Institut d'Etudes Politiques de Paris

ECOLE DOCTORALE DE SCIENCES PO

Programme doctoral Asie

CERI

Double doctorat en Science politique entre Sciences Po et Columbia University

The Judicial Politics of Enmity.

A Case Study of the Constitutional Court of Korea's Jurisprudence Since 1988.

Annexes

Justine GUICHARD

Thèse dirigée par Françoise Mengin, Directrice de recherche Sciences Po / CERI, et Andrew J. Nathan, Professeur de science politique à Columbia University

Soutenue le 6 juin 2014

Jury :
Mme Marie Seong-hak Kim, Professeur d'histoire, St. Cloud State University (rapporteur)
Mme Françoise Mengin, Directrice de recherche Sciences Po / CERI
M. Andrew J. Nathan, Professeur de science politique, Columbia University
M. Pasquale Pasquino, Directeur de recherche CNRS et Professeur de science politique, New York University (rapporteur)
M. Daniel Sabbagh, Directeur de recherche Sciences Po / CERI

LIST OF APPENDICES

FIELDWORK AT THE CONSTITUTIONAL COURT OF KOREA AND ITS RESEARCH INSTITUTE

I had the opportunity to conduct fieldwork at the Constitutional Court of Korea and its Research Institute, located in Seoul, from September 3 to September 28, 2012. During that month, I interned at the Constitutional Research Institute where I joined the Comparative Constitutional Law Research Team. My main assignments consisted in gathering and updating information on the constitutional adjudication systems of various French-speaking African countries and in drafting a report about my own research on the jurisprudence of the Constitutional Court of Korea. While most of my time at the Constitutional Research Institute was dedicated to collecting, reading, and analyzing decisions from the court, it also enabled me to interact on a daily basis with research officers from the Institute as well as from the Constitutional Court.

The Institute was established in 2011 in order to conduct research on a greater variety of constitutional issues than the one immediately falling under the purview of the Constitutional Court. The Institute is also in charge of providing constitutional education to legal practitioners through its Instruction team. The work of research officers from the Institute and the Court, as well as their recruitment channels, are largely independent. Only research officers from the Court directly assist justices by being ‘‘engaged in investigation and research concerning the deliberation and adjudication of cases at the direction of the President of the Constitutional Court’’ (article 19 of the Constitutional Court Act). They are appointed for a ten-year period, which can be renewed, and are assigned to justices rather than chosen by them, contrary to both the American and German practice (where issues of judicial philosophy on the one hand, and matters of expertise on the other hand, influence justices’ choice).

By contrast, the tasks that research officers from the Institute perform are more akin to that of scholars than law clerks. The Institute is divided into four research teams: Institutions, Basic Rights, Comparative Constitutional Law, and Instruction. My own research at the Institute was placed under the supervision of two officers, from both the Comparative Constitutional Law team and the Instruction team, whom I regularly met. Each encounter provided me with the occasion to conduct informal interviews. A diversity of other research events and activities taking place at the Institute and the Constitutional Court in the course of my internship offered me the possibility to observe, and exchange about, the work of research officers and their perception of the role and dynamics of the Constitutional Court.

A list of such main events and activities is provided below. Unfortunately, neither oral arguments nor public pronouncements of judgments were scheduled during my field research.

Monday, September 3

-meeting with my two research supervisors

-ceremony at the Constitutional Court to celebrate the institution’s 24th anniversary

-informal interview with my supervisor from the Comparative Constitutional Law team

Tuesday, September 4

-meeting with the director of the Instruction team and my two research supervisors

Wednesday, September 5

-weekly meeting with the Comparative Constitutional Law team, composed of one specialist of Germany (the team's director), one of Japan, one of the United States, one of France (my supervisor), one of Spain, and one of the European Court of Human Rights

-visit of the Constitutional Court (courtroom, justices' deliberation room, public service center where constitutional complaints can be filed)

-informal interview with the director of the Comparative Constitutional Law team and former research officer from the Constitutional Court

-informal interview with my supervisor from the Comparative Constitutional Law team

Thursday, September 6

-informal interview with my supervisor from the Comparative Constitutional Law team

-informal interview with my supervisor from the Instruction team

Friday, September 7

-bi-monthly research seminar at the Institute with officers from the Comparative Constitutional Law team and the Instruction team

-informal interview with my supervisor from the Instruction team

Monday, September 10

-informal interview with my supervisor from the Comparative Constitutional Law team

Tuesday, September 10

-informal interview with my supervisor from the Instruction team

Wednesday, September 12

-weekly meeting with the Comparative Constitutional Law team

Thursday, September 13

-research seminar at the Constitutional Court on the issue of comfort women

-meeting with research officers from the Constitutional Court

Friday, September 14

-retirement ceremony at the Constitutional Court of Korea of Justices Kim Jong-dae, Min Hyeong-ki, Lee Dong-heub, and Mok Young-joon

Monday, September 17

-informal interview with a research fellow from the Comparative Constitutional Law team (specialist of Spain)

-informal interview with two research officers from the Constitutional Court

Tuesday, September 18

-second informal interview with the two research officers from the Constitutional Court

-personal research in the case records of the Constitutional Court

Wednesday, September 19

-weekly meeting with the Comparative Constitutional Law team
-personal research in the case records of the Constitutional Court
-monthly research seminar at the Institute attended by all officers

Thursday, September 20

-visit to the Supreme Court
-informal interview with a former district court judge and former research officer at the Constitutional Court

Friday, September 21

-bi-monthly research seminar at the Institute with officers from the Comparative Constitutional Law team and the Instruction team
-interview with a research officer from the Comparative Constitutional Law team (specialist of the United States)
-inauguration ceremony at the Constitutional Court of Korea of Justices Kim Yi-Su, Lee Jin-Sung, Kim Chang-Jong, Ahn Chang-ho, and Kang Il-Won

Monday, September 24

-informal interview with two new research officers from the Constitutional Court

Tuesday, September 25

-informal interview with my research supervisor from the Instruction team

Wednesday, September 26

-weekly meeting with the Comparative Constitutional Law team
-research seminar at the Constitutional Court on Spanish constitutional law

Thursday, September 27

-meeting with my two research supervisors
-informal interview with my supervisor from the Comparative Constitutional Law team

CHRONOLOGY
OF MAJOR POLITICAL EVENTS

1905	Korea becomes Japan's protectorate as a result of the Ŭlsa Treaty
1910	Korea is fully annexed by Japan
1919	March 1st Independence Movement
1919	The Provisional Government of the Republic of Korea is founded in Shanghai; it is presided by Rhee Syngman from 1919 to 1925
1931	Japan invades Manchuria
1937	Japan enters war against China
1941	Japan enters war against the United States
1945, August 15	Japan's occupation ends in Korea
1945, September 8	U.S. forces land at Inchŏn, *de facto* division of the peninsula into two zones of occupation north and south of the 38th parallel
1945-1948	South Korea under the control of the U.S.Army Military Government (USAMGIK)
1948, July 17	The Constitution of the Republic of Korea is enacted
1948, August 15	The Republic of Korea is founded in the south; it is presided by Rhee Syngman from 1948 to 1960
1948, September 9	The Democratic People's Republic of Korea is founded in the north
1948, December 1	The National Security Act is enacted
1950, June 25	The Korean War begins following the North Korean army's invasion of South Korea
1952, July 7	The Constitution of the Republic of Korea is revised
1953, July 27	The Armistice Agreement is signed at Panmunjŏn
1954, November 29	The Constitution of the Republic of Korea is revised
1960, April	The so-called ''April revolution'' leads to the collapse of Rhee Syngman's regime
1960, April 19	The Second Republic is established
1960, June 15	The Constitution of the Republic of Korea is revised
1960, November 29	The Constitution of the Republic of Korea is revised
1961, May 16	General Park Chung-hee seizes power as a result of a military coup d'état
1961, May 20	The Korean Central Intelligence Agency is founded
1961, July 3	The Anti-Communist Act is enacted
1962, December 26	The Constitution of the Republic of Korea is revised
1963, December 27	The Third Republic is established; it is presided by Park Chung-hee from 1963 to 1972
1968, January 21	North Korean commandos carry out a raid against the Blue House, failed attempt at assassinating Park Chung-hee
1969, October 21	The Constitution of the Republic of Korea is revised
1972, July 4	North-South Joint Communiqué
1972, December 27	The Constitution of the Republic of Korea is revised, giving birth to the so-called *Yusin* constitution and the establishment of the Fourth Republic; it is presided by Park Chung-hee from 1972 to 1979
1979, October 26	Park Chung-hee is assassinated by the chief of his security service
1979, December 12	General Chun Doo-hwan seizes power as a result of a military coup d'état
1980, May 17	Martial law is declared nationwide

1980, May 18-27	Kwangju uprising and repression
1980, October 27	The Constitution of the Republic of Korea is revised
1980, December 12	The Anti-Communist Act is merged with the National Security Act
1981, March 3	The Fifth Republic is established; it is presided by Chun Doo-hwan from 1981 to 1987
1981, April 8	The Agency for National Security Planning replaces the Korean Central Intelligence Agency
1983, October 9	North Korean agents carry out the Rangoon bombing, a failed assassination attempt against Chun Doo-hwan
1987, June	June Democracy Movement
1987, June 29	Roh Tae-woo's Eight-Point Declaration
1987, August 3-31	Eight-Member Party Talks to revise the constitution
1987, October 29	The Constitution of the Republic of Korea is revised and the Sixth Republic established
1987, November 29	The Korean Air Flight 858 is destroyed in mid-air by a bomb planted by two North Korean agents
1987, December 16	Direct presidential election held and won by Roh Tae-woo
1988, September 1	The Constitutional Court of Korea begins its operations
1990, January 22	The ruling party of Roh Tae-woo and the opposition party of Kim Young-sam merge
1991, May 31	The National Security Act is revised
1991, September 17	The two Koreas gain separate membership to the United States
1991, December 13	The Inter-Korean Agreement on Reconciliation, Non-Agression, Exchange, and Cooperation is signed
1992, December 18	The presidential election is won by Kim Young-sam
1995, December 3	Chun Doo-hwan and Roh Tae-woo are arrested
1996, August 26	Chun Doo-hwan and Roh Tae-woo are condemned to death penalty and life imprisonment by the Seoul District Court
1997, December 19	The presidential election is won by Kim Dae-jung
1997, December 22	Chun Doo-hwan and Roh Tae-woo are pardoned
1999, January 22	The National Intelligence Service replaces the Agency for National Security Planning
2000, June 13-15	The first inter-Korean summit between Kim Jong-il and Kim Dae-jung is held in Pyongyang
2002, December 19	The presidential election is won by Roh Moo-hyun
2003, June 10	North Korea withdraws from the Non-Proliferation Treaty
2003, July 31	The pledge to abide by the law is abolished
2004, March 12	A motion to impeach Roh Moo-hyun is adopted by the National Assembly and later rejected by the Constitutional Court
2004, September	Debate over the abolition of the National Security Act
2006, October 9	North Korea's first nuclear test
2007, October 2-4	The second inter-Korean summit is held between Kim Jong-il and Roh Moo-hyun in Pyongyang
2007, December 19	The presidential election is won by Lee Myun-bak
2009, May 25	North Korea's second nuclear test
2012, December 19	The presidential election is won by Park Geun-hye
2013, February 12	North Korea's third nuclear test
2013, November 5	A request to dissolve the Unified Progressive Party is filed before the Constitutional Court

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 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 [Democracy]
(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 [Nationality]
(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 [Territory]
The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4 [Unification, Peace]

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 [War, Armed Forces]
(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 [Treaties, Foreigners]
(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rule 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 [Public Officials]
(1) All public officials shall be servants of the entire people and shall be responsible to the people.
(2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.

Article 8 [Political Parties]
(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 [Culture]
The State shall strive to sustain and develop the cultural heritage and to enhance national culture.

CHAPTER II. Rights and Duties of the Citizens

Article 10 [Dignity, Pursuit of Happiness]
All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Article 11 [Equality]
(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 ensue therefrom.

Article 12 [Personal Liberty, Personal Integrity
(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 citizen 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 therefore 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 [*Nulla poena sine lege*, double jeopardy, retroactive law, family liability]
(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 restriction 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 [Residence, Move]
All citizens shall enjoy freedom of residence and the right to move at will.

Article 15 [Occupation]
All citizens shall enjoy freedom of occupation.

Article 16 [Home, Search, Seizure]
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 [Privacy]
The privacy of no citizen shall be infringed.

Article 18 [Privacy of Correspondence]
The privacy of correspondence of no citizen shall be infringed.

Article 19 [Conscience]
All citizens shall enjoy the freedom of conscience.

Article 20 [Religion]
(1) All citizens shall enjoy freedom of religion.
(2) No state religion shall be recognized, and religion and state shall be separated.

Article 21 [Speech, Press, Assembly, Association, Honor, Public Morals]
(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 recognized.
(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 [Learning, Intellectual Rights]
(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 [Property, Public Welfare, Expropriation]
(1) The right to 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 therefore shall be governed by Act: *Provided*, That in such a case, just compensation shall be paid.

Article 24 [Right to Vote]
All citizens shall have the right to vote under the conditions as prescribed by Act.

Article 25 [Right to Public Office]
All citizens shall have the right to hold public office under the conditions as prescribed by Act.

Article 26 [Petition]
(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 [Right to Trial]
(1) All citizens shall have the right to be tried 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 under the conditions as prescribed by Act.

Article 28 [False Imprisonment]
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 [State and Official's Liability]
(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 [Victims]
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 [Education]
(1) All citizens shall have an equal right to receive 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 [Work]
(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 [Unions]
(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 [Welfare]
(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 citizen 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 [Environment, Housing]
(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 is determined by Act.
(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

Article 36 [Marriage, Family, Mothers, Health]
(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 mothers.
(3) The health of all citizens shall be protected by the State

Article 37 [Restriction, No Infringement of Essentials]
(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 [Duty to Pay Taxes]
All citizens shall have the duty to pay taxes under the conditions as prescribed by Act.

Article 39 [Duty to Military Service]
(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 [Parliament]
The legislative power shall be vested in the National Assembly.

Article 41 [Election]
(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 [Term]
The term of office of members of the National Assembly shall be four years.

Article 43 [Incompatibility]
Members of the National Assembly shall not concurrently hold any other office prescribed by Act.

Article 44 [Immunity]
(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 [Indemnity]
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 [Duties of Members]

(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 [Sessions]
(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 [Speakers]
The National Assembly shall elect one Speaker and two Vice-Speakers.

Article 49 [Quorum, Majority]
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 [Publicity]
(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 [Pending Bills]
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 [Initiative]
Bills may be introduced by members of the National Assembly or by the Executive.

Article 53 [Passing Bills]
(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 [Budget]
(1) The National Assembly shall deliberate and decides 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 [Reserve Fund]
(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 [Budget Amendment]
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 [Changes of Budget Bill]
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 [Issuing National Bonds]
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 [Taxes]
Types and rates of taxes shall be determined by Act.

Article 60 [Consent to Treaties]
(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, and the stationing of alien forces in the territory of the Republic of Korea.

Article 61 [Investigations]
(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 [Government in Parliament]
(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 [Recommendation for Removal]
(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 [Proceedings, Disciplinary Actions]
(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 [Impeachment]
(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 [Head of State]
(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 [Election]
(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 [Succession]
(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 [Oath]
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 [Term]
The term of office of the President shall be five years, and the President shall not be reelected.

Article 71 [Vacancy]
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 [Referendum on Policy]
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 [Treaties, Foreign Affairs]
The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

Article 74 [Armed Forces]
(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 [Decrees]
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 [Emergency Powers]
(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

Subsection 1 - The Prime Minister and Members of the State Council

Article 86 [Prime Minister]
(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 [Members of State Council]
(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.

Subsection 2 - The State Council

Article 88 [State Council]
(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 [Competences]
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, proposed 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 law; and
17. Other matters presented by the President, the Prime Minister, or a member of the State Council.

Article 90 [Advisory Council of Elder Statesmen]
(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 [National Security Council]
(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 [Advisory Council on Democracy and Peaceful Unification]
(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 [National Economic Advisory Council]
(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.

Subsection 3 - The Executive Ministries

Article 94 [Heads of Ministries]
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 [Ordinances]
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 [Ministry Organization]
The establishment, organization and function of each Executive Ministry shall be determined by Act.

Subsection 4 - The Board of Audit and Inspection

Article 97 [Board of Audit and Inspection]
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 [Membership, Term]
(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 [Inspection, Report]
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 [Organization]
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 [Courts]
(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 [Court Organization]
(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 [Independence of Judges]
Judges shall rule independently according to their conscience and in conformity with the Constitution and laws.

Article 104 [Appointment of Judges]
(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 [Term of Judges]
(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 [Sanctions, Early Retirement]
(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 [Constitutional Review]
(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 [Court Administration]
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 [Publicity]
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 courts-martial, 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 [Competence, Appointment]
(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 [Term, Incompatibility]
(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 [Majority, Internal Regulations]
(1) When the Constitutional Court makes a decision of the constitutionality 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 [Establishment]
(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 [Instructions]
(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 [Campaigns]
(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 [Local Governments]
(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 [Local Councils]
(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 [Regulation and Coordination]
(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 [Natural Resources]
(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 [Agriculture]
(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 [Land Laws]
The State may impose, under the conditions 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 [Farming and Fishing]
(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 [Consumer Protection]
The State shall guarantee a consumer protection movement intended to encourage sound consumption activities and improvement in the quality of products under the conditions as prescribed by Act.

Article 125 [Foreign Trade]
The State shall foster foreign trade, and may regulate and coordinate it.

Article 126 [No Socialization]
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 [Innovation, Standardization]
(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 [Initiative]
(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 [Publication]
Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Article 130 [Majority, Referendum]
(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 eighty-eight: *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.

CONSTITUTIONAL COURT ACT

Enacted	Aug. 5, 1988
Amended	Nov. 30, 1991
	Dec. 22, 1994
	Aug. 4, 1995
	Dec. 13, 1997
	Jan. 19, 2002
	Jan. 26, 2002
	Mar. 12, 2003
	Mar. 31, 2005
	Jul. 29, 2005
	Dec. 21, 2007
	Mar. 14, 2008
	Dec. 29, 2009
	May 4, 2010
	Apr. 5, 2011

CHAPTER I. GENERAL PROVISIONS

Article 1 (Purpose)
The purpose of this Act is to set forth provisions necessary for the organization and operation of the Constitutional Court and its adjudication procedures.

Article 2 (Jurisdiction)
The Constitutional Court shall have the authority to decide on the following:

1. Constitutionality of statutes at the request of ordinary courts.
2. Impeachments.
3. Dissolution of political parties.
4. Competence disputes between state agencies, between a state agency and a local government, or between local governments.
5. Constitutional complaints.

Article 3 (Composition)
The Constitutional Court shall consist of nine (9) Justices.

Article 4 (Independence of Justices)
The Justices shall adjudicate independently according to the Constitution and laws, guided by their conscience.

Article 5 (Qualifications of Justices)
(1) The Justices must have reached the age of forty and be appointed from among those who have held one of the following positions for fifteen or more years. *Provided*, that in case a person has held two or more of the following positions, the period of service shall be aggregated.

1. A judge, a public prosecutor or an attorney.
2. A person licensed to practice law who has been engaged in legal work at a state agency, a state-owned or public enterprise, a government-invested institution or other corporation.

3. A person licensed to practice law who has held the position of assistant professor of law or higher at an accredited college or university.

(2) No person falling under any of the following shall be appointed Justice:

1. A person who is disqualified from serving as a public official under other pertinent laws and regulations.
2. A person who has been sentenced to imprisonment without forced labor or heavier punishment.
3. A person for whom five years have not yet passed since being dismissed as a result of impeachment.

Article 6 (Appointment of Justices)

(1) The Justices shall be appointed by the President of the Republic. Among the Justices, three shall be appointed from those elected by the National Assembly, and three from those designated by the Chief Justice of the Supreme Court.

(2) The Justices shall be appointed, elected or designated after a Personnel Hearing held by the National Assembly. For this, the President shall request a Personnel Hearing before he or she appoints the Justices (except the Justices who shall be elected by the National Assembly or designated by the Chief Justice of the Supreme Court) and the Chief Justice of the Supreme Court shall request a Personnel Hearing before he or she designates the Justices.

(3) In the event the term of a Justice expires or a vacancy occurs during the term of office, a successor shall be appointed within thirty days from the date on which the term expired or the vacancy occurred. *Provided*, that if the Justice whose term expired or whose position became vacant had been elected by the National Assembly, and the expiration or vacancy occurs during adjournment or recess of the National Assembly, the National Assembly shall elect his or her successor within thirty days from the commencement of the next session.

(4) When a vacancy occurs during the term of office of a Justice, his/her successor shall be appointed within 30 days from the date a vacancy occurs.

(5) Notwithstanding paragraphs (3) and (4) of this Article, when the term of office of a Justice elected by the National Assembly expires or he/she reaches the retirement age or a vacancy occurs during adjournment or recess of the National Assembly, the National Assembly shall elect his/her successor within 30 days after resuming of the session or the commencement of next session.

Article 7 (Term of Justices)

(1) The term of Justices shall be six years and may be renewed.

(2) The retirement age of Justices shall be sixty-five. *Provided*, that the retirement age of the President of the Constitutional Court shall be seventy.

Article 8 (Guarantee of Justices' Status)

No Justice shall be removed from office against his or her will unless one of the following is the case:

1. An impeachment decision is rendered against him or her.
2. A sentence of imprisonment without forced labor or heavier punishment is rendered against him or her.

Article 9 (Prohibition of Justices' Participation in Politics)

No Justice shall be permitted to join a political party or participate in politics.

Article 10 (Rulemaking Power)
(1) The Constitutional Court may make rules regarding its adjudication procedures, inter- nal discipline, and management of general affairs, to the extent consistent with this Act and other statutes.
(2) The rules of the Constitutional Court shall be promulgated through publication in the Gazette of the government.

Article 10-2 (Presentation of Opinions on Legislation)
When the President of the Constitutional Court deems it necessary to enact or amend statutes relating to the Court's organization, personnel, operation, adjudication procedures, or other functions, the President may present opinions thereon in writing to the National Assembly.

Article 11 (Expenses)
(1) Expenses of the Constitutional Court shall be appropriated independently in the bud- get of the state.
(2) Reserve funds shall be included in the expenses referred to in Section (1).

CHAPTER II. ORGANIZATION

Article 12 (President of Constitutional Court)
(1) The Constitutional Court shall have a President.
(2) The President of the Constitutional Court shall be appointed from among the Justices by the President of the Republic, with the consent of the National Assembly.
(3) The President of the Constitutional Court shall represent the Constitutional Court, take charge of the affairs of the Constitutional Court, and direct and supervise the Court's public officials.
(4) When the President of the Constitutional Court is unable to perform his or her duties due to an accident or when the office is vacant, other Justices shall perform the duties of the President, in the order prescribed by the rules of the Constitutional Court.

Article 13 Repealed.

Article 14 (Prohibition of Concurrent Service)
The Justices shall not concurrently hold any of the following positions, or conduct any business for profit.

1. A member of the National Assembly or of a local legislative council.
2. A public official in the National Assembly, the Executive, or ordinary courts.
3. An advisor, officer or employee of a corporation or an organization, etc.

Article 15 (Status of the President of the Constitutional Court and the Justices)
(1) The status and remuneration of the President of the Constitutional Court shall be commensurate with those of the Chief Justice of the Supreme Court, and the Justices of the Constitutional Court shall be political appointees whose status and remuneration shall be commensurate with those of the Justices of the Supreme Court.
(2) Repealed.

Article 16 (Council of Justices)
(1) The Council of Justices shall consist of all the Justices, and the President of the Constitutional Court shall serve as the Chairperson.

(2) Decisions of the Council of Justices require the attendance of seven or more Justices and the affirmative vote of a majority of the Justices present.
(3) The Chairperson shall have the right to vote.
(4) The following matters must be decided by the Council of Justices.

1. Matters relating to the enactment or amendment of rules of the Constitutional Court, and to the submission, pursuant to Article 10-2, of opinions regarding legislation.
2. Matters relating to requests for budget, appropriation of reserve funds and settlement of accounts.
3. Matters relating to the appointment or removal of the Secretary General, Deputy Secretary General, Constitutional Research Officers and public officials of Grade III or higher.
4. Matters deemed especially important and submitted by the President of the Constitutional Court for discussion.

(5) Matters necessary for the operation of the Council of Justices shall be determined by the rules of the Constitutional Court.

Article 17 (Department of Court Administration)
(1) In order to manage the administrative affairs of the Constitutional Court, a Department of Court Administration shall be established in the Constitutional Court.
(2) There shall be a Secretary General and a Deputy Secretary General in the Department of Court Administration.
(3) The Secretary General shall, under the direction of the President of the Constitutional Court, take charge of the affairs of the Department of Court Administration and direct and supervise those public officials under his or her authority.
(4) The Secretary General may attend the National Assembly or the State Council and speak about the administration of the Constitutional Court.
(5) In administrative litigations challenging an action of the President of the Constitution- al Court, the Secretary General shall be named as the defendant.
(6) The Deputy Secretary General shall assist the Secretary General. Whenever the Secretary General is unable to perform his or her duties due to an accident, the Deputy Secretary General shall act on his or her behalf.
(7) The Department of Court Administration shall have offices, bureaus and divisions.
(8) Each office shall be assigned an office chief, each bureau assigned a bureau chief, and each division assigned a division chief. Under Secretary General, Deputy Secretary General, office chiefs or bureau chiefs, directors or officers-in-charge may be appointed for assisting in policy planning, establishment of plans, research, investigation, examination, evaluation and public relations.
(9) The organization and the scope of functions of the Department of Court Administration, the prescribed number of public officials assigned to the Department of Court Administration and other necessary matters not stipulated in this Act, shall be determined by the rules of the Constitutional Court.

Article 18 (Public Officials of Department of Court Administration)
(1) The Secretary General shall be appointed as a political appointee public official, and his or her salary shall be equal to that of a Member of the State Council.
(2) The Deputy Secretary General shall be appointed as a political appointee public official, and his or her salary shall be equal to that of a Vice-Minister.
(3) Office chiefs shall be appointed as general appointee public officials of Grade I or II; bureau chiefs as general appointee public officials of Grade II or III; directors and officers-in-

charge as general appointee public officials of Grade II through IV; and division chiefs as general appointee public officials of Grade III or IV. *Provided*, that one officer-in-charge may be appointed as a special appointee public official correspond- ing to Grade III or IV.
(4) Public officials of the Department of Court Administration shall be appointed and removed by the President of the Constitutional Court. *Provided*, that the appointment and removal of public officials of Grade III or higher shall require a resolution of the Council of Justices.
(5) The President of the Constitutional Court may request other state agencies to dispatch their public officials so as to have them serve as public officials in the Department of Court Administration.
(6) Repealed.

Article 19 (Constitutional Research Officer)
(1) The Constitutional Court shall have Constitutional Research Officers, whose number shall be determined by the rules of the Constitutional Court.
(2) Constitutional Research Officers shall be specific appointee public officials.
(3) Constitutional Research Officers shall be engaged in investigation and research concerning the deliberation and adjudication of cases at the direction of the President of the Constitutional Court.
(4) Constitutional Research Officers shall be appointed by the President of the Constitutional Court through a resolution of the Council of Justices, and shall be appointed from persons with one of the following qualifications.

1. Licensed to serve as a judge, a public prosecutor, or an attorney.
2. Served as an assistant professor of law or higher level faculty at an accredited college or university.
3. Served for five years or more in law-related positions as a public official of Grade IV or higher in state agencies, such as the National Assembly, the Executive, or ordinary courts.
5. Served for five years or more in law-related positions, with a doctorate in law, at state agencies, such as the National Assembly, the Executive, ordinary courts, or the Constitutional Court.
6. Served for five years or more in law-related positions, with a doctorate in law, at an accredited research institute, such as a college or university as stipulated by the rules of the Constitutional Court.

(5) Repealed.
(6) No person falling under any of the following shall be appointed as Constitutional Research Officers:

1. A person falling under one of the Items of Article 33 of the State Public Officials Act.
2. A person who has been sentenced to imprisonment without forced labor or heavier punishment.
3. A person for whom five years have not yet passed since being dismissed as a result of impeachment.

(7) The term of office of Constitutional Research Officers shall be ten years, but a consecutive appointment may be permitted, and their retirement age shall be sixty.
(8) When a Constitutional Research Officer falls under any of the Items of Section (6), he or she shall be removed from office as a matter of course. *Provided*, that this shall not apply when Article 33, Item 5 of the State Public Officials Act applies.

(9) The President of the Constitutional Court may request other state agencies to dispatch their public officials to the Constitutional Court so as to have them serve as Constitutional Research Officers.
(10) Deputy Secretary General may concurrently hold the position of a Constitutional Research Officer.
(11) The President of the Constitutional Court may have Constitutional Research Officers hold concurrent offices other than that of investigation and research concerning the deliberation and adjudication of cases. In such cases, the number of Constitutional Research Officers shall be determined by the rules of the Constitutional Court, and the remuneration level shall be determined according to the highest among them.

Article 19-2 (Assistant Constitutional Research Officer)
(1) When appointing a new Constitutional Research Officer, he or she shall be first appointed as an Assistant Constitutional Research Officer for a period of three years, and then be promoted to the position of Constitutional Research Officer after taking into account his or her service records. *Provided*, that appointment as an Assistant Constitutional Research Officer may be waived or the service period reduced in light of the person's career and capabilities in accordance with the rules of the Constitutional Court.
(2) Assistant Constitutional Research Officers shall be appointed by the President of the Constitutional Court through a resolution of the Council of Justices.
(3) Assistant Constitutional Research Officers shall be special appointee public officials, and their remuneration and criteria for promotion shall follow the scale set for Constitutional Research Officers.
(4) Assistant Constitutional Research Officers may be removed from office by a resolution of the Council of Justices in case their service records are unsatisfactory.
(5) The period of service as an Assistant Constitutional Research Officer shall be included in calculating the person's term of service as a Constitutional Research Officer for purposes of this Act and other laws and regulations.

Article 19-3 (Academic Adviser)
(1) The Constitutional Court may appoint Academic Advisers. Academic Advisers shall engage in expert investigation and research concerning the deliberation and adjudication of cases.
(2) Academic Advisers shall be appointed for a term of three years or less.
(3) Academic Advisers shall be appointed at the level of special appointee or contractual appointee public officials of Grade II or III, and their duties and qualifications shall be determined by the rules of the Constitutional Court.

Article 19-4 (Constitutional Research Institute)
(1) The Constitutional Research Institute shall be established in the Constitutional Court for the purpose of carrying out the research on the constitutional law and constitutional adjudication and education for Constitutional Research Officers, administration, staff, etc.
(2) The Constitutional Research Institute shall be composed of less than 40 personnel, including its own President, who shall be appointed from Constitutional Research Officer of the Constitutional Court or public official of Rank I in general service.
(3) Notwithstanding paragraph (2) of this Article, the President of the Constitutional Research Institute may be appointed as a public official in temporary position.
(4) Matters concerning the organization and operation of the Constitutional Research Institute shall be stipulated in the Constitutional Court Regulation.

Article 20 (Secretariat to the President of the Constitutional Court)
(1) The Constitutional Court shall have a Secretariat to the President of the Constitutional Court.
(2) The Secretariat to the President of the Constitutional Court shall be headed by one Chief of the Secretariat, who shall be appointed as a special appointee public official of Grade I, and shall take charge of confidential affairs under the direction of the President of the Constitutional Court.
(3) Matters necessary for the organization and operation of the Secretariat to the President of the Constitutional Court shall be determined by the rules of the Constitutional Court.
(4) The Constitutional Court shall appoint Aides to the Justices.
(5) Aides to the Justices shall be appointed as general appointee public officials of Grade IV, or as special appointee public officials at the level of Grade IV, and shall take charge of confidential affairs under the direction of the Justices.

Article 21 (Court Clerks and Courtroom Guards)
(1) Court clerks and courtroom guards shall be assigned to the Constitutional Court.
(2) The President of the Constitutional Court shall designate court clerks and courtroom guards from among the personnel of the Department of Court Administration.
(3) Court clerks shall, at the direction of the Presiding Justice, take charge of the affairs concerning the preparation, safekeeping or service of documents related to cases.
(4) Courtroom guards shall maintain order in courtrooms and execute other affairs as directed by the Presiding Justice.

CHAPTER III. GENERAL ADJUDICATION PROCEDURES

Article 22 (Full Bench)
(1) Except as provided in this Act, the adjudication of the Constitutional Court shall be conducted by the Full Bench composed of all the Justices.
(2) The Presiding Justice of the Full Bench shall be the President of the Constitutional Court.

Article 23 (Quorum)
(1) The Full Bench shall review a case with the attendance of seven or more Justices.
(2) The Full Bench shall make a decision on a case by the majority vote of Justices participating in the final deliberation. Provide, that a vote of six or more Justices is required in case of any of the following:

1. Decisions holding a statute unconstitutional, decisions to convict an impeached public official, decisions to dissolve a political party, or decisions to grant a constitutional complaint.
2. When the Constitutional Court overrules its earlier precedent on the interpretation and application of the Constitution or statutes.

Article 24 (Exclusion, Recusal and Evasion)
(1) In case one of the following is true of a Justice, that Justice shall be excluded from performing official duties.

1. When the Justice is a party to a case, or the Justice is or was the spouse of a party.
2. When the Justice is or was a relative of a party.
3. When the Justice gives a testimony or an appraisal in the case.
4. When the Justice serves or served as legal counsel to a party in the case.

5. When the Justice was involved in the case for professional reasons or for reasons of duties outside of the Constitutional Court.

(2) The Full Bench may, *sua sponte* or on motion by a party, make a decision to exclude a Justice.

(3) In case circumstances exist which make it difficult to expect a Justice to be impartial in the adjudication of a case, a party may move to recuse the Justice. *Provided*, that this shall not apply when the party has appeared and made a statement on the merits on a date for pleading.

(4) A party may not move to recuse two or more Justices in the same case.

(5) When there exists a cause referred to in Section (1) or Section (3), the Justice may recuse himself or herself with the permission of the Presiding Justice.

(6) The provisions of Article 44, Article 45, Article 46, Sections (1) and (2), and Article 48 of the Civil Procedure Act shall apply *mutatis mutandis* to the adjudication on motions to exclude or recuse.

Article 25 (Representation and Counsel)

(1) When the Government is a party (including a participating litigant; hereinafter the same shall apply) to any proceeding, it shall be represented by the Minister of Justice.

(2) In any proceeding, when a state agency or local government is a party, it may select an attorney or an employee who is qualified to be an attorney as counsel and have that person conduct the proceedings.

(3) In any proceeding, when a private person is a party, such person may not conduct the proceedings unless he or she appoints an attorney as counsel. *Provided*, that this shall not apply when the private person is licensed as an attorney.

Article 26 (Form of Request for Adjudication)

(1) Requests for adjudication shall be made by submitting to the Constitutional Court the proper written request form prescribed for the type of adjudication requested. Provid- ed, that in an adjudication on the constitutionality of statutes, the written request by the ordinary court shall take the place of the request form; in an adjudication on impeach- ment, the official copy of the impeachment resolution of the National Assembly shall take the place of the request form.

(2) Evidentiary documents or reference materials may be appended to the written request form.

Article 27 (Service of Written Request Form)

(1) Upon receiving the written request form, the Constitutional Court shall serve without delay a certified copy thereof on the respondent agency or the individual respondent (hereinafter referred to as "respondent").

(2) In case of a request for an adjudication on the constitutionality of statutes, a certified copy of the ordinary court's written request shall be served on the Minister of Justice and the parties to the underlying case at the ordinary court.

Article 28 (Correction of Request for Adjudication)

(1) When the Presiding Justice determines that a request for adjudication is faulty but may nevertheless be corrected, the Justice shall specify a reasonable time limit and require the correction.

(2) The provision of Article, 27 Section 1 shall be applicable *mutatis mutandis* to the written correction referred to in Section (1).

(3) When a correction is made pursuant to Section (1), the request for adjudication shall be deemed to have been made correctly from the beginning.
(4) The period for correction referred to in Section (1) shall not be included in calculating the period of adjudication specified under Article 38.
(5) The Presiding Justice, if necessary, may authorize one of the Justices to request the correction in Article 28 (1).

Article 29 (Submission of Written Answer)
(1) Upon being served with a written request or a written correction, the respondent may submit a written answer to the Constitutional Court.
(2) The written answer shall include a response to the claims and the reasons set forth in the request for adjudication.

Article 30 (Method of Review)
(1) Adjudications of impeachments, dissolution of political parties, and competence disputes shall be conducted through oral arguments.
(2) Adjudications on the constitutionality of statutes and constitutional complaints shall be conducted through documentary reviews. *Provided*, that when deemed necessary by the Full Bench, it may hold oral arguments and hear statements from the parties, interested persons, or expert witnesses.
(3) When the Full Bench holds oral arguments, it shall fix the date and summon the par- ties and interested persons.

Article 31 (Inspection of Evidence)
(1) When deemed necessary for reviewing the case, the Full Bench may inspect, *sua sponte* or on motion by a party, evidence as follows:

1. Examine the parties or witnesses.
2. Demand the submission of documents, ledgers, articles and other evidentiary materials in the possession of the parties or interested persons, and place them in the Court's custody.
3. Order an appraisal by a person with special knowledge and experience.
4. Verify the nature or condition of relevant articles, persons, places and other matters.

(2) When deemed necessary, the Presiding Justice may designate one of Justices to con- duct the inspection of evidence under Section (1).

Article 32 (Demand, etc. for Presentation of Materials)
The Full Bench may, by a ruling, make inquiries concerning facts necessary for the adjudication to other state agencies or the organs of public organizations, or demand them to deliver records or submit materials. *Provided*, that with respect to records of a case for which a trial, prosecution or criminal investigation is under way, it may not demand the delivery of such records.

Article 33 (Place of Adjudication)
Oral arguments of the adjudication and the announcement of final decisions shall be made in the courtroom. *Provided*, that when deemed necessary by the President of the Constitutional Court, they may be made at a place outside of courtroom.

Article 34 (Opening of Proceedings to Public)
(1) The oral arguments of the adjudication and the announcement of decisions shall be open to the public. *Provided*, that documentary review and the Justices' deliberation shall not be open to the public.
(2) The proviso of Article 57, Section 1, and the provisions of Article 57, Sections 2 and 3 of the Court Organization Act shall be applicable *mutatis mutandis* to the proceedings of the Constitutional Court.

Article 35 (Direction of Proceedings and Police Power in Courtroom)
(1) The Presiding Justice shall be responsible for maintaining order in the courtroom, for directing the oral arguments, and for organizing the deliberations.
(2) The provisions of Articles 58 through 63 of the Court Organization Act shall apply *mutatis mutandis* to the maintenance of order and the use of language in the courtroom of the Constitutional Court.

Article 36 (Final Decision)
(1) When the Full Bench completes the review, it shall make a final decision.
(2) When making a final decision, a written decision stating the following matters shall be prepared, signed and sealed by all the Justices who participated in the adjudication:

1. Case number and its title.
2. Indication of the parties, and the persons who pursued the proceedings or counsel.
3. Holding.
4. Reasoning.
5. Date of decision.

(3) Justices who participated in adjudication shall express his or her opinion on the written decision.
(4) When a final decision is pronounced, the court clerk shall prepare without delay an official copy of the written decision and serve it on the parties.
(5) Final decisions shall be made public through publication in the Gazette of the government.

Article 37 (Expenses, etc. of Adjudication)
(1) The expenses for adjudication by the Constitutional Court shall be borne by the state. *Provided*, that the expenses for the inspection of evidence upon parties' request may be borne by the requesting party in accordance with the provisions of the rules of the Constitutional Court.
(2) The Constitutional Court may order a person requesting an adjudication of a constitutional complaint to make a deposit as prescribed in the rules of the Constitutional Court.
(3) When one of the following is the case, the Constitutional Court may order the transfer of all or part of the deposit amount into state treasury as prescribed in the rules of the Constitutional Court:

1. The request for adjudication of constitutional complaint is dismissed.
2. The request for adjudication of constitutional complaint is rejected, and the request is deemed to be an abuse of right.

Article 38 (Time Limit of Adjudication)
The Constitutional Court shall make an announcement of the final decision within one hundred eighty days after it receives the case for adjudication. *Provided*, that if the attendance of seven Justices is impossible due to vacancies on the Court, the period of vacancy shall not be included in calculating the period of adjudication.

Article 39 (*ne bis in idem*)
The Constitutional Court shall not adjudicate again the same case on which a prior adjudication has already been made.

Article 39-2 (Inspection and Duplication of Record of Final Decision)
(1) Anyone may, for the purposes of seeking relief for rights violation, engaging in academic research, or promoting public interest, request inspection or duplication of the records of cases that have been finalized. *Provided*, that the President of the Constitutional Court may restrict such inspection or duplication in case one of the following is true:

1. Pleadings were not open to the public.
2. Disclosure of the case records may cause serious harm to the national security, to social morals and good customs, to the maintenance of public order, or to public welfare.
3. Disclosure of the case records may cause serious harm to the related parties' reputation, secrecy of private life, trade secret (as defined by Article 2 Item 2 of the Act on the Prevention of Unfair Competition and the Protection of Trade Secret), or life, physical safety or peace and security of life.

(2) In case the President of the Constitutional Court restricts the inspection or duplication of case records pursuant to the Proviso of Section (1), a notification shall be made to the requesting party with an explanation of the reasons for restriction.
(3) Matters necessary for the inspection and duplication of case records pursuant to Section (1) shall be determined by the rules of the Constitutional Court.
(4) The person inspecting or duplicating case records shall not use the knowledge obtained through the inspection or duplication to harm the public order or social morals and good customs, or to infringe upon the related parties' reputation or peace and security of their lives.

Article 40 (Applicable Provisions)
(1) Except as otherwise provided in this Act, the provisions of laws and regulations relating to civil litigation shall apply *mutatis mutandis* to the adjudication procedures of the Constitutional Court, as long as they are not contrary to the nature of constitutional adjudication. In addition, the laws and regulations relating to criminal litigation shall also apply *mutatis mutandis* to adjudications of impeachment, and the Administrative Litigation Act to the adjudications of competence disputes and constitutional com- plaints.
(2) In cases referred to in the latter part of Section (1), if the laws and regulations relating to criminal litigation or the Administrative Litigation Act conflict with those relating to civil litigation, the latter shall not be applicable *mutatis mutandis*.

CHAPTER IV. SPECIAL ADJUDICATION PROCEDURES

SUB-CHAPTER 1. Adjudication on the Constitutionality of Statutes

Article 41 (Request for Adjudication on the Constitutionality of Statutes)
(1)When the constitutionality of a statute must be determined prior to reaching a judgment in a case, ordinary courts (including military courts; hereinafter the same shall apply) shall make a request, *sua sponte* or on motion by a party, for an adjudication by the Constitutional Court on the constitutionality of the statute.
(2) The party's motion referred to in Section (1) shall be made in writing, stating matters indicated in Items 2 through 4 of Article 43.

(3) For reviewing the party's written motion referred to in Section (2), the provisions of Article 254 of the Civil Procedure Act shall apply *mutatis mutandis*.
(4) No appeal may be made against the decision of ordinary courts to make a request for an adjudication of the constitutionality of statutes.
(5) When an ordinary court other than the Supreme Court makes a request referred to in Section (1), it shall do so through the Supreme Court.

Article 42 (Suspension of Proceedings, etc.)
(1) When an ordinary court makes a request to the Constitutional Court for an adjudication of the constitutionality of statutes, the proceedings of the ordinary court shall be suspended until the Constitutional Court makes a decision on the constitutionality of statutes. *Provided*, that when deemed urgent by the ordinary court, it may proceed with the litigation other than making a final decision.
(2) The period in which a proceeding is suspended under the main sentence of Section (1) shall not be included in calculating the detention period as prescribed in Article 92, Sections 1 and 2 of the Criminal Procedure Act, and Article 132, Sections 1 and 2 of the Military Court Act, and the period for announcing judgment under Article 199 of the Civil Procedure Act.

Article 43 (Items to be Stated in Ordinary Courts' Written Request)
When an ordinary court makes a request to the Constitutional Court for an adjudication of the constitutionality of statutes, the court's written request shall include the following matters:

1. Indication of the requesting court.
2. Indication of the case and the parties.
3. The statute or statutory provision interpreted to be unconstitutional.
4. Reasons why it is interpreted as unconstitutional.
5. Other necessary matters.

Article 44 (Opinions of Parties and Litigants)
The parties to the original case and the Minister of Justice may submit to the Constitutional Court a written opinion on the constitutionality of the statute or statutory provision.

Article 45 (Decision of Unconstitutionality)
The Constitutional Court shall decide only whether or not the requested statute or statutory provision is unconstitutional. *Provided*, that when a decision of unconstitutionality regard- ing a statutory provision is deemed to render the entire statute unenforcible, the Constitutional Court may make a decision of unconstitutionality on the entire statute.

Article 46 (Service of Written Decision)
The Constitutional Court shall serve an official copy of the written decision on the request- ing court within fourteen days of the date of decision. In this case, if the requesting court is not the Supreme Court, the written decision shall be served through the Supreme Court.

Article 47 (Effect of Decision of Unconstitutionality)
(1) A decision of statute's unconstitutionality shall be binding on the ordinary courts, other state agencies and local governments.
(2) A statute or statutory provision held unconstitutional shall become invalid as of the day that the decision is made. *Provided*, that statutes or statutory provisions relating to criminal penalties shall become invalid retroactively.

(3) When a statute or statutory provision becomes invalid according to the proviso of Section (2), retrials may be requested for final convictions reached on the basis of the unconstitutional statute or statutory provision.
(4) The provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to retrials requested pursuant to Section (3).

SUB-CHAPTER 2. Adjudication of Impeachments

Article 48 (Institution of Impeachment)
If any of the following public officials violates the Constitution or statutes in the performance of his or her duties, the National Assembly may pass a resolution of impeachment in accordance with the provisions of the Constitution and the National Assembly Act:

1. President of the Republic, Prime Minister, Members of the State Council or Ministers of Various Administrative Ministries.
2. Justices of the Constitutional Court, judges, or Commissioners of the National Election Commission.
3. Chairman and Commissioners of the Board of Audit and Inspection. 4. Other public officials as prescribed by relevant statutes.
4. Other public officials as prescribed by relevant laws.

Article 49 (Impeachment Prosecutor)
(1) In impeachment adjudications, the Chairperson of the Legislation and Justice Committee of the National Assembly shall be the impeachment prosecutor.
(2) The impeachment prosecutor shall request the Constitutional Court for an adjudication by presenting an official copy of the written resolution of impeachment, and may examine the impeached person during the pleadings.

Article 50 (Suspension of Powers)
The powers of the person against whom a resolution of impeachment is passed shall be suspended until an adjudication has been made by the Constitutional Court.

Article 51 (Suspension of Impeachment Proceeding)
The Full Bench may suspend the impeachment proceedings when a criminal proceeding is under way against the impeached person for the same reasons.

Article 52 (Non-Appearance of Party)
(1) When a party fails to appear on a date of pleading, a new date shall be fixed.
(2) When a party fails to appear on the newly fixed date, the case may be reviewed in his or her absence.

Article 53 (Decision to Convict)
(1) When the request for impeachment adjudication is found to have merit, the Constitutional Court shall announce a decision of dismissing the impeached person from the currently held public office.
(2) When the impeached person is dismissed from the currently held public office prior to the announcement of its decision, the Constitutional Court must reject the request for impeachment adjudication.

Article 54 (Effect of Decision)
(1) A decision to convict the impeached person does not exempt that person from civil or criminal liabilities.
(2) No person dismissed from office as a result of a decision to convict at an impeachment proceeding shall be allowed to become a public official unless five (5) years have passed from the date on which the decision was announced.

SUB-CHAPTER 3. Adjudication for Dissolution of PoliticalParties

Article 55 (Request for Adjudication on Dissolution of a Political Party)
If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may, after deliberation at the State Council, request the Constitutional Court for an adjudication for the dissolution of the political party.

Article 56 (Items to be Stated on Written Request)
The written request for adjudication for the dissolution of a political party shall include the following:

1. Indication of the political party whose dissolution is sought.
2. Reasons for making the request.

Article 57 (Preliminary Injunctions)
Upon receiving a request for adjudication for the dissolution of a political party, the Constitutional Court may make, *sua sponte* or on motion by the requesting party, a ruling to suspend the activities of the respondent political party until the announcement of the final decision.

Article 58 (Notification of Request, etc.)
(1) When an adjudication for the dissolution of a political party is requested, when a rul- ing on preliminary injunction is made, or when the adjudication has been concluded, the President of the Constitutional Court shall notify the National Assembly and the National Election Commission of such facts.
(2) The written decision ordering the dissolution of a political party shall be served on the respondent political party, and also on the National Assembly, the Executive and the National Election Commission.

Article 59 (Effect of Decision)
When a decision ordering the dissolution of a political party is announced, the said political party shall be dissolved.

Article 60 (Execution of Decision)
The decision of the Constitutional Court ordering the dissolution of a political party shall be executed by the National Election Commission in accordance with the provisions of the Political Parties Act.

SUB-CHAPTER 4. Adjudication of Competence Disputes

Article 61 (Cause for Request)
(1) When a controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments, the

relevant state agency or local government may request the Constitutional Court for adjudication of the competence dispute.
(2) The request for adjudication referred to in Section (1) may be allowed only when a disposition or inaction by the respondent infringes upon, or is in clear danger of infringing upon, the competence of the requesting party as granted by the Constitution or statutes.

Article 62 (Classification of Competence Disputes)
(1) Competence disputes shall be classified as follows:
1. Competence disputes between state agencies:
Competence disputes among the National Assembly, the Executive, ordinary courts, and the National Election Commission.
2. Competence disputes between a state agency and a local government:
(a) Competence disputes between the Executive, on the one hand, and a Special Metropolitan City, a Metropolitan City or a Province, on the other.
(b) Competence disputes between the Executive, on the one hand, and a City, a County, or District which is a local government (hereinafter "Self-governing District"), on the other.
3. Competence disputes between local governments:
(a) Competence disputes among a Special Metropolitan City, Metropolitan Cities, or Provinces.
(b) Competence disputes among Cities, Counties, or Self-governing Districts.
(c) Competence disputes between a Special Metropolitan City, a Metropolitan City, or a Province, on the one hand, and a City, a County or a Self-governing District, on the other.
(2) When a competence dispute relates to the affairs of a local government concerning education, or science and the arts, as prescribed by Article 2 of the Local Educational Self-Governance Act, the Superintendent of the Board of Education shall be the party in disputes enumerated in Section (1), Items 2 and 3.

Article 63 (Time Limit for Request)
(1) Adjudication on competence disputes shall be requested within sixty (60) days of learning the existence of the cause, and within one hundred eighty (180) days of the occurrence of the cause.
(2) The period referred to in Section (1) shall be a peremptory period.

Article 64 (Items to be Stated on Written Request)
The written request for adjudication on competence dispute shall include the following:
1. Indication of the requesting party or the agency of which the requesting party is a sub-unit, and the persons who will pursue the proceedings or counsel.
2. Indication of the respondent.
3. The disposition or inaction by the respondent, which is the object of adjudication.
4. Reasons for the request.
5. Other necessary matters.

Article 65 (Preliminary Injunction)
Upon receiving a request for adjudication on competence dispute, the Constitutional Court may make, *sua sponte* or on motion by the requesting party, a ruling to suspend the effects of the respondent's disposition which is the object of the adjudication, until the announcement of the final decision.

Article 66 (Decision)
(1) The Constitutional Court shall decide on the existence or scope of the competence of a state agency or a local government.
(2) In reaching a decision according to Section (1), the Constitutional Court may cancel the disposition of the respondent which gave rise to the competence dispute or confirm the invalidity of the disposition, and when the Constitutional Court has rendered a decision to recognize the request against inaction, the respondent shall make a disposition in accordance with the contents of the decision.

Article 67 (Effect of Decision)
(1) A decision of the Constitutional Court in a competence dispute adjudication shall be binding on all state agencies and local governments.
(2) A decision canceling a disposition of a state agency or a local government shall not affect legal relations already formed in relation to the person to whom the disposition was directed.

SUB-CHAPTER 5. Adjudication of Constitutional Complaints

Article 68 (Cause for Request)
(1) A person whose constitutionally guaranteed basic rights have been violated on account of an exercise or non-exercise of state power may file a constitutional complaint with the Constitutional Court, except against the judgments of ordinary courts. *Provided*, that in case other relief processes are available under other statutes, no constitutional complaint may be filed unless all such processes have been exhausted.
(2) When a motion made pursuant to Article 41, Section (1) for an adjudication on the constitutionality of a statute has been rejected, the motioning party may file a constitutional complaint with the Constitutional Court. In this case, the party may not motion again for a request for adjudication on the constitutionality of the statute, for the same reasons within same underlying legal proceeding.

Article 69 (Time Limit for Request)
(1) A constitutional complaint under Article 68, Section (1) shall be filed within ninety (90) days of learning the existence of the cause, and within one (1) year of the occurrence of the cause. *Provided*, that constitutional complaints filed after going through other relief processes available under other statutes shall be filed within thirty (30) days of receiving notice of the final decision.
(2) A constitutional complaint under Article 68, Section (2) shall be filed within thirty (30) days of receiving notice of the ordinary court's ruling rejecting the motion for request for adjudication on the constitutionality of the statute.

Article 70 (Court-Appointed Counsel)
(1) In case a person intending to file a constitutional complaint has no financial means to hire an attorney as counsel, the person may request the Constitutional Court to provide court-appointed counsel. In this case, the time limit for filing a constitutional com- plaint as prescribed in Article 69 shall start to accrue from the day on which the request for court-appointed counsel was made.
(2) Notwithstanding the provision of Section (1), when deemed necessary for the public interest, the Constitutional Court may provide court-appointed counsel.

(3) In case a request is made pursuant to Section (1) or in case conditions of Section (2) are met, the Constitutional Court shall provide a court-appointed counsel from among attorneys-at-law in accordance with the rules of the Constitutional Court. *Provided*, that it may decline to provide court-appointed counsel in cases where the request for adjudication is clearly dismissible or groundless, or where it is deemed to be an abuse of rights.
(4) When the Constitutional Court makes a decision not to provide court-appointed counsel, it shall notify the requesting party of the decision without delay. In this case, the period from the day the request for court-appointed counsel was made to the day the notification was given shall not be included in calculating the time limit for filing a constitutional complaint as prescribed in Article 69.
(5) The attorney provided as court-appointed counsel pursuant to Section (3) shall submit to the Constitutional Court, within sixty (60) days of his or her appointment, a written request for adjudication including all the items specified in Article 71.
(6) The attorney provided as court-appointed counsel pursuant to Section (3) shall be compensated from the state treasury in accordance with the rules of the Constitutional Court.

Article 71 (Items to be Stated on Written Request)
(1) The written request for adjudication of constitutional complaints under Article 68, Section (1) shall include the following:

1. Indication of the complainant and counsel.
2. Infringed rights.
3. Exercise or non-exercise of state power by which the infringement of the rights was caused.
4. Reasons for the request.
5. Other necessary matters.

(2) On the items to be stated on the written request for adjudication of constitutional complaints under Article 68, Section (2), the provisions of Article 43 shall apply *mutatis mutandis*. In this case, "Indication of the requesting court" specified in Item 1 of Article 43 shall be read as "Indication of the complainant and counsel."
(3) The written request for adjudication of constitutional complaints must be accompanied by a document evidencing the appointment of counsel or a written notice of selection of court-appointed counsel.

Article 72 (Preliminary Review)
(1) The President of the Constitutional Court may establish a Designated Panel, comprised of three (3) Justices, and have the Panel conduct a preliminary review of constitutional complaints.
(2) Repealed.
(3) In case of any of the following is true, the Designated Panel shall, through a unanimous vote, dismiss the constitutional complaint:

1. The constitutional complaint was filed without having exhausted all the relief processes provided by other statutes, or was filed against a judgment of ordinary courts.
2. The constitutional complaint was filed after the expiration of the time limit specified in Article 69.
3. The constitutional complaint was filed with no counsel as specified in Article 25.
4. The constitutional complaint failed to meet other filing requirements and the defect cannot be corrected.

