign workers from changing workplaces and permits such change in exceptional cases, and clauses of a Public Notice of the Ministry of Employment and Labor that specify the grounds upon which a change of workplace can be allowed, do not infringe the freedom of Complainants to choose a workplace or their right to equality.

Background of the Case

Complainants are foreign workers with a non-professional employment (E-9) visa. They are currently working in the Republic of Korea on an employment permit granted under the "Act on the Employment, etc. of Foreign Workers" (hereinafter referred to as the "Foreign Workers Employment Act").

Complainants filed a constitutional complaint against provisions in the Foreign Workers Employment Act and clauses in a former version of the "Grounds for Changing Workplaces That Are Not Attributable to Foreign Workers." They argued that they are seeking to change their workplaces on grounds of unilateral changes to working hours, non-payment of overtime wages, additional deduction of a dormitory fee, forced operation of a piece of construction equipment without a license, threatening remarks, depositing an amount of money paid upon breach of an employment contract, failure to provide protective equipment, and witnessing an industrial accident in the workplace, but these grounds do not correspond to those set out in the above provisions and clauses.

Subject Matter of Review

The subject matter of review in this case is whether the fundamental rights of Complainants are infringed by the following: Article 25, Section (1) of the Foreign Workers Employment Act (amended by Act No. 16274 on January 15, 2019) (hereinafter referred to as the "Grounds Restriction Provision"); Article 25, Section (4) of the Foreign Workers Employment Act (amended by Act No. 12371 on January 28, 2014); and Articles 4 and 5 of the former Grounds for Changing Workplaces Which Are Not Attributable to Foreign Workers (amended by Public Notice No. 2019-39 of the Ministry of Employment and Labor on July 16, 2019, and before amendment by Public Notice No. 2021-30 of the same ministry on April 1, 2021) (hereinafter collectively referred to as the "Public Notice Clauses"). The provisions at issue read as follows:

Provisions at Issue

The Foreign Workers Employment Act (amended by Act No. 16274 on January 15, 2019)

Article 25 (Permission for Change of Business or Workplace)

(1) Where any of the following events occur, a foreign worker (excluding a foreign worker under Article 12(1)) may file an application for change of business or workplace with the head of an employment security office, as prescribed by Ordinance of the Ministry of Employment and Labor:

1. If his/her employer intends, on a justifiable ground, to terminate his/her employment contract during the contract period or refuse renewal of his/her employment contract after its expiration;
2. Where the Minister of Employment and Labor recognizes and issues a public notice that the foreign worker, by conventional social standards, is unable to continue to work in the business or workplace on a ground not attributable to him/her, such as

a temporary shutdown, closure of business, cancellation of the employment permit under Article 19(1), employment limitation under Article 20(1), provision of a dormitory in violation of Article 22-2, or his/her employer's violation of terms and conditions of employment or unfair treatment;

3. Where any other cause or event prescribed by Presidential Decree occurs.

The Foreign Workers Employment Act (amended by Act No. 12371 on January 28, 2014)

Article 25 (Permission for Change of Business or Workplace)

(4) A foreign worker's change of business or workplace under Section (1) shall not, in principle, be made more than three times during the period under Article 18 or two times during the extended period under Article 18-2(1): *Provided*, that the foregoing shall not include cases of change of business or workplace on any ground prescribed in Section (1)2.

The former Grounds for Changing Workplaces Which Are Not Attributable to Foreign Workers (amended by Public Notice No. 2019-39 of the Ministry of Employment and Labor on July 16, 2019, and before amendment by Public Notice No. 2021-30 of the same ministry on April 1, 2021)

Article 4 (Violation of Terms and Conditions of Employment)

Each of the following Items is a permissible ground for change of workplace under Article 25(1)2 of the Act, amounting to, *inter alia*, a violation of terms and conditions of employment.

1. An employer, *inter alia*, fails to pay wages, as described in any of the following Sub-items. (In such a case, an application for change of workplace must be filed during the failure or delay in paying wages, or before four months elapse from the date such failure or delay terminates. The case excludes a simple calculation mistake of the employer.)

(a) fails for two months or more to pay at least 30 percent of

monthly wages, or makes such payment after delay of two months or more;

(b) fails for four months or more to pay at least 10 percent of monthly wages, or makes such payment after delay of four months or more; or

(c) pays below the minimum wage provided by the Minimum Wage Act.

