THE FIRST TEN YEARS
OF
THE KOREAN CONSTITUTIONAL COURT

THE CONSTITUTIONAL COURT OF KOREA

THE FIRST TEN YEARS
OF
THE KOREAN CONSTITUTIONAL COURT
(1988 ~ 1998)

THE CONSTITUTIONAL COURT OF KOREA
2001

THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT

Preface

This volume is an English translation of *Ten Years of the Korean Constitutional Court* published in December 1998 in commemoration of the tenth anniversary of the founding of the Court. The publication of this volume is aimed at introducing foreign readers to the Korean system of constitutional adjudication and the remarkable achievements of the Constitutional Court for the ten years since its inception.

The present Constitution, the product of a bipartisan consensus in the wake of the June Democracy Movement in 1987, embodied several important moments in the development of constitutionalism in Korea. For instance, it improved upon the president-centered concentration of power, the anti-democratic presidential electoral system, and other problems of the political system under the pre-1987 authoritarian regimes, and provided for stronger protection for peoples basic rights. Especially, a European-style constitutional court was established as a venue of relief for infringement of basic rights, and the thus founded Constitutional Court engaged in active scrutiny of the constitutionality of statutes and constitutional complaints for the past ten years and played a decisive role in firmly establishing constitutionalism in Korea. The development and present structure of Korean constitutional adjudication, and the Court's achievements for the ten years after the founding are detailed in the body of this volume. After the publication of the Korean version of *Ten Years of the Korean Constitutional Court*, the activities of the Court continued. A cumulative total of about 6,800 cases were filed, out of which 6,300 were disposed of. Among the disposed cases, about three hundred statutes and regulations were struck down, and about one hundred constitutional complaints alleging infringement of basic rights by public authority were upheld. Constitutional adjudication took firm roots in the Korean constitutional system.

Describing one country's system in another's language contains many dangers. Most of all, whether jargons of the Korean system should be directly translated or matched with analogous foreign concepts is an important issue. In order to protect the readers from unnecessary prejudice, we adhered to those English expressions faithful to the Korean meanings and used Anglo-American concepts only when the former were too awkward or the latter were so accurate as not to leave any room for confusion. Although the original expressions were preserved as much as possible, the differences in nuances that arise out of the grammatical differences between Korean

and English were carefully resolved in favor of the original intent. A caution is in order that the volume does not translate the whole of the original. Minor parts of the original were deleted and revised by the Research Officers of the Constitutional Court in consideration of the needs of foreign readers. Also, the volume is also not updated with the changes after the publication of the original.

We hope that this volume becomes a worthy resource for foreign readers and research groups interested in the Korean Constitution and its constitutional adjudication system.

Professor Park Kyung-sin, Handong University, and Professor Kim Jong-cheol, Hanyang University, worked together to translate the original. Also, Professor Im Ji-bong of Kunkuk University made useful suggestions as to the choice of words, and the Research Officers of the Constitutional Court assisted in many ways as well. I would like to express gratitude to all those that made their best efforts to publish this volume.

May 31, 2001

Park Yong-sang
Secretary General
The Constitutional Court of the Republic of Korea

Preface

Since the Korean people's yearning and aspiration for democratization of the country fructified in establishment of the Constitutional Court of Korea on September 1, 1988, ten years have passed. In commemoration of the anniversary, the Constitutional Court publishes this volume.

Over the ten years, the Constitutional Court docketed about four thousand cases and disposed of about 3,700 among them. They included one hundred seventy or so cases where laws and regulations were held unconstitutional and about seventy cases of constitutional complaints where exercises of governmental power were held to be infringing on basic rights.

The numbers alone are not enough to evaluate the Court's activities. However, in comparison to the reality of constitutional adjudication for the past forty years before its establishment, the Court can be said to have truly done its best, and discharged its duty as the highest institution adjudicating on constitutional issues, designated to defend the constitutional order and protect people's basic rights.

As the result of the Court's activities, legislative activities became more cautious and the instances of human rights violations by public authorities have been on the decline. The Constitution became a living norm that permeates peoples consciousness, and they now value their basic rights more than ever. This means that constitutional adjudication has taken roots in our lives as the new means of protection of basic rights, and also that the Constitution is recovering its original function, namely checking the power of the state.

At the threshold of the twenty first century, we are at an important juncture in building a foundation for a free democratic society where "human dignity and worth" is respected and all pursue happiness freely and equally.

We are at a difficult moment calling for reevaluation and overhaul of the basic structures of our polity, society, and economy, and their efficiencies. Of course, the state and people must join their efforts, but they must do so particularly in establishing a country truly ruled by law where constitutional ideas and values are respected.

The Constitution is the main pillar supporting the foundation of a country. If the Constitution does not stand upright, social justice and economic development is unthinkable. The more difficult the

times are, the more keenly felt is need for the will to obey the Constitution. State power should be exercised in accordance with the constitutional norms and in order to provide the maximum protection for human dignity, and creativity. Only then, we can maximize our potential in all sectors of our society and make one powerful leap into the promising twenty first century.

At this point, recapitulating the changing faces of the Court and its decisions was thought to be helpful as the Court reflects upon the present and orients with respect to the future, and resulted in this volume.

This book contains the history of constitutional adjudication since ratification of the Founding Constitution, the organization of the Constitutional Court and the changes thereof, and the important cases accumulated by the Court in the ten years. The relatively short history of the Court may not satisfy the zealous but we sincerely hope that this book would be a stepping stone for promoting a better understanding of the Court and constitutional adjudication and ultimately bringing the Constitution closer to our lives.

Finally, I salute wholeheartedly all the editors and other related personnel for their unreserved efforts for publication of this book through many hardships and limitations.

December 31, 1998

Chang Eung-soo
Secretary General
The Constitutional Court of the Republic of Korea

The Statue of the Protector of the Constitution in the Grand Hall
(Choi Eu-soon 100×260㎝)

EXPLANATION OF ABBREVIATION & CODES

- KCCR : Korean Constitutional Court Report
- KCCG : Korean Constitutional Court Gazette
- Case Codes
  - Hun-Ka : constitutionality case referred by ordinary courts according to Article 41 of the Constitutional Court Act
  - Hun-Ba : constitutionality case filed by individual complainant(s) in the form of constitutional complaint according to Article 68 (2) of the Constitutional Court Act
  - Hun-Ma : constitutional complaint case filed by individual complainant(s) according to Article 68 (1) of the Constitutional Court Act
  - Hun-Ra : case involving dispute regarding the competence of governmental agencies filed according to Article 61 of the Constitutional Court Act

* For example, "96Hun-Ka2" means the constitutionality case referred by an ordinary court, the docket number of which is No. 2 in the year 1996.

Table of Contents

Chapter 1

Introduction of the Constitutional Adjudication System to Korea and its Development

Chapter 2

The Constitutional Court and its First Ten Years

Chapter 3

Decisions of the Constitutional Court

Appendixes

Chapter 1

Introduction of the Constitutional Adjudication System to Korea and its Development

The Fountain(Sounds-Meeting) in front of the Constitutional Court House
(Chun-joon 1,400×200㎝)

Chapter 1

Introduction of the Constitutional Adjudication System to Korea and its Development

I. Significance of Constitutional Adjudication

The Constitution is the fundamental law that regulates the structure, organization and function of a state to protect people's liberties and rights and to check and control its power with reason. Since the late eighteenth century, modern constitutionalism has begun to take written forms in most countries and has successfully institutionalized those democratic values long sought for by the mankind: liberty and equality.

However, in the past history of constitutionalism, protection for people's constitutional liberties and human rights was not sufficient, and neither was a system of preventing the state's arbitrary and unjust encroachment upon them. When political power self-proclaiming to be representative of the people became tyranny or despotism and encroached upon people's constitutional rights, political and administrative bodies remained subservient to such state actions and did not provide enough self-check to restore the rights. Hence was raised the need for securing the normative force of the constitution as the supreme law and guarding basic rights under it, and it is constitutional adjudication that answered the call.

Constitutional adjudication is a legal practice of restoring under the name of the constitution its basic value-order when those values are impaired, and of giving normative and practical force to the supreme law thereby safeguarding people's constitutional rights. Practically speaking, constitutional adjudication is a trial conducted by an ordinary court or an independent constitutional court in which the issue is infringement of basic rights, and the governing law is the constitution.

Nowadays, constitutional adjudication in free democracies defends the constitution by subjugating political power relations to constitutional norms. Due to its strong control of the state power, it is considered an indispensable element of a government, together with representative government, separation of powers, election, and local autonomy. It also holds the state power accountable to basic rights and demands procedural legitimacy from its action, protecting basic

rights and realizing the ideals of the principle of rule of law.

II. The Origins and Types of Constitutional Adjudication

Constitutional adjudication presupposes the supremacy of the constitution. Its underlying premise is that, since the constitution is the supreme law as the fundamental law governing the organization of the state and its organizing principle, subordinate state actions contravening it must be sanitized of their 'unconstitutional' elements.

The idea of subjugating the act of a state to a higher law has a long tradition throughout the history of mankind. Adoption of a written constitution and recognition of its supremacy provided a theoretical base for constitutional adjudication which disposes of any contravening subordinate action of government.

It was the Supreme Court of the United States of America that first put this idea into practice. In the 1803 case of *Marbury v. Madison* (1 Cranch 137), the American Supreme Court declared that the governmental activities incompatible with the Constitution, the supreme law of the land, are void. The Court moved on, with the power bestowed upon it to interpret the Constitution, to hold that a statute enacted by the legislature is unconstitutional. This was the first attempt to annul a statute based on review of its constitutionality, and the American system of constitutional adjudication took roots since then.

However, in European countries where the traditions of people's sovereignty and representation were strong, it has been seen inappropriate for a mere court to review constitutionality of a statute enacted by the legislature. The 19th century German system of *Staatsgerichtsbarkeit* did not amount to review of the contents of laws. A Portuguese attempt to introduce an American style judicial review in 1911 proved to be a failure. The first continental system of constitutional adjudication began with establishment of the Austrian Constitutional Court under the 1919 Federal Constitution, in which Hans Kelsen had great influence. This Austrian system introduced not only constitutional review of legislation but also constitutional complaints on which administrative violations of basic rights could be challenged.

Constitutional adjudication became commonplace only after the Second World War. After experiencing the totalitarian violations of human rights, the countries in Europe began to establish an independent constitutional court for protection of human rights. The Basic Law of Germany explicitly made basic rights the norms that

governmental activities are accountable to. It also introduced the Federal Constitutional Court with a comprehensive power, independent of ordinary courts. Since its establishment, this Court has operated as the immaculate protector of the Constitution and, with its comprehensive system, became known as the final rescuer for basic rights.

An independent constitutional court, successfully established in protection of human rights and defending the normative force of the Constitution, was soon adopted world-wide. Italy (1956), Spain (1979), Portugal (1982) and Poland (1982) built independent courts, and most eastern Europe countries adopting their new constitutions after the fall of the Soviet Union also adopted independent constitutional courts. They are Hungary (1988), Rumania (1991), Bulgaria (1991), Slovenia (1991), Lithuania (1992), Slovakia (1992), Albania (1992), Czech Republic (1992), and Russia (1993). In Asia, the Republic of Korea, the members of the former Soviet Union such as Uzbekistan (1992), Kazakhstan (1993), and Kyrgyzstan (1993), Mongolia (1992), Taipei (1992, constitutional review of political parties), and Thailand (1992, constitutional review of the bills before enactment) followed suit. In Africa, South Africa that recently amended her Constitution installed a constitutional court. The pattern of adoption of constitutional courts also seems to symbolize the transition from an old regime to a new democratic regime.

Today's system of constitutional adjudication is categorized into two in light of its historical development. Firstly, the American system diffuses the power of constitutional review among ordinary courts. Secondly, the European model concentrates it in an independent constitutional court. The French *Conseil Constitutionelle* is often categorized separately because it is highly politicized.

The American system was adopted by countries with the same basis of jurisprudence as that of the U.S. such as Canada, Australia, India, and Japan. In Korea, the Constitution of the Third Republic adopted this system. Its strength is unity in which ordinary courts conduct constitutional review in a variety of specific cases. However, it is premised upon independence of the judiciary from other political forces and people's respect for the courts. In the American system, ordinary court reviews a statute only when the constitutionality of a statute is a precondition to a specific civil, criminal, and administrative case, and therefore its decision of unconstitutionality applies in principle only to that case.

The European system of concentration designates a specialized, independent body to handle only constitutional issues and examine them on all sides, facilitating enforcement of the Constitution and

strengthening constitutional awareness on the part of other institutions. Most continental law countries with experience of grave human rights violations adopted an independent system to emphasize the functionality and professionalism of constitutional adjudication.

We had various systems of constitutional adjudication since the First Republic but never became active. The present Constitutional Court was born under the Ninth Revised Constitution that resulted from the 1987 movement for democracy, and adopted the European concentrated system.

III. The Development of the Korean System of Constitutional Adjudication

Constitutional adjudication is premised upon existence of a constitution. A history of Korean constitutional adjudication should be preceded by that of our Constitution. Conception of a constitution as a guarantee of basic rights and an organizing rule of state around separation of powers is a historical product of the modern age.

Not without a controversy, the first modern constitution of Korea can be said to be the *Hong-Bum Fourteen Articles* promulgated by the Chosun dynasty in January 1885 that reflected the spirit of democracy after *Gap-Oh Reform.* It was followed by the *Nine Articles of the Constitution of Daehanjeguk,* a written constitution initiated by the crown, which upheld monarchy and changed the country's name from Chosun to the Korean Empire or *Daehanjeguk.* In the wake of the March First Movement in 1919, a public uprising demanding independence of Korea from the Japanese colonial rule, a provisional government of the Republic of Korea was established in Shanghai, China and it adopted a constitution. The Shanghai constitution went through five revisions and such name changes from Constitution to Compact and to Charter subsequently but maintained its basic principles such as people's sovereignty, parliamentary democracy, separation of powers, protection of basic rights, rule of law, and a written constitution.

However, in these past constitutions such as t*he Hong-Bum Fourteen Articles, the Charter of the Provisional Government of the Republic of Korea*, there was no concept of constitutional adjudication. The Korean history of constitutional adjudication, the practice of professing the normative force of a constitution and materializing it in real life, began only when the government of the Republic of Korea was established in the era of the Founding Constitution. The history of constitutional adjudication since the time of the Founding

Constitution can be divided according to changes in rulers or constitutional politics into five republics from the First to the Fifth.

1. Constitutional Adjudication in the First Republic

The Founding Constitution of the new Republic provided the prototype of constitutional adjudication in the country's history.

The First Republic's Constitution established the Constitutional Committee independent from ordinary courts and provided that when a violation of the Constitution by a statute underlies a trial, the court shall request the Constitutional Committee to review the statute and proceed therefore according to the Committee's decision (Art. 81 (2)). It was a concrete *norms control*[1] whereby a court request a decision from the Committee only when an issue of unconstitutionality of law arises out of a concrete case, as opposed to an abstract norms control. The Constitution limited the Committee's review only to statutes, and left the conformity of executive orders, rules and regulations, administrative actions to the Constitution and statutes to the final review of the Supreme Court.

The Constitutional Committee was headed by the Vice-President, and consisted of five Justices of the Supreme Court and five members of the National Assembly (Art. 81 (3)).

The First Constitution separated out the authority over adjudication of impeachment and vested it with the Impeachment Court (Art. 47).

For a newly independent country that recovered its sovereignty after a long colonial rule of Japanese Empire, it was noteworthy that she instituted a constitutional adjudication system to realize the rule of law. In this period, the Constitutional Committee reviewed six statutes and held two of them unconstitutional. Given the irregular political environment around the Constitution in the First Republic, such achievement showed a possibility that the system may firmly take roots in the future.

2. Constitutional Adjudication in the Second Republic

The Constitution of the Second Republic adopted an European system in which an independent court was designated as the final arbiter of the Constitution with the jurisdiction over constitutional

1). Norms control means the practice of controlling the statutes, regulations, rules, and other norms of a society.

review of statute, competence disputes between state agencies, party dissolution, impeachment, and disputes concerning election of the President, the Chief Justice and Justices of the Supreme Court (Art. 83-3). The Constitutional Court were to consist of nine justices to which President, the Supreme Court and the Upper House each designated three. They were to serve for six years and three of them were to be replaced every two years. A supermajority of six justices was required for invalidation of a statute or acknowledgement of impeachment (Art. 83-4).

Although the Constitutional Court Act, enacted on April 17, 1961 to implement the new system, did not come into effect due to the May 16 Military Coup d'état, the system had the following significance as a model: Firstly, it would have strengthened the independence of the ordinary courts by taking the role of constitutional review of statutes away from ordinary courts so that the latter could be free from the political influences of the lawmakers. Secondly, the court's efficiency and expediency would have secured effective protection of human rights and the Constitution because the power of constitutional review was concentrated to an independent court and was exercised under a unitary procedure.

The Second Republic's system became an important model for the present system.

3. Constitutional Adjudication in the Third Republic

Art. 102 (1) of the Constitution of the Third Republic provided that when an issue of whether or not a statute is in contravention of the Constitution is a precondition of a trial[2], the Supreme Court shall have the power to make the final review of the constitutionality of that statute. The power of constitutional review was given to the Supreme Court which also had the power to determine whether or not a political party should be dissolved (Art. 103).

The jurisdiction over impeachment was given to the Impeachment

2). The meaning of "precondition of a trial" can be best grasped by envisioning a statute upon which the judicial proceeding relies for disposition of the merits. For instance, the Sherman Act will be said to have become a precondition of any trial in which a business is prosecuted civilly or criminally for its violation of the Sherman Act. Due to the breadth of the definition, various alternative expressions are used in this volume for the singular Korean phrase that literally corresponds to precondition of a trial. Most frequently used are "forming the premise of a trial", "being at issue at the underlying trial", etc. where the adjective underlying is to distinguish the proceeding at the non-constitutional court out of which the issue of constitutionality of the statute arose and was presented to the constitutional court for a constitutional review proceeding.

Committee while the process of impeachment was to be initiated by more than thirty members and approved by a majority of the National Assembly. The Committee was chaired by the Chief Justice of the Supreme Court, and impaneled with three Justices of the Supreme Court and five members of the National Assembly. When the Chief Justice of the Supreme Court faced impeachment, the Speaker of the National Assembly replaced as the chairperson.

There was a debate about whether or not the inferior courts below the Supreme Court could review constitutionality of statutes. This debate ended in November 1966 with the decision of the Supreme Court, which ruled that the inferior courts also had the power of constitutional review. It was a notable event in the history of constitutional development because it activated constitutional review in all levels of the judiciary, resulting in many decisions of unconstitutionality. However, they mostly concerned property rights. Also, the courts could not perform independent review in those cases with clear political implications.

The Third Republic was a period of hardship and disappointment for the Supreme-Court-centered constitutional adjudication system. The military-dominated, Administration-led regime of that period mobilized all resources and attention around economic growth. The focus of government was efficiency and unity. As economic growth assumed the supreme importance and anti-communism became the first principle of government, powers were inevitably concentrated and basic rights of the people neglected. Therefore, the period witnessed dire need for active constitutional adjudication to protect basic rights and the Constitution. The Supreme Court was just not strong enough to respond to the need.

4. Constitutional Adjudication in the Fourth Republic

The so-called *Yushin* Constitution of the Fourth Republic formed the Constitutional Committee with jurisdiction over constitutional review of statutes, impeachment, and political party dissolution (Art. 109 (1)). This Committee was composed of nine members appointed by the President. Three of them were appointed on nomination of the National Assembly and the other three on nomination of the Chief Justice of the Supreme Court. The Chairperson of the Committee was appointed by the President (Art. 109 (2) - (4)). The term of office of the members was six years, and their status was to be prescribed by statute (Art. 110 (1), (4)). A supermajority of six justices was required for a decision to invalidate a statute, impeach an officer or dissolve a political party. The organization,

operation and other necessary matters of the Committee were prescribed by statute (Art. 111).

The *Yushin* Constitution adopted a system of concrete norms control where a court presiding a trial could request constitutional review of a statute only when it formed the premise of the trial, an independent entity conducted the review, and the trial proceeded pursuant to the review (Art. 105 (1)).

When constitutionality of a statute was at issue in a trial, the presiding court *sua sponte* or upon motion requested constitutional review to the Constitutional Committee (The Constitutional Committee Act Art. 12 (1)). A request by an inferior court was first reviewed by the Supreme Court which could attach its own opinion when it forwarded the request to the Constitutional Committee (Id., Art. 15 (1) and (2)). The Supreme Court could cancel the inferior court's request on an *en banc* decision which was to be immediately notified to the requesting court (Id., Art. 15 (3) and (4)).

The system of constitutional adjudication in the Fourth Republic was merely nominal both in principle and in practice. It took three proceedings to strike down a statute. The court presiding the underlying trial first had to decide that the statute was unconstitutional. Then, the Supreme Court had to agree. Then, six out of nine members of the Constitutional Committee had to agree. Furthermore, the supplementary provisions of the Constitution excluded the so-called "emergency presidential decrees" entirely from judicial review.

Let alone the formal obstacles, the extraordinary political situation did not allow the Supreme Court to request constitutional review of even one statute.

Because there was no impeachment or political party dissolution initiated, the Constitutional Committee did not conduct any proceeding at all. In short, under the *Yushin* Constitution, the Constitutional Committee was a nominal institution that left no precedent.

5. Constitutional Adjudication in the Fifth Republic

The Constitution of the Fifth Republic retained the constitutional adjudication system under the *Yushin* Constitution by forming the Constitutional Committee (Art. 108 (1)).

A court's request of constitutional review now had to be approved by majority of the panel composed of more than two thirds of the Supreme Court justices (Id., Art. 15 (3)). Basically, the Fifth Republic left in tact the substance of the system under the *Yushin*

Constitution after changing only its phraseology. Because the Supreme Court still had the power of preliminary review and therefore forwarded the request only when it also found the statute unconstitutional, the function of the Constitutional Committee was very limited.

The constitutional environment of the Fifth Republic provided an equally hostile political soil for any system of constitutional adjudication. The Constitutional Committee, independent only in paper, remained a nominal body.

The supplementary provisions (Art. 6 (3)) of the Constitution excluded those laws enacted by the National Security Emergency Legislative Council from judicial review for constitutional or any other ground. Requests for constitutional review from all levels of the judiciary were screened by the Supreme Court. Again, during the Fifth Republic, the Constitutional Committee neither reviewed any case nor produced any precedent.

Chapter 2

The Constitutional Court and its First Ten Years

Ⅰ. Creation of the Constitutional Court

Ⅱ. Organization of the Constitutional Court and its Changes

Ⅲ. Adjudication Procedures

Ⅳ. Administrative Affairs

The Wall Painting(Ten Steps of Light)
at the back side of the Grand Court Room
(Ha Dong-chul 280×560㎝)

Chapter 2

The Constitutional Court and its First Ten Years

I. Creation of the Constitutional Court

1. The 9th Constitutional Amendment and the Constitutional-Political Environment

In the 12th National Assembly General Election held on February 12, 1985, three minority parties, the New Democratic Party of Korea (NDPK), the Democratic Korea Party (DKP), and the National Party (NP), ran on the platform of amending the Constitution to institute direct presidential election and received in aggregate 58.10% of the total votes, exceeding 35.25% of the incumbent Democratic Justice Party (DJP) by wide margins. Despite the result, President Chun Doo-hwan ignored the people's demonstrated wishes and announced on April 13, 1987 that any discussion on constitutional amendment be postponed to after the 1988 Olympic Games and the 13th Presidential Election be held indirectly under the present Constitution. On the same day, the opposition parties and the Korean Bar Association immediately issued a public condemnation of Chun's announcement. The dissident groups and university professors followed with their own condemnations, demanding cancellation of the April 13 Constitution Retention Announcement. Around the same time, the tortured death of a Seoul National University student, Park Jong-chul, and the subsequent cover-up, further ignited the public rage. Also, the death of a Yonsei University student, Lee Han-yeol after being hit by a tear gas bomb during demonstrations, accelerated the June Democratization movement. When the incumbent DJP held a national convention on June 10 and nominated another retired general, Roh Tae-woo, as its presidential candidate, ordinary citizens joined the students on street.

Finally, Presidential Candidate Roh Tae-woo responded to the massive protest by making the "June 29 Declaration" on that day, which promised direct presidential election, the release of political prisoners, the immediate stoppage of human rights violations, media liberalization, local self-governance, local governance of education, autonomy of social organizations, freedom of political party activities, etc. On July 1, President Chun consented to Roh's Declaration.

Afterwards, the parties began negotiation on July 24 and produced

a bipartisan bill for constitutional amendment, the main content of which concerned institution of direct presidential election. It passed through approval of the National Assembly on October 12. It was put on a referendum on October 27 and was supported by 93.1% of the total votes cast by 78.2% of all the eligible voters. The amendment went into effect on October 29.

The 9th Constitutional Amendment was the first democratic constitutional amendment that took place through meaningful negotiations among political parties, under the scrutiny of the mature public, and in the spirit of meeting the popular demand for a right to freely choose a government through direct presidential election and the strengthening of the guarantee of basic rights. Nevertheless, the 9th Constitutional Amendment, which changed the sweeping 37% of the previous Constitution, was not given sufficient time for full discussions. And also due to the political considerations of the political parties, it carried some problems.

On December 16, 1987, the DJP's candidate Roh defeated Kim Yeong-sam of the Unification Democratic Party and Kim Dae-jung of the Democratic Party for Peace by winning 37% of the total votes and became the 13th President while, through the April 26, 1988 National Assembly Election, the opposition parties for the first time took the majority of the seats.

2. Creation of the Constitutional Court

During the negotiation on constitutional amendment, the parties differed on which entity should have the power of constitutional adjudication.

Early in July, 1987, the parties had agreed on placing with the Supreme Court the power of constitutional review of statutes but disagreed on where to put the power of party dissolution, impeachment, and competence dispute review. The ruling party argued that it is improper for the Supreme Court to intervene in the matters of politics and proposed the establishment of an independent constitutional committee whereas the opposition parties argued for leaving all the powers of constitutional adjudication with the Supreme Court. The Supreme Court sided against the ruling party.

Contrary to their initial dispositions, the parties ended up establishing the independent Constitutional Court that has the power of constitutional review of statutes, a serendipity falling out of the process of introducing *constitutional complaints*.

The reasons for newly adopting constitutional complaints and

the West German system of constitutional adjudication are explained, by Lim Doo-bin, former Representative and Kim Sang-chul, an attorney, as follows:

According to Lim, at an international academic seminar at the Law Research Institute of Seoul National University held on August 26, 1988, the ruling party proposed to leave political matters, if at all, within the National Assembly and argued that the legislature should not be held accountable to the judiciary's decisions on political matters. It argued, therefore, for creation of an independent institution for the purpose of adjudicating political issues. The opposition parties did not see the need for a separate constitutional committee. Now, the opposition party proposed a compromise: if the system of constitutional complaint is introduced, it would agree to the proposal of the ruling party. As the result of this compromise, the Constitutional Court was established and the system of constitutional complaint introduced.

Kim explains the late attention on constitutional complaint as follows: The politicians did not see the constitutional complaint process as an important issue. It was the Headquarters of People's Movement for the Democracy (herein after HPMD) that recommended to the opposition parties that the ruling party's proposal to create an independent institution should be accepted but in the form of a West German system. The reasoning was that, under such system, the constitutional complaint process could be introduced and it would improve the protection of basic rights. The opposition parties accepted the HPMD's proposal without much thought, and the ruling party also agreed readily. Hence the present system of constitutional adjudication. Kim thinks that the ruling party at the time believed that the new constitutional court could be managed easily like the constitutional committees of the past.

3. Legislation of the Constitutional Court Act

Article 113 (3) of the Constitution provided that the organization, operation, and other necessary matters shall be determined by statute. Almost a year after the Constitutional Court was created by the 9th Constitutional Amendment, the Constitutional Court Act was enacted by Act No. 4017 on August 5, 1988, and went into effect on September 1.

On November 5, 1987, the Ministry of Justice formed a 5 member task force composed of working staffs from the Court, the Ministry of Legislation, the former Constitutional Committee, etc., and initiated

the drafting of the Constitutional Court Act. After examining many issues, including whether the subject matter of constitutional complaint should include ordinary court's judgments, the task force decided to exclude ordinary court's judgments in its proposal on December 18, 1987, and completed the first draft around early January of 1988.

On January 15, 1988, the Ministry of Justice held a seminar on 'the Legislation of the Constitutional Court Act' in order to survey the public opinion. The central issue was whether ordinary court's judgments should be challengeable on constitutional complaints. Attorneys Choe Kwang-ryool, Lee Sang-kyu, Kim-sun, and scholars Lee Kang-hyuk, Gye Hee-yul, Kim Nam-jin, etc., acknowledged the necessity to include while the ordinary courts opposed the inclusion.

A task force committee member Judge Lee Kang-kuk argued against the inclusion for the following two reasons: Firstly, the West German model of constitutional court, especially, the system of constitutional complaint, is extremely rare worldwide. To introduce it into Korea, a country with completely different social and political backgrounds, carries a risk. Secondly, the West German Federal Constitutional Court is an integral part of the judiciary along with the Supreme Court, and is a genuine judicial institution composed only of federal judges. In Korea, the judicial power belongs to the ordinary courts headed up by the Supreme Court, and the Constitutional Court stands independently of these courts and its members are merely required to have the qualification of a judge but not to be a career judge. Subjecting judgments of ordinary courts to the challenges on constitutional complaint means that the Constitutional Court exercises the judicial power, and results the creation of the fourth court higher than the Supreme Court.

Judge Lee Hong-hoon concurred: Review of judgments is no better done by the Constitutional Court than the Supreme Court. If at all, the Supreme Court has more neutral and professional make-up than the Constitutional Court. Also, the Constitutional Court or the Constitutional Committee comes and goes with every constitutional amendment. The ordinary courts have maintained the power regardless of constitutional amendments. It is inappropriate to subject the decisions of such powerful entity to review of the Constitutional Court.

Attorney Lee Sang-kyu pointed to the aim of the constitutional complaint process: to prevent and remedy infringement of basic rights by *all* unconstitutional exercises of governmental power and in doing so protect the constitutional guarantees of the basic rights. Therefore, he argued that all the acts of all the three branches must

be subject to review through the constitutional complaint process. If ordinary courts' judgments are completely excluded from the jurisdiction of the constitutional complaint process, they constitute a sanctuary free from the checks of the principle of separation of powers. He proposed that they be reviewed even if partially. Professor Gye Hee-yul also emphasized the importance of understanding the intent behind the entire constitutional amendment, and especially the intent behind its provisions concerning the Constitutional Court. According to him, the Constitution clearly incorporated the will to strengthen and expand the powers of the Constitutional Court and the judiciary was being too passive.

Professor Huh-young asserted that the scope and subject matter of constitutional complaint must be established in the perspective of obtaining the effectiveness of the protection of basic rights. He argued, all constitutional institutions are ultimately established for the purpose of realizing the values of the basic rights and therefore have no power to justify their acts violating these values. Therefore, even judgments of the ordinary court must receive constitutional evaluation through the constitutional complaint process lest they go against the correct interpretation of the Constitution or are based on an incorrect interpretation violative of the spirit of the Constitution.

Based on these discussions, the Ministry of Justice drafted the bill and announced its intent to legislate in early May, 1988. It excluded ordinary courts' judgments from the constitutional complaint process but allowed a constitutional complaint against the court's denial of a party's motion for constitutional review of a statute. The Korean Public Law Association and the Korean Bar Association maintained that ordinary courts' judgments themselves must be included.

In the mean time, the Administration and the incumbent party decided that it would be more desirable for the new bill to be submitted in form of a parliamentary legislation by a political party since it was aimed at protection of basic rights. Therefore, the incumbent party took over the draft of the Ministry of Justice and after several revisions submitted it to the National Assembly on July 4. Three opposition parties also submitted their own bill on July 18, incorporating substantially from the Korean Bar Association's proposal. The DJP plan provided for only four full-time Justices including the President of the Constitutional Court and excluded ordinary courts' judgments from the subject matter of the constitutional complaint process but instead allowed a constitutional complaint against the court's denial of a party's motion for constitutional review of a statute. The joint plan of the opposition parties provided that

all nine Justices be full-time, included ordinary courts' judgments in the constitutional complaint process, and even allowed direct petition for constitutional adjudication if exhaustion of all appellate processes were to result in irreparable injury.

The 3rd meeting of the Judiciary Committee of the 143rd Extraordinary Session of the National Assembly on July 21, 1988 reviewed the two proposals and decided to form a five-member review sub-committee for more effective review of the proposals. The sub-committee was composed of two ruling party members and three opposition party members. The sub-committee reviewed the two proposals until July 22 and rejected both in favor of a new proposal, which was submitted to the Plenary Session as the Judiciary Committee's proposal. It incorporated mainly the elements of the ruling party's proposal. As a result, six out of nine justices were full-time, and ordinary courts' judgments were excluded from the constitutional complaint process. The new proposal was passed without any objection at the 5th meeting of the Judiciary Committee on July 23 and then at the Second Plenary Session of the 143rd Session of the National Assembly. The bill was sent to the Administration on July 27, 1988, was promulgated as Act No. 4017 on August 5, and went into effect on September 1.

4. Powers of the Constitutional Court

According to Article 111 (1) of the Constitution, the Constitutional Court has jurisdiction over constitutional review of a statute; impeachment; party dissolution; competence disputes between state agencies, between a state agency and a local government, or between local governments; and finally constitutional complaints as prescribed by statute. In addition, Article 113 (2) authorizes the Constitutional Court to make necessary rules.

A. Adjudicative Powers

(1) Constitutional review of statutes upon request

Pursuant to Article 111 (1) (i) of the Constitution and Article 41 of the Constitutional Court Act, the Constitutional Court can adjudicate on the constitutionality of a law upon the request of ordinary courts. Under this system of concrete norms control, when the constitutionality of a statute or statutory provision forms the premise of a case pending in an ordinary court, the court presiding that case can request the Constitutional Court to adjudicate on the

constitutionality of that statute or that statutory provision.

Such power of *norms control* can, however, become meaningless because its exercise is premised on an ordinary court's request. Our constitutional history already witnessed the near demise of constitutional adjudication systems in the past due to the inactivity of ordinary courts in exercising their request powers. Article 68 (2) of the Constitutional Court Act is an institutional response to that weakness: a party to a trial can obtain constitutional review of the statute at issue without the presiding court's approval, by filing a constitutional complaint when its motion for constitutional review is denied by the presiding court.

(2) Impeachment

The institution of impeachment is aimed at protecting the Constitution by holding President and other high officials accountable to their legal duties through a special process of indictment. The current Constitution gives the National Assembly the power to initiate the impeachment process through indictment in Article 65 (1) and grants the Constitutional Court the power to adjudicate on the merits of the impeachment in Article 111 (1) [2].

Since the inception of an independent Impeachment Court during the 1st Republic, impeachment, though changing in forms, has made it possible to discipline high officials and others whose status are constitutionally protected and are outside the reach of an ordinary legal or personnel proceeding when they violate the Constitution and statutes. The 9th Amended Constitution divided the impeachment power, and granted that of prosecution and indictment to the National Assembly and that of adjudication to the Constitutional Court. Impeachment is by nature not a criminal proceeding but a disciplinary one.

(3) Dissolution of Political Parties

The institution of dissolving political parties functions as a means to defend or struggle[3] for the basic order of free democracy. Introduced first by the 2nd Republic Constitution (Art. 13 (2) and Art. 83-3), it has been maintained till now though governed by different entities.

---

3). The choice of the word is intentional and is related to the concept of defensive democracy or militant democracy, the idea that even democracy can persecute ideas or people if they pose threats to its integrity and security, or that it can protect itself from such ideas or people.

Article 8 (4) of the 9th Amended Constitution provides that "if the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action for its dissolution in the Constitutional Court, and the political party shall be dissolved in accordance to the decision of the Constitutional Court." The power to bring the dissolution action is granted to the Administration while the ultimate decision is made by the Constitutional Court. Since a political party serves an important political role in a democratic state, it is protected by a procedural and substantive privilege not granted to other organizations, and it can be dissolved only by the decision of the Constitutional Court.

(4) Competence Dispute

Competence dispute is aimed at facilitating the operation of state agencies by clarifying the scope and nature of powers allocated to them and protecting the normative force of the Constitution by maintaining the checks and balances.

The 9th Amended Constitution grants the Constitutional Court the power to adjudicate competence dispute between state agencies, between a state agency and a local government, or between local governments. The Constitutional Court Act allows the petition for a competence dispute proceeding to be brought only when the respondent entity's action or non-action violates or has a clear danger of violating the rights of the petitioning entity.

(5) Constitutional Complaint

Constitutional complaint is aimed at protecting people's basic rights from exercises of governmental power and allows them to petition for constitutional review of those exercises of governmental power. It is recognized in various forms in Germany and other countries with independent constitutional courts. Constitutional complaint serves both a subjective function of providing relief to individuals whose rights are infringed and an objective function of checking unconstitutional exercises of governmental power and thus upholding the constitutional order.

Aside from the ordinary, *remedial* form of constitutional complaint, the Constitutional Court Act adds the element of *objective*[4]

4). It is objective only in that a statute itself is reviewed not its manifestations in specific state actions which are routinely challengeable on normal constitutional complaints. Again, this so-called Article 68 (2) constitutional complaint can be

norms control (a constitutional complaint brought under Article 68 (2) of the Constitutional Court Act to request review of a statute), unique only to the Korean system.

B. Rule-Making Powers

The Constitutional Court can establish rules on adjudication procedure, internal discipline, and management of general affairs. The rule-making power secures independence and autonomy to the Constitutional Court under the separation-of-power system and allows the Court to conduct professional and independent self-governance, maintaining a technical and pragmatic perspective.

As to the subject matter of the rules, 'internal discipline' means the matters concerning organization of the Constitutional Court and 'management of general affairs' means administrative matters necessary for the conducting of the trials.

However, when the rules of the Constitutional Court regulate adjudication procedure, it can affect the rights and duties of people and may conflict with the statutes enacted by the National Assembly by binding on the petitioners or their counsels.

The Constitutional Court Act specifies the matters to be regulated by the Rules of the Court: the order in which the Justices take place of the President of the constitutional court in case of his or her absence (Article 12 (4)), management of the Council of the Justices (Article 16 (5)), the organization, duties, and employees of the Department of Court Administration (Article 17 (8)), the organization and management of the aide office of the President of the Constitutional Court (Article 20 (3)), expenses for the inspections of evidences (Article 37), payment and forfeiture of deposits (Article 37), salary of court-appointed counsel (Article 70), the organization and management of the Panels (Article 72 (6)), etc.

Since the establishment of the Rules on the Council of Justices on September 24, 1988, the Constitutional Court continued to promulgate other rules through the Council.

The promulgation and revision of the Constitutional Court Rules must be adopted through resolution at the Council of Justices (Article 16 (4)), which require attendance of seven or more justices and the affirmative vote of a majority of the Justices present

---

filed by a party to a judicial proceeding at an ordinary court, who made a motion for referring the case to the Constitutional Court for review of the statute at issue but was denied.

(Article 16 (2)). Then, the Secretary General of the Department of Court Administration must promulgate the proposed rules within 15 days of the resolution. Since the rules may affect the parties and other or ordinary citizens, they are published in the Gazette of the government (Article 10). The date of the publication there is deemed the date of promulgation, and the rules become effective after 20 days unless otherwise prescribed.

5. Growth of Constitutional Adjudication

Ever since the time of the Founding Constitution, the Korean constitutional history witnessed various forms of constitutional adjudication system: the Constitutional Committee of the 1st Republic, the stillborn Constitutional Court of the 2nd Republic, the ordinary-courts-centered approach of the 3rd Republic, and the Constitutional Committees of the 4th and 5th Republics. All failed to mature and some became dormant. The present Constitutional Court was established in the wake of the 1987 June 10 Democratization Movement on the foundation of thorough reflection on the past constitutional history and clear orientation toward the defense of the Constitution and basic rights. However, contrary to the public expectation, many were still concerned that the new Court would end up like the nominal Constitutional Committees of the past. The ruling power at the time, like the past authoritarian rulers, did not commit itself to the strengthening of the Constitutional Court. Under such circumstances, some scholars and jurists were skeptical of the functions and role of the Constitutional Court.