(4) When the Designated Panel is not able to dismiss through a unanimous vote as provided in Section (3), it shall make a decision to refer the constitutional complaint to adjudication by the Full Bench. When no decision to dismiss is made within thirty (30) days of filing the constitutional complaint, a decision to refer to the Full Bench (hereinafter "adjudication referral decision") shall be deemed to have been made.
(5) The provisions of Articles 28, 31, 32 and 35 shall apply *mutatis mutandis* to the review by Designated Panels.
(6) Matters necessary for the composition and operation of Designated Panels shall be determined by the rules of the Constitutional Court.

Article 73 (Notifications of Dismissal and Adjudication Referral Decisions)
(1) When a Designated Panel dismisses a constitutional complaint or decides to refer it to adjudication by the Full Bench, it shall notify the complainant or counsel, and the respondent, of that fact within fourteen (14) days of the decision. The same shall apply to the case provided in the latter part of Article 72, Section 4.
(2) When a constitutional complaint is referred to the Full Bench for adjudication under Article 72, Section 4, the President of the Constitutional Court shall notify each of the following persons of that fact without delay.

1. The Minister of Justice.
2. In case of a constitutional complaint filed pursuant to Article 68, Section 2, the other party to the underlying case, who is not the complainant.

Article 74 (Submission of Opinions by Interested Agencies)
(1) State agencies or public organizations with an interest in the adjudication of a constitutional complaint, and the Minister of Justice, may submit to the Constitutional Court written opinions relating to the adjudication.
(2) When a constitutional complaint filed pursuant to Article 68, Section 2 is referred to the Full Bench for adjudication, the provisions of Articles 27, Section 2 and Article 44 shall apply *mutatis mutandis*.

Article 75 (Decision to Grant a Constitutional Complaint)
(1) A decision to grant a constitutional complaint shall be binding on all state agencies and local governments.
(2) When granting a constitutional complaint filed pursuant to Article 68, Section 1, the infringed basic rights and the exercise or non-exercise of state power which caused the infringement shall be specified in the holding of the written decision.
(3) In cases referred to in Section (2), the Constitutional Court may cancel the exercise of state power that caused the infringement of basic rights, or confirm the unconstitutionality of the non-exercise of state power.
(4) When the Constitutional Court makes a decision to grant a constitutional complaint challenging the non-exercise of state power, the respondent must make a new disposition in accordance with the contents of the decision.
(5) In cases referred to in Section (2), when the exercise or non-exercise of state power is deemed to be caused by an unconstitutional statute or statutory provisions, the Constitutional Court may declare in the decision to grant the complaint that the statute or statutory provisions are unconstitutional.
(6) In cases referred to in Section (5), and when making decisions to grant a constitutional complaint filed pursuant to Article 68, Section 2, the provisions of Articles 45 and 47 shall apply *mutatis mutandis*.

(7) When a constitutional complaint filed pursuant to Article 68, Section 2 has been grant- ed, and when the underlying litigation related to the said constitutional complaint has already been decided by a final judgment, prescribed, the parties may request a retrial.
(8) For retrials referred to in Section (7), the provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to criminal cases, and those of the Civil Procedure Act to other cases.

CHAPTER V. ADJUDICATION PROCEDURES BASED ON ELECTRONIC INFORMATION PROCESSING SYSTEM

Article 76 (Receipt of Electronic Documents)
(1) A party or interested persons of each adjudication procedure may submit a request or other required documents as provided in this Act in electronic format (information prepared and transmitted, received, or stored in digital format through devices capable of information processing, such as computers, hereinafter ‘‘electronic documents’’ through the electronic information-processing system (electronic devices capable of processing information required for preparation, submission, and service of electronic documents, hereinafter the same shall apply) designated and operated by the Constitutional Court by using the information and communication network.
(2) The electronic documents submitted pursuant to Article 76 (1) take the same effect as the written documents submitted in accordance with the Act.
(3) Electronic documents submitted through the electronic information-processing system shall be deemed to have been received upon being recorded electronically in the electronic information-processing system.
(4) In case electronic documents are received pursuant to Article 76 (3), the Constitutional Court shall immediately notify the party or interested persons electronically the receipt thereof as provided in the Constitutional Court Rule.

Article 77 (Digital Signature, etc.)
(1) The party shall fix a digital signature on the electronic documents submitted to the Constitutional Court for authentication as provided in the Constitutional Court Rule.
(2) A Justice or clerk, when preparing the documents related to the case subject to adjudication, shall fix an administrative digital signature as provided in Article 2 Item 6 of the Electronic Government Act (hereinafter ‘‘administrative digital signature’’).
(3) The digital signature in Article 77 (1) and administrative digital signature in Article 77 (2) shall be considered signed and sealed as prescribed in the provisions concerning the adjudication procedures of the Act.

Article 78 (Electronic Service, etc.)
(1) The Constitutional Court may serve a copy of the decision or all types of documents related to the Act on the party by using the electronic information-processing system and its associated information and communication network. Provided, that the same will not apply if the party does not consent thereto.
(2) The Constitutional Court shall record and register the documents to be served on the party, such as the copy of decisions, in the electronic information-processing system, and notify the party or interested persons electronically the registration thereof as prescribed in the Constitutional Court Rule.
(3) Service of documents using the electronic information- processing system pursuant to Section 1 takes the same effect as the service of the written documents.

(4) In the case of Article 78 (2), the time of service on the party shall be when the recipient confirms the registered electronic document as provided in the Constitutional Court Rule. Provided, that if the registration is not confirmed within fourteen days from the day of its notification, the time of service shall be over fourteen days from the day of its notification.
(5) In case electronic service is, despite Article 78 (1), impossible due to a disrupted situation in the electronic information-processing system or other reasons prescribed in the Constitutional Court Rule, the documents concerned may be served pursuant to the ‘‘Civil Procedure Act’’.)

CHAPTER VI. PENAL PROVISIONS

Article 79 (Penal Provisions)

Any of the following persons shall be sentenced to imprisonment of not more than one (1) year, or a fine not exceeding one million won.

1. Person who was summoned or commissioned by the Constitutional Court as a witness, an appraiser, an interpreter or a translator, but failed to appear without any justifiable reason.
2. Person who received a demand or an order from the Constitutional Court to submit articles of evidence, but failed to submit them without any justifiable reason.
3. Person who refused, interfered with, or evaded the Constitutional Court’s inspection or examination without any justifiable reason.

NATIONAL SECURITY ACT
(unofficial and abbreviated translation)

Chapter 1. Preamble

Article 1 (Objectives)
(1) This law's objective is to suppress anti-state acts which endanger national security and to ensure the nation's security, as well as the people's life and freedom.
(2) The interpretation and application of this law shall be limited to the minimal measures required to achieve the objectives of paragraph 1 and any expanded interpretation of this law or unfair infringement of citizens' basic rights guaranteed by the Constitution shall not be permitted.

Article 2 (Definitions)
(1) The term "anti-state groups" refers to the domestic or foreign organizations or groups which claim the title of government or whose purpose is to cause national disturbances.
[...]

Chapter 2. Crimes And Punishments

Article 3 (Formation of Anti-State Groups)
(1) Those who organize, or join, an anti-state group shall be punished as follows:
1. Death or life imprisonment for the chief instigators or organizers.
2. Death, life imprisonment, or a minimum of five years of imprisonment for leadership cadres.
3. A minimum of two years of imprisonment for other members.
(2) Those who encourage others to join an anti-state group shall be punished by a minimum of two years of imprisonment.
[...]

Article 4 (Commission of Anti-State Acts)
(1) Members of an anti-state group or those who are under the orders of an anti-state organization who commit an anti-state act shall be punished as follows:
1. Those who commit an act violating the Criminal Code's articles [92], [97], [99], [250.2], [338] to [340.2] shall be punished as set forth in the Code.
2. Those who commit an act violating the Criminal Code's article [98] or who access, gather, leak, transmit, or compromise a national security secret shall be punished as follows:
i. Death or life imprisonment if a military secret or information which is critical to national security and restricted to government authorities is involved.
ii. Death, life imprisonment, or a minimum of seven years of imprisonment if other military or national security secret is involved.
3. Those who commit an act violating the Criminal Code's articles [115], [119.1], [147], [148], [164] to [169], [177.1] to [180], [192] to [195], [207], [208], [210], [250.1], [252], [253], [333] to [337], [339] to [340.1,2] shall be punished by death, life imprisonment, or a minimum of ten years of imprisonment.
4. The destruction of public or government buildings or other structures essential for transportation or communication; the abduction or seduction of officials; the theft or removal of ships, airplanes, automobiles, weapons, or other materials related to the

fore-mentioned functions shall be punished by death, life imprisonment, or a minimum of five years of imprisonment.

5. Those who commit an act violating the Criminal Code's articles [214] to [217], [257] to [259], or [262]; or those who engage in the theft, removal, counterfeit, or alteration of state secret documents or materials shall be punished by a minimum of three years of imprisonment.

6. Those who promote or propagandize the acts defined in sections 1 to 5 or those who create or spread false rumors aimed at causing social turmoil shall be punished by a minimum of two years of imprisonment.

[...]

Article 5 (Voluntary Help or Provision of Money and Materials)

(1) Those who commit acts falling under article 4, paragraph 1 of this law by voluntarily aiding anti-state groups, their members, or those who are under their orders shall be punished as set forth in article 4, paragraph 1.

(2) Those who accept money and valuables from anti-state groups, their members, or those under their orders knowing that it endangers the state's existence and security or the basic order of free democracy shall be punished by up to seven years of imprisonment.

[...]

Article 6 (Infiltration and Escape)

(1) Those who escape to or infiltrate from an area under the control of an anti-state organization knowing that it endangers the state's existence and security or the basic order of free democracy shall be punished by up to ten years of imprisonment.

(2) Those who escape or infiltrate to receive orders from, or consult with, an anti-state organization or its members shall be punished by death, life imprisonment, or a minimum of five years of imprisonment.

[...]

(5) Those who plan or plot acts defined in paragraph 1 shall be punished by up to seven years of imprisonment.

(6) Those who plan or plot acts defined in paragraph 2 shall be punished by up to two years of imprisonment.

Article 7 (Praising or Sympathizing)

(1) Those who praise, encourage, propagandize, or sympathize with anti-state groups, their members, of those under their orders, or those who propagandize national disturbances, knowing that it endangers the state's existence and security or the basic order of free democracy shall be punished by up to seven years of imprisonment.

[...]

(3) Those who organize or join a group for the purpose of committing acts defined in paragraph 1 shall be punished by a minimum of one year of imprisonment.

(4) The members of groups falling under paragraph 3 who create or spread false information which may disturb the national order shall be punished by a minimum of two years of imprisonment.

(5) Those who create, import, duplicate, possess, transport, disseminate, sell, or acquire documents, artistic materials, or other expressive materials for the purpose of committing acts falling under paragraphs 1, 3, or 4 shall be punished as set forth in paragraphs 1, 3, or 4.

[...]

(7) Those who plan or plot acts defined under paragraph 3 shall be punished by up to five years of imprisonment.

Article 8 (Meeting, Corresponding, etc.)
(1) Those who meet, correspond, or communicate through other means with anti-state groups, their members, or those under their orders, knowing that it endangers the state's existence and security or the basic order of free democracy shall be punished by up to ten years of imprisonment.
[...]

Article 9 (Aiding)
(1) Those who knowingly provide firearms, ammunition, explosives, and other weapons to the individuals who have committed or plan to commit acts falling under article 3 to article 8 of this law shall be punished by a minimum of five years of imprisonment.
(2) Those who knowingly provide valuables, money, or other financial benefits to the individuals who have committed or plan to commit acts falling under article 3 to article 8 of this law for hiding, meeting, or communicating, and those who knowingly provide them with facilities and other conveniences for such purposes shall be punished by up to ten years of imprisonment. This punishment may be reduced or waved in cases involving family members.
[...]
(4) Those who plan or plot acts defined under paragraph 1 shall be punished by a minimum of one year of imprisonment.

Article 10 (Failure To Inform)
Those who knowingly fail to inform investigative or intelligence agencies about the individuals who have committed acts defined under articles 3, 4, or 5 (paragraphs 1, 3, 4) of this law shall be punished by up to five years of imprisonment or by a fine of 2,000,000 won. This punishment may be reduced or waved in cases involving family members.

Article 11 (Special Dereliction of Duties)
Investigative or intelligence officers in contact with individuals who have committed anti-state acts while being in office shall be punished by up to ten years of imprisonment. This punishment may be reduced or waved in cases involving family members.

Article 12 (False Accusations)
(1) Those who falsely accuse and those who falsify, hide, or alter evidence to cause others to be prosecuted under this law shall be punished.
(2) Investigative or intelligence officers, as well as those supporting or directing them, who abuse their position to commit acts defined under paragraph 1 shall be punished.

Article 13 (Special Aggravation)
The maximum penalty shall be upgraded to death if an individual who has previously committed crimes defined under this law, the Military Criminal Code's articles [13] or [15], or the Criminal Code's book 2, chapter 1 (crimes related to internal disturbances) and chapter 2 (crimes related to external disturbances) within the last five years commits acts defined under this law's article 3, article 4, article 5, article 6, articles 7 to 9, or under the Criminal Code's articles [94.2], [97], and [99].
[*Declared unconstitutional in 2002*].

[...]

Article 15 (Confiscation or Tax Penalty)
(1) If an individual person who commits a crime under this law receives a compensation for his or her act, the compensation shall be confiscated. If it cannot be confiscated, the value shall be subject to a tax penalty.
(2) The prosecution may order the transfer of confiscated articles to the National Treasury.

Article 16 (Reduction of Sentence)
Punishment may be reduced or waved under one of the following conditions:

1. Voluntary surrender after the commission of a crime under this law.
2. Reporting other individuals who have committed a crime under this law or impeding other individuals from committing a crime under this law.

[...]

Chapter 3. Special Criminal Provisions

Article 18 (Arrest and Detention of Witnesses)
(1) Witnesses to a crime falling under this law who fail to appear before a prosecutor or a police investigator when ordered more than twice without proper justification may be arrested and detained.
(2) If necessary, witnesses to a crime falling under this law may be detained at a nearby police station or other appropriate location on a temporary basis.

Article 19 (Extension of Detention Period)
(1) A district judge may grant a first extension of the detention period for a suspect of a crime falling under article 3 to article 10 of this law if the prosecution requests the extension and presents sufficient reasons for such extension.
(2) A district judge may grant a second extension of the detention period if the prosecution requests the extension and presents sufficient reasons for such extension.
(3) Extension of the detention period in paragraphs 1 and 2 shall be limited to ten days each time it is granted.
[*Declared unconstitutional in 1992*].

[...]

Praising and Encouraging under National Security Act Case
[2 KCCR 49, 89Hun-Ka113, April 2, 1990]

A. Background of the Case

The Court in this case reviewed Article 7 (1) and (5) of the National Security Act which condemned the act of praising or encouraging anti-state groups and producing treasonous material, and found it constitutional only as it applies to the limited circumstances threatening national security and the basic order of free democracy.

The National Security Act was enacted to protect national security and people's liberties from the threat of anti-state activities under looming possibility of the North-South military confrontation, but has been criticized for its vague and overly broad provisions that could be abused. Article 7 (1) provided that "any person who praises, encourages, sympathizes with, or benefits through other means operation, an anti-state organization, its members, or any person under its direction shall be punished by imprisonment for up to seven years." Article 7 (5) provided that "any person who, for the purpose of performing the acts mentioned in (1), (2), (3) or, (4) of this section, produces, imports, duplicates, possesses, transports, distributes, sells or acquires a document, a drawing or any other expressive article shall be punished by a penalty prescribed in each subsection respectively." Using such vague terms, the provisions restricted the freedom of expression in a sweeping manner.

At the Choongmoo Branch of the Masan Local Court, the petitioners were prosecuted and tried for possessing and distributing books and other expressive materials for the purpose of benefiting an anti-state organization under Article 7 (1) and (5) of the National Security Act. They made motion for constitutional review of the s aid statute and the presiding court granted the motion.

B. Summary of the Decision

The Court found some terms in Article 7 (1) and (5) of the National Security Act vague but upheld them so long as it was interpreted to apply only to the limited circumstances threatening national security and the basic order of free democracy.

The expressions such as "member", "activities", "sympathizes with", or "benefits" used in the challenged provisions are too vague and do not permit a reasonable standard for ordinary people with good sense to visualize the covered types of conduct. They are also overbroad to determine the contents and boundaries of their definitions. Interpreted literally, they will merely intimidate and suppress freedom of expression without upholding any public interest in national security. Furthermore, they permit the law enforcement agencies to arbitrarily enforce the law, infringing freedom of speech, freedom of press, and freedom of science and arts, and ultimately violating the principle of rule of law and the principle of statutory punishment. In addition, the broadness of those expressions can potentially permit a punishment of a pursuit of reunification policy pursuant t o the basic order of free democracy or a promotion of the national brotherhood. This result is not consistent with the preamble to the Constitution calling for unity of the Korean race through justice, humanity, and national brotherhood pursuant to the mandate of peaceful unification, and the Article 4 directing us toward peaceful reunification.

This multiplicity, however, does not justify total invalidation of the entire provision. Pursuant to a general constitutional principle, the terms in a legal provision permitting multiple definitions or multiple interpretations within the bounds of their literal meanings should be interpreted to make the provision consistent with the Constitution and to avoid

unconstitutional interpretation of these terms, giving life to its constitutional and positive aspects. Article 7 (1) and (5) are not unconstitutional insofar as it is narrowly interpreted to cover only those activities posing a clear threat to the integrity and the security of the nation and the basic order of free democracy.

The activities jeopardizing the integrity and the security of the nation denote those communist activities, coming from outside, threatening the independence and infringing on the sovereignty of the Republic of Korea an d its territories, thereby destroying constitutional institutions and rendering the Constitution and the laws inoperative. The activities impairing the basic order of free democracy denote those activities undermining the rule of law pursuant to the principles of equality and liberty and that of people's self-government by a majority will in exclusion of rule of violence or arbitrary rule: in other words, one-person or one-party dictatorship by an anti-state organization. Specifically, they are the efforts to subvert and confuse our internal orders such as respect for basic rights, separation of power, representative democracy, multi-party system, elections, the economic order based on private property and market economy, and independence of the judiciary.

Justice Byun Jeong-soo dissented on grounds that the law so clearly unconstitutional cannot be cured merely by interpreting it narrowly and should simply be stricken down.

C. Aftermath of the Case

Social reactions to this case were overwhelming. *The Chosun Ilbo* on April 3, 1990 opined that "Article 7 of the National Security Act has been criticized time and again as a quintessential poison pill because the vague ness of such concepts as 'praising' and 'encouraging' the overly broad scope of their coverage permitted abuses. The Court's decision can be said to have accepted a substantial portion of this criticism." On the same day, The *Hankook Ilbo* made the following observation: "this decision shows the Court's consideration of the reality of the continuing South-North military confrontation, as well as its resolve to prevent immense nation- wide outcry expected to follow a total invalidation of the law despite the perceived unconstitutionality from a purely legal point of view." *The Dong-a Ilbo*, also on the same day, showed much interest, and called for revision of the law by stating that "the legislature has taken no initiative to change such phrases as 'praising and encouraging' that have been pointed out as typical bad law of the past, and the legislature is due the process of self-evaluation painful to its core."

From academic circles, Huh-young argued that a total invalidation was the most logical choice, but if politically difficult, it should have been substituted by the second best choice of upholding the law under the limited circumstances and only for a limited time only until the legislature revises the Act.

However, the intent of the Constitutional Court vis-à-vis the decision of limited constitutionality appeared to have been misunderstood by the judiciary and the prosecutors to some extent. Even after this decision, the Supreme Court continued to apply the previous precedents to the National Security Act violations in the same manner while simply inserting the language of this decision into its judgments.

After this decision, on May 31 1991, the National Assembly revised the problematic provision, Article 7 of the National Security Act through Act 4373. The phrase "knowingly endangering the national integrity and security, or the basic order of free democracy" was inserted at the beginning of Article 7 (1) as suggested by the Court. The expression "benefits anti-state organizations through other means" was replaced by promotes and advocates for national subversion.

When the revised law was challenged through constitutional complaints against and requests for a constitutional review of the remaining ambiguities, the Court admitted the presence of ambiguities in the new law. However, it held that the insertion of the subjective intent requirement, namely "knowingly endangering the nation al integrity and security, or the basic order of free democracy," made interpretations deviating from the legislative intent nearly impossible. The Court also ruled that even the remaining terms such as 'members,' 'activities,' and 'sympathizes with' would no longer be vague when they are interpreted narrowly as forming one element of the crime together with the revisions. The Court, therefore, handed down a simple decision of constitutionality, finding no violation of the essential content of freedom of expression or of the principle of statutory punishment. (CC 1996.10.4, 95Hun-Ka2; 1997. 1.16, 92Hun-Ma6, etc.).

國家保安法 第7條에 대한 違憲審判

(1990. 4. 2. 89헌가113 全員裁判部)

[판례집 2, 49~74]

【판시사항】

1. 다의적(多義的)이고 광범성(廣範成)이 인정되는 법률(法律)과 죄형법정주의(罪刑法定主義)

2. 합헌적(合憲的) 해석(解釋)의 요건(要件)

3. 국가보안법(國家保安法) 제7조 제1항 및 제5항(1980.12.31. 법률(法律) 제3318호)의 위헌여부(違憲與否)

4. 국가(國家)의 존립(存立)·안전(安全)을 위태롭게 한다는 것의 의미(意味)

5. 자유민주적(自由民主的) 기본질서(基本秩序)에 위해(危害)를 준다는 것의 의미(意味)

【결정요지】

1. 위헌법률심판(違憲法律審判)의 대상(對象)에 있어서 법문(法文)의 내용(內容)이 다의적(多義的)이고 그 적용범위(適用範圍)에 있어서 과도한 광범성(廣範性)이 인정된다면 법치주의(法治主義)와 죄형법정주의(罪刑法定主義)에 위배(違背)되어 위헌(違憲)의 소지(素地)가 있다.

2. 어떤 법률(法律)의 개념(槪念)이 다의적(多義的)이고 그 어의(語意)의 테두리안에서 여러가지 해석(解釋)이 가능할 때, 헌법(憲法)을 최고법규(最高法規)로 하는 통일적(統一的)인 법질서(法秩序)의 형성(形成)을 위하여 헌법(憲法)에 합치(合致)되는 해석(解釋) 즉 합헌적(合憲的)인 해석(解釋)을 택하여야 하며, 이에 의하여 위헌적(違憲的)인 결과(結果)과 될 해석(解釋)은 배제하면서 합헌적(合憲的)이고 긍적정적인 면은 살려야 한다는 것이 헌법(憲法)의 일반법리(一般法理)이다.

3. 국가보안법(國家保安法) 제7조 제1항 및 제5항의 규정(規定)은 각 그 소정(所定)의 행위(行爲)가 국가(國家)의 존립(存立)·안전(安全)을 위태롭게 하거나 자유민주적(自由民主的) 기본질서(基本秩序)에 위해(危害)를 줄 명백한 위험이 있을 경우에만 축소적용(縮小適用)되는 것으로 해석(解釋)한다면 헌법(憲法)에 위반(違反)되지 아니한다.

4. 국가(國家)의 존립(存立)·안전(安全)을 위태롭게 한다 함은 대한민국(大韓民國)의 독립(獨立)을 위협·침해하고 영토(領土)를 침략하며 헌법(憲法)과 법률(法律)의 기능(機能) 및 헌법기관(憲法機關)을 파괴·마비시키는 것으로 외형적(外形的)인 적화공작(赤化工作) 등(等)을 일컫는다.

5. 자유민주적(自由民主的) 기본질서(基本秩序)에 위해(危害)를 준다 함은 모든 폭력적(暴力的) 지배(支配)와 자의적(恣意的) 지배(支配) 즉 반국가단체(反國家團體)의 일

인독재(一人獨裁)내지 일당독재(一黨獨裁)를 배제하고 다수(多數)의 의사(意思)에 의한 국민(國民)의 자치(自治), 자유(自由)·평등(平等)의 기본원칙(基本原則)에 의한 법치주의적(法治主義的) 통치질서(統治秩序)의 유지를 어렵게 만드는 것으로서 구체적으로는 기본적(基本的) 인권(人權)의 존중(尊重), 권력분립(權力分立), 의회제도(議會制度), 복수정당제도(複數政黨制度), 선거제도(選擧制度), 사유재산(私有財産)과 시장경제(市場經濟)를 골간으로 한 경제질서(經濟秩序) 및 사법권(司法權)의 독립(獨立) 등(等) 우리의 내부체재(內部體制)를 파괴·변혁시키려는 것이다.

재판관 변정수의 반대의견(反對意見)

1. 국가보안법(國家保安法) 제7조 제1항 및 제5항은 너무 막연하고 불명확하여 죄형법정주의(罪刑法定主義)에 위반되고 또한 표현행위(表現行爲)가 대한민국(大韓民國)에 명백한 현실적인 위험이 있거나 없거나를 가리지 아니하고 다만 반국가단체(反國家團體)에 이로울 수 있다는 이유만으로 무조건 표현행위(表現行爲)를 제한하고 처벌대상(處罰對象)으로 삼고 있다는 점에서 표현(表現)의 자유(自由)의 본질적(本質的) 내용(內容)을 침해하는 명백한 위헌법률(違憲法律)이다.

2. 국가보안법(國家保安法)은 북한(北韓)을 반국가단체(反國家團體)로 규정짓고 있을 뿐만 아니라 특히 제7조 제1항 및 제5항은 반국가단체(反國家團體)인 북한(北韓)에게 이로운 것은 곧 대한민국(大韓民國)에 해롭다는 상호배타적(相互排他的)적인 적대관계(敵對關係)의 논리(論理)를 강요하고 있어 헌법(憲法)의 평화통일조항(平和統一條項)에 정면으로 위반
된다.

3. 결정주문(決定主文)의 "대한민국(大韓民國)의 안전존립(安全存立)을 위태(危殆)롭게 하거나 자유민주적(自由民主的) 기본질서(基本秩序)에 위해(危害)를 줄 경우"라는 표현 역시 매우 애매모호한 것이어서, 그렇지 않아도 불명확(不明確)하고 광범위(廣範圍)한 구성요건(構成要件)에다 또다시 불명확한 구성요건(構成要件)을 보태는 것이 되어 과연 신체(身體)의 자유(自由)나 표현(表現)의 자유보장(自由保障)을 위하여 어느 정도의 효과가 있을 것인지 의문이다. 위 법률조항(法律條項)들의 위헌성(違憲性)을 인정하였으면 헌법재판소(憲法裁判所)로서는 마땅히 위헌(違憲)을 선언(宣言)하여야 한다.

4. 주문(主文)과 같은 형태의 이른바 한정합헌결정(限定合憲決定) 또는 변형결정(變形決定)이 우리 법제상(法制上) 허용되지도 않을 뿐더러 위 법률조항(法律條項)들처럼 그 위헌성(違憲性)이 너무도 뚜렷한 법률(法律)을 아무리 주문(主文)과 같이 한정적으로 제한해석(制限解釋)하여 합헌결정(合憲決定)을 내린다 하여 그 위헌성(違憲性)이 치유(治癒)되는 것도 아니다.

제청법원 : 마산지방법원 충무지원(1989.11.10. 89 초 308위헌제청신청)
제청신청인 : 장○현 외 2인
대리인 변호사 이홍록

【참조조문】

헌법(憲法) 전문(前文), 제4조, 제8조 제4항, 제11조, 제12조 제1항, 제19조, 제21조 제1항, 제22조 제1항, 제37조 제2항 국가보안법(國家保安法) 제7조(讚揚·鼓舞 등) ① 반국가단체(反國家團體)나 그 구성원(構成員) 또는 그 지령(指令)을 받은 자의 활동을 찬양(讚揚)·고무(鼓舞) 또는 이에 동조(同調)하거나 기타의 방법(方法)으로 반국가단체(反國家團體)를 이(利)롭게 한 자는 7년이하의 징역(懲役)에 처(處)한다.
② 국외공산계열(國外共産系列)의 활동(活動)을 찬양(讚揚)·고무(鼓舞) 또는 이에 동조(同調)하거나 기타의 방법(方法)으로 반국가단체(反國家團體)를 이(利)롭게 한 자도 제1항의 형(刑)과 같다.
③ 제1항 및 제2항의 행위(行爲)를 목적(目的)으로 하는 단체(團體)를 구성(構成)하거나 이에 가입(加入)한 자는 1년이상의 유기징역(有期懲役)에 처(處)한다.
④ 제3항에 규정(規定)된 단체(團體)의 구성원(構成員)으로서 사회질서(社會秩序)의 혼란(混亂)을 조성(造成)할 우려가 있는 사항(事項)에 관하여 허위사실(虛僞事實)을 날조(捏造)·유포(流布) 또는 사실(事實)을 왜곡(歪曲)하여 전파(傳播)한 자는 2년이상의 유기징역(有期懲役)에 처(處)한다.
⑤ 제1항 내지 제4항의 행위(行爲)를 할 목적(目的)으로 문서(文書)·도서(圖書) 기타의 표현물(表現物)을 제작(製作)·수입(輸入)·복사(複寫)·소지(所持)·운반(運搬)·반포(頒布)·판매(販賣) 또는 취득(取得)한 자는 그 각 항(項)에 정한 형(刑)에 처(處)한다.
⑥～⑦ 생략.
구(舊) 국가보안법(國家保安法) (1960.6.10. 법률 제549호로 전문개정(全文改正)되기 전(前)의 것) 제2조(注意規定) 본법(本法)은 헌법(憲法)이 보장(保障)한 국민(國民)의 권리(權利), 자유(自由)와 밀접(密接)한 관련(關聯)이 있으므로 본법(本法)을 적용(適用)하고 해석(解釋)함에 있어서는 국민(國民)이 향유(享有)하는 모든 권리(權利)와 자유(自由)가 부당(不當)하게 제한(制限)되는 일이 없도록 특(特)히 주의(注意)하여야 한다.

【주 문】

국가보안법 제7조 제1항 및 제5항(1980.12.31. 법률 제3318호)은 각 그 소정 행위가 국가의 존립·안전을 위태롭게 하거나 자유민주적 기본질서에 위해를 줄 경우에 적용된다고 할 것이므로 이러한 해석하에 헌법에 위반되지 아니한다.

【이 유】

1. 사건의 개요와 심판의 대상

가. 사건의 개요

제청신청인들은 1989.10.10. 이 사건 제청법원인 마산지방법원 충무지원에 국가보안법 위반 등의 죄로 기소되었는데(위 지원 89고단 625사건) 그 기소된 내용중 국가보안법 위반의 점의 요지는 제청신청인들이 반국가단체를 이롭게 할 목적으로 도서 및 표현물을 소지하고 이를 반포하였는 바 이는 국가보안법 제7조 제5항, 제1항의 죄에 해당한다는 것이다.

제청법원은 제청신청인들의 제청신청에 따라 1989.11.10. 헌법재판소에 위 89고단 625사건 재판의 전제가 되는 국가보안법 제7조 제1항 및 제5항의 위헌여부의 심판을 제청하였다.

나. 심판의 대상

그러므로 이 사건 위헌법률심판의 대상이 되는 법률은 국가보안법 제7조 제1항 및 제5항으로서 그 내용은 다음과 같다. 국가보안법 제7조 제1항 : 반국가단체나 그 구성원 또는 그 지령을 받은 자의 활동을 찬양·고무 또는 이에 동조하거나 기타의 방법으로 반국가단체를 이롭게 한 자는 7년 이하의 징역에 처한다.

동조 제5항 : 제1항 내지 제4항의 행위를 할 목적으로 문서·도화 기타의 표현물을 제작·수입·복사·소지·운반·반포·판매 또는 취득한 자는 그 각 항에 정한 형에 처한다.

2. 위헌심판 제청이유와 관계인의 의견

가. 제청법원의 제청이유 요지는 헌법 제12조 제1항 후문 후단은 이른바 죄형법정주의를 규정한 것으로서 죄형법정주의에서 말하는 법률은 국민이 처벌가능성을 예측할 수 있을 정도로 구체적이고 명확하게 규정되어야 하고 지나치게 포괄적이고 애매하거나 막연하고 불명확한 처벌법규는 자의적인 행정권의 행사에 의한 국민의 기본권 침해의 여지를 가지게 되기 때문에 삼권분립 내지 법치주의의 이념과 죄형법정주의의 원칙에 어긋나는 위헌의 법률이고, 헌법 제37조 제2항 소정의 국민의 자유와 권리를 구체적으로 적시할 것을 요하며 기본권 일반을 제한한다는 형식의 입법은 위헌이라고 할 것인데 국가보안법 제7조 제1항 및 제5항은 반국가단체를 어떠한 방법으로든지 이롭게 한 자를 모두 처벌할 수 있다는 지나치게 포괄적이고 막연한 규정이므로 헌법 제12조 제1항과 제37조 제2항 전문의 규정에 위반되고 그 결과 국민의 자유와 권리의 본질적 내용을 침해할 우려가 있어 위와 같은 본질적 내용의 침해금지를 규정한 헌법 제37조 제2항 후문의 규정에도 위반된다는 의문이 있다는 취지이다.

나. 제청신청인의 의견은 국가보안법 제7조 제1항 및 제5항 소정 범죄의 구성요건인 "반국가단체나 그 구성원 또는 지령을 받은 자","찬양", "고무", "동조", "기타의 방법", "이롭게" 등의 개념은 포괄적이고 애매하여 불명확하므로 위 각 법 조항은 헌법상의 죄형법정주의에 위반하여 무효이다라는 것이다.

다. 법무부장관의 의견

(1)국가보안법 제7조 제1항 및 제5항의 규정이 지나치게 포괄적이고 막연하다는 제청이유에 대하여는 국민의 자유와 권리를 제한하는 법률이 구체성과 명확성을 갖추어야 한다는 점에 관하여는 별다른 이론이 없으나 이는 형사처벌법규에 있어서 법관이나 법률학자들의 법해석이 필요없을 정도로 구성요건이 구체적이어야 한다는 의미는 아니며 사회평균인의 입장에서 합리적으로 판단할 때 그 구성요건이 무엇을 금지하고 있는지를 알 수 있을 정도로 특정되어 있으면 족할 것으로 외견상 용어가 추상적인 것처럼 보이더라도 헌법정신에 맞도록 해석되는 경우에는 그것을 가지고 구체성과 명확성을 결여하였다고 할 수는 없는 것인 바, 국가보안법 제7조 제1항과 제5항의 규정은 이러한 견지에서 특정되어 있다고 할 수 있으며, 더욱이 판례와 학설에 의하여 국가보안법 제7조에서 사용된 개념들의 구체적인 의미와 내용이 명확히 정립되어 있으므로 국 가보안법 제7조 제1항 및 제5항의 규정이 지나치게 포괄적이고 막연한 것이라고는 할 수 없다는 취지이다.

(2) 국민의 자유와 권리의 본질적 내용을 침해할 우려가 있다는 제청이유에 대하여는 국가보안법 제7조 제1항 및 제5항은 구체성과 명확성을 갖추었으므로 위 각 조항이 지나치게 포괄적이고 막연하여 기본권의 본질적 내용을 침해할 우려가 있다고는 할 수 없을 뿐만 아니라 반국가단체의 활동을 찬양·고무·동조하거나 이를 목적으로 이적 표현물을 제작·반포하는 등의 행위는 국가안보에 실질적 해악을 초래할 수 있는 명백하고도 현존하는 위험이 있으므로 위와 같은 행위를 처벌하는 것이 표현의 자유의 본질적 내용 침해라고는 할 수 없고 대부분의 국가도 이와 같이 국가안보를 위하여 표현의 자유를 제한하는 법률을 가지고 있으며, 한편 국가보안법 제7조 제1항 및 제5항은 내면적인 자유로서의 학문연구나 순수한 예술창작자체를 제한하는 법률이 아니므로 학문·예술의 자유의 본질적 내용을 침해하는 것도 아니라는 것이다.

3. 판 단

가. 먼저 국가보안법 제7조 제1항에 관하여 본다.

여기에서 "반국가단체나 그 구성원 또는 그 지령을 받은 자의 활동을 찬양·고무 또는 이에 동조하거나 기타의 방법으로 반국가단체를 이롭게 한 자는 7년 이하의 징역에 처한다"고 규정하고 있다.

우선 위 조문의 문제점들을 차례로 살펴보기로 한다. 먼저 문제될 것은 단순히 반국가단체의 "구성원"의 활동에 대하여 찬양·고무 또는 이에 동조하였으면 동조 제1항 소정의 범죄구성요건에 해당되도록 규정한 것인데 문자 그대로 보면 반국가단체의 간부나 지도적 임무에 종사하는 자나 반국가단체의 통치이념의 추종자가 아닌 단순한 구성원 즉 북한집단의 주민이면 모두 포함되게 되어 있는 점이다. 따라서 어느 북한 어린이를 두고 노래를 잘한다는 말을 하는 경우까지도 동 조항의 찬양·고무죄의 구성요건에 해당될 여지가 있다. 여기에다가 "활동" 역시 어떠한 제한도 가하고 있지 아니하다. 문리해석을 하면 반국가단체나 그 구성원 또는 그 지령을 받은 자의 정치·군사·경제·사회·문화·체육 등 모든 분야의 활동을 포괄하는 것일 수 밖에 없으며 대한민국의 존립·안전을 위태롭게 하거나 자유민주적 기본질서에 위해를 줄 수 있는 활동이 아닌 것 까지도 미치게 될 광범위한 개념이다. 예를 들면 어느 북한학자의 학문적 업적에 대한 높은 평가진술, 체육인의 기량이나 예술인의 예술활동을 찬양하는 경우라도 문언대로라면 당연히 본 찬양·고무 등 죄(이하 찬양·고무죄라 한다)가 성립될 여지가 있다.

다음 "동조" 부문에 관하여 보면 문리대로 한다면 반국가단체나 그 구성원 또는 그 지령을 받은 자의 활동에 동조하는 것만으로 범죄가 성립되게 되어 있으므로 북한집단의 주장과 일치하기만 하면 그 내용에 관계없이 그 의사발표의 동기를 불문하고 모두 처벌받을 위험이 있는 포괄성을 띠고 있다. 예를 들면 북한측이 남북문화교류 제의를 하였을 때나 국제경기에 남북단일팀 출전 제의를 하였을 때에도 이에 찬의만 표해도 구성요건에 해당될 만큼 광범위하다. 나아가 "기타의 방법으로 반국가단체를 이롭게"하는 부분 또한 문제가 있는 것이라 하겠다. 국가보안법 제7조의 조문표제가 "이적"으로가 아니라 "찬양·고무 등"으로 되어 있고, 또 "기타의 방법" 이하가 조문 전단의 "…의 활동"에 직접 연결되기 어려우며 그 자체로서 독립절을 구성하고 있는 점으로 미루어 (이 점이 다른 법조의 "기타" 운운과 차이라고 할 것이다) 찬양죄, 고무죄, 동조죄 그리고 이적죄 등 네가지로 분화되어 있는 데다가 지금까지의 판례의 경향을 함께 종합하면, 반국가단체의 활동의 찬양·고무 또는 이에 버금가는 방법이라기 보다는, 반국가단체의 활동을 찬양·고무 또는 이에 동조하는 방법이 아닌 다른 모든 방법으로 반국가단체를 이롭게 하는 행위를 가리키는 것으로 보여진다. 따라서 사물의 변별능력을 제대로 갖춘 일반인의 이해와 판단으로서는 행위유형을 정형화할 해석의 합리적 기준을 찾기 어려운 개념이며 구성요건의 내포와 외연이 미치는 한계를 가리기 어려운 광범성을 지닌 것임에 틀림없다.

기타의 방법이하의 부분인 반국가단체를 "이롭게 한" 행위는 군사·정치·경제·사회·문화·체육 등 어떠한 영역에서든 이롭게 하는 행위라면 모두 포함된다. 대한민국과 반국가단체인 북한집단과는 적대관계가 지속되어 왔음에 비추어 대한민국정부에 해가 되는 경우라면 반사적으로 북한집단을 이롭게 하는 행위가 될 수 밖에 없다. 제7조 제1항의 찬양·고무죄가 목적범이나 의욕범이 아니고 고의범으로서 반국가단체를 이롭게 한다는 것을 인식하거나 또는 이익이 될 수 있다는 미필적 인식만 있으면 그 구성요건에 해당하도록 되어 있으므로, 그 의도가 어디에 있건 정부에 신랄한 비판이면 결국 여기의 "기타의 방법으로 이롭게 한" 경우에 견강부회를 시킬 여지가 있다. 이렇듯 제7조 제1항의 찬양·고무죄는 "구성원", "활동", "동조", "기타의 방법", "이롭게 한" 등 무려 다섯 군데의 용어가 지나치게 다의적고 그 적용범위가 광범위하다.

그러나 이와 같은 문언해석 그대로의 내용이 국가보안법 제7 조 제1항의 제도 본지일 것으로는 결코 보여지지 않으며, 문언을 그대로 해석·운영한다면 다음과 같은 문제가 생긴다.

첫째로 만일 문리 그대로 해석·운영한다면 헌법상의 언론·출판, 학문·예술의 자유를 위축시킬 염려가 있다. 북한을 반국가단체로 보는 한 북한집단 자체 뿐 아니라 그 구성원인 주민의 모든 분야의 활동도 찬양·고무해서는 아니되며, 북한집단이나 그 주민의 주장과 일치되는 언동을 하여서는 아니되고 그 밖의 북한집단에 이롭게 된다는 인식하에 북한집단에 대해 일체 긍정적인 평가활동을 하여서는 안된다. 그 언동의 동기나 의도 혹은 그 내용은 묻지 않으며, 그 내용이 국가의 존립·안전이나 자유민주적 기본질서에 명백한 위해를 줄 정도의 것이든 아니든 막론하고 금지되고 이를 어기면 형사처벌받게 되는 형벌과잉을 초래할 염려가 있다. 개인적으로는 자기가 행한 행위가 헌법상 보장된다고 생각되어도 그것이 법률의 문언상 규제 대상에 포함될 수 있기 때문에 북한문제에 관한 한 비난 빼고는 하고 싶은 말, 쓰고 싶은 글, 그리고 학술적 활동이나 예술활동이 일체 금기가 될 소지가 생길 것이며 북한의 남침정책이나 대한민국의 체제전복과 관계가 없는 무해한 표현행위라 하더라도 안심하고 자기 의사의 창달이 힘들게 된다. 다시 말하면 국가의 존립·안전의 법익 수호의 목적도 달함이 없이 국민의 표현의 자유만 위협하고 위축시킬 경우가 나타날 것이다. 헌법 제37조 제2항은 국민의 자유와 권리는 질서유지 또는 공공복리 이외 국가안전보장을 위하여 필요한 경우에 한하여 법률로

써 제한할 수 있도록 규정하였다. 따라서 국가의 안전보장의 희생위에 언론·출판의 자유, 학문·예술의 자유가 보장될 수는 없지만, 국가안전보장과 관계없는 경우에는 그것이 북한 집단이나 그 구성원인 주민에 관한 것이라 하여도 그와 같은 자유를 보장하는 것이 헌법이다. 국가는 헌법이 수호하려는 최고의 가치인 자유민주적 기본질서(헌법 전문, 제4조, 제8조 제4항)를 전복하려는 언동 등에 대하여는 단호히 대처를 할 수 밖에 없지만, 그와 무관한 경우에는 개인이 갖는 기본적 인권을 최대한 보장할 의무를 지는 것이다. 따라서 국가보안법 제7조 제1항이 국가안전보장이나 자유민주적 기본질서의 수호에 관계없는 경우까지 확대적용될 만큼 불투명하고 구체성이 결여되어 있다는 것은 분명히 헌법 제37조 제2항을 어겨 헌법 제21조 제1항의 언론·출판의 자유와 헌법 제22조 제1항의 학문·예술의 자유를 침해할 개연성 나아가 그와 같은 자유의 전제가 되는 헌법 제19조의 양심의 자유의 침해가능성을 남기는 것이다.

둘째로 문리 그대로 적용범위가 과도하게 광범위하고 다의적인 것이 되면 법운영 당국에 의한 자의적(恣意的) 집행을 허용할 소지가 생길 것이다. 차별적으로 법을 집행하는 이른바 선별집행이 가능할 수 있다. 법규의 문언대로 확대적용하느냐 한정적으로 축소적용하느냐는 법운영 당국의 재량의 여지가 있으므로 사람에 따라서는 법규의 문언 그대로 적용하여 합헌적인 행위까지도 처벌하여 기본적 인권을 침해할 수 있는가 하면, 그 운영당국은 가능한 한의 축소해석을 통해 위헌성을 띠는 행위마저 처벌을 면제시킬 수 있다. 다시 말하면 법운영 당국으로서 가장 경계하여야 할 편의적·자의적 법운영이 가능할 수 있다. 특히 국가권력과 통치자에 대한 비판이 우연히 북한집단의 주장과 맥을 같이 하는 바가 있으면 여기의 찬양·고무죄의 적용범위에 포함될 수 있으며 정부의 정책 비판이라도 북한측이 원용하여 선전수단으로 삼을 수 있다는 인식만 있었다면 이적 죄의 고리에 걸 수 있는 포괄성이 있기 때문에 정부비판세력을 견제하는 수단으로 오용 내지는 남용의 소지를 안고 있다. 돌이켜 찬양·고무죄의 구성요건에 대하여 넓게 보았느냐, 좁게 보았느냐의 해석범위의 문제와 당시 처해 있던 시대적 상황과 밀접한 관련이 있었던 것은 부인될 수 없는 사실이며, 이것은 여기의 찬양·고무죄의 적용범위의 과도한 광범성과 그 다의성이 큰 요인이었다고 볼 것이다. 무릇 법운영에 있어서 객관적인 자의성을 주는 것은 법치주의 원리에 반하는 것이고 결국 법의 집행을 받는 자에 대한 헌법 제11조의 평등권 침해가 되는 것이다. 나아가 법규의 적용범위가 과도하게 광범위해지면 어떠한 경우에 법을 적용하여야 합헌적인 것이 될 수 있는가 즉 법을 적용하여도 좋은 경우와 적용하여서는 안되는 경우가 법집행자에게도 불확실하고 애매해지는 사태가 온다. 이러한 의미에서도 과도한 광범성은 잠재적인 명확성 결여의 경우로 볼 수 있기 때문에 형벌법규에 관한 명확성의 원칙에 위배되는 한가지 예에 해당될 수 있다. 이리하여 어떠한 것이 범죄인가를 법제정 기관인 입법자가 법률로 확정하는 것이 아니라 사실상 법운영 당국이 재량으로 정하는 결과가 되어 법치주의에 위배되고 죄형법정주의에 저촉될 소지가 생겨날 것이다.

셋째로 제7조 제1항의 찬양·고무죄를 문언 그대로 해석한다면 헌법전문의 "평화적 통일의 사명에 입각하여 정의·인도와 동포애로써 민족의 단결을 공고히 하고"의 부분과 헌법 제4조의 평화적 통일지향의 규정에 양립하기 어려운 문제점이 생길 수도 있다. 물론 여기의 통일은 대한민국의 존립과 안전을 부정하는 것은 아니고 또 자유민주적 기본질서에 위해를 주는 것도 아니며 오히려 그에 바탕을 둔 통일인 것이다. 그러나 제6공화국 헌법이 지향하는 통일은 평화적 통일이기 때문에 마치 냉전시대처럼 빙탄불상용의 적대관계에서 접촉·대화를 무조건 피하는 것으로 일관할 수는 없는 것이고 자유민주적 기본질서에 입각한 통일을 위하여 때로는 북한을 정치적 실체로 인정함도 불가피하게 된다. 북한집단과 접촉·대화 및 타협하는 과정에서 자유민주적 기본질서에 위해를 주지 않는 범위내에서 때로는 그들의 주장을 일부 수용하여야 할 경우도 나타날

수 있다. 순수한 동포애의 발휘로서 서로 도와주는 일, 체제문제와 관계없이 협력하는 일은 단일민족으로서의 공감대형성이며, 이는 헌법 전문의 평화적 통일의 사명에 입각하여 민족의 단결을 공고히 하는 소위인 것으로서 헌법정신에 합치되는 것일 수도 있다. 그러나 앞서 본 바와 같은 찬양·고무 죄의 처벌범위의 광범성 때문에 자유민주적 기본질서에 입각한 통일정책의 추구나 단순한 동포애의 발휘에 지나지 않을 경우라도 그 문언상으로는 북한의 활동에 동조하거나 북한을 이롭게 하는 것이 된다는 해석으로 처벌될 위험이 있다.

이상 본 바 문제의 소재는 법문의 다의성과 그 적용범위의 광범성에 있으며 이 때문에 국가존립·안전을 위태롭게 하거나 자유민주적 기본질서에 해악을 줄 구체적인 위험이 없는 경우까지도 형사처벌이 확대될 위헌적 요소가 생기게 되어 있는 점이며, 이는 단순한 입법 정책의 문제를 떠난 것이다. 그러나 제7조 제1항의 그 다의성 때문에 위헌문제가 생길 수 있다고 해서 전면위헌으로 완전폐기되어야 할 규정으로는 보지 않으며 완전폐기에서 오는 법의 공백과 혼란도 문제지만, 남북간에 일찍이 전쟁이 있었고 아직도 휴전상태에서 남북이 막강한 군사력으로 대치하며 긴장상태가 계속되고 있는 마당에서는 완전폐기 함에서 오는 국가적 불이익이 폐기함으로써 오는 이익보다는 이익형량상 더 클 것이다. 분명히 평화시대를 기조로 한 형법상의 내란죄나 외환죄는 고전적이어서 오늘날 우리가 처한 국가의 자기안전·방어에는 다소 미흡하다. 따라서 제7조 제1항은 이와 별도로 그 존재의의가 있다고 할 것이며 또 침략행위나 민주체제전복을 부추기는 내용의 언동까지도 표현의 자유라는 이름으로 보호하는 것이 헌법이 아닐진대 여기에 합헌적이고 긍정적인 면도 간과할 수 없을 것으로, 다만 위헌적 요소가 있어서 정비되어야 할 불완전한 것일 뿐이다. 어떤 법률의 개념이 다의적이고 그 어의의 테두리안에서 여러 가지 해석이 가능할 때 헌법을 그 최고 법규로 하는 통일적인 법질서의 형성을 위하여 헌법에 합치되는 해석 즉 합헌적인 해석을 택하여야 하며, 이에 의하여 위헌적인 결과가 될 해석을 배제하면서 합헌적이고 긍정적인 면은 살려야 한다는 것이 헌법의 일반 법리이다. 이러한 합헌적 제한해석과 주문에는 헌법재판제도가 정착된 여러나라에 있어서 널리 활용되는 통례인 것으로서 법률에 일부합헌적 요소가 있음에도 불구하고 위헌적 요소 때문에 전면위헌을 선언할 때 생길 수 있는 큰 충격을 완화하기 위한 방안이기도 하다. 국가보안법 제7조 제1항 소정의 찬양·고무·동조 그리고 이롭게 하는 행위 모두가 곧바로 국가의 존립·안전을 위태롭게 하거나 또는 자유민주적 기본질서에 위해를 줄 위험이 있는 것이 아니므로 그 행위일체를 어의대로 해석하여 모두 처벌한다면 합헌적인 행위까지도 처벌하게 되어 위헌이 되게 된다는 것은 앞서 본 바이다. 그렇다면 그 가운데서 국가의 존립·안전이나 자유민주적 기본질서에 무해한 행위는 처벌에서 배제하고, 이에 실질적 해악을 미칠 명백한 위험성이 있는 경우로 처벌을 축소제한하는 것이 헌법 전문·제4조·제8조 제4항·제37조 제2항에 합치되는 해석일 것이다. 이러한 제한해석은 표현의 자유의 우월적 지위에 비추어 당연한 요청이라 하겠다. 여기에 해당되는가의 여부는 제7조 제1항 소정의 행위와 위험과의 근접정도도 기준이 되겠지만 특히 해악이 크냐 작은냐의 정도에 따라 결정함이 합당할 것이다. 국가보안법 제1조는 "이 법은 국가의 안전을 위태롭게 하는 반국가활동을 규제함으로써 국가의 안전과 국민의 생존 및 자유를 확보함을 목적으로 한다"고 규정하고 있다. 결국 국가보안법은 국가의 안전을 보장하고 자유민주적 기본질서의 파괴에 대처하기 위한데 그 목적이 있는 것이므로 위에 밝힌 제한해석은 그 입법목적에도 부합하는 것이 될 것이다. 구 국가보안법(1958.12.26. 법률 제500호) 제2조에서도 "본 법은 헌법에 보장된 국민의 권리, 자유와 밀접한 관련이 있으므로 본 법을 적용하고 해석함에 있어서는 국민이 향유하는 모든 권리와 자유가 부당하게 제한되는 일이 없도록 특히 주의하여야 한다."고 규정된 것을 상기할 필요가 있다. 이처럼 입법목적 등 합리적 기준으로 위 다의

적인 규정을 한정적 제한해석을 할 때 제7조 제1항의 보호법익을 살리면서도 전면 위헌의 문제를 피할 길이 열릴 것이며 이로써 언론·출판의 자유나 학문·예술 또는 양심의 자유의 위축문제나 이와 같은 기본권의 본질적 침해의 우려는 해소될 것이고, 허용될 행위와 금지되는 행위의 기준제시로 법운영 당국의 제도외적 오용 내지 남용으로 인한 기본권침해의 사태는 피해질 것이며, 이 정도의 기준제시로 처벌범위를 좁히면 외국의 입법례나 판례·학설에 비추어 법운영 당국의 해석권에 의하여 제도 본지를 충분히 살릴 수 있을 것으로 처벌범위의 불 명확성 때문에 생기는 죄형법정주의 위배의 소지는 없어지고, 나아가 국가의 존립·안전을 저해함이 없이 자유민주적 기본질서에 입각한 평화적 통일정책추진의 헌법적 과제는 이룩할 수 있을 것이다. 그러므로 제7조 제1항이 헌법의 규정에 전면 위배된다는 주장은 받아 들이기 어렵다고 할 것이다. 다만 여기에서 국가의 존립·안전을 위태롭게 한다 함은 대한민국의 독립을 위협 침해하고 영토를 침략하여 헌법과 법률의 기능 및 헌법기관을 파괴 마비시키는 것으로 외형적인 적화공작 등일 것이며, 자유민주적 기본질서에 위해를 준다 함은 모든 폭력적 지배와 자의적 지배 즉 반국가단체의 일인독재 내지 일당독재를 배제하고 다수의 의사에 의한 국민의 자치, 자유·평등의 기본 원칙에 의한 법치주의적 통치질서의 유지를 어렵게 만드는 것이고, 이를 보다 구체적으로 말하면 기본적 인권의 존중, 권력분립, 의회제도, 복수정당제도, 선거제도, 사유재산과 시장경제를 골간으로 한 경제질서 및 사법권의 독립 등 우리의 내부 체제를 파괴·변혁시키려는 것으로 풀이할 수 있을 것이다.

나. 다음 국가보안법 제7조 제5항의 규정에 관하여 본다.