2. Where an employer reduces at least 20 percent of the wages or working hours that he or she proposed when offering employment or has generally applied after commencement of employment, the period of such reduction is two months or more during the one year before an application for change of workplace is filed. (In such a case, the application for change of workplace must be filed during the time in which the reduction of the wages or working hours is being made, or before four months elapse from the date such reduction terminates.)

3. Where the work schedule that an employer proposed when offering employment or has generally applied after commencement of employment is moved forward or backward by two hours or more without the consent of his or her foreign worker, this fact continues for one month or more during the one year before an application for change of workplace is filed.

4. Where a foreign worker's injury or disease requiring suspension from work for at least three days arises out of a violation of the Occupational Safety and Health Act by his or her employer, the employer fails to take safety and health measures as required by the Occupational Safety and Health Act until a period of one month from the date of occurrence of the injury or disease expires.

Article 5 (Unfair treatment, etc.)

Each of the following Items is a permissible ground for change of workplace under Article 25(1)2 of the Act, amounting to unfair treatment, etc.

1. A change of workplace is recognized as urgently necessary for a foreign worker who has applied for the change of workplace by reason of damage from sexual assault by his or her employer.
2. A foreign worker is recognized as being unable to continue to work in the workplace for reasons including sexual harassment, sexual violence, assault, or habitual verbal abuse by his or her employer.
3. A foreign worker is recognized as being unable to continue to work in the workplace for reasons including sexual harassment, sexual violence, assault, or habitual verbal abuse by his or her coworker or his or her employer's spouse or lineal ascendants or descendants, committed within the workplace or another area under the influence of his or her employer's management.
4. A foreign worker is recognized as being unable to continue to work in the workplace due to unreasonable discriminatory treatment by his or her employer for reasons including nationality, religion, sex, or physical disability.
5. An employer who, by reason of providing his or her foreign worker with a vinyl greenhouse as accommodation, has received a self-improvement order from the head of an employment security office, but absent a legitimate justification fails to follow that order within a self-improvement period.

Summary of the Decision

1. Whether the Grounds Restriction Provision infringes fundamental rights

The Grounds Restriction Provision statutorily defines the specific scope of matters to be delegated to the Ministry of Employment and Labor. This provision delegates to the ministry the task of prescribing in a Public Notice the content of an employer's violation of terms and conditions of employment or his or her unfair treatment. Therefore, this provision is not in violation of the principle against blanket delegation.

It is recognized that there is wide legislative discretion in providing a system for accepting foreign workers. The freedom of foreign workers to choose a workplace is concretized only after the legislature enacts law specifically prescribing the content of the system based on policy considerations. Thus, the Grounds Restriction Provision—which limits the reasons for which foreign workers with a non-professional employment visa may change workplaces—is unconstitutional only when the content of this provision is excessively arbitrary and without reasonable basis. If foreign workers with a non-professional employment visa are allowed to freely change workplaces after terminating their employment contract or refusing to renew it, their employer may necessarily experience great difficulty in maintaining a stable workforce and smoothly operating the workplace. Further, in the context of efficient management of foreign workers, it is necessary to prevent their frequent changes of workplace and encourage their long-term employment within their authorized period of work. Because the employment permit system under the Foreign Workers Employment Act focuses on the regulation of employers, the criteria for examining incoming foreign workers with a non-professional employment visa are relatively loose compared with the criteria under a work permit system. Thus, there is a need to compensate for the lenient control over incoming foreign workers themselves by increasing the regulation of their stay in and departure from the Republic of Korea. For the foregoing reasons, the Grounds Restriction Provision—which does not recognize the right of a foreign worker to freely apply for change of workplace—is regarded as imposing limitations necessary to maintain the employment permit system consistent with its purpose.

In sum, the Grounds Restriction Provision neither violates the principle against blanket delegation nor is it clearly unreasonable to the extent that it is beyond the scope of legislative discretion. Accordingly, it does not infringe the right of Complainants to choose a workplace.