Moreover, the Constitutional Court Act, drafted without a sufficient diversity of experience and research, contained a number of flaws in its procedural and jurisdictional provisions and even those provisions concerning organization of the Constitutional Court, which could interfere with its efficient operation. In particular, ordinary courts' judgments were excluded from the subject matter of the constitutional complaint process and other exercises of governmental power could not be challenged on constitutional complaints without first exhausting all prior remedies such as ordinary judicial review. Therefore, the types of exercises of governmental power challengeable on constitutional complaints were very limited. Also, the prevailing prediction was that the ordinary courts would be very passive and rarely request constitutional review.

Institutional defects do not necessarily lead to deterioration of a system. Depending on the will of those operating it, the constitutional adjudication system can play an active role or remain nominal.

The present Constitutional Court was founded on the lessons of the past constitutional history and with the clear goal of protecting basic rights and restraining abuse of state power. The operators of the Court were active from its inception in meeting people's demand. The mature awareness of the people and the favorable political environment also contributed to the increasing activities of the Court. With the enactment of the new Constitution, many scholars and people put forth diverse opinions on the value and meaning of the Constitution. The number of those specializing in or researching on the Constitution or constitutional adjudication grew, accumulating dissertations and research papers in the field. Some cases in the Court were followed and reported in detail by the media. As the Court also provided a forum for people's discussion of constitutional issues, their constitutional awareness and awareness of the rights grew notably.

The First Term of the Constitutional Court sought to strengthen its activities by, through aggressive interpretation, expanding the scope of the subject matter of and relaxing the legal prerequisites to the constitutional complaint process. For instance, on December 7, 1988, the second Pamel of the Court allowed a constitutional complaint against non-institution of prosecution that are not subject to the request for the institution of prosecution by the court under the Criminal Procedure Act. Since then, the number of constitutional complaints against non-institution of prosecution have occupied a substantial part of the Court's caseload, functioning as a restraint on abuse of prosecutorial power by arbitrary non-institution of prosecution.

The First Term Court held to justice those laws passed in haste or for special interests in the past and struck many of them down. Many laws that the ordinary courts found constitutional and therefore refused to refer to the Court for review were struck down on the basis of a new understanding of basic rights. The legal prerequisites to a constitutional complaint were relaxed, allowing review of laws and regulations and expanding the exception to the rule of exhaustion of prior remedies.

Article 45 of the Constitutional Court Act provided only two forms of decisions, constitutional or unconstitutional as the means of norms control. The dichotomous form of decision was not sufficient to deal with all the various problems. From the time of the First Term Court, the Constitution Court introduced 'modified forms of decisions' such as those of 'limited constitutionality', 'limited unconstitutionality', and 'nonconformity to the Constitution'. These forms of decisions were already generally recognized in the consti-

tutional adjudication system of many advanced countries such as Germany. They were also indispensable in abiding faithfully by the *interpretive principle of preference for constitutionality*[5], respecting the legislative-formative power[6] properly, and preventing confusion arising from the vacuum of law. However, on April 9, 1996, the Supreme Court once held that the Constitutional Court's decision of limited constitutionality on certain clauses of the Income Tax Act was not binding because such form of decision was not authorized by statute and violates the power of the Supreme Court.

The newly surfaced disagreement between the two courts were criticized by the media and people as a fight between institutional self-interests, and the Constitutional Court devoted much efforts to convincing people of the necessity and legitimacy of the modified decisions. Later on December 24, 1997, the Constitutional Court later held that ordinary courts infringing people's rights by not following the Court's unconstitutionality decisions (even if limited) should be reviewed by the Court again, and that it was the mandate of the Constitution that the Court recover its power and the primacy of the Constitution by such review. The Court then cancelled the Supreme Court's judgment that did not recognize the binding force of the Court's decision.

6. Future Tasks and Prospect

Despite its relatively short history of ten years, the Constitutional Court succeeded in firmly establishing both the constitutional adjudication system in this country and itself as a constitutional institution. The previous systems of constitutional adjudication were limited in giving the Constitution concrete normative force, but after the founding of the Constitutional Court and the growth of constitutional adjudication, the Constitution was firmly rooted in the lives of the people as the supreme norm of the state. Now, the power of the state had to be exercised rationally in accordance to the consti-

---

5). This concept can also find its counterpart in the American rule of judicial interpretation that, if there are more than one interpretations of a statute available, the court should apply the one that makes the statute constitutional. Now, such interpretation will not be of any practical effect if the interpreter does not clearly announce under what alternative interpretation the statute will be unconstitutional. Hence the need for the modified decisions of limited constitutionality or unconstitutionality.

6). The term 'legislative-formative' comes from the concept that the legislature has the power to *form* the structure and content of the community that it represents. It best corresponds to the American concept of the *legislative discretion in policy-making* or the legislature's *policy-making privilege*. All the alternative translations are freely used to suit the stylistic needs of each sentence.

tutional order, and the people's freedom and rights were now faithfully protected from the arbitrary exercises of governmental power.

The Constitutional Court has received broad supports and positive evaluations from jurists, scholasdrs and people for its activities in the past ten years. However, the voices of criticism and reproach are not few: the time for processing a case is too long, the legal prerequisites to obtaining the review are too difficult to meet, constitutional interpretation is often distorted by political considerations, and the binding force of the decisions is weak. These problems arise in part from the institutional defects of the particular adjudicative system provided for by the Constitution and the Constitutional Court Act and also in part from the short history of constitutional adjudication. The Constitutional Court must examine in depth these issues and make necessary improvements in order to firmly establish itself in people's trust.

The Constitution enumerates the subject matters under the Court's jurisdiction as constitutional review of statutes upon request, impeachment, dissolution of political parties, competence disputes, and constitutional complaints. To each subject matter, the Constitutional Court Act prescribes the concrete issues to be adjudged, the legal prerequisites to and the scope of adjudication, and the procedures. However, these rules were enacted without a full understanding of the purpose and role of constitutional adjudication, the Constitutional Court's relationship with other state agencies, and sometimes can become obstacles to effective operation of the Court. The prime examples are the exclusion of the ordinary courts' judgments from the subject matter of the constitutional complaint process and the extremely narrow definition of 'state agency' that can be a party to competence disputes. Although the Constitutional Court has taken active measures in dealing with these obstacles, it cannot completely overcome the limitation of the positive laws. Therefore, the legislative and institutional improvements must be made in order to eliminate the obstacles that distort and hinder the normal functioning of the Constitutional Court and to optimize its function.

The Constitutional Court is now beginning to firmly establish itself as the last bastion of basic rights in the minds of the people. However, it is pointed out that, from people's perspectives, any attempt to remedy infringement of rights through constitutional adjudication still faces numerous obstacles, e.g., the high legal fees due to compulsory attorney representation rule and the intractable legal prerequisites to obtaining the review. A constitutional adjudication is one of the legal services that the state must provide the people with at high quality. Its legal prerequisites and proce-

dures must be improved to make it more convenient for the people. Accordingly, there must also be legal and institutional changes to increase efficiency and respect the people's will.

One of the most important tasks of the Constitutional Court is to secure the practical effect of its decisions. Constitutional adjudication is aimed at securing constitutionality of the state power. In order for the decisions of the Constitutional Court to have practical effects, other state agencies must respect them. If other state agencies put forth contradictory views and not follow the decisions, the unity of the legal order of the state centered upon the Constitution is damaged. Sometimes, it can cause disorder among and damage to people. Therefore, in order to maintain the constitutional order, it is proper and indispensable to secure the binding force to the decisions of the highest judicial institution interpreting the Constitution. There have been serious problems of this nature around application and interpretation of laws between the Constitutional Court and the ordinary courts. They arise from the fact that Article 107 of the Constitution severs the power of reviewing executive orders, rules and regulations, administrative actions away from the Constitutional Court's jurisdiction and grants it to ordinary courts, and yet Article 68 of the Constitutional Court Act bars constitutional complaint challenges against the ordinary courts' judgments. This problem calls for a legislative solution that provides general protection for the binding force of the Constitutional Court's decisions. In the meantime, both institutions must exercise their wisdom through cooperation and mutual respect of their powers and status.

The practical effect of the Court's decisions is ultimately secured by the persuasive power of its reasoning. Unlike its predecessors that delivered their decisions with only brief reasoning, the present Court presents its rationales for the holding in detail and systematically. Although substantial volumes of precedents have accumulated as a result, the Court must refine its reasoning even further in order to obtain the persuasive power of its decisions in relation to other state institutions and earn confidence in its decisions in relation to people. The Court also must develop the existing body of precedents to reach a higher plane of reason in constitutional review.

The Constitutional Court is composed of nine justices and all decisions are made by a bench in which all justices participate. The duty to defend the constitutional order and people's basic rights falls on the justices. Given the overwhelming importance of the power and duty of the Constitutional Court Justices, their selection process must be guaranteed democratic legitimacy and the justices be guaranteed independence in their status and work duties. The

appointment process under the current provisions of the Constitution and the Constitutional Court Act has been criticized for failing to meet the requirements of legitimacy and independence and lacking efficiency. It is necessary to seriously examine the ways to improve on these issues in relation to the qualification, number and length of term of the justices and who bears the power of appointing them. Also in order is a plan to support the justices with sufficient and qualified research staff in their legal and factual research.

Today, all countries in the world are moving to adopt a constitutional adjudication system to realize constitutional justice. Whether they do it through ordinary courts as in the United States or through an independent constitutional court as in Germany, few countries lack any form of constitutional adjudication. The Korean Constitutional Court has earned international recognition for having firmly established the constitutional adjudication system in ten years after the founding. The Court must not only participate in the international trend by expanding exchanges with the advanced countries such as the United States, Germany, etc. but also take on the pioneering role of developing an Asian model of constitutional adjudication through dialogues with other Asian countries with constitutional courts such as Thailand, Mongolia, etc.

Domestically, the Court must endeavor to ensure that constitutional values take roots in the daily lives of people. There still exist the undemocratic, anti-human-rights, and anti-rule-of-law elements in the Korean society. They exist because the constitutional values such as human dignity and worth, freedom, democracy, rule of law, have not taken roots in the lives of people. The Constitutional Court must try to improve and correct such environment. The Court must disseminate through constitutional adjudication the constitutional values culminating on human dignity and worth to the entire society so that the Constitution becomes the norm regulating the basic conditions of our livelihood. Only then, the Constitutional Court will be able to take roots in people's trust and affection and bear in abundance the beautiful fruits of human dignity and worth, liberty, and equality.

Ⅱ. Organization of the Constitutional Court and its Changes

The Constitutional Court Act provides that the Constitutional Court shall establish in it the President of the Constitutional Court, Justices, the Council of Justices, the Department of Court Adminis-

tration, the Coustitutional Research Officer, and the aide Office of the President of the Constitutional Court.

1. The President of the Constitutional Court

At the time of the enactment of the Constitutional Court Act, it was debated whether to make the President a full-time position. The incumbent Democratic Justice Party (DJP) proposed an honorary, part-time position. The three opposition parties, scholars, and the Korean Bar Association joined in a majority view that a full-time position was more desirable in light of the experience of the Fourth and Fifth Republics that had made the Chairperson of the Constitutional Committee an honorary position, practically neutralizing the entity, and also for the purpose of protecting political neutrality and independence of the Constitutional Court and promoting its activities. After a last minute negotiation, the parties agreed on a full-time President who would represent the Constitutional Court, oversee its operation, and supervise the employees.

Also, the DJP did not propose any retirement age for the President of the Constitutional Court while the opposition parties proposed that of 70 years of age. The Korean Public Law Association, commenting on the Ministry of Justice proposal, proposed the retirement ages of all the Constitutional Court Justices to be 68 years of age, midway between that of the Chief Justice of the Supreme Court, 70, and that of its other justices, 65, as provided by Article 105 (4) of the Constitution and Article 45 of the Court Organization Act. However, the Constitutional Court Act set the retirement age of the President of the Constitutional Court at 70 years of age, the same as the Chief Justice of the Supreme Court.

Also debated was which Justice takes charge when the President of the Constitutional Court becomes vacant or incompetent due to accidents. The Ministry of Justice proposed to follow the order of age among full-time justices, the DJP proposed to leave it up to the Constitutional Court Rules, the Korean Bar Association proposed to follow the order of seniority, and the three opposition parties adopted substantial parts of the Association's proposal and proposed to follow the order of seniority but subject to the Constitutional Court Rules. In the end, the Constitutional Court Act provided that the Acting President be chosen among the full-time Justices according to the Constitutional Court Rules.

On May 7, 1990, the Rules Concerning the Acting President of the Constitutional Court was enacted and promulgated as the Con-

stitutional Court Rule No. 24. The Rules provide that, in event of temporary absence, a full-time justice shall be appointed in order of the appointment date and then in order of their age if more than one justice has the same appointment dates (Article 2). In case of permanent vacancy or temporary vacancy for longer than a month due to an accident, a full-time justice shall be elected at the Council of Justices while the temporary absence rule governs pending the election (Article 3 (1)). For the First Term of the Constitutional Court, there were a few cases of the President's business travel, vacation, etc. during which an Acting President was elected. However, there was no permanent or longer-than-one-month vacancy.

On September 12, 1988, President Roh Tae-woo appointed Mr. Cho Kyu-kwang for the President of the Constitutional Court. On September 15, the National Assembly ratified the appointment and at the same time nominated three Justices to the Court. On September 19, Cho, the first President of the Constitutional Court, took the office, and on December 17, 1988, spoke at the opening ceremony of the new Eulji-ro Courthouse of the Constitutional Court. He said: *"Through serious reflection on the past constitutional history, the people of Korea came to focus their attention on a measure of providing substantive protection of basic rights and effectively controlling government power. In order to meet the will of the people, the new Constitution established this Court as the highest institution defending the Constitution."* Six years later, on September 14, 1994, Cho completed his term and retired with Justices Byun Jeong-soo, Han Byung-chae, Choe Kwang-ryool, and Kim Yang-kyun. There, he reflected: *"From the beginning, this Court faced the difficult and hard task of cultivating a barren soil. We overcame these early obstacles solely with our sense of duty. As a result of the long and arduous effort to build the tower of trust brick by brick, we received high praises and encouragement from the people and made no small contribution to our inexorable march toward free democracy."*

Then, the Second Term of the Constitutional Court began after the start of the Kim Yeong-sam Administration. On September 8, 1994, President Kim Yeong-sam appointed Kim Yong-joon for the President of the Constitutional Court. After the National Assembly ratified the appointment on September 13, Kim took the office on September 15. In his inauguration speech, Kim said: *"Six years ago, when the Court first opened, many expressed concerns about this Court's function and role. Now, the Court has firmly established its status as an institution of constitutional adjudication that protects people's basic rights and defends the constitutional order.*

We can now take the accomplishments of the First Term as our stepping stone in making our best efforts to prevent infringement of people's basic rights, and thereby be the forerunner in realization of the rule of law and social justice. At the same time, it is the duty of the Constitutional Court in this era to, through constitutional adjudication, establish the Constitution as a norm of daily living in people's consciousness, and thereby build a basic order of national community that we and our future generation will protect and nurture forever."

2. Justices of the Constitutional Court

Since the enactment of the Constitutional Committee Act in February 1973 and until its repeal in 1988, only one member of the Committee was full-time and the remaining eight, including the chairperson, were non-full-time. During the period of the Founding Constitution, all the members had non-full-time, honorary status and had other occupations. In light of these precedents, the number of Justices and whether there should non-full-time Justices was in controversy at the time of enacting the Constitutional Court Act. The Ministry of Justice and the DJP proposed to have nine Justices, only three of whom are full-time, and have a non-full-time President. The Korean Bar Association, the three opposition parties and the Korean Public Law Association proposed nine all full-time Justices. Eventually, the Constitutional Court Act was passed on a compromise that provided for nine justices, six of whom were full-time and included the Chief Justice. All six were to be appointed by the President, but two of them among the nominees of the National Assembly and the other two among the nominees of the Chief Justice of the Supreme Court.

To be appointed as a Justice, one must have 15 years or more of experience (1) as a judge, a prosecutor, an attorney; (2) of having worked in a law-related area in a state agency, a public or state corporation, a state-invested or other entity after having obtained a license to practice law; (3) as an assistant professor of law or one in higher positions in a certified college after having obtained a license to practice law, and be 40 years or more of age. Some proposed to relax the qualifications, arguing that limiting the candidates essen- tially to those who have qualifications to be judges can restrain constitutional adjudication to a particular standard of values and operate to decrease its professional expertise, and that people com- petent and experienced from various fields must be appointed. Such proposal was, however, not reflected

in the legislation.

When a Justice completes his term or his position becomes vacant for other reasons, a successor must be appointed within thirty days. When the expired or vacant position was the one reserved for the National Assembly's nomination, and it expired or became vacant between the legislative sessions, the National Assembly must nominate a successor within 30 days of the opening of the following session. In order to facilitate the Court's execution of the powers granted by the Constitution as the highest court on constitutional interpretation, the Justices are given a status independent from other state agencies and the people: they cannot be dismissed or removed but for impeachment or criminal punishment as severe as imprisonment. The term is six years and can be repeated once. The retirement age is 65 years.

On September 12, 1988, President Roh Tae-woo made his selections on Attorney Cho Kyu-kwang, and Kim Yang-kyun, the Chief Prosecutor of the Seoul Higher Public Prosecutor's Office, as full-time, and Attorney Choe Kwang-ryool as non-full-time. On the same day, Chief Justice of the Supreme Court Lee Il-Kyu made his three nominations on Lee Shi-yoon, the Chief Judge of the Suwon District Court, and Attorney Kim Moon-hee as full-time, and Attorney Lee Seong-yeol as non-full-time. Also, on September 15, the National Assembly nominated a former assemblyman Han Byung-chae on the DJP's slate and Attorney Byun Jeong-soo on recommendation of the Peace Democratic Party as full-time, and Attorney Kim Chin-woo on the slate of the Unification Democratic Party as non-full-time. The First Term of the Constitutional Court began as President Roh Tae-woo appointed the above mentioned nine on September 19.

On August 3, 1991, the non-full-time, Supreme Court nominee Lee Seong-yeol retired of age. On August 26, 1991, Hwang Do-yun was appointed with the nomination of the Chief Justice of the Supreme Court. non-full-time Justices were treated as honorary members: they did not work full time at the Courthouse and participated only in the Justices' Conference or the decision dates and were paid per diem and travel expenses according to the Constitutional Court Rules instead of a regular salary.

Three years after the establishment of the Court, the Constitutional Court Act was amended to make all nine justices full-time. Kim Chin-woo, Choe Kwang-ryool, and Hwang Do-yun continued as full-time.

On December 16, 1993, Justice Lee Shi-yoon (the Supreme Court

nominee) resigned mid-term when he was appointed to the Chairman of the Board of Audit and Inspection. As his successor, Justice Lee Jae-hwa was appointed on December 30, 1993.

On September 15, 1994, the President newly appointed Kim Yong-joon as the President of the Consitutional Court and, at the same time, Justices Cho Seung-hyung (the opposition Democratic Party nominee), Chung Kyung-sik (the President's nominee), Koh Joong-suk (the Supreme Court nominee)[7], and Shin Chang-on (the incumbent Democratic Liberal Party nominee), and reappointed Justices Kim Chin-woo (this time, nominated by the President)[8] and Kim Moon-hee (this time, nominated by the Democratic Liberal Party)[9]. The Constitutional Court began its Second Term. Afterwards, Justice Kim Chin-woo retired of age on January 22, 1997, and was succeeded by Lee Young-mo (nominated by the President). On August 26, 1997, Justice Hwang Do-yun completed his term[10] and was succeeded by Han Dae-hyun (nominated by the Supreme Court).

3. The Council of Justices[11]

In the Constitutional Court, the Council of Justices, composed of all Justices and chaired by the President of the Constitutional Court, exists as the highest administrative decision-making body. At the time of the enactment of the Constitutional Court Act, the Administration, the parties and the Korean Bar Association disagreed on the quorum and the power of the Council of Justices. The Administration and the incumbent party proposed a quorum of seven Justices and the power to appoint and dismiss public officials of Grade 3 or higher while the three opposition parties and the Korean

---

7). Since the two Supreme Court nominees of the previous term left the Constitutional Court mid-term and were succeeded by two new nominees, Hwang Do-yun and Lee Jae-hwa, who then each had a six year term from the time of his respective appointment, the Supreme Court had only one position to nominate in the beginning of the Second Term.

8). Kim Chin-woo was previously appointed by the Unification Democratic Party, then an opposition party. When the President of the Unification Democratic Party became the President of the country, he reappointed Kim Chin-woo.

9). The Democratic Liberal Party formed by the merger of the former incumbent Democratic Justice Party, the former opposition Unification Democratic Party, and the former opposition New Democratic Republican Party, which left the Peace Democratic Party as a lone opposition, which then changed its name to the Democratic Party. The merger and the resulting shift in power explains the fact that the incumbent DLP nominated two while the small opposition DP just one.

10). Hwang Do-yun took office when one of the justices of the First Term retired of age.

11). This is different from the Justices' Conference which takes place as part of deliberation on a case.

Bar Association proposed a quorum of 2/3 (6 Justices) and the power to appoint and dismiss public officials of Grade 5 or higher. The final enactment adopted the incumbent's proposal. Accordingly, the Council of Justices has a quorum of seven Justices and makes decisions on a majority vote of the Justices present, in which the Chairperson can participate.

The following mandatory subject matters must be decided at the Council of Justices: (1) enactment or amendment of the Constitutional Court Rules; (2) requests for budgets and appropriation of reserve fund and settlement of accounts; (3) recommendation for the appointment and dismissal of the Secretary General, and appointment and dismissal of Constitutional Research Officers and other public officials of Grade 3 or higher; and (4) matters deemed specially important and presented by the President of the Constitutional Court.

The Council of Justices has regular meetings and extra-ordinary meetings. The regular meetings are held on the first Mondays of every month and the extra-ordinary meetings are called by the President of the Constitutional Court or by the request of three or more justices.

The Council of Justices of the First Term enacted various rules regarding the organization, management, personnel, finance, court administration, etc. such as the Rules on the Auxiliary Organizations of the Constitutional Court, the Public Employees Rules of the Constitutional Court, and the Courtroom Installation Rules of the Constitutional Court, and decided on the selection of the current courthouse site in Jae-dong, the flag, emblem, and seal of the Court, the uniform of the Justices, etc. The Council of Justices of the Second Term also enacted important rules such as the Rules of the Administrative Adjudication Committee of the Department of Court Administration, the By-laws of the Committee for Office Automation of the Constitutional Court, the By-laws regarding the Electronic Documents Archiving, the By-laws regarding the Form of Decision, the Information Disclosure Rules of the Constitutional Court, etc.

4. Department of Court Administration

A. Overview

Compared to its predecessors, the newly enacted Constitutional Court Act has relatively detailed provisions on the expanded and strengthened auxiliary entities for the Constitutional Court. The Act established the Department of Court Administration with the Secretary

General and the Deputy Secretary General as its heads. The organization, scope of duties, and employees of the Department of Court Administration were to be determined by the Court's own rules according to the Act (Article 17 (8)). The Court enacted the Rules on the Auxiliary Organizations of the Constitutional Court, Rule No. 7, on November 1, 1988.

B. Secretary General and Deputy Secretary General

According to the Constitutional Court Act, the Secretary General takes charge of the affairs of the Department of Court Administration under the direction of the President of the Constitutional Court, directs and supervises the public employees under his authority, and reports to the National Assembly. The Deputy Secretary General assists the Secretary General and act on his behalf in case he is unable to perform his duties due to an accident.

On September 30, 1988, the First Secretary General, Byon Jong-il, was appointed and on October 7, Kim Yong-ho was appointed as the Deputy Secretary General. On July 13, 1992, Kim Yong-gyun succeed to the retiring Byon, and on October 15, 1994, Lee Young-mo succeeded to Kim. On September 1, 1995, Chang Eung-soo was appointed as the new Deputy Secretary General. As Secretary General Lee was appointed to a justice on January 22, 1997, Deputy Secretary General Chang was promoted to Secretary General. On February 21, 1997, Park Yong-sang was appointed as Deputy Secretary General.

C. Offices, Bureaus and Divisions

The Department of Court Administration is further divided into offices, bureaus and divisions headed by chiefs, staffed by around 180 public employees, many of whom were transferred from other ministries and state agencies at the time of the establishment of the Court. The details of the subdivisions of the Department are as follows:

Name	Affairs
Public Information Officer	Affairs related to public information, publications of public announcements
Emergency Planning Officer	Emergency planning, affairs related to the Reserve Army and the Civil Drills

General Services Division	Security, management and training of personnel documentation, execution and settlement of budget, affairs related to deposits, trial expenses, and provisional holdings, procurement, management of property and state-owned assets, ceremonies and events, affairs not covered by other offices, bureaus, divisions or officers
Planning and Budget Officer	Major projects planning, budget planning, fund allocation and control, affairs related to the National Assembly, affairs not covered by other officers in the Planning and Coordination Office
Administrative Management Officer	Management of organization and posts, salary, improve administration management and system, support the Council of Justice meetings, manage property registration of public officials, complaint and conflict resolution, audit and inspection of accounting and work
Facilities Management Officer	Manage, maintain, and repair facilities, sanitation and lighting management, welfare
Judgment Administration Division	Affairs related to deposits and trial expense, manage the public relations office, preservation of case records
Judgment Affairs Division I	Constitutionality review of statutes upon request, constitutional complaints
Judgment Affairs Division II	Prepare, preserve and deliver documents related to impeachment, dissolution of political parties, and competence disputes, enact and abolish rules and by-laws related to administration of judgement, computerize judgement affairs, compilation of *An Introduction to Constitutional Adjudication Practices*, etc., lawsuit against the Constitutional Court and public employees of the Constitutional Court
Judicial Materials Division	Collect and analyze various documents related to adjudications, analyze and summarize domestic and foreign precedents, translation, electronic documentation, management of the Library
Precedents Compilation Division	Compilation and publication of adjudication cases, compilation and publication of constitutional research documents, compilation and publication of Korean Constitutional Court Gazette(KCCG)

5. Constitutional Research Officers

The Constitutional Court employs Constitutional Research Officers who are Grade 1 to Grade 3 public employees who engage in factual investigation and legal research needed for the Court's adjudicative activities under the President' supervision. The positions are filled by (1) judges, public prosecutors or attorneys; (2) assistant professors of law or those in higher positions in an accredited college ; or (3) Grade 4 or higher public employees who have five or more years of experience in law-related positions in state agencies.

Earlier, it was difficult to find and hire qualified personnel for the positions of Constitutional Research Officers. Because the President of the Constitutional Court could request other state agencies to dispatch their employees as Constitutional Research Officers (Article 18 (3)), the majority of the workforce were research personnel dispatched from the ordinary courts, prosecutors' offices, and colleges. Afterwards, in order to meet the demand for research workforce, the new Constitutional Court Act, amended on December 24, 1991, created the position of Assistant Constitutional Research Officer to be filled by (1) a judge, public prosecutor or attorney; (2) a full-time lecturer in law or those in a higher positions in an accredited four-year college; (3) a Ph.D. degree holder specializing in public laws; or (4) Grade 5 or higher public employees with five or more years of experience in law-related positions in state agencies. Also, starting in 1989, Ph.D. degree holders could be employed on contractual bases on renewable three-year terms as Constitutional Researcher.

Customarily, the Chief Research Officer was appointed among the research personnel to report directly to the President of the Constitutional Court and supervise and mediate the opinions of the research officers and researchers (Hwang U-ryeo, March 1, 1989 - Feb. 28, 1990; Yang Sam-seung, March 1, 1990 - Feb. 20, 1992; Lee Dong-heup, Feb. 21, 1992 - Aug. 31, 1993; Seo Sang-hong, Sep. 1, 1993 - Aug. 31, 1995; Yoon Yong-sup, Sep. 1, 1995 - Aug. 31, 1997; Kwon Oh-gon, Sep. 1, 1997 - 1999).

The Research Officers collate and analyze the precedents and theories of foreign jurisprudence and draft the reports that the Justices present at their conferences. Despite the importance of their role, the supply for qualified personnel has not been sufficient. Assistant Constitutional Research Officers and Constitutional Researchers were assigned to the Panels. According to the Court Rules, one Constitutional Research Officer is to be appointed for the exclusive service of each Justice. In practice, some of them are shared by more than one Justice. Important cases are worked on together by more than

one Research Officer.

6. Various Committees

According to the Constitutional Court Rules, the Constitutional Court can form various committees in order to consult with experts in various fields:

Name	Composition	Functions	Legal Basis
Advisory Committee	less than 20 members, Chairperson and Vice Chairperson Mutual Election	Advise on systematic improvement and development of the Constitutional Court	Rules on the Advisory Committee of the Constitutional Court (Rule No. 21, July 21, 1989)
Ethics Committee	9 members, 5 (including Chair):Outsider 4(including Vice Chair): Insider	Review the Property Registration of Public Officials of the Constitutional Court	Public Officials Ethics Act, Constitutional Court Rules implementing the Public Officials Ethics Act (Rule No. 56, July 13, 1993)
Review Committee of Library Materials and Precedents	less than 20, Chair: Justice Vice Chair: among committee members	Manage and select materials for the Library, Review the selection of the precedents to be included in the Collection of KCCG and KCCR	Constitutional Court Rules on the Review Committee of Library Materials and Precedents (Rule No. 22, July 21, 1989)
Review Committee of Laws and Rules	less than 10, Chair: Justice Vice Chair: among committee members	Review proposals for enactment, amendment, and abolishment of Constitutional Court Rules and related laws, Review Decrees sent by the Council of Justices	Rules on the Review Committee of Laws and Rules (Rule No. 23, July 21, 1989)

Compilation Committee of An Introduction to Constitutional Adjudication Practices	less than 20, Chair: Deputy Secretary General Vice Chair: Chief Research Officer	Compile and edit An Introduction to Constitutional Adjudication Practices	Publication Plan of An Introduction to Constitutional Adjudication Practices (NO. 3342-200, Sep. 6, 1996)
Compilation Committee of the First Ten Years of the Constitutional Court	less than 30, Chair: Deputy Secretary General Vice Chair: Chief Research Officer	Compile and edit the First Ten Years of the Constitutional Court	Formation of the Compilation Committee of the First Ten Years of the Constitutional Court (NO. 4111-26, Jan. 10, 1996)
Committee for Computerization of the Constitutional Court	less than 10, Chair: Deputy Secretary General Vice Chair: Chief Research Officer	Systematic initiation of computerization, Efficient management of computer network	By-Laws of the Committee for Computerization of the Constitutional Court (By-Laws No. 33, May 9, 1997)

Ⅲ. Adjudication Procedures

1. Overview

Reflecting upon the past constitutional history, the Constitutional Court, from early on, made vigorous efforts in protecting fundamental human rights of the people and restraining abuse of governmental power. However, since there was no previous system of adjudication procedure, the Court faced a difficult task of creating one from scratch. Various systems of constitutional adjudication existed from the time of the Founding Constitution but all became inactive or dormant, failing to pass down any well-established rule or practice on adjudicative procedure.

The current Constitutional Court Act lists a set of procedural rules but most of them repeated the procedures of the past Constitutional Committees, which were formed by sporadic adaptation of

foreign systems and were not concrete, detailed, or unified, and especially completely unprepared for the new constitutional complaint process. These procedural rules were adopted without being concretely tested in practice. Also, the limited time during the enactment of the Constitutional Court Act did not allow sufficient discussion of procedural rules. It was not an easy task during constitutional adjudication to concentrate on the search for substantive rules of the Constitution while using the inadequate procedural rules.

The Constitutional Court Act provides general procedure of adjudication in Chapter 3 and the special adjudication procedures in Chapter 4. Many rules of procedures proved in practice to be contradictory, unclear or inadequate: e.g., the distinction between full-time and non-full-time justices (the former Article 13), the absence of rules on preliminary orders, the compulsory attorney representation rule (Article 25 (3)), the 180-days limit on the adjudication period (Article 38), the lack of explicit provisions on modified forms of decisions such as that of limited constitutionality or unconstitutionality and that of nonconformity to the Constitution, which necessarily arise out of adopting the interpretive rule of preference for constitutionality (Article 47 (1)), the failure to specify the effect of a decision on the underlying case, in contrast to the explicit provision on its effect on the future cases (Article 47 (2)), the limit on the scope of competence disputes (Article 62), the singular exclusion of ordinary courts' judgments from the scope of constitutional complaint process (Article 68 (1)), the failure to provide for exceptions to the rule of exhaustion of prior remedies, which are essential for proper functioning of the constitutional complaint process (Article 68 (1)), and the failure to define the legal nature and scope of Article 68 (2) constitutional complaint, which arises out of a party's motion for constitutional review.

In particular, the exclusion of ordinary courts' judgments from the subject matter of constitutional complaints, in conjunction with the rule of exhaustion of prior remedies, operated to overly restrict constitutional complaints against administrative actions and created numerous complex problems of procedure. It complicated the Court's ruling on the legal prerequistes to a constitutional complaint and led to many dismissals, which dissatisfied those citizens convinced of violations of their rights. Moreover, there was no enforcement mechanism for modified forms of decisions, reducing their practical effect. Also, there was no provision mandating ordinary courts to grant the party's motion for constitutional review of clearly unconstitutional laws (the party, upon denial, can file a constitutional complaint against the denial under Article 68 (2) but is restricted in many aspects).

Nevertheless, in the past ten years, the Constitutional Court endeavored to apply the procedural rules as rationally as possible while trying to cure their defects. As a result, the Court established a substantial body of new rules.

Adjudication procedure means the entire process in which a case is filed, allocated to a justice, reviewed, and adjudicated. In this section, we shall examine the changes in the procedural rules over time for each stage of the case flow, starting from the filing stage, allocation, deliberation, and the closing.

2. Procedure for Requesting for Adjudication

A. Request for Adjudication

The procedure for requesting a constitutional adjudication, especially, through a constitutional complaint was very unfamiliar to ordinary citizens and lawyers alike.

The first case of *constitutional complaint* was filed on September 23, 1988, concerning the Rules implementing the Certified Judicial Scriveners Act (88Hun-Ma1), by a court employee in general service wishing to be a judicial scrivener. The constitutional complaint was drafted in compliance with the relevant provisions of the Constitutional Court Act and properly identified the exercise or non-exercise of governmental power that allegedly violated his rights. (However, since he was not represented by an attorney, the first court-appointed counsel, Kim Do-chang, was appointed.)

After that, the complaints were filed in a variety of forms. Some resembled civil complaints, identifying the parties as plaintiffs and defendants. Others were submitted without any title in form of letters of griveance. Yet others, though titled "constitutional complaints", failed to identify the basic rights infringed or the infringing action of public power but merely stated the relief sought and the causes of action, following the form of civil complaints. Some of these early complaints were prepared prose without an attorney appointed. Pursuant to the rule of compulsory attorney representation, these cases were dismissed if they did not meet the eligibility requirements for court-appointed counsel.

Although many early constitutional complaints filed afterwards were out of compliance, the complaints increasingly complied with the requirements of the Constitutional Court Act (Article 71) by identifying the infringing state action. Some continue to write down the name of the respondent and the relief sought in addition to or

instead of the infringing state action. Even when the complaint is thus drafted incorrectly, the Court has not dismissed it as unlawful on the ground that the Court makes independent determination of who the state actor is, anyway (91Hun-Ma190, May 13, 1993).

Many complaints, however, do not identify the infringing state action clearly or state improbable rights as infringed. Strictly speaking, they do not make mandatory allegations but were never dismissed on such ground alone.

The first *request for constitutional review* was filed on November 8, 1988, concerning Article 5 of the Social Protection Act, by the Supreme Court. The Supreme Court granted a party's motion for constitutional review on the ground that there is a possibility that the provision violates due process of laws.[12)]

A controversy arose on how strong an opinion the presiding judge must have against the statute before requesting for its constitutional review. Even before the establishment of the Constitutional Court, some argued that mere suspicion of unconstitutionality was sufficient and others argued that conviction of unconstitutionality was required. From the practical perspective of the Constitutional Court, the issue became moot. The Court could not distinguish suspicion from conviction by reading the text of the presiding court's decision to request. Although the question never arose as an issue of a concrete case, the Constitutional Court set the general standard at 'reasonable suspicion of unconstitutionality' above and beyond mere doubt (92Hun-Ka2, Dec. 23, 1993).

Also, the Court faced the task of circumscribing the scope of the requirement that the reviewed statute forms the premise of an underlying trial. Strict interpretation will reduce the number of the request for constitutional review cases. Generous interpretation will diffuse the present system out of the boundary of concrete norms control. In the end, the Court through precedents has gradually broadened the scope of the required relationship to the underlying trial and even accepted a statute that, if struck down, does not change the ultimate outcome of the trial but only its reasoning.

All the immediately subsequent requests for constitutional review (88Hun-Ka2 to 5) concerned Article 5 of the Social Protection Act, which led to the Court's July 14, 1989 decision invalidating Article 5 (1) of that statute.

---

12). What was interesting, the motion for constitutional review had been made by Cho Kyu-kwang, the soon-to-be President of the Constitutional Court, while he was an attorney representing the petitioner in the Supreme Court. When the case finally reached the Constitutional Court, Cho recused himself from this case entirely.

The filing under Article 68 (2) is technically a *constitutional complaint* but was aimed at strengthening the *request-for-constitutional-review-of-statute* process in response to the ordinary courts' past unwillingness to grant a party's motion for constitutional review, which had prevailed during the Constitutional Committee eras to turn the institution into a nominal entity. The mixed origin, therefore, forebode a procedural controversy. A debate arose on what the subject matter of the Article 68 (2) review was. Some argued that the ordinary court's denial of the party's motion should be reviewed as an infringing state action as in a constitutional complaint. Others argued that the statute requested for review by the party should be the subject matter as in a request-for-constitutional-review process. The Court has heeded the latter opinion, treating the Article 68 (2) filing as a request for constitutional review, and therefore, reviews as a legal prerequiste whether the statute reviewed formed the premise of the underlying trial.

The expenses of constitutional adjudications are incurred by the State (Article 37 (1)). The Court may require a deposit from a claimant for the purpose of deterring abuse of the legal process, and order forfeiture of the deposit in event that the request for adjudication is dismissed or fails on merits and a finding of abuse is made (Article 37 (2), (3)). However, the deposit provision was never used by the Court due to its policy decision to increase the awareness among people of the new constitutional complaint process.

In the past, the requests for adjudication differed widely in length, ranging from 2-3 pages to several hundred pages. Some presented detailed arguments using statistics while others failed to treat the constitutional issues in depth. Here is an area where more expertise and efforts from the attorneys is needed.

The Court has published various guides to help claimants such as a pamphlet titled An Introduction to Adjudication of Constitutional Complaint, published in April 1993. Also, in August 1998, the Court published a comprehensive practice manual, titled "An Introduction to Constitutional Adjudication Practices."

B. Filing and Allocation of Cases

The requests can be filed 24 hours a day. After the office hours, one can file a request at the Night Duty Room and receive a receipt. No request is rejected at the filing stage except that the clerk has found some requests completely out of form that he or she has requested to resubmit after corrections. Filings are often done through

mail. If certified mail is used, the clerk does not issue a receipt. In the case of constitutional complaints, the number of mail filings are high, reaching 40% of the total.

Once the request is filed, it is assigned a case number consisting of a case code (*Hun-Ka* for requests for constitutional review of statutes, *Hun-Ma* for constitutional complaints, *Hun-Ba* for Article 68 (2) constitutional complaints, *Hun-Ra* for competence disputes, *Hun-Sa* for appointment of an counsel, preliminary orders, recusals) preceded by the two-digit filing year and followed by a three digit serial number given in the order of filing in that year. Article 68 (2) constitutional complaints were initially assigned *Hun-Ma* (16 cases including 88Hun-Ma4) until 1990 when such cases were recategorized as the *Hun-Ba* cases.