이는 제1항 내지 제4항의 행위를 할 목적으로 문서, 도화 기타의 표현물을 제작, 수입, 복사, 소지, 운반, 반포, 판매 또는 취득한 행위에 대한 처벌규정이다. 제5항은 제1항을 요건으로 하고 있는데, 제1항에 앞서 본 바와 같이 그 개념이 다의적이고 광범위한 문제점이 있는 이상 문리에 충실한 해석을 하면 제5항에도 같은 위헌적인 요소가 생길 수 있으며, 제2항은 제1항과의 관계에서 반국가단체 대신 국외 공산계열로 바뀌어졌다는 것뿐이므로 결국 제2항 때문에도 제5항에 위헌적 요소가 있다 하겠고, 제3·4항은 제1·2항을 전제로 하고 있으므로 제3·4항 때문에도 제5항에 앞서 본 바와 같은 문제가 생길 수 있을 것이다. 특히 프롤레타리아 독재의 기조위에서 언론·출판의 자유가 전혀 인정되지 않고 따라서 대정부 비판의 자유나 기본적 인권이 없는 북한이나 국외 공산계열의 국가라면 특단의 사정이 없는 한 자국에 불리한 서적이나 표현물을 간행할 자유 또한 없다 할 것이므로, 일응 이러한 곳의 발행서적이면 어느 서적이나 그들에게 이롭지 아니한 서적은 없다고 하여도 과언이 아닐 것이며, 제7조 제5항 문언대로라면 북한을 비롯한 공산국가 발행의 서적이라면 민주주의 체제를 전복하고 공산화를 획책하기 위한 수단이 아닌 것까지도 이적표현물이 되어 이에의 접근이 무제한하게 금기가 될 위험이 있다. 또 국내외 간행의 서적이라도 예컨대 북한이나 공산계열 국가의 문화·예술활동을 서술한 간행물까지도 쉬운 접근이 어려워질 것이다. 이로써 앞서 제7조 제1항에 대해서 본 바 같은 표현의 자유 등의 위축문제, 민주체제 전복으로부터의 방어의 차원에서 국가존립·안전에 무해한 서적의 제작·소지 등 까지 처벌되는 자의적 집행의 우려, 또 자유민주적 기본질서에 입각한 평화정착의 노력과 통일정책의 추진을 위한 남북간의 문화교류에 지장을 줄 가능성이 있다. 따라서 제7조 제5항도 제1항의 경우와 마찬가지로 국가보안법의 입법목적 등에 맞추어 그 소정행위에 의하여 국가의 존립·안전이나 자유민주적 기본질서에 실질적 해악을 줄 명백한 위험성이 있는 경우에 적용되는 것으로 해석할 것이다. 이와 같이 해석되는 이상, 제7조 제5항 역시 전면위헌이라고 할 수 없다. 여기에서 국가의 존립안전이나 자유민주적 기본질서에 실질적 해악을 줄 명백한 위

험성이 있는 경우란 특단의 사정이 없는 한 그 표현물의 내용이 그와 같은 경우일 때라고 볼 것이고 국가의 존립·안전이나 자유민주적 기본질서에 실질적 해악이 될 정도가 못되거나 해악이 되는지 여부가 불분명한 경우에는 배제된다고 할 것이다. 그밖에 문제의 표현물과 외부관련성의 정도도 또한 여기의 위험성의 유무를 판단하는 별도의 기준이라 할 것이다.

다. 결론을 본다.

국가보안법 제7조 제1항 및 제5항은 각 그 소정행위가 국가의 존립·안전을 위태롭게 하거나 자유민주적 기본질서에 위해를 줄 명백한 위험성이 있는 경우에 적용된다고 할 것이므로 이와 같은 해석하에서는 헌법에 위반되지 아니한다고 할 것이다. 다만 재판관 변정수의 반대의견이 있는 외에는 그 나머지 관여 재판관의 의견일치를 보았으므로 주문과 같이 결정한다.

4. 재판관 변정수의 반대의견

가. 국가보안법 제7조 제1항은 형벌규정이므로 죄형법정주의에 의하여 그 구성요건은 명확해야 할 것이며, 더구나 위 규정은 민주주의의 제도적 토대라고 할 수 있는 표현의 자유에 대한 제한을 수반하는 법률이므로 다른 형벌규정에서 보다도 그 명확성이 더욱 강하게 요구되는 것이다. 그런데 위 법률조항은 그 구성요건이 너무 막연하고 불명확한 규정들로 이루어져 있다. "반국가단체나 그 구성원 또는 그 지령을 받은 자의 활동"이라는 규정도 불명확하고 "찬양, 고무, 동조"라는 각각의 의미도 불명확하며, 찬양, 고무, 동조 등의 대상에 "반국가단체나 그 지령을 받은 자의 활동"만이 아니라 "반국가단체의 구성원의 활동"까지 포함하게 되면 처벌대상은 무한히 확대될 수 있으며 이러한 법리가 부당함은 일일이 예를 들 필요가 없는 것이다. 또한 찬양, 고무, 동조에 이어지는 "기타의 방법으로 반국가단체를 이롭게 한 자"하는 규정 역시 불명확하다. "기타의 방법"의 의미를 반국가단체를 이롭게 한 모든 행위를 지칭하는 것으로 해석한다면 이는 구성요건의 설정을 사실상 포기하는 것이나 다름이 없고, 그 의미를 한정하여 찬양, 고무, 동조에 유사한 행위를 가르키는 것으로 해석한다면 죄형법정주의의 또 다른 내용인 형벌규정에서의 유추해석금지의 원칙에 반한다. 도대체 표현의 자유를 규율하는 형벌규정에 "기타의 방법"이라는 구성요건을 둔 것 자체가 이미 죄형법정주의의 본질을 훼손한 것이다. "이롭게 한"이라는 규정 또한 애매모호하기 짝이 없는 것이어서 과연 어떤행위가 반국가단체를 이롭게 한 것이냐는 오로지 수사기관이나 법관의 주관적 해석에 맡겨질 수 밖에 없어 자의적(恣意的)해석의 여지도 있는 막연한 규정이다.

나. "국민에 의한 정치"이자 "여론에 의한 정치"인 민주정치가 제대로 그 기능을 발휘하기 위하여서는 합리적이고 건설적인 사상 또는 그 의견의 형성이 필요하며 그러기 위해서는 국민이 국가나 사회로부터 그에 필요한 정보를 광범위하게 수집할 수 있어야 하는데 이는 언론·출판 등의 표현의 자유가 보장됨으로써만이 가능한 것이다. 이런 점에서 표현의 자유는 민주주의의 제도적 토대라고 할 수 있어 헌법에서 보장된 여러 기본권 가운데에서도 특히 중요한 기본권이며, 그러기에 의사표현에 대하여 형벌을 과하는 법률은 최고도의 명확성이 요구될 뿐더러 그 의사표현행위를 처벌하기 위해서는 그것이 장래에 있어 국가나 사회에 단지 해로운 결과를 가져올 수 있는 성향을 띠었다는 것만으로는 부족하고, 법률에 의하여 금지된 해악을 초래할 명백하고도 현실적인 위험성이 입증된 경우에 한정되어야 하는 것이다(명백하고도 현존하는 위험의 원칙). 그런

데 국가보안법 제7조 제1항의 "찬양, 고무, 동조"등은 의사표현의 형태를 가리키고 있는 점에서 공통되고 따라서 위 법률조항은 의사표현의 자유를 제한하고 형벌을 과하는 규정이면서도 앞서 "가"항에서 지적한 것처럼 구성요건이 너무 애매하여 명확성이 결여되고 지나치게 광범위할 뿐더러 반국가단체에 이로울 수 있는 의사표현은 그것이 대한민국에 현실적으로 해악을 끼칠 위험성이 명백한 경우이건 아니건 간에 무조건 규제대상으로 삼는 것이어서 정부에 대한 비판이나 북한 등 공산계열에 관한 진실한 보도나 정당한 평가 또는 합리적인 언급조차도 권력의 선택에 따라 처벌할 수 있게 되어 있어 위 법률조항은 북한 등 공산계열이나 통일분야에 관한 국민의 알권리를 철저히 봉쇄하여 민주주의의 기초인 건전한 여론형성을 저해하는 기능으로 작용하고 있는 것이 분명하다.

다. 국민의 신체의 자유와 표현의 자유도 국가안전보장, 질서유지 또는 공공복리를 위해서 필요한 경우에는 헌법 제37조 제2항에 의하여 법률로써 제한할 수 있으나 이 경우에도 그 법률은 신체의 자유와 표현의 자유의 본질적 내용을 침해하여서는 아니된다.

그런데 국가보안법 제7조 제1항은 신체의 자유를 제한하는 형벌규정이면서도 그 구성요건의 명확성을 결여하여 죄형법정주의에 위배되므로 그 점에 있어 신체의 자유의 본질적 내용을 침해하는 법률이고, 또한 위 법률조항은 표현의 자유를 제한하는 법률이면서도 명확성의 결여 뿐만 아니라 표현행위가 대한민국의 안전보장이나 질서유지 또는 공공복리에 명백한 현실적인 위험이 있거나 없거나를 가리지 아니하고 다만 반국가단체에 이로울 수 있다는 이유만으로 무조건 표현행위를 제한하고 처벌대상으로 삼고 있다는 점에서 표현의 자유의 본질적 내용을 침해하는 법률이다. 그리하여 아무리 우리의 특수한 안보상황을 감안하더라도 국가보안법 제7조 제1항은 죄형법정주의를 규정한 헌법 제12조 제1항, 표현의 자유를 규정한 헌법 제21조 제1항 및 기본권제한법률의 한계를 규정한 헌법 제37조 제2항에 위반된다고 아니할 수 없다. 무릇 표현행위에 대한 대응은 역시 표현행위에 의하는 것이 논리적이고 설득력이 있는 것이다.

특히 국가보안법 제7조와 같은 표현행위에 대한 형벌적 규제는 통제하기 어려운 잠복적 활동을 조장하고, 허위사실 유언비어 등을 유포하게 함으로써 북한 등 공산계열에 대한 환상을 마치 진실인 것처럼 품게하여 결과적으로 도리어 그들을 이롭게 할 수도 있다는 점을 간과하여서는 아니된다.

라. 국가보안법 제7조 제5항은 제7조 제1항 내지 제4항의 행위를 목적으로 하는 표현물의 제작 등을 처벌대상으로 하고 있는 바 제1항의 규정은 그 구성요건이 지나치게 불명확할 뿐더러 반국가단체에게 이로울 수 있는 행위는 그것이 대한민국에게 현실적인 위험을 끼칠 명백한 증거가 있건 없건 무조건 처벌하는 규정이어서 표현의 자유를 침해하는 위헌법률임은 앞에서 본 바와 같고, 제2항의 규정은 그 구성요건의 내용에 있어 찬양고무의 대상이 반국가단체나 그 구성원 또는 그 지령을 받은 자의 활동이 아니라 국외공산계열의 활동이라는 점만 다를 뿐 제1항과 동일하므로 그 위헌성도 제1항의 경우와 마찬가지이며, 제3항의 규정은 제1항 및 제2항의 행위를 목적으로 하는 단체를 구성하거나 이에 가입한 자를 처벌대상으로 하고 있는데 제1항 및 제2항의 구성요건이 불명확하거나 표현의 자유를 지나치게 제한한 것이어서 위헌인 이상 제3항의 규정 또한 불명확하거나 표현의 자유를 지나치게 제한하는 규정이어서 위헌이라고 아니할 수 없을 것이며 제4항의 규정은 제3항에 규정된 단체의 구성원으로서 사회질서의 혼란을 조성할 우려가 있는 사항에 관하여 허위사실을 날조, 유포 또는 사실을 왜곡하여 전파한 자를 처벌대상으로 하고 있는데 제3항이 위헌법률이라는 것과 같은 논리로 제1항 내지 제3항이 위헌인 이상 제4항의 규정 또한 위헌이라고 아니할 수 없고 더구나 "사회질서의

혼란을 조성할 우려가 있는 사항"이라는 규정은 애매모호하기 짝이 없는 불명확한 구성요건이어서 그 점만으로서도 제4항은 위헌규정이다.

위와 같이 제7조 제1항 내지 제4항의 규정이 모두 불명확성과 표현의 자유제한 한계를 벗어난 위헌법률이라면 제1항 내지 제4항의 행위를 목적으로 하는 표현물의 제작 등 행위를 처벌하는 제5항의 규정 또한 불명확성 및 표현의 자유제한 한계를 벗어난 위헌법률이라고 아니할 수 없는 것이다. 뿐만 아니라 국가보안법 제7조 제5항의 행위유형인 표현물의 제작·수입·복사·소지·운반·반포·판매 또는 취득은 그 자체로는 위법적 행위유형이 아니고 따라서 동 조항의 핵심적 요소는 제1항 내지 제4항의 행위를 할 목적의 존재하는 주관적 요소에 있다고 할 수 있는데 제1항 내지 제4항의 행위는 곧 반국가단체를 이롭게 하는 표현행위이므로 제5항은 위와 같은 표현행위를 할 목적 즉 내심차원의 사상을 처벌대상으로 하는 것과 다름없고(이는 동일한 서적을 누가 소지하고 있느냐에 따라 처벌되기도 하고 처벌되지 않기도 한 점을 보아도 알 수 있다) 그렇다면 위 법률조항은 법률로써도 제한할 수 없는 양심과 사상의 자유를 규정한 헌법 제19조 및 학문과 예술의 자유를 규정한 헌법 제22조에서도 위반된다.

마. 헌법은 그 전문에서 "평화적 통일의 사명에 입각하여 정의·인도와 동포애로써 민족의 단결을 공고히 하고"라고 하였고 제4조에서 "대한민국은 통일을 지향하며, 자유민주적 기본질서에 입각한 평화적 통일정책을 수립하고 이를 추진한다"라고 하여 평화통일을 헌법이념의 하나로 선언하고 있다. 그런데 평화적 통일은 남북한이 무력을 배제하고 서로 대등한 지위에서의 합의를 통하여 통일을 이루는 방법 밖에 생각할 수 없고 그러자면 우선 남한과 북한이 적대관계를 청산하여 화해하고 협력하여야 하며 상대방을 무조건 헐뜯을 것이 아니라 잘한 일에는 칭찬도 하고 옳은 일에는 동조도 하여야 하며 상호 교류도 하여야 한다. 그리하여 남·북한의 주민이 서로 상대방의 실정을 정확히 알고서 형성된 여론의 바탕에서 통일방안이 강구되어야 한다. 그리고 이러한 일은 어디까지나 북한이 불법집단 내지 반국가단체로서 처벌대상이 되지 않는다는 전제에서만 가능한 것이다. 그런데 국가보안법은 처벌규정의 핵심근거로서 "반국가단체"라는 개념을 설정하고 있으며, 그 동안의 국가보안법 운영실정에서 볼 때 북한이 으뜸가는 반국가단체에 해당되는 것은 분명한 사실이다. 따라서 북한을 반국가단체로 규정지음으로써 북한을 정부로 참칭하거나 국가를 변란할 것을 목적으로 하는 범죄단체임을 전제로 하는 국가보안법의 여러 규정은 헌법의 평화통일조항과 상충된다.

특히 국가보안법 제7조 제1항 및 제5항은 반국가단체인 북한에게 이로운 것은 곧 대한민국에 해롭다는 상호배타적인 적대관계의 논리를 강요하고 있어 더욱 평화통일조항에 위반된다. 국가보안법이 그대로 존속하는 한 북한을 대등한 당사자로 전제하고서 추진되고 있는 정부의 통일정책 내지 대북한 정책은 명백히 국가보안법에 위반한 범죄행위이다. 그럼에도 불구하고 최근 정부 또는 정부의 승인을 받은 일부 국민이 북한을 비롯한 공산계열 국가와의 일련의 접촉행위를 통치행위라는 이론으로 합리화 시키려는 견해가 있으나 이른바 통치행위란 국가행위 중에서도 고도의 정치적 성질을 띤 행위 등 일반법원의 사법적 심사의 대상으로 하기에는 부적당한 행위가 있을 수 있다는 관념 아래 그러한 국가행위를 일컫는 개념으로 쓰이는 용어로서 그것은 어디까지나 일반법원의 사법적 심사의 대상이 되기에 적당하지 않다는 것을 의미할 뿐이지 통치행위라 하여 무조건 면책행위가 된다거나 무제한의 자유를 의미한 것도 아니고 통치행위도 헌법상의 여러 원칙에 위배되어서는 아니되는 것이기 때문에 그것이 일반법원에 의한 사법심사의 대상에서 제외된다고 해서 헌법적 통제나 국회 또는 국민의 여론에 의한 비판까지 면할 수 있는 것이 아니다. 그러므로 정부의 대북한 접촉이나 정부의 승인아래 행하여 지는 특정인에 의한 북한 등 공산계열 국가와의 접촉 등이 비록 위와 같은 의미의 통

치행위에 해당되어 일반법원의 사법심사의 대상에서 제외될 수 있을런지는 모르나 그렇다고 가정하더라도 국가보안법이 엄연히 살아있는 이상은 그것이 국가보안법 위반 행위에 해당됨은 틀림 없고 그것을 이유로 하는 국회에서의 정치적 책임 추궁 또는 국민여론에 의한 비판까지도 당연히 면제되는 것이라고 할 수 없는 것이다.

바. 다수의견은, 국가보안법 제7조 제1항 및 제5항의 불명확성, 광범위성과 표현의 자유의 과도한 침해 및 평화통일이념과의 모순 등 위헌성을 지적하면서도 위 법률조항들은 각 그 소정행위가 대한민국의 안전·존립을 위태롭게 하거나 자유민주적 기본질서에 위해를 줄 경우에 한하여 적용되는 것으로 해석할 수 있다고 보고 그러한 해석하에 합헌이라는 것이나 위 법률조항들이 그와 같이 한정적으로 적용되는 것으로 해석되지 아니할 뿐더러 설사 그와 같은 해석이 가능하다고 하더라도 대한민국의 안전·존립을 위태롭게 하는 행위냐 아니냐 또는 자유민주적 기본질서에 위해를 주는 행위냐, 아니냐 역시 객관적으로 뚜렷한 기준 내지 그 한계를 정할 수 없는 매우 애매모호하고 불명확한 것이어서 결국 수사기관이나 법관의 주관적 해석에 맡길 수 밖에 없는 구성요건이므로 이것 또한 죄형법정주의에 반한다. 다수의견은 위 법률조항들의 구성요건이 불명확하고 광범위하므로 이것의 적용범위를 되도록 축소하여 보자는 취지로 이해되나 그렇지 않아도 불명확하고 광범위한 구성요건에다 또 다시 불명확한 구성요건을 보태는 것이 되어 과연 신체의 자유나 표현의 자유보장을 위하여 어느 정도의 효과가 있을 것인지 의문이다. 위 법률조항들의 위헌성을 인정하였으면 헌법재판소로서는 마땅히 위헌을 선언하는 것이 국민에 대한 책무이다. 위 법률조항들처럼 그 위헌성이 너무도 뚜렷한 법률을 아무리 주문과 같이 한정적으로 제한해석하여 합헌결정을 내린다 하더라도 그 위헌성이 치유되는 것이 아니다.

주문과 같은 형태의 이른바 한정합헌결정 또는 변형결정이 우리 법제상 허용될 수 없는 것임은 이미 내가 1989년 7월 21일 선고 89헌마38 상속세법 제32조의 2의 위헌여부에 관한 헌법소원사건, 1989년 9월 8일 선고 88헌가6 국회의원선거법 제33조, 제34조의 위헌심판사건 및 1990년 1월 15일 선고 89헌가103 노동쟁의조정법 제13조의 2 등에 대한 위헌심판사건에서 소수의견으로 자세히 밝힌 바 있으므로 더 이상 언급하지 않는다.

1990. 4. 2.

재판장 재판관 조규광

재판관 이성렬

재판관 변정수

재판관 김진우

재판관 한병채

재판관 이시윤

재판관 최광률

재판관 김양균

재판관 김문희

Interference with Attorney Visits Case
[4 KCCR 51, 91 Hun-Ma 111, Jan. 28, 1992]

A. Background of the Case

In this case, the Constitutional Court recognized a detainee's right to free communication with his attorney uninterfered with by law enforcement personnel. The Court struck down a provision of the Criminal Administration Act that allowed correction officers to attend a meeting between a detainee pending appeals and his attorney.

Our practices, laws, and rules concerning investigation and execution of punishment have not reflected properly the constitutional ideals in criminal procedures such as a suspect's or a defendant's right to assistance of counsel.[1] On September 25, 1990, the Supreme Court denied the admissibility of a suspect's statements made while he was not allowed to consult with an attorney (90 Do 1586), curbing the police's prevalent, illegal practice of not permitting communication with counsel. Although such communication has been allowed since then, the controversies over the method of the communication continued. A suspect-detainee's visit with his attorney was frequently attended by a police investigator, who took notes there or photographed it or otherwise interrupted free communication. The lawyers have consistently demanded a change in the practices but to no avail.

However, the practices of restricting communication with counsel had a legal basis. Article 18 Section 3 of the Criminal Administration Act (as revised by Act No. 3289 on December 22, 1980), the very provision reviewed in the instant case, required that the visits of prisoners be attended and their correspondence censored by a correction officer. Article 62 of the same Act applied to the detainees pending appeals or trial the regulations applicable to the prisoners serving finalized sentences. Pursuant to these statutory provisions, Article 51 of the Correction Officer Work Duties Regulation (Ministry of Justice Order No. 291 enacted on December 10, 1986) provided that a uniformed correction officer must pay careful attention to the inmate's and visitor's conduct, facial expressions, and conversation during visits. Article 34 of the Suspects Detention and Transportation Rules (Police Directives No. 62, July 31, 1991) required that the officer in charge of the visit designate an officer who then observes the visit from within a visibility range.

The complainant was arrested by the National Security Planning Agency ("NSPA" hereinafter) for violation of the National Security Act and detained in a jail at a police station. He received a visit from his attorney and wife at the visit room of NSPA between 5 P.M. and 6 P.M. on June 14, 1991. Six NSPA agents attended, listened in on, took notes at, and photographed the visit. The attorney protested, and demanded that he meet the detainee alone and that they stop photographing or recording the visit on the ground that confidentiality be protected. The agents denied the requests and simply said, "you two can talk as freely as you want." The complainant filed a constitutional complaint on the ground that the agent's conduct infringed on his right to assistance of counsel guaranteed by Article 12 Section 4 of the Constitution.

---

[1] The right to assistance of counsel is used in Korea interchangeably to mean both the right to counsel and the right to assistance of counsel in the United States. The right to counsel is a negative right to be free of interference with one's consulting with his or attorney, and the right to assistance of counsel is a positive right to actually be given all the resources to exercise the right to counsel, i.e., right to court-appointed counsel (translator's note).

B. Summary of the Decision

The Court found the NSPA agents' attendance at the complainant's meeting with his attorney unconstitutional and also struck down Article 62 of the Criminal Administration Act that applied Article 18 Section 3 to detainees pending appeals. The Court first examined the right to assistance of counsel as follows:

The right to assistance of counsel guaranteed by Article 12 Section 4 is intended to protect the suspects and defendants, presumed innocent, from various evils arising out of the fact of incarceration and to make sure that the incarceration does not exceed the scope of its purposes. Therefore, assistance of counsel means sufficient assistance.

The indispensable content of right to assistance of counsel is the detainee's right to communicate and visit with his attorney. In order to provide sufficient guarantee of that right, the confidentiality of the contents of the conversations must be completely protected, and the detainee and attorney must be allowed to freely converse with each other free of any limitation, influence, coercion, undue interference. Such free visit will be possible only when it takes place outside the presence of a correction officer, an investigator, or any concerned government agent.

This right to free visit with his attorney is the most important part of a detainee's right to assistance of counsel and cannot be restricted even for reason of national security, maintenance of order or public welfare.

The NSPA agents' unconstitutional exercise of governmental power is already completed and cannot be cancelled. However, we find the danger of such unconstitutional acts being repeated and the need to clarify the meaning of the right to assistance of counsel. Therefore, we find the agents' conduct unconstitutional for declarative significance. Further, we strike down the portion of Article 62 of the Criminal Administration Act that applied the strictures of Article 18 Section 3 to unconvicted detainees' visits with attorneys, pursuant to Article 75 Section 5 of the Constitutional Court Act. The provision is believed to provide a statutory justification for the unconstitutional conduct.

C. Aftermath of the Case

The Constitutional Court made clear in this case that the right to free communication with attorney is the core content of the right to assistance of counsel and therefore cannot be restricted for any reason. After this decision, the investigating authorities' practice of not allowing an attorney's visit or interfering with such visit could no longer be forgiven.

Some praised the decision as an important landmark in the Korean history of human rights. According to them, it was a revolutionary precedent that for the first time recognized the direct binding effect that the presumption of innocence, the privilege against self-incrimination, and the right to assistance of counsel have on governmental operation.

On January 5, 1995, in the wake of the decision, the National Assembly revised the provision of the Criminal Administration Act by Act No. 4936. The revision read: "A detainee- pending-appeals' visit with his attorney (or one seeking to be his attorney) cannot be attended, listened in on, or recorded by a correction officer. Nevertheless, he can observe the inmate from a distance within a visibility range."

辯護人의 조력을 받을 權利에 대한 憲法訴願

(1992. 1. 28. 91헌마111 全員裁判部)

[판례집 4권, 51~63]

【판시사항】

1. 헌법소원(憲法訴願)의 대상이 된 침해행위(侵害行爲)의 종료(終了)와 심판청구(審判請求)의 이익(利益) 유무

2. 헌법상(憲法上) 변호인(辯護人)의 조력(助力)을 받을 권리(權利)와 의미와 내용

3. 변호인(辯護人)과의 접견교통권(接見交通權)과 헌법(憲法) 제37조 제2항과의 관계

4. 기본권침해(基本權侵害)의 원인이 된 공권력(公權力)의 행사를 취소(取消)하는 대신 위헌확인(違憲確認)을 한 사례(事例)

5. 가. 행형법(行刑法) 제26조 중 행형법(行刑法) 제18조 제3항을 미결수용자(未決收容者)의 변호인접견(辯護人接見)에도 준용(準用)하도록 한 부분이 헌법(憲法)에 위반(違反)되는지 여부

나. 피청구인의 위헌적(違憲的)인 공권력행사(公權力行使)가 위헌법률(違憲法律)에 기인한 것이라 인정하여 당해 법률조항(法律條項)에 대하여 위헌선언(違憲宣言)을 한 사례(事例)

【결정요지】

1. 헌법소원(憲法訴願)의 대상이 된 침해행위(侵害行爲)가 이미 종료하여서 이를 취소(取消)할 여지가 없기 때문에 헌법소원(憲法訴願)이 주관적(主觀的) 권리구제(權利救濟)에는 별 도움이 안되는 경우라도 그러한 침해행위(侵害行爲)가 앞으로도 반복(反復)될 위험(危險)이 있거나 당해분쟁의 해결이 헌법질서(憲法秩序)의 수호(守護)·유지(維持)를 위하여 긴요한 사항이어서 헌법적(憲法的)으로 그 해명(解明)이 중대한 의미를 지니고 있는 경우에는 심판청구(審判請求)의 이익(利益)을 인정하여 이미 종료한 침해행위가 위헌(違憲)이었음을 선언적(宣言的) 의미(意味)에서 확인할 필요가 있다.

2. 가. 헌법(憲法) 제12조 제4항이 보장하고 있는 신체구속(身體拘束)을 당한 사람의 변호인(辯護人)의 조력(助力)을 받을 권리(權利)는 무죄추정(無罪推定)을 받고 있는 피의자(被疑者)·피고인(被告人)에 대하여 신체구속의 상황에서 생기는 여러가지 폐해(弊害)를 제거하고 구속(拘束)이 그 목적의 한도(限度)를 초과하여 이용되거나 작용하지 않게끔 보장하기 위한 것으로 여기의 "변호인(辯護人)의 조력(助力)"은 "변호인(辯護人)의 충분한 조력(助力)"을 의미한다.

나. 변호인(辯護人)의 조력(助力)을 받을 권리(權利)의 필수적 내용은 신체구속(身體拘束)을 당한 사람과 변호인(辯護人)과의 접견교통권(接見交通權)이며 이러한 접견교통권(接見交通權)의 충분한 보장은 구속된 자와 변호인의 대화내용에 대하여 비밀이 완전히 보장되고 어떠한 제한·영향·압력 또는 부당한 간섭없이 자유롭게 대화할 수 있는 접견(接見)을 통하여서만 가능하고 이러한 자유로운 접견(接見)은 구속된 자와 변호인의 접견(接見)에 교도관(矯導官)이나 수사관(搜査官) 등 관계공무원(關係公務員)의 참여가 없어야 가능하다.

3. 변호인(辯護人)과의 자유로운 접견(接見)은 신체구속을 당한 사람에게 보장된 변호인(辯護人)의 조력(助力)을 받을 권리(權利)의 가장 중요한 내용이어서 국가안전보장(國家安全保障), 질서유지(秩序維持), 공공복리(公共福利) 등 어떠한 명분으로도 제한될 수 있는 성질의 것이 아니다.

4. 청구인(請求人)의 기본권(基本權)을 침해한 피청구인(被請求人)의 위헌적(違憲的)인 공권력(公權力)의 행사(行使)는 취소(取消)되어야 할 것이나 취소(取消)되어야 할 공권력(公權力)의 행사(行使)는 이미 종료되었으므로 이를 취소(取消)하는 대신 위헌적(違憲的)인 공권력(公權力)의 행사(行使)가 또 다시 반복될 수 있는 위헌성(違憲性)을 제거하기 위하여 그리고 변호인(辯護人)의 조력(助力)을 받을 권리(權利)의 내용을 명백히 하기 위하여 피청구인(被請求人)의 공권력(公權力)의 행사(行使)에 대하여 선언적(宣言的) 의미(意味)에서 위헌(違憲)임을 확인(確認)한다고 한 사례(事例)

5. 가. 행형법(行刑法) 제62조가 "미결수용자(未決收容者)에 대하여 본법(本法) 또는 본법(本法)의 규정에 의하여 발하는 명령에 특별한 규정이 없는 때에는 수형자(受刑者)에 관한 규정을 준용한다."라고 규정하여 미결수용자(未決收容者)(피의자, 피고인)의 변호인(辯護人) 접견(接見)에도 행형법(行刑法) 제18조 제3항에 따라서 교도관이 참여할 수 있게 한 것은 신체구속(身體拘束)을 당한 미결수용자(未決收容者)에게 보장된 변호인(辯護人)의 조력(助力)을 받을 권리(權利)를 침해하는 것이어서 헌법(憲法)에 위반(違反)된다.

나. 피청구인의 위헌적(違憲的)인 공권력행사(公權力行使)가 위와 같은 위헌법률(違憲法律)에 기인한 것이라고 인정되므로 헌법재판소법 제75조 제5항에 의하여 행형법(行刑法) 제62조의 준용규정 중 행형법(行刑法) 제18조 제3항을 미결수용자(未決收容者)의 변호인(辯護人) 접견(接見)에도 준용하도록 한 부분에 대하여 위헌선언(違憲宣言)을 한 사례(事例)

청구인 : 유○덕
대리인 변호사 이석태 외 2인
피청구인 : 국가안전기획부장

【심판대상조문】

행형법(行刑法) 제62조

(미결수용자(未決收容者)에 대(對)한 본법(本法)의 준용(準用)) 미결수용자(未決收容者)에 대(對)하여 본법(本法) 또는 본법(本法)의 규정(規定)에 의(依)하여 발(發)하는 명령(命令)에 특별(特別)한 규정(規定)이 없는 때에는 수형자(受刑者)에 관(關)한 규정(規定)을 준용(準用)한다.

【참조조문】

헌법(憲法) 제12조 제2항, 제12조 제4항, 제27조 제4항, 제37조 제2항

헌법재판소법(憲法裁判所法) 제75조 (인용결정(認容決定)) ① 생략

② 제68조 제1항의 규정(規定)에 의한 헌법소원(憲法訴願)을 인용(認容)할 때에는 인용결정서(認容決定書)의 주문(主文)에서 침해된 기본권(基本權)과 침해의 원인이 된 공권력(公權力)의 행사 또는 불행사(不行使)를 특정하여야 한다.

③ 제2항의 경우에 헌법재판소(憲法裁判所)는 기본권침해(基本權侵害)의 원인이 된 공권력(公權力)의 행사를 취소(取消)하거나 그 불행사(不行使)가 위헌(違憲)임을 확인할 수 있다.

④ 생략

⑤ 제2항의 경우에 헌법재판소(憲法裁判所)는 권력(公權力)의 행사 또는 불행사(不行使)가 위헌(違憲)인 법률(法律) 또는 법률(法律)의 항(條項)에 기인한 것이라고 인정될 때에는 용결정(認容決定)에서 당해 법률(法律) 또는 률(法律)의 조항(條項)이 위헌(違憲)임을 선고(宣告)할 있다.

⑥～⑧ 생략

형사소송법(刑事訴訟法) 제417조 (동전(同前)) 검사(檢事) 또는 사법경찰관(司法警察官)의 구금(拘禁), 수(押收) 또는 압수물(押收物)의 환부(還付)에 (關)한 처분(處分)에 대(對)하여 불복(不服)이 있으면 직무집행지(職務執行地)의 관할법원(管轄法院) 또는 검사(檢事)의 소속검찰청(所屬檢察廳)에 대응(對應)한 원(法院)에 그 처분(處分)의 취소(取消) 또는 경(變更)을 요구(要求)할 수 있다.

행형법(行刑法) 제18조 접견(接見)과 서신(書信)의 수발(受發)) ～② 생략

③ 수형자(受刑者)의 접견(接見)과 서신(書信) 수발(受發)은 교도관(矯導官)의 참여(參與) 또는 검열(檢閱)을 요(要)한다.

④ 생략

교도관집무규칙(矯導官執務規則)(1986.12.10. 법무부령(法務部令) 제291호) 제51조 (재소자의 접견참여) ① 정복교도관이 재소자의 접견에 참여하는 때에는 재소자 및 접견자의 행동·표정·대화내용 등을 엄밀하게 관찰하여야 한다.
②～④ 생략

피의자유치(被疑者留置)및호송규칙(護送規則)(1991.7.31. 경찰청훈령(警察廳訓令) 제62호) 제34조 (변호인과의 접견에 관한 주의) ① 유치인과의 접견 또는 서류 기타 물건의 접수에 있어서는 유치주무자는 가시거리에서 감시할 경찰관을 지정하여야 하되 서류 기타 물건의 접수를 방해하여서는 아니된다. 다만 수사 또는 유치장의 보안상 지장이 있다고 인정되는 물건 등이 수수되지 아니하도록 감시하여야 한다.
② 제1항의 경우에 감시경찰관은 수사 또는 유치장의 보안상 지장이 있다고 인정되는 물건의 수수를 발견한 때에는 유치주무자에게 보고하여 이의 수수를 금지하여야 한다.

【당 사 자】

1. 1991.7.8. 선고, 89헌마181 결정(판례집 3, 356)

【주 문】

1. 청구인이 1991.6.14. 17시부터 그날 18시경까지 국가안전기획부 면회실에서, 그의 변호인과 접견할 때 피청구인 소속직원(수사관)이 참여하여 대화내용을 듣거나 기록한 것은 헌법 제12조 제4항이 규정한 변호인의 조력을 받을 권리를 침해한 것으로서 위헌임을 확인한다.

2. 행형법(1950.3.2. 법률 제105호, 최후개정 1980.12.22. 법률 제3289호) 제62조는 그 중 행형법 제18조 제3항을 미결수용자의 변호인 접견에도 준용하도록 한 부분은 헌법에 위반된다.

【이 유】

1. 이 사건 기록에 의하면, 청구인이 1991.6.13. 국가보안법 위반 등 피의사건으로 국가안전기획부에 의하여 구속되어 서울 중부 경찰서 유치장에 수감되어 있던 중 1991.6.14. 17시부터 그 날 18시 경까지 국가안전기획부 면회실에서 그의 변호인인 조○환 변호사 및 그의 처 김○자와의 접견을 동시에 하게 되었는데 그 때 국가안전기획부 직원(수사관) 5인이 접견에 참여하여 가까이서 지켜 보면서 그들의 대화내용을 듣고 또 이를 기록하기도 하고 만나고 있는 장면을 사진을 찍기도 하므로 변호인이 이에 항의하고 변호인과 피의자의 접견은 비밀이 보장되어야 하니 청구인과 변호인이 따로 만날 수 있도록 해 줄 것과 대화내용의 기록이나 사진촬영을 하지 말 것을 요구하였으나 수사관들은 "무슨 말이든지 마음놓고 하라."고 말하면서 변호인의 요구를 거절한 사실과 청구인은 국가안전기획부 수사관들의 위와 같은 행위는 헌법 제12조 제2항이 신체구속을 당한 사람에게 보장하고 있는 변호인의 조력을 받을 권리를 침해한 것이라고 주장하고 1991.6.26. 이 사건 헌법소원의 심판청구를 하였음을 알 수 있다.

2. 헌법소원의 심판청구는 공권력의 행사 또는 불행사로 인하여 헌법상 보장된 기본권을 침해당한 경우에 할 수 있는 것이나 그러한 경우라도 다른 법률에 구제절차가 있는 경우에는 그 절차를 모두 거친 후가 아니면 청구할 수 없으며, 또한 헌법소원의 심판

청구를 할 만한 이익(권리보호의 이익)이 있어야 한다는 것이 원칙이다. 그러므로 이 사건 심판청구가 위와 같은 요건을 갖춘 것인가에 대하여 본다.

가. 형사소송법 제417조는 "검사 또는 사법경찰관의 구금·압수 또는 압수물의 환부에 관한 처분에 대하여 불복이 있으면 그 직무집행지의 관할 법원 또는 검사의 소속 검찰청에 대응한 법원에 그 처분의 취소 또는 변경을 청구할 수 있다."라고 규정하고 있으므로 국가안전기획부 소속 수사관이 구속당한 사람의 변호인 접견에 참여하여 대화내용을 듣는 등, 자유로운 접견방해를 하는 것을 사법경찰관의 구금에 관한 처분으로 보아 위 법률조항에 따라 그 처분의 취소 또는 변경을 법원에 청구할 수 있을 것처럼도 보인다.

그러나 가사 그러한 청구를 하더라도 취소·변경 청구의 대상이 되어야 할 접견방해행위는 계속 중인 것이 아니라, 이미 종료된 사실행위여서 취소·변경할 여지가 없기 때문에 법원으로서는 재판할 이익이 없다고 하여 청구를 각하할 수밖에 없을 것이므로 형사소송법 제417조 소정의 불복방법은 이 사건의 경우와 같은 수사기관에 의한 접견방해에 대한 구제방법이 될 수 없고 헌법소원의 심판청구이외에 달리 효과있는 구제방법을 발견할 수 없다.

나. 청구인이 그것에 의하여 권리를 침해당하였다고 주장하는 변호인 접견방해행위는 이미 끝났기 때문에 이제 이를 취소할 여지가 없고 그럼에도 불구하고 이 사건 헌법소원의 심판청구를 할 만한 이익이 있는 것인가가 문제된다.

헌법소원의 본질은 개인의 주관적 권리구제 뿐 아니라 객관적인 헌법질서의 보장도 하고 있으므로 헌법소원에 있어서의 권리보호이익은 일반법원의 소송사건에서처럼 주관적 기준으로 엄격하게 해석하여서는 아니된다. 따라서 침해행위가 이미 종료하여서 이를 취소할 여지가 없기 때문에 헌법소원이 주관적 권리구제에는 별 도움이 안되는 경우라도 그러한 침해행위가 앞으로도 반복될 위험이 있거나 당해 분쟁의 해결이 헌법질서의 수호·유지를 위하여 긴요한 사항이어서 헌법적으로 그 해명이 중대한 의미를 지니고 있는 경우에는 심판청구의 이익을 인정하여 이미 종료한 침해행위가 위헌이었음을 선언적 의미에서 확인할 필요가 있는 것이다. 이 사건의 경우, 신체구속을 당한 피의자나 피고인에게 보장된 변호인 접견권은 적정한 방어권행사를 통한 신체자유의 보장을 위하여 매우 중요한 권리이고 변호인과의 대화내용에 대하여 비밀이 보장되어야 하는가의 문제는 고도의 기본권에 관한 매우 중요한 헌법 문제임에도 불구하고 신체구속을 당한 사람의 변호인의 조력을 받을 권리를 규정한 헌법 제12조 제4항이나 변호인 접견권을 규정한 형사소송법 제34조에는 그에 관하여 명시적인 언급이 없고 도리어 행형법 제62조는 수형자가 타인과 접견할 경우에 교도관이 참여하도록 규정한 동법 제18조 제3항의 규정을 미결수용자의 변호인 접견에도 준용할 수 있도록 규정하고 있고 이 규정에 근거하여 법무부는 교도관집무규칙(1986.12.10. 법무부령 제291호) 제51조 제1항에 "정복교도관이 재소자의 접견에 참여하는 때에는 재소자 및 접견자의 행동, 표정, 대화내용 등을 엄밀하게 관찰하여야 한다."라는 규정을 두고 구치소나 교도소에 수감된 피의자나 피고인의 변호인 접견에도 정복교도관이 참여하여 대화내용을 청취하도록 하고 있으며, 경찰청은 피의자유치및호송규칙(1991.7.31. 경찰청훈령 제62호) 제34조(변호인과의 접견에 관한 주의) 제1항에 유치인과의 접견에 있어서는 유치주무자가 지정하는 경찰관이 이에 참여하도록 하는 규정을 두어 신체구속을 당한 피의자와 변호인의 접견에는 당연히 경찰관이 참여하여 대화내용을 청취하도록 하고 있기 때문에 앞으로도 신체구속을 당한 피의자, 피고인이 접견할 때에는 구치소·교도소에서는 정복교도관이, 경찰서에서는 경찰관이 계속하여 참여 할 것으로 보이므로 이처럼 제도적으로 시

행되고 있는 변호인 접견방해의 시정을 위하여, 그리고 헌법상 보장된 변호인 접견권의 내용을 명백히 하기 위하여 비록 헌법소원의 대상이 된 침해행위는 이미 종료되었지마는 그것의 위헌 여부를 확인할 필요가 있는 것이다. 따라서 이 사건 헌법소원은 심판청구의 이익이 있고 소원은 적법하다.

3. 그러므로 심판청구의 내용에 대하여 판단한다.

가. 헌법 제27조 제4항은 "형사피고인은 유죄의 판결이 확정될 때까지 무죄로 추정된다."라고 하여 이른바 무죄추정의 원칙을 선언하였는데 공소가 제기된 형사피고인에게 무죄추정의 원칙이 적용되는 이상, 아직 공소제기조차 되지 아니한 형사피의자에게 무죄추정의 원칙이 적용되는 것은 너무도 당연한 일이며 이 무죄추정의 원칙은 언제나 불리한 처지에 놓여 인권이 유린되기 쉬운 피의자, 피고인의 지위를 옹호하여 형사절차에서 그들의 불이익을 필요한 최소한에 그치게 하자는 것으로서 인간의 존엄성 존중을 궁극의 목표로 하고 있는 헌법이념에서 나온 것이다. 이 무죄추정의 원칙으로 인하여 불구속수사, 불구속재판을 원칙으로 하고 예외적으로 피의자 또는 피고인이 도망할 우려가 있으나 증거를 인멸할 우려가 있는 때에 한하여 구속수사 또는 구속재판이 인정될 따름이다.

나. 피의자, 피고인의 구속은 무죄추정을 받고 있는 사람에 대하여 만부득이 인정되고 있는 제도이므로 구속이 도망의 방지나 증거인멸의 방지라는 구속의 목적을 넘어서 수사편의나 재판편의를 위하여 이용되어서는 아니됨에도 불구하고 이것이 수사기관이나 재판기관에 의하여 남용되기 쉬우며 구속된 피의자나 피고인은 그 것만으로도 불안, 공포, 절망, 고민, 정신혼란 등 불안정한 상태에 빠지게 되고 수입상실, 수입감소, 사회활동의 억제, 명예의 추락 등 많은 불이익을 입게 되는데 특히 구속된 피의자의 경우는 자칫 자백을 얻어 내기 위한 고문·폭행 등이 자행되기 쉽고, 헌법이 보장하고 있는 진술거부권(헌법 제12조 제2항 후단)도 보장되기 어렵게 되며, 구속이 그 목적을 일탈하여 수사편의나 재판편의로 이용될 때 공소제기가 잘못되거나 재판이 잘못되어 원죄(寃罪) 사건이 생기기 쉽다. 이처럼 무죄추정을 받고 있는 피의자, 피고인에 대하여 신체구속의 상황에서 생기는 여러가지 폐해를 제거하고 구속이 그 목적의 한도를 초과하여 이용되거나 적용하지 않게끔 보장하기 위하여 헌법 제12조 제4항 본문은 "누구든지 체포 또는 구속을 당한 때에는 즉시 변호인의 조력을 받을 권리를 가진다."라고 규정하여 신체구속을 당한 사람에 대하여 변호인의 조력을 받을 권리를 기본권으로 보장하고 있다. 그리고 "변호인의 조력"은 "변호인의 충분한 조력"을 의미한다.

다. 신체구속을 당한 사람에 대하여 변호인의 충분한 조력을 받게 하기 위하여서는 무엇보다도 먼저 신체구속을 당한 사람이 변호인과 충분한 상담을 할 수 있도록 해 주어야만 할 것이므로 변호인의 조력을 받을 권리의 필수적 내용은 신체구속을 당한 사람과 변호인과의 접견교통일 것이다. 변호인은 접견을 통하여 구속된 피의자, 피고인의 상태를 파악하여 그에 따른 적절한 대응책을 강구하고, 피의사실이나 공소사실의 의미를 설명해 주고 그에 관한 피의자·피고인의 의견을 듣고 대책을 의논하며, 피의자나 피고인 진술의 방법, 정도, 시기, 내용 등에 대하여 변호인으로서의 의견을 말하고 지도도 하고, 진술거부권이나 서명날인거부권의 중요성과 유효적절한 행사방법을 가르치고 그것들의 유효적절한 행사에 의하여 억울한 죄를 면할 수 있다는 것을 인식시켜야 하며, 수사기관에 의한 자백강요, 사술(詐術), 유도(誘導), 고문 등이 있을 수 있다는 것을 알려 이에 대한 대응방법을 가르쳐 허위자백을 하지 않도록 권고하고, 피의자로부터 수

사관의 부당한 조사(유도, 협박, 이익공여, 폭력 등) 유무를 수시로 확인해야 하며, 피의자나 피고인의 불안, 절망, 고민, 허세 등을 발견하면 그 감정의 동요에 따라 격려하여 용기를 주거나 위문하거나 충고하여야 할 것이다. 그런데 이러한 일은 구속된 자와 변호인의 대화내용에 대하여 비밀이 완전히 보장되고 어떠한 제한, 영향, 압력 또는 부당한 간섭없이 자유롭게 대화할 수 있는 접견을 통하여서만 가능하고 이러한 자유로운 접견은 구속된 자와 변호인의 접견에 교도관이나 수사관 등 관계공무원의 참여가 없어야 가능할 것이다. 만약 관계공무원이 가까이서 감시하면서 대화내용을 듣거나 녹취하거나 또는 사진을 찍는 등 불안한 분위기를 조성한다면 변호인의 이러한 활동은 방해될 수밖에 없고 이는 변호인의 조력을 받을 권리나 진술거부권을 기본권으로 보장한 헌법정신에 크게 반하는 일이다.

공소제기를 잘못하거나 오판 등에 의한 원죄(寃罪)는 구속된 피의자, 피고인과 변호인의 자유로운 접견교통에 의하여 사전에 예방될 수 있을 것이다.

라. 이상과 같이 변호인과의 자유로운 접견은 신체구속을 당한 사람에게 보장된 변호인의 조력을 받을 권리의 가장 중요한 내용이어서 국가안전보장·질서유지·공공복리 등 어떠한 명분으로도 제 한될 수 있는 성질의 것이 아니다. 그리고 구속된 사람을 계호(戒護)함에 있어서도 1988.12.9. 제43차 유엔총회에서 채택된 "모든 형태의 구금 또는 수감상태에 있는 모든 사람들을 보호하기 위한 원칙" 제18조 제4항이 "피구금자 또는 피수감자와 그의 변호인 사이의 대담은 법 집행 공무원의 가시거리(可視距離)내에서 행하여 질 수는 있으나 가청거리(可聽距離)내에서 행하여져서는 아니된다."라고 적절하게 표현하고 있듯이 관계공무원은 구속된 자와 변호인의 대담내용을 들을 수 있거나 녹음이 가능한 거리에 있어서는 아니되며 계호나 그밖의 구실아래 대화장면의 사진을 찍는 등 불안한 분위기를 조성하여 자유로운 접견에 지장을 주어서도 아니될 것이다.

마. 헌법 제12조 제4항이 보장하고 있는 "변호인의 조력을 받을 권리"의 내용이 이상과 같음에도 불구하고, 피청구인은 국가보안법 위반으로 신체구속을 당한 청구인이 1991.6.14. 17시부터 그날 18시경까지 국가안전기획부 면회실에서 그의 변호인과 접견을 하는데 있어 소속직원(수사관)으로 하여금 접견에 참여하게 하고, 가까이서 지켜보면서 대화내용을 듣거나 기록하게 하였으니 이는 변호인의 조력을 받을 권리를 침해한 것으로서 헌법에 위반되는 일이다. 청구인의 변호인 접견이 그의 처 김○자와의 접견과 동시에 있었고, 대화내용의 비밀이 보장되는 자유로운 접견이라야 한다는 것은 변호인 접견에만 적용되고 변호인이외의 자와의 접견에는 적용되지 않는 것이라 하여 그러한 경우에는 수사관을 참여시켜도 괜찮은 것 아닌가라는 의견이 있을른지도 모르나 구속된 사람과 변호인과의 대화내용에 비밀이 보장되어야 하는 이상, 변호인 이외의 자를 동시에 접견하는 경우라 하여도 변호인과의 대화내용이 청취 당하여서는 아니되는 것이므로 그 경우 역시 관계공무원의 참여는 허용될 수 없는 것이며, 구속된 자와 변호인 이외의 자와의 접견에 관계공무원의 참여가 꼭 필요한 경우라면 접견을 시키는 수사기관이나 교도소는 변호인 접견과 변호인이외의 자와의 접견을 분리하여 실시하면 되는 것이다. 그럼에도 불구하고 피청구인은 청구인으로 하여금 그의 변호인 및 그의 처와 동시에 접견을 시키면서(더구나 변호인은, 변호인 접견은 비밀이 보장되어야 한다면서 청구인과 따로 만날 수 있게 해 달라고 요구하였다) 소속직원을 접견에 참여시켜 대화내용을 듣거나 기록하게 하였으니 이는 위헌임을 면할 수 없다.

바. 결국 청구인의 기본권(변호인의 조력을 받을 권리)을 침해한 피청구인의 위헌적인 공권력행사는 취소되어야 할 것이나 취소되어야 할 공권력행사는 이미 종료되었으니 이를 취소하는 대신, 위헌적인 공권력행사가 또 다시 반복될 수 있는 위험성을 제거하기 위하여, 그리고 헌법 제12조 제4항에 규정된 변호인의 조력을 받을 권리와 내용(변호인과의 자유로운 접견을 포함한다는 것)을 명백히 하기 위하여 피청구인의 공권력행사가 위헌인 것임을 선언적 의미에서 확인하고, 나아가서 행형법 제18조 제3항에는 "수형자의 접견과 서신수발은 교도관의 참여 또는 검열을 요한다."라고 규정되어 있는데 같은 법 제62조는 "미결수용자에 대하여 본법 또는 본법의 규정에 의하여 발하는 명령에 특별한 규정이 없는 때에는 수형자에 관한 규정을 준용한다."라고 규정하여 미결수용자(피의자, 피고인)의 변호인 접견에도 행형법 제18조 제3항에 따라서 교도관이 참여할 수 있게 하였는 바 이는 앞에서 설명한 바와 같이 신체구속을 당한 미결수용자에게 보장된 변호인의 조력을 받을 권리를 침해하는 것이어서 헌법에 위반되는 법률이고 피청구인의 위헌적인 공권력행사는 바로 위와 같은 위헌법률에 기인한 것이라고 인정되므로 헌법재판소법 제75조 제5항에 의하여 행형법 제62조의 준용규정 중 행형법 제18조 제3항을 미결수용자의 변호인 접견에도 준용하도록 한 부분에 대하여 위헌선언하기로 하여 주문과 같이 결정한다.

이 결정은 재판관 전원의 찬성에 의한 것이다.

1992. 1. 28.

재판장 재판관 조규광

재판관 변정수

재판관 김진우

재판관 한병채

재판관 이시윤

재판관 최광률

재판관 김양균

재판관 김문희

재판관 황도연

Pledge to Abide by the Law Case
[14-1 KCCR 351, 98Hun-Ma425, etc., (consolidated), April 25, 2002]

Contents of the Decision

1. Whether Article 14 of the Ordinance for Parole Review requiring inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act to submit a pledge to abide by the national laws of the Republic of Korea for consideration of parole release violates the freedom of conscience of these inmates because of the contents of the pledge.

2. Whether Article 14 of the Ordinance for Parole Review violates the freedom of conscience of inmates because of the coercive measures it employs.

3. Whether Article 14 of the Ordinance for Parole Review requiring only those inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act to submit the pledge to abide by the laws for consideration of parole release violates the right of equality of these inmates.

Summary of the Decision

1. The instant pledge which requires certain inmates to declare that they would abide by the national laws and respect the constitutional order once released on parole is merely a reconfirmation of the general duty duly required of all citizens. It does not require them to think certain new thoughts or perform particular actions under any hypothetical or actual situation. Therefore, as the instant pledge to abide by the law does not contain any specific or active requirement in its contents, and requirement to submit the pledge is a process only to confirm the existing constitutional duty of inmates. Requiring submission of the pledge does not intrude upon the domain of conscience.

2. Freedom of conscience can only be infringed when there is an unavoidable conflict between moral conviction within an individual's inner mind and requirements of the external legal order. When existing laws do not prohibit or order certain actions but only offer to give special privileges or recommend certain activities, individuals can either renounce the opportunity to receive the proffered benefits or refuse to act according to such recommendation, thus preserving their conscience without breaching the existing law. Therefore, such laws cannot infringe on the freedom of conscience of individuals.

In the instant case, Article 14 of the Ordinance for Parole Review does not compel submission of the pledge to abide by the national laws. An inmate considered for parole can refuse to submit such pledge even if the parole review board requests submission of the pledge for parole review: Whether to submit the pledge or not depends on his own will. Parole is a privilege conferred upon inmates by the law enforcement agency according to decisions based on the correctional or criminal policy, and it is not a right that every inmate in entitled to. While a prisoner refusing to submit the pledge to abide by the law may not be released on parole because of the instant article of the Ordinance for Parole Review, his refusal to submit the pledge would not further weaken his legal standing nor undermine his legal status in any way.

The instant provision does not levy any new legal duty on such inmate, nor does it force submission of the pledge with compulsory performance, punishment, or imposition of legal disadvantages. Therefore, it does not infringe on the freedom of conscience.

3. North Korea still endeavors to bring about the communist revolution in the entire peninsula, and to protect itself against such external threats, the government of South Korea has no choice but to defend against North Korea's attempts at radical revolution in South Korea. Illegal activities by individuals aiming to disturb the basic order of free democracy or overthrow the government, either in alliance with the North Korean government or through independent decision of its own, have largely been dealt with either the National Security Act or the Assembly and Demonstration Act because of the nature of such activities. It is under such circumstance that the parole review board examines, in addition to things ordinarily taken into consideration to determine eligibility for parole, whether inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act are willing to observe the national laws once released on parole. Thus, differential treatment of such inmates is not without a reasonable basis, and is appropriate as a means to achieve the policy objectives.

The purpose of differential treatment of inmates convicted for violation of the National Security Act or the Assembly and Demonstration Act is clear and important while the means to achieve the legislative objective is a mere reconfirmation of the general duty required of all citizens that does not entail any infringement on the basic rights of citizens. Thus, it is obvious that the principle of proportionality is observed in the differential treatment of different groups, and therefore, the instant provision does not violate the constitutional principle of equality.

Dissenting Opinion of Justices Kim Hyo-jong and Choo Sun-hoe

1. Reason that the Constitution protects the freedom of conscience and domain of protection

In our earlier adjudication concerning the domain of protection for the freedom of conscience, the Constitutional Court ruled that "conscience" protected by Article 19 of the Constitution includes not only one's world view, view of life, ideology, and other beliefs but also value judgments or ethical decisions in one's inner self affecting formation of one's personality. The majority opinion in the instant case is in conflict with this precedent in that it confines the domain of conscience protected by the Constitution to the sphere of morality, more specifically, to only imminent and specific ethical judgment regarding one's moral integrity. This is clearly either a limited interpretation or overruling of precedent.