Foreign workers with a work and visit (H-2) visa differ from those with a non-professional employment visa in several respects. They differ

as to their status as foreign nationals of Korean origin, the eligibility requirements to stay in the Republic of Korea, the scope of authorized work, the purpose of the visa program, and the procedures of employment. Therefore, while the Foreign Workers Employment Act does not limit the grounds upon which work and visit visa holders can change workplaces, the Grounds Restriction Provision has a reasonable basis for strictly requiring that non-professional employment visa holders establish grounds to change workplaces. The Grounds Restriction Provision does not infringe the right of Complainants to equality.

2. Whether the Public Notice Clauses infringe fundamental rights

The Public Notice Clauses set forth the following as grounds for change of workplace: violation of terms and conditions of employment, including failure to pay wages, delay in paying wages, reduction of terms and conditions of employment, modification of work schedule, and failure to take measures after an industrial accident; and unfair treatment, such as sexual harassment, sexual violence, assault, habitual verbal abuse, discriminatory treatment, and provision of a vinyl greenhouse as accommodation. These can be viewed as a comprehensive reflection of unreasonable treatment experienced by foreign workers in the workplace. Further, there is a mechanism in place whereby a Council for Protection of Rights and Interests of Foreign Workers can allow for change of workplace if proof of grounds for such change is lacking or any other equivalent grounds exist for such change. Therefore, because the Public Notice Clauses are not clearly unreasonable to the extent that they are beyond the scope of legislative discretion, they do not infringe the freedom of Complainants to choose a workplace.

Foreign workers with a work and visit visa differ from those with a non-professional employment visa in several respects. They differ as to their status as foreign nationals of Korean origin, the eligibility requirements to stay in the Republic of Korea, the scope of authorized

work, the purpose of the visa program, and the procedures of employment. Therefore, while the Foreign Workers Employment Act fully recognizes the freedom of work and visit visa holders to change workplaces, the Public Notice Clauses have a reasonable basis for strictly requiring that non-professional employment visa holders establish grounds to change workplaces. Accordingly, the Public Notice Clauses do not infringe the right of Complainants to equality.

Summary of Dissenting Opinion of Two Justices

1. Whether the Grounds Restriction Provision infringes the freedom to choose a workplace

Foreign and domestic workers in our country have a relationship in which the former substitute for or complement the latter, as opposed to competing against them. A strict control is maintained over the types of industries eligible to hire foreign workers and the number of such workers to be recruited in this country. Under these circumstances, there is no rationality in protecting the employment of domestic workers by imposing restrictions on change of workplace by foreign workers who may transition only to a workplace that cannot find domestic workers. Unduly limiting the grounds for change of workplace is not conducive to the efficient management and supervision of foreign workers. On the contrary, such limitation can lead to a proliferation of illegal residents, posing a threat to the stable operation of the employment permit system. We observe that domestic employment of the foreign worker commences when the employer unilaterally chooses him or her from a list of foreign job seekers. The foreign worker enters into employment with little knowledge of the specific working conditions and environment. In view of these considerations, we find that the foreign worker's freedom to choose a workplace is significantly curtailed by the strict limitations imposed on grounds for change of workplace. Because the Grounds Restriction Provision is clearly unreasonable to the extent that it is

beyond the scope of legislative discretion, it infringes the freedom of Complainants to choose a workplace.

2. Whether the Public Notice Clauses infringe the freedom to choose a workplace

As in the case of domestic persons who may avoid employment or leave workplaces for their own safety and health, etc., foreign workers ought to be allowed to withdraw from a workplace with a poor environment. We observe that the grounds enumerated in the Public Notice Clauses as "violations of terms and conditions of employment" involve only a fraction of the employment terms and conditions prescribed in the Labor Standards Act. In addition, the criteria used to select those grounds are patently arbitrary, and it is not easy to fall within those grounds. We also observe that the types and sizes of the workplaces in which industrial accidents involving death are common mainly match those of the workplaces that are subject to the employment permit system and where foreign workers provide labor. Restricting foreign workers from leaving workplaces where safety is not guaranteed and from moving to a new workplace not only constitutes an impingement on their freedom to choose a workplace but also may place their lives and bodies at risk. Moreover, the Public Notice Clauses do not include most of the reasons that can be considered as rational grounds for change of workplace, such as a dirty or hazardous working environment, high work intensity, and repetition of unreasonable work directions by the employer. Because the Public Notice Clauses are evidently not sufficient to ensure the freedom of Complainants to choose a workplace, they infringe this freedom.

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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