The Court began operation in September 1988, receiving in its docket 13 requests for constitutional review of statutes and 27 constitutional complaints. In 1989, the Court received 142 requests for constitutional review of statutes (many against the Social Protection Act and the Private School Act) and 283 constitutional complaints. In 1990, there were 71 requests for constitutional review of statutes, 59 Art. 68 (2) challenges, 230 constitutional complaints, etc. By the end of August 1998, the Court totaled 351 in requests for constitutional review of statutes, 3,247 in constitutional complaints, 586 in Art. 68 (2) challenges, 9 competence disputes, etc.

As soon as the request is filed, a copy is sent to the respondent so that he or she may respond. In constitutional review of statutes upon request, a copy of the request is sent to the Minister of Justice and parties to the underlying trial. The respondent can file *an answer*. Since a constitutional complaint does not identify a particular state actor the respondent, the interested state agencies or public organizations and the Minister of Justice may file *an opinion*. The responsiveness and the content of the opinions varied widely from agency to agency. The National Assembly, the maker of the reviewed law, has rarely filed opinions. In most cases, the Ministry of Justice or other directly related departments filed the opinions.

Each filed case is assigned to a justice, following the prevailing practice across the judiciary. The cases, once filed, are assigned to one of the Justices immediately thereafter or twice a week. Constitutional complaints, once the Assigned Justice is determined, are allocated to the Panel of Designated Justices in which the Assigned Justice sits.

The Constitutional Court Act provides that a Panel composed of three Justices shall conduct preliminary review of constitutional com-

plaints (Article 72). Accordingly, the Rules on Formation and Management of Panels was enacted on October 15, 1988, establishing three Panels. The changes in the composition of the Panels are shown in the following table.

Term	Panel 1	Panel 2	Panel 3	Remarks
Oct. 15, 88 -Aug. 5, 91	Cho Kyu-kwang, Lee Seong-yeol (non-full-time), Lee Shi-yoon	Byun Jeong-soo, Kim Chin-woo (non-full-time), Kim Yang-kyun	Han Byung-chae, Choe Kwang-ryool (non-full-time)	*Lee Seong-yeol retired on Aug. 5, 91
Aug. 6, 91 -Dec. 16, 93	Cho Kyu-kwang, Lee Shi-yoon, Hwang Do-yun (non-full-time)	Same as above.	Same as above.	*non-full-time system repealed on Nov. 30, 91
Dec. 17, 93 -Dec. 29, 93	Cho Kyu-kwang, Hwang Do-yun	Same as above.	Same as above.	*Lee Shi-yoon retired on Dec. 17, 93
Dec. 30, 93 -Sep. 14, 94	Cho Kyu-kwang, Hwang Do-yun, Lee Jae-hwa	Same as above.	Same as above.	
Sep. 15, 94 -Jan. 21, 97	Kim Yong-joon, Hwang Do-yun, Shin Chang-on	Kim Chin-woo, Lee Jae-hwa, Cho Seung-hyung	Kim Moon-hee, Chung Kyung-sik, Koh Joong-suk	*The 2nd Term began on Sep.15, 94 *Kim Chin-woo retired on Jan. 21, 97

Jan. 22, 97 -Aug. 25, 97	Kim Yong-joon, Hwang Do-yun, Shin Chang-on	Lee Jae-hwa, Cho Seung-hyung, Lee Young-mo	Same as above.	*Hwang Do-yun retired on Aug. 25, 97
Aug. 26, 97 -99	Kim Yong-joon, Koh Joong-suk, Shin Chang-on	Lee Jae-hwa, Cho Seung-hyung, Lee Young-mo	Kim Moon-hee, Chung Kyung-sik, Han Dae-hyun	

The Panel usually reviews sufficiency of each request in relation to the legal prerequisites. A substantial number of cases are also dismissed by the Full Bench for not meeting the legal prerequisites even after having passed through the Panel's review. Early on, the Court intentionally turned the legal prerequisite review of constitutional complaints over the Full Bench in order to accumulate precedents on the difficult issues of the legal prerequisites. Even now, many constitutional complaints are dismissed late at the Full Bench stage because of this reason.

Until August 1998, the Panels reviewed 3,426 constitutional complaints, and dismissed 1,763 filed under Article 68 (1) and 74 filed under Article 68 (2) (151 withdrawn). 83 of them were dismissed for not exhausting the prior remedies, 134 for being made against ordinary courts' judgments, 289 for having passed the filing time limit, 527 for not being represented by a counsel, and 270 for other reasons (Article 68 (1) cases); 10 for having passed the filing time limit, 9 for having no counsel representation, and 12 for other reasons (Article 68 (2) cases).

Case allocation is made to all eight Justices, except the President of the Constitutional Court, in the order of the serial number. When a concern was expressed that the allocation could be predicted, the By-laws on Case Filing and Allocation (By-law No. 17, June 10, 1992) was enacted on July 1, 1992 to institute random selection using gingko nuts. In order to maintain equal distribution of the cases, eight gingko nuts are put into a spinning wheel and are selected one at a time until three remained at which point all gingko nuts are put back. If the balance of the number of allocated cases has broken, then they can be reallocated by the decision of the Council

of Justices. If a new case presents a similar issue to an already allocated case, it can be assigned to the same Assigned Justice. Motion hearings are assigned to the Assigned Justice of the underlying case.[13]

The Assigned Justice submits the result of his review to the Justices' Conference, and presents the Summary of facts and his opinion at the Conference. Usually, if the Assigned Justice belongs to the majority opinion, he or she usually drafts the official opinion of the Court.

The constitutional complaints concerning the postponement of local elections, etc., 92Hun-Ma122 and 92Hun-Ma152, filed on June 18, and July 21, 1992, respectively were assigned to two different justices. Justice Byun Jeong-soo whom the first case was assigned protested the arrangement on September 18, 1992. Justice Byun argued that "the cases are similar but were unprecedentedly assigned separately. Unnecessary oral arguments are being planned, dimming the prospect of efficient disposition of the cases. Under these circumstances, I cannot fulfill my obligations as the Assigned Justice," and withdrew as the Assigned Justice. Three days later, the complaints withdrew, saying that one cannot expect relief to constitutional rights when the Constitutional Court is delaying the disposition on purpose.

C. Court-appointed Counsels

The Constitutional Court Act is the first in Korea to adopt compulsory representation of attorney-at-law. A controversy arose on whether the rule restricts people's right to request for adjudication of a constitutional complaint. The Court upheld the compulsory attorney representation on September 3, 1990, pointing to various public interests.

The Court has sought to expand the system of appointing a state-sponsored attorney and enacted the necessary rules. In order to request the appointment, one must submit in writing proof of his or her inability to appoint a lawyer along with the reasons for the underlying constitutional complaint. If the request is out of form, the presiding justice can order correction in a designated time. In reality, it was impossible for the Constitutional Court to appoint attorneys for all the constitutional complaint cases against non-institution of prosecution.

---

13). For instance, the motion to appoint a counsel is treated as another case and allocated.

During the Second Term of the Constitutional Court, the system of court-appointed counsels was strengthened to provide substantive guarantee of people's right to constitutional adjudication. Every year, the Constitutional Court requests the Korean Bar Association to select fifty prospects for appointment and now pays up to 1.5 million wons per appointment. In November 1997, the Court also enacted the rules to state explicitly the standard of indigence. The fees of court-appointed counsels is set every year by the Council of Justices within the budget. The fees can be increased by the presiding justice, depending on the difficulty of the case, the nature of the work, the number of claimants, the number of oral arguments, the expenses in duplicating documents and interviewing the claimants as long as the budget permits. In 1995, 61 out of 161 requests for appointment were granted (38%), in 1996, 81 out of 197 (41%), and in 1997, 98 out of 198 (49%).

It is rare but does happen that a claimant may request another appointment due to disagreement with the previously appointed counsel. The Court can authorize cancellation of appointment when a finding is made that the counsel does not carry out his duty faithfully or of other appropriate reasons (Article 6 (2) of the above Rule).

3. Review Process

A. Briefs and Hearings

The form of argumentation varies, depending on the subject matters. In impeachment, dissolution of political parties and competence disputes, oral presentation is mandatory (the Constitutional Court Act Article 30 (1)). In constitutional review of statutes upon requests and constitutional complaints, argumentation is in principle limited to briefs. Only when the full bench recognizes the need, it may hear arguments and testimonies from the parties and others interested (Article 30 (2)). Constitutional adjudication is a peaceful means of dispute resolution between people and state agencies or among state agencies, and presents an educational opportunity for people. For this reason, the Constitutional Court holds hearings for those cases of national interest.

By the end of December 1997, the Court held hearings for a total of 60 cases. They include the *Preventive Detention* case (88 Hun-Ma4, a constitutional complaint on Article 5 of the Social Protection Act), the *Candidacy Deposit* case (88Hun-Ka6 on Article 33 of the Election of National Assembly Members Act), the *Land*

Transaction Licensing case (88Hun-Ka13 on Article 31-2 (i) of the Act on the Utilization and Management of the National Territory), the *Legislative Railroading* case (90Hun-Ra1 on competence disputes between an assemblyperson and the Speaker of the National Assembly), the *Ban on Collective Action of Workers Employed by Defense Industries* case (95Hun-Ba10 on Article 12 (2) of the Labor Dispute Adjustment Act), the *Development Restriction Zoning* case (90Hun-Ba16 on Article 21 of the Urban Planning Act), the *Same-Surname-Same-Origin Marriage Ban* case (95Hun-Ka6 on Article 809 (1) of the Civil Act), the *Constitutional Complaints against Ordinary Courts' Judgments* case (96Hun-Ma172 on Article 68 (1) of the Constitutional Court Act).

If the bench calls for an oral hearing, a date is determined and the parties and other interested non-party participants are summoned to the hearing. At the hearing, both sides make oral presentation of the facts and evidences that form the basis of the Court's decision, and arguments on the interpretation of the Constitution and law. The Court opened to the public all the hearings held so far.

In the past, hearings, except for competence disputes, have been focused on legal arguments rather than fact-finding unlike ordinary court's criminal or civil trials. This reflects the special nature of constitutional adjudication: it does not stop at the relief of individual's rights but aims to protect the constitutional order through objective interpretation of the Constitution. Moreover, since the exercise of governmental power, which is the main subject matter of constitutional adjudication, is in most case carried out through documents, the issue of fact is not in controversy. Such phenomena sometimes place a demand on the Court's *sua sponte* examination of facts. The Court, *sua sponte*, can collect facts not presented by the parties and use them as the basis of its decision. In fact, much of the hearings in the past have been occupied by the testimonies of scholars and experts in the related fields, whose presence were requested by the Court. Often, the attorneys for the parties were not fully researched on the constitutional issues and the Court needed to hear diverse opinions in formulating an important precedent. Parts of the testimonies of experts and scholars are published in the serial publication, *Materials on Constitutional Adjudication.*

Arguments of the parties do not limit the Court's disposition of the case. In 91Hun-Ma190, the Constitutional Court held on May 13, 1993: "according to the Constitutional Court Act, the constitutional complaint process is composed of such elements as compulsory attorney representation, document-based review, *sua sponte* examination, public financing of expenses. Unlike ordinary civil trials

following the adversarial system, the Court does not merely rule on the arguments and responses put forth by the parties. It can, in principle, examine and rule on all issues concerning the violation of the complainant's rights and any exercise or non-exercise of governmental power that caused the violation."

Also, in order to conduct the review in a focused and efficient manner, the Court has made generous use of a preparatory proceeding conducted by a designated Justice(Article 40 of the Constitutional Court Act and Article 253 of the Civil Procedure Act). Since statute reviews and constitutional complaints are in principle conducted on papers, the arguments and evidence submitted at the preparatory proceeding can directly become the basis of the ultimate decision. Furthermore, when the case is complicated, the preparatory proceeding is especially valuable as a step to organize the issues and evidence nicely, and sometimes obviates the parties' testimonies, for the justices' review. The Court ordered nine preparatory proceedings so far.

The Court can conduct inspection of evidence whenever it is deemed necessary. Until December 1997, the Court questioned witnesses in several cases including the 89Hun-Ma5 non-institution of prosecution case and complainants themselves in such cases as the 89Hun-Ma61 State Compensation Act case; and conducted on-site inspection in such cases as the 88Hun-Ma4 Social Protection Act case, and inspection of documentary evidence in such cases as the 89Hun-Ma31 property right case.

Rarely, an issue of fact attracts attention in constitutional adjudication. However, on-site inspection conducted at the National Assembly on August 24, 1993 attracted attention. The facts of the cases are as follows: On July 14, 1990, 6 months after the so-called *Merger of the Three Parties*, which gave rise to a super-majority incumbent party, Vice-Speaker Kim Jae-kwang of the incumbent party conducted the 150th Extra-Ordinary Session of the National Assembly in the center aisle of the main hall, using a wireless microphone. and railroaded 26 legislations including the Kwangju Compensation Act, the Broadcasting Act, the Act on the Organization of National Armed Forces, in a span of one minute. The then opposition parties filed a constitutional complaint (90Hun-Ma125) against the railroaded bills for violating the legislative power of the opposition assemblymen and a competence dispute (90Hun-Ra1) against the Speaker of the National Assembly. The Court reached a consensus at the Justices' Conference and concurred with the claimants' counsel that on-site inspection was inevitable. All nine justices visited the National Assembly on August 24, 1993 for about an hour but failed to go into the main hall. Instead, they examined the recorded video

and audio tapes of the session and heard the testimony of the National Assembly Proceeding Director at the reception room of the Speaker of the National Assembly.

B. the Justices' Conference

The dictionary definition of 'conference' means a gathering to exchange opinions and discuss. The Constitutional Court's Conference is unique as reflected by the use of 'decision' instead of 'judgement' and is compared to the 'consensus' of the Supreme Court (Article 34 of the Constitutional Court Act). It had a historical significance of bringing together nine justices with all different backgrounds and beginning a wholly new constitutional discussion.

The First Term Court, though composed entirely of licensed attorneys, brought them from different career paths; a judge (Lee Shi-yoon), a prosecutor (Kim Yang-kyun), six in private practice (Cho Kyu-kwang, Lee Seong-yeol, Byun Jeong-soo, Kim Chin-woo, Kim Moon-hee, Choe Kwang-ryool), and an assemblyman (Han Byung-chae). Also, the justices nominated by the then opposition parties (Byun Jung-soo and Kim Jin-woo) wrote opinions of unconstitutionality more frequently than others (including minority opinions). As the Constitutional Court was established in a time of a transition from the past authoritarian regime to a more democratic system, many once suppressed issues were brought to the Constitutional Court such as concerning the Social Protection Act, the National Security Act, the Private School Act (the so called *Korean Teachers and Educational Workers Union* case), the dissolution of Kukje Group, the *legislative railroading*, the President's postponement of local elections. Many of these cases arose out of a sharp clash between social, political, and economic interests. At a time when the constitutional discourse had been suppressed under the authoritarian regime for a long time, the Constitutional Court faced a major task of starting fresh without any established standard of review or procedural rules. In such situation, it was not easy for the nine justices with different backgrounds to come together and begin a discussion, totally different from ordinary civil and criminal trials.

Early, the Justices' Conference was held once a month when some justices were part-time, but became regularized as a weekly practice on every Thursday. Usually, it began at ten in the morning and lasted the whole day, often continuing into the night. The cases were sometimes put on the agenda by the President of the Constitutional Court, but the new cases were put on the agenda when the Assigned Justice completed and submitted its report to all other

justices in Monday afternoons. The President presides the Conference at which the Assigned Justice begins the discussion of each case by explaining the issues of that case.

Justices sometimes disagreed on the timing of the Conference. In the *local election postponement* case and the *legislative railroad* case, Justice Byun Jeong-soo objected that the Conference was being delayed.

The timing can differ greatly from case to case. Some were filed, and two days later, submitted to the Conference, and then decided two days later (95Hun-Ma172, the *Act on the Election of Public Officials and the Prevention of Election Malpractices* case, June 12, 1995). One, filed right before the election, was submitted to three intense Conferences and decided within two weeks of the filing (92Hun-Ma37, the Election of National Assembly Members Act case, March 13, 1992). Others were not easily closed despite long conferences (the *Development Restriction Zoning* case). Some criticized the length of the review in view of the 180 days period set by the Constitutional Court Act, but the Court took the provision as advisory. The Second Term Court put priority on reducing the length of review and closed the cases within 180 days if there was no special issue.

The Conferences are not open to the public but the contents of the justices' discussion were disclosed in the past. In the *Rules implementing the Certified Judicial Scriveners Act* case, decided on October 15, 1990, the Supreme Court requested on October 12 that the Constitutional Court delay the announcement of what was to be a decision of unconstitutionality[14]. When it seemed that the date would be delayed, Justice Byun, presiding the case, intentionally made public the content of the proposed decision on the same day. The next day, a news article reported that the Supreme Court was lobbying the Constitutional Court Justices to delay the announcement of its unconstitutionality decision. The decision was announced as scheduled on October 15. It was reported that there was a discussion of impeaching Justice Byun. Justice Byun reminisced that his action was inevitable to prevent the proposed decision from forfeited by the influence of the Supreme Court. There followed a serious friction and legal cross fires with the Supreme Court, but the Supreme Court was eventually forced to hold judicial scriveners' licensing examination, pursuant to the Constitutional Court's decision, and thereby open the door of the profession to ordinary people without courtroom experience.

14). The Supreme Court's request can be explained by the fact that the respondent state agency in the case was the Supreme Court itself, which made decisions on whether to conduct the judicial scriveners' licensing examination.

As the above example shows, the Court in its early years found it objectively difficult to preserve its independence. Also in December 1995, the proposed decision on the *May 18 Incident non-institution of prosecution* case, in which the prosecutor had decided not to prosecute the former presidents Chun and Roh on the ground that a successful coup could not be prosecuted, was released to the media before it was announced. The complainants withdrew a day before the announcement because the aspect of the proposed decision concerning the period of limitation as reported by the media was unfavorable to them. The Court recognized the effect of the withdrawal and closed the case without announcing the decision as proposed. However, a minority of justices dissented on the effect of the withdrawal and incorporated in its opinion the contents of the decision that was to be announced. The proposed decision was to contain a historically important holding that a successful coup could be prosecuted. It is regrettable that it was not included in the official decision of the Court. The issue remained what effect withdrawal should have on the review process.

The Justices' Conference can be held by the Panel in case of constitutional complaints. Unlike the Supreme Court, however, the Panel does not review the merits of the case. Even the issues that it can decide on are, if important, routinely referred to the full bench for in-depth discussion and precedential examination. Therefore, most of the important decisions of the Constitutional Court are made by the full bench, and the Conference usually refers to the Conference of the full bench.

In most countries, a decision is made by a majority of justices. In Korea, the Korean Constitution explicitly requires a supermajority of six for the Constitutional Court to invalidate a statute, impeach a public official, dissolve a political party, affirm a constitutional complaint, In addition, Article 23 (2) of the Constitutional Court Act requires the same supermajority to overrule the Court's own precedents. Despite the stringent requirement, the Court has issued many decisions of unconstitutionality. Until August 1998, the Court has issued a cumulative total of 47 unconstitutionality, 20 nonconformity to the Constitution, 3 limited unconstitutionality, 7 limited constitutionality, 4 partial unconstitutionality decisions in statute reviews; 14 unconstitutionality, 2 nonconformity to the Constitution, 1 limited unconstitutionality, 4 partial unconstitutionality decisions in Article 68 (1) constitutional complaints; 67 decisions invalidating non-institution of prosecution decisions; 48 unconstitutionality, 17 nonconformity to the Constitution, 15 limited unconstitutionality, 9 limited constitutionality, 2 partial unconstitutionality decisions in Article 68 (2) constitutional

complaints.

It is rare in foreign countries to issue so many decisions of unconstitutionality in such a short period of time. This must be the result of active promotion of constitutional adjudication and the manifestation of the justices' commitment to correcting the wronged constitutional order of the past and bring on a society ruled by the Constitution. Also, the discourse on constitutional law was more vigorous than any time in the past, and the First Term Court guided and strengthened the discourse. Such a high number of constitutional decisions also indirectly reflects the fact that many laws legislated prior to the establishment of the Constitutional Court were arbitrarily enacted and swayed by special interests without much consideration of the restriction of the Constitution.

The Constitutional Court rarely gathered the required supermajority of six to overrule itself. In the competence dispute between the Speaker of the National Assembly and its members (96Hun-Ra2, July 16, 1997), the Court garnered six votes once to overturn its previous decision that had denied the standing to the individual assemblymen.

There is no statutory provision concerning whether the justices who opines to dismiss a case can participate in the review on the merits. The Court developed a practice of excluding those justices from the review on the merits. The practice, however, makes it more difficult to obtain a decision of unconstitutionality at the stage of merits review than an issue-by-issue voting system[15], calling for future research.

Preparation of a Justices' Conference is completed when a justice receives from his research officer a report and submits it as a call for Conference. Additional research is ordered for new issues and the issues which have been inadequately researched. Most of the reports are entered into a database used as an internal resource. The reports on a precedent-setting case are published in Materials for Adjudication, which are in more than 90 volumes.

4. Closure of the Case

A. Drafting and Announcement of the Decision

15). In the latter system, the decision to dismiss and the decision on the merits are treated separately. If a majority at the dismissal stage sends the case to the review on the merits, all justices, including those who has opined to dismiss it, can participate afresh in the review on the merits. The minority opinions at the dismissal stage are considered to be subsumed under the majority opinions.

Once the Justices' Conference is complete, the decision is drafted and announced on the next date of announcement. The announcement date is scheduled for once every month. The majority opinion is written by the Assigned Justice if he concurs in it. The minority opinion is drafted by one of the minority justices. For consolidated cases, the Assigned Justice of the earliest case writes for all cases if he belongs to the majority opinion. The majority and minority opinions sometimes mutually influence each other until the texts are finalized.

Drafting the decision of the Constitutional Court is a very difficult legal task involving persuasive linking of facts to open-ended constitutional norms. The First Term Court sought to produce persuasive constitutional precedents to people by applying diverse constitutional theories and comparative legal perspectives.

Previously, the announcement was made only with the first draft of the decision, which was finalized afterwards. These days, the announcement is made after the justices have signed and dated the final text of the decision.

Article 36 (3) of the Constitutional Court Act recognizes minority opinions. Minority opinions not only refer to dissenting opinions but also separate opinions concurring with and supplementing the majority opinion. The system of allowing minority opinions enriches the review on constitutional norms that are by nature open-ended and abstract. It also allows minority justices to profess their opinions at the Conference of the justices who have diverse backgrounds. It ameliorates the tension that may arise out of a process of attempting at the extreme uniformity of opinions if only the majority opinion is published.

The first minority opinion is Justice Han Byung-chae's opinion of constitutionality in the Act on Special Measures for Defaulted Loans of Financial Institutions case (89Hun-Ka37, etc. May 24, 1989). Justice Byun Jeong-soo issued the most minority opinions among the First Term Court justices. Among the Second Term Court justices, Justice Cho Seung-hyung has issued numerous minority opinions, including the ones challenging the language used in all Article 68 (2) constitutionality decisions, and, since the decision of the 92Hun-Ka11 on September 28, 1995, the ones challenging the legal basis of a decision of nonconformity to the Constitution.

In accordance with the Constitutional Court Act, the final decision of the Constitutional Court is made official as it is published in the Gazette of the government published by the Ministry of Government Administration and Home Affairs. In order to save time and re-

sources, only important decisions such as unconstitutionality decisions are published in the Gazette. Also, starting May 1, 1993, more decisions could be published in the KCCG. Also, the internet homepage of the Constitutional Court (www.ccourt.go.kr) which went on-line in late August 1998, allows the visitors to review the list and the full texts of all the decisions made that day.

B. Types and Effect of Decisions

The cases are usually closed on announcement of the decision on the merits. The constitutional complaint cases are sometimes closed on notice of dismissal to the parties. A substantial number of cases were closed by the complainants' withdrawal, and one was closed upon the death of the complainant.

The first decision of the full bench was the 88Hun-Ka7 (Special Act on Expedited Litigation, Etc. case) announced on January 25, 1989. In this case, the Constitutional Court ruled that a provision prohibiting the provision execution against the state in a civil proceeding is unconstitutional. The decision must be seen as an example of the First Term Court's committment to its historical duty in Constitutional adjudication. Such Committment was again demonstrated in the decision of unconstitutionality on the Social Protection Act that followed.

The decision of unconstitutionality has a binding force on all state agencies, immediately nullifies the reviewed provision and even retroactively applies in case of criminal statutes. For this reason, from early on, there was a request from the Administration that the Court exercises caution in review of criminal cases. Especially, as to the invalidation of the Social Protection Act provision that added mandatory preventive detention upon the completion of a regular sentence regardless of the likelihood of recidivism (July 14, 1989), the Minister of Justice argued that the retroactive effect of the decision should be limited in order to prevent a serious confusion. However, if Article 5 (1) of the Social Protection Act was unconstitutional, it was just to restore to all the people affected by that provision an opportunity for proper review.

The Constitutional Court decided on April 17, 1989, that prosecutors' decisions not to prosecute is an act of governmental power that is proper subject matter of a constitutional complaint. There arose a problem of what effect the Court's decision invalidating a prosecutor's non-institution of prosecution decision should have. In the inclusion of non-institution of prosecution in the objects of

constitutional complaint, the policy consideration to actively promote the system of constitutional complaint was applied. With the exclusion of courts' judgement from the objects of constitutinal complaint and the rule of exhaustion or prior remedies, the exercise or non-exercise of governmental power which will be an object of constitutional complaint is understood to be very limited. Some public law scholars predicted that the system of constitutional complaint would become nominal. When a request for constitutional complaint was made demanding a nullification of non-institution of prosecution, the Constitutional Court affirmed the relevance with basic rights. As a result, a substantial number of non-institution of prosecution cases were brought to the Constitutional Court as constitutional complaints. However, When the Constitutional Court invalidates a non-institution of prosecution decision, the Court is not compelling the prosecutor to prosecute. The Court is not in a position to competently investigate the evidence and the facts, and in most cases stops at reviewing the arbitrariness of the prosecutor's non-institution of prosecution decision on the basis of the facts produced during the investigation. By the end of August 1998, 1,960 non-institution of prosecution decisions were challenged, out of which 842 were dismissed or withdrawn, 58 were overturned. Out of the 58 non-institution of prosecution overturned, the challenges to 49 of them had been brought by those who had made the initial accusation of crimes, and the challenges to 9 had been brought by the accused whose charges were not dropped and merely exempted. Out of the 49 non-institution of prosecution, 18 resulted in institution of prosecution, 29 again ended in non-institution of prosecution, and the remaining two are still in investigation. Out of the nine exemptions of prosecution, eight were dropped on a finding of no suspicion and one is still in investigation. The Court's review has had the preventive effect on the field prosecutors to be more careful in making a decision whether to prosecute or not.

With the decision of limited constitutionality in the 89Hun-Ma 38 case on July 21, 1989, the Constitutional Court began to issue modified forms of decisions. In that case, the Court ruled that "Article 32-2 (1) of the Inheritance Tax Act is constitutional as long as it is interpreted to not apply to registration of property under a different name with no evasive purpose." *Modified forms of decisions* are various types of decisions in which the Court find the law unconstitutional in some aspects but do not invalidate it in deference to the legislative power or in order to prevent possible confusion arising out of a legal vacuum. They are decisions of limited constitutionality, limited unconstitutionality, and nonconformity to the Constitution. Modified forms of decisions are an inevitable corollary of the pro-

position that "when various interpretations of a law are possible, it must be given the constitutionally valid one." former President of the Constitutional Court Cho Kyu-kwang once emphasized in a concurring opinion that both limited decisions of constitutionality and unconstitutionality are qualitatively that of unconstitutionality. Justices Byun Jeong-soo and Kim Chin-woo initially expressed doubt about the binding force of these modified forms of decisions while Justice Kim later changed his position to recognize the need for modified forms of decisions.

The first decision of nonconformity to the Constitution was made on September 8, 1989: "1. Articles 33 and 34 of the National Assembly Elections Act is not conforming to the Constitution. 2. The provisions shall remain effective until the end of May, 1991, or new provisions are enacted by the legislators which ever comes first." The decision of nonconformity is usually issued when invalidation of a statutory provision will not restore a constitutional order and a whole new legislation is called for. The decision suspends application of the nonconforming provision indefinitely until it is revised, and applies to the interim state of affairs the revised provision retroactively. As in the above National Assembly Elections Act case, the Court sometimes exceptionally orders the continued, temporary application of the invalid provision until a given point in time.

A modified forms of decision worth noting is the decision of limited constitutionality in the National Security Act case. There, the Court opined that Article 7 (1) of the National Security Act will be constitutional as long as the scope of its application is limited to when the condemned conduct threatens the national integrity and security or the basic order of free democracy. However, the subsequent decisions of the Supreme Court, in reviewing the trials on the National Security Act violations, merely recited the above language to affirm the equally broad application of the statute, eviscerating the meaning of the decision of limited constitutionality.

The first decision of limited unconstitutionality was the *Notice of Apology* case decided on April 1, 1991, which limited the scope of valid statutory interpretation. A more explicit decision of limited unconstitutionality emerged in the *Periodicals Registration* case decided on June 26, 1992.

By the end of August 1998, the Court issued 16 decisions of limited constitutionality, 19 decisions of limited unconstitutionality, 39 decisions of nonconformity to the Constitution, and 10 other decisions of partial constitutionality (these are similar to the decision of limited unconstitutionality in their *partial* nature). Some find

modified forms of decisions overused but it is rare to find a public law scholar who denies the practical need for them.

Although the Court's decisions of unconstitutionality were generally respected by other state agencies, it was often doubtful whether the decisions were given the full binding force, i.e., followed up with remedial legislative efforts. The press repeatedly reported the laws struck down by the Court and yet not amended by the Legislature. They were the provision prohibiting release of a defendant charged with a sentence of death, life or up to ten years during the trial under the Criminal Procedure Act, the provision allowing immediate stay and appeal of a decision to release a defendant on bail under the Criminal Procedure Act, the provision extending the maximum time of investigative detention for the National Security Act violations. The statutes struck down on a simple decision of unconstitutionality become void immediately regardless of the subsequent legislative actions. Modified forms of decisions, however, do not produce the same effect, and should be immediately followed up with legislative actions in order to prevent a confusion in the legal system.

Also, there arose a problem when the ordinary court denied the binding force of a decision of limited unconstitutionality and found it merely advisory. On December 24, 1997, the Constitutional Court cancelled one of such judgments of the Supreme Court, finding Article 68 (1) invalid to the extent that allows such judgment, and reestablished a limited decision of unconstitutionality as a proper form of an unconstitutionality decision. However, the Supreme Court insisted on its original position, necessitating a legislative solution. In order to decide on the constitutionality of a law, the meaning of the interpreted law must also be determined. In upholding the rule of preferring a constitutional interpretation among competing interpretations of a statute, a decision of limited unconstitutionality becomes unavoidable.

The requirement of supermajority for a decision of unconstitutionality led to some peculiarities. When the Court split into four justices upholding and five invalidating, the Court once phrased its decision as: "the law cannot be declared unconstitutional" (88Hun-Ka13, Dec. 22, 1989; 92Hun-Ba23, June 30, 1994). However, since the decision of the *Special Act on the May Democratization Movement,* etc. case on February 16, 1996, the Court has disposed of similar situations on a simple decision of constitutionality.

There is no specific provision as to whether a decision of invalidating a statute should affect the original case out of which the

constitutional review of the invalidated statute arose. Article 47 (2) of the Constitutional Court Act only provided for its future effect with the exception of criminal statutes that were to apply retroactively to the original case. For reason of promoting the effectiveness of concrete *norms control*, the Constitutional Court held on May 13, 1998 that a decision of unconstitutionality applies retroactively to the original case, and also that the Court can determine the retroactive effect of each decision on a case-by-case basis by weighing justice and fairness. The Court also ruled that, when there is no such determination by the Constitutional Court, the ordinary courts can make the determination rationally. Now, ordinary courts generally held a view that the decision should apply not only to the original case but also to *all* other similar cases that are pending at the time of the decision or will be filed afterwards[16]. Only in applying the decision retroactively to judicial reviews of administrative action, a careful distinction should be made between *nullifying* the administrative action carried out pursuant to the now invalidated law and *canceling* it. Nullification will lead to a large number of other nullifications, disturbing the stability of the legal system. Therefore, in those cases, the ordinary courts have taken the decision of unconstitutionality merely as a reason for cancellation although the Constitutional Court held that it could be a reason for nullification (92Hun-Ka18, June 30, 1994).

C. Applying other laws mutatis mutandis to the body of procedural law of the Constitutional Court

The Constitutional Court Act provides that the Civil Procedure Act, the Administrative Litigation Act and the Criminal Procedure Act can be applied mutatis mutandis to the procedure of constitutional adjudication (Article 40).

An issue was raised whether retrial can be requested on the final decision of the Constitutional Court. On December 8, 1992, in the Article 68 (2) constitutional complaint case in 92Hun-Ah3, which had been decided by the Panel No. 3, the Court rejected the request for retrial on the ground that the legal stability achieved by not allowing a retrial outweighs the benefit of individual justice that may be obtained in the retrial. The Court then suggested that the

16). Keep in mind that the Constitutional Court Act already made an unconstitutionality decision apply to all future cases. Here, the ordinary courts are expanding the application retroactively as far as to the similar cases that arose before the time of the decision but were not filed yet, not to mention the similar cases that were already filed and pending at the time of the decision.

decision can vary for each type of proceeding.

Also, the Court debated on the effect of the claimant's withdrawal on the proceeding. In the past, since there was no specific provision in the Constitutional Court Act, the Court has applied mutatis mutandis Article 239 of the Civil Procedure Act and, upon the claimant's withdrawal, immediately closed the case without the respondent's consent, leaving the case undecided. Among the total of 4,193 cases filed by the end of August 1998, 248 were withdrawn, i.e., 96 out of 351 requests for constitutional review, 135 out of 3,247 Article 68 (1) constitutional complaints, 16 out of 586 Article 68 (2) constitutional complaints.

A question was once raised as to whether the constitutional complaint process should close upon the withdrawal in view of its function of maintaining the objective legal order, even when the withdrawal was made right before the announcement of the final decision as in the May 18 Incident non-institution of prosecution case in December 1995. There, the complainant obtained the information on the adverse decision in advance and withdrew for the purpose of forfeiting it. As in that case, the Court has followed the practice of terminating the process immediately upon the claimants' withdrawal.

There is a need for a provisional remedy that can stay the legal status quo in order to secure the effectiveness of the constitutional adjudication. The Constitutional Court Act also provides for such remedy for dissolution of political parties and competence disputes, but not for requests for constitutional review and constitutional complaints. Some find no interpretative problem in applying the Civil Procedure Act or Administrative Litigation Act provisions *mutatis mutandis*. The Constitutional Court once rejected a motion for preliminary order in 93Hun-Sa81 on Dec. 20, 1993, without giving a concrete reason. A constitutional complaint process needs a provisional procedure for the purpose of preventing irreparable damage to the complainant or timely restoring the constitutional state of affairs. Application of the provisional order provisions of other statutes must be applied to constitutional adjudication until a clear provision is added to the Constitutional Court Act.

Ⅳ. Administrative Affairs

1. Auxiliary Activities

The organization of the Constitutional Court is presented in Ⅱ.

Therefore, in this section, the changes in the contents of important activities directly related to constitutional adjudication will be examined.

A. The Library of the Constitutional Court

The Constitutional Court inherited a collection of about 1,800 volumes from the former Constitutional Committee, which was inadequate for its purpose. The Constitutional Court, on July 21, 1989, began securing the resources and set the goal of building the largest library of public law in Korea.

The five-year acquisition plan, budgeted at 2,197 million wons until the end of 1994, was expected to secure the total of 100,000 new books (23,000 Korean and 77,000 foreign). On June 11, 1993, the Library was moved to the present space on the fifth floor of the Jaedong Courthouse. Equipped with a reading room (1,007 sq. meter[17]), a reference room (66 sq. meter), and the Bailiff Room (99 sq. meter) that are open to students, scholars, and the public alike, the Library finally obtained the appearance deserving the name of a public law library.

B. Publication of Case Reports and Materials

(1) The Korean Constitutional Court Report

The Constitutional Court publishes its important decisions in the Korean Constitutional Court Report. On November 15, 1990, the first volume of the Korean Constitutional Court Report that reported on 38 cases among 223 decisions made by the end of 1989 (9 requests for constitutional review of statute, 29 constitutional complaint cases) was published 1,500 copies. At the 10th meeting of the Review Committee of Library Materials and Precedents held on November 29, 1993, it was decided to publish semi-annually, starting from the first issue of Vol. 5. By the September of 1997, a total of 13 volumes ending with Volume 9, Issue 1 were published. The Report is not for sale and distributed to most public libraries, interested personnel in the National Assembly, the ordinary courts, the Prosecutors' Offices, and former personnel of the Constitutional Court (same as the Korean Constitutional Court Gazette). Upon the demand of scholars and the public, additional copies are printed and distributed for cost.

17). One square meter is roughly 10 square feet.

(2) The Korean Constitutional Court Gazette

Since it is impossible to keep up with all the new cases with the semi-annual Report, academic and jurists expressed the need for a more expedited medium of publication. Accordingly, on January 26, 1993, it was decided at the justices' meeting that the Gazette will be a quarterly publication, starting with the first issue on May 1, 1993. It adopted the format of a magazine and was printed 1,200 copies. Then, it was published 5 times in 1995, and 6 times on even months in 1996, taking on the role of expedited introduction of the cases to the public.

(3) The Constitutional Law Review

The Constitutional Court publishes papers and articles related to constitutional adjudication written by the Justices and personnel of the Constitutional Court in the yearly journal, to promote research interest in constitutional adjudication and contribute to constitutional law research. It is also used as a resource material in the Court's own adjudication. The articles are reviewed and selected by the panel of all justices although a detail review is delegated to the Sub-committee of the Review Committee of Library Materials and Precedents. By December 1997, 8 volumes were published.

(4) Materials on Constitutional Adjudication

In order to provide resource materials for both academia, practitioners, and the Court's adjudicative activities, the Constitutional Court publishes Materials on Constitutional Adjudication in which comments on various cases and academic notes are included. By the December of 1997, a total of eight volumes were published.

(5) Publication of Contract Research

The Constitutional Court grants research funds to constitutional researchers for in-depth studies of various constitutional issues and publishes their reports. By the December of 1997, a total of nine volumes were published. Each volume is devoted to one subject.

(6) Other publications

The Constitutional Court has also published a introductory brochure (Korean and English) and a video (15 minute long) on the

Court itself, *the Guide to Constitutional Complaint Process* (Dec. 1997), and most significantly, An *Introduction to Constitutional Adjudication Practices* (Aug. 1998) that encompasses the Court's entire adjudicative experience and all theoretical issues on constitutional adjudication so far.

C. Computerization

On March 25, 1993, the Working Committee for Computerization of the Constitutional Court was formed in order to build an electronic database of all materials, domestic and foreign, needed for constitutional adjudication and share it through a local area network, and to increase the administrative efficiency of the Court.

After a series of discussions of the Computerization Working Committee, a local area network (LAN) was constructed connecting the computer room, the reference room and the reading room on December 23 of the same year. In October 1994, the subcontracted project of building an electronic library filing system was completed and tested. On December 27, 1994, a new project of adding 23,000 books to the electronic library filing system was initiated with the Korean Cooperative Union for Computerization. Starting June 23, 1994, all precedents published in the Korean Constitutional Court Report were entered into an electronic case search system (LX), which provided a simultaneous search of the decisions of the Constitutional Court and the Supreme Court.

The Constitutional Court plans to increase the budget for the computerization project, expand the network of legal information, and build a truly electronic library.