Furthermore, the majority opinion prescribes the domain of the constitutionally protected freedom of conscience using three conditions. Constitutional review based on such deductive reasoning can be used to limit, instead of extend, the constitutionally protected domain of the freedom of conscience when there are only few legal precedents concerning the matter, and hence, should be avoided.

2. Whether requiring submission of the pledge to abide by the law falls within the protected domain of the freedom of conscience

A. The majority of Justices in the instant case concludes that requiring submission of the pledge to abide by the law "only confirms and makes citizens vow to uphold their

constitutional duty," and "therefore, it does not intrude upon the domains of conscience." We do not object to such a conclusion when applied to ordinary prisoners. However, such a conclusion would not be appropriate when a prisoner, who is holding onto the communist ideology sentenced to life imprisonment for attempts to overthrow the government by force and violence in violation of the National Security Act, is required to submit such a pledge. No one has the right to overthrow the government using violent means. However, it infringes on the freedom of conscience to force him to confess of or change such ideas as long as the ideas remain in his thoughts.

B. In a free democratic society, the rights of even opponents of free democracy are protected; only their specific actions can be re-strained when they are deleterious to the public interest. The government must protect itself against extremists trying to overthrow the government via violence and force. In a free democratic society, however, the government can only penalize the opponents of democracy for their "actions"; it should not force them to renounce their ideology or make them pledge to abide by the law against their beliefs using any form of direct or indirect means of coercion. This is what distinguishes a free democratic society from a communist regime.

C. In form, requiring the pledge to abide by the law is different from the ideological conversion programs in the past. However, there is no practical difference between the two; an inmate imprisoned for violation of the National Security Act for action based on his belief in communism is required to express an intention to change such belief under both programs. Thus, both are used to effectively separate and isolate individuals with particular ideological beliefs from ones with same beliefs.

D. Even if the concept of conscience used by the majority of Justices is adopted, an individual can claim the violation of such basic rights as the freedom of conscience and freedom of expression even when he was denied important benefits by the government. While the court will need to examine each case to determine what is such an important benefit, exclusion of a long-term prisoner from parole consideration is certainly one of such cases because parole may be one of the most important matters in his life.

E. Therefore, requiring submission of the pledge to abide by the law for parole consideration is a matter within the domains of the freedom of conscience protected by Article 19 of the Constitution.

3. Whether requiring submission of the pledge to abide by the law violates the freedom of conscience

A. Since requiring submission of the pledge to abide by the law directly affects "a person's world view, view of life, ideology, or other beliefs or values or ethical judgments in one's mind," it directly restrains the freedom of mind. In the instant case, while the "expressed action" of refusal to submission of the required pledge is the basis for a sanction by the state, the demand for submission of the pledge by the State forces a formation and confession of certain thoughts. This is not a realization of conscience. It is ineffectively coercion of the formation of certain thoughts.

B. Requiring submission of the pledge to abide by the law is not based on an act, and the legislature has not delegated detailed rule-making concerning the pledge to the Administrative Branch. Therefore, this is in violation of Article 37(2) of the Constitution stipulating that freedoms and rights of citizens may be restricted by "acts" only.

C. Even if one argues that requiring submission of the pledge is not a matter of inner freedom but only a restriction on the freedom to realize conscience, the instant provision fails the proportionality test.

The instant provision of the Ordinance may have a valid legislative purpose in that the pledge is used to judge the likelihood of recidivism of an inmate. However, appropriateness of the means chosen to achieve the legislative purpose is questionable for the following reasons: First, submission of the pledge may not serve a guarantee against recidivism; and second, it is not clear that those released on parole without submission of the pledge are more likely to be recidivists.

If requiring submission of the pledge aims to assist judgments whether the released inmate is likely to be a recidivist, the instant provision excessively restricts freedom of conscience because interviews or other means used for parole review of ordinary inmates could be employed to achieve such a legislative purpose.

An individual asked to submit the pledge in order to be reviewed for parole release suffers a serious conflict of interests: He can either express his intent to change his fundamental belief to be released, or he can choose to retain his inner belief by remaining silent. Thus, the injury inflicted on conscience by requiring the pledge to abide by the law is far greater than the public interest of acquisition of information necessary for parole review, and the instant provision fails the balance of interest test.

Provisions on Review

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 14 (Procedural Rules; Parole Review)

(1) [omitted]

(2) Inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act should be required to submit a pledge to abide by the national laws of the Republic of Korea before being released on parole, thus ensuring that such prisoners would observe the laws once they are set free.

(3) [omitted]

Related Provisions

The Constitution

Articles 11(1), 19

Criminal Act

Article 72 (Requirements for Parole)

(1) A person under execution of imprisonment or imprisonment without prison labor who maintains good behavior and has shown sincere repentance may be provisionally released by administrative action when ten years of a life sentence or one-third of a limited term of punishment has been served.

(2) If a fine or minor fine has been imposed concurrently with the punishment specified in the preceding paragraph, the amount thereof shall be paid in full in order for the parole to be granted.

Criminal Administration Act

Article 50 (Composition of Parole Review Board)

(1) The review board shall be composed of board members of not less than 5 but not more than 9, including the chairman.

(2) The Vice Minister of Justice shall chair the review board, and the Minister of Justice shall appoint or commission the board members from among judges, public prosecutors, lawyers, public officials be- longing to the Ministry of Justice and persons of learning and experience in correction affairs.

(3) Matters necessary for the review board shall be determined by the Ordinance of the Ministry of Justice.

Article 51 (Review of Paroles)

(1) In case where a convicted prisoner, who has served a term of imprisonment under Article 72 (1) of the Criminal Act, maintains an excellent incarceration record and is deemed not likely to commit a second offense, the warden shall, under the conditions as prescribed by the ordinance of the Ministry of Justice, propose that the review board make an examination of his parole.

(2) The review board shall, when reviewing eligibility for parole, take into account all circumstances such as the convicted prisoner's age, charge, motive for crime, term of sentence, records of criminal administration, means of livelihood and living environment after parole, and the likelihood of committing a crime again, etc.

(3) The review board shall, after voting for eligibility for parole, apply for permission for parole to the Minister of Justice within 5 days.

Article 52 (Permission for Parole)

The Minister of Justice may grant permission, when he deems that the application for a parole made by the review board under Article 51 is justifiable.

Enforcement Decree of the Criminal Administration Act

Article 153 (Criteria, etc. for Candidates for Parole Review)

The parole review board shall examine a person who has served the term as provided in Article 72 (1) of the Criminal Act, and falls under one of the following subparagraphs, and shall decide on the application for parole:

(i) A person whose accumulated scores rank at the top of the class on the review of records of criminal administration; and

(ii) A person who does not fall under subparagraph 1 but is deemed unlikely to commit a crime again and very likely to adapt to society.

Article 156 (Review, etc. of Parole)

Matters necessary for reviewing parole shall be prescribed by the Ordinance of the Ministry of Justice.

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 3 (Subject of Review)

(i) The parole review board (hereinafter called "the board") shall take into account the prisoner's personal background, circumstance of the convicted crime, existence of persons

who can look after the prisoner once released on parole, or other pertinent matters when reviewing eligibility for parole.

(ii) [omitted]

Related Precedents

3 KCCR 149, 89Hun-Ma160, April 1, 1991
7-1 KCCR 416, 93Hun-Ma12, March 23, 1995
9-1 KCCR 245, 96Hun-Ka11, March 27, 1997
9-2 KCCR 548, 92Hun-Ba28, November 27, 1997
10-2 KCCR 159, 96Hun-Ba35, July 16, 1998
11-2 KCCR 770, 98Hun-Ma363, December 23, 1999

Parties

Complainants
1. Cho O-rok (98Hun-Ma425)
   Court-Appointed-Counsel: Lee Kyung-woo
2. Cho O-won (99Hun-Ma170)
   Counsel: Lee Jae-myong and 1 other
3. Lee O-chul and 28 others (99Hun-Ma498)
   Counsel: Kang Kum-Sil and 9 others

Holding

The complaints filed by Complainants Cho O-rok and Cho O-won are rejected, and the complaints filed by other complainants are dismissed.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) 98Hun-Ma425

The complainant was detained for violation of the National Security Act on February 2, 1978, and a sentence of life imprisonment was finalized on December 26, 1978. He was serving his term at Andong Correctional Institution when he was excluded from parole release on August 15, 1998 for refusing to submit the pledge to abide by the law. On November 26, 1998, the complainant filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review requiring inmates imprisoned for violation of the National Security Act to submit the pledge to abide by the law for parole review, alleging that the provision infringed on his freedom of conscience, the right to pursue happiness, and the right to equality.

(2) 99Hun-Ma170

The complainant was detained for violation of the National Security Act in February, 1993, and received an eight year sentence. He was serving his term at Chunchon Correctional Institution when he was excluded from parole release on August 15, 1998 and again on February 25, 1999 for refusing to submit the pledge to abide by the law. On March 25, 1999,

the complainant filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review for the reasons cited in the above case.

(3) 99Hun-Ma498

The complainants received one and a half year to five year sentences for violation of the National Security Act between 1996 and 1998, respectively. The complainants were excluded from parole on February 25, 1999 for refusing to submit the pledge to abide by the law. On August 24, 1999, the complainants filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review for the reasons cited in the above case.

B. Subject Matter of Review

The subject matter of review is the constitutionality of Article 14(2) (hereinafter called the "instant provision") of the Ordinance for Parole Review (amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998, hereinafter called the "Ordinance on review"). The provision and related provisions are as follows:

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 14 (Procedural Rules to Check during a Parole Review)

(2) Inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act should be required to submit a pledge to abide by the national laws of the Republic of Korea be- fore being released on parole, thus ensuring that such prisoners would indeed observe the laws once they are set free.

Criminal Act

Article 72 (Requisites for Parole)

(1) A person under execution of imprisonment or imprisonment without prison labor who has behaved himself well and has shown sincere repentance may be provisionally released by administrative action when ten years of a life sentence or one-third of a limited term of punishment has been served.

Criminal Administration Act

Article 50 (Composition of Parole Review Board)

(3) Matters necessary for the review board shall be determined by the Ordinance of the Ministry of Justice.

Article 51 (Review of Paroles)

(1) In case where a convicted prisoner, who has served a term of imprisonment under Article 72(1) of the Criminal Act, maintains an excellent incarceration record and is deemed not likely to commit a second offense, the warden shall, under the conditions as prescribed by the ordinance of the Ministry of Justice, propose that the review board make an examination of his parole.

(2) The review board shall, when reviewing eligibility for parole, take into account all circumstances such as the convicted prisoner's age, charge, motive for crime, term of

sentence, records of criminal administration, means of livelihood and living environment after parole, and the likelihood of committing a crime again, etc.

(3) The review board shall, after voting for eligibility for parole, apply for permission for parole to the Minister of Justice within 5 days.

Article 52 (Permission for Parole)

The Minister of Justice may grant permission, when he deems that the application for a parole made by the review board under Article 51 is justifiable.

Enforcement Decree of the Criminal Administration Act

Article 153 (Criteria, etc. for Candidates for Parole Review)

The parole review board shall examine a person who has served the term as provided in Article 72 (1) of the Criminal Act, and falls under one of the following subparagraphs, and shall decide on the application for parole:

(i) A person whose accumulated scores rank at the top on the review of records of criminal administration; and

(ii) A person who does not fall under subparagraph 1 but is deemed unlikely to commit a crime again and very likely to adapt to society.

Article 156 (Review, etc. of Parole)

Matters necessary for reviewing parole shall be prescribed by the Ordinance of the Ministry of Justice.

Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998)

Article 3 (Subject of Review)

(1) The parole review board (hereinafter called "the board") shall take into account the prisoner's personal background, circumstance of the convicted crime, existence of persons who can look after the prisoner once released on parole, or other pertinent matters when reviewing eligibility for parole.

2. Complainants' Arguments and Opinion of the Minister of Justice

A. Complainants' Arguments

Requiring submission of the pledge to abide by the law violates the freedom of conscience and the right to pursue happiness by formation of a mind free from outside influence because it, in effect, requires ideological conversion, or at the least, compels explicit expression of the intent to abide by the national laws. It violates the right of equality of inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act as only these inmates, and not other prisoners incarcerated for other crimes, are required to submit the pledge in order to obtain review by the parole board.

In addition, the instant provision is in violation of Article 37(2) of the Constitution because it does not have a legitimate purpose, does not employ appropriate means to achieve the legislative purpose, and excessively restricts the basic rights of individuals. It is also against Article 12(1) of the Constitution stipulating due process of law.

B. Opinion of the Minister of Justice

The instant provision does not directly infringe on the basic rights of the complainants. Moreover, since the basic rights of the complainants are no longer being violated because they had all been released after filing of the constitutional complaints, the complaint has become moot and is unjustified. The pledge necessary for parole consideration does not require an inmate to renounce his former belief, and whether to submit the pledge or not is entirely up to the inmate. Thus, requiring submission of the pledge does not infringe on the basic rights and freedom of conscience of an inmate. Unlike other criminals, a so-called political criminal is convinced that violation of existing laws through his actions is justified, and he objects to the existing legal order in a systematic fashion. Thus, differential treatment of such prisoner from other inmates in making judgment about the likelihood of recidivism has a reasonable basis, and does not violate the principle of equality. Requiring the pledge to abide by the law is necessary to make an accurate judgment about the likelihood of recidivism of inmates imprisoned for violation of the National Security Act. It is appropriate as a means to achieve such legislative purpose, and infringement on the basic rights is minimal as such requirement does not intrude upon inner freedom nor compel formation of certain decisions. The instant provision serves to protect the important national interest by the proper criminal administration to perpetrators of the public security related laws, and the private interest at hand, namely disadvantage suffered by inmates required to submit the pledge to abide by the law, is negligible. Therefore, there is a balance between the public interest being protected and the basic rights being infringed, and the principle of proportionality is observed.

3. Review

A. Legal Prerequisites

(1) Directness

In order for a statutory provision to be the subject for a constitutional complaint, the complainants must directly and presently suffer infringement on their own basic rights by the provision without any specific intermediary administrative disposition. Here, directness of infringement of the basic rights implies that there has been a restriction of freedom, levying of duties, or deprivation of rights or a legal status by the statute itself, not by a particular disposition of an administrative agency (11-2 KCCR 593, 605, 98Hun-Ma55, November 25, 1999). Existence of a specific administrative action enforcing a statute, however, does not always prohibit filing of a constitutional complaint against a statutory provision. Even if there was an administrative disposition to enforce the statutory provision, an individual can file a constitutional complaint under the following conditions as long as the administrative action is based on the statutory provision: when there is no remedy process to relieve citizens from the infringement on their rights or interests by illegal disposition of an administrative agency; or even if there exists a remedy process, when the prospect of relief of individual rights through such process is dismal and when it only forces the individual to take an unnecessary detour (9-2 KCCR 295, 304, 96Hun-Ma48, August 21, 1997; 11-2 KCCR 593, 606, 98Hun-Ma55, November 25, 1999).

In the instant case, the parole review board would first select inmates who could be ultimately set free on parole amidst a group of prisoners who have been incarcerated for violation of the National Security Act or the Assembly and Demonstration Act, have served the minimum imprisonment term required to be considered for parole, and have kept up an

excellent behavioral record during the imprisonment term. The instant provision is applied to inmates only when the board requests the submission of the pledge to inmates screened and selected. Request for submission of the pledge, however, is only an intermediary measure to collect necessary information to make a final decision whether to release someone on parole. The requisitioned inmate needs not obey such request nor would he be automatically released on parole upon submission of the pledge. The private interest of an inmate would be affected not by the request to submit the pledge but by the final decision of the Minster of Justice to release him on parole or not. Thus, request for submission of the pledge by the parole review board is an intermediary measure recommending or suggesting submission of the pledge, and it is not an independent administrative disposition that would be subject to an administrative litigation. Then, it cannot be expected that the complainants institute an administrative litigation against the request to submit the pledge by the parole review board or take other measures to relieve the infringement of their rights before filing the instant constitutional complaint. Then, prerequisite of directness cannot be denied just because the complainant did not take other steps to remedy the infringement, and the instant constitutional complaints are all valid in terms of directness of infringement of the basic rights.

(2) Justiciable Interest

The complainants' sentences were suspended 98Hun-Ma425 and 99Hun-Ma170 cases on February 25, 1999 and on August 15, 1999, respectively. Complainants Lee O-chul, Jung O-jae, Yoon O-joon, Chun O-eun, Bae O-kyun, Yang O-hoon, Jang O-sang, Cho O-byung, Kim O-hak, Roh O-cho, Park O-seo, Lee O-yeol, Kim O-joon, Kim O-soo, Kim O-hee, Kim O-seok, Jang O-seop, Min O-woo, Park O-eun were released on suspension of sentences on August 15, 1999, and Complainant Kim O-jung was released on suspension of sentences on December 31, 1999. Complainant Choi O-joo was released on February 29, 2000 upon the completion of the prison term, and Complainants LeeA-chul, Na O-young, Jung O-hong, Lee O-gu, Kim O were released on suspension of sentences on August 15, 2000. Complainants Kang O-won, Jung O-chan, Jung O-ki were all released upon the completion of the prison terms between July 13, 2001 and August 3, 2001, respectively.

Since all complainants are released, requiring the submission of the pledge to abide by the law would no longer pose any constitutional problem for the complainants, and the complaints have become moot. However, a constitutional complaint has not only a subjective function of providing relief for infringement on individual rights but also an objective function of defending and maintaining the constitutional order. Even if the complaints have become moot during the review, the Court needs to recognize the existence of an objective justiciable interest when the infringement on the basic rights is likely to be repeated and a constitutional clarification of the matter has an important meaning for the defense and maintenance of the constitutional order (3 KCCR 356, 367, 89Hun-Ma181, July 8, 1991; 4 KCCR 51, 56-57, 91Hun-Ma111, January 28, 1992). Requiring the submission of the pledge to abide by the law is likely to repeat, and adjudication on the constitutional validity of such a requirement would bear an important meaning for the defense of the constitutional order. Therefore, the justiciable interest is still recognized in the case.

(3) Filing Time Limit

(A) 98Hun-Ma425

The parole review board demanded the complainant to submit the pledge to abide by the law before excluding him from parole on August 15, 1998. Then, the complainant must have known that there was an infringement on his basic rights following his refusal to submit the pledge by August 15, 1998. According to the court record, the constitutional complaint in the case was filed on November 26, 1998, and it is apparent that the complaint was filed over sixty days after the cause of the grievance was known. This would make the complaint unfit for constitutional review. However, the complainant did not file a complaint against an administrative disposition, but against the provision of the Ordinance which forms the basis for such a dis- position. Since the provision was promulgated and entered into force on October 10, 1998 (In fact, the provision in question was being applied even before it was promulgated), the instant constitutional complaint was filed before tolling of the statute of limitation.

(B) 99Hun-Ma170

The complainant was excluded from parole on August 15, 1998 and again on February 25, 1999 for refusing to submit the pledge to abide by the law. Then, the complainant must have known the existence of the cause of an infringement on his basic rights following his refusal to submit the pledge by February 25, 1999. According to the court record, the constitutional complaint in the case was filed on March 25, 1999, and it is apparent that the complaint was filed before tolling of the statute of limitation for a constitutional complaint.

(C) 99Hun-Ma498

The complainants were excluded from parole release on February 25, 1999 for refusing to submit the pledge to abide by the law. The complainants must have known the existence of the cause of an infringement on their basic rights following their refusal to submit the pledge by February 25, 1999. According to the court record, the constitutional complaint in the case was filed on August 24, 1999, and it is apparent that the complaint was filed after tolling of the statute of limitation for a constitutional complaint expired.

(4) Sub-conclusion

While other complaints meet the legal prerequisites of directness and existence of justiciable interest, the complaint in 99Hun-Ma498 case was filed after tolling of the statute of limitation, and therefore, shall be dismissed.

B. Review on Merits

(1) Infringement on the Freedom of Conscience

Article 19 of the Constitution stipulates that "All citizens shall enjoy the freedom of conscience." Constitutionally protected conscience refers to a specific and dire state of mind: It refers to a strong and sincere inner voice that his moral integrity will disintegrate if the individual does not take certain actions after judging the rights or wrongs of a matter. It does not refer to conscience as an obscure or abstract concept (9-1 KCCR 245, 263, 96Hun-Ka11, March 27, 1997).

Freedom of conscience, so-called starting point for any personal freedom, serves to guarantee the moral identity of an individual necessary for maintenance of human dignity and

unhindered development of individual personality. However, not every action based on an inner decision belong to the domain of the freedom of conscience protected by the Constitution. Before making judgments about whether there was an infringement on the freedom of conscience, we need to first determine the constitutionally protected domain of the freedom of conscience. We should approach this problem by examining conditions and the degree of protection when there is a conflict between an action (or an inaction) based on the conscience of an individual and the requirements of the positive law.

In this light, conscience is protected by the Constitution under the following conditions: First, the content of the positive law in question should deal with a matter related to the domains of conscience. Second, compulsory legal measures such as coercion of performance, punishment, or imposition of legal disadvantages should follow any violation of such law. Third, perpetration should be a result of command of conscience. We shall examine whether the requirement of the submission of the pledge to abide by the law encroaches upon freedom of conscience under this guideline.

(A) Contents of the Pledge to Abide by the Law and the Domains of Conscience

Observance of the legal order of a state by its citizens forms the ideological basis for the existence and function of the state. In a free democratic government governed by the rule of law, freedom of mind and freedom to criticize the existing legal order are duly protected, and there exists the means to change or amend the Constitution and other laws through a legitimate process. Existence of such the government, however, is dependent on the autonomous participation and observance of the legal order by its citizens. Therefore, while there is no explicit provision in our Constitution stipulating such duty, it is the basic duty of all citizens to abide by the Constitution and other laws of the state.

Contents of the pledge to abide by the law required by the instant provision include the "vow to respect the national legal order of the Republic of Korea." An inmate needs to fill out his name, Korean identification number, convicted crime, circumstance of conviction as well as sentence, pledge to abide by the established legal order of the Republic of Korea, future life plan, and other statements if desired. There is no standardized form of expression for the pledge, and in practice, most inmates simply write that "they will abide by the laws of Korea".

As seen above, it is clear that all citizens have a general duty to observe the laws of the state under the Constitution. The instant pledge which requires certain inmates to declare that they would abide by the national laws and respect the constitutional order once released on parole is merely a reconfirmation of the general duty duly required of all citizens. It does not newly require them to think certain thoughts or perform particular actions under any hypothetical or actual situation. The instant pledge to abide by the law does not contain any specific or active requirement in its contents, and the requirement to submit the pledge is a process only to confirm the existing constitutional duty of inmates. Therefore, requiring submission of the pledge does not intrude upon the domain of conscience.

Among the complainants are some long-term prisoners who have refused to renounce their beliefs in communism. They may be convinced that the contents of the National Security Act are contrary to their political beliefs or that the free democratic regime is against their ideologies, and their such beliefs may be known to others. However, as long as the contents of the pledge used for parole review require nothing more than what has been described above, such pledge does not touch upon the domains of conscience. Basically, the Constitution does not protect anyone's right to overthrow the existing legal order or a free democratic order using such unconstitutional means as force or violence with vehement disrespect for the Constitution or other laws of the land. Requiring submission of a pledge to abide by the

existing legal order or to respect the extant constitutional regime does not violate any constitutionally protected freedom or right, including the freedom of conscience.

(B) Legally Compelled Submission of the Pledge to Abide by the Law and Violation of the Freedom of Conscience

Freedom of conscience can only be infringed when there is an unavoidable conflict between moral conviction within an individual's inner mind and the requirements of the external legal order. When existing laws do not prohibit or order certain actions but only offer to give special privileges or recommend certain activities, individuals can either renounce the opportunity to receive the proffered benefits or refuse to act according to such recommendation, thus preserving their conscience without breaching the existing law. To declare that there is a violation of the freedom of conscience by the demand of an existing legal order, the law being enforced should impose a new legal duty that did not exist beforehand, and failure to observe the law should be dealt with such compulsory legal measures as compulsory performance, punishment, or imposition of legal disadvantages. Here, imposition of a legal disadvantage does not mean infringement on individual rights, but it refers to change in the current legal status or standing for the worse toward the future, such as deprivation of an existing legal status or worsening of legal standing of an individual.

In the instant case, Article 14 of the Ordinance for Parole Review does not compel submission of the pledge to abide by the national laws. An inmate considered for parole can refuse to submit such pledge even if the parole review board requests submission of the pledge for parole review: Whether to submit the pledge or not depends on his own will. Parole is a privilege conferred upon inmates by the law enforcement agency according to decisions based on the correctional or criminal policy, and it is not a right that every inmate in entitled to (7-1 KCCR 416, 422, 93Hun-Ma12, March 23, 1995).

Parole is a privilege or benefit that an inmate incidentally enjoys when the law enforcement agency decides that parole is appropriate. While a prisoner refusing to submit the pledge to abide by the law may not be released on parole because of the instant article of the Ordinance for Parole Review, his refusal to submit the pledge would not further weaken his legal standing nor undermine his legal status in any way. He only needs to serve the remaining term of imprisonment. The instant provision does not levy any new legal duty on such inmate, nor does it force submission of the pledge with compulsory performance, punishment, or imposition of legal disadvantages. Therefore, it does not infringe on the freedom of conscience.

The instant provision of the Ordinance essentially pronounces that there will be no parole unless the pledge is submitted. While the provision does not force submission of the pledge against one's conviction with punishment, or imposition of legal disadvantage, the pro-vision uses parole release, one of the most instinctive desires of any inmate, as a bait to lead inmates to submit the pledge. Such practice may seem to violate the freedom of conscience of some long-term prisoners who are convinced that they should not recognize the legal order of the Republic of Korea because of their political beliefs or ideologies. However, it would be inaccurate to conclude that there is an infringement on freedom of conscience only because the bestowment of certain benefits is contingent upon performance of an action or inaction based on free will.

In implementing its policy, including its criminal administration policy such as parole, a state can decide to confer benefits to only a limited number of citizens satisfying predetermined qualifications.

When a provision does not legally compel performance of a certain action but is only employed to decide whether to bestow certain benefits, such provision does not infringe on freedom of conscience, even though conferred benefit might be very critical and it is painful to give up the opportunity to receive such benefit. The only constitutional problem in such case is whether it violates the principle of equality in bestowing such benefits.

In summary, submission of the pledge to abide by the law based on the instant provision is merely a precondition to receive benefit of parole release, and each inmate is free to choose to meet eligibility requirement for this benefit following his inner voice.

(2) Violation of the Due Process Clause

Article 12(1) of the Constitution stipulates that "No person shall be punished, placed under preventive measures or subject to involuntary labor except as provided by statute and through due process of law." Due process of law, an independent constitutional principle incorporated into the Constitution by the above provision, implies that not only formal procedure but also substantive contents of the law need to be reasonable and just. Under the principle, infringement on life, freedom, and property of citizens by any governmental power can only be allowed through legitimate procedures based on reasonable and just legislation (9-1 KCCR 509, 515, 96Hun-Ka17, May 29, 1997).

In the instant case, the instant provision of the Ordinance concerning the pledge to abide by the law does not infringe on the freedom of conscience of an inmate as seen above. Then, we need not look further to determine that the there does not exist any violation of the principle of due process of law; the principle applies only when there is an encroachment of basic rights such as infringement on life, freedom, or property.

(3) Violation of the Right to Parole

Article 72(1) of the Criminal Act stipulates that "A person under execution of imprisonment or imprisonment without prison labor who maintains good behavior and has shown a sincere repentance may be provisionally released by administrative action when ten years of a life sentence or one-third of a limited term of punishment has been served." Parole as used in this provision refers to the release of a prisoner before the expiry of a sentence, based on good behavior during his prison term, to promote successful integration of an inmate into the general society. It is an administrative disposition based on the criminal administration policy to avoid unnecessary confinement of an individual who deeply regrets his crime and to encourage inmates to strive to achieve a sense of moral integrity. The chairperson of the parole review board established at each correctional institution applies for permission for parole of an inmate to the Minister of Justice, and the Minister of Justice may grant permission, when he deems that the application for parole made by the review board is justifiable (Article 51 and 52 of the Criminal Administration Act). The board members shall take a vote to decide whether it is appropriate to request parole for a particular inmate before the chairperson of the board applies for permission for parole of an inmate to the Minister of Justice. In order for an inmate to be considered for parole by the board, the inmate needs to have served at least one-third of the sentenced term, and he either needs to be one of the most well behaved inmate or the chairperson of the board must have determined that he should be considered for parole. Once a list of candidates to be considered for parole are selected, the board determines whether to apply for permission for parole for a particular inmate after considering diverse factors such as the convicted prisoner's age, convicted crime, criminal motive, term of sentence, criminal administration record, means of livelihood and living

environment after parole release, and the likelihood of recidivism. As explained here, an inmate is not being released on parole based on an individual request or desire for parole release. Rather, parole is a privilege conferred upon an inmate by the law enforcement agency according to decisions based on correctional or criminal policies. An inmate who has met requirements prescribed in Article 72(1) of the Criminal Act does not automatically obtain a subjective right to demand parole release, and the administrative authority is not legally bound to release the inmate on parole. An inmate can enjoy the benefit of release before the expiry of his sentence only when there is a specific administrative disposition to release an inmate on parole based on Article 72(1) of the Criminal Act (7-1 KCCR 416, 421-422, 93Hun-Ma12, March 23, 1995)

As seen above, an inmate does not have the subjective right to demand parole, and hence, the instant provision does not infringe upon the right to parole.

(4) Violation of the Right of Equality

(A) Standard of Review

Whether a strict or relaxed standard is to be used for equality review of a particular case depends on the scope of the legislative-formative power given to the legislature. Those cases where the Constitution specifically demands equality shall be scrutinized under a strict standard. If the Constitution itself designates certain standards not to be used as basis for discrimination or certain domains in which discrimination shall not take place, strict scrutiny should be employed to determine whether there is discrimination. Next, if differential treatment causes a great burden on the related basic rights, the legislative-formative power shall be curtailed, and strict scrutiny should be used for the constitutional review of the case (11-2 KCCR 770, 787, 98Hun-Ma363, December 23, 1999).

The instant provision deals with the review procedure for parole review, and the criminal administrative authority is allowed a large degree of discretion in the matter. Moreover, the Constitution does not explicitly proscribe discrimination in this field. As seen above, the instant provision concerning the pledge to abide by the law does not infringe on the freedom of conscience or other basic rights of the complainants, and thus, there is no burden on the related basic rights caused by differential treatment. Therefore, constitutional review of the instant provision does not require use of a strict standard, and it suffices to use a relaxed standard to determine reasonableness of the provision.

(B) Legislative Purpose of Requiring Submission of the Pledge to Abide by the Law

Since its inception, the Republic of Korea has confronted North Korea, and under such special conditions of the nation, many persons have been imprisoned for violation of the public security laws. Many inmates incarcerated for violation of the public security laws have either remained hostile or disapproved the constitutional regime of the Republic of Korea. Considering such tendency of these inmates, the instant statutory provision requires them to pledge allegiance to the existing constitutional order to the maximum degree permissible under the Constitution in order to preserve the existing constitutional system of the Republic of Korea. It replaced the ideological conversion program requiring inmates imprisoned for violation of the public security laws such as the National Security Act to renounce their belief in communist ideologies. The present requirement of submission of the pledge aims to silence criticism on the past ideological conversion pro- gram that it violated the freedom of conscience. It also aims to satiate the constitutional requirement only by

reconfirming the duty to abide by the law that is duly required of all citizens while relieving the psychological burden of inmates subject to parole review.

(C) Proportionality in Differential Treatment

The instant provision does not require all inmates to submit the pledge to abide by the law regardless of their convicted crimes, but only demand the pledge from those inmates imprisoned for perpetration of the National Security Act and the Assembly and Demonstration Act for parole consideration.

North Korea still endeavors to bring about a communist revolution to the entire peninsula, and to protect itself against such external threats. The government of South Korea has no choice but to defend against North Korea's attempts at a radical revolution of South Korea. Illegal activities by individuals aiming to disturb the basic order of free democracy or overthrow the government, either in alliance with the North Korean government, or through independent decision of its own, have largely been dealt with either the National Security Act or the Assembly and Demonstration Act because of the nature of such activities. It is under such circumstance that the parole review board examines, in addition to things ordinarily taken into consideration to determine eligibility for parole, whether inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act are willing to observe the national laws once released on parole. Thus, differential treatment of such inmates is not without a reasonable basis, and is appropriate as a means to achieve the policy objectives.

The purpose of differential treatment of inmates convicted for violation of the National Security Act or the Assembly and Demonstration Act is clear and important while the means to achieve the legislative objective is a mere reconfirmation of the general duty required of all citizens that does not entail any infringement on the basic rights of citizens. Thus, it is obvious that the principle of proportionality is observed in differential treatment of different groups, and therefore, the instant provision does not violate the constitutional principle of equality.

4. Conclusion

The complaints filed by complainants Cho O-rok and Cho O-won are rejected, and the complaints filed by other complainants are dismissed.

This decision is pursuant to the consensus of all justices except Justice Kwon Seong who wrote a concurring opinion and Justices Kim Hyo-jong and Choo Sun-hoe who wrote a dissenting opinion.

5. Concurring Opinion of Justice Kwon Seong

A. We can demarcate the domain of the freedom of conscience not overlapping with the domain of the freedom of religion, freedom of ideology, or general freedom of action and call them the "original domain of the freedom of conscience." Conscience within the original domains, then, indicates the inherent mentality of each person recognizing what is good or bad and pursuing what is good. In other words, it refers to the human instinct recognizing and judging good or evil, and selecting and deciding to act for what is good in the moral sphere. In this sense, internal decision about academic or artistic problems is not an issue of conscience, and political ideologies and beliefs as well as religious tenets and principles that are not

directly associated with the issue of moral good or bad is not within the domain of the freedom of conscience.

Constitutional freedom generally refers to freedom from interference or coercion by the state. Coercion followed by punishment or legal disadvantage when an individual refuses to comply with the demands of the State, and continued interference to disturb the inner peace of an individual are some examples of infringements on the freedom.

B. It does not infringe on the freedom of conscience of citizens for the state to recommend or induce citizens to act for what is good and stay away from what is evil. However, it is encroachment on the freedom of conscience if the state decides what is good or bad for citizens and forces citizens to accept such decisions. Judgment of good or bad must ultimately be left with each individual, and in this regard, freedom of conscience implies that each individual should be able to autonomously decide what is good or bad for himself.

Freedom of conscience also includes freedom to act on what an individual believes is good.

Finally, freedom of conscience includes freedom not to be questioned about the contents of conscience.

C. Freedom of conscience defined in the above manner would be in direct conflict with the positive law when an individual deems something good and decides to act on it when the existing legal order has declared it evil, or when an individual decides that something is evil and refuses to act on it when the existing legal order has declared it good.

Choice or decision mentioned here does not merely refer to personal preference of each individual, but rather, to an unalterable ethical resolution of an individual based on his decision to choose good or bad. It refers to a decision based on conviction about one's ethical and moral identity that would lead a person to declare "I would not be a human being if I do such an evil thing or I would not be a human being if I don't act".

Some provisions of the existing law reflect judgments on good and evil by members of the society. When the court concludes that it has no choice but to apply such provisions, individuals who violated such provisions will not be able to avoid punishment. The issue of the freedom of conscience arises in such occasion when there is a direct conflict between the judgment of the majority and the minority about what is good or bad. Since it is in effect tantamount to punishment of the minority disagreeing with judgment of the majority, the principle of protection of the minority could become another important issue here.

D. As noted by the majority of Justices, the instant provision which requires certain inmates to declare that they would abide by the national laws and respect the constitutional order once released on parole is only a reconfirmation of the general duty duly required of all citizens. Requiring submission of such pledge does not force the complainants to make a judgment on good or evil and then disclose the result of such judgment. Therefore, requirement of submission of the pledge is not within the domain of the freedom of conscience.

The complainants in the case were imprisoned for violation of the National Security Act. They violated the law to pursue political beliefs or to achieve political objectives of their preference. They refused to submit the pledge stating that they would not commit such crimes again after being released because such pledge was contrary to their political beliefs. Generally, refusal of submission of such pledge is to show off and reconfirm their firm and unchanging political beliefs. It could be interpreted as a strategic choice following the conclusion that it would be more advantageous to achieve their political objective to act that way. On the contrary, there is not enough evidence in the case to conclude that refusal to

submit the pledge was based on their attempt to protect their ethical and moral identity as human beings. It seems that the complainants' refusal to submit the pledge to abide by the law is not based on their conscientious, or moral, judgment that to submit the pledge would be an evil thing to do. In conclusion, their refusal to submit the pledge had nothing to do with conscience.

6. Dissenting Opinion of Justices Kim Hyo-jong and Choo Sun-hoe

We do not agree with the majority of Justices about the protected domain of the freedom of conscience. We believe that the pledge to abide by the law also lies within the constitutionally protected domain of the freedom of conscience. We conclude that it is unconstitutional to limit this freedom based not on statute but on an ordinance of the Minister of Justice, and that the instant provision requiring submission of the pledge violates the principle of the proportionality.

A. Reason that the Constitution Protects Freedom of Conscience and the Domain of Protection

(1) Reason that the Constitution Protects Freedom of Conscience

In a free democratic state, the governmental authority retains its legitimacy only when it guarantees the basic rights of its citizens. Authority of the state is derived from citizens. But at times, the state may wield its authority to the disadvantage of particular individuals to protect and preserve the community. Individuals will accept such disadvantage only when there is a common understanding that no basic right can be restricted without any overriding public interest.

Among basic rights, freedom of conscience retains a special standing. When there is a conflict between an individual and the state, freedom of conscience, especially freedom of mind, constitutes the last protection for individuals that should not be intruded upon by the state, no matter how great the public need is. Therefore, in order for each citizen to enjoy human dignity, be assured of his worth, and to preserve his fundamental morality and personal beliefs, the state needs to guarantee freedom of conscience above everything else. This is the basic condition of, or demand for, a free democratic state.

(2) Domain of Protection for Freedom of Conscience

(A) In its earlier adjudication concerning the domain of protection for freedom of conscience, the Constitutional Court ruled that "conscience" protected by Article 19 of the Constitution includes not only one's world view, view of life, ideology, and other beliefs but also value judgments or ethical decisions in one's inner self affecting formation of one's personality. Freedom of conscience includes freedom of inner thought which precludes the state from intervening on people's ethical judgment about right or wrong as well as good or evil. It also includes freedom not to be forced by the government to publicly disclose one's ethical judgment (3 KCCR 149, 153-154, 89Hun- Ma160, April 1, 1991; 9-2 KCCR 548, 571, 92Hun-Ba28, November 27, 1997; 10-2 KCCR 159, 166, 96Hun-Ba35, July 16, 1998).

The domain of conscience, then, is broader than that of a choice between a moral good or evil. The Court has explicated the reasons for recognizing such broad scope of conscience as follows:

"Such interpretation would be pursuant to our Constitution which, unlike the constitutions of other nations, has an independent article explicitly stipulating protection of freedom of conscience while distinguishing it from freedom of religion and separating it from freedom of thoughts. This is declaration of the principle that the state would not intrude upon freedom of inner thoughts, nor interfere with one's value judgment. It is to better protect freedom of mental activities, a basis of democracy, which should not be abridged by any state authority and which has been an essential element for progress and development of the human race. Article 18 (2) of the International Covenant of Civil and Political Rights (so-called "International Human Rights Covenant B") that the Republic of Korea acceded to in 1990 stipulates that no one shall be subject to coercion which would impair his freedom to adopt belief of his choice." (3 KCCR 149, 153-154, 89Hun-Ma160, April 1, 1991)

Therefore, the protected domain of freedom of conscience does not include only morality choices between good or evil. It also includes one's world view, ideology, or other beliefs. This bears important significance in the adjudication of the matter. That is the reason the Constitutional Court concluded that an order of public apology is an issue within the domain of the freedom of conscience (3 KCCR 149, 153-154, 89Hun-Ma160, April 1, 1991)

The Court has recognized a broad scope of freedom of conscience because the Constitution does not have an independent article to protect freedom of thoughts or ideology and because freedom of conscience is an important basis of democracy.

(B) The majority opinion in the instant case, however, is in conflict with the precedent of this Court in that it confines the domain of conscience protected by the Constitution to the sphere of morality, more specifically, to only imminent and specific ethical judgments regarding one's moral integrity. This is clearly either limited interpretation of or overruling of precedent.

The majority of Justices does not cite the aforementioned precedent about the domain of conscience. Rather, the majority of Justices quotes the ruling on the refusal to take the breathalyzer test (96Hun- Ka11), and adds new conditions to recognize that there is an issue of the freedom of conscience involved in a particular case. The majority of Justices concludes that constitutionally protected conscience refers to "a specific and dire state of mind" necessary to preserve "one's ethical and moral identity." Such view limiting the domain of constitutionally protected conscience is not in harmony with the afore-mentioned precedent, and it is contrary to the ruling of this precedent that included not only moral conscience, in the narrow sense, but also one's world view, view of life, ideology, or other beliefs within the constitutionally protected domain of conscience. If conscience protected under the Constitution only refers to "a specific and dire state of mind" necessary to preserve "one's ethical and moral identity," the Court would have reached at a different conclusion on the case concerning the order of public apology (89Hun-Ma160 case). The precedent on the order of public apology was adjudicated based on the Court's view that concept of conscience has a broader scope than what the majority of Justices in the instant case is willing to recognize.

(C) Furthermore, the majority opinion prescribes the domain of the constitutionally protected freedom of conscience using three conditions. As the second condition, it requires that "Compulsory legal measures such as compulsory performance, punishment, or imposition of legal disadvantage should follow violation of the law." We are deeply concerned about reasonableness and effectiveness of this conclusion.

The Court rendered but very few decisions about the freedom of conscience thus far. Under such circumstance, attempts to define the concept based on deductive reasoning may not be appropriate. Freedom of conscience is a very sensitive issue dealing with the inner mind of

individuals in connection with the state authority. By defining the freedom of conscience as such, the Court may be binding itself to only superficial or conceptual examination of cases concerning freedom of conscience. If above definition of conscience is adopted, the Court would only look at each case to determine whether a given case meets three conditions required to make it an issue of constitutionally protected conscience: The Court would not look at each case in its entirety respecting individual and specific circumstance of each case. This may lead to rulings far from existing realities in cases of such an important and sensitive basic right as the freedom of conscience.

Such approach is also contrary to the generally adopted method of constitutional interpretation, namely, "constitutional interpretation through specific cases." Constitutional review based on such deductive reasoning can be used to limit, instead of extend, the protected domain of the freedom of conscience.

The Constitution is the supreme law of the land that takes an open and abstract form. The Constitution has taken such form to give enough room for appropriate constitutional interpretation for diverse relations over many generations to come. It would be inappropriate for the Court to define the domain of constitutionally protected basic rights based on deductive reasoning when there are not enough precedents accumulated about the issue.

B. Whether requiring submission of the pledge to abide by the law is an issue within the protected domain of the freedom of conscience

(1) The majority of Justices in the instant case concludes that requiring submission of the pledge to abide by the law "only confirms and makes citizens vow to uphold their constitutional duty", and "therefore, it does not intrude upon the domains of conscience."

We do not object to such a conclusion when applied to ordinary prisoners. However, such a conclusion would not be appropriate when a prisoner, who is holding onto the communist ideology sentenced to life imprisonment for attempts to overthrow the government by force and violence in violation of the National Security Act, is required to submit such pledge for parole.

The majority of Justices concedes that there may be some long-term prisoners who have refused to renounce their beliefs in communism among the complainants and they may firmly believe that the contents of the National Security Act are contrary to their political beliefs or that a free democratic regime is against their ideologies. They, however, conclude that "the Constitution does not protect anyone's right to overthrow the existing legal order or a free democratic order using such unconstitutional means as force or violence, and such pledge to abide by the law or respect the existing constitutional regime does not violate any constitutionally protected freedom or right, including freedom of conscience."

Such conclusion is contrary to the Constitution guaranteeing freedom of conscience, and there is also a gap in the argument’s logic.

Certainly, no one has the right to overthrow the government using violent means; however, it infringes on the freedom of conscience to force him to confess or change such idea as long as the idea remains in his thoughts. It would be hard to argue that there is no infringement on the freedom of conscience when requiring submission of the pledge to abide by the law, albeit in effect or indirectly, forces an individual with a particular world view or ideology to change his inner beliefs.

We cannot readily agree with the claim that "such pledge to abide by the law or respect the existing constitutional regime does not violate any constitutionally protected freedom or right, including the freedom of conscience."

Neutrality of the State on the world view or ethical judgment is precondition on guaranteeing the freedom of conscience. Freedom of conscience is based on the understanding that no matter what kind of world view or moral belief an individual has, the state should not force him to adhere to a certain world view or moral belief and that the state must tolerate individual's choice on the matter. In principle, freedom of conscience and freedom of expression of even those individuals who may prefer a regime that may not be free nor democratic are protected to a certain extent under the constitution of a free democratic society. In other words, in a free democratic society, conscience and expression that may not be in harmony with the existing free democratic regime are protected.

(2) Protection of the free democratic basic order is one of the superior values of the Constitution. While the Constitution is based on moral relativism, the state is justified to restrain actions that may be harmful to a free democratic basic order. Under the free democratic regime, diverse opinions about ideologies and beliefs are not indiscriminately ignored nor made uniform. Emphasis on "free" democratic basic order implies that there should be no forceful or discriminatory governance and that individual opinions and actions should be tolerated, as long as they do not injure the legal interests of other individuals or public interest.

Therefore, in a free democratic society, the rights of even opponents of free democracy are protected; only their specific actions can be restrained when they are deleterious to the public interest. The government must protect itself against extremists trying to overthrow the government via violence and force. In a free democratic society, however, the government can only penalize the opponents of democracy for their "actions"; it should not force them to renounce their ideology or make them pledge to abide by the law against their beliefs using any form of direct or indirect means of coercion. This is what distinguishes a free democratic society from a communist regime.

(3) Let us next examine what it means to submit the pledge to abide by the law to the long-term prisoners who have thus far refused to convert their ideologies.

In form, requiring the pledge to abide by the law is different from the ideological conversion programs in the past. However, there is no practical difference between the two; an inmate imprisoned for violation of the National Security Act for action based on his belief in communism is required to express an intention to change such belief under both programs. Thus, both are used to effectively separate and isolate individuals with particular ideological beliefs from ones with same beliefs.

A letter of conversion is a written statement renouncing previously held communist ideology. In his official opinion about the instant case, the Minister of Justice wrote that "the ideology conversion program has been replaced by requirement of submission of the pledge to abide by the law because the ideology conversion program may infringe on individual freedom of conscience as it requires an explicit expression renouncing inner beliefs and imposes certain legal disadvantage if the individual refuses to convert."

Requiring submission of the pledge to abide by the law, like the ideology conversion program, forces a communist to renounce his communist ideology and makes him publicly express it.

To such individual, a decision to submit the pledge to abide by the law is fundamentally identical to that to submit a letter of conversion. To him, "to abide by the law of a free democratic regime" is tantamount to "renouncement of the creation of a communist society." This is to change his world view, ideology, and beliefs. To such individual, the pledge is not merely a document without much significance as the majority of Justices claims.

While interpretation of laws and legal judgment take an important place in the legal process, there are many cases whose outcome will be dependent on how the judges appraise the facts constituting a case.

The central issue of the case is the meaning of submission of the pledge to those inmates who have firmly held onto the communist ideology. The majority of Justices take the issue too lightly. The Constitutional Court must determine whether the case at hand contains elements concerning freedom of conscience through individual and substantial review of specific circumstances of the case.

The pledge to abide by the law, like the ideology conversion pro- gram, requires expression of a renouncement of inner beliefs. Since constitutionally protected conscience includes conscience that affects individual's world view, ideology, and beliefs, requiring submission of the pledge is an issue within the protected domain of the freedom of conscience.

(4) Let us next examine whether it is legal coercion limiting freedom of conscience to exclude individuals who refused to submit the pledge to abide by the law for parole.

The majority of Justices points out that submission of the pledge is not compulsory and that the result of refusal to submit the pledge is merely exclusion from parole, which is a favor or benefit that an inmate only incidentally enjoys. The majority of Justices concludes that there is no coercion such as an imposition of a legal disadvantage to force submission of the pledge, and hence, there is no infringement on the freedom of conscience.

Furthermore, the majority writes that "When a statutory provision does not legally compel performance of a certain action but is only employed to decide whether to bestow certain benefits, such provision does not infringe on the freedom of conscience, even though such benefit might be very critical and it is painful to give up the opportunity to receive such benefit."

Even if the concept of conscience used by the majority of Justices is adopted, it is too formal an interpretation to conclude that exclusion from parole release upon refusal to submit the pledge is not a legal disadvantage. Such view is far from the constitutional spirit putting an emphasis on the protection of basic rights.

Let us consider a prisoner imprisoned for life for violation of the National Security Act, and let us say that while he meets all other qualification necessary for parole, he is excluded from parole because he refused to submit the pledge to abide by the law. Even for such inmate who has a very firm ideological belief, it is very difficult to decide whether to return to his family and enjoy his freedom after being released on parole or to spend the rest of his life confined by holding onto his belief tenaciously.

Since submission of the pledge would mean renouncement of the communist ideology that he has held on to heretofore and betrayal of his comrades, he would experience a conflict of conscience when deciding whether to submit the pledge or forego the opportunity for parole. We cannot look at this problem under the conceptual "rights and benefits" dichotomy.

While a conceptual tool could contribute to legal stability, it would not yield a reasonable conclusion pertinent to a particular case. Constitutional adjudication is a process to give concrete and substantial meanings to abstract and open provisions of the Constitution by applying them to actual cases. In this light, it would not be appropriate to decide whether there has been limitation of basic rights based on a simple criterion of whether a particular disposition is "infringement on rights or deprivation of benefits." How could we say that it is not an issue of freedom of conscience when impoverished individuals holding onto the communist ideology are denied basic social security aid or medical care for refusing to submit the pledge to abide by the laws of the free democratic regime because such benefits are not considered rights?

An individual can claim violation of such basic rights as freedom of conscience and freedom of expression even when he was denied important benefits by the government. While the court will need to examine each case to determine what is such an important benefit, exclusion of a long-term prisoner from parole consideration is certainly one of such cases because parole may be one of the most important matters in his life.

The majority of Justices employ such terms as "legal disadvantage" and "legal coercion" to conclude that there is no issue concerning freedom of conscience in the case. This conclusion is too formal for a question of infringement on such vital constitutional value as the freedom of conscience.[1]

(5) While the instant provision requiring submission of the pledge to abide by the law does not directly compel expression of conscience of an inmate, it does forcibly demand that he subscribes to the pledge in effect whether he may recover his bodily freedom or continue his permanent stay in the confined facility depends on his decision to submit the pledge or not. In reality, this is to indirectly compelling an inmate to express his conscience - ideology, or beliefs.

If the inmate refuses to subscribe to the pledge, it would be a passive declaration that they would not abide by the national laws, or that they would continue to hold on to their previous beliefs or ideology. This is a restriction of the freedom of silence.

The pledge to abide by the law is bigger than something that "prisoners can refuse to submit and as a result, not enjoy the benefit of parole release." It falls within the domain of the freedom of conscience protected by Article 19 of the Constitution. We would not be able to say that it is unrelated to freedom of conscience to offer parole to an inmate who is imprisoned for religious reasons on the condition that he step over a cross because there is no legal disadvantage.

Freedom of conscience is a very delicate matter dealing with the inner minds of citizens, and there could be various ways to restrict it by the State who has diverse policy measures. The Constitutional Court, the last bastion for basic rights protection, should examine substantial effects that a particular state action might have on the inner minds of citizens in reviewing a case concerning the freedom of conscience from diverse angles.

C. Whether requiring submission of the pledge to abide by the law violates freedom of conscience

(1) "Freedom of conscience protected by Article 19 of the Constitution includes not only *forum internum* that include freedom to form conscience and freedom to make a decision based on one's conscience, but also *forum externum* that include freedom to express and take

---

[1] A U.S. Supreme Court decision concerning the matter is very instructive. In *Speiser v. Randall*, 357 U.S. 513 (1958), Justice Brennan delivered the opinion of the Court, saying that "when we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." (According to the U.S. Supreme Court decisions, freedom of conscience is protected by the First Amendment stipulating the freedom of expression and the freedom of religion.)
In *Speiser v. Randall*, the U.S. Supreme Court ruled that a California statute requiring the veterans to file an oath that they do not advocate the overthrow of the Federal or State Government by force, violence or other unlawful means in order to qualify for tax exemptions denied the freedom of speech of such veterans. The Court concluded that deterrent effect of such statute would be the same as if the State were to fine them for this speech. The Court went on to point out that the argument of the California State Government that because a tax exemption was a "privilege" or "bounty," its denial would not infringe speech was incorrect. The Court further wrote that the denial of a tax exemption for engaging in certain speech necessarily would have the effect of coercing the claimants to refrain from the proscribed speech, and that the denial was "frankly aimed at the suppression of dangerous ideas."

actions based on decisions of one's conscience. While *forum internum* is an absolute freedom that may not be abridged under any circumstance as long as it stays within one's mind, *forum externum* is a relative freedom that can be restricted by Statute when it is necessary to do so for national security, the maintenance of law and order, or for public welfare under Article 37 (2) of the Constitution (10-2 KCCR 159-166, 96Hun-Ba35, July 18, 1998).

(2) Requiring submission of the pledge to abide by the law directly restricts inner freedom of a person in that it deals with an individual's world view, view of life, ideology, beliefs, or other moral judgment.

While what matters is the pledge which can be said to be a form of "expression," it is an issue not in the domains of *forum externum* but in the domain of *forum internum* since the State in effect coerces an individual to make confession of one's inner beliefs.

In other words, the pledge in question does not stop at requiring an individual to submit himself externally but goes on to compel one to convince oneself internally the legitimacy of such a submission as a condition of parole. Article 16(2) of the Constitution of Spain stipulates that "nobody may be compelled to make statements regarding his religion, beliefs or ideologies"; Article 18(2) of the International Covenant of Civil and Political Rights (so-called "International Human Rights Covenant B") that the Republic of Korea acceded to in 1990 stipulates that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice; and Article 4(1) of the Basic Law for the Federal Republic of Germany stipulates that "...freedom to profess a religious or philosophical creed shall be inviolable." These provisions have been adopted to prevent infringement on inner freedom brought by compelling one to confess one's beliefs. This is an outcome of a constitutional tradition to prevent religious confession such as "stepping on the cross."

Since requiring submission of the pledge to abide by the law is forcing an individual to either confess one's inner mind or preventing him from keeping silence, it infringes upon the freedom to decide whether to confess one's beliefs or not. This means that requiring the pledge is not merely a problem of expression of inner thoughts, but rather a problem of inner thoughts itself.

Otherwise, one can argue that it would not be a problem concerned with inner freedom to ask "I would not ask what your beliefs are, but tell me whether it is A or not."

Since the pledge is a restriction on whether to confess one's inner freedom, it touches upon the inner part of the freedom of conscience, and thus, is linked with the essential aspect of the freedom of conscience.

(3) Let us next examine whether requiring submission of the pledge to abide by the law is a restriction of basic rights by an Act. We think that, since requiring submission of the pledge to abide by the law falls within the protected domain of the freedom of conscience, it can only be restricted by an Act when necessary to do so for national security or other compelling reasons. However, no act has been passed to legitimize the requirement of such a pledge, and the legislature has not delegated to the administration detailed rule-making concerning the pledge. It has only been implemented based on Ordinance for Parole Review (Amended by Ordinance of the Ministry of Justice No. 467 on October 10, 1998). It is in violation of the Constitution to limit the basic rights of citizens by ordinance of the Ministry, not by act nor with delegation of rule-making, and is unconstitutional.