The Constitutional Court opened its own homepage (www.ccourt.go.kr) in late August 1998, giving all employees their own e-mail addresses ending with the domain name. Through the homepage, ordinary citizens now can have access to not only news and precedents but also to the electronic library system and full texts of various publications of the Constitutional Court. Moreover, through an interactive bulletin system on the web site, people could register various inquiries and get prompt answers on-line, and the Court increased and broadened exchange with people overseas. Currently, there is a discussion of adding audio files of oral arguments in the Internet to provide a more real and live experience of constitutional adjudication to the people.

2. Budget

The budget of the Constitutional Court is set by the Administration and submitted to the National Assembly for approval. The Court does not have the power to submit its own budget but can make various requests to the Administration and the Ministry of Finance and Economy must consult with the President of the Constitutional Court before reducing the requested amounts. So far, the President has never objected to any budget cut by the Administration. Between 1993 and 1998, the Court's budget grew every year at the rate of 11.5 %, slower than the increase of the national budget. The Court's budget takes up about 0.015% of the national budget.

<Table 1 Amount of Budget by year>

(unit: 1,000 won)

Fiscal Year	Budget Amount	Rate of Increase (%)	Remark
88	1,321,023	-	*'88 : including 873,242 reserve fund
89	4,955,912	275.2	
90	8,668,693	74.9	
91	11,672,617	34.7	
92	20,702,127	77.4	
93	15,930,481	-23.0	
94	8,575,823	-46.2	
95	7,116,519	-17.0	
96	8,525,465	19.8	
97	9,110,189	6.9	
98	8,513,684	-6.5	

Because the Administration holds the power to submit the Court's budget, the Court has had trouble in securing sufficient fund. In order for the Court to maintain its prestige as an independent constitutional institution, it must be given the power to submit its own budget.

3. Courthouse

The Constitutional Court, founded on September 15, 1988, began its operation in an office space in the Chung-dong Building located in Choong-gu, Chung-dong, 15-5, Seoul (16th Floor, and later 18th

Floor as well), where the former Constitutional Committee had used since it moved here on January 26, 1978. However, the space was so small and crowded that part-time justices had no office of their own while the full-time justices shared an office.

Three months later, as it became clear that the Constitutional Court was much more active than its predecessors and needed more space, the Courthouse was relocated to the former Seoul National University College of Education Annex located in Choong-gu, Ulchiro 5 ga, 40-3, Seoul, loaned from the City of Seoul.

Now, the so-called *Ulchiro Courthouse* itself was a worn down school building built in 1910. Also, the City of Seoul, the owner of the lot, was soon to begin a redevelopment project in that lot. Accordingly, a 5,084 pyung site in Chongro-gu, Jae-dong, 83, Seoul, was purchased for the Court's own building. The construction of the Constitutional Courthouse began on March 13, 1991, and was completed on June 1, 1993. On June 11, the Constitutional Court finally began operation in its own building, the so-called *Jae-dong Courthouse.*

The facade of the Jaedong Courthouse emphasizes the symbolic importance of the Constitutional Court while accommodating the urban surrounding. The dome placed on the top of the building symbolizes the supremacy of the Constitution. The three horizontal lines in the upper part signify the constitutional principle of equality. The top of the middle entrance is divided into three, symbolizing the separation of three branches of the government. For the cross sectional plan, the height of the five-story courthouse was lowered as much as possible in accommodation of the surrounding, which is a traditional housing preservation district.

4. Public Relations and Public Service

The Constitutional Court has distributed various brochures and pamphlets to visitors, reporters and civil petitioners in order to promote a better understanding of the functions of the Constitutional Court.

Also, in May 1990, an English version of "The Constitutional Court" was published and reprinted several times. The major cases were translated into English and published in a booklet (also posted in the Internet homepage). The summary of additional 34 cases are in the process of being translated.

In September 1996, 1,500 copies of a promotional video titled "The Constitutional Court" explaining the power, the organization, the record of adjudications, etc. was made and distributed to all Offices of Local

Education.

The Constitutional Court greeted many visitors since the opening of the Constitutional Court on September 1, 1988. On November 7, 1988, a delegation of the Asia Society visited the Court from the U.S. The important guests of the Constitutional Court from foreign countries include the Honorable Vjacheslav M. Lebedev, Chief Justice of the Supreme Court of Russia (July 14, 1995), the Honorable Marie Madeleine Mboratsuo, President of the Constitutional Court of Gabon (September 18, 1995), the Honorable Shlomo Levin, Deputy Chief Justice of the Supreme Court of Israel (Nov. 2, 1995), the Honorable Laszlo Solyom, President of the Constitutional Court of Hungary (Jan. 10, 1996), the Honorable Ren Jian Xin, Chief Justice of the Supreme People's Court of PRC (May 22, 1996), and the Honorable Sonobe Itsuo, Justice of the Supreme Court of Japan (May 2, 1997). On September 1, 1998, the 10th Anniversary of the Constitutional Court, not only important national guests like President Kim Dae-jung but also distinguished foreign dignitaries like the Honorable Jutta Limbach, President of the Federal Constitutional Court of Germany, and the Honorable Jose Cardoso Da Costa, President of the Constitutional Court of Portugal made special visits. On September 2, these two distinguished guests gave seminars at the Constitutional Adjudication Symposium sharing the experiences of constitutional adjudication and the systems of constitutional adjudication in their own countries.

In particular, in 1998 celebrating the 10th Anniversary, the Constitutional Court announced that it would welcome field trips of students and has received many. In May 1998, 22 schools with 1,777 students made field trips to the Constitutional Court reflecting the high interest in the Constitutional Court as a field of practical education. The field trip program begins with the viewing of a promotional video, an introductory presentation from the Constitutional Research Officer in charge of Public Relations, and then the viewing of the Grand Courtroom and the white pine tree, National Monument No. 8, in the courtyard.

The Constitutional Court has operated its own Office of Public Service since its opening. Various accusations, crime reports, an petitioners that do not meet the requirements of a proper request for constitutional adjudication are processed here and sometimes guided to properly formed requests. The number of calls and visits to the Office has increased. After consultation and guide, many of these cases were later filed as constitutional complaints. Many questions and answers are now made through computer on-line services like the Internet, Hitel, Chollian, etc.

Chapter 3

Decisions of the Constitutional Court

Engraving(Article 10 of the Constitution) on the wall of the Central Lobby
(Koh-gang 608×106㎝)

Chapter 3

Decisions of the Constitutional Court

I. Introduction

1. Introductory remarks

This part aims to introduce and analyze the decisions of representative significance made by the Constitutional Court in each area of interest over the past ten years. In this introductory chapter, we shall examine such salient issues as the relationship between the Constitutional Court and other state agencies, the necessity of and rationale for the modified forms of decisions, and the expanding jurisdiction of the Constitutional Court.

The establishment of the Constitutional Court opened the way for active constitutional review of statutes for the first time in our history of constitutional adjudication. As a result, the task of reconciling the law-making power of the legislature with the Constitutional Court's power to review statutes emerged as an important issue. In understanding the decisions of the Court, it would be helpful for us to examine the utmost considerations given to this issue by the Court in an effort to maintain deference to the legislative power. Another vital issue is the preferred relationship between the Supreme Court and the Constitutional Court. The Korean system divided constitutional review between the Constitutional Court and the Supreme Court and charged each of the institutions with the duty to defend the Constitution and basic rights within its respective jurisdiction. This dual system can cause jurisdictional disputes between the two agencies.

The Court's deference to the legislative power appears in the "modified forms of decisions". In evaluating the Court's activities in the past ten years, it is important to understand the process through which modified forms of decision were developed and theoretically justified, as well as the attendant complications.

By widening the doors to the constitutional complaint process, the Court aims to provide as complete a relief as possible for the injuries suffered when the remedies provided by the ordinary courts are not adequate. The Court has extended its jurisdiction to non-institution of prosecution decisions, executive orders, rules and regulations and ordinances per se violative of individuals' basic rights and other state actions that cannot be redressed through the *admin-*

istrative litigation[18] alone. Even legislative omissions and so-called executive prerogative action are now said to be covered by the expanding jurisdiction.

As the main focus of this chapter, we will examine the decisions made by the First and the Second Term Court and analyze the trends found in them. We will also examine various standards of constitutional review first developed by the Court. Finally, we will examine various perspectives that have been proposed in an effort to evaluate the Court's decisions and activities.

2. The relationship between the Constitutional Court and other state agencies

A. The relationship between the Constitutional Court and the National Assembly

The establishment of the Constitutional Court changed the traditional system of separation of powers in a number of respects. Apart from impeachment, dissolution of a political party, competence disputes between state agencies, between state agencies and local governments, and between local governments, all of which are rarely brought before the Court, the main subject matters of its functions are constitutional review of statutes upon the request of the ordinary courts and constitutional complaints. Constitutional complaints can be brought in two venues. Under Article 68 (1) of the Constitutional Court Act, constitutional complaints can be brought against a public authority's violation of an individual's constitutional rights. As this provision excludes judgment of an ordinary court as a permissible target of scrutiny, complaints under this provision are usually brought against statutes. Also, under Article 68 (2), the parties to an ordinary judiciary proceeding can request that the presiding court seek constitutional review of the relevant statutes and if their motion is denied, challenge the statutes in the Constitutional Court in form of a constitutional complaint. In addition, Article 41 authorizes judges to apply to the Court for constitutional review of statutes upon suspicion of unconstitutionality. Since the Court's primary function is normative control of the legislature, the relationship between the Court and the legislature emerges as an important issue.

---

18). The cumbersome term corresponds to judicial review of administrative measures in the U.S. and is designed to distinguish painstakingly from *administrative review* and *administrative adjudication*, which is the quasi-judicial function carried out by administrative bodies.

Examining this relationship is equivalent to questioning how the task of concretizing the meanings of the Constitution and the task of realizing its ideals are divided and assigned to each institution.

The constitutionally assigned function of the Constitutional Court and that of our legislature are different. The legislature plays the central role of forming a national community through political decisions within the boundaries set by the Constitution. From the Constitution, the Court deduces the limitations on the legislature's power, thereby providing a constitutional check on the political process of community formation.

The task of realizing the ideals of the Constitution is not a responsibility of the Court alone: it is achieved only when all the state agencies of the legislative, judiciary, and executive branches play their unique roles assigned by the Constitution. The legislature does so through the law-making process, and the Constitutional Court, through the process of constitutional adjudication. In other words, the legislature bears the initial, formative powers, and the Court assumes the ultimate authority of review on the limit of these formative powers. Because the Court decides on the meaning of the Constitution through adjudication (of specific cases), its attempt to interpret the Constitution in an overly comprehensive or pervasive manner will necessarily place an excessive restriction the legislature's formative power, resulting in disharmony in the checks and balances of the separation-of-power principle. The Constitution is realized when all state agencies execute the unique functions that have been properly assigned. Their independence can be maintained only when the Court defers to their power to a certain extent. Therefore, the principle of separation of powers acts as a limit on the Court's role in realizing the Constitution. If the Court reviews the legislature's actions in a comprehensive and broad manner similar to that of a policy-maker, then the Court will be usurping the role of the legislature and infringing on the National Assembly's unique function in forming the national community, thereby disturbing the order of functional separation of powers.

The starting point for the Court in constitutional review has been deference to the formative powers of the legislature. The Court has upheld many statutes, stressing the importance of the legislative power. The only available standard of constitutional review is constitutional norms, not the Court's political opinions. The Court has consistently adhered to a belief that it is possible to control rules only to the extent that a standard of constitutionality exists. The Court has consistently maintained that it must abstain from an overly expansive interpretation and avoid trying to answer those questions

that are indeterminate under the Constitution and are therefore open to political discussion.

The Court's deference to the legislative power found another concrete expression in the adoption of modified forms of decisions. If a statute can be interpreted in more than one way within the bounds of its text, and its constitutionality depends upon its varying interpretations, the Court would uphold it under a condition that the statute be applied only in a manner that circumvents any unconstitutional effect. The necessary results of applying this principle of preference for constitutionality are the decisions of limited constitutionality or unconstitutionality. This principle provides that the institutions designated for adjudication, in deference to the formative power of the legislature, should interpret the statutes in a way that maintains their normative validity as much as possible. It represents the Court's respect for the legislative initiative based on the constitutional principles of democracy and the separation of powers.

In addition, even when the Court found a statute unavoidably unconstitutional, if there were alternatives other than its invalidation that would render the situation constitutional, then the Court reckoning the principles of democracy and the separation of powers, would issue a "decision of nonconformity to the Constitution," thereby eschewing facial invalidation and allowing the legislature an opportunity to cure. When the unconstitutionality of a statute can be cured by means other than its repeal that itself cannot secure the ultimate realization of the Constitution, deciding on which agency should actually carry out the remedy becomes a question of allocating power between the Constitutional Court and the legislature under the constitutional order of separation of power.

Another expression of the Court's deference to the legislative privilege is found in its basic creed that the Constitution, to such policy-making institutions as the legislature, signifies guidance and limits on action while to the Constitutional Court, it is the standards against which to evaluate the constitutionality of those actions. Hence, the nature of duty which the Constitution imposes upon each institution varies according to how it intends to fulfill its ends *via* that institution.

No example shows this difference better than the principle of equality. On the one hand, equality as a standard of constitutionality employed by the Constitutional Court means a ban on arbitrariness in the exercise of legislative, executive, and judicial powers. Thus the Court recognizes the violation of this principle only when there is no reasonable justification for discrimination in the legis-

lative policy. On the other hand, the principle of equality means more than a mere exclusion of arbitrariness to the legislature because it requires the legislature to treat people equally in the substantive sense of "treating equals as equals and treating unequals as unequals." Under the principle of equality, the legislature has a duty to enforce substantive equality while the Court strives merely to exclude arbitrariness. If the legislature's duty as specified by the Constitution coincided with that of the Court, all other state agencies governed by the Constitution would be subject to the opinions and viewpoints of the Court. The legislature's privilege of community formation and the functional separation of powers can best be secured only when the Court confines its jurisdiction to the question of whether or not the exercise of the legislative power remained within constitutional limits.

In a case relating to social basic rights, the Constitutional Court categorized these two different duties as originating from "the norm for behavior" and "the norm for control," respectively. It demonstrated theoretically how the function of social basic rights varied depending on which institution implemented them (See the Constitutional Court's Decision[CC] 1997.6.26, 94Hun-Ma33). In its reasoning, the Court ruled that the concept of social basic rights as the norm for behavior imposes on the legislature an obligation to guarantee some level of income to people or otherwise provide for them financially to an extent possible in view of its competing tasks, but that the other concept of social basic rights, namely as the norm for control only obliges the state to take minimum action.

In the first case where the Court expressed its view on the duty of the state to protect its people, the Court held that the state was obliged not only to respect individuals' private sphere, but also to actively protect their rights from infringement by other individuals. The Court also held that it would be ideal to require the state to fulfill the maximum extent of its protective duty, not by means of setting up such duty as a constitutional muster but through periodic elections. The Court stated that, according to the principle of separation of powers, it should merely ask whether or not the state provided for the minimum level of protection pursuant to the principle against excessive non-protection, stressing the necessity for distinguishing between the norm for behavior and the norm for control (CC 1997.1.16, 90Hun-Ma110).

On issues of legislative omission, the Court narrowed its jurisdiction as follows: legislative omission will be found only when the Constitution explicitly mandates (authorizes) the state to legislate necessary laws to protect some basic rights, or when the Court has

determined that protection of certain implied basic rights in the Constitution required some affirmative legislation from the state. The Court in the above instance did recognize legislative omission as a proper subject matter for constitutional complaint (CC 1989.3.17. 88Hun-Ma1), but in the other instance, it maintained its deference to the legislative privilege by narrowly limiting the circumstances in which duty of affirmative legislation can be interpreted from the Constitution (CC 1996.11.28, 93Hun-Ma258).

The Constitution's explicit or implicit mandate for affirmative legislation is a prerequisite to finding a legislative omission. Therefore, legislative omission simply refers to a situation in which the legislature does not carry out the constitutionally required duty to enact. To what extent the duty of legislation can be recognized is nothing but the question as to how to allocate the common duty of the realization of the constitutional ideals and principles between the legislature and the Constitutional Court. The greater the implicit duty of legislation the Court recognizes beyond the explicit mandate of the Constitution, the smaller the legislature's privilege, which, in turn, becomes more bound to the views of the Constitutional Court as the final arbiter of the Constitution and the controller of the legislature. Instead, the Court, in order to respect the legislature's privilege, announced that the constitutionally required duty of legislation is an exception rather than the norm, and the recognition of this duty will be limited as closely to the instances of explicit delegation by the Constitution as possible.

B. The relationship between the Constitutional Court and the Ordinary Courts

Under Article 68 (1) of the Constitutional Court Act, the ordinary courts' judgments are excluded from the Court's jurisdiction vis-à-vis constitutional complaint. However, the Constitution, in setting up the new Constitutional Court, has made no explicit provision for its proper jurisdictional relationship with the ordinary courts, and merely set up the jurisdiction of the new Court, paying no attention to the probable conflict of each other's jurisdiction. Naturally, this lack of explicit provision causes the tension between the two institutions over the issue of jurisdiction.

The Constitution divides power of constitutional review between the Constitutional Court and the ordinary court system and imposes on both agencies a duty to uphold the Constitution as the supreme law of the lands within their respective jurisdictions. The review of those statutes that underlie actual judicial proceedings against

petitioners (Article 107 (1) of the Constitution) and the laws and regulations that directly infringe upon individual's constitutional rights (Article 111 (1) (v)) are placed under the jurisdiction of the Constitutional Court while the review of those executive orders, rules and regulations, administrative actions that form the premise of judicial proceedings against the petitioners (Article 107 (2)) are left with the Ordinary Court system. Our Constitution imposes a common duty to defend the Constitution and of people's basic rights both on the Constitutional Court and the Ordinary Court. However, this formal separation of jurisdictions leaves much room for jurisdictional disputes. For example, when the Constitutional Court upholds a statute through a decision of limited constitutionality and the regulations implementing that statute are deemed to manifest unconstitutional application of the otherwise valid statute, the ruling of the Court necessarily involves constitutional review of regulations. Such review, when it affects people's rights via judicial proceedings, is the subject matter for the Ordinary Court system. Separating interpretive authorities on statutes and regulations and assigning each to the Constitutional Court and the Ordinary Court system is a problem that leaves room for jurisdictional discord between the two agencies.

Constitutional review of executive orders, rules and regulations regulated by the ordinary courts is possible only in the form of *concrete norms control*, in the sense that their constitutionality is put to the test in concrete judicial proceedings. Constitutionality of these administrative rules, though not the ultimate objective of the underlying proceedings, forms its premise. An ordinary court's invalidation of an administrative rule does not lead to its facial invalidation, and it becomes invalid only as applied to the specific facts of the underlying proceeding. This is a natural result of the ordinary court' constitutional adjudication being ancillary to the underlying proceeding. Contrarily, if the Constitutional Court declares executive orders, rules and regulations unconstitutional, then it produces a general application to which all other state agencies are bound, producing ramifications far different from that of the ordinary court's constitutional adjudication.

Also, the Supreme Court and the Constitutional Court has contended over the question of whether or not executive orders, rules and regulations directly encroaching upon individuals' constitutional rights can be the subject matter for constitutional complaint process. Although the Supreme Court has expressed a view that the Constitution gives ordinary courts an exclusive jurisdiction over constitutional review of executive orders, rules and regulations, the Con-

stitutional Court on October 15, 1990 held that since a suit in an ordinary court cannot be filed over the *per se* unconstitutionality of the executive orders, rules and regulations themselves, redress through constitutional complaint process must be allowed (CC 1990.10.15, 89 Hun-Ma178). This decision became the well-established precedent for a rule that a constitutional complaint can be filed on executive orders, rules and regulations if their validity cannot be tested as the premise for any ordinary judicial proceeding (CC 1996.10.4, 94Hun-Ma68, etc.).

On the effect of modified forms of decisions, the Supreme Court also took a stance different from that of the Constitutional Court. When *a decision of nonconformity to the Constitution* was first introduced, the ordinary courts seemed to misinterpret its rationales and intended effects in their own decisions. However, as they came to recognize its constitutional bases, its binding effect, and the necessity for this type of decisions, they began follow the Court's decisions almost without exception. One debatable exception arose when an ordinary court refused to follow the Constitutional Court's *nonconformity* ruling that (due to the unconstitutionality of the old law: interpreter) the revised version of Article 60 of the Income Tax Act should be applied to the underlying proceeding (CC 1995.11.30, 91 Hun-Ba1, etc.). However, it could be explained that the ordinary court could not apply the new law because there was no regulation implementing it.

On the other hand, with regard to decisions *limited of constitutionality or unconstitutionality* - namely, cutting away the unconstitutional aspects of a law by invalidating its improper interpretations or applications - the ordinary courts have not responded in a consistent manner. In several earlier cases, the Supreme Court respected this exceptional approach toward constitutional adjudication. They include the Inheritance Tax case (the first case in which the Constitutional Court applied this special approach, CC 1989.7.21, 89 Hun-Ma38), the Road Traffic Act case (CC 1990.8.27, 89Hun-Ka 118), the Notice of Apology case (CC 1991.4.1, 89Hun-Ma160), the Military Secret Protection Act case (CC 1992.2.25, 89Hun-Ka104), the Registration, etc. of Periodicals Act case (CC 1992.6.26, 90Hun-Ka 23) and the Local Finance Act case (CC 1992.10.1. 92Hun-Ka6). Recently, however, the Supreme Court refused to accept limited decisions as binding. When the Constitutional Court interpreted some provisions of the Income Tax Act as being unconstitutional (CC 1995.11.30, 94Hun-Ba40, etc.), the Supreme Court characterized the decision as merely one of the possible interpretations of the law and not binding *vis-à-vis* the Supreme Court, which has the exclusive

power of statutory interpretation and application (See the Supreme Court Decision 1996.4.9, 95Nu11405).

Although the authority of statutory interpretation and application is granted exclusively to the judiciary, the Constitutional Court will inevitably interpret the statutes in question in order to determine whether or not they are constitutional. Furthermore, since the ordinary courts' power of statutory interpretation presupposes the validity of the statute being interpreted, its effectiveness is conditional upon the Constitutional Court's finding of its constitutionality. Interpretive preference for constitutionality is universally acknowledged in all countries conducting constitutional review, and *decisions of limited constitutionality* or *unconstitutionality* are justified as inevitable products of this practice of respecting the legislative privilege of policy-making and should have the same binding force as a simple decision of unconstitutionality. On December 24, 1997, the Constitutional Court affirmed the binding force of *decision of limited unconstitutionality* when it allowed a constitutional complaint challenging the Supreme Court's decision which applied the unconstitutional aspect of a stature in the defiance to the Constitutional Court's earlier decision of limited unconstitutionality (CC 1997.12.24, 96Hun-Ma172, etc.).

The notable significance of this case is that the Constitutional Court opened the way for constitutional complaint of judicial judgments, although this exception was limited to the cases in which the ordinary courts directly infringed upon individuals' constitutional rights by applying the law that had already been declared void by the Constitutional Court (CC 1997.12.24, 96Hun-Ma172, etc.). However, the Constitutional Court refused to declare unconstitutional Article 68 (1) on its face, which excludes judicial judgements from its own jurisdiction while acknowledging that the ideal formation of protection of basic rights should include judicial judgements as the subjects of constitutional complaint. In the Court's view, exclusion of judicial judgements from constitutional complaint is a matter of policy within the wide discretion of the legislature.

However, despite the Constitutional Court Act, the Court should review judicial judgement in the case where an ordinary court defied the Constitutional Court's decision of unconstitutionality and thus directly encroached upon basic rights. If the Court were to leave the judicial defiance intact, it would in fact grant the ordinary court the independent power of constitutional review of statutes, which is impermissible under the Constitution. Therefore, the Court reasoned, its claim of the jurisdiction over judicial judgement is in accordance with its own constitutional power and duty to defend the system of

constitutional adjudication and to achieve the supremacy of the Constitution.[19]

For enforcement of its decisions, the Constitutional Court relies on the voluntary acceptance and deference on the part of other institutions, because it lacks its own means of enforcement. Therefore the existential base and lifeline of the Constitutional Court is the inherent binding force of its decisions. The Court's decision of limited unconstitutionality on Article 68 (1) of the Constitutional Act, and its cancellation of the judicial judgement were not intended to place the Court in a position superior to the Supreme Court nor to expand its jurisdiction: rather, they can be seen as an act of protecting the Court's power of constitutional review and its existential base. It would be self-destructive for the Court to take no action against those decisions made by ordinary courts that threaten to erode the binding force of the Court's judgements. The Constitutional Court could not turn a blind eye to a constitutional challenge to the Supreme Court's judgement that defied the Court's power, and its decision was unavoidable.

C. The relationship between the Constitutional Court and the Executive

The executive branch is the main proponent of statutes which are subject to constitutional review; its exercise of governmental power is also subject to constitutional complaint process, and it is one of the competing state agencies, the competence disputes between which are another area of constitutional adjudication.

Because in Korea the executive branch takes a leading role in formulating most of the proposals for legislation, it is often incumbent on that branch to revise the statutes to conform to the Constitution. The state's response to most constitutional challenges regarding statutes is submitted either by the ministry that was in charge of drafting the original statute, or by the Ministry of Justice that plays the role of attorney general for the state. The executive branch's understanding and interpretation of the Constitution exert not an insignificant influence on the working of the constitutional adjudication system.

Specifically, the relationship between the executive and the Con-

19). Note: this decision itself is that of limited unconstitutionality, interpreting Article 68 (1) as constitutional only so far as it allows the Constitutional Court to review those judicial judgements that disobey the Court's validating interpretation of a statute.

stitutional Court can be examined in the following practical respects: the constitutional principle of separation of powers, the limits on delegation of legislation, competence disputes, and constitutional complaints against administrative actions, including, in particular, prosecutors' non-institution of prosecution decisions.

The Korean Constitution adopted the principle of separation of powers under which the main functions of the state are divided into the executive, the legislative and the judiciary; and checked and balanced with one another (CC 1992.4.28, 90Hun-Ba24). The Constitutional Court once reviewed a statute that defined the executive power under this system.

Firstly, in relation to the organization of the government, the Court reviewed the constitutionality of the Agency for National Security Planning Act and the Governmental Organization Act, which placed the Agency for National Security Planning under the direct control of the President of the Republic. The Court reasoned that, unlike the parliamentary system of government in which the executive power lies in the Prime Minister, our Constitution endows the President with the ultimate authority on the executive power; and the Prime Minister is simply the President's first secretary who supervises the component ministries of the cabinet on behalf of the President without any independent executive power. Therefore, administrative agencies are not necessarily under the control of the Prime Minister, and the Agency for the National Security Planning, an agency directly reporting to and assisting the President in matters of national security, is one of those agencies outside of the Prime Minister's control (CC 1994.4.28, 89Hun-Ma221). The Court, however, indicated that establishing an agency under the President's direct control has to comply with the basic principles and the rules of free democracy. Accordingly, the Court articulated some basic requirements; the establishment, the organization and the function of such an agency are to be regulated by a statute; its objectives and practices have to abide by the Constitution; measures should be institutionalized to assure that it exercises its powers for the purpose of upholding the values of basic rights; and a reasonable and effective control mechanism has to be designed to prevent abuses and misuses of the agency's powers.

In another case, the Constitutional Court found unconstitutional the old Act on Special Measures for National Integrity that endowed the President with an extra-constitutional power to take emergency measures. The Court determined that the exercise of such state emergency power had a serious danger of infringing upon individual basic rights, thereby requiring stringent legal justification and checks,

and that the granting the power in this case violated the principles of constitutionalism and rule of law (CC 1994.6.30, 92Hun-Ka18).

As to the Financial and Economic Emergency Decree promulgated by the then President Kim Yeong-sam on August 12, 1993 with the goal of bringing the nation's financial system up to a real name basis, the Court stated that only a present economic and financial crisis - not a mere possibility of such a crisis - too urgent for normal governmental control during the off-session of the National Assembly would justify such an emergency decree. As such, the purpose of the decree should be limited to the restoration of the normal state of affairs *ex post facto* (not a positive goal of promoting public welfare); the methods and means utilized must be the minimum necessary to eradicate the direct causes of the crisis; and it must follow the processes designated in the Constitution. The Court also ruled that these requirements should be strictly construed because a financial and economic emergency decree is an extraordinary measure that may encroach upon parliamentary democracy and the separation of powers, and thus can be justified only as a response to an extraordinary situation where the normal constitutional control mechanism cannot work properly (CC 1996.2.29, 93Hun-Ma186).

In this case, whether or not the so-called "executive prerogative actions" is subject to constitutional review was another important issue examined by the Court. According to the Court's reasoning, all governmental activities, including "executive prerogative actions", should exist only to protect people's constitutional rights and to promote the free exercise of these rights. Even high-level political decision-making must be subject to constitutional review if it directly involves the infringement upon constitutional rights. In particular, the financial and economic emergency decree has the same effect as a statute, and the exercise of such a power should be subject to constitutional scrutiny (CC 1996.2.29, 93 Hun-Ma186).

The legislature often delegates to the administration detailed rule-making in many legislative areas where abridgment of basic rights is implicated. The Constitutional Court has issued many decisions concerning the requirements for proper delegation of rule-making designated in Article 75 of the Constitution. The primary issue here is the interpretation of the statute itself. However, that issue is intimately related to the interpretation of the regulations themselves.

For instance, when the Registration, etc. of Periodicals Act enabled a presidential decree to promulgate the regulations concerning the facility requirement for periodical publishing, and the presidential decree required the publishers to own their own facilities, the

Court held the enabling Act unconstitutional to the extent that it permitted the Administration to misunderstand the true intent of the parental Act and construe the registration requirements of the Act too stringently (CC 1992.6.26, 90Hun-Ka23).

Also, when the regulations implementing the Income Tax Act selectively used the actual transaction price as a basis for taxation on those occasions when this price is higher than the standard value price which in principle is the basis for taxation as set by the Income Tax Act, the Court held the mother statute itself unconstitutional as interpreted as it permitted such selective use of the actual transaction price to the detriment of taxpayers. (CC 1995.11. 30, 94Hun-Ba40). Therefore, the subject matter for the constitutional review can be either the statute or the regulation depending on the scope of delegation allowed by the statute.

The executive itself becomes a party in competence disputes. The County of Young-Il challenged the Pohang Local Agency for Maritime and Port Affairs on the issue of who should be responsible for the loss suffered by the fishermen due to the latter's refusal to extend their fishing licenses (CC 1998.6.25, 94Hun-Ra1). The City of Shi-heung filed a competence dispute arguing that the central government should be responsible for the management of public facilities located in the Shi-wha Industrial Zone and would likely infringe on the plaintiff's powers if it failed to discharge its duty (CC 1998.8.27, 96Hun-Ra1). A group of representatives from the National Assembly successfully filed a competence dispute against the President concerning the latter's appointment of Kim Jong-pil as the *acting* Prime Minister (CC 1998.7.14, 98Hun-Ra1). Apart from these cases, there are many competence disputes pending at the Constitutional Court to which the executive is a party.

Many administrative actions have escaped constitutional complaint because of the joint operation of two rules: namely, exclusion of ordinary court's judgments from constitutional complaint and the rule of exhaustion of prior remedies. In a case where the complainant, having failed to obtain remedies through all available processes of the judicial review of administrative action, challenged the constitutionality of the original administrative action, the Constitutional Court ruled that such challenge is invalid in principle because the law prohibits constitutional complaints against judicial judgement including those laid down in judicial review of administrative action (CC 1998.5.28, 91Hun-Ma98). However, the Court has taken a flexible approach to the rule of exhaustion of prior remedies if the challenged action was not appropriate subject matter for judicial review of administrative action or cannot be remedied through any venue

other than a constitutional complaint. Those that fell within the first category include the so-called *Kukje Group Dissolution* case in which the Court allowed the application for a constitutional complaint challenging the President's *de facto* exercise of power (CC 1993.7.29, 89Hun-Ma31)[20]; and the *Seoul National University Entrance Examination Plan* case in which the Court reviewed the university's plan on the merits although the plan had not been implemented. (CC 1992.10.1, 92Hun-Ma68). On the other hand, there are many cases in which the Court recognized the exception to the rule of exhaustion of prior remedies on the grounds that there were no available prior remedies to the complainant; or that it was difficult to determine whether such remedy existed; or that the requirement of the exhaustion rule imposed undue burden on the complainant. For example, the Court allowed without requiring exhaustion of prior remedies a constitutional complaint challenging the government's refusal to allow duplication of the records of finalized criminal cases (CC 1991.5.13, 90Hun-Ma133), the infringement upon the attorney's right to meet and communicate with the detainees (CC 1992.1.28, 91Hun-Ma111) and the prison authority's censorship of the inmates' correspondence (CC 1995.7.21, 92 Hun-Ma144).

The Constitutional Court has also allowed victims of crimes to challenge the decision of non-institution of prosecution through constitutional complaints. The Court opined that a legal system that grants the state a monopoly on the power of prosecution, and forbids the victims' redress except through the narrowly recognized instances of self-help can maintain a meaningful existence only when the state secures sufficient protection for the victims. The Court then held that the prosecutor's decision of non-institution of prosecution based on an arbitrary investigation or evaluation may amount to violation of the right of equality provided in Article 11 of the Constitution and the crime victim's right to testify in criminal proceedings guaranteed by Article 27 (5) in the Constitution (CC 1989. 4.17, 88Hun-Ma3). In such cases, the victims have to exhaust prior remedies such as appeals and re-appeals provided under the Public Prosecutors' Office Act. All victime, including both the accusers[21] and the reporting witnesses can file constitutional complaints, and if the decision of non-institution of prosecution arose out of a case

20). The Kukje, one of the largest business conglomerates in 1980s, was dissolved when the then president Chun secretly effected such dissolution through informal means using his influence on the financial institutions.

21). Note: Regulatory victimless violations suffice to be *reported* by any person who has knowledge of the violation while traditional crimes such as murder, assault, fraud, etc., can be *accused of* by the victims who then can play a significant role in prosecution of the crimes.

without any charge or report by the victims, they can directly apply to the Constitutional Court without exhausting any prior remedy. The Court added, even the accused who received exemption of prosecution could file a constitutional complaint against it.[22]

In the past, the Court has cancelled the prosecutor's decision of non-institution of prosecution when the decision involved a serious error in evaluation of facts or evidence, and is therefore found arbitrary from the objective perspective of a constitutional norm. However the Court's cancellation has been generally understood as compelling the prosecutor to simply resume the investigation, not compelling him to prosecute. Because the Court is seldom able to discover new facts or evaluate evidence, it merely surveys for the arbitrariness of the prosecutor's decision. The Court's decision becomes an important operative standard for the prosecutor when he resumes the investigation.

As of the end of August 1998, the Court reviewed 1,784 non-institutions of prosecution and cancelled only 58 of them (9 exemption of prosecution, and 49 in other categories). After the Court has made its decisions, the prosecutors resumed the investigation and disposed of eight of the nine exemptions in a non-institution of prosecution decision by concluding them with a finding of no suspicion. Out of forty nine others reinvestigated, the prosecutors put three on exemption, two on suspension, reconfirmed non-institution of prosecution on twenty four, reversed and prosecuted eighteen, and are still investigating the two remaining. Though only a small number of the challenges against the decision of non-institution of prosecution is successfully upheld, the Court's review has had a preventive effect of forcing the prosecutors to base their prosecution decisions on more thorough investigation and more objective evaluation of evidence.

However, the constitutional complaints challenging the prosecutors' non-institution of prosecution have constituted a majority of the filed cases; and it has been criticized for overloading the Court's docket and hindering the Court from reviewing other important areas.

The executive is in charge of implementing and enforcing the law, and it is most intimately involved with the basic human rights of the people and their lives in law. Admittedly, the executive is granted administrative discretion. Still, it is important that the executive branch of a government of law realize the maximum pro-

22). At his discretion, the prosecutor can exempt the prosecution for various legal reasons and release the accused in the meantime. Note: Exemption of prosecution must be distinguished from suspension of prosecution that is triggered usually when the indictee is missing.

tection of basic rights as well as other goals of a constitutional state in all areas of enforcement of law and administrative rule-making. One important function of the Constitutional Court is to assist the executive in carrying out such tasks successfully.

3. Introduction of the Modified Forms of Decisions

The modified forms of decisions are designed to avoid total invalidation of the statute in those cases where the Constitutional Court found it to be in violation of the Constitution. These are employed in order either to give deference to the legislature's policy-making privilege or to prevent the vacuum in law that would probably result from total invalidation. Since modified forms of decisions are not expressly provided in the relevant statute, their legal grounds, justifications, and legitimacy were controversial in the beginning. However, before the end of its first year of operation, the Constitutional Court recognized the necessity of such special forms of decisions and firmly established their legitimacy by the end of the First Term of the Court in 1994. Although some criticize modified forms of decisions as being unnecessary alternatives to clear-cut decisions of constitutionality or unconstitutionality or a cover for the Court's reluctance to decide on politically sensitive cases or the cases that carry implications for national policy, an overwhelming majority recognizes its necessity and supports it as such.

In the First Term of the Constitutional Court, the Court stated in its holding "the decision not to declare unconstitutionality" if only five justices of the Court found the statute at issue unconstitutional when the statute requires six for a decision of unconstitutionality. The legal effect of this form of decision was not different from a decision of "unqualified constitutionality," but, through this form of decision, the Court wished to make it clear that the majority of the Court regarded the statute as unconstitutional (CC 1989.12.22, 88 Hun-Ka13; CC 1993.5.13, 90Hun-Ba22, etc.). The Second Term Court discarded this form of decision. In the *Special Act on the May Democratization Movement,* etc. case decided on February 16, 1996, the Court took the form of a decision of unqualified constitutionality rather than "a decision not to declare unconstitu- tionality", though five justices found the statute at issue unconstitu- tional (CC 1996. 2.16, 96Hun-Ka2). This changed stance was reaffirmed in the *Industrial Disputes Arbitration Act* case where five justices found Articles 4 and 30 of the Act unconstitutional (CC 1996.12.26, 90Hun-Ba19). In fact, "a decision not to declare unconstitutionality" is not a genuine modified forms of decision but an attempt to indicate,

separately from the decision itself, the relationship between the majority and minority.

A. The Decision of Nonconformity to the Constitution

In September 1989, the Constitutional Court first delivered "the decision of nonconformity to the Constitution" ("nonconformity decision") in the *National Assembly Candidacy Deposit* case where it reviewed the provisions of the Election of National Assembly Members Act that specified the candidates' obligations to make election deposit (CC 1989.9.8, 88Hun-Ka6). In this case, the Court stated that there is a general need for "nonconformity decisions" because a simple choice between unconstitutionality and constitutionality prevents the Court from taking a flexible and resilient approach to a reasonable interpretation of the laws that regulate the complex social phenomena; it may cause the vacuum in or confusion about law, destabilizing the legal system; and it can restrict the legislature's policy-making privilege. In the instant case, the Court issued a decision of nonconformity although the Court found the required election deposit to be impermissibly excessive, discriminating between independents and party nominees, and in violation of the constitutional principle of public finance of elections. The Court's justifica tions fir the choice of this special form of decision were put forward in two respects. Firstly, it could best respect the authority and the policy-making function of the National Assembly consisting of the representatives of the people. Secondly, there was a need for securing the homogeneity of the Assemblymen and equality in election requirements.[23] The Court made it clear that this nonconformity decision is simply a mutated form of the decision of unconstitutionality provided in Article 47 (1) of the Constitutional Court Act; and therefore naturally has the binding force on all other state institutions. This is not a simple declaration of nonconformity to the Constitution but one that gives provisional legal effects to the unconstitutional statute until the legislature cures its defect in accordance with the Court's decision.

Nonconformity decision was also applied to the similar provisions for election deposits in the Election of Local Council Members Act (CC 1991.3.11, 91Hun-Ma21). In a slightly different approach from the above Election of National Assembly Members *Act* case, the

23). The latter justification represents the Court's concern that an unqualified decision of unconstitutionality will exempt only the claimant from the old election deposits in the coming reelection before the statute is revised and thus there will exist two kinds of Assemblymen.