(4) Let us next see whether requiring submission of the pledge violates the principle of proportionality.

Even if one argues that requiring submission of the pledge is not a matter of inner freedom but only a restriction on the freedom to realize conscience, the instant provision violates the principle of proportionality.

The instant provision of the Ordinance may have a valid legislative purpose in that the pledge is used to judge the likelihood of recidivism of an inmate. However, appropriateness of the means chosen to achieve the legislative purpose is questionable. While there may be some individuals who adamantly object to the legal order of the Republic of Korea among violators of the public security laws, failure to submit the pledge is passive refusal. Recidivism can be said to be a form of active refusal of the existing legal order, and the likelihood of recidivism is affected by numerous contingencies such as political or social conditions of the society when an inmate is released, and individual living environments. It is not clear whether an inmate released on parole after submitting the pledge is not likely to commit another crime or whether likelihood of recidivism would be higher if inmates were to be released without submitting the pledge.

If requiring submission of the pledge aims to assist judgment whether the released inmate is likely to be a recidivist, other means used for parole review of ordinary inmates could be employed to achieve such a legislative purpose. A potential candidate for parole could first be screened by using the incarceration record during the imprisonment term. The members of Parole Review Board could question the inmate about the status of mind and future plans during the interview for parole review, and could indirectly make assessment about the inmate's ideology and about whether he accepts the constitutional order of the Republic of Korea. Likelihood of recidivism could thus be examined thoroughly.

The instant provision excessively restricts freedom of conscience because it forces an inmate to make a written confession about things related to fundamental beliefs or conscience.

An individual asked to submit the pledge in order to be reviewed for parole release suffers a serious mental conflict: he can either express his intent to change his fundamental belief to be released, or he can choose to retain his inner belief by remaining silent. Thus, the injury inflicted on individuals' conscience by requiring the pledge to abide by the law is far greater than the public interest of acquisition of information for parole review, and the instant provision fails the balance of interest test.

D. Conclusion

In conclusion, we think that the instant provision is unconstitutional because it infringes upon the inner freedom of conscience, encroaches upon the basic rights of citizens not based on acts legislated by the National Assembly, and violates the principle of proportionality even when one deems it as restriction of freedom to realize one's conscience.

Justices Yun Young-chul (Presiding Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim Kyoung-il (Assigned Justice), Song In-jun, and Choo Sun-hoe.

Aftermath of the Case

The decision put an end to a constitutional debate about the pledge required of inmates imprisoned for violation of public security laws. However, voices calling for abolishment of the pledge based on political consideration did not disappear altogether. The pledge requirement was abrogated with revision of the Ordinance for Parole Review on July 31, 2003.

Impeachment of the President (Roh Moo-hyun) Case
[16-1 KCCR 609, 2004Hun-Na1, May 14, 2004]

Contents of the Decision

Summary of the Decision

1. The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment than those stated in the impeachment resolution may constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment

adjudication proceeding. However, with respect to the "determination on legal provisions," the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely for the Constitutional Court to determine.

2. The principle of due process is a legal principle that, before a decision is made by the governmental power, entitles a citizen who might be prejudiced by such a decision to an opportunity to express his or her opinion and thereby influence the process of the proceedings and the result thereof. In this case, the impeachment proceeding at the National Assembly concerns two constitutional institutions of the National Assembly and the President, and the National Assembly's resolution to impeach the President merely suspends the exercise of the power and authorities of the President as a state institution and does not impede upon the fundamental rights of the President as a private individual. Therefore, the due process principle that has been formed as a legal principle applicable to the exercise of governmental power by a state institution in its relationship with its citizens shall not be directly applicable in the impeachment proceeding that is designed to protect the Constitution against a state institution. Furthermore, there is no express provision of law concerning the impeachment proceeding that requires an opportunity to be heard for the respondent. Therefore, the argument that the impeachment proceeding at the National Assembly was in violation of the due process principle is without merit.

3. Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and of the judiciary for violation of the Constitution or statutes. It thereby functions as a warning to such public officials not to violate the Constitution and thus also prevents such violations. Further, where certain state institutions are delegated with state authority by the citizenry but abuse such authority to violate the Constitution or statutes, the impeachment process functions to deprive such state institutions of their authority. That is, reinforcing the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties is the purpose and the function of the impeachment process.

4. An analysis of the specific grounds for impeachment set forth in Article 65 of the Constitution reveals that the "official duties" as provided in "exercising the official duties" mean the duties that are inherent in particular governmental offices as provided by law and also other duties related thereto as commonly understood. Therefore, acts in exercising official duties mean any and all acts or activities necessary for or concomitant with the nature of a specific public office under the relevant statutes, orders, regulations, or administrative customs and practices. As the Constitution provides the grounds for impeachment as a "violation of the Constitution or statutes," the "Constitution" includes the unwritten Constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions; the "statutes" include the statutes in their formal meaning, international treaties that are provided with the same force as statutes, and the international law that is generally approved.

5. The obligation to maintain political neutrality at the election owed by public officials is a constitutional request drawn from the status of public officials as "civil servants for the entire citizenry" as set forth in Article 7(1) of the Constitution; the principle of free election set forth in Articles 41(1) and Article 67(1) of the Constitution; and the equal opportunity among the political parties guaranteed by Article 116(1) of the Constitution. Article 9 of the Public Officials Election Act is a legal provision that specifies and realizes the above constitutional request.

6. "Public officials" within the meaning of Article 9 of the Public Officials Election Act mean any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more specifically, any and all public officials who are in a position to threaten the "principle of free election" and "equal opportunity among the political parties at the election." Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising official duties, the public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities. Here, the exception is that members of the National Assembly and the members of the local legislatures are excluded from "public officials" within the meaning of Article 9 of the Public Officials Election Act, as no political neutrality concerning elections can be requested from such members of the legislatures due to their status as the representatives of the political parties and the directly interested parties in the political campaign.

Therefore, political neutrality at the election is a basic obligation owed by all public officials of the executive branch and of the judiciary. Furthermore, since the President bears the obligation to over- see and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a "public official" within the meaning of Article 9 of the Public Officials Election Act.

7. If the President makes a one-sided statement in support of a particular political party and influences the process through which the public opinion is formed, the President thereby interferes with and distorts the process of the independent formation of the public's opinion based on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by half the meaning of the political activities continuously performed by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. The relevant part of the President's statements at issue in this regard repeatedly and actively expressed his support for a particular political party in the course of performing the President's official duties and further directly appealed to the public for the support of that particular political party.

Therefore, the president's statements toward the entire public at press conferences in support of a particular political party made by taking advantage of the political significance and influence of the office of the President, when political neutrality of public officials is required more than ever before as general elections approach, were in violation of the neutrality obligation concerning elections as acts unjustly influencing the elections and thereby affecting the outcome of the elections by taking advantage of the status of the President.

8. Article 58(1) of the Public Officials Election Act makes it a prerequisite for the electoral campaign "whether or not a candidate can be specified," by defining the concept of "electoral campaign" adopting the standard of "being elected." When the statements at issue in this case

were made on February 18, 2004 and February 24, 2004, the party-endorsed candidates had not yet been determined. Therefore, the statements in support of a particular political party when the party-endorsed candidates were not yet specified did not constitute an electoral campaign.

Furthermore, considering that the president's statements at issue herein were neither actively made nor premeditated as such statements were made in the form of the President's response to questions posed by the reporters at press conferences, neither was there an active or premeditated element to be found in the President's statements, nor, as a result, a purposeful intention sufficient to find the nature of a political campaign. Therefore, the respondent's statements cannot be deemed as active and intended electoral campaign activities committed with an intention to have a particular candidate or certain identifiable candidates win or lose the election.

9. The "obligation to abide by and protect the Constitution" of the President set forth in Articles 66(2) and 69 of the Constitution is the constitutional manifestation that specifies the constitutional principle of government by the rule of law in relation to the President's performance of official duties. While the "obligation to abide by and protect the Constitution" is a norm derived from the principle of government by the rule of law, the Constitution repeatedly emphasizes such obligation of the President in Articles 66(2) and 69, considering the significance of the status of the President as the head of the state and the chief of the executive branch. Under the spirit of the Constitution as such, the President is the "symbolic existence personifying the rule of law and the observance of law" toward the entire public.

10. The President's acts denigrating the current law as the "vestige of the era of the government-power-interfered elections" and publicly questioning the constitutionality and the legitimacy of the statute from his status as the President do not conform to the obligation to abide by and protect the Constitution and statutes. The President, of course, may express his or her own position and belief regarding the direction for revising the current statute as a political figure. However, it is of great importance that in which circumstances and in which relations such discussions on possible statutory revisions take place. The President's statements denigrating the current election statutes made as a response to and in the context of the National Election Commission's warning for the president's violation of such election statutes cannot be deemed as an attitude showing respect for the law.

The statements as such made by the President, who should serve as a good example for all public officials, might have significantly negative influence on the realization of a government by the rule of law, by gravely affecting the other public officials obligated to respect and abide by the law and, further, by lowering the public's awareness to abide by the law. To conclude, the act of the President questioning the legitimacy and the normative power of the current statute in front of the public is against the principle of government by the rule of law and is in violation of the obligation to protect the Constitution.

11. The national referendum is a means to realize direct democracy, and its object or subject matter is the "decision on issues," that is, specific state policies or legislative bills. Therefore, by the own nature of the national referendum, the "confidence the public has in its representative" cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections.

The President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's authority to institute a national

referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political position. Although the President merely suggested an unconstitutional national referendum on the people's confidence and did not yet actually institute such referendum, the suggestion toward the public of a national confidence referendum,[1] which is not permitted under the Constitution, is itself in violation of Article 72 of the Constitution and not in conformity with the president's obligation to realize and protect the Constitution.

12. As Article 65(1) of the Constitution provides "as the President, ... exercises his or her official duties" and thereby limits the grounds for impeachment to the exercise of the "official duties," the above provision, as construed, mandates that only those acts of violation of law performed by the President while holding the office of the President may constitute the grounds for impeachment. The alleged grounds for impeachment concerning the unlawful political funds that involved the Sun & Moon corporation and the respondent's presidential election camp are based on facts that arose before the respondent was elected and sworn in on February 25, 2003 as the President. Therefore, such alleged grounds are clearly irrelevant to the respondent's exercise of his official duties as President and do not constitute grounds for impeachment. With respect to the misconducts of the President's close associates and aides that took place subsequent to the respondent's assumption of the office of President, none of the evidence submitted to the bench throughout the entire proceedings in this case supports any finding that the respondent instructed or abetted the acts of Choi Do-sul and others including receiving unlawful funds or was otherwise illegally involved in such acts. Therefore, the alleged grounds for impeachment based on the above facts are without merit.

13. Article 69 of the Constitution provides for the President's "obligation to faithfully perform the official duties," as it provides for the obligation of the President to take the oath of office. Although the "obligation to faithfully perform the official duties" of the President is a constitutional obligation, this obligation, by its own nature, is, unlike the "obligation to protect the Constitution," not the one the performance of which can be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a judicial adjudication.

As Article 65(1) of the Constitution limits the ground for impeachment to the 'violation of the Constitution or statutes' and the impeachment adjudication process at the Constitutional Court is solely to determine the existence or the nonexistence of a ground for impeachment from a legal standpoint, the ground for impeachment alleged by the petitioner in this case concerning the respondent's faithfulness of the performance of the official duties such as the political incapability or the mistake in policy decisions, cannot in and by itself constitute a ground for impeachment and therefore it is not a subject matter for an impeachment adjudication.

14. Article 53(1) of the Constitutional Court Act provides that, "when there is a valid ground for the petition for impeachment adjudication, the Constitutional Court shall issue a decision removing the respondent from office." The above provision may be interpreted literally to mean that the Constitutional Court shall automatically make a decision of removal from office in all cases where there is any valid ground for impeachment as set forth in Article 65(1) of

---

[1]A national confidence referendum is a national referendum through which the President asks voters to decide whether the President should remain in office (translator's note).

the Constitution. However, if every and any minor violation of law committed in the course of performing official duties were to mandate removal from office, this would offend the request that punishment under the Constitution proportionally correspond to the obligation owed by the respondent, that is, the principle of proportionality. Therefore, the "valid ground for the petition for impeachment adjudication" provided in Article 53(1) of the Constitutional Court Act does not mean any and all incidence of violation of law, but the incidence of a "grave" violation of law sufficient to justify removal of a public official from office.

15. The question of whether there was a "grave violation of law" or whether the "removal is justifiable" cannot be conceived by itself. Therefore, the existence of a valid ground for the petition for impeachment adjudication, that is, the removal from office, should be determined by balancing the "degree of the negative impact on or the harm to the constitutional order caused by the violation of law" and the "effect to be caused by the removal of the respondent from office."

On the other hand, a decision to remove the President from office would deprive the "democratic legitimacy" delegated to the President by the national constituents through an election during the term of the office and may cause political chaos arising from the disruption of the opinions among the people, that is, the disruption and the antagonism between those who support the President and those who do not, let alone a national loss and an interruption in state affairs from the discontinuity of the performance of presidential duties. Therefore, in light of the gravity of the effect to be caused by the removal of the President, the ground to justify a decision of removal should also possess corresponding gravity.

Although it is very difficult to provide in general terms which should constitute a "grave violation of law sufficient to justify the removal of the President from office," a decision to remove the President from office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.

16. Considering the impact on the constitutional order caused by the violations of laws by the President as recognized in this case in its entirety, the specific acts of the President in violation of law cannot be assessed as a threat to the basic order of a free democracy as there is no finding of an active intent to stand against the constitutional order therein.

The acts of the President violating the laws were not grave in terms of the protection of the Constitution to the extent that it would require the protection of the Constitution and the restoration of the impaired constitutional order by a decision to remove the President from office. Also, such acts of the President cannot be deemed as acts that betrayed the trust of the people to the extent that they would require the deprivation of the trust delegated to the President by the people prior to the completion of the presidential term. Therefore, there is no valid ground sufficient to justify a decision to remove the President from office.

17. Article 34(1) of the Constitutional Court Act provides that the deliberation of the Constitutional Court shall not be public. Therefore, the separate opinions of the individual Justices may be noted in the decision only when a special provision permits an exception to such secrecy of deliberation proceedings. With respect to the impeachment adjudication, no provision for the exception to the secrecy of deliberation exists. Therefore, in this impeachment adjudication, the separate opinions of the individual Justices or the numbers thereof may not be noted in the decision.

However, it should be noted that concerning the above position, there was also a position that the "separate opinions may be noted in the decision as Article 36(3) of the Act should be interpreted to leave the question of whether to note individual opinions in an impeachment adjudication to the discretion of the participating justices."

Parties

Petitioner
The Chair of the Legislation and Judiciary Committee of the National Assembly of the Republic of Korea, on behalf of the National Assembly of the Republic of Korea
Counsel of Record: Kang Jae-sup and 66 others

Respondent
Roh Moo-hyun, the President of the Republic of Korea
Counsel of Record: Ryu Hyun-seok and 9 others

Holding

The petition for the impeachment adjudication is rejected.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

(1) Resolution of the impeachment and the petition for impeachment adjudication

The National Assembly of the Republic of Korea proposed the "motion for the impeachment of the President (Roh Moo-hyun)" presented by Assembly members Yoo Yong-tae and Hong Sa-deok and 157 others before the second plenary session at the 246th session (extraordinary) on March 12, 2004, and passed the motion by 193 concurrent votes out of the entire Assembly membership of 271. The Chair of the National Assembly Legislation and Judiciary Committee, Kim Ki-chun, acting *ex officio* as the petitioner, requested an impeachment adjudication against the respondent by submitting the attested original copy of the impeachment resolution to the Constitutional Court on the same date pursuant to Article 49(2) of the Constitutional Court Act.

The full text of the National Assembly's impeachment resolution against the respondent is attached hereto as Appendix 3.

(2) Summary of the grounds for the impeachment resolution of the National Assembly

(A) Corrupting the national law and order

1) Act of supporting a particular political party

A) The respondent violated Articles 9(1), 60(1), 85(1), 86(1) and 255(1) of the Public Officials Election and Election Malpractice Prevention Act (hereinafter referred to as the "Public Officials Election Act"), in (i) stating, at a joint press conference with six

news media organizations in the Seoul-Incheon region on February 18, 2004 , that "I simply cannot utter what will follow should the quorum to resist the constitutional revision be destroyed"; and (ii) stating, as an invited guest at a press conference with the Korean Network Reporters Club on February 24, that "the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down," "I expect that the public will overwhelmingly support the Uri Party at the general election," and "I would like to do anything that is legal if it may lead to votes for the Uri Party."

B) The respondent violated Articles 9(1), 59, and 87 of the Public Officials Election Act and Article 69 of the Constitution, in (i) stating, on December 19, 2003, when he participated in an event entitled "Remember 1219" hosted by the so-called "Roh-Sa-Mo,"[2] that "The citizens revolution is still going on. Let's step forward once again"; and (ii) stating, at a meeting with the journalists in the Gangwon-Doregion on February 5, 2004, that "the 'Citizen Participation 0415(Kook-Cham 0415)' members' participation in politics should be permitted and encouraged legally and politically."

C) Pursuant to the report in Joong-Ang Ilbo on February 27, 2004, the document entitled "the strategic planning of the Uri Party for the 17th General Election" states that it is necessary to "establish the control tower where the party, the administration, and Cheong Wa Dae (the Office of the President) together participate" in order to invite the candidates for the general election, and lists "the party - Cheong Wa Dae - the administration" in the order of importance in the administration of the state affairs for the general election. This confirms the organizational intervention into the election by Cheong Wa Dae, and the command of the strategy of a particular political party for the general election by the respondent was in violation of Articles 9(1) and 86(1)(ii) of the Public Officials Election Act.

D) The respondent violated Article 9(1) of the Public Officials Election Act and Articles 8(3) and 11(1) of the Constitution, in (i) stating, at a beginning-of-the-year press conference on January 14, 2004, that "there was a split because there were those who supported reform and those who did not support reform fearing it, and I would like to go together with the Uri Party as those who supported me at the presidential election are running the Uri Party"; and (ii) stating, at a gathering with the close associates on December 24, 2003, that "if you vote for the New Millennium Democratic Party, you are helping the Grand National Party."

E) The respondent violated Article 237 (1) (iii) of the Public Officials Election Act and Articles 10, 19 and 24 of the Constitution, in inducing the support for a particular political party by threatening the public and in repeatedly making remarks affecting the public's mind concerning the general election.

2) Act in contempt of the constitutional institutions

A) The respondent violated Articles 66(2), 69 and 78 of the Constitution and Article 7(1) of the National Intelligence Service Act, in ignoring the impropriety recommendation by the National Assembly Confirmation Hearing Committee on April 25, 2003, for Ko Young-gu, as the head of the National Intelligence Service.

---

[2] An activist group of President Roh Moo-hyun supporters (translator's note).

B) The respondent violated Articles 66(2) and 69 of the Constitution, Article 63 of the National Public Official Act, and Article 311 of the Criminal Code, in describing the then incumbent members of the National Assembly as 'weeds to be mowed' in his open letter to the public via the Internet on May 8, 2003.

C) The respondent violated Articles 63(1), 66(2) and 69 of the Constitution, in taking the position that seemed to refuse the National Assembly resolution of September 3, 2003 that proposed the removal of Kim Doo-kwan from the office of the Minister of Government Administration and Home Affairs, by postponing the acceptance of such resolution.

D) The respondent violated Articles 40, 66(2), and 69 of the Constitution, in (i) expressing regrettableness on March 4, 2004 towards the National Election Commission's decision requesting the President to observe the neutrality obligation concerning elections, through the Senior Secretary to the President for Public Information; (ii) denigrating the current election laws, on the same date, as the "vestige of the era of the government-power-interfered-elections "; and, (iii) on March 8,devaluating his violation of Article 9 of the Public Officials Election Act as "miscellaneous " and "minor and equivocal."

E) The respondent violated Articles 65(1), 66(2) and 69 of the Constitution, in stating on March 8, 2004 that the National Assembly's moving forward on the impeachment proposal was an "unjust oppression."

F) The respondent violated Articles 66(2), 69 and 72 of the Constitution, in stating at a press conference on October 10, 2003 that, with respect to the suspicion as to Choi Do-sul's reception of the secret fund from the SK Group, "when the investigation closes, I will ask the public the confidence in the President concerning the public distrust accumulated during the past including this matter"; and stating at the policy speech on the state affairs at the National Assembly on October 13 that "the vote of confidence will be feasible even under the current law upon reaching a political agreement although there are some legal arguments upon it," "although a way to associate the vote of confidence with certain policies is under discussion, it would rather not be done that way and none of the conditions will be attached," and "if I win the vote of confidence, I plan to reorganize the cabinet and Cheong Wa Dae within this year and to carry out reform to state affairs."

(B) Power-engendered corruption

1) Act of receiving illegal political funds concerning the Sun & Moon Group

A) In June 2002, the respondent had Ahn Hee-jung request the National Tax Service to reduce the taxes for the Sun & Moon Group (CEO, Moon Byung-wook), whereby the taxes for the Sun & Moon Group was reduced to 2.3 billion Korean Won from 17.1 billion Korean Won. This was in violation of Article 129(2) of the Criminal Code and Article 3 of the Enhanced Punishments for the Specified Crimes Act.

B) The respondent had a breakfast meeting with Moon Byung-wook on November 9, 2002 at Ritz Carlton in Seoul, for which Lee Gwang-jaeacted as an agent. Immediately after the respondent left the breakfast meeting, Lee Gwang-jae received 100 million Korean Won

from Moon Byung-wook. This was in violation of Article 30 of the Political Fund Act (hereinafter referred to as the "Fund Act") and Article 32 of the Criminal Code.

C) The respondent violated Article 129 of the Criminal Code, Article 61 of the State Public Officials Act, and Article 30 of the Fund Act, in receiving two packages of money (presumed to be approximately 100 million Korean Won) from Moon Byung-wook at Kimhae Tourists Hotel on July 7, 2002 and forwarding it to his accompanying secretary Yeo Taek-soo.

2) Receiving illegal political fund concerning the presidential election camp

In Roh Moo-hyun's presidential election camp, Chung Dae-chul, the chief of the Joint Election Strategy Committee, received 900 million Korean Won, Lee Sang-soo, the General Affairs Director, received 700 million Korean Won, and Lee Jae-jung, the Campaign Headquarter Director, received 1 billion Korean Won, of illegal political fund, all of which was forwarded to Roh Moo-hyun's presidential election camp. The respondent's involvement in the above transactions was in violation of Article 30 of the Fund Act.

3) Involvement in the corruption of close associates

A) Corruption concerning Choi Do-sul

Choi Do-sul (i) embezzled 250 million Korean Won and delivered the funds to Sun Bong-sul, the CEO of the Jang-Soo-Cheon company, in May 2002, which were the remaining funds in the account belonging to the New Millennium Democratic Party Election Committee Busan Branch as the balance from the local elections, in order to pay the obligation owed by the respondent concerning the Jang-Soo-Cheon company; (ii) collected illegal funds in the amount of 500 million Korean Won and delivered such funds to Sun Bong-sul for the period of December 2002 to February 6, 2003, in order to pay the obligation owed to Jang-Soo-cheon; (iii) received illegal funds in the amount of 100 million Korean Won through an account under an assumed name for the period of March to April of 2002, in order to create funds for the presidential candidacy nomination of the respondent; (iv) received illegal funds in the amount of 296.5 million Korean Won from the Nexen Tire company and others after the presidential election; (v) received 47 million Korean Won from Samsung and others during his office as the General Affairs Secretary for the President; (vi) received negotiable certificates of deposits from the SK Group in the amount of approximately 1.1 billion Korean Won immediately after the presidential election. The above acts of Choi Do-sul were impossible without the respondent's direction or tacit permission. Therefore, such acts of the respondent were in violation of Article 61(1) of the State Public Officials Act, Article 30 of the Fund Act, Article 3 of the Act of Regulation and Punishment for the Concealment of Criminally Gained Profit, and Articles 31, 32, 129 and 356 of the Criminal Code.

B) Corruption concerning Ahn Hee-jung

(i) Between August 29, 2002 and February 2003, Kang Geum-won provided 1.9 billion Korean Won of illegal funds by way of a disguised sale and purchase of real estate owned by Lee Gi-myung; (ii) Ahn Hee-jung collected 790 million Korean Won of illegal funds from September through December of 2002 and delivered such funds to Sun Bong-sul and others; and (iii) Ahn Hee-jung received 50 million Korean Won of illegal funds at the time of the

presidential candidacy nomination process, 3 billion Korean Won of illegal funds from Samsung at the time of the presidential election, and 1 billion Korean Won of illegal funds between March and August of 2003. The respondent violated Article 2 of the Enhanced Punishments for the Specified Crimes Act, Article 61(1) of the State Public Officials Act, Article 30 of the Fund Act, and Articles 31 and 32 of the Criminal Code, as the respondent directed and abetted the above acts.

C) Corruption concerning Yeo Taek-soo

Yeo Taek-soo received 300 million Korean Won of illegal funds from the Lotte Group and provided 200 million Korean Won out of such funds for the formation of the Uri Party during his office as an administrative officer at Cheong Wa Dae. The respondent violated Article 61(1) of the State Public Officials Act, Article 30 of the Funds Act, and Articles 31, 32 and 129 of the Criminal Code, as the respondent was involved in such acts.

D) Corruption concerning Yang Gil-seung

Yang Gil-seung, who was the Chief of Personal Secretary Office for the President, was arrested in June of 2003 for allegedly having requested to suspend the investigation in return for a lavish entertainment at the expense of Lee Won-ho, who was then under investigation for an alleged tax evasion.

4) Public remarks as to the retirement from politics

The respondent publically made remarks at the party representative meeting at Cheong Wa Dae on December 14, 2003 that the respondent would retire from politics should the amount of illegal political funds on the part of the respondent exceed one-tenth of that of the Grand National Party. The respondent, however, ignored such public promise of political retirement although the result of the public prosecutors office's investigation indicates that the amount reached one seventh as of March 8, 2004. The respondent thereby violated Article 69 of the Constitution, Article 63 of the State Public Officials Act, and Article 30 of the Fund Act.

(C) Disruption of the National Administration

The respondent violated Articles 10 and 69 of the Constitution in disrupting the public and drowning the economy into a rupture, notwithstanding his constitutionally mandated obligation as the head of the state and the ultimately responsible party of the national administration to sincerely endeavor to protect the public's right to pursue happiness and to increase the public welfare by uniting the public and consolidating the whole capacity for the nation's development and economic growth, by failing to maintain integrity in the policy goals between growth and distribution, by increasing uncertainty at the industry from oscillating without clear policy directions regarding the right-obligation relationship of the labor and the management, by exacerbating economic instability from causing confusion and theoretical enmity among the policy administrators, by having unfaithfully performed his office in, for example, pouring all his authority and effort in for a particular political party's victory at the general election, and by irresponsibly and recklessly administering the national affairs in, for example, making a remark that "the presidency is too damn much trouble to do," proposing a confidence vote, and declaring his retirement from politics.

B. Subject Matter of Review

(1) The subject matters of review in the instant case are whether the President violated the constitution or statutes in performing his duties and whether the President should be removed from office by the issuance of the Constitutional Court's order as such.

(2) The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment except those stated in the impeachment resolution constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding.

However, with respect to the "determination on legal provisions," the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound thereby. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely to be determined by the Constitutional Court.

2. Summary of the Impeaching Petitioner's Argument and the Respondent's Answer

A. Summary of the Argument of the Impeaching Petitioner

(1) Not only an act of a public official in violation of the provisions of the Constitution or statutes in the performance of his or her official duties, but also immorality concerning the performance of the office or the political incapability and the error in political decision making, constitutes the grounds for impeachment. The grounds for impeachment are "all" acts in violation of the Constitution and statutes in the performance of his or her official duties and are not limited to only "grave" violations. Even if it is necessary to limit the grounds for impeachment to an "act of grave violation" in order to prevent abuse of the impeachment system, it is manifest that a violation of the constitutionally mandated obligation or an unfaithful performance of the official duties by the President, unlike other acts of violation, constitutes a grave violation of the Constitution or statutes.
Also, an act prior to inauguration as President may constitute a ground for impeachment.

(2) The authority to determine whether an act of the President in violation of the Constitution or statutes in the performance of his or her official duties is of such gravity to justify the removal from the office lies in the National Assembly directly constituted by the national constituents. The scope of the subject matter in the impeachment adjudication proceeding at the Constitutional Court is limited to the question of the constitutionality and legality of the impeachment procedures and to the question of whether or not the specific violations that allegedly constitute the grounds for impeachment in fact exist.

(3) The respondent, both prior to and following the inauguration as President, continuously and repeatedly made remarks that cast a doubt on his qualification as President and his will to preserve the basic order of free democracy and instigated the disintegration of the national opinions. Also, the respondent impeded the political neutrality and independence of the public

prosecutors' office by intervening into or pressuring the investigation process. The respondent continuously performed an illegal election campaign for a particular political party, upon which the constitutional institution of the National Election Commission determined, as unprecedented in the constitutional history for an incumbent president, that the respondent was in violation of the Public Officials Election Act, and the decision and the accompanying warning were announced to the respondent on March 3, 2004. Notwithstanding, ignoring such warning, the respondent has taken an anti-constitutional position directly denying the rule of law by declaring that he would also publicly support a particular political party in the future irrespective of the election law.

Also, the respondent violated various statutes such as Article 30 of the Political Funds Act (punishing the act of receiving illegal political funds), Articles 123 (abuse of office) and 129 (bribery) of the Criminal Code, in getting directly and indirectly involved with numerous incidents of receiving illegal funds and embezzlement by his close associates prior to and following his winning the presidential election. The respondent violated the Constitution and statutes such as Article 69 of the Constitution (obligation to abide by the Constitution), in suggesting, concerning certain corruption matters involving his close associates, a national referendum whether he should remain in office, which is not permitted under the Constitution, and, concerning illegal funds for the presidential election, in publicly declaring that he would retire from politics had such illegal funds been in excess of certain amount and then ignoring such promise.

Furthermore, although the respondent, as the president of a nation, should endeavor to unify the nation, to develop economy, and to promote public welfare, the respondent, abandoning such constitutionally mandated obligations, disintegrated the national opinions by making statements that instigated antagonism and jealousy among various classes in our society, exacerbated economic instability by uncertain policy goals between 'growth and distribution' and confusion among the policy administrators, and led the national economy and the people's livelihood into distress by causing economic stagnation and large-scale unemployment among the younger generation thus returning to the public agony and misery harsher than that during the IMF foreign-currency crisis, thereby violated Articles 10 (the obligation to protect the public's right to pursue happiness) and 69 (the obligation to faithfully perform the office in order to promote the public welfare) of the Constitution.

The National Assembly, as the above can no longer be tolerated, unavoidably, in order for the happiness of the public and the future of the nation, reached the resolution to impeach the President, which is the sole means under the current Constitution to directly hold responsible and check the President against misrulings in violation of the Constitution and statutes.

B. Summary of the Respondent's Answer

(1) On the Question of Legal Prerequisites

It is the abuse of the impeachment authority by the National Assembly that, in the instant case, the National Assembly hastily resolved to impeach the President while no sufficient grounds or evidence for impeachment existed, thereby suspending the authority of the President, and it attempts to inquire into the grounds and the evidence for impeachment through the adjudication procedure at the Constitutional Court.

The Grand National Party and the New Millennium Democratic Party threatened to oust party-member assemblypersons should they not participate in the impeachment resolution. The assemblypersons who participated in the resolution process did a public vote with no curtain hung at the voting booth, with certain assemblypersons showing their marked votes

to the whip of the party to which they belonged. Also, the Speaker of the National Assembly voted by proxy.

The Speaker of the National Assembly unilaterally changed the time when the general meeting would open from 2 o'clock in the afternoon to 10 o'clock in the morning, without consulting the representative member of the Uri Party, which is a negotiating party[3] of the National Assembly.

The Speaker of the National Assembly impeded the voting rights of the assemblypersons who were members of the Uri Party, by hastily declaring the closure of the vote upon completion of vote by the assemblypersons belonging to the Grand National Party, the New Millennium Democratic Party and the United Liberal Democrats, without cautiously assessing the circumstances regarding whether the assemblypersons belonging to the Uri Party would participate in voting.

The Speaker of the National Assembly impeded the right of assemblypersons to inquire and discuss in violation of Article 93 of the National Assembly Act, by foregoing the procedure of explaining the purpose but instead distributing the printed materials, and by forcing the vote without any procedure for inquiry and discussion, in the deliberation process for the impeachment motion.

The National Assembly violated the Constitution by impeding the right of assemblypersons to inquire and discuss, in passing the impeachment motion as a single measure by way of a single vote, without going through the procedures to inquire and discuss and to vote individually on each of the three stated grounds for impeachment, while the impeachment resolution in the instant case contains three distinct grounds for impeachment against the respondent.

The resolution on the impeachment is in violation of due process as the respondent was not provided with any notice or opportunity to state his opinion at the impeachment process in the National Assembly.

(2) On the Merit of the Case

The authority to impeach the President and the authority to adjudicate thereon should be exercised with utmost caution within the boundary of checks and balances under the principle of separation of powers. The "violation of the Constitution or statutes in performing official duties " provided in Article 65(1) of the Constitution is too vague to indicate which types of act of violation rendered in which method are subject to impeachment. Considering the systematic and practical dynamics surrounding the constitutional institutions and the fundamental order and the value ordained by the Constitution, the grounds for impeachment against the President should correctly be limited to "grave and apparent violation of the Constitution and statutes deemed to impede upon the constitutional values and the constitutional fundamental order."

The impeachment resolution in the instant case was reached by a National Assembly that has practically lost democratic legitimacy, with the termination of its term fast approaching, in pursuit of party interest and impulse beyond its authority delegated by the public; and was hastily processed even though there was no substantive ground that would justify impeachment, without careful investigation and deliberation, democratic discussion, or any process to persuade the public.

---

[3]Any political party having in the National Assembly a certain number (currently twenty or more) of members who belong to it should organize a negotiating party, and it is entitled to particular privileges and benefits according to law (translator's note).

With respect to the first alleged ground for impeachment entitled the "violation of the election law," the President is a public officer of a political nature who is permitted to be a member of a political party and Article 9 of the Public Officials Election Act cannot be applied to the President. Even if not, the statements at issue herein are not deemed to be in violation of the Public Officials Election Act.

With respect to the second alleged ground for impeachment entitled the "corruption of the respondent's close associates and aides," many of the alleged facts occurred prior to the respondent's inauguration as President, and the respondent was neither involved in the alleged corruption by, for example, directing or abetting such alleged acts, nor has the respondent's involvement been proven, therefore, such alleged acts under this count do not constitute a ground for impeachment.

With respect to the third alleged ground for impeachment entitled the "disruption of the national administration," the allegation is different from the fact, and, even if true, the political incapacity or the misjudgment in policymaking of the President does not constitute a ground for impeachment.

3. Review of the Legality of the National Assembly's Impeachment

A. National Assembly's Authority to Self-Regulate its Deliberation Proceedings

The National Assembly, as the representative of the public and as the legislative body, possesses vast authority to self-regulate its administration, including its deliberation process and internal regulation. This self-regulating authority should be respected in light of the doctrine of separation of powers and the status and the function of the National Assembly, as long as there is no clear violation of the Constitution or statutes in the deliberative or legislative process of the National Assembly. Therefore, it is not desirable for other state institutions to intervene and judge the legitimacy of a decision reached by the National Assembly upon matters that fall within the scope of its self-regulating authority, and no exception thereto applies to the Constitutional Court (*See* 10-2 KCCR 74, 83, 98Hun-Ra3, July 14, 1998).

Also, the Speaker of the National Assembly is, in principle, vested with the general and inclusive authority and responsibility concerning the deliberation process of the National Assembly, pursuant to Article 10 of the National Assembly Act. Therefore, in cases of disputes as to the deliberation process at the general meeting or where the normal deliberative process otherwise cannot apply, the method of deliberation and of resolution is to be determined by the Speaker of the National Assembly within the above authority endowed to the Speaker. Such authority of the Speaker to preside over the deliberation process is, widely interpreted, part of the self-regulating authority of the National Assembly, and should be respected as such unless exercised in a way clearly beyond its limit. As a principle, such authority may not be impeded upon by the Constitutional Court (*See* 12-1 KCCR 115, 128, 99Hun-Ra1, February 24, 2000).

B. On the argument that the proceedings at the National Assembly lacked sufficient investigation and deliberation

The respondent argues that in order for the National Assembly to petition for the impeachment of the President, the National Assembly must sufficiently investigate the grounds for impeachment and the evidence thereto, to the extent that the Constitutional Court in its impeachment adjudication can readily determine the validity of the alleged grounds for

impeachment. It is desirable, as a matter of course, that the National Assembly thoroughly investigate the stated grounds for impeachment prior to its reaching a resolution to impeach. However, Article 130(1) of the National Assembly Act provides that, "upon proposal for the impeachment resolution, ... the National Assembly may, by resolution at the plenary session, assign the matter to the Legislation and Judiciary Committee for investigation," thus subjects the investigation to the discretion of the National Assembly. Therefore, even if the National Assembly did not perform a separate investigation in the instant case, this was not in violation of the Constitution or statutes.

C. On the arguments of the forced voting, the non-secret vote, and the proxy vote for the Speaker of the National Assembly

(1) Even if the Grand National Party and the New Millennium Democratic Party publicly declared that they "will oust from the party those assemblypersons who will not participate in the vote for the impeachment measure," this cannot be deemed as pressure or threat substantively preventing the assemblypersons from exercising their voting right pursuant to their conscience (Article 46(2) of the Constitution, and Article 114-2 of the National Assembly Act) beyond the boundaries of the party control permissible under today's party democracy.

(2) Even if it was true that the screen at the voting booth was not pulled down at the time of voting or certain assemblypersons disclosed the content of their votes to the party whip of their respective party membership, the question of the effect of such on the validity of the voting at the National Assembly is a matter for which the decision of the National Assembly, with its self-regulating authority regarding the deliberation process, should be respected. The Speaker of the National Assembly confirmed the validity of the votes, thereby, declaring the passing of the impeachment resolution, and there is no clear basis or materials indicating a patent violation of the Constitution or statutes. Therefore, the Constitutional Court may not deny the effect of the votes on or the passing of the impeachment resolution, solely on these alleged facts.

(3) With respect to the argument that the Speaker of the National Assembly voted by proxy, voting by proxy means that "someone does not mark the vote and, instead, has a third party mark the vote on his or her behalf." The acknowledged facts here merely indicate that the Speaker of the National Assembly, pursuant to the custom within the National Assembly, marked the vote himself from the seat reserved for the Speaker, folded the voting paper to secure the content of the vote from disclosure to others, and forwarded such voting paper to an officer so that the officer put the vote into the ballot box. Therefore, there was no vote by proxy.

D. On the argument that the opening time for the National Assembly general meeting was arbitrarily changed

The National Assembly Act, with respect to the opening time for its meetings and sessions, provides in Article 72 that the "meeting of the plenary session shall be opened at two o'clock p.m. (on Saturday, at ten o'clock a.m.): provided, That the Speaker may change the opening time after consulting with the representative assemblyperson of each negotiating party," thereby providing that a change of the opening time shall be subject to the consultation with the representing assemblyperson of each negotiation party.

The "consultation" here may occur in various forms, by its nature, as the process for exchanging and receiving opinions, and the Speaker of the National Assembly makes the final judgment and decision upon matters regarding such consultation. In the instant case, considering that a normal deliberation process pursuant to the National Assembly Act was hardly anticipated due to the continuous occupation of the floor for the general meeting by the assemblypersons of the Uri Party notwithstanding the fact that the impeachment motion was to be discarded past March 12, 2004 for the expiration of the time limit, and further considering that the prevailing majority of the assemblypersons, including the assemblypersons of the Uri Party, were present at the designated venue when the general meeting at issue was opened at approximately 11:22 on March 12, 2004, the mere fact that the Representative Assemblyperson of the Uri Party and the Speaker of the National Assembly did not directly discuss the opening time cannot, by itself, be deemed as a violation of Article 72 of the National Assembly Act or as an infringement on the right of assemblypersons of the Uri Party membership to examine and vote.

E. On the argument that the voting was unilaterally declared to be closed

The respondent alleges that the Speaker of the National Assembly unilaterally declared that the voting was closed disregarding whether or not the assemblypersons of the Uri Party would intend to participate in voting. However, the minutes of the National Assembly general meeting for March 12, 2004 indicate that the Speaker, at that time, urged two or three times those who had not yet voted to participate in voting and declared that the voting would be closed should there be no more votes. It cannot be, then, deemed that the Speaker of the National Assembly obstructed the Uri Party assemblypersons from exercising their voting rights by unilaterally closing the voting.

F. On the argument that the inquiry and discussion process was lacking

The respondent argues that the forcefully performed voting with a mere distribution of the printed materials instead of the explanation of the purpose by the assemblyperson who proposed the impeachment motion, without any inquiry or discussion process, in violation of Article 93 of the National Assembly Act, impeded the assemblypersons' right to inquire and discuss.

Article 93 of the National Assembly Act provides that, "with respect to such subject matters which have not been examined by a committee, the proponent of such matter should explain its purpose." The above minutes of the National Assembly general meeting indicate that, in the deliberation process for the impeachment motion in the instant case, a "document" was substituted for the proponent's explanation of the purpose. There is no legal ground to deem this method as inappropriate.

Next, on the argument that the inquiry and discussion process was lacking, as Article 93 of the National Assembly Act provides that the "general meeting, in deliberating the subject matters before it, shall vote upon inquiry and discussion," it would have been desirable, in light of the significance of the impeachment, if the National Assembly had rendered sufficient inquiry and discussion within the National Assembly. However, with respect to the proposed impeachment motion not sent to the Legislation and Judiciary Committee, Article130 (2) of the National Assembly Act stipulating that "a secret vote shall be taken to determine whether to pass an impeachment motion between 24 and 72 hours after the motion is reported to the plenary session" can be deemed as a special provision concerning the impeachment procedure and may be interpreted to mean that the "impeachment motion may be put to a vote without

inquiry and discussion." With the self-regulating authority and the legal interpretation of the National Assembly to be respected, such interpretation of the law cannot be deemed as arbitrary or incorrect.

G. On the argument that each ground for impeachment was not separately voted on

In voting to decide whether to pass an impeachment resolution, it would be desirable to vote on each of the stated grounds for impeachment separately, in order to appropriately protect the right to vote of the assemblypersons. However, the National Assembly Act does not contain any express provision regarding such and merely provides in Article 110 that the Speaker of the National Assembly should declare the title of the subject matter that is to be voted on. Pursuant to the above provision, the scope of the subject matter to be voted on varies depending upon how the title of the subject matter is determined. Thus, whether or not more than one ground for impeachment may be voted on as a single matter is, basically, up to the Speaker of the National Assembly who has the authority to determine the title of the subject matter that is to be voted on. Therefore, the argument raised by the respondent in this regard lacks merit.

H. On the argument that the principle of due process was violated

The respondent argues that the impeachment resolution in the instant case was in violation of the principle of due process since the respondent had not been officially notified of the facts allegedly constituting the grounds for impeachment nor had the respondent been provided with an opportunity to state his own opinions.

The principle of due process here, as the respondent argues, is the legal principle that before the state authority makes a decision prejudicing its citizen, such citizen should be provided with an opportunity to state his or her own opinions, and should thereby be able to affect the progress of the procedure and the result thereof. The citizen is not a mere object of the state authority but the subject of the process and only when a citizen may state his or her own opinions prior to a decision concerning his or her own right can an objective and fair procedure be guaranteed and the equality of status in the procedure between the parties realized.

In the instant case, however, the impeachment procedures at the National Assembly concern the relationship between two constitutional institutions, the National Assembly and the President, and the impeachment resolution by the National Assembly merely suspends the exercise of the authority vested in the President as a state institution and does not infringe the basic rights of the President as a private individual. Therefore, the due process principle that has been formed as a legal principle applicable in the exercise of the governmental power by the state institution in its relationship with its citizens shall not be directly applicable in the impeachment proceeding that is designed to protect the Constitution against a state institution. Furthermore, there is no express provision of law concerning the impeachment proceeding that requires an opportunity to be heard for the respondent. Therefore, the argument that the impeachment proceeding at the National Assembly was in violation of the due process principle is groundless.

4. Nature of the impeachment adjudication procedure in Article 65 of the Constitution and the grounds for impeachment

A. The impeachment adjudication procedure is a system designed to protect and maintain the Constitution from infringement by high-ranking public officials of the executive and judicial branches.

Article 65 of the Constitution provides for the possibility of impeachment of high-ranking public officials of the executive branch and the judiciary for violation of the Constitution or statutes. It thereby functions as a warning to such public officials not to violate the Constitution and thus also prevents such violations. Further, where certain public officials are delegated with state authority by the citizenry but abuse such authority to violate the Constitution or statutes, the impeachment process functions to deprive them of such authority. That is, reinforcing the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties is the purpose and the function of the impeachment adjudication process.

Article 65 of the Constitution includes the President in the definition of public officials who are subject to impeachment, memorializing a discerned position that even the President elected by the public and thereby directly endowed with democratic legitimacy may be impeached in order for the preservation of the constitutional order and that the considerable political chaos that may be caused by a decision to remove the President from office should be deemed as an inevitable cost of democracy in order for the national community to protect the basic order of free democracy. The system subjecting the President to the possibility of impeachment, thus realizes the principle of the rule of law or a state governed by law that every person is under the law and no possessor of the state power, however mighty, is above the law.

Our Constitution, in order to fulfill the function of the impeachment adjudication process as a process dedicated to the preservation of the Constitution, expressly provides in Article 65 that the ground for impeachment shall be a "violation of the Constitution or statutes" and mandates the Constitutional Court to take charge of the impeachment adjudication, thereby indicating that the purpose of the impeachment system lies in the removal of the President "not for political grounds but for violations of law."

B. The Constitution, in Article 65(1), provides for the grounds of impeachment that "the National Assembly may resolve to impeach the President, ... upon violation of the Constitution or statutes by the President, ... in performing official duties."

(1) All state institutions are bound by the Constitution. Especially, the legislator should abide by the Constitution in the legislative process and the executive branch and the judicial branch are bound by the Constitution in exercising the state authority vested by and under the Constitution. Article 65 of the Constitution reemphasizes that the state institutions of the executive and the judicial branches are bound by the Constitution and statutes, and, on this very ground, sets forth the grounds for impeachment to be the violation of the Constitution and statutes, not limiting the grounds merely to the violation of the Constitution. The question of whether the executive branch and the judicial branch abide by the statutes formed by the legislative branch is directly related to the question of their compliance with the doctrine of separation of powers and the principle of the rule of law under the Constitution. Therefore, observance of the statutes by the executive and the judicial branches means, in turn, their compliance with the constitutional order.

(2) An analysis of the specific grounds for impeachment set forth in Article 65 of the Constitution here reveals that the "official duties" as provided in "exercising the official

duties" mean the duties that are inherent in particular governmental offices as provided by law and also other duties related thereto as commonly understood. Therefore, acts in exercising official duties mean any and all acts or activities necessary for or concomitant with the nature of a specific public office under the relevant statutes, orders, regulations, or administrative customs and practices. Thus, the act of the President in exercising official duties is a concept not only including an act based on pertinent statutes, orders, or regulations, but also encompassing any act performed by the President in his or her office as President with respect to the implementation of state affairs, and includes any such acts, for example, visiting various organizations and industrial sites, participating in various events such as a dedication ceremony and an official dinner, appearing through the broadcasting media to explain government policies in order to seek the public understanding thereof and to efficiently implement national policies, and agreeing to hold après conference.

The Constitution sets forth the grounds for impeachment as a "violation of the Constitution or statutes." The "Constitution" here includes the unwritten constitution formed and established by the precedents of the Constitutional Court as well as the express constitutional provisions; the 'statutes' include not only the statutes in their formal meaning, but also, for example, international treaties that are provided with the same force as statutes, and the international law that is generally approved.

5. Whether the respondent violated the Constitution or statutes in exercising his official duties

Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the respondent from office should the grounds for the impeachment petition be valid." Therefore, in order to determine whether to issue a decision to remove the President from office, an examination should precede upon the existence of the grounds for impeachment set forth in the Constitution, i.e., whether the "President violated the Constitution or statutes in the performance of his official duties." In the immediately following paragraphs, we will examine each of the grounds for impeachment stated in the impeachment resolution of the National Assembly under the respective categories.

A. Act of supporting a particular political party at a press conference (the statements at the press conference with six of the Seoul-Incheon area news media organizations on February 18, 2004, and as an invited guest at the press conference with the Korean Network Reporters Club on February 24, 2004)

Pursuant to the acknowledged facts, the President stated, at a press conference on February 18, 2004 with six of the Seoul-Incheon area news media organizations, that "... I simply cannot utter what will follow should the quorum to resist the constitution revision be destroyed"; and, at a press conference with the Korean Network Reporters Club, as an invited guest, which was broadcasted nationwide on February 24, 2004, in response to a question posed by a reporter concerning the upcoming general election that how the respondent would run the political affairs if the Uri Party would remain as a minority party unlike the anticipation of Chung Dong-young, the Chairman of the Uri Party, projecting about 100 seats as a goal, the respondent stated that "I expect that the public will overwhelmingly support the Uri Party," "I would like to do anything that is legal if it may lead to the votes for the Uri Party," and "when they elected Roh Moo-hyun as the President, the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down."

On the other hand, no arbitrary amendment to the impeachment resolution by the impeaching party in order to add new facts not stated in the original resolution is permitted in the impeachment adjudication proceeding. The statement of the President made on March 11, 2004 that "connected the general election to the matter of confidence of the President" is a fact not included in the original impeachment resolution of the National Assembly and merely stated in the impeaching party's brief submitted to the Court as an additional ground for impeachment subsequent to the National Assembly's resolution of impeachment and, as such, the Court does not examine such additionally stated ground.

(1) Obligation of a public official to maintain political neutrality concerning elections

The political neutrality obligation concerning elections owed by public officials is a constitutional request drawn from the status of public officials set forth in Section 1, Article 7, of the Constitution; the principle of free election set forth in Section 1, Article 41, and Section 1, Article 67, of the Constitution; and the equal opportunity among the political parties guaranteed by Section 1, Article 116 of the Constitution.

(A) Article 7(1) of the Constitution provides that "all public officials shall be servants of the entire people and shall be responsible to the people," thereby setting forth that the public officials shall perform their official duties for the welfare of the public as a whole and should not serve the interest of a particular political party or organization. The status and the responsibility of the state institutions as the servant for the entire citizenry is, in the area of election, realized in concrete terms as the "obligation of the state institutions to maintain neutrality concerning elections." The state institutions should serve the entire population, therefore, should act neutrally in the competition among the political parties or political factions. Thus, Article 7(1) of the Constitution mandates that no state institution should exercise influence in the free competition among political factions by identifying itself with a particular political party or a candidate or taking sides with a particular political party or a candidate in electoral campaigns by use of the influence and authority vested in the office.

(B) Articles 41(1) and 67(1) of the Constitution provide for the principles applicable to the general election for members of the National Assembly and the presidential election, respectively. Although such provisions do not expressly mention the principle of free election, in order for any election to properly represent the political will of the public, the voters should be able to form and decide their own opinions through a free and open process without undue extraneous influence. Therefore, the principle of free election is part of the fundamental principles of election as a basic premise to provide legitimacy for the state institutions constituted by and through an election.

The principle of free election not only means that the voters should be able to vote without forceful or undue influence from the state or the society, but also that the voters should be able to make their own judgment and decisions in a free and open process to form their own opinions. The principle of free election, in turn, in the context of state institutions, means the "obligation of public officials to maintain neutrality," that is, the prohibition against the state institutions from supporting or opposing any particular political party or candidate by identifying themselves with such particular political party or candidate.

(C) The obligation of public officials to maintain neutrality concerning elections is mandated by the Constitution also from the standpoint of equal opportunity among the

political parties. The principle of equal opportunity among the political parties is a constitutional principle derived from the interrelationship of Article 8(1) of the Constitution that guarantees the freedom to form a political party and the multi-party system and Article 11 of the Constitution that sets forth the principle of equality. Particularly, Article 116(1) of the Constitution provides that "an equal opportunity should be guaranteed ... in the electoral campaign," thereby specifying the "principle of equal opportunity among the political parties" concerning the political campaign. The principle of equal opportunity among the political parties requires state institutions to act neutrally in the competition among political parties at the elections, thus prohibiting the state institutions from either favoring or prejudicing any particular political party or candidate in the electoral campaign.

(2) Whether the respondent violated Article 9 of the Public Officials Election Act (neutrality obligation of a public official)

Article 9 of the Public Officials Election Act provides that "no public official or no one obligated to maintain political neutrality should act in a way unduly influencing the election or otherwise affecting the outcome of the election," and thereby provides for the "obligation of public officials to maintain neutrality concerning elections."

(A) Whether the President is a "public official " within the meaning of Article 9 of the Public Officials Election Act

The issue here is whether the officials at certain political offices such as the President fall within the definition of a "public official or anyone obligated to maintain political neutrality" of Article 9 of the Public Officials Election Act.

1) Article 9 of the Public Officials Election Act is a statutory provision that specifies and realizes the constitutionally requested "obligation of public officials to maintain neutrality concerning elections," derived from Article 7(1) (status of a public official as a servant for the public as a whole), Article 41, Article 67 (principle of free election) and Article 116 (principle of equal opportunity among the political parties) of the Constitution. Therefore, the "public official" within the meaning of Article 9 of the Public Officials Election Act means any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more particularly, any or all public officials who are in a position to threaten the "principle of free election" and "equal opportunity among the political parties at the election." Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising through exercise of their official duties, public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities (for example, the President, the Prime Minister, the ministers of the administration, and the chief executive officer at various levels of local government such as the governor, the mayor, and the county magistrate).

The possibility of affecting the public's open opinion formulation process and distorting the political parties' competitive relationship through the function and influence of the official duties is particularly greater for the executive institutions at the national or local governments. Therefore, political neutrality concerning elections is even more greatly requested than other public officials for the President and the chief executive officers at the local governments.

2) Obligating public officials to maintain neutrality concerning elections in Article 9 of the Public Officials Election Act is a mere specification of the constitutional request of the principle of free election, the principle of equal opportunity among the political parties, and the "obligation of public officials to maintain neutrality concerning elections" derived from Article 7(1) of the Constitution, made applicable to public officials in the area of election law. Thus, such provision is constitutional as long as it is interpreted to exclude the members of the National Assembly and the members of the local legislatures from whom political neutrality concerning elections cannot be requested.

The members of the National Assembly and the members of the local legislatures are not "public officials " within the meaning of Article 9 of the Public Officials Election Act, due to their status as political party representatives and as active figures at the electoral campaign. The state institutions bear the obligation to maintain neutrality concerning elections, in order to provide a "forum for free competition " where the political parties can compete fairly at the election. In such "free competition among the political parties" guaranteed by the state's neutrality obligation, the members of the National Assembly play an active role at the electoral campaigns as the representatives of their respective political parties. That is, whereas the state institutions administrate the election and should not affect the election as the institutions that are mandated to guarantee a fair election, the political parties, on the other hand, are premised on the mission to affect the election.

3) Also, a systematic analysis of the meaning of "public officials" in Article 9 of the Public Officials Election Act in its interrelationship with other provisions of the Public Officials Election Act or with other statutes mandates an interpretation that the concept of "public officials" in the Public Officials Election Act includes all public officials at political offices with the exception of the members of the National Assembly and of the local legislatures. For example, the Public Officials Election Act uses "public officials" as a general term to include public officials at political offices in its Article 60(1)(iv) that prohibits, in principle, the political campaign of public officials and also in Article 86(1) that prohibits the acts of public officials influencing the election. Furthermore, in such other statutes as the State Public Officials Act (in Article 2 and other provisions) and the Political Party Act (in Article 6 and other provisions), the term 'public official' is used inclusive of public officials at political offices.

4) Therefore, political neutrality concerning elections is a basic obligation of all public officials of the executive branch and the judiciary. Furthermore, since the President bears the obligation to oversee and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a "public official" within the meaning of Article 9 of the Public Officials Election Act.

(B) The President as a "constitutional institution of a political nature' and the 'obligation to maintain neutrality concerning elections"

The fact that the President is a "constitutional institution of a political nature" is a distinct matter and should thus be distinguished from the question of whether the President bears the "obligation to maintain political neutrality concerning elections. "

The President, in ordinary circumstances, is elected through the electoral campaign endorsed and supported by a political party, as a party member. Therefore, the President generally maintains party membership after being elected as the President and also retains an affiliation with such particular political party. Current law also provides that the President

may maintain party membership (Article 6(1) of the Political Party Act) and thus permits party activities, unlike in the case of other career public officials who are not allowed to be a member of a political party.

However, the President is not an institution that implements the policies of the ruling party, but instead, the President is the constitutional institution that is obligated to serve and realize the public interest as the head of the executive branch. The President is not the President merely for part of the population or a certain particular political faction that supported him or her at the past election, but he or she is the President of the entire community organized as the state and is the President for the entire constituents. The President is obligated to unify the social community by serving the entire population beyond that segment of the population supporting him or her. The status of the President as the servant of the entire public is specified, in the context of election, as the status of ultimately overseeing a fair election, and the Public Officials Election Act therefore prohibits a political campaign by the President (Article 60(1)(iv) of the Public Officials Election Act).

Therefore, neither the fact that the President is a public official of a political nature who is elected through nomination and support by a political party nor the fact that certain political and party activities of the President are permitted can serve as a valid ground for denying the obligation owed by the President to maintain political neutrality concerning elections.

(C) The President's "obligation of political neutrality " concerning elections and "freedom to express political opinions"

Every person in public office is obligated to maintain political neutrality concerning elections; on the other hand, at the same time such person is a citizen of the state and is subject of basic rights who may assert his or her own basic rights against the state. Likewise, in the case of the presidency, the status of the President as a private citizen who may perform party activities for the party of his of her membership and the status of the President as a constitutional institution bearing the obligation to serve the entire population and the public welfare should be distinguished as two distinct concepts.

The mandate that the President should maintain political neutrality concerning elections does not require no political activities or indifference to party politics on the part of the President. Unlike other public officials who are prevented from any party activities, the President, as a member or an officer of a political party, may not only be involved with the internal decision making process of the party and perform ordinary party activities, but also may participate in the party convention to express his or her political opinions and express support for the party of his or her membership. However, at the same time, even when the President exercises his or her freedom of expression as a political figure, the President should restrain and limit himself or herself in light of the significance of the office of the presidency and the potential reflections of his or her remarks and acts, and should not make an impression towards the public that the President may no more fairly exercise presidential duties due to his or her political activities outside the presidential duties. Furthermore, since the ultimate noticeability of the President obscures the President's "exercise of basic rights as a private citizen" and "activity within the boundary of the presidential duties," the President, even in the case where the President is exercising the freedom of speech as a private citizen and performing party activities, should do so in a way appropriate to a harmonious implementation of the presidency and the maintenance of the functions thereof, that is, in accordance with the request of Article 7(1) of the Constitution that the President should serve the entire public.

Therefore, the President should, in principle, restrain himself or herself from expressing his or her personal opinions towards party politics when exercising duties as the head of the state or the chief executive officer. Furthermore, when the President makes statements concerning elections as the state institution of president and not as a party member or as a mere political figure, the President is bound by the obligation to maintain political neutrality concerning elections.

(D) Violation of Article 9 of the Public Officials Election Act

Article 9 of the Public Officials Election Act provides that "no public official shall exercise undue influence upon the election or otherwise affect the outcome of the election," thereby setting forth acts to be prohibited in order to realize the obligation of public officials to maintain neutrality concerning elections. Specifically, Article 9 of the Public Official Act provides the "act affecting the outcome of the election" as the violation of the neutrality obligation, and mentions the 'exercise of undue influence upon the election' as a typical example therefor.

Therefore, the question of whether the President violated the neutrality obligation concerning elections depends upon whether the President 'exercised undue influence upon the election,' and should a public servant affect the election by taking advantage of the political weight and influence vested in the official duties in a way not appropriate for the mission to serve and be held responsible for the entire public or residents, such is beyond the boundaries of political activities permitted for a public official at the election, thus constituting an act of exercising undue influence upon the election.

Thus, if a public official is acting in the status of a public servant and taking advantage of the influence vested in the public duties, undue influence upon the election is found to be exercised, thus constituting a violation of the neutrality obligation concerning elections.

(E) Whether the statements of the President violated the neutrality obligation owed by public officials

Whether the statements of the President violated Article 9 of the Public Officials Election Act depends upon the judgment as to "whether the President affected the election through his statements by taking advantage of the political weight and influence of the public office of presidency in a way that was not appropriate for his status to serve the entire national public" in light of the specific contents of the statements, their timing and frequency, and the specific circumstance thereof.

1) The statements of the President at issue herein should be deemed to have been made in the president's status as a public servant and in implementing the official duties of the President or in relation thereto. The President held the above press conferences not as a private citizen or a mere political figure, but as the President, and the President, in such course, made the statements supporting a particular political party by taking advantage of the political weight and influence vested in his status as the President. Therefore, the statements made by the President at the above press conferences constitute an act "in the performance of his official duties " within the meaning of Article 65(1) of the Constitution.

2) In the case of the general election to constitute the National Assembly, general parliamentary activities of the individual assemblypersons, the political parties, and the negotiating parties during the four-year term function as an important and meaningful

indicator for the voters to form their judgment at the next election. Especially during the period designated for the electoral campaign under the Public Officials Election Act, the political parties, the negotiating parties and the individual candidates are involved in a feverous competition in order to obtain the trust and a vote from the voters in every possible legitimate way, by presenting their policies and political designs and criticizing the policies of the opposing parties or candidates in competition.

Here, if the President makes a statement unilaterally supporting a particular political party and influences the process by which the public forms its opinions, the President thereby intervenes and distorts the process of the independent formation of the public's opinions based on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by half the meaning of the political activities continuously done by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. An electoral campaign in a democratic country is a free and open competition for multiple parties and candidates, with a goal to obtain political power, to seek a vote, by emphasizing their political activities and achievements during the past and by convincing the voters of the legitimacy of the policy they pursue. Such free competition relationship among the political parties to obtain the votes through the voters' judgment upon the policies and political activities is significantly perverted by one-sided intervention of the President supporting a particular party.

The relevant part of the President's statements at issue repeatedly and actively expressed his support for a particular political party in the course of performing his official duties and further directly appealed to the public for the support of that particular political party. Therefore, the President's taking advantage of his political weight and influence vested in his public office through the above statements favoring a particular political party, by way of identifying himself with such political party, was an exercise of undue influence in a way not appropriate for his responsibility as a servant for the entire public by the use of his status as a state institution. The President thereby violated his obligation to maintain neutrality concerning elections.

3) The judgment upon whether there was undue influence on the election may also vary depending upon the timing certain statements supporting a particular party were made. Should a statement as such be made at a time where there is no temporally intimate relation to an election, there is only a remote or limited possibility for such statements to affect the outcome of the election. However, as the election approaches, the possibility for the President's statement supporting a particular political party to affect the outcome of the election increases, therefore the President bears during such time period, as a state institution, an obligation to restrain, as much as possible, any and all acts that may unfairly influence the election.

Although it is not possible to clearly discern when an one-sided act of the state institution begins to particularly affect the election, the statements by the President at issue herein were made on February 18, 2004 and February 24, 2004, with approximately two months remaining before the general election for the National Assembly on April 15, 2004. Thus, at that time, there existed a temporal intimacy between the statements and the election as the preparation for the electoral campaign had practically begun and the probability of the act of a state institution to influence the election was relatively high, and there was an increased demand for the political neutrality of state institutions at least during that period of time.

4) The President, then, violated the obligation to maintain neutrality concerning elections, by making the statements at the press conferences toward the entire public in support of a particular political party by taking advantage of the political weight and influence of the presidency, when the political neutrality of public official was highly demanded more than ever due to the temporal proximity to the election, while the President is ultimately responsible to oversee a fair administration of election, since such statements constituted acts performed using the respondent's status as the President unduly influencing the election and thereby affecting the outcome of the election.

(3) Whether the respondent violated Article 60 of the Public Officials Election Act (prohibition of electoral campaign by public official)

(A) Definition of electoral campaign

Article 58(1) of the Public Officials Election Act defines the term "electoral campaign" as an "activity for winning an election or for having another person be or not be elected." The Public Officials Election Act, in a proviso in the same provision, lists certain "acts not deemed to constitute electoral campaign," which are: mere expression of opinion toward election, preparatory activity to register as a candidate and for electoral campaign, mere expression of opinion in agreement or disagreement toward the parties' recommendation of the candidates, and ordinary party activities.

Pursuant to the precedents of the Constitutional Court, the "electoral campaign" under Article 58(1) of the Public Officials Election Act is any and all active and premeditated deeds for a specific candidate's winning the election and obtaining the votes therefore, or any and all active and premeditated deeds to have a specific candidate lose the election, among which there is an objective intent to win or to have win or lose the election (6-2 KCCR 15, 33, 93Hun-Ka4, July 29, 1994; 13-2 KCCR 263, 274, 2000Hun-Ma121, August 30, 2001).

The important standard in determining whether a specific act falls within the definition of electoral campaign is the existence of the required "intent," whereas other nature of "activeness" or "premeditatedness" is a secondary element that contributes to an objective finding and analyzing of the required "intent" of the electoral campaign. Since the "purposeful intent" of the actor is a highly subjective element and it is difficult to discern such element, such element may be found to a certain extent of objectivity through other "subjective elements that can be objectified" in relative terms of the "activeness" of the deed or the "premeditatedness" thereof.

(B) Whether the statements of the President constituted electoral campaign

1) Article 58(1) of the Public Officials Election Act makes it a prerequisite for the electoral campaign "whether or not a candidate can be specified," by adopting the standard of "being elected" in defining the concept of "electoral campaign." Therefore, the concept of electoral campaign is premised upon that it should be an activity to have win or lose a "specific" or at least "discernible" candidate. Although a statement supporting a specific political party may satisfy the definition of electoral campaign since an activity intended to obtain votes for a specific political party inevitably means an activity intended to have the candidate nominated by that party in a certain district, even in such circumstances, a candidate intended to have win through such statement must be discernible.

When the statements at issue in this case were made on February 18, 2004 and February 24, 2004, the party-endorsed candidates had not yet been determined. Therefore, the statement

supporting a particular political party when the party-endorsed candidates were not specified did not constitute an electoral campaign.

2) Also, whereas an activity requires a "purposeful intent" to have a certain candidate win or lose an election in order for such activity to constitute an electoral campaign, there was no such purposeful intent in the statements at issue in the instant case.

A) In order for an election to properly represent the political will of the public, the voters should be able to make their decisions in a free and open process to form their own opinions. At the same time, the voters may make truly free decisions as voters only when they are aware of which candidates advocate and intend to implement the policies they support and are correctly informed of the candidates and the policy directions among which they can choose. Therefore, in terms of the public's right to know, it is required, as the election approaches, to provide certain information that may form the basis of the voters' decision or the information as to the parties and the candidates, through various means such as press conferences.

Therefore, strictly including all of the statements at a press conference in the definition of the electoral campaign would excessively limit the freedom of expression of a political figure. Especially, when the current Public Officials Election Act permits electoral campaigns only during a short period designated for such, and even additionally limits the electoral campaigns in various terms such as their subjects and means, defining the term "electoral campaign" too loosely might mean an even further shrinking of the scope of freedom of political activities given to the public.

Then, a statement at a press conference does not, in itself, constitute an electoral campaign and likewise is not, in itself, excluded from the activities constituting an electoral campaign. Rather, more than anything else, whether a "purposeful intent of a considerable degree to perform an electoral campaign by taking advantage of such opportunities as press conferences can be found" should be determined on a case-by-case basis, considering the totality of the specific aspects of the activity, such as the timing of the statement, its content, venue, and context. Here, the activeness and the premeditatedness of the statement operates as an important standard in perceiving "purposeful intent."

B) In the instant case, although the statements at issue were made in a close temporal proximity to the approaching general election of April 15, 2004, such statements, in terms of the content and the specific circumstance of the statements, were made in the form of a response to the question posed by the reporters at the press conferences, thus in a passive and unintentional way. Considering this, no element of activeness or premeditatedness towards an electoral campaign is found in the statements of the President. Therefore, such statements lacked any purposeful intent of a considerable degree sufficient to constitute an electoral campaign.

3) Therefore, although the statements of the respondent pleaded to the public for their support of the Uri Party, such statements cannot be deemed as an act of an active and intentional electoral campaign to have specific or discernible candidates win or lose the election. Thus, the respondent's act in relevant part did not violate Article 60(1) of the Public Officials Election Act or its punishment provision of Article 255(1) of the Act.

(4) Whether the respondent violated Articles 85(1) or 86(1) of the Public Officials Election Act

Article 85(1) of the Public Officials Election Act prohibits public officials from conducting electoral campaigns using their status as such, and deems electoral campaigns by public officials toward other officers of the same public office or the employees and officers of a particular institution or business as an electoral campaign by way of his or her status as a public official.

However, as discussed above, the statements of the respondent at issue herein do not constitute electoral campaign activities, and therefore such statements did not violate Article 85(1) of the Public Officials Election Act without further reviewing the same.

Article 86(1) of the Public Officials Election Act prohibits various election-related activities of a public official. First, Subdivision (i) prohibits an act publicizing the achievements of a specific party or a candidate towards other officers of the same public office or the constituents within the election district. The respondent's statements do not contain any that publicized the achievements of the Uri Party, thus Subdivision (i) does not apply herein. Next, Subdivisions (ii) through (vii) are clearly inapplicable to the respondent's statements in terms of the constituting elements in themselves. Therefore, there was no violation of Article 86(1) of the Public Officials Election Act.

B. Other remarks concerning the general election

(1) Remark at the Remember 1219 event on December 19, 2003

Pursuant to the acknowledged facts, the President on December 19, 2003, participated in the event entitled "Remember 1219" hosted by the reform netizen front such as the Roh-Sa-Mo,[4] and stated that "your revolution is yet to be concluded," "The citizen revolution is still going on at this very moment," and that "my dear respected members of Roh-Sa-Mo, and citizens, let's step forward once again."

The above statements were made at an event to celebrate the one-year anniversary of President Roh's election as the President, while invited to the event. It was hosted by certain associations that supported President Roh at the election such as Roh-Sa-Mo. Reviewed in the whole context, the above statements were to plead for participation in election reform ("fair election where money is not required") or political reform, or simply to "generally ask for the support of the President himself," and, as such, can hardly be deemed as statements seeking the support for a particular political party concerning the election or inciting illegal an electoral campaign by the citizen organizations. Therefore, the above statements of the President were not beyond the boundaries of permissible expression of opinions toward politics and did not constitute a violation of the political neutrality obligation concerning elections or an electoral campaign activity prior to the permitted time period. Also, such statements did not constitute a violation for any other statutes.

However, such an one-sided act of the President toward a specific citizen organization might well cause a division between the groups of citizens supporting the President and the groups of citizens not supporting the President and, thereby, does not conform to the obligation of the President to unify the national community as the President of the entire public, which might lead to the public's distrust against the administration as a whole.

---

[4] *See* above note 2 (translator's note).

(2) Remark at the luncheon with former presidential aides on December 24, 2003 at Cheong Wa Dae

Pursuant to the acknowledged facts, the President on December 24, 2003, at a luncheon at Cheong Wa Dae with nine others including his former presidential aides who had resigned in order to run for the general election, stated that "the next year's general election will have a polarized structure between the Grand National Party and the President with the Uri Party on the other side," and that "a vote for the New Millennium Democratic Party at next year's election will be conceived as support for the Grand National Party."

In this case of a luncheon at Cheong Wa Dae hosted by the President and the first lady for the former Cheong Wa Dae aides and the administrative officers, the nature of the meeting was private rather than one hosted by the President in his official status as the President. The content of the statements can hardly be deemed as statements intended by the President to unduly influence the election by taking advantage of the political influence of his official status. The above statements of the President, considering altogether the other party of the speech, the context thereof and the motive therefor, were acts justified by the freedom of expression under the Constitution as an exercise of the freedom to express opinion towards politics, and did not exceed the limits on the political activities permitted for public officials of political offices.

(3) Remark at the beginning-of-the-year press conference on January 14, 2004

Pursuant to the acknowledged facts, the President at the beginning-of-the-year press conference on January 14, 2004, stated that "there was a split because there were those who supported reform and those who did not support reform fearing it, and I would like to go together with the Uri Party as those who supported me at the presidential election are running the Uri Party."

The above statement was made as a response to a reporter's question asking "when the President would join the Uri Party," and, as such, was a mere expression by the President, who is permitted to have party membership, stating the party that he supported and his position as to whether he would join such party and, if so, when. Therefore, since the President did not intend through the above statements to support a particular political party concerning the election or thereby to influence the election, the above statement did not constitute a violation of the neutrality obligation concerning elections owed by public officials or an electoral campaign activity.

(4) Remark at the meeting with the Gangwon-Do region journalists on February 5, 2004

Pursuant to the acknowledged facts, the President at the meeting with the journalists in the Gangwon-Do region on February 5, 2004, stated that "the Citizen Participation 0415 (Kook-Cham 0415) members' participation in politics should be permitted and encouraged both legally and politically."

The above statement was made as a response to the question asking the "President's opinion as to the debate concerning the Citizen Participation 0415's activities declaring to have certain candidates win the election as illegal intervention into the election." As such, the statement is understood to mean that, "in order to be an advanced electoral culture, we should encourage voluntary participation and activities of the citizenry, and in order to achieve this goal the citizen participation in politics should be legally permitted as widely as possible, and at the least a generous legal interpretation is required as

long as it is not against the law." Therefore, the above statement was a mere expression of the respondent's personal opinion upon the aspect of the public participation in politics, and thereby did not constitute a violation of the neutrality obligation concerning elections or the prohibition of electoral campaign activities.

(5) The "Uri Party Strategy for the 17th General Election" reported in Joong-Ang Ilbo dated February 27, 2004

The Joong-Ang Ilbo reported with respect to a classified document entitled "Uri Party Strategy for the 17th General Election" on February 27, 2004, which posed suspicion as to the organizational intervention of Cheong Wa Dae into the election. However, even under the entire evidence submitted and accepted during the proceedings in this case, there is no finding that the respondent directed or was involved in the election strategy of the Uri Party. Therefore, there is no valid ground for impeachment in this regard.

(6) Act interfering with free election by threatening the public

With respect to the ground for impeachment under this count, there is no specific facts alleged in this regard, instead, the impeachment resolution merely alleges that the respondent interfered with the public's free election by "inducing support for a particular political party by threatening the public and by repeatedly making statements affecting the public's will concerning the general election." There is no factual basis to find that the respondent's statements concerning the election had a pervasive effect in the general community of public officials thereby actually affecting negatively upon the neutrality of public officials at the election, that the executive organization of which the respondent is the chief officer intervened in the election for a particular political party, or that the function of the election management commission was impeded upon. Nor is it plausible to deem that the respondent thereby interfered with or distorted the unbridled formation of the public's will concerning the election or interfered with the free exercise of voting rights.

Therefore, the respondent's statements neither interfered with free election nor did such statements violate Article 237(1)(iii) of the Public Officials Election Act providing for the crime of interfering with the election.

C. Acts at issue with respect to the obligation to abide by and protect the Constitution (Articles 66(2) and 69 of the Constitution)

(1) The President's obligation to abide by and protect the Constitution

Article 66 of the Constitution, in Section 2, "obligates" the President "to protect the independence of the state, the preservation of the territorial integrity, the continuity of the state, and the nation's Constitution," and in Section 3 "obligates" the President "to faithfully endeavor for the peaceful reunification of the nation." Article 69 of the Constitution obligates the President to take an oath of office, the content of which corresponds to such obligations. Article 69 of the Constitution not only sets forth the obligation of the President to take an oath of office, but also functions as a substantive provision specifying and emphasizing the constitutional obligations of the President under Article 66(2) and Article 66(3) of the Constitution.

The "obligation to abide by and protect the Constitution" of the President set forth in Articles 66(2) and 69 of the Constitution is the constitutional manifestation that specifies the

constitutional principle of government by the rule of law in relation to the President's performance of official duties. Expressed only in summary, the fundamental element of the principle of the rule of law, which is a basic constitutional principle, is that any and all operation of the state shall be by the "Constitution" and the "statutes" enacted by the legislature consisting of the representatives of the people and that any and all exercise of the state authority shall be the object of the judicial control in the form of administrative adjudication for the executive function and constitutional adjudication for the legislative function. Accordingly, the legislature is bound by the constitution, and the executive and the judicial branches of the government implementing and applying the law, respectively, are bound by the Constitution and the statutes. Therefore, the President, as the chief of the executive branch, is constitutionally mandated to respect and abide by the constitution and the statutes.

While the "obligation to abide by and protect the Constitution" is a norm derived from the principle of government by the rule of law, the Constitution repeatedly emphasizes such obligation of the President in Articles 66(2) and 69, considering the significance of the status of the President as the head of the state and the chief of the executive branch. Under the spirit of the Constitution as such, the President is the "symbolic existence personifying the rule of law and the observance of law" toward the entire public. Accordingly, the President should not only make every possible effort to protect and realize the Constitution, but also abide by the law and perform no act in violation of any of the valid law. Furthermore, the President should do all acts in order to implement the objective will of the legislator. The obligation of the executive branch of the government to respect and implement the law is equally applicable to the statutes that the executive branch deems unconstitutional. Since the Constitutional Court alone is vested with the authority under the Constitution to remove a statute that is unconstitutional, even if the executive branch suspects a particular statute to be unconstitutional, the executive branch should make every possible effort to respect and implement the law unless and until the Constitutional Court holds such statute unconstitutional.

(2) Acts of the President to the National Election Commission's decision that the President violated the election law

(A) Pursuant to the acknowledged facts, President Roh Moo-hyun stated through Lee Byung-wan, the Senior Secretary to the President for Public Information, on March 4, 2004, as the position of Cheong Wa Dae concerning the National Election Commission's decision warning him of his undue intervention into the election that "I would like to make it clear that the decision of the National Election Commission at this time is not convincing," "Now we should change both the institution and the custom under the standard of advanced democracy," "The election-related law of the past when the president mobilized ... the state institutions should now be reformed rationally," and "The interpretation of the election law and the decision concerning the election law should also be adjusted in conformity with such different culture surrounding the state authority and new trend of the time." Although the above stated position of Cheong Wa Dae on March 4, 2004 to the National Election Commission's decision was, internally, a position reached at a meeting of senior presidential secretaries, all of the positions of Cheong Wa Dae that are publicly announced revert, in principle, to the President. Particularly in this case, the acknowledged facts indicate that the Office of the President reported the outcome of the meeting to the President and held the briefing at issue upon the President's approval. Therefore, the above statements made by the Senior Secretary to the President for Public Information should be deemed as acts of the

President himself. The purport of the above statements announced by the Senior Secretary to the President for Public Information is that the President expressed unsatisfaction toward the National Election Commission's decision and denigrated the current election law as the "vestige of the era of the government-power-interfered elections."

(B) The President's acts denigrating the current law as the "vestige of the era of the government-power-interfered elections" and publicly questioning the constitutionality and the legitimacy of the statute from his status as the President do not conform to the obligation to abide by and protect the Constitution and statutes. Should the President suspect the constitutionality of a bill passed by the National Assembly or suspect that such a bill can be improved, the President should ask for reconsideration by returning such bill to the National Assembly (Article 53(2) of the Constitution), and should the President doubt the constitutionality of a current statute, the President should perform his or her obligation to implement the Constitution by, for example, having the administration review the constitutionality of such statute and thereby introduce a bill to revise such statute or revising the statute in a constitutional manner through the support of the National Assembly (Article 52 of the Constitution). Even if the President suspects the constitutionality of a statute, questioning the constitutionality of such statute itself in front of the national public constitutes a violation of the President's obligation to protect the Constitution. The President, of course, may express his or her own position and belief regarding the direction for revising the current statutes as a political figure. However, it is of great importance that in which circumstances and in which relations such discussions on possible statutory revisions take place. The President's statements denigrating the current election statutes by comparing them to the equivalent foreign legislations as a response to and in the context of the National Election Commission's warning for the violation of such election statutes cannot be deemed as an attitude respecting the law.

The statements as such made by the President, who should serve as a good example for all public officials, might have significantly negative influence on the realization of a government by the rule of law, by gravely affecting the other public officials obligated to respect and abide by the law and, further, by lowering the public's awareness to abide by the law. Namely, it cannot be denied that an obscure attitude or a reserved position of the President toward government by the rule of law gravely affects the nation as a whole and the constitutional order. When the President himself or herself fails to respect and abide by the law, no citizen, let alone no other public officials, can be demanded to abide by the law.

(C) To conclude, the act of the President questioning the legitimacy and the normative power of the current statute in front of the public is against the principle of government by the rule of law and is in violation of the obligation to protect the Constitution.

(3) Act of suggesting a confidence vote in the form of a national referendum on October 13, 2003

Since the National Assembly's impeachment resolution specifically mentions the President's "unconstitutional suggestion to have a confidence referendum" with respect to its third stated ground for impeachment of "unfaithful performance of official duties and reckless administration of state affairs" and the National Assembly further specified on this issue in its brief submitted subsequent to the initiation of the impeachment adjudication, we examine this issue as a subject matter of this impeachment adjudication.

(A) The President, during "his speech" at the National Assembly on October 13, 2003 "concerning the budget for fiscal year of 2004," stated that "I announced last week that I would submit myself for public confidence. ... Although it is not a matter that I can determine, I think a national referendum is a correct way to do this. Although there are disputes as to legal issues, I think it is feasible even under the current law by interpreting the 'matters concerning national security' more broadly, should there be a political agreement," thereby suggesting a confidence vote to be instituted in December of 2003. Debates concerning the constitutional permissibility of a confidence vote were thereby caused. Finally, such debates upon the constitutionality of a confidence referendum reached the Constitutional Court through a constitutional petition, but the Constitutional Court, in its majority opinion of five Justices in 2003Hun-Ma694 (issued on November 27, 2003), dismissed such constitutional petition on the ground that the "act of the President that is the subject matter of the case was not an act accompanying legal effect but an expression of a mere political plan, therefore did not constitute an exercise of governmental power."

(B) Article 72 of the Constitution vests in the President the authority to institute national referendum by providing that 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 or she deems it necessary." Article 72 of the Constitution connotes a danger that the President might use national referendum as a political weapon and politically abuse such device by employing it to further legitimize his or her policy and to strengthen his or her political position beyond as a mere means to confirm the will of the public toward a specific policy, as the President monopolizes the discretionary authority to institute national referendum including the authority to decide whether to institute a national referendum, its timing, and the specific agendas to be voted on and the questions to be asked at the referendum, under Article 72 of the Constitution. Thus, Article 72 of the Constitution vesting within the President the authority to institute a national referendum should be strictly and narrowly interpreted in order to prevent the political abuse of national referendum by the President.

(C) From this standpoint, the "important policy matters " that can be subjected to a national referendum under Article 72 of the Constitution do not include the "trust of the public" in the President.

An election is for the "decision on persons," that is, an election is to determine the representatives of the public as a premise to make representative democracy possible. By contrast, the national referendum is a means to realize direct democracy, and its object or subject matter is the "decision on issues," that is, specific state policies or legislative bills. Therefore, by the own nature of the national referendum, the "confidence the public has in its representative" cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections. The President's attempt to reconfirm the public's trust in him that was obtained through the past election in the form of a referendum constitutes an unconstitutional use of the institution of a national referendum provided in Article 72 of the Constitution in a way not permitted by the Constitution.

The Constitution does not permit the President to ask the public's trust in him by way of national referendum. The constitution further prohibits as an unconstitutional act the act of the President subjecting a specific policy to a referendum and linking the matter of confidence thereto. Of course, when the President institutes a referendum for a specific policy and fails to obtain the consent of the public concerning the implementation of such policy, the President

may possibly resign by regarding such outcome as public's distrust in him or her. However, should the President submit a policy matter to a referendum and declare at the same time that "I shall regard the outcome of the referendum as a confidence vote," this act will unduly influence the decision making of the public and employ the referendum as a means to indirectly ask confidence in the President, therefore will exceed the constitutional authority vested in the President. The Constitution does not vest in the President the authority to ask the confidence in him or her by the public through a national referendum, directly or indirectly.

(D) Furthermore, the Constitution does not permit a national confidence referendum in any other form than the national referendum that is expressly provided in the Constitution. This is also true even when a confidence referendum is demanded by the people as the sovereign or implemented under the name of the people. The people directly exercise the state power by way of the election and the national referendum, and the national referendum requires an express basis therefor within the Constitution as a means by which the people exercise the state power. Therefore, national referendum cannot be grounded on such general constitutional principles as people's sovereignty or democracy, and, instead, can only be permitted when there is a ground expressly provided in the Constitution.

(E) In conclusion, the President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's authority to institute a national referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political position. Although the President merely suggested an unconstitutional national referendum for confidence vote and did not yet actually institute such referendum, the suggestion toward the public of a confidence vote by way of national referendum, which is not permitted under the Constitution, is itself in violation of Article 72 of the Constitution and not in conformity with the President's obligation to realize and protect the Constitution.

(4) Act of disregarding the opinion of the National Assembly

Pursuant to the acknowledged facts, the President disregarded the conclusion of the National Assembly appointment hearing held on April 25, 2003 that Ko Young-gu was inappropriate for the position as the Director of National Intelligence Service, and did not accept immediately the resolution of removal by the National Assembly of September 3, 2003 to dismiss the Minister of Government Administration and Home Affairs.

(A) The President possesses the authority to appoint and remove the members of the executive branch of the government under his or her direction and supervision (Article 78 of the Constitution). Therefore, the appointment of the head of the Director of National Intelligence Service is part of the President's exclusive authority and the President does not bear any obligation to accept the opinion concluded at the appointment hearing at the National Assembly. Thus, the President did not violate the Constitution by impeding upon the authority of the National Assembly or infringing upon the constitutional doctrine of separation of powers, in disregarding the decision of the National Assembly's appointment hearing.

(B) Notwithstanding the authority of the National Assembly to recommend removal of the Prime Minister or other ministers of the administration (Article 63 of the Constitution), such

recommendation is a mere suggestion to remove such public official from office with no legally binding effect, and not the authority to determine the removal binding the President thereto. The meaning of the "authority to recommend removal from office" is that the President may be subject to an indirect check and control by holding politically responsible the Prime Minister or other ministers of the administration serving the President's administration, instead of the President who may not be held politically responsible during the presidential term. An interpretation understanding the authority to recommend removal of certain public officials of Article 63 of the Constitution as the authority to determine removal of such public officials does not conform to the constitutional provision itself, nor can such interpretation be harmonized with the current constitutional separation of powers order that does not authorize the President to dissolve the National Assembly.

(C) In conclusion, the question of whether the President accepts the conclusion reached at the National Assembly appointment hearing or the National Assembly's recommendation to remove a certain public official is a question of political reverence towards the decision of the National Assembly as the institution representing the public will, and not one of a legal nature. Therefore, the acts of the President herein were the President's legitimate exercise of his authority within the separation of powers structure under the Constitution, or were inconformity with constitutional norms, thus did not constitute acts in violation of the Constitution or statutes.

(5) Remark disparaging the National Assembly, etc.

(A) Pursuant to the acknowledged facts, the President in his open letter to the public via the Internet dated May 8, 2003 stated that "The farmer, when the time comes for weeding, roots out the weed from the field. ... certain politicians who fall to personal greed and interest and wrongful group selfishness ... certain politicians who disregard the will of the majority of the public for reform and instead hamper such reform effort and harm the future of the nation ..." (note that the President, unlike the allegation of the impeaching petitioner, did not describe the then incumbent members of the National Assembly as the "weed to be rooted out") and described the movement at the National Assembly of March 8, 2004 to impeach the President as "unjust abuse of power."

The above statements fall within the definition of the expression of opinion toward politics permitted to the President as the constitutional institution of a political nature and, as such, were not in violation of the Constitution or statutes, apart from the possibility of such statements serving as the ground for political criticism notwithstanding.

(B) Although the impeaching petitioner alleges that the President, in his "address commemorating the 85th anniversary of the March 1st Independence Movement" of March 1, 2004, stated, concerning the move of the U.S. military base out of Yong-San, that "The symbol of interference, invasion, and dependence will return to the bosom of the citizens of the Republic of Korea as a true independent state," such allegation was not included in the original National Assembly impeachment resolution and is thus deemed to have been added subsequent to the National Assembly's resolution to impeach the President. Therefore, such allegation cannot properly be a subject matter in this impeachment adjudication.

D. Political power-based corruption involving the President's intimate associates and aides

(1) Temporal scope of the proximity to the implementation of official duties

Since Article 65(1) of the Constitution limits the ground for impeachment as arising out of the implementation of "official duties " in providing "the President, ... , in the performance of the official duties," the interpretation of the above provision urges that only certain acts violating the law committed while the President was in the office of the President may constitute the ground for impeachment. Therefore, even those acts committed by the President between the time of election and the time of inauguration do not constitute the ground for impeachment. Although the legal status during this period as the 'president-elect' pursuant to the Act on Presidential Succession provides the president-elect with certain authority to perform preparatory acts necessary for the succession of the office of the president, such status and authority of the president-elect is fundamentally different from the official duties of the President and an act violating the law committed during this period by the president-elect such as receiving illegal political funds is subject to criminal prosecution. Therefore, there is no basis to adopt a different interpretation concerning the act of violation committed during this period in terms of the ground for impeachment under the Constitution.

(2) Reception of illegal political funds concerning the Sun & Moon Group and the presidential election camp

The alleged grounds for impeachment in this regard arose out of the facts that occurred prior to the respondent's inauguration as the President on February 25, 2003, and are thus clearly irrelevant to the respondent's performance of official duties as the President. Therefore, such alleged grounds are invalid without further reviewing the facts as to whether the respondent was involved in the reception of such illegal funds.

(3) Corruption of the respondent's intimate associates and aides

Among the alleged grounds for impeachment in this regard, those based on the facts that occurred after the president's inauguration as President are that Choi Do-sul received 47 million Korean Won from Samsung and others during his office as the General Affairs Secretary for the President, that Ahn Hee-jung received 1 billion Korean Won of illegal fund from March through August of 2003, and the allegations of Yeo Taek-su and Yang Gil-seung.

However, none of the evidence submitted throughout the proceedings in this case supports the allegation that the respondent directed or abetted the above Choi Do-sul and others in receiving the illegal funds or was otherwise illegally involved therein. Therefore, the alleged grounds for impeachment premised on the above are meritless.

The rest of the alleged grounds for impeachment are based on facts that occurred prior to the respondent's inauguration as President and are thus clearly irrelevant to the respondent's performance of official duties as President. Therefore, such alleged grounds are invalid without further reviewing the facts as to whether the respondent was involved in the alleged reception of illegal funds.

(4) Publicly declaring retirement from politics

Pursuant to the acknowledged fact, the respondent publicly declared, at the party representative meeting at Cheong Wa Dae on December14, 2003, that the respondent would retire from politics should the amount of illegal political funds received by his election camp exceed one-tenth of that received by the Grand National Party at the time of the presidential election.

However, such statement was made risking his political trustworthiness facing a political situation and, as such, can hardly be deemed as a statement creating any legal obligation or responsibility. The question of whether to keep such promise is merely a matter for political and moral judgment and responsibility on the part of the President as a politician and cannot constitute an act of violating the Constitution or statutes in the President's performance of his official duties.

(5) Remark relating to the investigation by the prosecutors' office

The alleged ground for impeachment contending that the respondent interfered with and obstructed the investigation by the prosecutors' office by, for example, making a statement at the year-end luncheon at Cheong Wa Dae on December 30, 2003 that "I would have been able to twice grind up the prosecution had I meant to kill the prosecution, but I did not." However, this allegation was not included in the National Assembly's original impeachment resolution and is thus deemed to have been added subsequently, therefore it cannot be a subject matter in this impeachment adjudication.

E. Political chaos and economic collapse caused by unfaithful performance of official duties and reckless administration of state affairs

(1) The ground for impeachment in this regard is that the respondent, since his inauguration as President to date, has created extreme hardship and pain on the entire citizenry by breaking down the national economy and the state administration, allegedly caused by the President's unfaithful performance of official duties and reckless administration of state affairs lacking any sincerity or consistency, such as the President's repeatedly improper statements, expression of an anti-war position following the declaration to dispatch military to Iraq, proposition of an unconstitutional confidence referendum, and declaration to retire from politics, and unjust acts such as an illegal electoral campaign pouring all his efforts into the general election prior to the permitted time period therefor. It is alleged that the respondent thereby impeded the right to pursue happiness of the public under Article 10 of the Constitution and violated his "obligation to faithfully perform official duties as president" as expressly provided under Article 69 of the Constitution.

As various statistical indicators relating to the "economic breakdown" are presented in this case, although it is true that household debt increased, the unemployment rate among younger generations grew, and the state debt increased in the past year, it would be irrational to hold the respondent entirely responsible for such economic aggravation. Also, there is no evidence in this case that would otherwise support a judgment that the economy of the nation fell to an irrecoverable state or that the administration of state affairs was broken down.

(2) Article 69 of the Constitution stipulates the "obligation to faithfully perform the official duties" as President while it provides for the oath of office for the President. As stated previously, Article 69 is not a provision that merely obligates the President to take the oath of office, but is a provision that reemphasizes and specifies the obligation mandated by the Constitution in Articles 66(2) and 66(3) for the office of presidency by expressively setting forth the content of such oath of office.

Although the "obligation to faithfully perform the official duties" of the President is a constitutional obligation, this obligation, by its own nature, is, unlike the "obligation to protect the Constitution," not the one the performance of which can be normatively enforced. As such, as a matter of principle, this obligation cannot be a subject matter for a

judicial adjudication. Whether the President has faithfully performed his official duties may become the object of the judgment by the public at the next regularly held election. However, under the current Constitution that limits the presidential term to a single term, there is no means to hold the President directly responsible, even politically, let alone legally, toward the public and the President's faithfulness or unfaithfulness in performing his or her official duties may only be politically reflected favorably or unfavorably on the ruling party of which the President is a member.

As Article 65(1) of the Constitution limits the ground for impeachment to the 'violation of the Constitution or statutes' and the impeachment adjudication process at the Constitutional Court is solely to determine the existence or the nonexistence of aground for impeachment from a legal standpoint, the ground for impeachment alleged by the petitioner in this case concerning the respondent's faithfulness of the performance of the official duties such as the political incapability or the mistake in policy decisions, cannot in and by itself constitute a ground for impeachment and therefore it is not a subject matter for an impeachment adjudication.

F. Sub-conclusion

(1) The President's statements at the press conference with six news media organizations in the Seoul-Incheon region on February 18, 2004 and the statements at the press conference with the Korean Network Reporters' Club on February 24, 2004 were in violation of the neutrality obligation owed by public officials provided in Article 9 of the Public Officials Election Act.

(2) The act of the President in response to the National Election Commission's March 4, 2004 decision that found a breach of election law by the President was in violation of the President's obligation to protect the Constitution as not in conformity with the principle of the rule of law. The act of the President on October 13, 2003 that proposed a confidence referendum violated the obligation to protect the Constitution as not in conformity with Article 72 of the Constitution.

6. Whether to remove the respondent from office

A. Interpretation of Article 53(1) of the Constitutional Court Act

Article 65(4) of the Constitution provides that the "effect of the decision of impeachment is limited to the removal of the public official from office," and Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the public official from office when there is a valid ground for the petition for impeachment adjudication." Here, the issue is how to interpret the phrase of "when there is a valid ground for the petition for impeachment adjudication."

One possible literal interpretation is that Article 53(1) of the Constitutional Court Act provides that the Constitutional Court shall automatically issue a decision removing the public official from office as long as there is any valid ground for impeachment set forth in Article 65(1) of the Constitution. However, under such interpretation, the Constitutional Court is bound to order removal from public office upon finding any act of the respondent in violation of law without regard to the gravity of illegality. Should the respondent be removed from his office for any and all miscellaneous violations of law committed in the course of performing his official duties, this would be against the principle of proportionality that

requests constitutional punishment that corresponds to the responsibility given to the respondent. Therefore, the existence of the "valid ground for the petition for impeachment adjudication" in Article 53(1) of the Constitutional Court Act means the existence of a "grave" violation of law sufficient to justify removal of a public official from his or her office and not merely any violation of law.

B. Standard to be adopted in judging the "gravity of violations "

(1) The question of whether there was a "grave violation of law " or whether the "removal is justifiable" cannot be conceived by itself. Thus, whether or not to remove a public official from office should be determined by balancing the "gravity of the violation of law " by the public official against the "impact of the decision to remove." As the essential nature of the impeachment adjudication process lies in the protection and the preservation of the Constitution, the "gravity of the violation of law" means the "gravity in terms of the protection of the constitutional order." Therefore, the existence of a valid ground for the petition for impeachment adjudication, that is, the removal from office, should be determined by balancing the "degree of the negative impact on or the harm to the constitutional order caused by the violation of law" and the "effect to be caused by the removal of the respondent from office."

(2) The President is in an extremely significant status as the head of the state and the chief of the executive branch (Article 66 of the Constitution). Also, the President is an institution representing the public will directly vested with the democratic legitimacy in that the President is elected through a national election (Article 67 of the Constitution). In these regards, there is a fundamental difference in political function and weight between the President and other public officials subject to impeachment. This difference is exhibited as a fundamental discrepancy in the "impact of the removal."

A decision to remove the President from office would deprive the "democratic legitimacy" delegated to the President by the national constituents through an election during the term of the office and may cause political chaos arising from the disruption of the opinions among the people, that is, the disruption and the antagonism between those who support the President and those who do not, let alone a national loss and an interruption in state affairs from the discontinuity of the performance of presidential duties. Therefore, in the case of the President, the "directly delegated democratic legitimacy" vested through a national election and the "public interest in continuity of performance of presidential duties" should be considered as important elements in determining whether to remove the President from office. Therefore in light of the gravity of the effect to be caused by the removal of the President from office, the ground to justify a decision of removal should also possess corresponding gravity.

As a result, a grave violation of law is required for a decision to remove the President from office that can overwhelmingly outweigh the extremely significant impact of such decision of removal, whereas even a relatively minor violation of law may justify the removal from office of public officials other than the President as the impact of removal is generally light.

(3) Although it is very difficult to provide in general terms which should constitute a "grave violation of law sufficient to justify the removal of the President from office," that the impeachment adjudication process is a system designed to protect the Constitution from the abuse of public officials' power on one hand and that the decision of removal of the President from office would deprive the public's trust vested in the President on the other hand, can be presented as important standards. That is, on one hand, from the standpoint that the

impeachment adjudication process is a procedure ultimately dedicated to the protection of the Constitution, a decision to remove the President from office may be justified only when the President's act of violating law has a significant meaning in terms of the protection of the Constitution to the extent that it is requested to protect the constitution and restore the impaired constitutional order by a decision of removal. On the other hand, from the standpoint that the President is an institution representing the public's will directly vested with democratic legitimacy through election, a valid ground for impeaching the President can be found only when the President has lost the public's trust by the act of violation of law to the extent that such public trust vested in the President should be forfeited while the presidential term still remains.

Specifically, the essential content of the constitutional order ultimately protected by the impeachment adjudication process, that is, the "basic order of free democracy" is constituted of the basic elements of the principle of government by the rule of law which are "respect for basic human rights, the separation of powers, and the independence of the judiciary," and of the basic elements of the principle of democracy which include "the parliamentary system, the multi-party system, and the electoral system" (2 KCCR 49, 64, 89Hun-Ka113, April 2, 1990). Accordingly, a "violation of law significant from the standpoint of protection of the Constitution" requiring the removal of the President from office means an act threatening the basic order of free democracy that is an affirmative act against the fundamental principles constituting the principles of the rule of law and a democratic state. An "act of betrayal of the public's trust" is inclusive of other patterns of act than a "violation of law significant from the standpoint of protection of the Constitution," and, as such, typical examples thereof include bribery, corruption and an act manifestly prejudicing state interest, besides an act threatening the basic order of free democracy.

Therefore, for example, in case of the President's act of corruption by abuse of power and status given by the Constitution such as bribery and embezzlement of public funds, the President's act manifestly prejudicing state interest despite the President's obligation to implement public interest, the President's act of impeding upon the authority vested in other constitutional institutions such as the National Assembly by abuse of power, the President's act of infringing upon the fundamental rights of the public such as oppression of the citizenry by way of state organizations, or the President's act of an illegal electoral campaign or fabricating the election by using the state organizations in elections, it may be concluded that the President can no longer be entrusted to implement state affairs since the President has lost the trust of the public that the President will protect the basic order of free democracy and faithfully implement state administration.

In conclusion, a decision to remove the President from his or her office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.

C. Whether to remove the President from office in this case

(1) Summary of the violation of law by the President

As confirmed above, the acts of violation of law by the President at issue in this case can be categorized into the violation of the "obligation to maintain neutrality" concerning elections owed by public officials by making statements in support of a particular political party at press conferences, and the violation of the obligation to protect the Constitution owed by the President against the principle of rule of law and Article 72 of the Constitution by

expressing unsatisfaction towards the National Election Commission's decision that the President violated the election law and making statements denigrating the current election law and by proposing a confidence referendum.

(2) Gravity of the violation of law

(A) The President violated the "obligation to maintain neutrality concerning elections" by making statements supporting a particular political party, thereby infringing the constitutional request that the state institution should not affect the process through which the public freely forms the opinion or distort the competitive relations among the political parties.

However, such acts by the President do not constitute affirmative acts of violation against the "parliamentary system" or "electoral system" constituting basic order of free democracy and, accordingly, it cannot be deemed that the negative impact of the acts in violation of the Public Officials Election Act upon the constitutional order was grave, considering that the above acts of violation of the President were not committed in any affirmative, active or premeditated way by, for example, attempting to have administrative authority intervene through state organization. Instead, they took place in a way that was unaggressive, passive, and incidental, during the course of expressing the president's political belief or policy design in the form of a response to the question posed by the reporters at the press conference. It should also be considered that the boundary between the "expression of opinion toward politics" constitutionally permissible for the President who is allowed to do political and party activities and the impermissible "acts of violating neutrality obligation concerning elections" is blurred and there has not been any established clear legal interpretation as to "in which circumstances it is beyond the scope of political activities permitted for the President with respect to elections."

(B) The President's statement and act that causes suspicion to the President's willingness to abide by law, even if minor, may greatly affect the legal conscientiousness and the observance of the law of the public. Thus, the President's statement disrespectful of the current election law cannot be deemed as a minor violation of law on the part of the President who bears an obligation to make all the efforts to respect and implement the law.

However, the statement of the President denigrating the current election law as the "vestige of the era of government-power-interfered election" does not constitute an affirmative violation of the current law. Instead, such statement is an act of violation of law committed during the course of reacting, in an unaggressive and passive way, towards the decision of the National Election Commission. The President, of course, may well deserve criticism as such statement was an expression of disrespectfulness toward the current law, therefore it was in violation of the President's obligation to protect the Constitution. However, considering the totality of the specific circumstance where such statement was made, such statement was made with no affirmative intent to stand against the basic order of free democracy, nor was it an act of grave violation of law fundamentally questioning the principle of the rule of law.

(C) The acts of the President intending to seek sanctuary in direct democracy through directly appealing to the public by proposing a confidence referendum in the state of minority ruling party and majority opposing party rather than administering state affairs in conformity with the spirit of the presidential system and parliamentary system of the Constitution, were not only in violation of Article 72 of the Constitution, but also against the principle of the rule of law.

Also, however, in this regard, the above acts of the President did not constitute an affirmative violation of law against the fundamental rules of the Constitution forming the principle of democracy and accordingly, there was no grave negative impact upon the constitutional order, considering that the President merely proposed an unconstitutional confidence referendum and did not attempt to enforce such and that the interpretation as to whether the "important policy concerning national security" of Article 72 of the Constitution includes the issue of confidence in the President has been subject to academic debates.

(3) Sub-conclusion

(A) To conclude, reviewing the totality of the impact the violation of law by the President has upon the constitutional order, specific acts of violation of law by the President cannot be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order therein.

Therefore, since the act of violation of law by the President does not have a significant meaning in terms of the protection of the Constitution to the extent that it is requested to protect the Constitution and restore the impaired constitutional order by removing the President from office and, also, since such violation of law by the President cannot be deemed to evidence the betrayal of public trust on the part of the President to the extent that the public trust vested in the President should be deprived of prior to the completion of the remaining presidential term, there is no valid ground justifying removal of the President from office.

(B) The power and political authority of the President is vested by the Constitution and a president who disrespects the Constitution denies and destroys his or her own power and authority. Especially, the importance of a resolute position of the President to protect the Constitution cannot be emphasized enough in today's situation where the constitutional awareness among the public has just begun to sprout in a brief history of democracy and the respect for the Constitution has yet to be firmly established in the consciousness of the general public. As the "symbolic existence of the rule of law and the observance of law," the President should make the best effort in order to realize the rule of law and ultimately protect the basic order of free democracy by, not only respecting and abiding by the Constitution and statutes, but also taking a decisive stand toward unconstitutional or unlawful acts on the part of other state institutions or the general public.

7. Conclusion

A. The petition for impeachment adjudication is hereby rejected as the number of the Justices required to remove the President from office under Article 23(2) of the Constitutional Court Act has not been met. It is so ordered, pursuant to Articles 34(1) and 36(3) of the Constitutional Court Act.

B. Article 34(1) of the Constitutional Court Act provides that the deliberation at the Constitutional Court shall not be disclosed to the public, whereas the oral argument and the pronouncement of the decision shall be disclosed. Here, non-disclosure of the deliberation by the Constitutional Court Justices means that neither the separate opinions of the individual Justices nor the numbers thereof shall be disclosed, as well as the course of the deliberation. Therefore, the opinions of the individual Justices may be noted in the decision only when a special provision permits an exception to such secret deliberation procedure. While there is such special provision permitting an exception to the secrecy of deliberation in Article 36(3)

of the Constitutional Court Act applicable to the proceedings of constitutional review of a law, competency dispute among state institutions, and constitutional petition, there is no provision permitting exception to the secrecy of deliberation with respect to the impeachment adjudication. Therefore, in this impeachment adjudication, the separate opinions of the individual Justices or the numbers thereof may not be pronounced in the decision.

It should be noted that, concerning the above position, there was also a position that separate opinions may be pronounced and disclosed in the decision, interpreting Article 34(1) of the Constitutional Court Act as a provision merely providing for non-disclosure of the deliberative proceedings in that only the external proceeding or the content of the opinions exchanged therein to reach the conclusion should not be disclosed and the final opinion of the individual participating Justices reached through such deliberative process may be disclosed, and interpreting Article 36(3) of the Constitutional Court Act as a provision permitting disclosure of separate opinions since such provision is based on the consideration to prevent the problem of indiscriminately mandating disclosure of separate opinions where it is improper to disclose separate opinions in impeachment adjudication or political party resolution proceeding, thus leaving the decision to disclose separate opinions in impeachment adjudication to the discretion of the participating Justices.

Justices Yun Young-chul (Presiding Justice), Kim Young-il, Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe (Assigned Justice), Jeon Hyo-sook, and Lee, Sang-kyung

Aftermath of the Case

By its decision on May 14, 2004 to reject the petition for impeachment adjudication, the Constitutional Court brought an end to the political and legal debates for and against the impeachment of the President that lasted for over two months, and President Roh Moo-hyun thereby returned to his office in sixty-three days from suspension of presidential authority and power.

Through this case, the public newly recognized that even the President is subject to possible removal from office for violating the Constitution and statutes, and yet, the removal process should also proceed pursuant to the Constitution and statutes. In this regard, it is the analysis within the legal profession that the "impeachment adjudication of the President served as a precious opportunity for the public to learn the importance of the rule of law and democracy."

The Constitutional Court's decision in this case mainly received positive review throughout the media as the "decision committed to both the spirit of the Constitution and the will of the public reflecting the Court's completed mission as the final bulwark of the Constitution," and the "historic decision that set a new landmark of constitutionalism and the rule of law." The announcement of the decision in this case was televised nationwide by live broadcasting.

Conscientious Objection of Military Service Case
[16-2(A) KCCR 141, 2002Hun-Ka1, August 26, 2004]

Held, the provision of the Military Service Act that punishes a person who objects to mandatory military service on the ground that it is against his conscience, is not unconstitutional.

Background of the Case

The Military Service Act provides that a person who is drafted for military service yet fails to enroll or report, with no justifiable cause, shall be punished by imprisonment for up to six (6) months or fine of up to two million (2,000,000) Korean Won. The requesting petitioner is accused of violating the Military Service Act for failure to enroll for military service, while served with the notice of enlistment for active military service from the Commissioner of the Military Manpower Administration obligating him to enroll for active military service. The requesting party petitioned the court to request constitutional review, claiming that the Military Service Act applicable to the accused facts of the underlying case infringed the freedom of conscience of those who objected to military service on the ground of their religious conscience. The court thereupon accepted the petition and filed a request for constitutional review with the Constitutional Court.

Summary of the Decision

The Constitutional Court, in a 7:2 opinion, held the Military Service Act not unconstitutional. The summary of the reasoning is as follows:

1. Majority Opinion

The public interest to be achieved by the legal provisions at issue in this case is the very important one of "national security," which is the prerequisite for the existence of a nation and for all liberty and freedoms. When such an important public interest is at issue, an immoderate legislative experiment that might harm national security may not be demanded in order for a maximum guarantee of individual liberty and freedom. Considering the security situation of Korea, the social demand concerning the equity of conscription, and the various restrictive elements that might accompany the adoption of the alternative military service system, the current situation does not assure that the adoption of the alternative military service system will not harm the important constitutional legal interest of national security. In order to adopt the alternative military service system, peaceful coexistence should be stabilized between South Korea and North Korea, and the incentives to evade military service should be eliminated through the improvement of the conditions of military service. Furthermore, a consensus among the members of the community that allowing alternative service still serves toward realizing the equality of the burdens in performing military duty and does not impair social unity should be formed, through the wide spread understanding and tolerance of the conscientious objectors within our society. The judgment of the legislators that the adoption of the alternative military service is presently a difficult task, where such prerequisites are yet to be satisfied, may not be deemed as conspicuously unreasonable or clearly wrong.

However, the legislators should seriously assess the possibility of eliminating the conflicting relationship between the legal interests of the freedom of conscience and the national security,

and also the possibility of the coexistence of these two legal interests. Even if the legislators determine not to adopt the alternative military service system, the legislators should carefully deliberate whether to supplement the legislation so that the institution that implements the law may take measures to protect conscience through the application of law in a way favorable to conscience.

2. Dissenting Opinion of Two Justices

It is undeniable that the conscientious objection to military service is based upon the earnest hope and resolution with respect to the peaceful coexistence of the human race. The ideal toward peace is something that the human race has pursued and respected over a long period of time. In this sense, the objection to military service by the conscientious objectors should not be viewed as the avoidance of hardship of military service or the demand of protection as free-riders while failing to perform the basic obligation to the state. They have been sincerely pleading for alternative ways to service as they can in no way perform military duty to bear arms. The disadvantages they have to endure due to the criminal punishment for evasion of military service is immense. Also, in light of the gross number of our armed forces, the impact upon the national defense power of the military service by the conscientious objectors on active duty to bear arms is not of the degree that merits a discussion of the decrease in combat capabilities thereby. The duty of national defense is not limited to the obligation to directly form a military force to bear arms by, for example, serving the military pursuant to the Military Service Act. Therefore, by imposing upon the conscientious objectors an obligation that is similar or higher thereto upon considering the time period and the burden of the military service on active duty, the equity in performing the duty of national defense may be restored.