Court found that the requirement of candidacy deposits itself is not *per se* unconstitutional but the required sum of deposit is too exorbitant to be valid. Having said that, the Court ruled that it is more desirable for the legislature, which has the policy-making power, to cure the unconstitutionality of the questioned statute rather than for the Court to invalidate the entire deposit system. Generally, the Court stated that nonconformity decision is a possible form of decision when the statute in question has not only unconstitutional but also constitutional aspects, and that the primary rationale for this special form of decision is respect for the policy-making privilege of the National Assembly.

While the two decisions on election deposits maintained the legal effects of the unconstitutional laws until they were revised, another kind of nonconformity decision did not: in the *Industrial Dispute Arbitration Act* case (CC 1993.3.11, 88Hun-Ma5), the Court delivered an "unqualified decision of nonconformity to the Constitution that immediately suspended application of the statute at issue and compelled the legislature to take necessary actions by a fixed point in time after which the statute would become void. In other words, the law prohibiting every collective action of all civil servants is invalid. However, there are several ways of curing such unconstitutionality. The legislature has wide discretion in policy-making in terms of deciding, for instance, the range of the types and the ranks of civil servants to be allowed to take collective action, and is therefore in a better position to determine the most desirable way of remedying unconstitutionality. Hence the decision of nonconformity.

In July 1994, the Court delivered another *unqualified* nonconformity decision concerning the Land Excess-Profits Tax[24] Act, this time without setting the time limit for legislative cure. Once again, the Court based its decision on its deference to the policy-making privilege of the legislature that was deemed more suitable for readjusting the complex system of tax rates. Some practical problems suggested are the probable vacuum in law in the financial sector as a result of immediate invalidation, and the equity between those who already paid the tax and the complainant who would benefit from his disobedience and the Court's decision of invalidation (CC 1994.7.29, 92Hun-Ba49, etc.)[25].

---

24). The land excess-profits tax is imposed on the unrealized increase in land prices. It should be distinguished from the *transfer gains tax* imposed on the realized gains on land transactions.

25). Notice the difference with the U.S. legal system which would, on a finding of unconstitutionality, simply require the IRS to refund all the money collected while the unconstitutional law was in effect.

The Second Term Court has continued to deliver a number of nonconformity decisions in order to secure the stability of the legal system by way of granting provisional validity to the unconstitutional laws. In particular, a great number of nonconformity decisions has taken place in the field of tax law because it requires legislature's policy considerations more than other fields of law: for example, the equity between tax-payers and tax-defaulters and the shortage of revenue.

In the July 27, 1995 constitutional complaint case challenging Article 8 of the Land Excess-Profits Tax Act, the Court, for the first time, systematically articulated that the consequence of nonconformity decision should be, in principle, an immediate suspension of the effects of the invalid law and therefore, an immediate suspension of the underlying judicial proceeding that would have applied the law against the complainant (CC 1995.7.27, 93Hun-Ba1, etc.).

However, following the above decision, the Court in review of a challenge to Article 186 (1) of the Patent Act stated specifically, again for the first time, that it could apply the invalid law to the original case if the nonconformity decision specifically orders it (CC 1995.9.28, 92Hun-Ka11, etc.).

In review of a challenge to Article 60 of the Income Tax Act, the Court issued a nonconformity decision, ordering that the new law, instead of the old law, be applied (CC 1995.11.30, 91Hun-Ba1, etc.)[26]. As before, the Supreme Court presiding over the original case made a controversial decision to apply the old law in direct defiance of this decision, arguing that it was impossible to apply the new law because the regulations implementing the new law were not in place yet. This case revealed a hidden but general problem that may arise when the Constitutional Court orders other institutions to apply the new law retrospectively. Since the legislature usually revises the laws without considering the possibility that the new law may be applied to the legal relationship that existed under

26). The legal basis for such retroactive application of the old law needs some explanation. As stated earlier, a nonconformity decision has taken two principal forms, one immediately suspending all applications of the statute at issue until legislative revision, and the other one maintaining the effect of the statute at issue provisionally until legislative revision. Now, if the law has not changed during constitutional review and the Court finds the old law non-conforming and orders the first, 'unqualified', type of nonconformity decision, such decision will have the effect of suspending application of the statute to the claimant's case until a new law is in place. In other words, the new law will apply to the petitioner's case. In this case, the law has changed during constitutional review, and therefore, the Court directly orders the new law to be applied, producing the same effect. Here, the problem was that the new law was enacted but has not been turned into regulations enforceable to the facts.

the old law, it would be impossible for the new law to be applied when the old law is struck down before the delegated rule-making has taken place.

B. Decisions of Limited Unconstitutionality /Constitutionality

When the Court struck down Article 5 of the Social Protection Act in 1989, the Court stated that a statute must be interpreted as constitutional as possible to the extent that such interpretation does not change the letter of the law or make the legislative intent frivolous (CC 1989.7.14, 88Hun-Ka5, etc.). The significance of this case is that the Court for the first time made clear that the rationale for *preference for constitutionality* is separation of powers and the legislature's formative power[27], and that the text and original legislative intent of the legislation act as an outer limit on the various preferences in interpretation.

Following the above decision, the Court, in a constitutional complaint challenging Article 32-2 of the Inheritance Tax Act, issued a decision of limited constitutionality for the first time, using the expression "[the law] is not unconstitutional as interpreted. . . ": in a language that has been accepted as standard on this issue. It explained that, although the statute in question had unconstitutional aspects, if it could also be interpreted in ways consistent with the Constitution, the Court could deliver "the decision of constitutionality/unconstitutionality as interpreted or applied" as could be naturally be derived from the doctrine of *preference for constitutionality in statutory interpretation* (CC 1989.7.21, 89Hun-Ma38). Specifically, in expressing his concurring opinion of this case, the first President Cho Kyu-kwang elaborated that if the text and the legislative intent of the statute has room for both the decisions of constitutionality and unconstitutionality, the Court must choose the preferred, constitutional version of the statutory interpretation. In doing so, the Court can use both "unconstitutional as interpreted" and "constitutional as interpreted" as proper forms. As the two forms are different only in expression but the same in essence and for all practical purposes, the choice between them is merely a matter of choosing the appropriate means.

The first decision using the form of "[the law] is unconstitutional as interpreted" is the *Notice of Apology* case in April 1991 in which the unconstitutionality of Article 764 of the Civil Act was

27). Equivalently, the legislature's policy-making privilege.

considered (CC 1991.4.1, 89Hun-Ma160). This case fully adopted the reasoning of President Cho Kyu-kwang in the above case.

The stance on the decision that "unconstitutional as interpreted" and the "constitutional as interpreted" are not different in nature has remained unchanged. The choice depended on appropriateness of the means in that it depended only on whether the Court wanted to uphold or exclude a particular interpretation of the statute (CC 1992.2.25, 89Hun-Ka104; 1994.4.28, 92Hun-Ka3).

On December 24, 1997, the Court took an extraordinary step of striking down the Constitutional Court's judgment on the grounds that the Supreme Court's judgment defied the binding force of the Constitutional Court's previous decision of limited constitutionality, and applied the unconstitutional aspect of the statute. The Court unambiguously ruled that, aside from a decision of unqualified unconstitutionality, other decisions such as "unconstitutional as interpreted", "constitutional as interpreted" and "non-conforming to the Constitution" were all, in principle, decisions of unconstitutionality and thus have the binding force provided in Article 47 (1) of the Constitutional Court Act. It also confirmed that "unconstitutional as interpreted" and "constitutional as interpreted" are the flip sides of the same coin and have the same effect of partially invalidating the law in question (CC 1997.12.24, 96Hun-Ma172, etc.).

In reviewing the constitutionality of Article 7 (1) of the Registration, etc. of Periodicals Act, the Constitutional Court found the Act unconstitutional as interpreted (CC 1992.6.26, 90Hun-Ka23). This decision showed that review of a statute constitutes an indirect review of regulations enforcing that statute.

Item 7 of Article 7 (1) of the Registration, etc. of Periodicals Act states that the periodical publishers "shall equip with related facilities designated by the presidential decree". Item 3 of Article 6 of the regulations, promulgated through the presidential decree to implement the Act, stated that the publishers should have ownership of such related facilities. The Court ruled that the statutory provisions were void insofar as they were to be interpreted as requiring publishers to own those facilities. Note that this decision reviewing the statute accomplished constitutional review of the regulations. In outlawing a particular version of interpretation of a statute, it also outlawed the regulations promulgated with that interpretation in mind. The Constitution grants the power of constitutional review of regulations to the ordinary courts while endowing the Constitutional Court with that of statutes. Therefore, the Constitutional Court's indirect review of regulations, first recognized in this case, hints at

a probable jurisdictional conflict with the Supreme Court.

This conflict finally occurred with a constitutional complaint (CC 1995.11.30, 94Hun-Ba40, etc.) on Article 23 (4) of the Income Tax Act (Act No. 3576, Dec. 21, 1982). This Article provided that the transfer value for the purpose of transfer gains taxation should be the transfer price. Item 1 of Article 45 (1) provided that the acquisition cost as a necessary expense deductible from the transfer value should be calculated using the standard land value at the time of the acquisition. However, both provisions had provisos that if the presidential decree stated otherwise, both the transfer value and the acquisition cost could be determined by the actual rather than the standard land prices. The Constitutional Court ruled that these provisos would lose their validity if interpreted in such a way as to allow the Administration to apply the actual prices when the tax based on them exceeded the tax based on the standard land value. In fact, the presidential decree implementing this Act had prescribed that when the estimated tax based on the actual land price was more than the tax based on the standard land price, the actual price could be applied in calculating the tax. Therefore, this case virtually resulted in the Constitutional Court's review of the regulations. The Supreme Court regarded this decision as usurping their power of constitutional review of regulations, and went on to deny its binding force, stating that it was at most, an advisory opinion. The Supreme Court upheld its own judgement in conflict with the Constitutional Court's decision (the Supreme Court Decision 1996.4.9, 95Nu11405). The claimant won the suit in the Constitutional Court but was denied redress by the Supreme Court.

It has been argued that the Supreme Court went too far when it defied the Constitutional Court's decision. It is true that Article 107 (2) grants the Supreme Court the authority to review the constitutionality of rules and regulations. However, it is equally true that the Constitutional Court was granted the statutory review power, and the invalidation of the regulations in the case above was merely a by-product of this statutory review.[28] Therefore, if the Supreme Court had correctly understood the significance and the necessity of "the decision of unconstitutionality as interpreted," it would not have regarded the Constitutional Court's decision usurpation of its own power.

Furthermore, as our Constitution restructures the framework for constitutional adjudication by setting up a new specialized court for

28). Even when the Constitutional Court strikes down a statute with a decision of unqualified unconstitutionality, all the regulations implementing the statute become void. This point is made in the paragraph below.

that function, the Supreme Court's ultimate power to review rules and regulations will inevitably be adjusted to fit this new framework. For instance, if the Constitutional Court invalidates a statute on the grounds that it violated the rule against blanket delegation, all regulations based on the original statute will be voided irrespective of the Supreme Court's will. In addition, the constitutional complaint process now allowed the Constitutional Court to review the rules and regulations that were directly infringing upon people's basic rights even without any administrative action based on that rule or regulation. In short, the power to review constitutionality, divided between the Constitutional Court and the ordinary courts, will work properly only under the two institutions' common understanding that evaluation of a statute inevitably influences the validity of the regulations promulgated to specify the contents of that original statute.

4. Establishment of the Jurisdiction of the Constitutional Court

A. Constitutional complaint challenging the prosecutor's decision of non-institution of prosecution

In April 1989, the Constitutional Court extended its jurisdiction over constitutional complaints to prosecutor's decision of non-institution of prosecution by ruling that prosecutor's arbitrary decision not to prosecute the accused may not only infringe upon the victims' right to testify in criminal proceedings as guaranteed by Article 27 (5) of the Constitution, but also violate the right of equality preserved in Article 11 (CC 1989.4.17, 88Hun-Ma3). Since this landmark case, constitutional complaints challenging prosecutor's decision of non-institution of prosecution have formed the bulk of constitutional adjudication. The primary reason for this extension of jurisdiction was that since the Public Prosecutors' Office had the monopoly over the power to prosecute as well as a broad discretion under the principle of *discretionary prosecution,* while the request processes for the institution of prosecution by the court, as provided by the Criminal Procedure Act, were very restrictive, an effective control mechanism for this authority was necessary.

The Constitutional Court has taken over this task by extending its constitutional complaints jurisdiction to non-institutions of prosecution and thereby securing a means of protection for victims of crimes. However, a concern has been raised over the question of whether or not a non-institution of prosecution decision can be re-

garded as an infringement upon complainant's right as a crime victim, and whether or not scrutinizing prosecutor's decision is suitable for the Constitutional Court whose original aims is to defend and maintain the Constitution. At one point, there was a popular opinion among the academics and practitioners that prosecutor's power of prosecution should be controlled not through the constitutional complaint process but by strengthening the request processes for the institution of prosecution by the court. However, the legislature has not acted on this opinion and to date, the situation remains unchanged.

B. Constitutional complaints challenging executive orders, rules and regulations, ordinances

In October 1990, the Constitutional Court reviewed a constitutional complaint challenging the rules implementing the Judicial Certified Scriveners Act. At the end of the review, the Court acknowledged that the appropriate subject matter for constitutional complaints is not limited to the statutes enacted by the legislature but also extends to the rules and the regulations made by the executive and the judiciary if they directly infringe upon individual's constitutional rights even before being enforced in a particular situation (CC 1990.10.15, 89Hun-Ma178). This decision demonstrates the Court's firm resolve to provide a legal remedy for violation of individual rights by public authorities even in those cases when redress is not available in the ordinary judicial proceedings.

Under Article 107 (2) of the Constitution, the Supreme Court has the jurisdiction to adjudicate the constitutionality of rules and regulations, but such adjudication is possible only when the rules and regulations form a premise to an actual lawsuit. Therefore, if these rules and regulations *directly* infringe upon individual's constitutional rights, there would be no way to challenge the constitutionality of such rules and regulations.[29] In order to fill the vacuum that exist in legal remedies, the Court acknowledged that those rules and regulations directly violating constitutional rights could be reviewed in a constitutional complaint proceeding. It was the Supreme Court that had first insisted on its ultimate authority on rules and regulations granted by Article 107 (2), but the attendant juris-

29). Only when the rules and regulations result in specific administrative actions, these actions can then be challenged through administrative action review. Again, administratve action review is a short hand for judicial review of administrative action, and should be distinguished from administrative adjudication or administrative review where the Administration is the one conducting the review.

dictional conflict was soon resolved when the precedents firmly established that an administrative rule-making that has no chance of being subjected to an effective review by the ordinary courts can be reviewed through the constitutional complaint process.

The precedents have also firmly established that the Constitutional Court's jurisdiction over the constitutional complaints covers not only the regulations promulgated through administrative rule-making but also the rules made by the judiciary if these rules and regulations directly infringe upon people's constitutional rights even before they result in concrete administrative actions. The Court extended this precedent to ordinances made by provincial selfgoverning bodies: it accepted a constitutional complaint challenging the Prohibition of Installation of the Cigarette Vending Machine Ordinance on the grounds that it violated people's basic rights directly even before it was enforced (CC 1995.4.20, 92Hun-Ma264, etc.).

C. Constitutional complaint challenging administrative action not subject to judicial review

The Court has expressed its intent to step in to fill the gap in legal relief, which is created when the Supreme Court utilizes an overly narrow interpretation of the protectable interests in the suits challenging administrative action, and dismisses them. In other words, when the Supreme Court dismissed certain instances of exercise of administrative power as being unfit for judicial review, the Constitutional Court, after finding legitimate need for legal relief, extends its jurisdiction to them.

In 1992, the Constitutional Court found an exercise of governmental power that could be reviewed when the Director of the National Security Planning Bureau made its agents observe and record a detainee's meeting with his attorney (CC 1992.1.28, 92Hun-Ma 111); and also in case of the *Seoul National University Entrance Examination Plan* (CC 1992.10.1, 92Hun-Ma68, etc.). In 1993, the Court also held that a private bank's decision to foreclose and dissolve Kukje Group under the leadership of Minister of Finance also constituted the *de facto* exercise of governmental power (CC 1993. 7.29, 89Hun-Ma31).

D. Constitutional complaint challenging "executive prerogative actions"

In August 1993, the Constitutional Court also accepted "a execu-

tive prerogative actions", - namely an executive act that requires highly political judgments - as a "reviewable" subject matter, when it reviewed the Financial and Economic Emergency Decree designed to shift the nation's finance into a real name basis from the nominal one (CC 1996.2.29, 93Hun-Ma186).

Through this decision, the Court expressly rejected the theory of "political questions" which had been used in the U.S. Supreme Court to avoid constitutional evaluation of the state actions of highly political nature; and clearly established that there is no area of exercise of governmental power that lies beyond the Constitutional control. This indicates that the political nature of exercise of governmental power cannot be a proper standard that limits the scope of judicial review by the Constitutional Court.

E. Constitutional complaint challenging legislative omission

In March 1989, the Constitutional Court elaborated the narrowly defined set of conditions under which it could allow the constitutional complaints challenging the legislature's failure to enact the required legislation. A constitutional complaint can be brought when the Constitution expressly delegates to the legislature a duty to protect certain basic rights or when the Constitution is construed in a concrete context as establishing a specific constitutional right as well as imposing a corresponding duty on the state to ensure that right, and the legislature fails to discharge this duty in either situation (CC 1989.3.17, 88Hun-Ma1).

The issue of legislative omission is the question of whether or not people can petition for certain legislation through a constitutional complaint process on the grounds that the Constitution itself imposes on the legislature a duty to enact a specific law. There are several examples illustrating the issue: could the complainants not included as beneficiaries of a public program contest their exclusion as a violation of the principle of equality? Could the licensed professionals, upon losing their licenses due to the newly strengthened requirement of occupational qualifications, contest the state's failure to accommodate their interest as a violation of their basic right? Could a similar argument be made by the college entrance examinees who, after having prepared for an exam for a substantial period of time, must now also study additional subjects due to sudden changes in the exam format? The answers to these questions depend on whether the situations at hand are categorized as genuine legislative omission or *pseudo* legislative omission.

In October 1996, the Constitutional Court separated the general notion of legislative omission into two different categories: a genuine omission where the legislature takes no action at all despite its duty to do so as specified in the Constitution; and a *pseudo* legislative omission where the legislature has enacted certain statutes and there are defects, inadequacies, or unfairness in the substance, scope or process of the legislature's regulation of the subject matter. The Court ruled that a constitutional complaint challenging a *pseudo* legislative omission must affirmatively state the specific constitutional violations such as the violation of the principle of equality, and must abide by the time limit for filing as prescribed in the Constitutional Court Act[30] (CC 1996.10.31, 94Hun-Ma108).

However, in December 1994, in reviewing the compensation claim of the shareholders of the Chosun Railway Company(CC 1994.12.29, 89Hun-Ma2), the Court first accepted a constitutional complaint challenging legislative omission as a proper subject matter and, after review, granted the complainant's claim. Hun-Ma In this case, the Court read the duty of compensation prescribed in Article 23 (3) of the Constitution as the affirmative duty to enact compensation provisions, opening the way for constitutional challenges against all instances of public takings not supported by compensation measures, regardless of the time limits for filing.

However, all other complaints were dismissed as inappropriate subject matter for constitutional review because there the Constitution did not delegate a duty to legislate the specific law as requested by the complainant (CC 1991.9.16, 89Hun-Ma163; 1993.11.25, 90Hun-Ma209; 1996.4.25, 94Hun-Ma129), or because the complainants' request for the transitional clauses[31] implicated only *psuedo* legislative omission (CC 1989.7.28, 89Hun-Ma1; 1993.3.11, 89Hun-Ma79; 1993.9.27, 89Hun-Ma248). In case of *psuedo* legislative omission, the further violation of the equality principle is required in order for the complainant to file a constitutional complaint (CC 1996. 11.28, 93Hun-Ma258).

---

30). Now, in the case of legislative omission, there is a logical difficulty in pinpointing the time of the exercise of governmental power, from which the filing time limit accrues, because it is the absence of exercise of governmental power that the filing petitioner wants to challenge. The Court is basically exempting all genuine legislative omissions from proving up satisfaction of the time requirement while imposing the requirement on *pseudo* legislative omission, treating the latter in the same manner as affirmative state actions.

31). "Transitional clauses" are meant to indicate those statutory or regulatory provisions that exempt partially or totally those who were affected by an old law from the effects of a new law. An American legal term "grandfather clause" will be one example of transitional clauses.

F. The Extension of justiciable interests for Constitutional complaints

The purpose of the system of Constitutional complaints is to provide remedies for the people whose constitutional rights have been infringed upon. Therefore, the complainant must have a personal stake in the outcome of the subsequent proceedings, namely, "legally protectable interests", or his complaint will be dismissed. And these legally protectable interests should exist not only at the time of filing the complaint but also at the time of judgment. Therefore, if a legally protectable interest that existed at the time of filing evaporates in the course of court proceedings because of the changes either in fact or in law, the complaint becomes void and will be dismissed. The Court, however, has given weight to the dual purpose of constitutional complaint, namely the "subjective" function of providing legal relief to particular individuals and the "objective" function of protecting a constitutional order, and has recognized a wide range of exceptions to the above rule when personal and legally protectable interest has been extinguished.

In July 1991, the Court articulated these exceptions in a constitutional complaint case which reviewed the law enforcement authority's refusal to allow detainees to meet with their counsel. Through subsequent precedents, it was ruled and firmly established that (1) when a case involves an issue critical to defense and maintenance of the constitutional order and its resolution or clarification has importance of constitutional magnitude, or (2) when the infringing situation is likely to repeat, the Court will exceptionally recognize existence of justiciable interests and review the constitutionality of the previous situation which no longer exists (CC 1991.7.8, 89Hun-Ma 181). Furthermore, the Court has not placed stringent requirements on the level of constitutional "importance" needed for the first exception, and has not interpreted the requirement of "likelihood of repetition" for the second exception not as repeatability to the complainant himself but repeatability of similar injuries to the people in general, thereby treating the repeatability requirement more or less equal to that of "constitutional importance." As a result, the Court overall has been very generous in allowing the cases to find its way to review on the merits even when the complainant's subjective interest in constitutional adjudication no longer exists.

G. Extension of the standing rule in competence disputes

Article 62 (1) of the Constitutional Court Act allows only the National Assembly, the Executive, the Judiciary and the National Election Commission to become parties to competence disputes. If this enumeration is construed as exhaustive, it will necessarily mean that the legislature, by embodying in specific adjudicative procedures the substantive judicial review power granted to the Constitutional Court in areas of competence disputes, has excessively restricted the scope of the permissible parties and ended up making the review power vacuous. Instead, the provision should be interpreted in favor of its constitutionality: in other words, in light of the nature and the constitutional intent behind competence disputes, in order to make the processes operate in practice. Since procedural laws are geared toward accomplishing substantive ends, the crucial standard in interpreting the above provision should be whether or not the competence dispute procedure is adequate for ensuring the freedom-guaranteeing functions and power-distributive functions among constitutional institutions.

If the list of state institutions in Article 62 (1) of the Constitutional Court Act is construed as being exhaustive, there can be no practical possibility for a competence dispute between the Administration and the National Assembly. The development of a "party state" transformed and shifted the basic paradigm of separation of powers away from confrontation between the Executive and the Legislative towards confrontation between the ruling party and the opposition. Realistically, the power of the Executive and that of the Legislative are fused together around the majority party, and the actual separation of powers is between the ruling party and the opposition inside the parliament.

Our Constitution adopted a government run by a president; and therefore, it is not necessarily true that the interests of the Administration always coincide with the interests of the majority party as is the case in a government run by the parliament. However, it is generally true that the President's party is the majority party, and it can easily be imagined that the National Assembly will not challenge the Administration even when its own power is encroached upon by the latter. If only the National Assembly as a whole, through a majority vote, can become a party to a competence dispute, it follows that any attempt by the minority party to restore the Assembly's infringed authority through a competence dispute will be frustrated by the resistance of the majority. Therefore, there should be

a venue for the *parts* of the National Assembly to request judicial review of infringement on their immanent powers guaranteed by law and Constitution. When the power of an individual representative or the minority faction of the National Assembly is undermined, competence disputes at the Constitutional Court make protection of rights and resolution of disputes possible, thereby assuming an important function in protecting minority.

In the first competence dispute brought before the Court, where the members of the Assembly contended with the Speaker, the Court refused to grant the standing to the members or to the component institutions of the National Assembly such as individual representatives or a negotiating body (CC 1995.2.23, 90Hun-Ra1). In July of 1997, the Court recognized that the extension of the standing in competence dispute is necessary for its proper working, and allowed the individual members as well as the Speaker of the National Assembly to be a party to a competence dispute (CC 1997.7.16, 96Hun-Ra2).

5. Major Decisions of the Constitutional Court

A. Decisions of the First Term of the Constitutional Court

(1) General evaluation

In its short, six-year tenure, the First Term of the Court (hereinafter the First Term Court), constituted in September 14, 1988 and led by the President Cho Kyu-kwang made great contributions towards making the new Constitutional Court take root as an institution of constitutional adjudication. The creation of the Constitutional Court was the product of a political compromise between the ruling party, which expected to play an insignificant role like the previous constitutional committees, and the opposition party, which also had only vague hopes for its role. However, the people, reflecting on the past when constitutional adjudication under the Supreme Court did not bring about any notable result, had high hopes for the new Court as an institution specialized in defending the Constitution. The Constitutional Court was established in a mixed mood of hopes for the first system of active constitutional adjudication in our history and concerns for its ability to perform the constitutionally delegated duties.

When the First Term Court finished its term in 1994, it was acknowledged that the people trusted the Constitutional Court as the

final bastion of their basic rights. Civic organizations including those of lawyers and the academics favorably evaluated the efforts of the justices of the First Term Court as having firmly established the system of constitutional adjudication. In a September 1994 survey conducted by a citizen group, the overwhelming majority of lawyers and law professors returned positive reviews of the First Term Court's activities for the previous six years.

As the precedents of the Court accumulated, a new era in study of constitutional law began. Korean constitutional-legal study, which had relied on abstract theories in the past, began to transform into a 'living science' focusing on concrete facts and methods of conflict resolution as more constitutional litigation took place; and every constitutional textbook came to cite decisions of the Court. Only when the Constitutional Court was established did people begin to see in concrete contexts the role of the Korean Constitution as the highest norm in the state's legal order and also as a standard of judicial review. The introduction of a constitutional complaint process which is available to all people as a venue for challenging constitutionality of the laws promoted people's awareness of basic rights and helped them realize their role as vigilantes against the state's abuse of power. The First Term Court can be criticized as well as praised in many different ways, but it cannot be denied that it clearly demonstrated the raison detre and affirmed the value of a constitutional justice system when people hardly had any understanding of what it was.

(2) Brief summaries of major decisions

(a) The first set of notable decisions of the First Term Court is a series of decisions striking down the statutes violating bodily freedom.

In July 1989, the Constitutional Court, after more than a hundred hours of Conference, struck down Article 5 (1) of the old Social Protection Act (amend. March 1989) that mandated serving additional sentence of preventive confinement *after serving the regular sentence*, regardless of the likelihood of recidivism (CC 1989.7.14, 88Hun-Ka5 *etc.*). This was an important decision because it made clear for the first time that the restriction of bodily freedom not justified by any reason of important public interest is unconstitutional because it excessively restricts basic rights. It is also notable as the first check on the controversial statutes enacted by the National Security Emergency Legislative Council, an extraordinary body replacing the National Assembly in inauguration of the Fifth Republic of Korea, and

as the first demonstration of the kind of caution required of the state when restricting people's bodily freedom.

The second important decision relating to bodily freedom is concerned with constitutionality of the National Security Act. In April 1990, the Constitutional Court held that the Article 7 of the Act was impermissibly vague and violates the rule that crimes can be defined only by statutes; but issued a decision of limited constitutionality after adopting a favorable interpretation that its application can be limited to the activities posing a clear danger to the integrity and the security of the state and the basic order of free democracy (CC 1990.4.2, 89Hun-Ka113).

Unconstitutionality of the National Security Act was attacked not only on its substantive aspect of the vagueness of the elements of the crime but also on its procedural aspects. Article 19 of the National Security Act extended the normal 30 days limit on investigative detention by the police and prosecutors by 10 days for the National Security Act violators. The Court struck it down on grounds that, when the state's power to punish criminals is balanced against the competing basic rights of people, it is unnecessarily excessive restriction of people's physical freedom unjustified by any reason of public necessity (CC 1992.4.14, 90Hun-Ma82). Through this case, the Court showed again that restriction of bodily freedom demands a most cautious approach from the state.

Another important case relating to physical freedom was laid down in January 1992. In this case, the Court held that the essential content of the detainee's right to counsel (Article 12 (4) of the Constitution) is right to meet and communicate with counsel, and that investigators' presence in, or listening or recording of, a meeting between the detainee and his counsel violated that right, which cannot be compromised even for reason of national security or public order and welfare (CC 1992.1.28, 91Hun-Ma111).

In December of the same year, the Court struck down Section 331 of the Criminal Procedure Act under which, if the prosecutor has requested at trial a death penalty or a sentence of imprisonment for life or more than ten years, even an acquittal or a dismissal is not held to extinguish the original warrant for arrest and therefore does not set the accused free immediately[32]. The Court reasoned that the challenged statute violates the principle of *arrest by warrant* (Article 12 (3) of the Constitution) whereby the judiciary decides whether to detain or continue detaining a person, and also it excessively infringes upon the right to physical freedom (CC 1992.12.24,

32). The detainee must wait until the prosecutor exhausts all its appeals.

92Hun-Ka8).

In December 1993, the Court struck down Article 97 (3) of the Criminal Procedure Act that allowed prosecutors to immediately appeal (and thereby stay - Trans.) the judges' decision to release on bail[33]. The Court reasoned that the statute upholds the prosecutor's objection at the expense of the judge's decision that further detention is unnecessary, thereby violating the principle of *arrest by warrant* which delegates control over continuation of detention to the judiciary. Also it excessively infringes upon the accused's bodily freedom as it is without any justification of public necessity (CC 1993.12.23, 93Hun-Ka2).

It is generally accepted that the two decisions striking down extension of maximum detention periods for the National Security Act violations and prosecutors' immediate appeal of the bail decision rectified the widespread unconstitutional practices of detaining the suspects and the accused for unnecessarily long periods of time under the pretext of exercising the state's power to punish criminals.

The principle of proportionality, an element of the rule of law, requires that criminal penalty be commensurate with the degree of illegality of the criminal conduct and the culpability of the criminal. In April 1992, the Court struck down Article 5-3 (2) (i) of the Enhanced Punishments for the Specified Crimes Act[34] for imposing too heavy a sentence (CC 1992.4.28, 90Hun-Ba24). According to this provision, a person who negligently injures another, and runs away, leaving the victim to die, or intentionally disposes the victim's body, faces a statutory sentence higher than that of a murderer. The Court ruled that such statutory sentencing conflicted with justice and fairness embedded in the criminal justice system, and violated human dignity guaranteed by Article 10 of the Constitution, the principle of equality of Article 11, and the prohibition of excessive legislation of Article 37 (2). However, in a subsequent series of cases, the Court opined that, unless the legislative ends of criminal punishment are so different from the interests to be protected as to clearly violates the principle of proportionality, the legislature has a wide discretion to determine the types and lengths of statutory sentences and the Court should not strike down the legislature's judgment. It has taken a cautious approach since then.

(b) The First Term Court laid down a number of important de-

33). Again, what is at issue is not whether the prosecutor can appeal but whether such appeal stays the bail decision.

34). The official name of the statute is "the Act on the aggravated Punishments, etc. of Specific Crimes."

cisions regarding expansion of the scope of freedom of expression and right to participate in government, which are essential to the democratization of the society.

In September 1989, the Constitutional Court declared that the right to know is a constitutional right derived from the freedom of expression. It is not merely confined to the publicly available information, but covers the right to request information held by the government. The Court ruled that a County's failure to respond to the requests for the access to and the duplication of the survey records on forests and real properties in its custody violated this constitutional right to know (CC 1989.9.4, 88Hun-Ma22). By expanding the scope of the right to know, this decision opened the way for the people previously denied access to governmental documents to raise constitutional complaints on the grounds that their constitutional right to know was infringed. Applying the theory of right to know established above, the Court also held that the accused, at the end of a criminal proceeding against him, should be allowed to duplicate or inspect the records of the case; and unless there are special circumstances, the refusal to provide such access is an unconstitutional violation of the right to know (CC 1991.5.13, 90Hun-Ma133).

The Court dismissed a constitutional complaint brought by the Motion Pictures Association of Korea ("MPAK") that challenged Article 22 and 13 of the Motion Picture Act. The former provision gave the Public Performance Ethics Committee the power to inspect a movie in advance of its showing, and the latter provision provided for the standards of the pre-inspection. The Court did not touch upon the main issue of whether or not the pre-inspection violated the constitutional provisions of freedom of art, or the prohibition of prior restraint immanent in freedom of expression; but simply found that the MPAK did not meet the requirement of the standing rule because the body *per se* was not the person whose constitutional rights were directly infringed (CC 1991.6.3, 90Hun-Ma56). An opportunity for substantive review of freedom of expression in this area was turned over to the Second Term of the Constitutional Court.

In September 1989, the Court held that the provisions of the Election of National Assembly Members Act requiring the candidates to deposit a specified amount of money were constitutional as means to prevent mock candidacy and an excessive number of candidates. But, the Court added that, if they require excessive amounts of deposits, they could prevent serious but indigent people's candidacy, turning the election into that of the wealthy, and thus infringe upon people's right to participate in government (CC 1989.9.8, 88Hun-Ka6). Following this decision, the Court also struck down the pro-

visions of the Election of Local Council Members Act requiring the candidates to deposit 700 million Korean won, and lowered barriers for the indigent's participation in elections (CC 1991.3.11, 91Hun-Ma 21).

(c) The First Term Court contributed to protection of people's basic rights through many decisions in areas of economic liberty and protection of property rights.

Firstly, in view of the economic order of free democracy which is the basic principle of our Constitution, the First Term Court upheld the liberties and initiatives of individuals and businesses; and circumscribed the permissible limits of the state's economic intervention by striking down its excessive abridgement on freedom of occupation and right of property.

In January 25, 1989, the four-month-old Court in its first decision of unconstitutionality reviewed a claim based on right of property. Article 6 (1) of the Act on Special Cases concerning Expedition, etc. of Legal Proceedings mandated the court to include in its judgment in favor of a plaintiff an order of provisional execution (on the defendant's property - Trans.), provided that such order shall not be issued against the state, unless there were sufficient reasons to the contrary. When the state becomes a party to a civil suit, the Court reasoned, it is merely another private economic actor and is held in a horizontal, equal relationship with the other party as all parties to civil suits should be. However, the provision in question grants the state a favorable status, violating the principle of equality. (CC 1989. 1.25, 88Hun-Ka7) This decision stands highly as the first confirmation of the basic principle of the liberal economic order that all economic actors are equal before the law. It is also the first instance of defending that principle from the legislation that endowed the state with a superior status above private individuals without any rational reason of public interest.

The core spirit of this decision led to another decision of unconstitutionality four months later, this time against the Act on Special Measures for Defaulted Loans of Financial Institutions. The Act gave financial institutions a privileged status in public auctions by requiring the person objecting to a sale requested by a financial institution to make a deposit as a security. The Court found no rational basis for the preference given to financial institutions and held the statute unconstitutional (CC 1989.5.24, 89Hun-Ka37, etc.). This decision extended the freedom and the equality of all economic actors, not only to the state in relation to private persons, but also to the relationship between private persons.

The principle that the state and private persons should be equally treated unless there are justifications for unequal treatment was reconfirmed in the Court's review of Article 5 (2) of the State Properties Act. In May 1991, the Constitutional Court invalidated the provision for exempting the "miscellaneous state-owned property"[35] from *adverse possession* on grounds that, insofar as the miscellaneous property is concerned, the state becomes merely a corporation and holds the same rights as a private person (CC 1991.5.13, 89Hun-Ka97). This rule was also confirmed in the constitutional review of Article 74 (2) of the Local Finance Act (CC 1992.10.1, 92 Hun-Ka6, etc.).

In September 1990, the Court invalidated Article 35 (1) (iii) of the Framework Act on National Taxes which granted priorities to the national tax liabilities over the private, secured debts incurred within one year after the taxes became due, on the ground that it infringed the essential content of the right of property and gave preference to national tax debt for no rational reason (CC 1990.9.3, 89Hun-Ka95). Again, this case negated the state's privilege in private economic matters and also confirmed that the legitimate public interest of securing the national treasury cannot justify collection activities that infringe on the essence of right of property. This rule was reaffirmed in a constitutional review of the similar provisions in the Local Tax Act that granted priorities to local tax liabilities over other secured debts incurred within the one year period (CC 1991.11.25, 91Hun-Ka6).

On July 29, 1993, the founder of the Kukje Group Yang Jung-mo brought a constitutional complaint challenging the dissolution of his business group by its primary creditor Korea First Bank and the subsequent transfer of stocks, arguing that such private action was forced by the Finance Minister and therefore constituted a *de facto* exercise of governmental power. The Court, evaluating the entire series of events as a whole, reasoned that the First Bank's autonomy was weakened to nullity under the tight government control over the nation's finance. Its dissolution of the Kukje Group was no more than acquiescence to the state's efforts under the Finance Minister's leadership to bring about the dissolution of Kukje Group. Therefore, it constituted a *de facto* exercise of governmental power properly reviewable under the constitutional complaint process. As to the merits of the complaint, the Court ruled that the constitutional principle of the rule of law requires that all exercises of governmental, whatever benign ends they seek to achieve, must be au-

35). Miscellaneous state property usually means real estate owned by the state not for the purpose of administration or conservation.

thorized by statutes; and that the dissolution of Kukje Group did not meet this constitutional requirement (CC 1993.7.29, 89Hun-Ma31). The decision reconfirmed the obvious in the area of economic liberty, that every abridgment of basic rights must be authorized by the law.

Freedom of occupation was ruled upon by the Constitutional Court in several cases. In November 1989, the Court invalidated Article 10 (2) of the Attorney-at-Law Act that prohibited certain lawyers from practicing in certain geographical areas where they have personal connections. According to the Court, this provision excessively restricted occupational freedom, and discriminated without reason against those lawyers wishing to practice in certain areas (CC 1989.11.20, 88Hun-Ka102). Later, Article 15 of the same Act authorizing the Minister of Justice to suspend without a hearing those lawyers who are criminally prosecuted was also invalidated as an excessive infringement upon the freedom of occupation (CC 1990. 11.19, 90Hun-Ka48).

(d) As seen above, the First Term Court required the state to ensure, in principle, people's economic liberty enshrined in the liberal economic order and to abstain from excessive restriction. However, the Court also unambiguously recognized the public and societal nature of economic activities and exercise of property rights, and the importance of social responsibility in the exercise of basic rights. It acknowledged that no individual basic right can be absolute and its exercise should be reconciled with social environment. In particular, in the areas of economic or property rights intimately related to others' enjoyment of freedom, people should accept certain restrictions imposed by the sate and designed to provide a common arena where all actors can actually enjoy their freedom.

The first area of property rights in which the Court recognized the importance of social responsibility was the licensing of land transactions under the Act on the Utilization and Management of the National Territory. The government initiated and enacted a number of statutes and regulations to control land speculation and the skyrocketing land prices nation-wide. Ultimately, it upheld the concept of *land as public property* against the backdrop of a high population density, a small territory, and the traditional preference for land ownership.

In December 1989, the Court reviewed Article 21-3 (1) of the Act on the Utilization and Management of the National Territory prescribing the requirement of prior approval for all land transactions in certain areas. The Court stated that private property can be protected only to the extent of being in harmony with the life of the

community with others. The Court added that the public responsibility attached to property rights varies, depending on the types and the characteristics of the proprietary objects, and is strongest for lands than other types of properties. The Court held, therefore, that the legislature needs to regulate the lands more strictly, and that the license of land transactions is constitutional (CC 1989.12.12, 88HunKa13).

The decision on the requirement of submitting advance copies of periodicals also showed that exercise of property rights is socially bound to a certain extent. In June 1992, the Court dealt with Article 10 (1) of the Registration, etc. of Periodicals Act that required periodical publishers to immediately submit two copies of the new periodicals to the Minister of Public Information, and also provided for just compensation for the submission upon the publisher's request. The Court ruled that this provision was in accordance with the inherent limit on the right of property, and was constitutional (CC 1992.6.26, 90Hun-Ba26).

When the continuing increase in land price and the vicious cycle around land speculation were distorting wealth distribution and turning the cash flows against the national economy, a public debate on the concept of *land as public property* began in 1989 and resulted in the Land Excess-Profits Tax Act, the ceiling on the Ownership of Housing Sites Act, and the Restitution of Development Gains Act. It was the Land Excess-Profits Tax Act that first received the Court's scrutiny.

On July 29, 1994, the Court held that the assessment of tax on excessive increase in land prices was itself valid in view of the legislative intent to achieve equity in tax obligations, stability in land prices and efficient use of national land. However, stressing the importance of fair and exact calculation of the taxed profits, the Court found that the statute as a whole did not conform to the Constitution because it taxed on the unrealized gains, applied a unitary rate regardless of the income brackets, and left it to the regulations to set up a system of measuring the market prices (CC 1994.7.29, 92 Hun-Ba49, etc.). In this case, it was pointed out that the system of taxation itself was constitutional in view of the principle of equal taxation derived from the right of equality and the public responsibility attached to land ownership; but its operation should accord with people's property rights and various constitutional principles concerning taxation.

(e) Among many disputes on constitutionality of labor relations statutes, the First Term Court first spoke on the provisions banning third party intervention in labor disputes in the Labor Dispute Ad-

justment Act.

In January 1990, the Court characterized the said provisions in section 13-2 of the Labour Dispute Adjustment Act as a ban only on the conduct that infringes upon the principle of *self-determination in labor disputes* outside the scope of the *three basic rights of labor*[36]. The Court upheld them since they, regulating the activities exceeding the internal limits of freedom of expression and action, are not a ban on receiving consulting or assistance (for example, legal advice - Trans.) (CC 1990.1.15, 89Hun-Ka103).

Founding of the National Union of Teachers and the government's non-recognition policy followed by a series of disciplinary personnel actions in 1989 raised a fundamental question of how to constitutionally reconcile teachers' identity as workers with their special social status, in light of the statute banning a teacher's union. In July 1991, the Court held that teachers in private schools are workers, however, in view of their special status due to the public nature and the social, ethical importance of education, they can be subjugated to the public employee regulations, especially Article 66 of the State Public Officials Act which bans unions. The Court held that Article 55 of the Private Schools Act, applied *mutatis mutandis* to private school teachers and thereby limiting the *three rights of labor,* was constitutional (CC 1991.7.22, 89Hun-Ka106). Later, the Court also upheld Article 66 of the State Public Officials Act that prohibited all civil servants, except laborers, from participating in labor movements (CC 1992.4.28, 90Hun-Ba27 etc.).

However, the Court struck down Article 12 (2) of the Labour Dispute Adjustment Act that denied all civil servants the right to collective action. It was ruled that the challenged provision violated Article 33 (2) of the Constitution which, in principle, allowed the three rights of labor to limited categories of civil servants, and merely delegated to the legislature the authority to define those categories. The decision took the form of nonconformity to the Constitution on the grounds that choosing among the various ways of eradicating the unconstitutional elements of the statute falls within the policy-making privilege of the legislature (CC 1993.3.11, 88Hun-Ma5).

(f) The First Term Court also solidified the people's right to trial through a series of precedents. The rule of law is realized through guarantee of basic rights, separation of powers, and judicial relief from infringement of rights; and therefore the right to trial is

36). The three basic rights of labor are that of organization, collective bargaining and collective action.

an essential element of a government by law. Right to trial guarantees that everyone's rights, constitutional or statutory, are given effect in actual judicial proceedings, and therefore requires a judicial processes through which people can claim infringement of their rights and request protection thereof.

The first case brought before the Court alleging infringement of right to trial concerned compulsory attorney representation prescribed in the Constitutional Court Act. Article 25 (3) of the Act required a party to a constitutional complaint to be represented by an attorney, and the complaint argued that the provision that does not allow complainants to bring the case by themselves was unjustly restricting the right to trial. The Court balanced right to trial against the public interest secured by the compulsory attorney representation rule, namely, efficient operation of the judiciary and reduction in the case load, and ruled in favor of the latter, holding it constitutional (CC 1990.9.3, 89Hun-Ma120, etc.).

Article 3 of the Trial of Small Claims Act applied different requirements to appealing small claims cases to the Supreme Court from those applied to other civil suits. The statute strictly limits appeal of a suit claiming a judgment of money, its equivalent, or securities in an amount less than five million won to the Supreme Court. From the inception of the legislation, classifying cases by the amount of money raised a suspicion that the limitation on the right to trial was not the same for the rich claimants and for the poor. In June 1992, the Court held this provision constitutional. The Court reasoned that the nature of trial is finding of fact, and interpretation and application of law, and the constitutional right to trial guarantees at least one opportunity for adjudication on the matter of facts and law, but not three trials on the matter of law. Right to appeal to the Supreme Court is not explicitly provided for by the Constitution and is a matter of legislative policy left to the legislature (CC 1992.6.26, 90Hun-Ba25). In this case, right to trial was defined as "the right to have at least one trial on the matters of both law and fact." In another case, the Civil Procedure Act, which did not allow appeal of an order of enforcement of judgment, was also held constitutional on the grounds that the legislature had the discretion to determine the scope of the appeal, depending on the nature and importance of various types of cases. The Court then stated that there was rational basis for not allowing appeal in this case and that the statute, therefore, was in accordance with Article 27 of the Constitution (CC 1993.11.25, 91Hun-Ba8).

After defining the scope of the right to trial in *the Trial of Small Claims Act* case, the Court has expanded it in a series of en-

suing cases. Since the realization of right to trial depends upon the statutes concerning the organization and processes of the judiciary, the legislature regulates the parties, methods, procedures, time, and costs by prescribing, through statutes, formal legal prerequisites to commencement of a suit, such as time limits for filing, administrative fees, and attorney representation. However, the right to trial does not give the legislature an entirely free hand in concretely specifying the permissible scope of relief to infringement of right or the procedures thereof. If the legislature provides formal but empty rights and merely theoretical possibilities of redress without substantive remedies, remedial procedure will not have any meaning. The right to trial requires the minimum set of procedures and organization necessary for substantive and efficient redress of the infringed rights. The mandate of efficient protection of rights should be the operative standard in legislating the permissible scope of remedies and the remedial procedures, as well as the limit on the legislature's policy-making privilege. Procedural barriers restricting the access to the judicial process without any reasonable basis does not reconcile with the constitutional mandate of right to trial, and this is the limit of legislative discretion.

In May 1989, the Court reviewed Article 5-2 of the Act on Special Measures for Defaulted Loans of Financial Institutions, which, during public auction of indebted properties, required anyone objecting to the sale to deposit an amount equal to one half of the sale price. The Court ruled that exorbitant deposit requirements placed undue economic burden on the indigent, and thus unjustly limited their right to trial in contravention of Articles 27 (1) and 37 (2) of the Constitution (CC 1989.5.24, 89Hun-Ka37, etc.).

In July of 1992, the Court reviewed Article 56 (2) of the Framework Act of National Taxes that imposed a statutory time limit for requesting judicial review of taxation. The Court stated that the provisions concerning calculation of such time limit should be set in plain and unequivocal terms that do not permit people to lose their right to trial due to an excusable error. The challenged provisions are unclear and obscure, creating confusion on the accrual date of the time limit and breaching the principle of *clear and plain statutory time limits,* which is derived from the right to trial guaranteed by Article 27 of the Constitution (CC 1992.7.23, 90Hun-Ba2, etc.). This case made it clear that the right to trial not only prescribes the legislative duty to provide at least one trial but also prohibits the legislature from setting up too short or vague a time limit for filing and making it excessively inconvenient to utilize the remedial procedures.

However, in February 1994, the Court reviewed Article 3 of the Act on the Stamps Attached for Civil Litigation, etc. which required an appeal to be filed with double the amount of filing stamps on the original complaint, and the next appeal with the triple the amount. In response to the complainant's argument that the provision infringes indigents' right to trial, the Court reasoned that the filing fees are not only aimed at covering the expenses proportionate to the services provided by the state but also at protecting the operation of the courts from abusive litigations. From this perspective, the gradual increase in filing fees from the original complaint, the appeal, and the high appeal does not infringe people's right to trial (CC 1994.2.24, 93Hun-Ba10).

(g) Other major decisions of the First Term Court include the decisions on criminal punishment of adultery and also on preferential employment of graduates of national or public teachers' schools.

In September 10, 1990, the Court held that Article 241 of the Criminal Act punishing adultery with an imprisonment of up to two years did restrict people's right to sexual self-determination derived from Article 10 of the Constitution. The Court, however, ruled that it was justified by the public's interest in sound sexual ethics and maintenance of the system of marriage, and therefore, it did not excessively restrict individual's sexual freedom (CC 1990.9.10, 89Hun-Ma82).

Article 11 (1) of the Public Educational Officials Act gave preference to graduates of national or public teachers' colleges over those of private institutions in hiring for national or public schools. The preference originated from the time of shortage in supply of teachers and was intended to reserve a supply of qualified teachers. However, since the time of surplus of teachers in 1980s, it effectively obstructed the hiring of the graduates of private teachers' colleges. The Court found the statute to be discriminating against those seeking to be public educational officials, merely on the basis of the public or the private nature of their schools' founding body, and therefore, ruled it unconstitutional (CC 1990.10.8, 89Hun-Ma89).

(h) The First Term Court made several important decisions concerning the procedures of constitutional adjudication, one of which concerned the nature of constitutional complaint process under Article 68 (2) of the Constitutional Court Act[37].

37). To recap, the Act specifies three venues for general constitutional review of state actions. Article 41 authorizes the ordinary courts, on their own initiatives or upon motion, to submit their cases to the Constitutional Court for review, if the constitutionality of the statutes underlying the cases is in question. Article 68 (1) authorizes constitutional complaints to be filed against statutes as well as some reg-

Article 68 (2) of the Act offers a party to a judicial proceeding an opportunity to bring his own constitutional complaint against a statute when his motion for constitutional review has been denied by the presiding court. Hitherto, this feature remains unutilized in other parts of the world, and is unique to our system of constitutional adjudication. From the inception of the statute, debates continued incessantly on how to manage and understand this procedure, especially its nature and content. Theoretically, if the statute forming the premise of a trial is unconstitutional, and the judge does not submit the case for constitutional review, the would-be petitioner can challenge the statute by bringing a constitutional complaint against the final judgment after going through all the stages of adjudication. However, our system of constitutional adjudication excludes ordinary courts' judgments as the subject matter of a constitutional complaint. Article 68 (2) of the Constitutional Court Act provides the only alternative for the party to an ordinary judicial proceeding to seek constitutional review of the statute applied against him or her in that proceeding. The provision can be said to functionally make up for exclusion of judgments as the subject matter of our constitutional adjudication.

In early cases, the Court seemed to focus on the location of the Article 68 (2) under section 68, which is on constitutional complaint process, and complainants' role as the initiators of the process, and thus considered the Article 68 (2) process a type of constitutional complaint. Therefore, in September 1989, the Court assigned "Hun-Ma" as the case code for both Article 68 (1) constitutional complaints and Article 68 (2) cases; and even applied to them the same legal prerequisites such as existence of justiciable interest (- Trans.) (CC 1989.9.29, 89Hun-Ma53; CC 1989.12.18, 89Hun-Ma32, etc.).

However, in 1990, Article 68 (2) complaints were granted a separate code, namely "Hun-Ba", and the Court shifted the focus of the *legal prerequisites* inquiry from existence of justiciable interest to *the relevance of the challenged statute to the original case* (CC 1990. 6.25, 89Hun-Ma107). In doing this, the Court ended the debate about the nature of Article 68 (2) processes, and classified them as a kind of constitutional review of statutes upon request.

In the end, Article 68 (2) processes were established as concrete forms of norms control along with the constitutional review of statutes requested by the ordinary courts. That the same jurispru-

---

ulations at the Constitutional Court. Article 68 (2) authorizes the parties to ordinary judicial proceedings to file constitutional complaints if the presiding court has denied their motion for constitutional review of the relevant statutes, the possibility of which is described in Article 41.

dence is applicable both to Article 68 (2) complaints and Article 41 *statute review*[38] cases is only a natural consequence.

B. Decisions of the Second Term of the Constitutional Court

(1) General evaluation

Inheriting the achievements of the First Term Court, the Second Term Court (the President of the Constitutional Court: Kim Yong-joon) began its operation on September 15, 1994. The success of the first six years of its operation drew much attention from people and other state agencies, and the Court emerged as an important constitutional institution in Korea. Korea was recognized as having established a successful model of constitutional adjudication in the Asian realm. Its successes invited other countries to look back on their own system of constitutional adjudication. In particular, some Japanese commentators cited the active operation of the Korean Constitutional Court in criticizing their passive system of constitutional review modeled after the American system.

The First Term Court was established in the wake of rapid social changes, and its major effort went into remedying many statutes which had accumulated over many years under the authoritarian regimes and whose constitutionality was relatively easy to judge. The Second Term Court had to face more difficult cases requiring subtler approaches. As soon as the Second Term Court began, it adjudicated political cases - the by-products of the past regime - that commanded the attention of the media and people. For instance, a constitutional complaint challenged the prosecutor's decision not to prosecute the former presidents, Chun Doo-whan and Roh Tae-woo, and other persons involved in the military coup d'etat of December 12, 1979. The campaign to "rectify the past" continued in a series of similar challenges against the non-institution of prosecution decision granted to those involved in the May 18 Incident of 1980[39]; and finally came to an end when the Constitutional Court upheld the Special Act on the May Democratization Movement, etc. that suspended the statute of limitations [for prosecuting the people involved

38). When "constitutional review of statutes upon request" is cumbersome, it will simply be referred to as statute review since, given the subject matter of the book, the adjective constitutional is superfluous.

39). In this incident, which followed the December 12 Coup of the preceding year, the military junta prevailing from the coup suppressed popular movements for democracy in the south-western city of Kwanju with fully armed paratroopers who shot to kill.

in the massacre and made their prosecution possible. - Trans.]. Apart from these historic cases related to the December 12 Incident and the May 18 Incident, the Second Term Court handed down a number of decisions of paramount importance from the perspectives of democracy, the rule of law, and public welfare: finding unconstitutionality in the *Electoral District Reapportionment* case, the *Motion Picture Censorship* case, the *Liquor Tax Act* case and the *Prohibition of Same-Surname-Same-Origin Marriage* case, while upholding capital punishment. In addition, the first review on the merit of competence disputes and the first decision on the *social basic rights* were handed down. The Court also reviewed the Constitutional Court Act provision that excluded ordinary courts' judgments as a subject matter for constitutional complaint, making a decision important to its relationship to the ordinary courts.

In a relatively short period of ten years, the Constitutional Court successfully passed the test by handing down persuasive decisions, and also established its respectable status as an institution of constitutional adjudication. Recently, all state agencies and the people in important constitutional disputes developed a trend to refer the cases to the Constitutional Court and accept its decision. This is a desirable phenomenon for development of democracy and the rule of law.

(2) Brief summaries of major decisions

(a) In February 1995, the Second Term Court made its first decision on a competence dispute. In a dispute between the members of the National Assembly and the Speaker, the Court dismissed the request on the grounds that, as components of the National Assembly, the members of the National Assembly, the individual representatives or the negotiating bodies, do not have a standing in competence disputes (CC 1995.2.23, 90Hun-Ra1). This case was criticized for bringing about the shrinkage of the jurisdiction vis-à-vis competence disputes granted to the Court.

In July 1997, the Court overruled its previous decision on the standing in a competence dispute, and considerably expanded the scope of permissible parties in the process (CC 1997.7.16, 96Hun-Ra2). In this case, the plaintiffs, the members of the opposition party, argued that the Speaker of the National Assembly breached their constitutional right to review and vote on bills by passing a number of bills (including the revisions of the Labor Relations Acts) in the absence of opposition party members. The Court opined that the scope of state agencies entitled to be parties to competence dispute

depended on interpretation of the relevant constitutional provisions [Article 111 (1) (iv)], and that the individual members of the National Assembly and its Speaker, though only components of the legislature, were permissible parties to competence dispute proceedings. On the merits, the Court ruled that the Speaker violated the plaintiff's constitutional rights.

(b) The Second Term Court followed the First Term Court's jurisprudence on the right to trial. The Court continues to rule that the right to trial means at least one trial on the matter of fact and law, and that it requires procedures ensuring effective redress to rights-infringement, not formal presence of remedial procedures and theoretical possibilities of remedies.

In September 1995, the Patent Act was reviewed. The Article 186 (1) of the Act authorized Korean Intellectual Property Office, an administrative agency, to make findings of fact and required the appeal to be taken directly to the Supreme Court (for review of law - Trans.) without going through intermediate appellate court. The Court struck down this provision, opining that it denied the plaintiff's right to a trial by a judge on the matter of fact, thereby infringing on the essence of the right to trial (CC 1995.9.28, 92 Hun-Ka11, etc.).

In October 1997, the Court expressed its view on the conditions of appeal to the Supreme Court. Reviewing the Act on Special cases concerning procedure for Trial by the Supreme Court, the Court reasoned that operation of the multi-tiered appeal processes depends on how to distribute the limited law-finding resources needed for judicial relief to rights infringement and upon how to strike a balance between the fairness and the efficiency of trial, and that such task falls under the policy-making privilege of the legislature. Therefore, it was ruled that the right to trial did not include the right to appeal to the Supreme Court in *all cases* (CC 1997.10.30, 97Hun-Ba37). For the same reasons, both Article 11 of the old Act on Special Cases concerning Expedition, etc. of Legal Proceedings limiting the permissible grounds of appeal to the Supreme Court and Article 12 of the same requiring prior approval for the high appeal were also held constitutional (CC 1995.1.20, 90Hun-Ba1).

In April 1996, the Constitutional Court reviewed Article 642 (4) of the Civil Procedure Act, which, in an auction to enforce a judgment, required a person objecting to the final sale to deposit one tenth of the proposed sale price in order to prevent appeals from being abused as a way to delay enforcement. The Court found the requirement of such amount did not make it impossible or significantly difficult to appeal the final sale and did not amount to deprivation of right to trial (CC 1996.4.25, 92Hun-Ba30). The Court

also reviewed Article 1 of the Act on the stamps attached for Civil Litigation, etc. which required specified amounts of stamps to be attached to the complaints to be filed. The Court noted the existence of an assistance program for filing fees (for the indigent - Trans.) and ruled that the filing stamp requirement could not be seen as blocking or obstructing the indigent's access to judicial process and denying them an opportunity for trial. Therefore, it did not constitute either an infringement of the right to trial or an instance of unreasonable discrimination (CC 1996.8.29, 93Hun-Ba57).

(c) In October 1995, the Court upheld Article 75 (1) (i) of the old Military Criminal Act which prescribed a more severe punishment for theft of military supplies than for murder (CC 1995.10.26, 92Hun-Ba45). In contrast to the First Term Court's decision on unconstitutionality on the Enhanced Punishments for the Specified Crimes Act, the Second Term Court's decision made it clear that statutory sentencing falls under the legislative privilege unless it exhibits clear violation of the principle of proportionality (CC 1992. 4.28, 90Hun-Ba24).

(d) The Second Term Court handed down important decisions on the December 12 Incident and the May 18 Incident. On January 20, 1995, the Court reviewed a constitutional complaint against the prosecutor's decision not to prosecute the two former presidents as well as others involved in the December 12 Incident. On the one hand, the Court recognized the importance of the reasons for prosecution - rectifying the past, deterring the similar future events, restoring the justice, and fulfilling of the people's prevailing sense of justice. On the other hand, however, the Court did not treat lightly the reasons for non-institution of prosecution such as preventing the social division around the issue and further confrontation, saving the national resources and preserving national pride. The Court, finding that one set of values does not clearly outweigh the other, upheld the decision to exempt prosecution (CC 1995.1.20, 94Hun-Ma246).

On December 15, 1995, when the complainants withdrew the complaint against the non-institution of prosecution decision on the December 12 Incident, the Court stopped its review but not without a minority opinion that even a successful coup can be punished (CC 1995.12.15, 95Hun-Ma221, etc.). It was the first judicial review of a successful coup d'etat concerning not one but two former presidents and, if it had proceeded to a decision on merit, it would have been recorded as constitutional precedent attracting international attention. The majority would have held that, in essence, a coup, if successful, makes it practically impossible for the agency in charge of criminal

justice to punish its leaders, but does not make their punishment legally impossible. Therefore, it does not violate the rule of law to punish them after the state recovers its legitimacy and assumes proper functions. It is unfortunate that the contents of the Justices' Conference was leaked to the media and the political circles, and that the complainants, in fear of an adverse decision on other grounds, withdrew their complaint, precluding a final decision. Some in the academia joined the minority's criticism of the majority's decision to stop the process. The minority stated that the constitutional complaint process by nature has an objective function of defending the constitutional order (as well as a subjective function of remedying the infringed rights of complainants - Trans.), which was ignored by the Court when applying the normal rules of civil procedure and stopping the review process. The Court should have proceeded to a final decision even upon the complainants' withdrawal of the complaint, thereby showing commitment to the defense of constitutional order. This case, with the breach of secrecy of the judicial conference and the Court's self-restraint on its authority, symbolically illustrated the delicate role the Constitutional Court plays in cases of great political consequences.

On February 16, 1996, the Court upheld the Special Act on the May Democratization Movement, etc. which suspended the statutes of limitations for prosecution of those involved in the December 12 and May 18 Incidents during the those periods when the reasons of disability made the exercise of prosecution power practically impossible (CC 1996.2.16, 96Hun-Ka2, etc.). The Court thereby granted constitutional legitimacy to the May 18 Special Law and freed the hands of the prosecutor. With this case, the issue of remedying the illegalities of the past regimes left the hands of the Court.

(e) After the First Term Court invalidated the Social Protection Act whereby judges were required to add the preventive detention at the end of each prison term, irrespective of likelihood of recidivism (CC 1989.7.14, 88Hun-Ka5, etc.), the Second Term Court followed with decisions on several other instances where the legislature could accomplish its goals while allowing courts and administrative agencies discretion to consider the unique and special circumstances of each particular case, but chose to take away that discretion through mandatory provisions. The Court found in those instances a violation of the rule of the least restrictive means, an element of the principle of proportionality.

In July 1994, the Court struck down the *proviso* of Article 58-2 (1) of the Private School Act which mandated removal from the post of all private school teachers criminally prosecuted during the

criminal proceedings, on grounds that in not allowing the school to consider severity of the charged offense, credibility of evidence and predicted judgments, it violated the freedom of occupation of Article 15 by limiting it regardless of proportionality of Article 37 (2) of the Constitution, and also violated presumption of innocence of Article 27 (4) (CC 1994.7.29, 93Hun-Ka3, etc.).

A similar provision of the Certified Architects Act was struck down for excessively infringing the freedom of occupation. It mandated cancellation of license belonging to those architectural engineers who violated the scope of permitted work even though the legislature could achieve its ends by allowing the administrative agency in charge to exercise discretion in choosing suspension, cancellation or other measures (CC 1995.2.23, 93Hun-Ka1). For the same reasons, the Sound Records and Video Products Act was struck down for excessively infringing people's property right and other basic rights because it prescribed mandatory forfeiture of *all* records in possession of unlicensed vendors. The Court reasoned that the court could order forfeiture *only* of illegal records by reasonable exercise of its discretion, achieving the legislative end to regulate the flow of unlicensed records (CC 1995.11.30, 94Hun-Ka3).

(f) In contemporary societies, the state's aggressive and comprehensive regulatory activities are subjecting people to a progressively denser thicket of legal system. People's confidence in law should be protected from frequent changes in laws, and the activity of revising laws should be controlled constitutionally to some extent. In this sense, the principle of *protection of expectation interest*, like basic rights, can be a means for defending an individual against the state's power permeating almost every aspect of his or her life. The principle of *protection of expectation interest* aims to hold the legislature responsible to its previous actions and decisions and put this responsibility into practice through the means consistent with the rule of law.

In October 1995, the Second Term Court recognized the need for protection of the expectation of those who relied upon the continuation of the old law and found violation of the expectation interest. When the Regulation of Tax Reduction and Exemption Act had been amended in prejudice to the complainant during the period of taxation, the Court opined that the complainant could not expect such an amendment, and that the purpose of the amendment was merely to promote capitalization of businesses, not a keen interest overwhelming people's expectation interest. To the contrary, the Court found the expectation interest outweighing the public interest. It therefore ruled that the amendment should have been accompanied

by transitional clauses protecting the expectation and held the amendment unconstitutional for want of such provision (CC 1995.10.26, 94Hun-Ba12). This case is significant in that it stated the requirements for finding violation of expectation interest and required a transitional clause as a remedy.

(g) In December 1995, the Second Term Court handed down an important decision on the principle of equal election. The complainants argued that equal election means not only equal votes for all, but also equal weight given to each vote in selecting their representatives and that it is therefore seriously implicated in redistricting of electoral districts. The National Assembly Election Redistricting Plan exhibited excessive differences in district populations, they argued, and therefore violated their equality right. The Court agreed that equal election requires not only equality in number of votes but also equality in their weight, and that it is the most important factor in redistricting. The Court held the plan in question unconstitutional, finding no reasonableness in general and no justification even under the special circumstances of our country (CC 1995.12.27, 95Hun-Ma224, etc.). Indeed, the plan in question had left the ratio between the most and the least populous districts at 5.87 : 1, and the ratio of about one fifth of all districts to the least at 3:1 or higher. This decision is significant as the first constitutional review of the unequal state of affairs in electoral redistricting.

The Court prescribed the ratio of 4:1 as the maximum population disparity permissible under the equal election principle. Some thought it too generous for our system since we elect the most popular candidate in each district and therefore depend decisively on the balanced district population for fulfilling the requirements of the principle of equal election. They contrasted it with the system of proportional representation whereby parliamentary seats are distributed according to the total number of votes obtained nationwide by each political party.

(h) In October 1996, the Second Term Court struck down the Motion Picture Act requirement of prior inspection of motion pictures by the Performance Ethics Commission in a decision of great importance to the entire field of freedom of speech (CC 1996.10.4, 93Hun-Ka13, etc.). Even when Article 21 (2) of the Constitution explicitly prohibited censorship of press and publication, the state's censorship of various media of expression had continued, obstructing the creative activities of artists and ultimately the progress of art. The Court reconfirmed that the constitutional ban on censorship, that is, the limitation on freedom of expression by censorship, is not allowed even by statute; and held that the prior inspection required

by the Motion Picture Act fell under this censorship. However, the constitutional ban on censorship does not prohibit all venues of evaluating various forms of expression. Neither does it apply to the enforcement of obscenity or defamation laws through judicial processes after the publication or through prior inspection, such as motion picture rating, that aims primarily to preclude the possibility of statutory violations or to protect minors in the chain of supplies. Whether or not to permit a specific inspection depends on how to reconcile freedom of expression with other legal interests in limiting it.

(i) The Court's understanding of Article 37 (2), the ban on infringement of the *essence* of basic rights is unclear. This obscurity can be attributed not only to the difficulty in identifying the essential nucleus or the substance of each basic right, but also to the fact that, in practice, there is no need for constitutional adjudication when adjudicating on the essential contents. If exercise of governmental power abides by the principle of proportionality (i.e., the rule against excessive regulation), it cannot encroach upon the deeper essence of basic rights. If it violates the principle of proportionality, there is no need for scrutiny on the question of violation of the essential content because it will have become unconstitutional already.

However, in reviewing a constitutional complaint against capital punishment, the Court indicated that the constitutional right to life is not an absolute right that the state must not deprive of under any circumstance; and that, in certain inevitable circumstances, this right could be subject to statutory restrictions so that other, equally important interests can be protected (CC 1996. 11.28, 95Hun-Ba1). The Court also probed the practice for excessive infringement of right to life under the proportionality principle, and ruled that it is valid in light of people' sentiments about death penalty and its social functions. However, the Court indicated a possibility that changes in the society can make the death penalty unconstitutional.

(j) In December 1996, the economic provisions in the Constitution were elaborated upon quite in detail by the Constitutional Court.

Upon request, the Court reviewed the Liquor Tax Act which required a wholesaler of *soju*, Korean spirit, to purchase more than 50 percent of the annual supply from producers located in his or her *do*, province, in order to protect local *soju* manufacturers from external competition. The Court struck it down on grounds that despite the concurrent goals of promoting regional economy and preventing national monopoly, it excessively restricted the occupational freedom of *soju* wholesalers, the freedom of business and competition of *soju* producers, and the consumers' right to self-determination (CC 1996.

12.26, 96Hun-Ka18). The Court reasoned that the economic provisions of Article 119, which enumerate the economic goals of the nation, specify, on the one hand, the concrete public interests to be accomplished by economic policies, and on the other hand, the public interests that could justify abridgment of economic freedom under Article 37 (2). In the eyes of the Court, monopoly regulation, promotion of regional economy and protection of small-to-midsize enterprises could not justify the statute. It was stressed that even such public policies as prevention of monopoly and protection of small-to-midsize enterprises should be formulated through the basic goal of upholding the rules of competition within the bounds of a free competition order.

(k) In May 1997, the Second Term Court expressed its view on the nature of social basic rights and the standard of review for the laws implementing such rights.

An old couple who received living assistance benefits under the Livelihood Protection Standard of 1994 as determined by the Minister of Health and Welfare, lodged a complaint that challenges the payment amount as being far less than the minimum cost of living. The Court confirmed that our Constitution adopted the idea of a social state by broadly defining social basic rights, and their content is that the state has a duty to materialize the *objective* contents of those rights in concrete forms (CC 1997.5.29, 94Hun-Ma33). The Court ruled that the neglect of such a duty on the part of the state could be subjected to a constitutional complaint. However, in view of separation of powers under which the legislature and the administration play the leading roles in *community-formation*, such a complaint could be sustained only when the state failed to legislate anything at all to protect the concerned social basic rights, or when the state did legislate but abused its discretion. In short, it was at least made clear that whether or not the state discharged its constitutional duty to protect social basic rights must be determined by whether or not the state secured the objective contents of these rights at the minimum level (whatever the *objective* contents mean. . . . - Trans.)

(l) The right to pursue happiness was first recognized by the First Term Court in the so-called *"Ul-Cha-Ryeo"* case. In this case, the prosecutor decided to exempt prosecution, but nonetheless accepted a charge of insubordination against a private soldier who refused to follow a collective disciplinary action[40]. The Court found

40). In which each solider must continue racing against all others of the group before he or she becomes the first in any one race.

that the prosecutor's decision contravened the soldier's right to pursue happiness (CC 1989.10.27, 89Hun-Ma56). Following this case, the right to pursue happiness was further concretized to cover general freedom of action and the right to free development of personality (CC 1991.6.3, 89Hun-Ma204; CC 1992.4.14, 90Hun-Ba23).

On July 16, 1997, the Second Term Court held that the Civil Act prohibiting marriage between two persons from the same family origins and surnames, regardless of the degree of kinship, was non-conforming to the Constitution. The Court reasoned that it violated their autonomy to choose their own spouse, thereby violating human dignity and the right to pursue happiness. This decision directly brought happiness to around two hundred thousand couples and their children in *de facto* marriages, and inculcated the people with the raison d'être of the Constitutional Court, i.e., that legislative deadlocks caused by political considerations could be resolved by the Constitutional Court. The decision stands for two propositions. Firstly, even our cultural traditions cannot survive in form of law if they are incompatible with the constitutional ideals of personhood, marriage, and family. Secondly, if the legislature answerable to its constituencies cannot reform the laws that has lost their social appropriateness and rationality, the Constitutional Court can reconcile the traditions of our community with the personal dignity and happiness based on constitutional norms.

(m) As we have seen, the First Term Court extended the right to know, derived from freedom of expression, to the right to inspect and duplicate administrative, judicial documents so as to allow the accused access to his criminal litigation records (CC 1989.9.4, 88 Hun-Ma22; CC 1991.5.13, 90Hun-Ma133).

However, in November 1997, the Second Term Court took a slightly different approach in the similar *Investigation Records Inspection* case by not mentioning the right to know, and thereby indicating that the right to trial protects the accused's inspection or duplication of investigation records more closely than the right to know (CC 1997.11.27, 94Hun-Ma60). In this case, the complainant's attorney requested an inspection and duplication of all investigation records for the purpose of preparing for litigation, and the request was denied without any apparent reason. The Court found that the unexplained refusal by the Public Prosecutor's Office breached the complainant's right to a fair and speedy trial and his right to counsel. However, whether this case signals a change in precedents must wait for clearer expressions from the Court.

(n) Finally, the Second Term Court handed down two important cases concerning its jurisdiction. One is the decision about the

constitutionality of Article 68 (1) of the Constitutional Court Act excluding ordinary courts' judgments from constitutional complaint proceedings. The other concerns the Criminal Procedure Act limiting request for the institution of prosecution by the Court only for several crimes heavily implicating violation of human rights.

Since the establishment of the Constitutional Court, constitutionality of the Article 68 (1) ban on complaints against ordinary courts' judgments has been a subject of an unending debate. On December 24, 1997, the Constitutional Court handed down a decision that became a final authority on this matter as well as on its proper relations with the Supreme Court (CC 1997.12.24, 96Hun-Ma172, etc.). In the Court's view, the challenged provision itself was compatible with people's right to trial and to equality and therefore, constitutional. However, it is an unconstitutional violation of the system of distribution of power between the Court and the ordinary courts, if it is interpreted to exclude even an ordinary court's judgment that unlawfully enforces the laws previously struck down by the Constitutional Court. The Court then went ahead to cancel the ordinary court's judgment. The Court opined that the limited unconstitutionality of Article 68 (1) does not originate from the provision itself but came to surface through another state agency's unconstitutional action, preserving the constitutionality of the provision itself. Furthermore, the Court recognized that protection of basic rights and defense of the Constitution are not the duties solely of the Court but rather, common duties to be shared with the Supreme Court. In this way, the Court shed light on the partnership between the Court that mainly controls legislation and the Supreme Court that mainly controls administration with the common goal of protecting basic rights.

In the early years, the Court decided to include prosecutor's decision not to prosecute as the subject matter of constitutional complaints on the grounds that there was no other effective control mechanism checking prosecutor's power to prosecute because request for the institution of prosecution by the Court was allowed only under exceptional circumstances. Therefore, if the Court struck down the Criminal Procedure Act that restricts the scope of permissible request for the institution of prosecution by the Court, the legislature would have expanded it, leaving only non-institution of prosecution in the limited, uncovered cases for the Court's review. Such a decision would have indirectly affected the jurisdiction of the Court. In August 1997, the Court held that the method and the extent of control over prosecutor's prosecution power is a matter of legislative policy. Therefore, the Court held the challenged law constitutional insofar as

the limited conditions for permissible requests for the institution of prosecution by the Court did not contravene the constitutional principle of equality (CC 1997.8.21, 94Hun-Ba2).

C. Standards of Review

(1) The rule against excessive restriction

Article 37 (2) of the Constitution prescribes the principle of proportionality or prohibition of excessive restriction by stating that "all liberties and rights of people may be restricted by statute only when such restriction is necessary for national security, maintenance of order, or for public welfare; and such restriction may not violate the essence of the liberties and rights." Since the Constitution itself finds basic rights not entitled to absolute protection, but rather subject to state restriction for the reason of public interest, restriction of those rights by public authorities is not unconstitutional in and of itself, but only when it cannot be justified constitutionally. In reviewing the constitutionality of those governmental actions restricting basic rights, especially *liberty rights*, the Court has usually employed the rule against excessive restriction as the standard. This principle of proportionality, instead of creating substantively different levels of scrutiny, provides a unified standard under which the relationship between the legislative end and its means is scrutinized in three different aspects (appropriateness, necessity, and proportionality in narrow sense or balance) and which is applied to every restriction of liberties to demarcate and balance between the public interest and the liberty.

Restriction of liberties by public authorities satisfies the principle of proportionality only when it is (a) aimed at a valid purpose (legitimacy of the end); (b) reasonable as a means chosen by the state to achieve and promote such purpose (appropriateness of the means); (c) the least restrictive among all equally effective options (necessity of the means or the doctrine of the least restrictive means); and (d) on a relationship of proportionality when the importance of public interest and the degree of infringement are balanced (proportionality in the narrow sense or balance). Since the principle of proportionality concerns only the relationship between the end and the means, strictly speaking, it does not cover the legitimacy of the end. However, the Court applies this principle in four respects, *i.e.*, the legitimacy of the end, the appropriateness of the means, the necessity of the means or the doctrine of the least restrictive means and the balance of conflicting interests.

(2) The Principle against arbitrariness

The right of equality demands that equals be treated equally and unequals, unequally. The principle of equality prohibits the legislature from treating essentially equal things arbitrarily unequally or treating unequal things arbitrarily equally. Under the right of equality, equality or lack thereof is established in two steps. The first step is to determine existence of discrimination by asking whether or not equals are treated unequally. The second is to see whether or not such different treatment is arbitrary.

Discrimination takes place only when two groups perceived to be essentially the same in comparison are treated differently, and thus implicates equality as a standard of review. If two compared groups are essentially different, their different treatment does not constitute discrimination and there is no need to ask whether the discrimination is constitutionally justified. However, such identity means identity in a particular respect, not in every respect. Then, the question is how and by what standard such identity is determined. In general, such standard draws upon the intent and meaning of the statute in question (CC 1996.12.26, 96Hun-Ka18).

Not every discrimination between equals or every equal treatment between unequals is unconstitutional. It must be arbitrary to be unconstitutional. Arbitrariness means the lack of reasonable cause: discrimination is not arbitrary if it has an objective justification.

(3) The principle of clarity of law

The constitutional principle of rule of law requires every law to be unequivocally expressed as a standard to be used by the executive and the judiciary. When a statute authorizes the executive to deprive people of their liberty, it must clearly demarcate the scope of the authority granted. When the statute is applied by courts, it must be sufficiently clear as a standard of law.

In particular, the principle of clarity of law requires that delegation of the authority to the executive be sufficiently defined and restricted in its contents, ends, and scope by the enabling statute so that people can foresee the actions of the concerned administrative agency. Of course, this principle does not prohibit the use of general provisions or indefinite concepts. In order to allow the executive to cope with various tasks and the special circumstances of each particular case as well as the changing world as the object of law, the legislature inevitably uses abstract and open-ended concepts. Therefore, the requirement of clarity varies in accordance with

the subject matter to be regulated and the restrictive effects on basic rights of the person thus regulated. If the concerned statute regulates a variety of subject matters or the subject matter of the statute is expected to change frequently, the requirement of clarity cannot be too demanding. As the restrictive effects on the affected people become more severe, the demand of clarity on the statute must increase. In general, if even the process of interpretation does not produce an objective standard that excludes arbitrary application of the law by the administrative agencies and the courts, the statute most likely violates the principle of clarity.

Restriction of people's liberties and rights must be done by statute. If the statute authorizes administrative action to restrict human liberties and rights, this principle of *statutory restriction* requires as its precondition that the authorizing statute clearly indicate the scope of authority. The rule of clarity is a necessary complement for the principle of statutory restriction, which in turn derives itself from democracy and the rule of law.

(4) Prohibition of blanket delegation

Article 75 of the Constitution provides that "the President may issue presidential decrees concerning matters delegated to him in a concrete, limited scope by statute, and also the matters necessary to enforce statutes". It not only provides a basis for delegation of rule-making, but requires such delegation to limit its scope concretely. This aspect of Article 75 implements the principle of clarity of law in relation to administrative rule-making. Therefore, the basic rules of clarity of statute explained in the previous section are applicable to the enabling statutes.