3. Separate Concurring Opinion of One Justice

The faith of the petitioner is a religious one, thus the freedom of religion as well as the freedom of conscience is at issue. The Constitutional Court may not judge the legitimacy of the religious tenets, but it may only determine whether their effect upon society is acceptable in reality. Here, the objection to bear arms, which guarantees national security and the protection of national territory, is impermissible under our constitutional order. On the other hand, the external expression of the freedom of conscience that is not based upon religion is subject to restrictions, and the permissibility of the restriction depends upon whether the conscience has universal validity. Here, the objection to bear arms, which is to defend against unanticipated aggressions may hardly be deemed as conscience with universal validity. In addition, the recommendation of the majority opinion to assess alternative civilian service is inappropriate under the principle of separation of powers.

4. Separate Concurring Opinion of One Justice

It may hardly be deemed that the conscientious objectors have also given up the protection of themselves by free-riding on others' obligation to serve the military. Then, whether the conscience of those who object to the military service on the ground of conscience may fall within the meaning of conscience that is the object of constitutional protection is itself questionable, as such conscience is no more than a hope that is an antinomy, which lacks consistency and universality. Therefore, punishing those who object to military service on the ground of conscience is not beyond the external limit of justice. The recommendation for the

legislators upon legislative matters with respect to the alternative military service system, which is irrelevant to the subject matter of review of this case, is not appropriate as it is beyond the limit of judicial review.

Aftermath of The Case

This decision, along with the Supreme Court decision of July 15, 2004 that affirmed the punishment of the conscientious objectors, brought an end to the legal debates over the conscientious objection. The conscientious objectors thereupon sought relief from the United Nations Human Rights Commission. On the other hand, a bill for the revision of the Military Service Act in order to legislate the alternative military service system was submitted to the National Assembly.

Parties

Requesting Court
Seoul Southern District Court

Petitioner
Lee O-Soo
Counsel of Record: Saehanyang Law Firm
(Attorney In Charge: Oh Jong Kwon and 7 others)

Underlying Case
Seoul Southern District Court, 2001Kodan5819, Violation Of Military Service Act

Holding

Subdivision 1 of Section 1 of Article 88 of the Military Service Act (as revised on February 5, 1999 by Statute No. 5757) is not unconstitutional.

Reasoning

1. Overview of the Case and the Subject Matter of Review

A. Overview of the Case

The requesting petitioner, who is the defendant in the underlying case, failed to enroll for military service until five (5) days after the enrollment date notwithstanding the notice of enlistment served by the Commissioner of the Military Manpower Administration for the conscription for military service on active duty. The charge against the requesting petitioner for violation of Subdivision 1 of Section 1 of Article 88 of the Military Service Act is currently pending at Seoul Southern District Court.

The requesting petitioner thereupon petitioned the underlying court to request constitutional review claiming that Subdivision 1 of Section 1 of Article 88 of the Military Service Act applicable to the accused facts of the underlying case infringed the freedom of conscience of those objecting to enlistment based on religious conscience (2002Choki54). The underlying court accepted this petition and filed a request for constitutional review with the Constitutional Court on January 29, 2002, with respect to the above provision.

B. Subject Matter of Review

The subject matter of review of this case is Subdivision 1 of Section 1 of Article 88 of the Military Service Act(as revised on February 5, 1999 by Statute No. 5757) (hereinafter referred to as the "statutory provision at issue in this case"). Its content is as follows:

Article 88 of the *Military Service Act* (Evasion of Enlistment)

Section 1. Persons who have received a notice of enlistment in the active service or a notice of call(including a notice of enlistment through recruitment), and fail to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: Provided, That persons who have received a notice of check-up to provide the wartime labor call under Article 53(2), are absent from the check-up at the designated date and time, without justifiable reason, they shall be punished by imprisonment for not more than six months, or by a fine not exceeding two million won, or with penal detention.

Subdivision 1. Five days in cases of enlistment in active service

2. Ground for Request of Constitutional Review of the Requesting Court and the Opinions of the Relevant

Parties

A. Ground for Request of Constitutional Review of the Requesting Court

(1) In the case of so-called conscientious or religious objection to military service, that is, objection to performing the duty of military service on the ground of ideas or conscience or of religious tenets (hereinafter referred to as the "conscientious objection to military service"), there is a clash between the basic duty of citizens under the Constitution of military service and the core fundamental right under the basic order of free democracy of the freedom of ideas, conscience and religion. Therefore, there is a need for harmony and coexistence of these two within the scope that does not impair the essential aspects of either of the two.

However, the current Military Service Act criminally punishes, without exception, the so-called conscientious objection to military service, that is, the objection to enlist on the ground of the decision of one's conscience. Thus, there is much room for possible infringement upon the freedom of ideas and conscience and the freedom of religion, and, further, the human dignity and values, the right to pursue happiness, and the right to equality, of those who conscientiously object to military service (hereinafter referred to as the "conscientious objectors").

(2) Most of the advanced nations, including Germany and the United States, and the eastern European nations recognize the right of conscientious objection to military service as a right either under the constitution or statute, and the international organizations and institutions such as the United Nations Human Rights Commission, also recommend or obligate the member states to recognize such right. Our nation, however, does not recognize the right to object to military service on the ground of conscience (hereinafter referred to as the "right to

conscientious objection to military service") and imposes criminal punishment thereupon, which necessitates an assessment at the constitutional level.

B. Ground for Petitioning for Request of Constitutional Review of the Petitioner

(1) Article 10 of the Constitution guarantees human dignity and values, and Article 37, Section 1, of the Constitution provides that the freedom and the rights of the citizens shall not be neglected even if not enumerated in the Constitution. Religion and conscience are indispensable elements in realizing dignity and values as humans, in the course of living limited lives while pursuing truth, goodness and beauty. Thus, restricting the objection to military service for the reasons of religious conscience by way of criminal punishment is a violation of these provisions.

(2) Enforcing forceful conscription or imposing criminal punishment upon those who object to military service pursuant to their sincere religious conscience notwithstanding the prohibition of Article 11 of the Constitution against discriminatory treatment on the ground of religion, is in violation of the principle of equality. As female citizens and individuals with particular disease or physical or mental disability are excluded from the mandatory military service, excluding the conscientious objectors from the mandatory military service, as long as alternative service is mandated, falls within the scope of reasonable discrimination. Considering the disadvantages suffered by the conscientious objectors in the past, this must be considered from the perspective of affirmative action as well.

(3) The freedom of conscience and the freedom of religion are mandatory prerequisites for liberation from spiritual coercion, and the indispensable vitalizing elements of the basic order of free democracy that is rooted in the plurality of ideologies. Whereas coercing military service by imposing criminal sanctions fundamentally burdens conscience and religion, the state interest achieved through compulsory enforcement of conscription may be satisfied even without coercive conscription of the conscientious objectors. In such a case, therefore, it is desirable for the nation's legal order to concede. Forcefully enforcing the conscription of conscientious objectors by way of criminal sanctions in disregard thereof infringes the freedom of conscience.

(4) Even if the freedom to exercise religion, which is one aspect of the freedom of religion, may be restricted within the limits of Article 37, Section 2, of the Constitution, the standard of judgment upon the necessity of the restriction is the legal principle of clear and present danger or the prohibition of excessive restriction. As the number of conscientious objectors is extremely small, their conscientious objection does not pose a clear and present danger to national defense. Immediately imposing criminal punishment without providing the conscientious objectors with any opportunity of alternative military service is in violation of the prohibition of excessive restriction.

(5) The implementation of the alternative military service system may possibly cause a problem of the violation of the right to equality or of mass production of those evading military service. This can be prevented by the implementation of the alternative military service system equivalent to the military service on active duty in terms of the duration of the service, the degree of hardships during the service, the life of the joint billet, and so forth. In light of the fact that the conscientious objectors constitute approximately 0.2% of the individuals who are conscripted, and of the transformation of the war today to scientific

warfare, the implementation of the alternative military service system will be one mode of adequate utilization of human resources, rather than a threat to the national defense.

C. Opinion of the Chief Public Prosecutor of Seoul District Public Prosecutors' Office, South Branch

(1) The performance of the duty of military service is necessary and indispensable in order to guarantee of the right to peaceful living and the right to pursue happiness of the citizens. Should the right of conscientious objection to military service be recognized, the number of those voluntarily performing military service will decline, which will cause a serious threat to the existence of the nation. Therefore, non-recognition of such right of conscientious objection may not be deemed to infringe the right to pursue happiness.

(2) We should not treat identically those individuals with physical disabilities that objectively indicate the impossibility of military service on active duties and the conscientious objectors whom may not be objectively verified. Rather, allowing an exception to the duty to serve the military for the conscientious objectors would possibly violate the right to equality on the part of the overwhelming majority of the citizens. Thus, as far as it is not the case that the believers of a particular religion are singled out for the imposition of the duty of military service, non-exemption of the conscientious objectors is not in violation of the principle of equality.

(3) Although the freedom to exercise conscience may be deemed to include the conscientious objection to military service, as this is a right that may be restricted pursuant to Article 37, Section 2, of the Constitution, its external expression or realization is limited by the basic duty owed by the individuals to the state. Therefore, an individual may not refuse to perform the obligation to serve the military even if it is against one's own conscience, and there is no infringement upon the freedom of conscience.

(4) The conscience objectors whose objection is based on the religious beliefs refuse the act of war. Under the special security circumstance as in our nation, even if the duty of military service including military education is compulsorily enforced, as military education itself is not a coercion of the act of war, this may not be deemed as an infringement upon the freedom of religion of the individuals.

D. Opinion of the Minister of National Defense

(1) The conscientious objection to military service is not a constitutional right that is drawn as a matter of course from the freedom of conscience or the freedom of religion. Rather, it is no more than a statutory right that is recognized only by and upon the legislation of the legislators. Even assuming that the freedom to exercise conscience includes the right of conscientious objection to military service, this is a right that may be limited by and under Article 37, Section 2, of the Constitution. As suppressing the waging of war by the armed entity hostile to our nation, and ordering those conscripted to bear arms for national self-defense does not violate the right to life of others, the state's demanding those who have the belief in objecting war to bear the duty of military service during the time of peace is not a fundamental infringement of the freedom of conscience that threatens such belief.

(2) The alternative military service system asserted by the conscientious objectors is to exempt them from the basic military training, the eight (8)-week training during supplemental service and the wartime call-up mobilization duty in the entirety. This is a de facto exemption of military service that is different even from the supplemental service system under the current Military Service Act. Allowing alternative service as an option in a nation that adopts the mandatory conscription system is against the fundamental aspects of the mandatory conscription of uniformity and equality, which will result in discrimination against those who have already performed the duty of military service or the potential conscientious objectors within the military, as well as those who believe in other religions.

(3) In light of the reality of egregious service conditions in our Armed Forces, the adoption of the alternative military service system would cause exponential increase of those evading military service. Furthermore, as it would be difficult to assure the strictness of the evaluation procedure in selecting out conscientious objectors, the mandatory conscription system might collapse due to the damage to the uniformity and unity of the conscription system. Further yet, finding a task outside the military, equivalent to military service on active duty in terms of hardships of service would not be easy. Therefore, the alternative military service system may not be deemed as a system harmonious with the guarantee of national security. Considering the fact that the duration of military service on active duty is currently two (2) years or up to two (2) years and four (4) months, neither limiting the prison term to the maximum of three (3) years for the crime of noncompliance with enlistment to guarantee the effectiveness of the duty of military service nor exempting from further military service upon sentencing of the actual prison term of one (1) year and a half or longer by enrollment in the second citizen service, is in violation of the principle of the prohibition against excessive restriction.

E. Opinion of the Commissioner of the Military Manpower Administration

The opinion of the Commissioner of the Military Manpower Administration is largely the same as the opinion of the Minister of National Defense.

3. Determination of the Court

A. Constitutional Meaning and Scope of the Protection of the Freedom of Conscience

(1) Article 19 of the Constitution provides that "All citizens shall enjoy freedom of conscience," thereby guaranteeing the freedom of conscience as a basic right of the citizens. When the legal order of the nation and conscience as the internal and moral decision of the individuals collide, the Constitution thereby mandates that the state shall protect the conscience of the individuals. Collision between the legal order of the nation and the conscience of the individuals would always occur, should a minority of the citizens refuse, by asserting the freedom of conscience, to obey the legal order determined by the majority.

Conscience that is protected by the Constitution is an acute and concrete conscience that is the powerful and earnest voice of one's heart, the failure to realize which in action upon judging right and wrong of a matter would destroy one's existential value as a person (9-1 KCCR 245, 263, 96Hun-Ga11, March 27, 1997; 13-2 KCCR 174, 203, 99Hun-Ba92 and others, August 30, 2001; 14-1 KCCR 351, 363, 98Hun-Ma425 and others, April 25, 2002). That is, the "decisions from the conscience" mean all earnest decisions concerning ethics pursuant to one's own standards of right and wrong, acting against which is not possible

without a serious conflict under the conscience, as the individual takes such decisions as something that binds her or him that should be obeyed unconditionally.

Under the system of basic rights of our Constitution that values the maintenance of human dignity and the unfettered expression of personality of the individuals the most, the function of the freedom of conscience lies in maintaining the homogeneity and identity of individual personality.

(2) The "conscience" that the "freedom of conscience" intends to protect is not synonymous to the thoughts and the values of the democratic majority; rather, it is something that is extremely subjective in an individualistic aspect. The conscience may not be judged by its object, content or motivation. Particularly, the standpoint of whether the decisions from the conscience are reasonable and rational, or appropriate, or consonant to the legal order, social norm or ethical rules may not serve as the standard that judges the existence of the conscience.

In general, as the democratic majority forms the legal order and the social order pursuant to its political will and ethical standard, it is an exception for such majority to have conflicts of conscience with the legal order of the nation or the ethical rules of the society. What becomes an issue in reality under the freedom of conscience is not the conscience of the majority of society, but the conscience of the minority intending to deviate from the legal order of the nation or the ethical rules of the society. Therefore, regardless of which religious viewpoint or view of the world or other value system forms the basis of the conscientious decisions, the conscientious decisions of all substance are protected by the freedom of conscience.

(3) The freedom of conscience under Article 19 of the Constitution is largely divided into the internal realm of the formation of the conscience and the external realm of the exercise of the conscience that has been formed. As such, in its specific objects of protection as well, it is divided into the "freedom to form the conscience," which is the freedom internal and inherent to one's heart, and the "freedom to exercise the conscience," which is to express and realize the conscientious decisions. The freedom to form the conscience is the freedom to form one's conscience and to make a decision under the conscience within the realm internal to one's heart, without unjust interference or coercion from outside. The freedom to exercise the conscience is the freedom to express the conscience thus formed towards the outside world and to establish life pursuant to the conscience, including, more specifically, the freedom to express the conscience or not to be forced to express the conscience (the freedom to express the conscience), the freedom not to be forced to act against the conscience (the freedom to exercise the conscience by inaction), and the freedom to act pursuant to the conscience (the freedom to exercise the conscience by action).

Among the freedom of conscience, the freedom to form the conscience is an absolutely protected basic right as long as it stays within one's heart, while the freedom to exercise the conscience that is the right to externally express and realize the conscientious decisions is a relative freedom that may be restricted by the statute as it may violate the legal order or infringe upon the right of others (10-2 KCCR 159, 166, 96Hun-Ba35, July 16, 1998).

B. Basic Right Limited by the Statutory Provision at Issue in this Case

Article 39 of the Constitution provides for the duty of national defense as the obligation of the citizens, and Article 3 of the Military Service Act that specifies the constitutional duty of national defense imposes the duty of military service upon all male citizens of the Republic of Korea. The statutory provision at issue in this case provides for punishing those who

notwithstanding the constriction fail to enroll until five (5) days past the date of enrollment without justifiable cause thereby imposing the sanction of criminal punishment upon those who evade military service, in order to compel the performance of the obligation to military service. The statutory provision at issue in this case imposes criminal punishment only upon those who fail to enroll "without justifiable cause," however, as the refusal to perform the duty of military service on the ground of conscientious resolution does not fall within the meaning of "justifiable cause" here (refer to the Supreme Court Decision 2004Do2965, July 15, 2004), the conscientious objectors are criminally punished under the statutory provision at issue in this case as in the general case of those evading military service.

Should one's earnest conscience opposing war and the resulting human killing and injuring be formed pursuant to one's religious belief, values and view toward the world, the decision that one "may not perform the duty of military service" is a powerful and earnest decision of ethics, acting against which is not possible without conflict with conscience. The circumstance that compels the performance of the duty of military service causes a significantly crucial state with respect to the ethical identity of the individual. Endowing the individual with a possibility of following the voice of one's conscience in the case of the clash of two contradicting orders, the "order of the conscience" and the "order of the legal order", is the exemplary domain that the freedom of conscience intends to protect.

The statutory provision at issue in this case compels the conscientious objectors to act against their conscience by way of criminal punishment. Therefore, it is a provision that restricts the "freedom not to be forced by the state to act against one's conscience" or the "freedom not to perform legal obligation that is against one's conscience," that is, the right to exercise the conscience by inaction.

On the other hand, as Article 20, Section 1, of the Constitution separately protects the freedom of religion, should the conscientious objection to military service be based upon religious doctrines or religious beliefs, the statutory provision at issue in this case restricts the freedom of religion of the conscientious objectors as well. However, as the freedom of conscience is a comprehensive fundamental right that includes non-religious conscience as well as conscience based upon religious beliefs, the focus will be centered upon the freedom of conscience in the following paragraphs.

C. Legislative Purpose of the Statutory Provision at Issue in this Case

The Constitution provides in Section 2 of Article 5 that the "guarantee of national security" and the defense of the national territory are the sacred duties of the national armed forces. The Constitution further provides in Section 1 of Article 39 for the duty of national defense as an important means to realize the guarantee of national security. In addition, the Constitution indicates in Section 2 of Article 37 that all freedoms of the citizens may be restricted for the guarantee of national security, and regulates the "guarantee of the national security" as an important constitutional legal interest by, for example, endowing the President with the national emergency power for the guarantee of national security in Section 1 of Article 76, and mandating the establishment of the National Security Council in Article 91 as an advisory institution for the President.

The "guarantee of national security" is an important legal interest recognized by the Constitution regardless of the existence of express provisions therefor in the Constitution, as an indispensable prerequisite for the existence of the nation, preservation of the national territory, protection of the life and safety of the citizens, and also as a basic prerequisite for the exercise of the freedom by all citizens. The duty of national defense is an important means adopted by the Constitution in order to realize the guarantee of national security. The statutory

provision at issue in this case fulfills and compels the performance of the "duty to national defense," which is an obligation of the citizens, thereby ensuring to secure the military resources and balance the burden of military service under the military service system based upon mandatory conscription, and, ultimately, realizing the constitutional legal interest of the guarantee of national security.

D. Issue of Protection of Freedom to Exercise Conscience

(1) Freedom to Exercise Conscience as Part of the Constitutional Order

(A) As the freedom of conscience protects the freedom to realize the conscience in the external world as well as the freedom to form the conscience that occurs in the internal world of individuals, the freedom of conscience may collide with the legal order or the legal interest of others, which inevitably subjects it to restrictions. Even if not a statute that intentionally restricts the freedom of conscience, any statute applied generally to the entire citizenry always has intrinsically the possibility to collide with the conscience of some of the citizens.

The freedom of conscience is a freedom that is protected as the constitutional basic right, and constitutes part of the order of positive law. The freedom that is a basic right is a legal liberty, and the legal liberty may be guaranteed neither absolutely nor limitlessly. The existence of the nation and the legal order are the basic prerequisites for the exercise of the freedom by all constituents. It is the limit for all basic rights as a principle that the exercise of the basic right should be undertaken within the scope that enables the common life with others in the national community and does not endanger the legal order of the nation. To the freedom of conscience as well, as it has been established within the constitutional order, such a limit binding all constitutional legal interests readily applies.

Therefore, the guarantee of the freedom of conscience does not mean that individuals are endowed with the right to refuse to obey the legal order on the ground of their conscience. Considering that there is a possibility that all individuals might refuse to obey a statute that is constitutional claiming the freedom of conscience, and that all conscience is protected by the freedom of conscience regardless of its substance as the conscience of the individuals is an extremely subjective phenomenon which includes the conscience that is unreasonable, unethical or antisocial, the position that the "legal order of the nation is valid only as long as it is not against the conscience of the individuals" means the disintegration of the legal order and, further, the disintegration of the national community. However, no freedom that is a fundamental right may serve as the ground for disintegrating the state and the legal order, therefore, such interpretation does not stand.

(B) Therefore, in this case, the freedom of conscience of Article 19 of the Constitution does not endow the individuals with the right to refuse the performance of the duty of military service. The freedom of conscience is no more than the right to request the state to take into account and protect the individual conscience if possible, and is not the right to refuse to perform legal obligations on the ground of conscience or the right to request the provision of alternative obligations. Therefore, the right to request alternative military service may not be drawn from the freedom of conscience. Our Constitution does not have any normative expression therein that recognizes the unilateral superiority of the freedom of conscience, with respect to the duty of military service. The right to refuse the performance of the duty of military service on the ground of conscience may be recognized only when the Constitution itself expressly provides therefor.

(2) Unique Characteristics of Balancing of Legal Interests in the Case of Duty to National Defense and the Freedom to Exercise Conscience

The issue of guaranteeing the freedom to exercise the conscience is the question of harmonizing the "freedom of conscience" and the "constitutional legal interest" or "legal order of the state" that the restriction of the freedom of conscience intends to achieve, and, the question of balancing between these two legal interests.

However, the freedom to exercise the conscience takes a special form in the balancing process between the legal interests. The general process of scrutiny of the proportionality principle that determines to which extent a fundamental right should concede on the ground of public interests through examination of the appropriateness of the means and the least restrictive means does not apply as unchanged to the freedom of conscience. In the case of the freedom of conscience, balancing the freedom of conscience against the public interest under the principle of proportionality and rendering the conscience relative in order for the realization of the public interest is not compatible with the essence of the freedom of conscience. Should a conscientious resolution be diminished to a the state that is compatible with the public interest or be distorted and refracted in its substance in the process of balancing of the legal interests, this is not 'conscience' any more. In this case, exempting those objecting to the duty of military service on the ground of religious conscience from one half of the duty of military service or exempting those from the obligation of military service on the condition that the obligation to military service shall be imposed only at the time of emergency, may not be a solution that respects the conscience of the conscientious objectors.

Therefore, in the case of the freedom of conscience, it is not to realize both of the legal interests at the same time by reaching the state of harmony and balance through balancing between the freedom of conscience and the public interest; instead, there is only the choice between the "freedom of conscience" and the "public interest," that is, the question of whether an action or inaction against conscience is 'compelled or not compelled' by the legal order.

E. Whether the Statutory Provision at Issue in this Case Infringes the Freedom to Exercise Conscience

(1) When the individuals claim that their freedom to exercise conscience is infringed by a statute, it is the case where the statute does not give a special consideration to their unique situation of ethical conflict while imposing a legal obligation that is applicable to all citizens, that is, where the individuals challenge the absence of the exceptions applicable to them within the statute such as the provision that exempts the obligation or the provision that provides for alternative obligations, which takes the situation of conscientious conflicts of such individuals into account.

The question of whether the state guarantees the freedom to exercise conscience is the question of whether the legal community possesses the possibility of relieving the conscientious conflicts through a means respectful of the conscience of the individuals. Eventually, the question of the guarantee of the freedom to exercise conscience is the question of "how the state gives consideration to the minority of its citizens who think differently and intend to act differently from the decisions of the majority of the democratic community," the question of national and societal tolerance towards the minority, and the question of "whether the state is capable of presenting an alternative that is protective of the conscience of the individuals while maintaining its existence and legal order."

The freedom of conscience is a basic right that imposes an obligation to establish the legal order so that the freedom of conscience may be guaranteed as much as possible, primarily

upon the legislators. When the legal obligation and the conscience of the individuals collide, if the conscientious conflict may be removed by presenting an alternative such as an exemption of the legal obligation or other possible substitutes for the legal obligation without endangering legal order or the realization of the public interest intended to be achieved through the imposition of the legal obligation, then the legislators are obligated to minimize the possibility of collision between the conscience of the individuals and the legal order of the nation by way of such means.

(2) Therefore, the question of whether the statutory provision at issue in this case infringes the freedom of conscience is a question of judging whether the "public interest intended to be achieved by the imposition of the duty of military service may still be achieved notwithstanding the exception provided by the legislators in consideration of the freedom of conscience." If the legislators do not present an alternative while an alternative may be presented without obstructing the public interest or the legal order, this may be unconstitutional as a unilateral compulsion of sacrifice upon the freedom of conscience.

However, exempting without imposing any of the alternative obligations those who claim the freedom of conscience from the obligation that is applicable to all citizens is equivalent to the endowment of a privilege that is not permissible under the Constitution. Therefore, if the freedom of conscience requests an exception from the obligation of the citizens, the state should offset such an unequal element through the imposition of the alternative obligations if possible, in order that the national tolerance and the permission of exceptions does not become a privilege of the few.

With respect to the duty of military service, as a means to take the conscience of the individuals into account while removing as much as possible the unequal element in imposing the obligation, that is, as a solution to harmonize the conflicting legal interests of the conscience and the obligation to military service, we may consider an alternative civil service system (hereinafter referred to as the "alternative service system").

The alternative service system refers to a system under which the conscientious objectors provide service for the public interest in, for example, the state institutions, the public organizations and the social welfare facilities, as an alternative to the military service.

Currently, many of the nations have actually adopted this system on the constitutional or statutory basis, thereby resolving the situation of the conflict between the conscience and the obligation to military service.

(3) Then, the constitutionality of the statutory provision at issue in this case is ultimately the question of judging "whether the legislators may still effectively achieve the public interest of national security while permitting an exception to the duty of military service through the adoption of an alternative service system."

In judging whether or not to adopt an alternative service system, the legislators should comprehensively take into account the overall state of security of the nation, the combat capability of the nation, the demand of military resources, the quantity and the quality of the human resources subject to the conscription, the expected change in the combat capability in time of adoption of an alternative service system, the meaning and the significance of the duty of military service under the national security situation of Korea, the national and the social demand for the equal allocation of the performance of the duty of military service, the actual condition of the military service, and so forth. With respect to whether the adoption of an alternative service system will impede upon the achievement of the important public interest of national security under our current security situation, the following different assessments and judgments are possible.

(A) On one hand, an optimistic prediction can be made as follows.

First of all, the proportion of the conscientious objectors to the overall number of individuals under conscription is insignificant. In addition, the importance of human military resources has diminished in comparison, as the current-day national defense power does not depend solely upon the combat capability, and modern warfare takes on the aspect of the information warfare and the scientific warfare.

Although a question of equality in the duty of military service will be at stake if an exception to the duty of military service is to be permitted, the adoption of an alternative service system is feasible in reality as an alternative solution to simultaneously resolve the problems of the protection of the conscience and the equality, as has already been implemented in many nations for a long time.

If an alternative service system is operated in a way the burden of the alternative service is equivalent to that of the military service on active duty in totality of the duration of the service, the degree of the hardships and so forth, then an equal implementation of the duty of military service can be secured and the problem of the evasion of military service by abusing this system will also be resolved. In addition, as the experience in many of other nations that have adopted the alternative service systems confirms, because it is possible to select true conscientious objectors through strict preliminary screening process and post management concerning whether or not the objection to military service is based upon the conscientious decision, the national defense power will be maintained unharmed even if an alternative solution of the alternative service system is to be adopted.

(B) On the other hand, however, a pessimistic prediction can be made as follows.

Our nation is the only divided nation in the world that is under the state of truce, and the South and the North are still in a hostile opposition state based upon extremely strong military powers accumulated through the arms races in the past. Under this unique security situation, the duty of military service and the principle of equality in allocating the burden of military service have an important meaning that is incomparable to other nations. Although it is true that there has been a change in the concept of national defense and the aspect of the modern warfare, the proportion of the human military resources in the national defense power may still not be neglected, and the natural decrease in the military resources due to the decrease of birth-rate of these days should also be taken into consideration.

Considering the tough conditions of military service on active duty in our nation, it is not easy to secure the equivalence of the burdens through the alternative service, and, there is a danger that the attempt to realize the equivalence of the burdens might render the alternative service into a measure punishing the realization of one's conscience.

In addition, although the proportion of the conscientious objectors to the overall number of individuals subject to conscription is not great at the current stage, we may not rule out the possibility that the preventive effect of deterring the evasion of military service by way of the criminal sanctions might abruptly be dissipated by the adoption of the alternative service system. In light of the past experience of our society that corruption and the trend to evade military service continued incessantly, it is too much of an optimism to expect to completely prevent solely by institutional preventive measures, the intentional evasion of military service by abusing the alternative service system. In our society where the social demand for the equality in the burden of military service is strong and absolute, should the equality in performing the obligation become a social issue due to the permission of an exception to the duty of military service, the adoption of the alternative service system might cause a serious

harm to the capacity of the nation as a whole by crucially injuring the social unification and might further destabilize the backbone of the entire military service system based upon the mandatory conscription of all citizens.

(4) Should the constitutionality of a statute restrictive of the basic right depend upon the legal effect that will be materialized in the future as in this case, the question lies in to which extent the Constitutional Court may review the predictive legislative judgment with respect to this and to which degree the Constitutional Court may substitute its own judgment on estimation for the uncertain predictive judgment of the legislators.

(A) The right of the legislators to make predictive judgment varies depending upon the significance of the public interest intended to be achieved through the statute, the meaning of the legal interest that is infringed, the characteristic of the area of regulation, and the degree of the realistic possibility to make a predictive judgment. The more significant the public interest intended to be achieved is, and the greater the influence on others and the national community the individuals exert through the exercise of the basic right is, that is, the greater the social relevance of the exercise of the basic right is, the broader formative power is given to the legislators. Therefore, in this case, the only thing that is subject to review is whether the predictive judgment of the legislators or assessment may clearly be refuted or is plainly wrong. To this extent, the judgment with respect to which means will be employed to realize the public interest should be left to the legislators under the legislative authority for formation (14-2 KCCR 410, 432-433, 99Hun-Ba76 and others, October 31, 2002).

(B) Returning to this case, although the freedom of conscience is an extremely important basic right in the expression of the individual personality and the realization of the human dignity, considering that the essence of the freedom of conscience is not a right to refuse to obey the legal order but, instead, a right to request the state to protect within the scope that the national community may tolerate the conscience by taking the situation of conscientious conflict of the individuals into account, and, at the same time, the corresponding obligation of the state, the legislators have a wide scope of authority for formation with respect to whether the obligation to protect the conscience derived from the freedom of conscience should be performed and its method therefor.

On the other hand, the public interest that the statutory provision at issue in this case intends to achieve is a very important public interest of "national security," which is the prerequisite for the existence of the nation and for all liberties. When such an important public interest is at issue, we may not request an immoderate legislative experiment that might harm national security in order for the maximum guarantee of the liberty of the individuals. Furthermore, as the realization of one's conscience by way of refusing to perform the duty of military service is requesting an exception from the duty of military service that is applicable to all, judging from the perspective of equal allocation of the burden of the duty of military service, the pervasive effect over others and the entire social community will be great, thus a strong social relevance of the exercise of the basic right is recognized.

Therefore, from this perspective, the judgment of "whether the failure to adopt an alternative service system by the state is in violation of the freedom of conscience as the public interest of national security may still be effectively achieved notwithstanding the adoption of the alternative service system" should be limited to the test of "whether the legislative judgment is conspicuously wrong."

(5) As a matter of principle, determining upon the important policies concerning national security is the task for the legislators. The judgment of the legislators upon the security situation of the nation should be respected, and the legislators have a wide scope of freedom of formation in specifying the constitutionally imposed duty of national defense in the form of the statute based upon such judgment of the reality.

Considering the security situation of Korea, the social demand for equality in conscription, and the various restrictive elements that may accompany the adoption of the alternative service system, the current situation does not assure that the adoption of the alternative service system will not harm the important constitutional legal interest of national security. In order for the adoption of the alternative service system, the peaceful coexistence between South Korea and North Koreas should be established, the incentives for evading military service should be eliminated through the improvement of the condition of the military service, and, further, a consensus should be formed among the members of the social community that permitting the alternative service will harm neither the realization of equality in the burden of performing the duty of military service nor the social unity, through the wide spread understanding and tolerance of the conscientious objectors. At the current stage where such prerequisites are yet to be satisfied, the legislative judgment that the time is not ripe for the adoption of an alternative service system, may not be deemed to be clearly unreasonable or plainly wrong.

When there is a collision between the obligation to military service and the freedom of conscience, although the legislators are obligated to take the freedom of conscience into account as much as possible within the scope that is tolerable by the state in the process of balancing the legal interests, should the legislators fail to provide the possibility of the alternative service that will be substituted for the military service based on the judgment as the result of the balancing of the legal interests, that the freedom of conscience cannot be possibly realized without endangering the public interest of national security, such decision of the legislators may be justified in light of the importance of the public interest of national security and, as such, is not in violation of the legislators' "obligation to protect the freedom of conscience." Then, the statutory provision at issue in this case does not infringe the freedom of conscience or the freedom of religion of the conscientious objectors.

F. Whether the Statutory Provision at Issue in this Case is in Violation of the Principle of Equality

The statutory provision at issue in this case punishes the conscientious objectors rejecting military service on the ground that is fundamentally different from that of the rest of those evading the military service, by treating the conscientious objectors identically to the rest of those objecting to military service. Thus, its violation of the principle of equality is possibly at issue. This issue, however, is eventually dependent on the judgment upon "whether the non-recognition of an exception to the military service for the conscientious objectors is in violation of the Constitution." Therefore, as examined above, the absence of the exception for the conscientious objectors in applying the statutory provision at issue in this case is not in violation of the principle of equality.

The petitioner claims that punishing those who object to the military service on the ground of religious conscience is discriminatory treatment on the religious ground in violation of Article 11 of the Constitution. However, the statutory provision at issue in this case uniformly regulates regardless of whether the objection to the military service is based on conscience or not, or whether the conscience is a religious one or non-religious one, and does not discriminate on the ground of religion.

The petitioner further claims the violation of the principle of equality asserting that the impossibility of performing military service for the conscientious objectors is not different from the case of those with physical, mental or psychological disabilities or diseases, and comparing this case with the service as supplemental force or as personnel for public interest services by those with special talents in the areas of arts and athletics. However, there exists a fundamental difference between the conscientious objectors and those compared with by the petitioner from the perspective of military service. Therefore, a different treatment based on this corresponding difference is not in violation of the principle of equality.

G. Recommendation to the Legislators

(1) The issue of conscientious objectors has now become a major issue of the national community in our nation as well. The phenomenon of rejecting military service on the ground of religious conscience has existed since a long time ago primarily among the Jehovah's Witnesses, and, recently, this phenomenon has spread among the buddhists and the pacifists. Those who evade the military service are not only criminally punished under the statutory provision at issue in this case, but also subjected to the significant social disadvantages such as restrictions on becoming public officials or serving as directors or officers and the prohibition on obtaining permissions, approvals and licenses for various government-licensed businesses (Article 76 of the Military Service Act), and the deprivation of the qualification to serve as public officials for a considerable period of time even after the criminal punishment (Article 33 of the State Public Officials Act).

The number of the conscientious objectors still remains to be small. However, as the legislators have had so far a sufficient opportunity and time to recognize and affirm that the enforcement of the statutory provision at issue in this case collectively causes the situation of conscientious conflict, we are in the opinion that now is the time to seek a national solution of our own through a serious social discussion with respect to how to take the conscientious objectors into account, instead of neglecting and leaving as untouched the situation of suffering and conflict of the conscientious objectors.

In the international dimension as well, since 1967, the resolution for the recognition of the conscientious objection to military service has been repeatedly adopted at the European Union and the United Nations. Further, many of the nations have already resolved this problem through legislation, as the survey conducted by the United Nations in 1997 indicates that, among those ninety-three (93) nations implementing the mandatory conscription system, only less than a half of the nations do not recognize at all the conscientious objection to military service.

(2) The legislators are obligated under the freedom of conscience of Article 19 of the Constitution to mitigate the conscientious conflict by presenting the alternatives within the scope of not impeding the public interest or the legal order, such as a different possibility as a substitute for the legal obligation, or an individual exemption of the legal obligation. If such possibility may not be provided, the legislators then should at least look for the room for the protection of the freedom of conscience by permitting the diminution or exemption of the punishment or sanction imposed for the violation of the obligation.

Therefore, the legislators should earnestly assess whether there is a solution for eliminating the conflict relationship between the legal interests of the freedom of conscience and the national security and for enabling the coexistence of these two legal interests, whether there is an alternative to protect the conscience of the conscientious objectors while securing the realization of the public interest of national security, and whether our society is now mature

enough to understand and tolerate the conscientious objectors. Even if the legislators decide not to adopt an alternative service system, the legislators should seriously consider whether to supplement the legislation in the direction that the institutions implementing the law may take measures protecting the conscience through the conscience-favoring application of the law.

4. Conclusion

Therefore, it is hereby held that the statutory provision at issue in this case is not in violation of the Constitution.

This decision is by a unanimous decision of the participating Justices, with the exception that there are a dissenting opinion of Justices Kim kyung-il and Jeon Hyo-sook as in Paragraph 5 below, a separate concurring opinion of Justice Kwon Seong as in Paragraph 6 below, and a separate concurring opinion of Justice Lee Sang-kyung as in Paragraph 7 below.

5. Dissenting Opinion of Justices Kim Kyung-il and Jeon Hyo-sook

We agree with the majority opinion with respect to the constitutional meaning and importance of national defense and the political and social reality of our nation. However, we respectfully disagree with the conclusion of the majority opinion in that we conclude that the statutory provision at issue in this case is unconstitutional as stated in the following paragraphs. We are of the opinion that the legislators have failed to make the minimum of the effort that is necessary and possible notwithstanding the fact that we have reached the stage where we should search for an alternative for settling the conflict between the constitutional values of the freedom of conscience of the conscientious objectors and the duty of national defense.

A. Meaning of Freedom of Conscience

(1) Nowadays, the freedom of conscience is regarded as the root of the spiritual fundamental rights in major democratic nations. This is because, first, the freedom of conscience is inseparable from human dignity as it means that an individual may establish one's self-identity and live pursuant to one's own earnest and powerful voice from the heart by finding the existence within the surrounding world and the direction of one's actions; second, the freedom of conscience is the prerequisite for the realization of democracy as it enables the free formation and interchange of various opinions within the community based on value-relativism and the neutrality of the world views; and, third, without the freedom of conscience, neither the freedom of science and art nor the freedom of political activities may hardly be substantively guaranteed.

Our Constitution also has a separate provision of Article 19 that guarantees the freedom of conscience. The basis that forms conscience may be those that can properly be referred to as the view of the world, view of life, isms and beliefs or religion, and also the values and the ethical judgments internal to the heart pertaining to the formation of the personality of the individuals. When the religious conscience is at issue as in this case, the protection under the freedom of religion is also concerned. Whichever basis has formed conscience, however, the extent of sincerity required therefor is that the inability to act pursuant thereto would disintegrate the existential value of one's personality, and whether it is a powerful and earnest conscience as such should be judged separately in each of the individual cases.

(2) On the other hand, whether it is one's conscience may not be dependent upon the assessment on its substance by others external to that particular individual, nor may the degree of the value thereof be determined by such others. As long as it is a powerful and earnest voice from the heart, it should be regarded as one's conscience, and whether or not it is beneficial to the society, the nation or the human race is not considered in determining if it is conscience that is protected, with the exception that the assessment of its content may be conducted from the aspect of what impact a free permission of the realization of the conscience would have upon the guarantee of national security, the social order, or public welfare. From this aspect, whereas the conscience that remains internal to the heart is recognized as an absolute liberty and the restriction thereupon is not permissible, the external expression thereof or the exercise of the conscience through action or inaction may be restricted under Section 2 of Article 37 of the Constitution, as in the case of most of other rights to freedom.

An act should not be treated as insignificant, as a matter of course, on the ground that such an act is pursuant to the conscience that can be restricted. This is because humans do not live solely by the internal world but rather by relating themselves to the surrounding world, and also because, as the mind and the conduct are connected with each other, the mind may be preserved only when the conduct is in conformity with the internal side. The only thing is that, as the conduct pursuant to the internal mind has a greater social relevance due to the "possibility of harming other persons' basic right or the social order" compared with something that remains as a thought internal to the heart, such conduct may be relatively restricted.

(3) The issue of conscience that may not be consistent with the order of a generally applicable statute that does not intend to restrict the freedom of conscience, appears in the form of the question of whether or not to recognize an exception to the legal order. It is easy to regard the "exception or exemption" as a kind of privilege thus to deem that the realization of the freedom of conscience pursuant thereto is not guaranteed as a right.

However, the value chosen by the minority should not be presumed to be abnormal or inferior just because it is different from the thought commonly possessed by the majority, and conscience should be protected no matter what as a basic right. Therefore, in the above case, it is not appropriate to relax the review standard from the perspective of 'whether to provide a beneficial treatment' based on the premise that the majority principle should absolutely prevail. The constitutionality review of the statute in this case should be conducted pursuant to the general principle of restriction of basic rights under Section 2 of Article 37 of the Constitution, as in the judgment upon the infringement of other basic rights.

B. Conflict of Constitutional Values and Obligation of Legislators

(1) In general, when there is a conflict between constitutional values the superiority among which may not easily be determined, the legislators should seek a way for the coexistence of each of the constitutional values and for the harmonization among them through the optimal realization thereof. Also, when there is a collision or conflict between a basic right and other constitutional values, the legislators should not seek to unilaterally realize such other constitutional values, yet, instead, should seek an alternative to avoid the collision or conflict, and, even when an alternative may not be provided and the restriction of the basic right is inevitable, such restriction should stay within the scope that is in proportion to the purpose thereof. This is the content included in the principle of the restriction of basic right under Section 2 of Article 37 of the Constitution.

Therefore, when an alternative is necessary and possible, should the legislators fail to make the minimum effort therefor, the legislators may not be deemed to have abode by the principle of the restriction of basic right indicated above.

(2) On the other hand, while Article 39 of the Constitution imposes the duty of national defense upon all citizens, it at the same time endows upon the legislators as a matter of principle the authority and the responsibility to specify the duty of national defense in light of the totality of the national security conditions in reality and the amount of national defense power necessary for the existence of the nation. Among the systems relevant to national defense, especially the scope of the individuals subject to the conscription is a matter to be determined in light of the purpose in order to maintain the "optimal combat capacity" while responding flexibly to the abruptly changing domestic and international political situations, and, as such, a wide scope of authority for legislative formation concerning this matter is essentially endowed to the legislators (14-2 KCCR 704, 710, 2002Hun-Ba45, November 28, 2002). However, such authority for legislative formation is not always recognized for any matters indirectly or abstractly relevant to "national defense."

As will be examined below, in light of the fact that the conscientious objectors have objected to military service for a long period of time despite the continuing punishment and disadvantages that were suffered, the statutory provision at issue in this case has primarily functioned to resolve the inequality problem that would be caused by the recognition of the conscientious objection and its negative pervasive effect, rather than to secure the performance of the obligation to form military power by bearing arms on the part of the conscientious objectors. We do not claim in this situation that the conflict should be resolved by choosing the side of the protection of conscience notwithstanding the debilitation of military power or injury to the equality in the burden of military service. Our claim is that an alternative solution should be sought that may resolve the inequality issue and the negative pervasive effect issue to be caused by the recognition of an exception and may at the same time realize the protection of the conscience of the conscientious objectors. The search for this alternative solution does not belong to the typical national defense domain where essentially a very wide scope of authority for legislative formation is recognized, the examples of which include the range of the individuals subject to the conscription and the reasonableness of its construction. Therefore, the discretion of the legislators over the search for such an alternative solution may not be deemed to be as wide as above, just because the search for an alternative solution concerning the statutory provision at issue in this case is relevant to national security.

(3) The conscientious objection has continuously been at issue for half-a-century as centrally raised by the Jehovah's Witnesses, and they have endeavored to follow their conscience despite much of the disadvantages suffered including criminal punishment through incarceration. Thus, as it may hardly be debated under the current situation that their conscience is an earnest and powerful order from the heart that may never be relinquished, it is undeniable that its conflict with the constitutional duty of military service is in a serious state.

Therefore, the constitutionality of the statutory provision at issue in this case is to be determined depending upon, first, whether the recognition of an exception to the statutory provision at issue in this case generally applicable to those subject to conscription based on the premise of the duty of national defense would hinder national defense, second, whether the alternative service system under discussion as an alternative thereto is a proper alternative that may prevent a negative pervasive effect and eliminate the inequality problem, and, third,

whether the legislators have failed to make even the minimum of the effort therefor notwithstanding the fact that all of these questions are answered in the positive.

C. Proper Understanding of Conscientious Objection to Military Service

(1) It is not a subject matter of review here whether the ideology of the conscientious objectors objectively conforms to justice or is complete as an ideology or personality. However, it is undeniable that the conscientious objection to military service is based upon the sincere hope and resolution for the peaceful coexistence of the human race. Both at the individual level and the state level, the belief in refusing any and all killing or wounding irrespective of the cause has continuously appeared throughout history, and the ideal of peace represented in the forms of, for example, non-violence, prohibition of killing, and pacifism has been sought for and respected by the human race for a long period of time irrespective of the possibility of its realization. Our Constitution also expresses an aspect of such ideology in its Preamble by declaring the "contribution to perpetual world peace and common prosperity of the human race." The facts that many of the nations in the world have recognized the conscientious objection to military service and the international organizations have also continuously confirmed the need for its protection through the resolutions and the decisions of various kinds indicate that this issue is correlated to the common ideal of the human race as discussed above.

In this sense, the objection to military service by the conscientious objectors may not be deemed as an attempt to avoid the hardships of the military service or a demand for protection as free-riders while failing to perform the basic duty owed to the national community. They do not deny the sincere performance of their various other duties including that of taxation as members of the community, and sincerely petition to be provided with an alternative means of service that is no easier than the military service, in lieu of bearing arms for military service that they cannot perform.

With respect to entitling this as the "conscientious" objection, a question is raised whether this then means "those who serve the military lack conscience and those who object to military service are conscientious." However, the meaning of conscience here does not include the judgment that it is ethically justified; rather, the conscience here simply means that an individual is lead to objects to military service by the order from one's heart that may not be disobeyed. Therefore, this should not be understood as devaluing either the sanctity of the duty of national defense or the spirit and the hardships of most of the citizens who willingly perform the duty of military service in order to protect the nation and their families.

(2) Although the conscientious objection to military service is not, as examined above, to evade the obligation owed to the national community, the disadvantage that the conscientious objectors have to suffer due to the criminal punishment for the evasion of military service is immense.

First, the conscientious objectors are mostly sentenced to prison terms of a minimum of one year and a half, and may not be qualified to serve as public officials for a certain period of time even subsequent to the completion of the prison term (Subdivision 3 of Section 1 of Article 33 of the State Public Officials Act; Subdivision 3 of Article 31 of the Local Public Officials Act). In addition, in the case they are in public offices or work as directors and officers or employees of a civilian company, they shall be disemployed and lose their jobs by the irrebuttable presumption that they are military service evaders (Section 1 of Article 76 and Section 1 of Article 93 of the Military Service Act), thus will have to look for a new job following the release from the prison terms, while they are deprived of all of the previously

obtained patents, permissions, approvals and licenses for any businesses subject to government permission(Section 2 of Article 76 of the Military Service Act). On top of these disadvantages under the law, they also have to suffer in their subsequent social life such disadvantages as the various tangible and intangible inhospitalities and hardships in employment as criminal convicts with a criminal record of prison terms.

Especially when the religion and the belief upon which the conscientious objection is based is shared by family members, the father and the son from one generation to another or the brothers in succession are criminally punished, which causes even further infelicity to other family members. Actual cases include the case of incarceration of two sons subsequent to four years of incarceration of the father in the past and in anticipation of the incarceration of yet a third son, all for the reason of conscientious objection, and the case of the punishment of all of four brothers one after another by prison terms of either two years or one year and six months all as the conscientious objectors.

What do these examples, which are even frightening, mean? To which degree is the weight of their conscience that they endeavor to preserve despite the criminal punishment and the immense harm in social life they suffer? Aren't we perhaps considering too lightly their sincere conscience or are we prejudiced against them?

D. Necessity for and Possibility of Alternative Military Service System

In light of the facts that the freedom of conscience is an important right basic among the rights to spiritual freedom and that the freedom to exercise the conscience should not be disregarded, the seriousness of the conflict between the current law and the conscience surrounding the conscientious objection, the discussions and the experiences accumulated domestically and internationally concerning this matter, and the degree of discretion endowed to the legislators with respect to this matter, we are of the opinion that the legislators are now obligated to search for a solution to achieve harmony by settling the conflict relationship between the freedom of conscience and the equal performance of the duty of military service by way of, for example, providing an alternative solution, and, further, that it is sufficiently possible in reality to satisfy such obligation.

(1) First, the effect upon the overall national defense power of the service and the failure thereof in the military to bear arms of the conscientious objectors in itself is examined.

The records presented by the Military Manpower Administration indicate that the number of the conscientious objectors who suffered criminal punishment was approximately 400 per year from 1992 to 2000, and approximately 600 per year from 2001 to 2003. They are mostly Jehovah's Witnesses. Also, from 2001 to 2003, the number of the individuals who objected to enlistment thus either were or currently are subjected to trial therefor as buddhists or pacifists was less than 10 in the respective years. On the other hand, the number of the individuals who are conscripted for military service on active duty is approximately 300,000 to 350,000 per year, and the number of those enlisted in the first militia service as of January 1, 2003 is approximately 350,000. Also, the number of the individuals who are enlisted as the result of the physical examination in the supplemental force for the supplement of short-term deficiency in military power is approximately 40,000 per year, and the number of the individuals enlisted as personnel for public interest service is approximately 30,000 per year. Therefore, in terms of the numbers, the proportion of the conscientious objectors does not reach the extent that will cause a decrease in military power or combat capacity.

In addition, the fact that they have continuously objected to enlistment or bearing arms despite criminal punishment and the immense tangible and intangible disadvantages

subsequent thereto for half-a-century since the enactment of the Military Service Act or the Military Criminal Act corroborates that criminal punishment may not be expected to have either a special deterrence effect or a general deterrence effect with respect to the conscientious objection to military service. Then, it can hardly be deemed that the criminal punishment of the conscientious objectors is a means necessary for securing the performance of the obligation by them or by the potential conscientious objectors in the future.

(2) Therefore, if there is something that the legislators should be concerned about with respect to the recognition of the exception for the conscientious objectors, it would be the issue of equality in the duty of military service. There is a concern that the recognition of an exception for them might hinder securing the equal performance of the duty of military service, and that its pervasive effect might harm the effectiveness of military service system based on mandatory conscription applicable to all citizens as a whole due to the loss of trust in the entire military service system and the increase of those evading military service under the pretext of the conscientious objection. The claim that the statutory provision at issue in this case against the conscientious objectors is necessary as general deterrence in the sense that it prevents the general trend of evading military service is also based upon the concern stated above.

Considering the wide spread and incessant trend to evade military service and also a wide spread and strong demand for the equal performance of military service due to our security situation, the seriousness of the burden demanded from the individuals by the performance of military service, the corruption concerning military service, and the issue of welfare within the military concerning the military facilities and the military culture, it is true that there exists a justifiable ground for the concern that the above problems might appear in the future in serious forms.

However, this is premised primarily on the expectation that it is extremely difficult for the legislators to find a solution, theoretical or practical, facing the issues of the equal performance of the duty of military service and the increase in evasion of military service, while such expectation is not the result of a serious and sufficient assessment of possible alternatives. An alternative solution that may resolve the protection of conscience and the issue of inequality at the same time is possible in theory, and, further, the fact that many of the nations in the world have maintained the conscription system by effectively resolving these issues while recognizing the conscientious objection to military service for a considerable period of time strongly indicates that it is feasible in practice as well.

(A) First, the issue of securing equal performance of the duty of military service is hereby examined.

Sharing the equal burden among all citizens to participate in national defense as members of the nation is the core of our national defense system and an important element that has maintained the national community and held the citizens together. From this aspect, the inequality in performing the duty of national defense that will inevitably resulted from an exception to the duty of military service for the conscientious objectors has a serious significance, and will cause yet another issue of violation of the Constitution.

However, the duty of national defense is not limited to the obligation to directly form military force by bearing arms by, for example, serving the military pursuant to the Military Service Act (7-2 KCCR 851, 860-861, 91Hun-Ma80, December 28, 1995), therefore, the compulsion of the performance of the obligation and the criminal punishment under the statutory provision at issue in this case are not the only means to achieve equality in

performing the duty of national defense. Therefore, if an obligation that is equivalent to or severer than military service on active duty in light of its duration and burden is to be imposed upon them, the equality in performing the duty of national defense may be restored and the debate over providing the conscientious objectors with an unjust privilege will also cease.

Various means may be devised with respect to the content of such an obligation. For example, many of the nations in the world including Germany, Denmark, France, Austria, Italy, Spain, Brazil and Taiwan have resolved the issue of equality in performing the duty of military service and maintained the conscription system without any notable problems by having the conscientious objectors serve as non-combat force within the military or in the alternative civilian duties. These nations generally utilize as the alternative civilian duties tasks such as rescuing activities, patient transportation, fire-fighting, service for the disabled persons, environmental improvement, agriculture, refugee protection, service at the youth protection centers, preservation and protection of cultural heritages, service at the prisons or rehabilitation institutions.

There are many of those that can be sufficient alternatives under the current law with slight changes in the system. For example, the legislators may prepare an institutional device so that those conscientious objectors who do not object to the enlistment itself but object to bearing arms may serve in the tasks not directly related to arms-bearing or combats, and may also revise the current supplemental force system in part so that it will apply to the conscientious objectors.

It should be specifically noted that having the conscientious objectors perform support tasks necessary for the public interest of the state, public organizations or social welfare facilities and those with expert knowledge and abilities server the public interest by utilizing it will bring a greater substantively beneficial effect on national security in the broad sense than compelling military service on active duty by bearing arms thus subjecting them to criminal punishment. Such systems in the current Military Service Act as the personnel for public interest service system under which those who are qualified to serve on active duty as the result of physical examination may serve in support tasks for the public interest, in the art and athletics areas for prosperity of culture and enhancement of nation's prestige, or in the tasks supporting the developing nations (Section 1 of Article 26) and the system under which such individuals may be enlisted in the supplemental force and serve as public health doctors, doctors for international cooperation, or law officers for the public interests are also the result of consideration upon this very aspect.

However, in the case of the current supplemental forces, they are subject to military training in the range of the maximum of 60 days (normally for 30 days) (Section 1 of Article 55 of the Military Service Act, Article 108 of the Enforcement Decree). Even subsequent to the completion of the service, they remain to be subject to be called for military force mobilization for composition of troops or military strategy demand upon occurrence of war or calamity or the declaration of the mobilization order, and are subject to military force mobilization training for up to 30 days each year (Articles 44 and 49 of the Military Service Act). Therefore, exempting the conscientious objectors from these obligations would cause an issue from the aspect of the equivalence of the obligations. However, this problem may also be settled by obligating them to physical training for a specific time period in lieu of military training, as seen in the alternative service systems in other nations, and by making the duration of service longer than that for military service on active duty reflecting the time period of military force mobilization training.

(B) Next, the issue of the negative pervasive effect on the military system as a whole that is based on the mandatory conscription of all citizens due to the increase of those evading military service, is hereby examined.

The current situation of failing to eradicate corruption concerning military service and the trend evading military service despite the continuous effort to secure the fairness of military affairs administration, provides a strong corroboration for the prediction that recognizing the conscientious objection to military service would offer yet another incentive for corruption concerning military service or evasion from the military service. It is also true that a considerable number of citizens share this view.

However, as shown in the experiences of many of other nations that operate the alternative service system, as indicated above, it is possible to select out the true conscientious objectors from those who are not through strict preliminary review processes and post management.