On the basis of administrative law-making and its limit, the Constitutional Court has held as follows:

Article 75 aims at carrying out the rule of law and the principle of legislative law-making by requiring the parent statutes to specify the scope and the content of the subject matter to be regulated by presidential decrees, thereby precluding arbitrary interpretation or enforcement of law. In light of this constitutional-legislative intent, 'concrete in scope' means that the enabling statute must specify the subject matter delegated to presidential decrees as well as other inferior laws so clearly and concretely as to allow people to infer from the statute itself the basic outlines of the presidential decrees (CC 1991.7.8, 91Hun-Ka4). Inferability is not to be measured for each statutory provision but evaluated through a comprehensive and systemic analysis of the entire set of related provisions as a whole,

and also in light of the concrete nature of the individual statute at issue. In short, if the outlines of regulation cannot reasonably be inferred from a comprehensive analysis of the statutory provisions themselves and the legislative intent thereof, then the statute in question violates the limit on delegation of law-making (CC 1994. 7.29, 93Hun-Ka12).

In addition, the requirement for the specificity and the clarity of delegation varies with the type and the nature of the subject matter. It becomes more exacting in the areas of taxation and criminal punishment, which directly abridges or is likely to infringe upon basic rights, than in entitlements, and becomes more generous for the subject matter of various types or of rapidly changing nature (CC 1991.2.11, 90Hun-Ka27, etc.).

(5) The principle of statutory taxation and equal taxation

Taxation by statute and equality in taxation are the twin major principles of taxation in the Constitution. Article 38 of the Constitution provides that "all people shall have the duty to pay taxes pursuant to statute," while Article 59 provides that "types and rates of taxes shall be determined by statute". Therefore, the state cannot impose tax upon people or collect from them without statutory authorization. The important elements of this principle are two requirements. Firstly, since taxation is an infringement of people's property right, the person and the object taxed, the standard, time periods, and rates of taxation, and the methods of assessing and collecting tax should be prescribed in the statute enacted by the legislature as the representatives of the people (CC 1989.7.21, 89Hun-Ma38). Secondly, the statute itself must be clear and singular in meaning and must avoid abstractness or indefiniteness to preclude arbitrary interpretation and execution by the taxing agencies (CC 1989. 7.21, 89Hun-Ma38, etc.). These two requirements are concrete manifestations of the two principles in the area of taxation, namely the principle of *statutory restriction* and that of clarity of law.

The principle of equal taxation is a manifestation of the equality principle in Article 11 (1) of the Constitution. This principle aims to achieve justice in taxation by treating equals equally and unequals unequally in the legislative and the enforcement processes of taxation (CC 1989.7.21, 89Hun-Ma38; 1991.11.25, 91Hun-Ka6). Drawing upon this principle, the burden of taxation should be proportionate to the financial capacity of the taxpayers.

(6) Protection of expectation interest (protection of confidence in law)

The stability of the law, an element of the rule of law, means credibility, permanency, transparency, and peacefulness of law. The subjective aspect of stability of law is the inherently and mutually related principle of protection of expectation interest, i.e., an individual's expectation that the once enacted legal norms will continue to be effective and the protection of the standard of conduct applicable to him. Time is of essence in the stability of law and protection of confidence in law. In principle, every legal relation formed while a particular law is in effect should be considered and judged only in reference to that law, and one must have confidence that the old legal relation will be judged by an *ex post facto* standard. Therefore, the mandates of stability of law and protection of confidence in law apply most sensitively to the laws with retroactive effects.

The Court divided the retroactive effect of laws into two categories, genuine and pseudo. The genuine retroactive legislation applies to the already concluded legal relation. It is, in principle, unconstitutional except in a number of instances: 1) when people's expectation interest is very little because retroactive legislation was being expected or because the legal system was so uncertain and chaotic as to inspire very little confidence in it; 2) when the concerned party's loss due to retroactive application is none or very little; 3) when the compelling public interest overrides the mandate of protection of confidence in law.

The pseudo retroactive legislation applies to the present legal relation and is in principle constitutional. In other words, it is not really retroactive, but its validity is determined by to what extent the state should be bound to its past conduct and protect people's expectation interest in its continuation by such means as transitional provisions. Here, confidence in law is to be merely balanced with the public's interest in the retroactive law to limit the policy-making privilege of the legislature (CC 1996.2.16, 96Hun-Ka2, etc.).

(7) Due process of law

The Constitutional Court held that due process of law is not only related to bodily freedom but to a principle governing the entire field of the Constitution.

Article 12 (1) of the Constitution, concerning punishment, preventive measures and involuntary labor, and Article 12 (3) for the

principle of *arrest by warrant* mention due process of law. They simply show examples and are not exhaustive. Due process of law is an independent constitutional principle not only concerned with formal procedure but also with mandating reason and justice from the substantive contents of law. Its application is not confined to criminal proceedings but extends to all governmental functions. In particular, it asks whether each statute is substantively reasonable and just (CC 1989.9.8, 88Hun-Ka6; 1990.11.19, 90Hun-Ka48, etc.). Due process of law is not only procedural but has substantive content (hence, substantive due process). It is a manifestation of the substantive principle of rule of law derived from a perspective emphasizing justice (CC 1997.7.16, 96Hun-Ba36).

The Court attempted to clarify the relationship between due process of law and the rule against excessive restriction in the following way: unlike the other, due process of law does not operate merely to limit the legislative power but as an independent constitutional principle governing all government functions, regardless of whether they infringe basic rights or not. Applied to restriction of bodily freedom in criminal proceedings, it emphasizes the importance of other rules, namely that even punishment by law should not infringe upon the essential content of bodily freedom; and it should be not excessive or proportional to be constitutional (CC 1992.12.24, 92 Hun-Ka8, etc.).

These cases show the Court's tendency to apply due process of law as a primary standard of review in criminal areas and apply the rule against excessive restriction in other areas.

D. Perspectives in evaluation of the Court's cases

A judicial institution like the Constitutional Court tells its history by its decisions. The cases in the past ten years are the most important part of the history of the decade. Also, judges speak through judgments and their evaluation should be left to others. However, the following pointers may be needed in looking at the decisions.

(1) A view that the more laws the Constitutional Court strike down, the more closely its activities approach to the ideal of the rule of law should be amended. Over the first few years, the Court struck down, for short periods of time and with relative frequency, many laws that had been enacted regardless of the normative role of the Constitution and people's basic rights; and thereby succeeded in cleaning up the unconstitutional laws left over from the past governments. However, as the system of constitutional adjudication became more established and active, the normative force of the Constitution

began to pervade all areas of governmental power, and was defended and exerted through constitutional trials. As the educational effect of this change, the legislature became more cautious in lawmaking and reassessed the constitutionality of the laws enacted already. If reduction in the rate of unconstitutionality decision can be explained this way, it only reflects well on the important role of Constitutional Court in establishing the rule of law in our country.

On the one hand, the high rate of unconstitutionality decisions evidences the Court's overcoming judicial passivity in relation to the legislature. On the other hand, it may mean that the Court overstepped its role as a judicial institution under separation of powers by excessively broad interpretation. A self-evident idea that democracy can be limited by the Constitution in the rule of law can generate more tendencies to limit the legislature's policy-making privilege as constitutional trials emphasize the rule of law and basic rights. A passive and restricted interpretation of basic rights makes their substance vacuous by leaving it at the mercy of the legislative, but an active and expansive interpretation has tendencies to elevate the Constitutional Court to the role of a master of *community-formation,* thereby infringing on the legislative power.

(2) For the same reasons that the rate of unconstitutionality decisions cannot be a standard in evaluating the Court's activities, the rate of unconstitutionality opinions by an individual justice cannot inform evaluation of him or her. Characterizing the justices who frequently strike down as being progressive and those frequently upholding as being conservative is inappropriate and unreasonable unless done with a clear standard. Many statutes reviewed nowadays are social and economic laws motivated by the ideals of the social state, namely, that of materializing the substantive conditions under which the majority can *actually* exercise their rights by limiting the rights of the minority. Favoring to strike down one of these statutes may expose one as a conservative - a result converse to the above. Characterizing the opinions to uphold as being conservative and those to strike down as being progressive is a one dimensional non-sense.

(3) Likewise, the amount of attention the Court as a whole or an individual justice pays to public sentiments cannot be a reasonable standard for evaluating either the Court's or an individual justice's activities or dispositions. The Court ultimately depends on people for its existence and the legitimacy of its power, but this does not mean that the Court is answerable to popular opinion or people's sense of justice in concrete cases. Some cases may allow the Court to consider public opinions and sentiments, but the sole standard of constitutional review is the Constitution itself. The Constitutional

Court should be free not only from the influence of the political parties but also from the desire to gain popularity or political power.

Public opinion changes rapidly and capriciously. For the Court, following the precarious public opinion in making decisions constitutes dereliction of its duty to protect the minority from the majority. If public opinions are in conflict with the ideal personhood and the creed of the Constitution, the Court must be able to defend the Constitution and protect basic rights from them. In particular, a statute represents the will of the majority in a democratic state, and its constitutional review means protection of the overwhelmed minority, those who did not agree to the content of the statute. The Court's protection of basic rights is thus based upon the belief in the existence of a sacred, private sphere in each individual that cannot be violated even by the majority will of democracy.

II. Decisions on Freedom of Press and other Intellectual Freedoms

1. *Forests Survey Inspection Request* case, 1 KCCR 176, 88Hun-Ma22, September 4, 1989

A. Background of the Case

Even before the enactment of the Disclosure of Information Act, this case established for the first time that the right to know included the right to request disclosure of information held by the administrative agencies and confirmed a constitutional obligation of the state or local governments to comply with a citizen's legitimate request for information.

The complainant found that the land inherited from his father immediately after the Korean War became the state's property without his knowledge. In order to recover the title to the land, he repeatedly requested the respondent Supervisor of County of Ichon of the Kyong-ki Do (Province) for inspection and duplication of the old forests title records, private forests use surveys, land surveys, and land tax ledgers kept by the County. The respondent did not take any action on the land surveys and private forests use surveys. The complainant brought a constitutional complaint against this inaction for violating his right of property.

B. Summary of the Decision

The majority opinion of eight justices explicitly recognized the right to know and held that the complainant's inaction on the petitioner's request for inspection and duplication unconstitutionally violated this right.

Freedom of speech and press guaranteed by Article 21 of the Constitution envisages free expression and communication of ideas and opinions that require free formation of ideas as a precondition. Free formation of ideas is in turn made possible by guaranteeing access to sufficient information. Right to access, collection and processing of information, namely the right to know, is therefore covered by the freedom of expression. The core of right to know is people's right to know with respect to the information held by the government, that is, general right to request disclosure of information from the government (claim-right).[41]

Right to know is given effect directly by the Constitution without any legislation implementing it. Therefore, if the complainant requested disclosure of information with legitimate interest in it, and the government failed to respond without any review, his freedom of speech and press, or freedom of expression of Article 21 or its component, right to know, was abridged.

However, the right to know is not absolute, and can be reasonably restricted. The limit on the extent of restriction must be drawn by balancing the interest secured by the restriction and the infringement on the right to know. Generally, the right to know must be broadly protected to a person making the request with interest as long as it poses no threat to public interest. Disclosure, at least to a person with direct interest, is mandatory.

In this case, the requested estate records have not been classified as secret or confidential and its disclosure does not implicate invasion of another's privacy. There is no reason for insisting non-disclosure of the requested documents themselves, or statutes or regulations. Therefore, the government's inaction on the complainant's request breached his right to know.

Justice Choe Kwang-ryool dissented on grounds that the complainant had a right to inspect and duplicate the above documents under Article 36 (2) of the Governmental Records rules (Presidential

41). This concept of *claim-right* is contrasted to *liberty-right*: the former implicates a duty of the state to take affirmative action benefiting the claimant whereas the latter is negative in that it merely mandates the state not to infringe on the right of the individual.

decree no. 11547) and had not first exhausted the procedures for judicial review of administrative inaction available to him on that matter.

C. Aftermath of the Case

Major newspapers generally praised the case for evincing the Court's commitment to active protection and promotion of people's rights until the then draft of the Disclosure of Information Act is actually enacted. On September 5, 1989, The Dong-A Ilbo, signified the case as proposing a clear standard on the scope and limit of disclosure that should be included in the Disclosure of Information Act, thereby precluding unconstitutional elements in advance. The Hankyoreh Shinmun on September 6, 1989 hailed it as the first case providing affirmative interpretation of the right to know as a *claim-right* and an important progress in light of the past laws related to press and publication.

Academic opinions were balanced. Some found the case rich in the justices' commitment to protection of basic rights but lacking in support of an established, constitutional theory. Others found it logically problematic in deriving from a liberty-right (freedom of speech and press) a much broader claim-right (right to know). Yet others praised it both for its revolutionary holding and an excellent reasoning.

The Court reconfirmed its position on the issue of the right to know in another case decided on May 13, 1991 (CC 90Hun-Ma133, the *Records Duplication Request* case). In this case, the Chief of the Uijongbu Branch of the Seoul Prosecutor's Office refused to allow a former defendant in a criminal trial to inspect and duplicate the records of the concluded trial. The Court found it unconstitutional.

In the wake of a series of constitutional cases concerning the right to know, the National Assembly enacted the Act on Disclosure of Information by Public Agencies on December 31, 1996 (Act 5242, effective January 1, 1998) that specifically recognized the right to request disclosure of information.

2. *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 said 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*[42]. In addition, the broadness of those expressions can potentially permit a punishment of a pursuit of reunification policy pursuant to 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 and 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

42). i.e. nulla poena sine lege

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 vagueness 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 national 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.)

3. *Notice of Apology* case, 3 KCCR 149, 89Hun-Ma160, April 1, 1991

A. Background of the Case

In this case, the Constitutional Court ruled that Article 764 of the Civil Act would be unconstitutional if it were interpreted to include notice of apology as "suitable measures to restore [the plaintiff's] reputation."

Prior to this case, the ordinary courts had granted an order of notice of apology together with damages in defamation cases against media agencies. The court's order was pursuant to Article 764 of the Civil Act, which states that "the court, upon motion by the defamed, may order measures suitable to restore the reputation of the defamed, in addition to or in lieu of damages, against a person who defamed him or her." In theories and in precedents, an order of notice of apology had been generally accepted as a representative example of "suitable measures to restore the plaintiff's reputation," and also, it was understood to be enforceable through substitute enforcement. In this case, the Constitutional Court overruled the conventional precedents and theories on the grounds of freedom of conscience and the right to personality.

The plaintiff, a former Miss Korea, brought a civil action against the complainants, *Dong-a Ilbo*, its President, and the Chief of Editorial of *Women Dong-a* at the Seoul District Civil Court, claiming monetary damages and notice of an apology for an allegedly defamatory story in the June 1988 issue of *Women Dong-a* Upon the trial court's denial of a motion challenging the constitutionality of Article 764 of the Civil Act for authorizing notice of apology, the defendants filed a constitutional complaint with the Constitutional Court.

B. Summary of the Decision

The Court held Article 764 unconstitutional insofar as it is interpreted to include the notice of apology as a suitable measure for restoring damaged reputation after elaborating on the nature of freedom of conscience and public apology as follows:

"Conscience" protected by Article 19 of the Constitution includes a world view, a life view, an ideology, a belief and also, even if not rising to the level of the mentioned above, those value- or ethical judgments in inner thoughts affecting one's formation of personality. Freedom of conscience protects freedom of inner thought from the state's intervention of people's ethical judgment of the right or wrong and the good or bad, and also protects people being forced by the state into making ethical judgments public, hence freedom of silence.

An order of public apology compels an individual admitting no wrong on his part to confess and apologize for his conduct. It distorts his conscience and forces a dual personality upon him by ordering him to express what is not his conscience as his conscience. Therefore, it violates the prohibition against compelling one to commit an act against one's conscience, which is derived from freedom of silence. Therefore, the Court cannot help but find limitation on freedom of conscience (in case of a corporation, forcing its representative to express his fabricated conscience). Furthermore, the right to personality, allowing free development of personality either for a human being or a corporation, is impaired in the process. State-coerced distortion of external personality is necessarily followed by fragmentation in personality.

State-coerced apology is an improper attempt to achieve, through civil liability, the policy goal of satisfying the sentiments of retribution that can only be achieved through a criminal punishment. It is inconsistent with the intent and the purpose of the system set up by Civil Act Article 764, and violates the rule against excessive restriction of Article 37 (2) of the Constitution. That is, the Article 764's goal of restoration of reputation can be achieved by such means as using the defendant's fund to publish civil or criminal judgment against him in newspapers and magazines in general or an advertisement withdrawing the defaming story. Therefore a public apology, which involves imposing coerced expression of one's conscience and other disgraces on the defendant, is an excessive and unnecessary restriction of rights.

C. Aftermath of the Case

The press and the media welcomed the case in their editorials, stressing the negative aspects of public apology. However, focusing on the public responsibility of the mass media and the positive aspects of pubic apology, i.e., deterring abuses of freedom of press, some commentators criticized the decision as being based upon a misunderstanding of the legislative ends behind public apology which, they argued, accords with the legislative ends of Article 264.

As a result of this case, the courts are unable to order a notice of apology as a suitable measure for restoration of damaged reputation. As even critiques agree, this case is significant in giving the practical, normative force to the freedom of conscience and the right to personality, which form the foundation of all intellectual freedoms.

4. *Request for a Corrective Report* case, 3 KCCR 518, 89Hun-Ma165, September 16, 1991

A. Background of the Case

This case held that the provisions of the Registration, etc. of Periodicals Act requiring a corrective report as a means to protect right to personality from the media did not infringe upon the freedom of press.

Article 16 (3) of the Act allows a person whose right to personality has been infringed by stories in periodicals to request a corrective report, and Article 19 (3) authorizes the court to dispose of that issue through preliminary orders.

The JoongAng Ilbo, published by the complainant, was sued by the Pasteur Dairy corporation in the Seoul District Civil Court for a July 23, 1988 story concerning Pasteur Dairy which appeared in its Reporter's Notepad section. The JoongAng Ilbo was ordered to print a corrective material when Pasteur Dairy prevailed in the action for a corrective report pursuant to the above statute. The complainant moved for constitutional review of the statute for infringing freedom of press and the press' right to trial, and when denied, brought a constitutional complaint.

B. Summary of the Decision

The Court upheld Article 16 (3) and 19 (3) of the Act elaborating

on the nature of right to request a corrective report as follows:

Although the relevant provisions mention "correction", they in reality mean a right to request that the reporting agency publish rebuttal by those affected by the report. Hence, right to reply. Reply does not aim to contest the truth of the report[43] or compel correction of a false report. A right to reply gives the injured person an opportunity to present reply to the factual reports by the press, thereby protecting to his right to personality. It also enhances the objectivity of the report and thus the systemic security of the press by allowing the defamed victim to participate in generating a balanced public opinion. Obviously, such a right is derived from the general right to personality, right to privacy, freedom of privacy guaranteed by the Constitution.

Right to a corrective report restricts the editing and the layout of the periodicals and may impose indirect limitations on reporting, and therefore should adhere to the rule against excessive restriction so that all rights complementing freedom of press are given the maximum effects. The right to reply has a legitimate end and applies only to reply of factual assertions (Article 16 (1)). It allows a periodical to refuse to carry the reply under certain circumstances, narrowing the permissible scope of exercise of the right (Article 16 (3)). The Act requires the request to be made within certain time limits in order to protect the press from long periods of uncertainty. Finally, reply is done not by the press but under the name of the injured party, and therefore does not directly denigrate the reputation and the credibility of the media agency. In short, the challenged law achieves a well-struck balance between the two conflicting interests.

Article 19 (3) submission of the matter to preliminary order processes also does not violate the complainant's right to trial because it is needed for swift remedies to injuries.

The statutes above mentioned do not violate the essential content of freedom of the press or their right to trial.

Against this majority opinion, Justices Han Byong-chae and Lee Shi-yoon dissented, arguing that right to a corrective report does not operate like right to reply, and disposing of it through summary procedures such as preliminary orders, instead of full trials, discriminates against the publishers of periodicals unreasonably, violating the

43). The line between 'contesting the truth of a report' and 'presenting reply to a factual report' can be thin. However, a factual assertion may tend to injure a person without being false, and the injured person may want to present additional facts or new opinions that do not contest the truth of the assertions and yet tend to remedy his injury, whether it be on his privacy or reputation.

equality before law and procedural basic rights.

C. Aftermath of the Case

This case was assessed positively as constitutional ratification of the need for a speedy mechanism of relief and repair to the injuries caused by the media when the contemporary society witnessed the growing danger of unfair infringement on individuals' privacy and attack on their reputation by the powerful media conglomerates. Theoretically, the case was appraised as a great achievement for clearly stating that the conflicts between basic rights should be resolved by harmonizing competing provisions pursuant to the uniformity of the Constitution; and also for emphasizing the meaning and function of freedom of press as an objective normative order.

After this case, the National Assembly revised the Act (Act. 5145) on December 30, 1995 to reconcile it with the decision, *inter alia* replacing 'right to a corrective report' with 'right to reply'.

5. *Military Secret Leakage* case, 4 KCCR 64, 89Hun-Ka104, February 25, 1992

A. Background of the Case

This case found that Articles 6, 7 and 10 of the Military Secret Protection Act (hereinafter MSPA) are constitutional insofar as they apply only to detection, collection and leakage of military secret that pose a clear danger to national security.

MSPA (Law No. 2387) provides punishment for "detection and collection of military secrets through inappropriate means (Article 6)," "leakage of military secrets by those who detects and collects them (Article 7)," and "leakage of military secrets by those who obtained or possessed them accidentally (Article 10)." The concepts of 'military secrets' and 'inappropriate means' were criticized for being so vague that the provisions that included them violated the rule of clarity of law and the essential content of right to know.

In this case, at the request of the director of the Peace Research Institute for 'the documents being deliberated on by the National Defense Committee of the National Assembly', the defendant A, an aide to an assemblyperson, obtained from the defendant B, also an aide to another assemblyperson who was a member of the National Defense Committee, eight documents including the 'Relocation Plan of Major Military Headquarters (second class military secret)' which

had been submitted by the Ministry of National Defense. They were turned over to the above mentioned director, and both A and B were prosecuted for violation of MSPA. Upon the defendants' motion, the trial court requested constitutional review of Articles 6, 7 and 10 of MSPA.

B. Summary of the Decision

The Court upheld the Articles 6, 7 and 10 of MSPA on limited constitutionality after explaining the relationship between the military secrets and the principle of *statutory punishment* (*nulla poena sine lege*):[44]

Even though 'military secrets' may be overbroad and vague to the lay people, they are divided into class I, II, and III by the regulations, and are to be accordingly marked (Article 3 of MSPA, Article 2 (1) and 3 of its regulations). The possibility that the lay people may commit the crime because of their inability to identify military secrets is only theoretical, and have resulted in hardly any actual problems. Hence, no violation of the rule of clarity required by the principle of *statutory punishment*.

"Detection and collection through inappropriate means (Article 6)" clearly denotes a violation of procedures set up by the relevant laws and regulations, and is sufficiently clear to those with ordinary sensibilities; therefore, it does not violate of the rule of clarity of law, either.

Protecting military secrets and ultimately national security is of great importance. However, the scope of military secrets should not be so broad as to reduce people's right to know, and should be limited to the necessary minimum in order to maximize the scope of the subject matter open to people's freedom of expression and right to know. Hence, 'military secrets' in Articles 6, 7 and 10 of MSPA should be interpreted narrowly to mean only the undisclosed facts classified and marked through proper procedures, the contents of which will, upon leakage, pose a clear threat to national security due to their confidential nature. Information concerning political interests or administrative expediencies (*pseudo* secrets) are, therefore, distinguished from those related to national security (true secrets) and

44). In this case, three justices would have upheld unconditionally, five conditionally, and one would have struck down unconditionally. Since the decision of limited constitutionality is essentially a kind of unconstitutionality decision, the remaining two groups were added up to form the six, required by Article 113 (1) of the Constitution and Article 23 (2) (i) of the Constitutional Court Act for any decision of unconstitutionality.

are not covered by the MSPA.

When interpreted to apply only to the Article 2 (1)[45] facts that have so much practical value as to pose a clear threat to national security, Article 6, 7 and 10 of the Act are not unconstitutional.

Dissenting, Justice Byun Jeong-soo advocated a decision of unqualified unconstitutionality while Justices Han Byong-chae, Choe Kwang-ryool, Hwang Do-yun advocated unqualified constitutionality. The President of the Constitutional Court Cho Kyu-kwang rendered a concurring opinion.

Justice Byun opined that the provisions infringe on freedom of expression and right to know about military affairs and define the elements of crimes in an impermissibly overbroad and vague manner, thus violating the principle of *nulla poena sine lege.* Justices Han, Choe, and Hwang found the provisions clear and concrete, satisfying the requirement of clarity, and not in violation of right to know.

The President Cho explained that a decision of limited constitutionality defines the permissible scope of interpretation of a statute, and a decision of limited unconstitutionality carves out the prohibited area of application from an otherwise valid statute. However, they are different only theoretically: they are equally versions of a decision of partial unconstitutionality and have the same binding forces as such.

C. Aftermath of the Case

This case generated positive reactions, including one that praised it as a representative decision showing the Court's commitment to democratization of the prevalent legal system.

After this decision, the Ministry of National Defense forwarded a revised MSPA, which fully carried purports of this case, to the National Assembly, and the National Assembly passed it as total revision, not simple revision, in Act Number 4616 on Dec. 27, 1993.

The revised MSPA considerably narrows down the definition of military secrets in Article 2 to the following: "the military documents, pictures, electronic records, material of other special medium, and objects that were undisclosed to the public, and which, when leaked, are likely to cause a clear danger to national security, and were marked or notified as military secretes or guarded through other means as such, and their content." Moreover, Article 9 establishes for the first time "the right to petition for disclosure of military secrets," thereby improving on protection of people's right to know;

45). Article 2 (1) classifies and marks military secrets.

and Article 7 allows the Minister of National Defense to disclose "if there is need to make them public" or "when the disclosure is perceived to bring outstanding benefits to national security." The Article 11 "detection and collection of military secrets through inappropriate means" was replaced by "detection and collection of military secrets not through legal means."

6. *Periodicals Registration* case, 4 KCCR 300, 90Hun-Ka23, June 26, 1992

A. Background of the Case

This case inquired whether Article 7 (1) of the Registration, etc. of Periodicals Act (hereinafter RPA), which requires all periodicals to be registered for publication, violates the ban on licensing of publication in Article 21 (2) of the Constitution. The case was resolved on a decision of limited unconstitutionality.

Article 7 (1) of RPA (amended by Law No. 4441) requires the publisher of periodicals to register with the Ministry of Public Information his or her rotary press machines specified by Article 6 (3) (i) and (ii) of the Act, and ancillary facilities specified by presidential decrees. Article 5 of the regulation of that Act define "ancillary facilities" as layout and engraving machines; and Article 6 (iii) of the same regulation allows registration only when accompanied by proof of ownership of at least one rotary printing press and the ancillary facilities. Article 22 (iii) of the Act provides for punishment of unregistered publishers of periodicals, including those of regular weekly newspapers, by imprisonment of up to one year or a fine of 5 million won or less.

The complainants were being prosecuted at the Seoul District Criminal Court pursuant to RPA for having published "Chunminrun Shinmun" twice a month from March 10 to June 25, 1989, eight times in total, without registering with the Ministry of Public Information. The complainants argued that the RPA facility requirement is too stringent and has the effect of a licensure, which is prohibited by the Constitution; and motioned for constitutional review of the statute. The court granted the motion, referring the case to the Court on January 19, 1990.

Incidentally, on April 10, 1990, a few months after the Seoul District Criminal Court referred the case, the Supreme Court in a separate case (90Do332) explicitly ruled that Article 7 (1) of RPA did not violate the Constitution.

B. Summary of the Decision

The Constitutional Court, after circumscribing the protective domain of freedom of press, ruled that Article 7 (1) (ix) of RPA was unconstitutional insofar as it was interpreted as requiring a proof of ownership of the printing facilities:

Freedom of speech and press in the Constitution protects the methods and the contents of essential and inherent manifestation of that freedom, but does not protect the objects needed to materialize such expression or the business activities of the entrepreneur controlling the media. Therefore, legally requiring periodical publishers to maintain and safeguard a certain level of facilities for sound growth of the press must clearly be distinguished from interfering with the essential contents of freedom of speech and press. Registration is not required for formulating and presenting views, nor for gathering and disseminating information - the substantive freedom of press - but is required of the business entity and the facilities that are the means of reporting and periodicals publication. They can be required to be registered without infringing the essential content of freedom of speech and press.

In addition, Article 21 (3) of the Constitution delegates to the National Assembly, the organization representing the people, the power to set by statute the standard of physical facility necessary to ensure, maintain, and improve on the growth and functioning of reporting and publication. Enacted accordingly, Article 7 (1) cannot profess to be an abuse of the legislative discretion violating the rule against excessive restriction or arbitrary legislation.

However, requiring proof of ownership of the printing facilities as a precondition of registration is too stringent to be constitutional. The printing facilities can be procured by rent or lease. Reading the ownership requirement out of Article 7 (1) (ix) is not only an arbitrary construction of the elements of a crime violating the Article 12 principle of *nulla poena sine lege;* but also an exaggerated construction of "matters necessary for proper functioning of the press" in Article 21 (3), which violates the Article 37 (2) rule against excessive restriction.

Justice Byun Jeong-soo dissented, arguing that any system of registration for periodicals can be run practically as a licensing system, and therefore infringes upon freedom of speech and press, and that facility requirement discriminates between the wealthy and the poor, thereby violating the principle of equality.

C. Aftermath of the Case

The decision was met with a positive response as it opened the way to publish periodicals for those who could not afford expensive printing facilities, thereby broadening the scope of freedom of expression. Others in the press saw in it a critique of the past governmental practice of enforcing the statute essentially as a *licensing* system in contravention of the legislative intent and of the Constitution; and also an attempt at a optimum balance between freedom of speech and press and its responsibility, both of which were emphasized alike by the decision.

After this decision, Article 6 (iii) of the new regulation of the Registration, etc. of Periodical Act, amended on December 21, 1992, replaced 'proof of ownership' with 'documents showing *possession of the facilities' through all operations of law including lease.* Furthermore, Article 7 (1) of RPA, amended on December 30, 1995 by Law No. 5145, no longer required those facilities for weekly newspapers.

7. *Election Campaign Participants Limitation* case, 6-2 KCCR 15, 93Hun-Ka4, etc., July 29, 1994

A. Background of the Case

This case struck down the former Presidential Election Act (hereafter "PEA") which inclusively and generally prohibited election campaigns.

Article 34 of PEA (discontinued by Law No. 4739 on March 16, 1994) allowed campaigning between candidacy registration and the day before the election. Article 36 (1) prohibited all from participating in campaigns except political parties, candidates, campaign managers, campaign liaison office heads, campaign staffs or speakers, thereby inclusively limiting the scope of permissible campaign participants.

Claimant A was being prosecuted at the Seoul District Criminal Court on the charge of speaking in support for Kim Yeong-sam, then the candidate for the Democratic Liberal Party, during a dinner with local agency chiefs at a blow fish stew restaurant in the Pusan area sometime in December 1992. Claimant B was being prosecuted at the West Branch of the Seoul District Court also for violation of PEA. The Seoul District Criminal Court, upon Claimant A's motion, referred the case to the Constitutional Court for review of Article 36

(1) of PEA and its punitive clauses in Article 162 (1) (i). The West Branch of the Seoul District Court, upon Claimant B's motion, referred the case to the Constitutional Court for review of Article 34 of PEA.

Incidentally, during the review of this case, the Act on the Election of Public Officials and the Prevention of Election Malpractices (Act No. 4739) was enacted and took effect on March 16, 1994, supplanting the old Presidential Election Act. Its Articles 58 (2) and 60 (1) allow all to freely participate in election campaigns and enumerate those who cannot.

B. Summary of the Decision

The Constitutional court struck down Article 36 (1) of EPA and its punitive provisions that comprehensively barred the general public from participating in election campaigns, and upheld Article 34 and its punitive provisions that limited the allowed period of election campaign activities for the following reason:

A citizen's participation in elections is an exercise of his sovereignty or his right to political participation, and therefore, in principle, must be unhindered and guaranteed to the utmost. However, since some restrictions are inevitable to secure the fairness of election, freedom of election campaign can be limited according to Article 37 (2) of the Constitution. The legislature must skillfully harmonize freedom and fairness.

The concept of 'election campaigns' used in Articles 36 (1) and 34 of PEA is defined in Article 33 as 'acts making a candidate to be elected or to not be elected'. Despite its ambiguity and lack of clarity, this concept can be understood in light of the legislative intent and the overall structure of the statute, and clearly distinguished from simple expression of opinions. Then, the culpable act requires the specific intent to gain votes or win elections, the objective indicia of such intent, an affirmative act, and premeditation. Since ordinary people can make such distinction, it does not violate the clarity required by the principle of *nulla poena sine lege*.

Article 34 of PEA limiting the permitted period of campaign to after candidacy registration and the day before the election day has reasonable bases and does allow between twenty three and twenty eight days. Considering the pervasiveness of the mass media and the means of transportation bringing every part of the country within a day's trip, such period is not excessively restrictive in view of the Constitution.

However, Article 36 (1) allows only "political parties, candidates, campaign managers, campaign liaison office heads, campaign staffs or speakers" to participate in campaigns, and does not allow ordinary people, despite their right to vote. This constitutes excessive restriction on people's freedom to participate in election campaign, stepping over the permissible boundary of the legislature's policy-making privilege, and violates Articles 21 (freedom of expression) and 24 (right to vote) as well as the principles of people's sovereignty and free election enshrined in the Constitution. In other words, the core content of regulations aimed at fair election should be regulation of election fund, intervention of public authorities or financial influences, blackmailing, and false rumors, not a comprehensive and total ban on ordinary people's campaign activities. Furthermore, PEA does not allow any campaign activity other than those defined in the statute; it provides detailed regulation for each one of those defined, as well as many penalties for acts damaging the fairness of election. In light of these regulations sufficient to accomplish the fairness by themselves, the comprehensive ban is beyond the necessary minimum. The public interest in fairness of election does not justify sacrifice of freedom of political expressions and right to political participation implicated in election campaign. The new Act on the Election of Public Officials and the Prevention of Election Malpractices in principle allows all to participate in campaign in its Articles 58 (2) and 60 (1), and enumerates those prohibited such as public employees in a concrete and limited fashion. Upholding the spirit of the new law, we find any ban on those not listed by Article 260 (1) of the new law unconstitutional.

Justices Kim Chin-woo and Han Byung-chae dissented, upholding Article 36 (1); and the concurring Justice Byun Jeong-soo opined that the presidential election carried out under the PEA would lose its democratic legitimacy.

C. Aftermath of the Case

Having established basic and important judicial positions on the constitutional significance of and justification and limit for regulation on election campaign and its concept, this decision became a guiding precedent providing a standard of review and a direction for the later cases on the Act on the Election of Public Officials and the Prevention of Election Malpractices. The later cases all upheld the statute emphasizing the question of harmony between freedom to participate in election campaign and the fairness of election:

95Hun-Ma105 on Article 87 (prohibition of election campaign by

organizations) on May 25, 1995;
94Hun-Ma97 on Articles 59 (the period of election campaign) and 112 (2) (ii) (definition of donation and limitation on the period) on November 30, 1995;
96Hun-Ma9, etc. on Articles 89 (1), (2) (prohibition of establishing affinitive organizations), 93 (3) (banning issuance of ID cards for campaign purpose), 111 (limitation on legislative activities and other reporting activities), 150 (3), (4), (5) (the method of deciding candidacy code) on March 28, 1996;
96Hun-Ma18, etc. on Articles 111, 141 (1) (limitation on party unity rallies), 142 (1) (limitation on meetings of party officials), and 143 (1) (limitation on party member training) on March 28, 1996;
95Hun-Ka17 on Articles 230 (1) (iii) (iv) and (2), (3) (vote buying, etc.) on March 27, 1997; and
96Hun-Ba60 on Articles 113 (limitation of political donation) and 230 (1) (i) (vote buying etc.) on November 27, 1997.

The decision on Article 111 of the Act received much public attention. This article allowed the assemblypersons to publicly report their legislative activities before the election period, raising the question of equal opportunity for those candidates who were not incumbent. The Court ruled that reporting legislative activities is an assemblyperson's political function and his/her unique occupational duties. A new campaign activity is not authorized anew just because the ban on them applies only during the campaign period. This is not an irrational discrimination against the challengers in favor of the incumbents. Even if the incumbents actually carry out a campaign activity under the pretext of reporting his legislative activity, thereby creating inequality in campaign opportunities, the inequality created is *in fact* preventable by thorough enforcement of the law, not inequality in law.

Justices Kim Moon-hee, Hwang Do-yun, Chung Kyung-sik, and Shin Chang-on joined in an opinion of unconstitutionality, asserting that *any* reporting done immediately before the campaign period is essentially a campaign activity, and Article 111 gives the incumbents a longer campaign period, depriving the challengers of equal opportunity in election campaign.

8. *Motion Pictures Pre-Inspection* case, 8-2 KCCR 212, 93Hun-Ka13, etc., October 4, 1996

A. Background of the Case

This decision struck down pre-inspection by the Public Performance Ethics Committee ("the Ethics Committee") provided under Article 12 of the former Motion Picture Act (hereafter "MPA") as being violative of the constitutional ban on censorship.

Article 12 (1) and (2), Article 13 (1), and Article 32 (v) of the old MPA (repealed by Act No. 5129 [the Promotion of Motion Pictures Industry Act] on December 30, 1995) require all motion pictures to be evaluated by the Ethics Committee before showing. The failure to do so is punishable by imprisonment of up to two years or a fine up to five million won.

Article 21 (1) of the Constitution stipulates "every citizen shall have the freedom of speech and of press as well as that of assembly and association," providing general protection for freedom of expression. The second part of the same Article bans censorship or licensing of the speech and press, and licensing of assembly and association. The ban on censorship was first introduced to the Constitution in the proviso of Article 28 (2) of the Second Republic's Constitution, and was also declared by the Third Republic's, although exceptions for motion pictures and entertainment were allowed. The Fourth and Fifth Republic did not separately provide for the ban, but the present Constitution does and does so without any exception. Regardless of explicit provisions in the Constitution, the ban on censorship forms the essential content of freedom of press in a democratic constitution. Nevertheless, lack of full appreciation of the constitutional value of freedom of press led to a number of laws allowing censorship on various forms of media, and has continued to do so even after the present Constitution took effect on 1998.

The combined cases, 93Hun-Ka13 and 91Hun-Ba10, arose out of motions for constitutional review by the claimants who were brought to the Seoul District Criminal Court for violating the MPA by showing *Opening the Closed Gate to the School* in 1992 and *Oh, Country of Dream* in 1989 respectively without pre-inspection of the Ethics Committee. The first claimant made the motion when prosecuted, and the court accepted, referring the case to the Court for review. The second, already convicted and imposed a one million won fine, made the motion in appeal of that conviction, but was denied. Accordingly, they filed a constitutional complaint with the Court.[46]

46). *Opening the Closed Gate to the School* is about teachers fired for joining the then outlawed teachers' union, and *Oh, Country of Dream* about the May 18 Kwangju Democracy Movement.

B. Summary of the Decision

The Court struck down the requirement of pre-inspection by the Ethics Committee provided in Article 12 (1), (2) and Article 13 (1) of the former Motion Picture Act after mentioning the constitutional protection of motion pictures and the principle of prohibition of censorship.

A motion picture is a form of expression, and its production and showing should be protected by the Article 21 (1) freedom of speech and press. It is protected also under the Article 22 (1) freedom of Science and arts since it is often used as means to publish the results of academic research or as a form of art.

Censorship, forbidden by Article 21 (2), is an administrative authority's act of deliberating on the contents of an idea or opinion and suppressing it from being published on the basis of its contents - in other words, a ban on publication of the unlicensed material. Censorship debilitates originality and creativity of people's artistic activities and poses a grievous danger to their mental functions and may suppress in advance the ideas adverse to the government or the ruler, leaving at large only the opinions controlled by the government or innocuous ideas to it.