Most of all, should the incentive for the evasion of the military service on active duty be eliminated by securing the equivalence of military service on active duty and the substituting alternative service, this problem may be effectively settled. If anyone would attempt to evade bearing arms for military service on active duty under the pretext of the conscientious objection, this would be because of the judgment that serving in the alternative tasks would be beneficial to that individual. Thus, the greater the burden and the hardship of the alternative service would be, the corollary would be the decrease of such evaders of the military service. Eventually, securing the equivalence of the burdens, along with the guarantee of the equality in the duty of national defense, can be the ultimate means to resolve the problem of the evasion of military service. In addition thereto, it is a matter of course that the improvement of the treatment and the welfare within the military concerning, for example, the military facilities should be undertaken simultaneously with the above measures. Those nations implementing the alternative service system have in fact witnessed the effect that the welfare of the military has also improved.

It is a possibility, as a matter of course, that an excessively long duration or excessive degree of the alternative service might render it difficult for the conscientious objectors to choose the alternative service system thereby making the alternative service system no more than nominal or causing the problem of yet another violation of the Constitution. However, this may only be concluded as the problem of unreasonableness of the content of the alternative service itself, and may not lead to the conclusion either that the provision of the possibility to choose the service in an alternative form in lieu of bearing arms for the military service on active duty is in itself unreasonable, or that the uniform compulsion of military service on active duty by bearing arms under the statutory provision at issue in this case is reasonable.

Should there be solutions to face such problems that might be caused by the exemption of the conscientious objectors from enlistment for active duty, such as the inequality of duty of military service and the abrupt increase of the evasion of military service, it may not be deemed that there necessarily is a need to criminally punish those evading military service pursuant to their conscience by prison terms in order to compel military service on active duty by bearing arms, even if there are practical difficulties to be overcome in the process of implementing those solutions.

(3) There is a high demand for the recognition of the conscientious objection to military service from the aspect of the international laws as well.

The International Convention on Civil and Political Rights adopted by the United Nations in 1966 guarantees in Article 18 the freedom of ideas, conscience and religion. In 1993, the

United Nations Human Rights Committee declared, in its General Comment No. 22 concerning the freedom of ideas, conscience and religion, that "The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief."

The United Nations Commission on Human Rights also expressed the same position through repeated resolutions. For example, the above Commission expressly stated in 1987, in its Resolution No. 46, that "we urge a universal recognition of the right of conscientious objection," and declared in 1993, in its Resolution No. 84, that "alternative service should be of a non-combatant or civilian character, in the public interest and not of a punitive nature," as well as declaring for the prohibition of criminal punishment of the conscientious objectors. In addition, in 1998, the Commission in its Resolution No. 77 reaffirmed the right of conscientious objection, and also requested each of the nations to adopt the alternative service system, as well as to establish an independent and fair institution to judge the claims of the conscientious objectors, to stop the imprisonment and the repeated imposition of criminal sanctions, to stop discrimination in economic, social, cultural, civil or political rights, and to protect as refugees those individuals who left their home countries to avoid persecution due to the conscientious objection.

Our nation signed the above Covenant in 1990 without any reservation with respect to Article 18, became a member of the United Nations in 1991, and directly participated in the recent resolutions of the United Nations Human Rights Commission for the recognition of the right of conscientious objection including the resolution in the year 2004. It is necessary to actively seek an alternative solution while we may no longer postpone or turn our face away from this issue, not only in light of the facts that many of the nations already recognize the right of conscientious objection to military service and that the nations punishing as many individuals as our nations for conscientious objection are rare, but also in light of the fact that our statutes and relevant practices may in no way be harmonized with the above international laws.

(4) Nevertheless, examining our military service system and the statutory provision at issue in this case, there may be found no trace of even the minimum consideration for the conscientious objectors in consideration of such situations.

In the case of the supplemental force under the current Military Service Act, there exists no supplemental force on the ground of conscience, as the supplemental force enlistment is categorized under the criteria of the determination of the degree of physical capability and the expert knowledge and abilities. Also, even those among the conscientious objectors who are categorized for the supplemental force service according to the criteria such as the degree of physical capability, are still subject to "military training" for up to 60 days pursuant to the Military Service Act and to the military force mobilization training subsequent to the completion of service, thus this is hardly acceptable on the part of the conscientious objectors who refuse to bear arms.

In the case of someone under military service on active duty, there is a possibility of being exempted from weapons training and serving instead as medical personnel depending on the discretion of the Ministry of National Defense or the commanding officer in charge. However, it is questionable whether the Ministry of National Defense or the commanding officer in charge does actually have such discretion, and also whether it is desirable to recognize such individual exercise of discretion in the military organization that needs consistent and uniform structures and rules. Further, even if it is possible under the current law that the adjudicating

courts may flexibly apply the statutory provision at issue in this case in consideration of the situation of the conscientious objectors, this does not exist as a measure for the protection of conscience, nor, on the other hand, may it hardly be expected that the institutions enforcing the law or the adjudicating courts take measures in consideration of them, in light of the practice of compulsion of military service on active duty by bearing arms and criminal punishment imposed upon them so far (*Refer to* Supreme Court Decision 2004Do2965, July 15, 2004).

More than anything else, leaving the solution in the discretion and judgment of the individual enforcement institutions or adjudicating courts without any legislative solutions may not be expected to be a fair, objective or consistent measure. This method may not be a fundamental solution, as it will produce yet another debate over corruption concerning the military service or inequality and cannot but be incomplete from the aspect of the protection of conscience. It is worth noting in this respect that those nations adopting the alternative service system have detailed legislation therefor, and that the resolutions of the United Nations Human Rights Commission expressly required an independent and fair decision making institution be established to determine the appropriateness of the conscientious objection in particular cases (Resolution No. 84 of 1993, and Resolution No. 77 of 1998).

Therefore, there is no room to deem under the current law that there are certain elements that enable conscience protection measures by the institutions implementing the law or that there exist the minimum of measures for adjustment from the perspective of the national legal system in its entirety.

E. Conclusion

Listening to the voice of the "minorities" who think differently from the majority and reflecting it under the democratic decision making structure based upon the majority rule is a core element in the basic ideas of our Constitution of the guarantee of the inviolable basic human rights of the individuals and the establishment of the democratic basic order. Furthermore, we believe that respecting and to a possible extent accepting the belief of the conscientious objectors who are the minority citizens distinguished from the majority of the society will guide our society in the direction toward further maturity and development.

We conclude, as examined above, that the legislators have failed to make even the minimum effort to harmonize by resolving a serious and long conflict relationship between the duty of military service and the freedom of conscience of the conscientious objectors who are the social minorities in compelling the enforcement of the duty of military service specified by the statutory provision at issue in this case. Therefore, we are respectfully of the opinion that the statutory provision at issue in this case is unavoidably unconstitutional to the extent that it uniformly compels enlistment and imposes criminal punishment upon the conscientious objectors.

6. Separate Concurring Opinion of Justice Kwon Seong

I agree with the conclusion of the majority opinion that Subdivision 1 of Section 1 of Article 88 of the Military Service Act indicated in the holding of the opinion of the Court is not in violation of the Constitution. However, I respectfully disagree in part with the majority opinion to its structuring of the reasons therefor, and hereby express my opinion as follows.

A. There are two ways of approaching the constitutionality of the statutory provision at issue in this case. The first of these is the method of proving the unconstitutionality of the

legislative omission of the failure to legislate the possibility of the so-called alternative civilian service and then drawing from this the conclusion that the statutory provision at issue in this case that punishes the evasion of military service while blocking the possibility of substituting the alternative civilian service is also unavoidably unconstitutional. The second of these is the method of proving that, based upon the premise of the accumulated interpretation of the courts that evading military service in order to obey the order of conscience mandating refusal to bear arms does not constitute a "justifiable cause" for evading military service, the statutory provision at issue in this case that represents the above interpretation is unconstitutional as it infringes upon the freedom of conscience.

(1) First, the appropriateness of the first approach is hereby examined.

The statutory provision at issue in this case is no more than a provision that criminally punishes those evading military service, and the obligation of enlistment for military service on active duty itself is not imposed by the statutory provision at issue in this case. The obligation of enlistment for military service on active duty is imposed by Articles 3 (Obligation To Military Service), 5 (Types Of Military Service) and 16 (Enlistment For Military Service On Active Duty) of the Military Service Act and by Article 21 of the enforcement decree (Service Of Notice Of Enlistment For Military Service On Active Duty). Thus, a valid service of the notice of enlistment in active service originates the obligation of enlistment in active service, while the statutory provision at issue in this case applies to the failure to perform such enlistment obligation, in order to punish such failure to perform the obligation. Therefore, assuming the existence of a provision permitting alternative civilian service, such a provision must apply prior to the occurrence of the obligation of enlistment in active service, that is, prior to the sending out for service of the notice of enlistment, by way of the application therefor by the individuals concerned, the review, and the determination. This is because the alternative civilian service may not be available to those who have already been enlisted to serve on active duty, as the military soldiers on active duty and the civilians have a different status and the service as a military soldier on active duty and the service in alternative civilian tasks will fundamentally differ in their respective contents. If arguing for a provision permitting the transfer to alternative civilian service subsequent to the occurrence of the obligation of enlistment for military service on active duty, this would be an after-the-fact termination of the already originated obligation of enlistment. This would therefore be identical in practice to recognizing the ground for permitting alternative civilian service as a "justifiable cause for refusing enlistment," which then matches the second approach stated above. If this were claiming for a provision permitting the transfer to alternative civilian service subsequent to the enlistment in active service duty, then such a provision would bear no relevance to the statutory provision at issue in this case punishing those refusing the enlistment itself, therefore this would be an issue beyond the subject matter of this case.

From this perspective, should it be determined to adopt a provision permitting alternative civilian service, such a provision in its own nature should be the one regulated as a measure of exception to the imposition of the duty of military service, at the stage of imposition of the duty of military service prior to the origination of the obligation of enlistment in active service. Therefore, even assuming that the omission of legislating to permit alternative civilian service were held to be unconstitutional, such unconstitutionality might only possibly lead to the unconstitutionality of the provision uniformly imposing the duty of military service (that is, Article 3, 5 or 16 of the Military Service Act), yet could not lead to the unconstitutionality of the provision punishing the failure to perform the previously originated

obligation of enlistment for military service on active duty (that is, the statutory provision at issue in this case).

Then, attempting to prove the unconstitutionality of the statutory provision at issue in this case by way of the first approach, that is, attempting to conclude the unconstitutionality of the statutory provision at issue in this case depending upon the unconstitutionality of the omission of legislation of the permissibility of the alternative civilian service, is not appropriate, as an argument structured upon a matter that bears no logical causation to the statutory provision at issue in this case. I support the separate concurring opinion of Justice Lee Sang-kyung that points this out first, and respectfully disagree with the majority opinion disregarding this.

(2) Next, the second approach predicated above is hereby examined.

Pursuant to the accumulated opinions of the courts, the "evasion of the enlistment in order to obey the so-called order of conscience mandating the refusal to bear arms" may not constitute a "justifiable cause" for the evasion of enlistment regulated in the provisions of law. Therefore, the statutory provision at issue in this case should be treated as conclusively having this meaning therein. With respect to whether the statutory provision at issue in this case that has such meaning does actually violate the freedom of religion or conscience of the petitioner, that is, with respect to the second approach predicated above, my opinion is in the negative as stated in the following. This is examined in a separate paragraph below.

B. Infringement upon Freedom of Religion

(1) Distinction between Conscience and Religion

Conscience refers to the mind of humans that orders humans to think and judge morally and ethically and to act accordingly. Thus, conscience is the subject that exists within humans and makes humans as moral and ethical beings, and this constitutes the main axis that supports human dignity. On the other hand, religion that means an internal conviction towards God and the world after human mortality is the voice of God as the teachings of god delivered by the human consciousness. Therefore, while conscience is the voice of the human mind itself, religion is the voice of God delivered by the human consciousness. Whether these two are ultimately identical is a separate issue of a higher dimension, and, as an issue in the phenomenal world, a starting point for the reasonable discussion lies *prima facie* in the understanding of these two as distinguishable as above, respectively belonging to different categories. This distinction conforms to the tenor of our Constitution that separately and distinctively provides for the freedom of conscience, the freedom of religion, and the freedom of science and art.

In many cases, the belief as the result of conscience and the belief as the result of religion coincide in their conclusions. However, this does not render these two identical, as these two clearly have different origins.

The analysis of the petitioner's claim in this case in light of the facts of the case reveals that this falls under the religious belief that originated from the religion of Jehovah's Witnesses in which the petitioner believes (According to the summary of the case under Item 1 on page 1 of the petition for the request of constitutional review filed by the petitioner, the petitioner alleges that he refused to the enlistment pursuant to his firm religious conscience formed through the religious life as a Jehovah's Witness). The petitioner's claim is clearly based upon, internally, the voice of god and the teachings of god as the starting point.

The majority opinion understands the issue of this case as a matter of conscience as well as a matter of religion at the same time, and then states that it is to be examined mainly under the freedom of conscience for a more comprehensive discussion. However, as explained above, even when the result of the conscience and the result of the religion take an identical external form, as long as they have different origins internally, these two should not be regarded as the same.

(2) From this perspective, whether the statutory provision at issue in this case violates the freedom of religion is examined first.

(A) First, whether or not the petitioner's refusal to bear arms is right as a religious belief or teaching is not a subject matter of review. This is because it is not appropriate for humans that are limited and incomplete beings to judge the right and wrong of the teachings of God in their substance that are premised upon the God as the omnipotent being in terms of capability and knowledge. The principle against state interference with this matter reflects human wisdom that accepted the lessons from the history. In this sense, the freedom of religion under the Constitution is an absolute liberty.

(B) Therefore, the task for us in constitutional adjudication is not to judge whether or not the content of the religious belief or teachings is justifiable; instead, it is limited solely to the judgment over the realistic acceptability of the effect of its social waves upon the constitutional order. To recapitulate this, the act that expresses the religious teachings or belief (defined to include the act for the realization of such teachings or belief) is an act that results in pervasive effects upon society, therefore, such an act is the object of regulation by the statute, and, as such regulation concerns the restriction of a basic right, Section 2 of Article 37 of the Constitution applies thereto.

The relationship between the need for the guarantee of national security regulated in Section 2 of Article 37 of the Constitution and the duty of national defense under Article 39 of the Constitution is examined below where the freedom of conscience is discussed.

(C) The assessment under this logical context over whether the statutory provision at issue in this case violates the petitioner's freedom of religion leads to the conclusion that the social effect of refusing to bear arms which is for the guarantee of national security and the defense of national territory under our Constitution that denies the war of aggression (Section 1 of Article 5) is not acceptable under our constitutional order.

That is because it is not certain whether permitting the refusal to bear arms would not harm the important constitutional legal interest of national security, considering the security situation of our nation, the social demand for the equality in conscription, and the various restrictive elements that might accompany the permission of the conscientious objection and the adoption of an alternative solution.

In order to recognize and permit the refusal to bear arms, a peaceful coexistence at least between South Korea and North Koreas should be settled, and, in the long run, an international order for the guarantee of security should be in formation, which will render the wealth and the military power of a nation unnecessary therefor. It is difficult to hold a positive view at the current stage that such conditions have been satisfied. Therefore, the legislative judgment (and the accumulated interpretation of the courts) that the refusal to bear arms on the ground of religion does not constitute a justifiable cause for the evasion of enlistment is neither clearly unreasonable nor plainly wrong.

Then, non-recognition of the so-called refusal to bear arms on the ground of religious belief in the statutory provision at issue in this case does not violate the petitioner's freedom of religion as it is necessary for the guarantee of national security, and, therefore, it is not in violation of the Constitution.

C. Issue of Freedom of Conscience

The issue to be determined when it is assumed that the petitioner's refusal to bear arms is not mandated from the voice of God but instead from the voice of his own conscience is now examined.

(1) While religious belief or teaching is the voice of God, the voice of conscience is the human voice, which is the expression of the ethical determination in conformity with human dignity.

It is already stated in the preceding paragraphs that humans may not judge the right and wrong of the voice of God in its substance, and merely the acceptability in reality of its social impact can be the subject matter of constitutional adjudication as a matter of the restriction of basic rights.

On the contrary, the voice of conscience is the human voice, therefore, the right and wrong of its substance, that is, its justifiability, can be judged, as a matter of course. At the stage when the voice of conscience remains internal in one's mind, it is exempt from criticism as it is guaranteed as an absolute liberty in the sense that its external expression may not be coerced, although, however, once expressed and disclosed, it may not be excluded from the criticism. Conscience that has been expressed is no more one's own but has become an objective thing to which both self and others are socially related, thus it is now subject to criticism. It is different from that the voice of religion may not be criticized in the voice of the humans other than its being criticized in other names of the god.

(2) There is no limitation of the means to express the voice of conscience. Expression by way of conduct is possible, as well as verbal expression. Furthermore, such expression may be the representation of the gradual pursuit of the truth or the sudden enlightenment as well.

Eventually, the act of realizing the conscience is one form of expressing conscience, and becomes as such an objective thing to which both self and others are socially related. Therefore, the freedom to realize conscience may be the subject matter of criticism.

(3) What is the criterion for criticism? It is the universal validity.

As the voice of conscience is the result of ethical determination that conforms to human dignity, it should be in conformity with human dignity and should thus have universal validity that is acceptable by human reason. At a minimum, even if universal validity is currently not recognized, the possibility of obtaining it should be left open.

What is the threshold for obtaining universal validity?

Unlike science or ideology, conscience is the essence of the ethical determination. Therefore, the substance of its universal validity is epitomized as benevolence (仁) and righteousness (義), which are the core theses of ethics.

Some variations in the approach thereto and the expression thereof depending upon the time and the individuals notwithstanding, it is undeniable that, eventually, benevolence and righteousness are the two specific marks that the essential nature of any and all humans pursue.

Benevolence and righteousness are the reasons enabling humans to become dignified and to become ethical beings. Therefore, a conduct of benevolence and righteousness obtains the universal validity, whereas a conduct that lacks benevolence and righteousness has no possibility of obtaining the universal validity. [Refer to Paragraph (6) below for the meaning of benevolence and righteousness in this case.]

Should the voice of conscience have universal validity, such voice of conscience should be absolutely protected. Section 2 of Article 37 of the Constitution does not apply as it is absolutely protected. Therefore, should the voice of conscience have universal validity, even if its social impact is hardly acceptable readily under the current order of positive law, this may not be regulated by applying Section 2 of Article 37 of the Constitution. In this sense, universal validity is the internal limit of the freedom of conscience.

However, it is a different matter when the voice of the conscience lacks universal validity. In this case, first, should there be little concern over its social impact, this may not be regulated by the application of Section 2 of Article 37 of the Constitution, even if its substance is unjustifiable. What falls within this range is the object of tolerance.

Then, the voice of conscience is categorized into different phases and constitutionally protected in accordance thereto, as follows. First, when it is an internal thing, it is absolutely protected. That is, there is no room for Section 2 of Article 37 of the Constitution to be applied. Second, when the voice of conscience that has been expressed has universal validity, it is also absolutely protected. Therefore, it may not be restricted even for the guarantee of national security, the maintenance of order, or public welfare. That is, Section 2 of Article 37 of the Constitution does not apply thereto. Third, when the voice of conscience that has been expressed lacks universal validity, Section 2 of Article 37 of the Constitution does apply. As a result, it may be restricted if necessary for the guarantee of national security, the maintenance of order, or public welfare, while it may not be restricted if such need is not recognized.

Understanding the constitutional protection of the freedom of conscience by categorization as above for respective phases is a means to provide a greater protection therefor, correspondingly to the importance of the freedom of conscience. It is because, under the previously held opinion, only the conscience remaining at the stage internal to the heart was absolutely protected in general, whereas, pursuant to the opinion of categorical protection indicated above, not only the conscience that remains as an internal being but also the conscience with universal validity that has been expressed is also absolutely protected.

Furthermore, if the freedom of conscience is, as the majority opinion states, no more than something that petitions for tolerance
for the conscience of minorities and imposes the obligation of favorable consideration for tolerance upon the state, the protection of the freedom of conscience turns into something that does not have any substantial content or meaning in reality. This is out of balance with the position that holds the freedom of conscience out as the most important basic right.

Therefore, it is appropriate to determine the depth of the protection for the freedom of conscience under the criterion of the existence of universal validity.

The judgment upon universal validity is conducted in two venues. One is the court and the Constitutional Court, and the other is the market of scholarship. The judgments by these two should be mutually respectful, however, they inevitably are mutually intrusive in reality.

(4) The freedom of conscience, the freedom of ideas and the freedom of science share a common aspect in that they all have their roots in the spiritual process of the internal mind of humans. Therefore, the above discussion concerning the freedom of conscience may generally be appropriate as is for the freedom of science or the freedom of ideas.

When adapting the Inquisition of the Middle Ages on the heliocentric theory of Galileo's to today's constitutional adjudication as a means of explanation, the heliocentric theory is, first, not the voice of conscience as it does not fall within the category of ethics and morals, nor is it a matter of religion as it does not deliver the voice of God. This belongs in the dimension of natural science and the philosophical ideology based thereupon. Then, the expression of the heliocentric theory comes under the freedom of science and ideology, and, should its content have universal validity or the possibility thereof, it should be absolutely protected. The above Inquisition of the Middle Ages was incorrect in regarding the heliocentric and the geocentric theories as a matter of religion, in rejecting the universal validity of the heliocentric theory by abstract dogmatism without examining its universal validity by way of reason, and, even worse, in coercing the defendant to deny the heliocentric theory by threats. In light of the understanding of the general public toward science at that time and of the sophistication of the judges, it was indeed an extremely difficult task to examine and affirm the universal validity of the heliocentric theory. A lesson from history is drawn from this as follows: In examining universal validity concerning such matters as conscience, science and ideology, prudence is mandated when denying the universal validity, in light of the enlightenment of human reason, the development of science and the evolution of the society that may proceed in the future; and, even upon denial thereof, as generous as possible a position should be taken over the ensuing sanction thereupon, in light of the possibility of its obtaining universal validity in the future. This is one of the elements that the courts today may take into account at trial.

(5) The voice of conscience that is absolutely protected under the Constitution is limited, as indicated above, to that with universal validity in its substance and that with the open possibility of obtaining the universal validity. Furthermore, although it is a matter of course, sincerity in its formation process should also be recognizable. Eventually, sincerity in the formation process and universal validity of the substance, these two are the required elements for the constitutional protection of the voice of conscience.

Those having a problem in the formation process, for example, those formed due to mental disease, should be excluded from the object of protection. In addition, sincerity in formation is one of the elements distinguishing the freedom of conscience from the general freedom of conduct. Only when it is based upon an intense determination that means the expression of one's identity, an intense determination that means one's consistency in knowledge and conduct, or a determination for which sacrifice is willingly suffered, it is the expression of the conscience; if not, it comes under the general freedom of conduct.

(6) Returning to this case, there is an extremely thin possibility that refusing to bear arms required to defend against an unjust and unrighteous war of aggression can be judged as an ethical determination that is in conformity to human dignity. There is sufficient recognition that the natural perception of ordinary people across nations and throughout history is that they would feel much ashamed if they could not bear arms due to the order of their conscience, when the bearing arms is to preserve national territory and the constitution, to fight against the killing and wounding of themselves, their families and their loved ones, and to prepare for such resistance. Furthermore, such perception can sufficiently be recognized as proper upon rational thinking of our reason.

Taking no measure upon witnessing the killing and the wounding of one's parents, siblings, spouse and children is suspicious of the lack of benevolence (仁) due to the destitution of the feeling of commiseration (惻隱之心); Feeling no fury upon witnessing such killing and wounding is under suspicion of the lack of righteousness (義) due to the destitution of the

feeling of shame and dislike (羞惡之心); Remaining solely at the indulgence in the safety earned as the result of hardships and sacrifices of other people is under suspicion of the deviation from propriety (禮) as it lacked the feeling modesty and complaisance (辭讓之心); Turning the face away from the danger of invasion that is sufficiently predicted yet not imminent is suspicious of the lack of wisdom (智慧).

A conduct that is suspicious of lacking benevolence (仁), righteousness (義), propriety (禮) and wisdom (智) as such may not be recognized to have universal validity.

Therefore, refusal to bear arms that is necessary to defend a war of aggression or to prepare such defense may not be recognized as the voice of conscience that has universal validity.

It was not because Yulgok Lee Yi lacked conscience or was belligerent that he petitioned to raise 100,000 soldiers in 1583, ten years prior to the outbreak of the Korean-Japanese war of 1592. Nor is it because those many young persons in military service are lacking in conscience or are belligerent that they bear arms and offer sacrifice in the military. It is not because of the lack of conscience or the sake of enjoyment of war that the United Nations commits the peace-keeping corps to subjugate the entity committing cruel ethnic cleansing.

Therefore, it may never be deemed as the voice of universally valid conscience to refuse to bear arms for defensive purposes. Even considering the future, this conclusion will remain unchanged for at least a considerable period of time.

Then, the act of refusing to bear arms lacks universal validity even if it is based upon the voice of conscience, as far as the bearing of arms is not demanded to conduct a war of aggression. Thus, the constitutional protection therefor may be restricted. It may be limited by the statute when necessary for the guarantee of national security, the maintenance of order, or public welfare.

(7) Relationship between Need in order for Guarantee of National Security under Section 2 of Article 37 of The Constitution and the Duty of National Defense under Article 39 of the Constitution

As stated above when discussing the categorical protection for the freedom of conscience, the voice of conscience that lacks universal validity may be limited under Section 2 of Article 37 of the Constitution by the statute if necessary for the guarantee of national security, the maintenance of order, or public welfare. In this case, what is at issue is the need for the guarantee of national security, while the issue here does not include prima facie that of the need for the maintenance of order or public welfare. Therefore, the discussion in this paragraph proceeds as limited to the issue of the guarantee of national security, with respect to Section 2 of Article 37 of the Constitution.

In order to restrict the voice of conscience pursuant to Section 2 of Article 37 of the Constitution, the need for the guarantee of national security should first be recognized, and then the content of the limit should be regulated in the form of a statute. In general cases of the restriction of basic rights, not only the content of the restriction upon the basic right should be regulated in a statute, but also the need for the sake of the guarantee of national security, whether express or implied, should be regulated together in the statute. Here, the duty of national defense or the duty of military service provided in Article 39 of the Constitution is in response to the need for the guarantee of national security in its essence, and, on the other hand, the performance of an obligation of any kind is in essence inevitably accompanied by the restriction of rights. Therefore, the imposition by the Constitution in its Article 39 of the duty of military service upon all citizens means that the Constitution itself recognizes that it is necessary to impose the obligation to military service for the guarantee of

the security of the nation, and that it is inevitably necessary to restrict the basic rights for the performance of the duty of military service. To recapitulate, with respect to the imposition of the obligation to military service and the restriction of the fundamental right caused thereby, the Constitution itself is already recognizing the need therefor and regulating such (constitutional reservation), even without having to regulate such in a statute. To repeat, the need for the guarantee of national security is not to be freshly debated, as the Constitution is already recognizing it.

Then, in applying Section 2 of Article 37 of the Constitution to the voice of conscience that lacks universal validity, the remaining question is whether the content of the restriction, that is, in this case, non-recognition of the refusal to bear arms on the ground of conscience as a justifiable cause for evading military service, violates the essence of the freedom of conscience or not.

The essence of the freedom of conscience lies, *inter alia*, in non-interference of the state with the free formation of conscience and the free expression (either active or passive) thereof. Here, the statutory provision at issue in this case does not concern free formation or expression of the conscience. It is merely that the state has not proactively accepted the voice of conscience that is claimed by the petitioner. Although the punishment of the petitioner pursuant to this provision at issue may well have the effect of indirectly suppressing to a certain extent the expression of the petitioner's conscience, such indirect suppression does not affect the essence of the freedom of conscience. This is because the punishment here is not due to the content or the expression of the conscience, but based on the ground that the conduct that is externally expressed is objectively in violation of the legal obligation in another dimension that is imposed upon all citizens. To state differently, it is because this provision at issue merely demands an external obedience of the petitioner, and neither compels the petitioner to abandon the voice of his conscience nor coerces an inner conviction in the justifiability of the obedience. Therefore, the statutory provision at issue in this case does not violate the essence of the freedom of conscience, and, thus, is not unconstitutional.

The general content of the duty of military service including the issue of what may constitute a justifiable cause for evading enlistment is a matter to be determined by the legislature under its discretion, in the dimension of achieving the purpose of national defense while at the same time endeavoring to reasonably guarantee the basic right. From this perspective, for the same reason examined in Paragraph B (2) (C) above, the statutory provision at issue in this case that does not recognize the refusal of bearing arms on the ground of conscience as one of the justifiable causes for evading enlistment is not a clear deviation from or abuse of the discretion of the legislature, thus may not be deemed to violate the essence of the freedom of conscience.

Another remaining question is whether it is an excessive restriction or not that the statute imposes a uniform sanction of incarceration for the refusal to bear arms. This is also a matter of legislative discretion, and, as there is no clear deviation from discretion in this regard, the statutory provision at issue in this case is not unconstitutional.

(8) In conclusion, even assuming that the petitioner's refusal to bear arms is mandated by the voice of his conscience, such voice of conscience lacks universal validity, while it is necessary to not accept this in order for the guarantee of the national security. Therefore, even if the petitioner's refusal to bear arms on the ground of conscience is not recognized under the meaning of the statutory provision at issue in this case as one of the justifiable causes for evading the enlistment, this is not in violation of the freedom of conscience.

D. On Recommendation to the National Assembly

The recommendation made by the majority opinion that a research on the part of the National Assembly is necessary over the demand for the legislative improvement concerning the alternative civilian service is improper under the principle of the separation of powers and may rather possibly cause misapprehension. As such, such recommendation is undesirable.

7. Separate Concurring Opinion of Justice Lee Sang-kyung

A. Although I agree with the conclusion of the majority opinion, I respectfully disagree to the reasoning of the majority in reaching the conclusion. My opinion in this regard is hereby stated in the following paragraphs.

B. Legal Nature Of Section 1 Of Article 39 Of The Constitution That Provides For Duty Of National Defense

Article 39 of the Constitution provides in its Section 1 that "all citizens shall have the duty of national defense under the conditions as prescribed by Act," and, in its Section 2, provides that "no citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service." Therefore, the Constitution itself imposes the duty of national defense as a duty of all citizens, and the duty of military service is interpreted to be the core element thereof.

Although Section 1 of Article 39 of the Constitution indicated above does not specifically express the basic rights that are restricted thereby as it takes the form of imposing an obligation upon the citizens, because it is premised as a matter of course that individual liberties are restricted for the performance of the duty of national defense, the above provision is one that restricts relevant basic rights such as bodily freedom. Further, as the Constitution itself restricts the basic rights, the above provision sets the constitutional limit on the relevant basic rights.

C. Standard for Constitutional Review over the Statute that Regulates Collision between Constitutional Values

(1) Section 1 of Article 39 of the Constitution providing that the specific content of the duty of national defense shall be regulated by the statute, reserves that the Constitution itself may limit the basic rights of the citizens whom it shall protect within the scope that is necessary for the purpose of its own defense in order for the Constitution to protect itself by safeguarding the nation that is the basis of its own existence against the invasion from outside (theory of constitutional reservation of important matters), and provides that such content that is reserved (inherent content) shall be established and formed by the National Assembly, which is the representative organ that represents the citizenry (theory of reservation to the legislature). Therefore, the Military Service Act that is a statute pursuant to the same provision is the materialization of the content inherent in the Constitution for the realization of constitutional values. Thus, the statutory provision at issue in this case which is of such nature establishes and forms the specific duty of the citizens of national defense, while, on the other hand, it specifies the content of the restriction of the basic rights such as the freedom of conscience that is particularly at issue in this case, as well as the bodily freedom that is relevant to such duty of national defense. Therefore, although the statutory provision at issue in this case does have the content restrictive of the basic rights of the citizens, this is not a

new creation of the content of statutory restriction of the basic rights, but instead has the constitutional effect of specifying the content inherent to the Constitution concerning the restriction or the limitation of the basic rights, which is presupposed by the Constitution itself for the realization of the constitutional provisions.

Therefore, the restriction of the basic rights pursuant to the statutory provision at issue in this case is to establish the border line in terms of positive law where the two colliding constitutional values encounter each other, between the constitutional value of the maintenance of national defense power for the preservation of the nation that the duty of national defense intends to realize, and the constitutional value of individual basic rights. Thus, it should be distinguished from the case of the statutory restriction of the basic rights for the realization of the legislative purpose that is itself established by the statute, which is the case presupposed by Section 2 of Article 37 of the Constitution.

(2) Our Constitution does not expressly present a standard for resolving the problem of the clash between the constitutional values, including the one indicated above. With respect to this, the dissenting opinion employs the prerequisites for the restriction of basic rights set in Section 2 of Article 37 of the Constitution as the standard of review, thereby assessing whether the statutory provision at issue in this case is in violation of the principle of proportionality or the principle of prohibition against excessive restriction.

However, the principle of prohibition against excessive restriction is the review formula that prioritizes the constitutional value of basic right on top, when there is a clash between basic rights that is of constitutional value and the legislative purpose and the means therefor which are statutory values. That is, it is a restrained and passive review standard that is based on the premise that the statute or the public interest restrictive of the basic rights may be sacrificed in order for the maximum guarantee of basic rights, requiring that, in order for the restriction of basic rights by statute to be justified, the legitimacy of the legislative purpose thereof should first be proven, the appropriateness of the legislative measure that is a means to obtain such legislative purpose should be recognized, the infringement upon the basic rights due thereto should be the minimum, and the public interest intended to be realized should be greater than the private interests restricted thereby. On the other hand, the principle of pragmatic harmonization, which is one example of the solution for the clash of the constitutional values, actively pursues the mutually supplemental optimum under which the clashing basic rights (that is, constitutional values) may both be respected and exert the maximum effects thereof. Thus, in this regard, these two standards of review fundamentally differ.

Therefore, applying Section 2 of Article 37 of the Constitution and the principle of prohibition against excessive restriction as the standards of review in resolving the problem of the clash between the constitutional values that are equivalent to each other in terms of values and thus incomparable to each other may not be accepted, for this contains the danger of injuring either one of the constitutional values against the will of the framers of the Constitution and the constitutionally sought values.

(3) In seeking the standard for the resolution of the clash between constitutional values, it should be clearly understood first that the settlement of the clash of such values is a task for the legislative formation for the preservation of the constitutional values, rather than a subject matter of judicial review. The Constitution's choice to not present a clear standard for the settlement of the clash of the values, while accepting within the constitutional order different values that may contradict each other, is interpreted to be its delegation to the National Assembly of the establishment the demarcation between the domains of the respective values in clash, by way of the statute, based upon the legislators' accurate assessment of the state of

interests surrounding the conflicting values and gathering of the political wills reflecting toward the aspirational values of the members of the legal community. Such constitutional request is more evidently indicated when the Constitution reserves the formation of the specific matters to the statute.

The legislators are likewise endowed with the authority to establish the law for a reasonable demarcation in the areas of conflict between different constitutional values. Accordingly, in principle, the legislators are given certain room for the prognosis (*Prognosespielraum*) in understanding the perceptional facts that form the basis of the legislation (objective judgment), and with certain freedom of formation (*Gestaltungsfreiheit*) in determining the procedure, the substance and the form of the legislation (subjective judgment). This means, in the exercise of the legislators' authority, legislative discretion in a broad sense is endowed thereto. Especially, when the Constitution itself has an express provision restricting the basic right for the purpose of obtaining a particular public interest, it is interpreted as the reflection of the will of the framers of the Constitution that the Constitution has thereby placed that constitutional value (i.e., public interest) forming the basis of the restriction of such basic right above that basic right, in which case, therefore, the legislators are possessed of a broader legislative discretion in the realization of the public interest requested by the Constitution.

However, endowment of legislative discretion to the legislators should not be deemed that the freedom and rights enjoyed by the citizens, especially the freedom of conscience, have thereby been degenerated to the nominality that is limited to the scope benignly permitted by the state under the interrelationship with the maintenance of the legal order. The legislative discretion of the legislators is also subject to a certain limit. Here, when the legislators have conducted a specific legislative act, the purview of judicial review is limited to the issue of whether the legislators' exercise of legislative discretion is deviative of its limits, and the standard in such judicial review should be whether the exercise of the legislative authority has gone beyond the external limit of justice thereby rendering a contradiction with justice intolerable, that is, whether it has crossed the limit of tolerance under justice, or, the principle of prohibition against arbitrariness that prohibits arbitrary exercise of the legislative power.

Such a difference in review standards may bring about a substantive difference not only in the structure of reasoning for the review but also in the allocation of the burden of proof or the burden of persuasion for unconstitutionality. Pursuant to the principle of prohibition against excessive restriction, unless it is proven that the statute restrictive of the basic right is not an excessive intrusion (especially that the public interest intended to be achieved is greater), it is held to be unconstitutional. However, on the other hand, if legislative discretion is recognized, unless it is proven that the legislators have crossed the limit in exercising legislative discretion, that is, that the legislators have exercised the legislative power arbitrarily, the statute under review is held constitutional. For example, there exists a possibility that these two review standards will lead to different conclusions, when a fact in the past or future that may form the basis of the legislation cannot be proven.

(4) Such constitutional interpretation with respect to the review standards is consistent with the position that has been taken by our Constitutional Court. That is, the Constitutional Court, in its decision in the case of 90Hun-Ba27(consolidated), April 28, 1992, with respect to the restriction by Sections 1 and 2 of Article 66 of the State Public Officials Act of the scope of the public officials guaranteed with the three basic labor rights, which is pursuant to the restriction of the subject of the fundamental right under Section 2 of Article 33 of the Constitution concerning the three fundamental labor rights of the workers guaranteed by Section 1 of Article 33 of the Constitution, held that the above statutory provision is not

deviative of the discretion of formation endowed to the legislators by Section 2 of Article 33 of the Constitution which delegates to the legislators to determine the scope of the public officials who may become the subject of the three fundamental labor rights, and that, therefore, the above statutory provision is not violative of the Constitution. The above decision affirmed the legislators' discretion of formation in the case of the restriction of the basic right by the Constitution itself. Furthermore, the above decision merely reviewed, within the scope of rationality review, first, whether the above statutory provision is not in conformity with the purpose that is inherent in the statutory reservation of Section 2 of Article 33 of the Constitution, and, second, whether there is a proper harmony between the order of the value that is to be achieved by the constitutional guarantee of the three fundamental labor rights for the workers and the purpose of public welfare of the entire citizenry that is to be achieved through the maintenance and the development of a reasonable professional civil servant system; while the above decision did not employ a strict scrutiny under Section 2 of Article 37 of the Constitution and under the principle of prohibition against excessive restriction.

In addition, in the decision in the case of 95Hun-Ba3, December 28, 1995, the Constitutional Court held that the proviso of Section 1 of Article 2 of the State Compensation Act is not in violation of the Constitution in that such proviso is directly based upon Section 2 of Article 29 of the Constitution that restricts in the way inherent to the Constitution the claim for state compensation which is guaranteed by Section 1 of Article 29 of the Constitution, and that the content of this proviso substantively conforms to that of Section 2 of Article 29 of the Constitution. This has also clarified that judicial review upon the violation of basic rights in the case of the restriction of basic rights by the Constitution itself may not be the same as the judicial review in the case of the restriction of basic rights by way of ordinary statutes.

(5) Therefore, the dissenting opinion's employment of Section 2 of Article 37 of the Constitution and the principle of prohibition against excessive restriction as the review standards in reviewing the constitutionality of the statutory provision at issue in this case may not be acceptable, in that it is the choice of an incorrect review standard caused by neglecting the special characteristics, i.e., the constitutional reservation of the important matters and the principle of reservation to the National Assembly, of Article 39 of the Constitution which restricts basic rights by the Constitution itself, and, further, in that it is also inconsistent with the review standard and the method of review taken by our Constitutional Court in the past.

D. Constitutionality of the Statutory Provision at Issue in this Case

(1) As the majority opinion indicates, the statutory provision at issue in this case punishes those who are subject to enlistment for active duty but fail to enroll until five days past the designated date of enlistment with no justifiable reason. As such, the statutory provision at issue in this case restricts the freedom to exercise conscience of the conscientious objectors, thereby limiting the freedom of conscience provided in Article 19 of the Constitution.

From the aspect of coercing the duty of military service by way of criminal punishment upon the conscientious objectors as such, there is a clash between the constitutional value intended to be realized through the duty of national defense provided in Section 2 of Article 5 as well as Section 1 of Article 39 of the Constitution, that is, the constitutional value of the maintenance of the nation and preservation of national territory, or the preservation of the life and the safety of its citizens, or, more specifically, the maintenance of national defense power, on one hand, and, on the other hand, the constitutional value of the freedom of conscience which is the fundamental right of the citizens.

Here, as Section 1 of Article 39 of the Constitution is deemed to have placed the constitutional value of the maintenance of national defense power over basic rights by expressly providing for the restriction of basic rights, the legislators have extremely broad legislative discretion for the realization of the constitutional value of the maintenance of national defense power. Therefore, in order to hold the statutory provision at issue in this case unconstitutional, it should be proven that the statutory provision at issue in this case has gone beyond the limit of the legislative discretion by demonstrating either that this provision is beyond the limit of tolerance of justice or that the affirmation of the facts that formed the basis of the legislation and the choice of the policy measure were clearly arbitrary.

(2) First, whether the statutory provision at issue in this case is beyond the limit of tolerance of justice is hereby examined.

First, it is hereby examined whether the imposition of criminal punishment under the statutory provision at issue in this case upon the so-called conscientious objectors, is beyond the tolerable limit of justice thereby violating the freedom of conscience.

There is a fundamental difference between the freedom of conscience and the other basic rights. In the cases of the freedom of life, property, expression, assembly, vocation, etc., such basic rights are guaranteed regardless of the individual and subjective state internal to the subject of the respective basic rights, and, further, are not violable by governmental power. Therefore, should a specific legal provision violate any of the above basic rights of one individual, the application of this legal provision to another individual also constitutes a violation of the basic right of that individual. On the contrary, as the freedom of conscience is extremely subjective in its own nature, the violation of the freedom of conscience caused by the clash between a decision under the conscience and the national legal order is inevitably individualistic, and, even if a legal provision thereby violates the freedom of conscience of one individual, this does not result in the general effect of the violation of the freedom of conscience of other individuals. Therefore, we may not request the legislators to enact a general provision under which the freedom of conscience is considered in advance and preventively over any and all cases where there is room for conscientious conflict which is individualistic and cannot be generalized. We may not, as a rule, impose upon the legislators an obligation to provide an alternative that may be substituted for a legal obligation, in light of countless individual possibilities of the occurrence of conscientious conflicts, which are beyond perception. Even if the legislative omission of such a provision does result in the violation of the freedom of conscience, this does not render the statute unconstitutional *per se* (Refer to Herdegen, Gewissensfreiheit und Normativitat des positiven Rechts, S. pp. 286-287).

In light of such characteristics of the freedom of conscience in its own fundamental nature, even if the legislators did not enact a general provision for the protection of conscience in legislating the statutory provision at issue in this case, it should not be concluded directly therefrom that the statutory provision at issue in this case is unconstitutional for the reason that it is intolerable from the perspective of justice as deviative of the external limit of justice.

Next, it is hereby examined whether the statutory provision at issue in this case is in contradiction to justice, as it criminally punishes those individuals with conscience the content of which is the ideology of justice.

That is, there may be a question of whether the statutory provision at issue in this case is intolerable by any means for its contradiction to and conflict with justice, as it is a provision of positive law that suppresses and sanctions the conscientious objectors, when the conscientious objectors punished by the statutory provision at issue in this case are the so-

called prisoners of conscience, who pursue the just values toward which this community in which we live should move forward and attempt to realize this in a passive way.

Here, conscience that the Constitution intends to protect is the "powerful and earnest voice of the heart that determines the right and wrong of a matter, failing to conduct pursuant to which will disintegrate one's existential value as a person." As such, the conscience protected by the Constitution is a specific conscience that is earnest and acute, and not the conscience as a vague or abstract concept. Furthermore, it should be conscience that satisfies the consistency or universality in judging the values.

The conscientious objectors that the statutory provision at issue in this case concerns claim that they refuse enlistment due to the order of conscience pursuant to the teachings of the religion of their belief. The conscience of such conscientious objectors should be deemed to prohibit any and all violence including war, as far as it is not merely for the evasion of the military service. Whether this conscience is the one that satisfies the consistency or universality in the judgment of the values is dependent upon whether or not these individuals who have such conscience respectful of non-violence will actually give up the protection by governmental power in its entirety, which inevitably accompanies the exercise of the physical power, upon infliction of harm by others on their own life, body or property. It should be noted that the refusal of the duty of military service is inevitably linked to the abandonment of such protection of oneself, especially because our Constitution denies the war of aggression (Section 1 of Article 5 of the Constitution) thereby undeniably characterizing the maintenance of national defense power of the Republic of Korea as one of self-defense.

If the conscientious objectors do completely give up protection by governmental power offered through the exercise of the physical power provided for their protection, the consistency and universality of their conscience and ideology can be affirmed, as sufficiently possessing the value that deserves to be respected. However, the very fact that they maintain their life and property within the territory of this nation is in itself clear evidence that they receive the protection provided through the use of physical power by governmental power, or the institutionalized violence. In addition, any record indicating that the so-called conscientious objectors have refused such protection of governmental power by way of physical power is nowhere to be seen. As such, conscience that the so-called conscientious objectors claim to have is undeniably an antinomy, if they object to the performance of the duty of obligation to military service that contributes to the formation and the maintenance of the physical power which constitutes an important part of the governmental power of the nation on one hand, while, however, they intend to and do enjoy the protection provided by such governmental power for their life, body and property, on the other hand. Further, this unavoidably presents a serious doubt with respect to what the conscience of the conscientious objectors purporting to pursue nonviolence is in substance, and whether such conscience may be accepted as an earnest value system that has consistency and universality. Such doubt is of a fundamental nature that it may not be eliminated solely by the fact that the conscientious objectors claim their conscience notwithstanding the incarceration and the ensuing great disadvantages of hardships in vocational career and inhospitalities from society, or that the conscientious objection is broadly recognized in other nations and its recognition is also internationally demanded. Rather, the conscience that comes from the bottom of our hearts mandates a more serious deliberation over this issue for the future of our community, despite the sympathetic atmosphere of society towards the so-called conscientious objectors. The conscience that they claim to have may hardly be accepted as one that has a sincere value system with consistency and universality, from the fact that the claims of the petitioner and others objecting to military service purportedly on the ground of conscience, at least at the

current point, indicate no clear perception or explanation on this issue and even no serious thought given to this issue.

Then, the conscience of those who object to military service on the ground of conscience is itself something no more than a hope of antinomy that lacks consistency and universality. Thus, it is questionable whether such conscience may be deemed conscience that is the object of constitutional protection, and, at the very least, this is unacceptable as one criterion of justice that rules our community. Therefore, the imposition of criminal punishment upon those who object to military service on the ground of conscience may not be deemed as an intolerable contradiction of the exercise of the legislative authority against justice beyond the external limit of justice, as in the case of the persecution of the earnest conscientious criminal convicts.

(3) Next, whether the statutory provision at issue in this case is a clearly arbitrary legislative measure is hereby examined.

The first question to be posed here is whether the imposition of the criminal sanction upon non-performance of the duty of military service is a proper means to achieve the constitutionally established legislative purpose, that is, the maintenance of national defense power, the maintenance of the nation and the preservation of national territory, and the protection of the life and safety of its citizens. The appropriateness of criminal sanction for such purpose is easily agreeable, in that it at least deters, due to the effect of general deterrence of such criminal sanction, the spread of the evasion of military service by others who use as a pretext conscience that lacks sincerity, even if the statutory provision at issue in this case does not have an effect of making those objecting to perform military service and choosing instead a criminal punishment for the reason they may not refuse the order of their conscience, to enroll and serve by bearing arms. Considering especially that the criminal punishment regulated in the Military Service Act punishes the *mala prohibita* and not *mala in se*, such general deterrence effect is rather a core function of the criminal punishment under the statutory provision at issue in this case.

Then, the crucial issue is whether criminal sanction as such is an excessive one for a prisoner of conscience convict who has not committed physical harm to others, that it should be replaced with other alternative means.

The petitioner argues for the settlement of the clash between the conscience and the duty of military service by way of an alternative civilian service system (hereinafter referred to as the "alternative service system"). However, the statutory provision at issue in this case, which is the subject matter of the request for constitutional review in this case, does not itself provide for the duty of military service. Instead, the statutory provision at issue in this case merely regulates the sanction for the violation of the obligation, on the premise of the duty of military service provided for in Sections 3 and 5 of the Military Service Act. Thus, the alternative service system that is to cause a transformation of the duty of military service itself is not relevant to the constitutionality of the statutory provision at issue in this case to be judged in the process of the constitutional review in this case, which does not include the above provisions mandating military service duty as the subject matter of review. Therefore, judgment upon this issue may not fall within the scope of judgment for this case (This confusion seems to have been caused by the decision of the requesting court that filed the request for constitutional review solely of the statutory provision at issue in this case, while putting the right of conscientious objection at issue). Even if the alternative service system has been claimed in the context that it should be recognized as one form of lenient sanction, the alternative service system may not, as examined above, be deemed as a sanction for the violation of the duty although it may change the content of the duty itself. Once the state has

imposed the obligation of military service without altering it, it must clearly present toward the citizens the standard of judgment over the right and wrong in the normative sense, by imposing negative value assessment and criticism against the conduct that is in violation of such obligation. Should instead merely a value-neutral social service or alternative service be imposed as the legal effect thereof, this would be an act of contradiction abandoning the status as the protector of justice and norms, on the part of the state itself. Therefore, I do not agree with the view of deeming the alternative service as one form of lenient sanction.

Then, it is now examined whether the means of sanction is excessive. The criminal punishment is the most powerful and cruel among all sanctions for failure to perform obligations in public law. Especially, the statutory provision at issue in this case imposes incarceration of fixed prison terms of a maximum of three years, thus the degree of restriction of the fundamental right is considerable. As there are possibilities of administrative order punishments such as non-penal fines as well as the above administrative penal punishments, which are available as sanctions for the failure to perform obligations in public law, it may be questioned whether criminal sanction had to be chosen as the sanction for the violation of the duty of military service, and, whether it was not possible to provide for a more lenient kind of criminal punishment when choosing to impose criminal punishment. However, there is a prima facie balance between the sentence of fixed term incarceration under the statutory provision at issue in this case and the violation of the duty, in light of the facts that the military service on active duty to which the statutory provision at issue in this case applies is imposed for the period of two years through two years and four months (Article 18 of the Military Service Act), that such duration of service may be extended for up to one year in certain cases necessary for national defense (Article 19 of the Military Service Act), and that individual liberty is considerably limited thereby as such military service on active duty is imposed by way of mandatory conscription.

Creation of a new lenient means of sanction may be considered, as a matter of course, should we lie in the situation of a conspicuous decrease in the need for the maintenance of national defense power rendering the powerful sanction of criminal punishment unnecessary. Such lenient means of sanction should of course be premised upon a diagnosis for the future situation that the implementation of such new system will not compromise the maintenance of national defense power.

With respect to this, the petitioner claims that the implementation of the alternative service system will be a proper method of utilizing human resources rather than a threat to national defense, in light of the facts that the concern of mass producing military service evaders upon the availability of the alternative service system can be eliminated by the implementation of the alternative service system that is equivalent to the military service on active duty in terms of the duration of service, the degree of hardships and life of joint camp training, that the proportion of the conscientious objectors is approximately 0.2% of the entire number of individuals subject to conscription, and that modern warfare is turning into a scientific warfare.

On the contrary, the Minister of National Defense and the Commissioner of the Military Manpower Administration claim that the alternative service system is not a system that may be in harmony with the guarantee of national security, on the grounds that there is a concern of abrupt increase of the number of conscientious objectors under the current situation of poor conditions in military service, that injury to uniformity and unity of the conscription system, under the situation where it is difficult to secure a strict review process for the selection of the conscientious objectors, might disintegrate the conscription system, and that, further, it is difficult to find a task outside the military that is equivalent to the military service on active duty in terms of the degree of hardships.

As such, there are different expectations toward the result of the relaxation of the duty of military service and the relevant sanctions, depending upon their respective positions. Further, it may not be concluded that it will not affect the maintenance of national defense power in the future on the sole ground that currently the proportion of the conscientious objectors is small, especially considering in total that the number of individuals subject to conscription is in the process of diminishing due to the decrease in birth rate, that relaxation of sanctions may provide a new incentive for evading military service on the pretext of conscience, that it may not be excluded as a possibility that an influential religious entity declares objection to bearing arms on the ground of development in religious doctrine or a religious entity inculcating objection to bearing arms as its religious doctrine is newly established and abruptly proliferates thereby producing the conscientious objectors to an unbearable degree, and that the importance of the size and scale of the military force does not necessarily decrease due to the aspect of modern warfare as a scientific warfare and the relative balance in correlation with the size of the military capability of the hostile power should also be taken into account.

Therefore, when the prospect of the future situation with respect to whether national defense power may be maintained notwithstanding the relaxation of the sanction for the nonperformance of the duty of military service is unclear, if the legislators takes one of the situations that is possibly expected and conducts legislative formation corresponding thereto, this may not be criticized as arbitrary legislation in excess of the legislative discretion. According to this, in order to hold the statutory provision at issue in this case unconstitutional, it should be sufficiently proven that the legislators have arbitrarily legislated outside of the scope of legislative discretion while the relaxation of the sanction under the statutory provision at issue in this case will not harm the maintenance of the national defense power. However, examination *sua sponte* of the totality of the situations as seen above does not indicate that it is an arbitrary legislation, while the forecast of relevant future facts is unclear.

Therefore, the statutory provision that imposes the criminal sanction of incarceration of a maximum of three years without exception for the so-called conscientious objectors may not be deemed as clearly arbitrary legislation that imposes excessive criminal punishment.

(4) Subconclusion

Then, in whichever perspectives, the statutory provision at issue in this case is not unconstitutional beyond the limit of legislative discretion.

E. The majority opinion goes one step further from here and recommends the legislators with respect to the issue of conscientious objection to sincerely assess whether there is a solution to resolve the conflict between the legal interests of the freedom of conscience and national security for the coexistence of these two legal interests, whether there is an alternative solution to protect the conscience of the conscientious objectors while securing the realization of the public interest of national security, and whether our society is now mature enough to show understanding and tolerance for the conscientious objectors. The majority opinion further recommends that the legislators earnestly consider whether to supplement legislation in the direction of permitting the institutions applying the law to take measures protecting conscience through the application of law that is favorable to conscience, even if the legislators decide not to adopt the alternative service system.

However, in a situation where there is remaining concern yet to be eliminated concerning whether such conscience deserves constitutional protection or whether it conforms to the principle of justice acceptable in our society as the conscientious objection has an aspect of antinomy as examined above by simultaneously pursuing contradicting values, I do not agree

with the above position that recommends, without presenting any convincing answer to such inquiries of legal philosophy and political ideology, to favorably consider the conscientious objectors by declaring certain conscientious objectors as those claiming earnest conscience and also by considering the expressed opinions of the social organizations and international trends. Furthermore, especially under the situation where the expectation toward the possibility of maintenance of national defense power upon changes in system is unclear, making the above recommendations to the legislators who have a broad authority in recognizing the legislative facts and choosing the policy measures for the realization of the constitutional values contains a danger of being understood in false light as an interference with or intrusion upon the legislative power by the judicial power. It should be noted that it is undesirable as exceeding the limit of judicial judgment to make a recommendation to the legislators with respect to the legislative matters upon an issue that is irrelevant to the subject matter of this case, in a situation where there is yet to be any conviction with respect to the legitimate direction of legislation.

F. Conclusion

Although I agree with the conclusion of the majority opinion in that the statutory provision at issue in this case is constitutional, I respectfully disagree with the majority opinion in terms of the reasoning that supports the conclusion. My separate concurring opinion is thus stated as discussed above.

Justices Yun Young-chul (Presiding Justice), Kim Young-il (Assigned Justice), Kwon Seong, Kim Hyo-jong, Kim Kyung-il, Song In-jun, Choo Sun-hoe, Jeon Hyo-sook, and Lee Sang-kyung.