Compared to Article 37 (2) that allows all liberties and rights of the people to be limited by means of statute for reason of national security, public order or public welfare, Article 21 (2) stands for prohibition of censorship as a means at all, even if in form of a statute, when freedom of press and publication is at stake. However, unconstitutional censorship is only a system of pre-inspection conducted by an administrative body with complete control on whether a material can be published or not, based on compulsory submission and supported by a mechanism enforcing the ban in the event that it is not licensed.

The MPA subjects all motion pictures to pre-inspection of the Ethics Committee (Article 12 (1)), which is commissioned by the Minister of Culture and Sports (Article 25-3 (3)), reports the inspection results to the Minster through its Chairperson, is funded from the government budget to support the operation of the Committee (Article 25-3 (6)), and therefore is an administrative body for all practical purposes. The Act finally prohibits showing of any unlicensed picture (Article 12 (2)) upon penalty of imprisonment or fine, meeting all the elements of censorship forbidden by the Constitution.

C. Aftermath of the Case

On October 31, 1996, about a month after this case, the Court issued another decision of unconstitutionality in the *Phonograph Pre-Inspection* case (CC 94Hun-Ka6), a case with practically the same constitutional controversy. This case arose out of motion for constitutional review by a singer being prosecuted and tried at the Seoul District Criminal Court for having produced and distributed uninspected records. The court referred this challenge to the Sound Records and Video Products Act (before it was revised by Act No. 5016, on December 6, 1995) to the Court, which struck it down unanimously for the same reason as in the MPA case.

These two decisions divided public opinion. Many in the cultural fields including motion pictures enthusiastically welcomed them as revolutionary, strengthening freedom of art and press, and others criticized them as removal of all the means of regulating obscene materials and therefore as effectively permitting obscenity. The debates focused on interpretation of the Court's rationale. As long as the Ethics Committee does not discolor itself as a governmental entity, it was argued, the Committee can only rate an obscene material and cannot edit it or withhold from it a seal of inspection. So, it was debated whether we needed to designate theaters for showing obscene materials in order to protect juveniles.

The debate manifested itself in a deadlock in the Culture, Sports, and Public Information Committee of the National Assembly deliberating on revision of the Promotion of Motion Pictures Industry Act around the time of this decision in late 1996. The opposition party advocated purely rating the pictures and allowing those rated 'limited showing permitted' to be shown in adult theaters. The ruling party advocated for suspending showing of those pictures rated 'off-the-rating'.[47] The revised Promotion of Motion Pictures Industry Act, mainly reflecting the ruling party's position, was passed on April 10, 1997 and took effect on October 10, 1997.

The outlines of the revised PMPIA are as follows: The pre-inspection system was replaced by a four-tier rating system by which pictures can be shown to all or only to those above 12, 15 or 18 years in age, depending on the rating, or can be deferred for rating in six months (Article 12 (5)). The Ethics Committee changed its name to

47). Note that under the ruling party's system, the reviewing administrative agency can effectively censor materials by classifying them as 'off-the-rating.' The difference with the previous law is that the unlicensed material is resubmitted after six months of the 'off-the-rating' decision, giving the makers of the picture a chance to *sanitize* voluntarily.

the Korean Council for Promotion of Performance Arts which then did the rating (Article 12). In order to make the rating effective, the Minister of Culture and Sports was authorized to ban or suspend the showing of unrated pictures, pictures with fraudulently obtained or altered rate, or pictures shown in violation of the rating (Article 18) and to impose on the violators the penalties including suspension of business (Article 18-2) or civil fines up to 100 million won (Article 35 (1) (viii)). One could file an objection with the Council to rating or postponement within 60 days of the decision (Article 13-2).

9. Case on *Registration Revocation of Obscenity Publishers*, 10-1 KCCR 327, 95Hun-Ka16, April 30, 1998

A. Background of the Case

This case reviewed constitutionality of a statute authorizing revocation of a publisher's registration for publishing obscene or indecent materials, and for the first time drew a boundary of permissible sexual expressions. It also upheld revocation of registration for obscenities and struck down the same for indecencies.

Article 5-2 (v) of the Registration of Publishing Companies and revoke the publisher's registration when it is proven that he or she has published obscene or indecent materials or cartoons harmful to children, thereby undermining public customs or social ethics.

The Seocho District Office of City of Seoul revoked registration of the petitioner under the name Jongin Enterprise Publishing for publishing and distributing the so-called 'Semi-Girl' photo binder ("nine actress semi-girls nice photographs"). The petitioner sought judicial review of the revocation at the Seoul High Court whereupon he made a motion for constitutional review under Article 21 (1) (freedom of press), and with Article 11 (equality) of the Constitution. The High Court referred the case to the Constitutional Court.

B. Summary of the Decision

The Court, after reviewing the scope of protection under freedom of speech and press and publication in light of the theory of free market of ideas, upheld the portion of the Registration of Publishing Companies and Printing Offices Act Article 5-2 (v) concerning 'obscene materials' and struck down the portion concerning 'indecent materials.'

Regulation of speech and press to cure and prevent the ills thereof is necessary and reasonable, but is secondary to the primary regulatory mechanism inherent in civil society, that is, competition of ideas. If the ills of malignant speech and press can be cured through competition with conflicting ideas and opinions within civil society, state intervention should be limited to the minimum.

However, if the harm cannot, by nature, be cured even by the self-cleansing mechanism of civil society or its magnitude is too great to await countervailing ideas and expressions, state intervention is permitted as the primary and freedom of speech and press not protected.

'Obscenity' is a naked and unabashed sexual expression which distorts human dignity or humanity; it appeals only to the prurient interest, has overall no literary artistic, scientific or political value, degrades the sound sexual ethics of the society, and causes harms not dissolvable in the mechanism of competition of ideas. Stringently defined, obscenity is not protected under freedom of speech and press.

The definition of obscenity in Article 5-2 (v) of the Registration of Publishing Companies and Printing Offices Act provides an appropriate standard both for the person subject to the law and the person enforcing it. It is hardly likely to change in meaning due to the individual flavors of the person applying the law, and therefore does not violate the rule of clarity. Revocation of registration may chill publication and supply of even constitutionally protected publications. But, considering the reality of the chain of supply of obscenities, the actual working of the revocation system, and the devices designed to minimize the effects on constitutional materials, the impairment of the basic rights is not severe whereas the public interest and the need for banning and suppressing obscene publications is overwhelming. The provision does not violate the prohibition of excessive restriction.

In the mean time, 'indecency' is a sexual or violent and cruel expression, a swearing, or other expressions of vulgar and base content, not reaching the level of obscenity and remaining within the domain protected by the Constitution. The concept of 'indecency' justifying revocation of registration is so broad and abstract that a judge's supplementary interpretation cannot sharpen its meaning, and therefore does not inform a publisher's decision in adjusting the contents of the material, violating the rule of clarity and the rule against overbreadth. Corrupt sexual expressions or overly violent and cruel expressions do need be regulated away from the minds of juveniles,

but such regulation should be limited to only juveniles and only such narrowly defined means as blocking the chain of supply to them. Totally banning indecent materials and revoking registration of the publisher is excessive as a means for juvenile protection, and debases adults' right to know to the level of a juvenile's, violating the rule against excessive restriction.

C. Aftermath of the Case

Through this decision, the registration of a publisher of indecent materials was no longer revocable while that of obscene materials was. The administrative authorities had revoked in the past simply citing obscenity and indecency together but now had to differentiate between the two and had to apply the definition of obscenity formulated by the Constitutional Court. Of course, the judiciary remained the ultimate authority on obscenity of a particular material.

The High Court in the original case (Seoul High Court 95Gu6078) found the 'Semi-Girl' indecent and rehabilitated registration of its publisher.

10. *Solicitation Ban* case, 10-1 KCCR 541, 96Hun-Ka5, May 28, 1998

A. Background of the Case

In this case, the Court struck down, as being violative of right to pursue happiness, the old Prohibition on Soliciting Contributions Act (PSCA) and its Article 3, which left approval of soliciting activities to the discretion of administrative agencies, and limited the permissible purposes of solicitation, thereby in principle banning solicitation altogether.

Article 3 of PSCA (revised to the Regulation on Soliciting Contributions Act on Dec. 30, 1995 through Act No. 5126) banned solicitation of contributions in principle and provided a number of exceptions that could be applied upon approval of the Contribution Evaluation Committee.[48] Article 11 of PSCA punishes unapproved solicitation with imprisonment of up to three years or a fine up to two million won.

The claimant was prosecuted in the Seoul District Court on

48). The approval of the Contribution Evaluation Committee can be sought only by the Mayor of the City.

charges including a violation of the Labor Disputes Adjustment Act and solicitation of contributions without obtaining approval of the Mayor of Seoul in contravention of Article 3, 11 of PSCA. Upon his motion challenging the constitutionality of Article 3 of PSCA, the Seoul District Court applied to the Constitutional Court for the constitutional review of the statute.

B. Summary of the Decision

The Court decided that Article 3, 11 of PSCA excessively limits people's right to pursue happiness as follows:

The right to pursue happiness provided by Article 10 of the Constitution includes, as its concrete manifestation, a general freedom of action and a right to freely develop personality. The act of soliciting contributions are protected thereunder.

License by an administrative authority does not establish a new right. It restores the basic liberty which was previously restricted for the reason of public interest. Therefore, the procedure of approval should not eliminate the right itself. Anyone who meets all the substantive requirements for approval should be given the right to request that the ban be lifted, which has become only formal by now. Article 3 of PSCA, while specifying the conditions under which approval *can* be given by an administrative body, leaves the ultimate decision to the sole discretion of the body without specifying when the approval *shall* be given. It does not provide for one's right to request approval upon satisfying all the requirements, and therefore infringes on the basic right (right to persue happiness).

Limitations on basic rights can restrict the permissible means of exercising the right or be applied to the question of permission itself. In order to minimize the extent of restriction of basic rights, the legislature should first consider using the means restriction, and resort to a complete ban only when it is found to be insufficient for accomplishing the targeted public interest. The Article 3 limitation on the scope of permissible purpose for solicitation is not a means restriction, and operates on the level of whether or not to allow exercise of the basic right at all. Property rights and stable livelihoods can be sufficiently secured by a restriction on the process and method of solicitation and the use of the collected funds that is less than the limitation on its purposes. Article 3 and its penalty provisions in Article 11 exceed the scope necessary for accomplishment of the legislative intent in restricting basic rights.

C. Aftermath of the Case

Elimination of the general ban on solicitation in this case represents the Court's acknowledgment of the changes that have taken place since the time of enactment in 1951. Since then, people have drastically improved their standards of living and have matured into democratic citizens who make decisions on and responsibly conduct their lives in the community on the basis of the views of life and society of their own choosing. The decision expanded the opportunities for people to actively participate in recreation of the society, and thereby achieve self-realization, through the acts of donation.

In particular, given the importance of funding foundation, operation, and activities of an organization through solicitation, the decision may be said to have indirectly contributed to substantive protection of freedom of association.

When the Prohibition on Soliciting Contributions Act was amended into the Regulation on Soliciting Contributions Act on December 30, 1995, before the decision was announced, the new law stated a set of legislative purposes different from that of the old law in Article 1(Intent), and restricted the methods of solicitation in Article 6, seq. However, the new law inherited the danger of being unconstitutional from the old law because it still limited the permissible purposes of solicitation to four categories (Article 4 (2)).

III. Decisions Concerning Politics and Elections

1. *Local Government Election Postponement* case, 6-2 KCCR 176, 92Hun-Ma126, August 31, 1994

A. Background of the Case

This case would have questioned unconstitutionality of the presidential measures postponing the first local government heads election ever in our history; but was dismissed because a statute was enacted during the review to justify the postponement, eliminating the justiciable interests.

The National Assembly revised the Local Autonomy Act on the basis of Article 118 (2) of the Constitution and set the date of the first election of local government heads as December 30, 1991 (1989. 12.30. Act No. 4162) and later revised again to change the date to December 30, 1992 or earlier (1990.12.30. Act No. 4310).

Then, when some members of the media and business advocated further postponement, citing the likelihood of economic instability and social confusion accompanying the election, the respondent President Roh Tae-woo announced at the 1992 New Year Conference that he postponed the election to 1995 or later, and that he would discuss the appropriateness of this action at the 14th National Assembly.

Afterwards, 14th National Assembly Election was held on March 24, 1992. Because a preliminary negotiation on whether to conduct the local government heads election stalled, the 14th National Assembly did not even open its regular session. In the meantime, the Administration submitted to the Assembly a bill postponing the election to June 30, 1995 or later, and passed the June 12, 1992 statutory deadline to announce the date of the election.

At that point, fifty nine petitioners who were planning to run or vote in elementary or regional local government heads election filed a constitutional complaint claiming that their right to vote and to hold public offices (right to be elected) was violated when the government failed to announce the date of the election by June 12, 1992, as required by the then effective statutes, *i.e.* the Local Autonomy Act (amended by Act No. 4741 on March 16, 1994) Supplement Article 2 (2), the Election of the Heads of Local Governments Act (repealed by Act No. 4739 on March 16, 1994) Article 95 (3) and its Supplement Article 6.

At the same time, a group of other complainants composed of individuals and political organizations like the Reunification National Party also filed complaints challenging the non-announcement of the date of election, and the postponement of or the omission to hold the election (92Hun-Ma122, 92Hun-Ma152, 92Hun-Ma174, 92Hun-Ma178, 92Hun-Ma184).

B. Summary of the Decision

The Court dismissed the case on the grounds that the changes in the relevant statutes during their constitutional review extinguished the legally protected interests related to the postponement of the local government heads election.

While the case was pending, the National Assembly set up the Political Relations Laws Special Review Committee and sought to remedy the omission politically. On March 4, 1994, the Plenary Session of the National Assembly passed the Act on the Election of Public Officials and the Prevention of Election Malpractices Act as well as the revisions to the Local Autonomy Act and the Political

Fund Act on a bipartisan agreement. The respondent signed them into effect on March 16. The amended Local Autonomy Act specified the postponement to June 30, 1995 or earlier in its Supplement 2. The new Act on the Election of Public Officials and the Prevention of Election Malpractices Act abolished advance announcing of election dates and instead fixed them statutorily (Articles 34 or 36, Supplement Article 2 and 7 (1)). As a result, the state of the respondent's violation of the old law by failing to announce the date of election was extinguished (by revision of that law).

However, even if the changes in law or fact during the review extinguished legally protectable interests, a justiciable interest would be exceptionally recognized for those violations of basic rights that are likely to repeat or for those disputes, resolution of which are vital to defense of the constitutional order. The repeatability is not an abstract or theoretical possibility but a concrete and real possibility (89 Hun-Ma 181, July 8, 1991; 92 Hun-Ma 98, March 11, 1993; 91 Hun-Ma 137, July 29, 1994). The importance of constitutional resolution means a lasting constitutional importance. In this case, advance announcements are abolished and election dates are statutorily fixed; therefore, there is neither repeatability of no-announcements nor importance of constitutional clarification. Hence no justiciable interest.

Justices Cho Kyu-kwang, Kim Chin-woo, Choe Kwang-ryool, and Lee Jae-hwa added their concurring opinions as follows: since Article 118 (2) of the Constitution leaves the methods of selecting local Government heads to statutes, and therefore, does not commit itself to direct election, rights to vote and run in local government heads elections are merely those rights created by statutes (Justices Cho Kyu-kwang and Kim Chin-woo). The respondent's duty to announce the election date is also defined statutorily by the former Local Autonomy Act and the former Election of the Heads of Local Governments Act and not is a constitutional duty. Therefore, when they filed the complaint before the date of election, before they had constitutional right to demand an election, the complainants did not satisfy the legal prerequisites to complain of unconstitutional omission (Justices Choe Kwang-ryool and Lee Jae-hwa).

Justices Byun Jeong-soo and Kim Yang-kyun dissented as follows: it can easily be derived from Articles 24, 25 and 118 (2) of the Constitution and the essence of local autonomy that the representative of a local government should be elected by the willing support of the locals. Therefore it is a constitutionally guaranteed basic right. The respondent's duty to enforce the statute[49] is also pursuant to Articles 66 (4), 69 and 118 (2) and the complainants'

right to run and vote in elections are subjective rights. The complainants had right to demand the election at the time they did. Furthermore, the prerequisite repeatability of the same violations should be measured by repeatability of the president's disruption of the legal order or failure to discharge his statutory duty. Also, the importance of constitutional resolution is immediately recognized upon a showing of possibility of basic rights violations. The complaint met the justiciability requirements.

C. Aftermath of the Case

Some in the press criticized the decision for its tardiness - the fact that it took two years and two months only to get a dismissal.

However, when the complaint was filed, the Court, while seriously examining the constitutional issues involved in it, awaited an appropriate resolution to be reached in the National Assembly in consideration of its polity-making privilege and role. The National Assembly answered the call by forming the Special Committee as mentioned above, arranging the timing of the election through a series of negotiations and adjustments, and thereby producing a revised statute that provided for the election on June 27, 1995. Hence was the significance of the decision.

After such a process, the first local government heads election ever in our history took place on June 27, 1995 where the fifteen heads of regional local governments and two hundred thirty heads of elementary local governments were directly elected.

2. *December 12 Incident Non-institution of Prosecution* case, 7-1 KCCR 15, 94Hun-Ma246, January 20, 1995

A. Background of the Case

In this case, the Court dismissed in part and rejected in part a constitutional complaint challenging the Public Prosecutor's Office's decision not to prosecute Chun Doo-hwan, Roh Tae-woo, other members of the military junta for their involvement in the December 12 Incident. After the assassination of President Park Cheong-hi by Kim Chae-kyu, then the director of the Korean Central Intelligence Agency, left a vacuum in the executive power on October 26, 1979,

49). By announcing the date of election as required by the statute and proceeding to conduct the election.

the new military power arrested Martial Law Commander-in-chief Chung Sung-hwa and other military leaders, took control of the military, and practically took over the control of the state.

After the December 12 Incident, Chun Doo-hwan served as the president of the 5th Republic for seven years five months and twenty four days from September 1, 1980, to February 24, 1988. Roh Tae-woo succeeded him immediately and served as the president of the 6th Republic for five years until February 24, 1993. The Kim Yeong-sam government which took office in February of 1993 characterized the December 12 Incident as a 'military coup d'etat' but allowed that the past must be left to history itself to be judged. After the main actors of the incident left the power, Chung Sung-hwa and thirty two other victims filed a complaint accusing Chun Doo-hwan, Roh Tae-woo and thirty four others of treason and insurrection on July 29, 1993.

The Seoul District Public Prosecutor's Office (hereafter "the Prosecutor's Office") disposed of all eight complaints and reports including the ones on non-institution of prosecution decisions on October 29, 1994. On the charge of treason, the Prosecutor's Office found no suspicion because the new military junta took control only of the military, leaving in tact the constitutional institutions such as the President and the Prime Minister, and did not conspire to disrupt the national constitutional order. On the charge of mutiny, it did find sufficient facts for a finding of suspicion but exempted prosecution in consideration of various extenuating circumstances.

The complainants appealed and reappealed the decisions of the Prosecutor's Office, and when they were all denied, filed a constitutional complaint on November 24, 1994.

B. Summary of the Decision

The Court first considered whether the period of limitation for a charge of treason was suspended during the presidents' tenure, and dismissed the complaint relating to that charge, finding that the period ran out. The Court then found that the rest of the complaint satisfied the legal prerequisites for review, but denied relief on the grounds that the prosecutor's decision was not arbitrary.

Article 84 of the Constitution stipulates "the President shall not be prosecuted during the term except on crimes of treason internal or external." Since it allows prosecution of the President during his term, the statute of limitation was not suspended. It suspends the statute for mutiny, however, since it does not allow prosecution for

mutiny. The Constitution only seeks to allow the President to perform his duties smoothly during his term by barring criminal prosecution, but does not grant him a personal immunity for his criminal acts. If accrual of the statute is not suspended during the term of office, President will enjoy expiration of statutes on most crimes committed during or before the term, a privilege not granted to ordinary people. Such result contravenes justice and fairness.

In the end, since the statute expired on December 11, 1994 for the charge of treason, the constitutional complaint on non-institution of prosecution on that charge lacks legally protectable interests. However, the periods of limitation for prosecution on mutiny against the accused Chun Doo-hwan was suspended during his term of presidency for seven years five months and twenty four days, and a complaint on non-institution of prosecution in that respect has met the legal prerequisites.

As to the Prosecutor's Office's exemption of prosecution on mutiny, the accused used military force and mobilized the troops illegally to take over the military command, causing casualties. Such insubordination frustrated and humiliated the people of the nation and left stains of distortion and regression in our constitutional history. But, the accused has neither admitted nor apologized for their wrongdoings to the complainants who were the direct victims, or to the people, the ultimate victims of their acts. These facts support prosecution. However, it cannot be denied that the suspects have led the country in pivotal roles, as presidents, aides to the president, or assemblypersons in the past ten or so years. Whether to a small or large extent, whether to our liking or not, the order established during that time became an integral part of our history and formed the foundation of the present political, economical, and social order. The key player Chun Doo-hwan already resigned from the office, and Roh Tae-woo was elected by the people themselves. The crimes were also dealt with once through the so-called Fifth Republic Corruption Hearing at the National Assembly. These facts justify exemption of prosecution.

Balancing between the two countervailing set of facts does not produce an objectively clear precedence for either, and we cannot find the Prosecution's decision arbitrary.

Justices Kim Moon-hee and Hwang Do-yun dissented, arguing that Article 84 of the Constitution is not an explicit provision suspending the period of limitation, and that its running against the crimes committed by the president is not suspended during his term of office. Justices Cho Seung-hyung and Koh Joong-suk also dis-

sented, arguing that the decision of the Prosecutor's Office to exempt prosecution goes beyond the rational scope of the prosecution's discretion, and should be cancelled.

C. Aftermath of the Case

The Court was asked to decide this case fourteen years after the December 12 Incident and after the new military junta, which had taken over the power, had ruled the country and left the power. The victims' complaint challenging the non-institution of prosecution decisions led to legal evaluation of the historical incident. In allowing constitutional evaluation of the method of obtaining power, it reminded all of the importance of constitutional complaint on non-institution of prosecution decisions.

The decision of this Court received mixed reviews from people with different interests in it. However, the holding that the statute is suspended for the crimes committed by the president during his term, except for the crime of internal or external treason, has import from the perspectives of the rule of law.

The decision included a premonition that the statute of limitation for mutiny will expire for the two former presidents, Chun Doo-hwan and Roh Tae-woo around the year 2002, leaving a cinder for further legal battles. It also led to a challenge against the non-institution of prosecution decisions on the May 18th Incident; prompted enactment of the Special Act on the May Democratization Movement, etc.; and influenced the Court's decision on its constitutionality.

3. *May 18 Incident Non-institution of Prosecution Decision* case, 7-2 KCCR 697, 95Hun-Ma221, etc., December 15, 1995

A. Background of the Case

In this case, the Court reviewed a constitutional complaint against the prosecutor's decision not to prosecute the violent suppression of the Kwangju Democratization Movement on May 18, 1980. Although the Court did not announce its review on the merits because the complainants withdrew the complaint right before the announcement of the final decision, prompting the Court to declare the case closed, it made an important statement that a successful coup det'at is subject to criminal prosecution.

This case arose out of three different criminal complaints against the main actors of the May 18 Incident. The first one was filed by the victims of the violent suppression, charging treason, murder with treasonous intent, and mutiny against Chun Doo-hwan and twenty four other major figures in the military junta (95Hun-Ma221, filed on May 13, 1994). The second one was filed by Kim Dae-jung and others victimized by the fabricated charges of treasonous conspiracy, charging treason, attempted murder with treasonous intent, and mutiny against Chun Doo-hwan and ten others (95Hun-Ma233, filed on October 19, 1994). The third one was filed by others, charging treason and mutiny against Chun Doo-hwan and thirty five others (95 Hun-Ma297).[50]

The Seoul District Public Prosecutor's Office, after investigating the complaints, decided not to prosecute the accused Chun Doo-hwan and all others named in seventy complaints in all, including the above mentioned, on July 18, 1995 on the ground that the accused succeeded in the coup and formed a new constitutional order. He reasoned that such successful coup is not subject to judicial review and leaves the prosecutor himself without a power to prosecute. Consequently, the complainants filed a constitutional complaint in order to nullify the Prosecutor's decision not to prosecute for reason that it was arbitrary exercise of his prosecutorial power.

B. Procedural History

This Court began the review, confronting the social and political demands raised since the launching of the Kim Yeong-sam Administration to punish those involved in the May 18 Incident, one of the tragedies in Korean modern history.

Since the non-institution of prosecution decisions were made very close to or after the expiration of periods of limitations for the May 18 treason[51], the Court had a very limited amount of time to not only rule on the arbitrariness and but decide on the difficult penal, constitutional, legal-philosophical problems concerning a successful coup.

---

50). A charge of treason arises out of the fact that the military junta finally forced the then President Choi Kyu-hah to step down on August 16, 1980 after having taken over the *de facto* power through the December 12 coup in the previous year.

51). The Court had held that the fifteen-years statute for treason arising out of the December 12, 1979 coup expired on December 11, 1994. Therefore, the statute for treason arising out of the May 18, 1980 coup was expected to expire on May 17, 1995. Note that the charges by the May 18 victims were filed on May 13, 1994 and they were dismissed by the prosecutor on July 18, 1995, well past the expected expiration date.

Also, the *Non-institution of Prosecution* on *December 12 Incident* decision prompted many to extrapolate that the statute expired also on treason of the May 18 Incident and to advocate for enactment of a special law that makes punishment for the May 18 Incident possible. The political circles were preoccupied with the proposed special law.

During the review, a large amount of the former President Roh's slush fund hidden in bank accounts was exposed. Amidst the ensuing public demand that the May 18 Incident perpetrators should be prosecuted, the Public Prosecutor's Office arrested Roh on the charge of forming a slush fund on November 16, 1995, giving further impetus to the demand for the special law. Just a few days before the Court was to issue its decision, President Kim Yeong-sam finally announced his plan of Refounding the Korean History, and on the 24th of the same month, he announced the plan to enact the special law. At that point, a draft copy of the Court's decision was leaked to the press before the announcement planned for the 30th of that month. It was reported that the Court, while holding that a successful coup is subject to criminal prosecution, calculated the period of limitation to run from President Choi Kyu-hah's abdication on August 16, 1980 and expire on August 15, 1995. The complainants withdrew their complaints, afraid that the Court's proposed decision on expiration of statute could cast a question on the proposed Special Law pending in the National Assembly for being retroactive, and therefore, render it unconstitutional.

C. Summary of the Decision

The majority of five justices declared the case closed upon the complainants' withdrawal pursuant to Article 40 of the Constitutional Court Act interpreted in light of Article 239 of the Civil Procedure Act, forming the Court's opinion.

Justices Shin Chang-on, Kim Chin-woo, Lee Jae-hwa and Cho Seung-hyung posited that the Court could proceed to a final ruling even if the complainants had withdrawn.

Justice Shin emphasized the objective function of the constitutional complaint process and opined that the Court should publish the opinion as the Justices have previously agreed.

Justices Kim Chin-woo, Lee Jae-hwa and Cho Seung-hyung reasoned that, if the complainants withdraw, the case should be closed with respect to its *subjective* portion, namely giving relief to claims of rights. But, the objective function of the constitutional complaint process demands that it should continue on to a final

decision with respect to those issues resolution of which are vital to defense of the constitutional order, if there are such issues. In this case, the question of punishability of a successful coup calls for a constitutional answer because it affects the fate of this nation and the basic rights of all people, and demands a final decision irrespective of the complainants' withdrawal.

Before the withdrawal, a super-majority of the justices had agreed that a successful coup is punishable during the deliberation. The new majority that declared the case closed acquiesced with the minority's publication of a part of the previously agreed-upon final decision, while leaving out the part about expiration of the statute. Thusly, the justices' prevailing view in the deliberation room saw the light of the day: a successful coup is punishable. The following is the summary of the opinion of the three Justices who were in the minority:

The constitutional order protected by penalties against treason is one based on people's sovereignty and the basic order of free democracy, not the incumbent power or the order maintained by it. In addition, Article 84 of the Constitution, which stipulates "the President shall not be prosecuted during the term except on crimes of treason internal or external," stands as an unequivocal expression of a constitutional resolve that treason can be punished at all times regardless of its outcome. Therefore, even if a successful coup makes it practically impossible to punish the perpetrators during their incumbency, they can always be punished whenever the constitutional institutions recover their proper function and thereby regain *de facto* power to punish them. However, if treasonous activities were the means to create a democratic civil state and to restore the people's sovereignty previously suppressed and excluded under a feudal monarchy or despotism, they can be justified before or after the fact by the will of all the people. Therefore, a successful treason becomes not punishable under the exceptional circumstances that the people have ratified it through free expressions of their sovereign wills.

In this case, the treasonous acts of the two former Presidents were neither justified by the circumstances nor were ratified by free expressions of the people (denying legitimacy of the treasonous government does not mean denying the legal effects of all of its acts). The prosecutor's non-institution of prosecution decision for reason of immunity of a successful coup engenders misunderstanding of the ideals of the Constitution and the criminal jurisprudence of treason.

D. Aftermath of the Case

In unfurling its logic about the punishability of a successful coup, the Court made a finding that it is practically difficult to prosecute in mid-term a president who has come to power through a treason. This finding supports the legislative intent of the special law that suspended accrual of the statute during the terms of Chun and Roh.

The press interpreted that the Court borrowed a minority opinion to disclose the prevailing view in its original deliberation (i.e., a successful coup is punishable) while closing the case through its majority ruling, and thereby dodged the issue of expiration of the statute while precluding the possibility of a similar debate in the future.

4. The *Special Act on the May Democratization Movement,* etc. case, 8-1 KCCR 51, 96Hun-Ka2, etc., February 16, 1996

A. Background of the Case

In this case, the Court upheld Article 2 of the Special Act on the May Democratization Movement, etc. (hereafter, the May 18 Act) that suspended the statute of limitations for the leaders of the December 12 Incident and the May 18 Incident in order to punish the "criminals (for their acts) against the constitutional order."

Article 2 (1) of the May 18 Act provided that "in applying Article 2 of the Act on Special Cases concerning the prescription for public prosecution etc. against Crimes Disrupting Constitutional Order, accrual of the period is hereby considered having been suspended during the time of disability of prosecution power for the crimes that took place around December 12, 1979, and May 18, 1980." Item (2) of the Article then states that "the period of disability of prosecution power is hereby determined to be the period from the completion of the crime and February 4, 1993."

The civilian government that took office in February 1993 drove Chun and Roh, the leaders of the December 12 Mutiny and the May 18 Treason, and their followers out of power, and newly defined the December 12 incident as a coup d'état. President Kim Yeong-sam was initially satisfied with leaving judgement on these incidents to the history; but Roh's slush fund incident became the turning point

whereby he had to yield to the demands of the academia, dissident leaders, citizens' organizations and student activists. Subsequently, Kim announced the plan to enact the special law.

Shortly after the May 18 Act was enacted and promulgated on December 21, 1995, the Seoul District Public Prosecutor's Office re-opened the cases against all the suspects in the two incidents, which they had previously closed by non-institution of prosecution. The office then applied for warrants for the suspects' arrest at the Seoul District Court on the suspicion of major involvement in the December 12 mutiny[52] and the May 18 treason.

On the date of the applications for warrants, the accused argued that suspension of the period of limitation in Article 2 of the May 18 Act constitutes an *ex post facto* law prohibited by Article 13 (1) of the Constitution, and motioned for constitutional review. The presiding court granted the motion in relation to the December 12 mutiny and referred the case to the Constitutional Court (96Hun-Ka 2). However, it denied the motion in relation to the May 18 treason on grounds that the period of limitations had not expired (even without the new law - Trans.) and therefore the new law does not form the premise of the trial on application for arrest warrants[53]. The complainants then filed a 68 (2) complaint before the Constitutional Court (96Hun-Ba7, 96Hun-Ba13).

B. Summary of the Decision

All justices agreed that the May 18 Act is constitutional if the period of limitations had not expired at the time of enactment. Four justices, Kim Chin-woo, Lee Jae-hwa, Cho Seung-hyung, and Chung Kyung-sik, stated that they would still uphold it even if the period

52). Remember that, in the earlier *December 12 Non-institution of Prosecution Decision* case, the Court merely ruled that the prosecutor's exemption of prosecution was not arbitrary, and therefore did not bar the prosecutor from subsequently prosecuting the perpetrators. More importantly, the Court in that decision had ruled that the statute for mutiny was suspended during the presidential terms of the perpetrator and therefore was to expire in 2002.

53). The presiding court's position is diametrically opposed to the Constitutional Court's earlier *December 12 non-institution of prosecution* decision and the unannounced majority view in the *May 18 non-institution of prosecution* case in which the statute for the December 12 mutiny was deemed suspended during the perpetrator's presidential terms while the statute for the May 18 treason was deemed to have run and expired. The presiding court explained that it is treason, not mutiny, that poses a greater threat to the constitutional order, and therefore should be entitled to suspension of statute. At any rate, the complainants challenged the presiding court's decision on the May 18 treason through a constitutional complaint, anyway. Therefore, the Constitutional Court faces retroactivity challenges on both the December 12 mutiny and the May 18 treason.

had expired at the time of enactment. Five other justices, Kim Yong-joon, Kim Moon-hee, Hwang Do-yun, Koh Joong-suk, and Shin Chang-on, stated that they would find it unconstitutional to a limited extent in that case. Because there were not sufficient votes for a decision of unconstitutionality as required by Article 23 (2) (i) of the Constitutional Court Act, it was held constitutional.

Case-specific legislation is prohibited. The May 18 Act makes clear at the time of enactment that it applies only to the December 12 Incident and the May 18 Incident; it thereby limits range of people that it applies to, and therefore can be said to be a case-specific legislation. However, the rule against case-specific legislation is meant to require the legislature to abide by the principle of equality. A case-specific legislation is not inherently unconstitutional. It can be constitutional if its discriminatory provisions can be justified with reasonable cause. The discrimination against the accused in the May 18 Act can be justified in light of the illegalities they committed in coming to power and also in consideration of the mandate of 'rectifying the past' and starting us on the right path of constitutional history. The case-specific legislation here is constitutional.

Ex post facto criminal law is prohibited. The issue is whether the provision here merely deduces from the preexisting laws another reason for suspension of the period of limitation and affirms it (a *declaratory* statute) or it creates a new reason for suspension and therefore constitutes a retroactive legislation (a *formative* statute).

Justices Kim Yong-joon, Chung Kyung-sik, Koh Joong-suk, and Shin Chang-on stated that the statute of limitation does not have a constitutional origin but rather, is based on statutes, and its interpretation is exclusively up to the ordinary courts. Therefore, deciding whether the provision is a declaratory statute or a formative statute is up to the ordinary courts. They held that the constitutionality of the provision can be questioned if the ordinary courts find the statute formative. Justices Kim Chin-woo, Lee Jae-hwa, Cho Seung-hyung reasoned that the period of limitation accrues only when there are no legal or systemic obstacles to the exercise of prosecution power by the related agencies. They ruled that, because distortions in the laws and their enforcement constituted disability in exercise of prosecution power, the provision merely affirmed suspension of the period of limitation for certain crimes against constitutional order, against which the prosecution power could not be exercised, and therefore is not retroactive legislation. Justices Kim Moon-hee and Hwang Do-yun ruled that since the provision suspends the period of limitation for all suspects and specifies the time of suspension, it is a retroactive,

formative law.

In the end, the ultimate ruling on constitutionality had to depend on the ordinary courts' statutory interpretation.

First of all, all Justices agreed that, if the ordinary courts find the period of limitation not expired and the provision merely extending it, and therefore *pseudo-retroactive*, the public interest in punishing the crimes against the constitutional order and restoring justice overwhelms the relatively weak interest in expectation in law, and the provision is constitutional.[54]

Contrarily, the Justices differed about the result if the ordinary courts found the period of limitation already expired and therefore the provision genuinely retroactive, giving new effects to the acts or legal relations already completed or formed in the past.

Justices Kim Chin-woo, Lee Jae-hwa, Cho Seung-hyung, and Chung Kyung-sik ruled that, although genuine retroactive legislation is prohibited in principle by the rule of law, it can be allowed exceptionally when protection of the private interest of confidence in the existing status of law cannot be justified in light of the compelling public interest in changing it. They found that the provision pursues the public interest overwhelmingly more important than the protection of expectation interest of the criminals, and deemed it constitutional.

Justices Kim Yong-joon, Kim Moon-hee, Hwang Do-yun, Koh Joong-suk, and Shin Chang-on first posited that, in substantive criminal law, punishment has direct implications on bodily freedom, and therefore, in this area, no public or national interest has precedence over protection of expectation interest and the stability of law. They then reasoned that making a new law to prosecute a crime against which the period of limitation has already expired is equivalent to legislating new elements into a crime that has been already committed. They ruled that such legislation is not permissible under the Article 12 (1) principle of due process and Article 13 (1) prohibition of *ex post facto* criminal punishment. As a result, they held the provision unconstitutional to the limited extent that it applies to the crimes on which the period of limitation had expired before it was enacted.

C. Aftermath of the Case

This decision put an end to the controversy surrounding con-

54). So even the two justices who think that the provision is formative think that it can be justified by the overwhelming public interest.

stitutionality of the provision, and made it possible to issue the arrest warrants for those involved in the December 12 and May 18 incidents including the former presidents Chun and Roh, for whom the issuance had been postponed. Furthermore, because of the holding that the Special Act is constitutional even as retroactive legislation, the ordinary courts could concentrate only on the issue of guilt without worrying about when the period of limitation began to accrue.

The decision was received well by the press. Some criticized that the Court cleverly allocated their votes to point out unconstitutionality of the Special Act while leaving its effects in tact; succeeded only in meeting the political demands while evading the essential questions of law and its duty as the highest authority on the Constitution. Others found the decision too obscure for the lay people to understand.

The Public Prosecutor's Office concluded its investigation of the December 12 and May 18 incidents on February 28, 1996, prosecuted sixteen people including the two former presidents Chun and Roh. On August 26 of that year, the Seoul District Court sentenced Chun to death and Roh to twenty two years and six months in prison. On December 16, the appellate court commuted their sentences to life imprisonment and seventeen years respectively. When the Supreme Court rejected the appeal on April 17, 1997, the two former presidents served time until December 22 of that year when they were released by the presidential amnesty.

5. *National Assembly Candidacy Deposit* case, 1 KCCR 199, 88Hun-Ka6, September 8, 1989

A. Background of the Case

In this case, the Court found non-conforming to the Constitution Articles 33 and 34 of the Election of National Assembly Members Act (hereafter 'the Act') which required the candidates to deposit substantial amounts of money in order to prevent too many candidates from running and ensure a clean election.

Article 33 (1) of the Act (revised by Act No. 4003, March 17, 1988) requires independent candidates to make a deposit of twenty million won to the local Election Commission at the time of registering as a candidate and party nominees to deposit ten million won. Article 34 then forfeits the deposits minus some expenses in the event that the candidate resigns, nullifies his registration, or failures to gain one-third of the effective votes.

A former candidate in a National Assembly election brought a suit to recover his deposit and applied for constitutional review of Articles 33 and 34 of the Act, which formed the premise of the suit, for allegedly violating his right of equality, right to participate in government, and right to hold public offices, guaranteed by the Constitution. The Seoul District Civil Court granted the motion, referring the case to the Constitutional Court.

B. Summary of the Decision

The Court, in the following majority opinion of seven justices, found both Article 33 and Article 34 violating Articles of 11, 24, 25, 41 and 116 of the Constitution, and therefore, nonconforming to the Constitution:

The average amount of savings of the economically active in this country is 6.93 million won. The deposit requirement of ten or twenty million is prohibitive to people of ordinary income or in their twenties' or thirties', and therefore permits only the wealthy to the candidacy. Therefore, it is excessive. They violate the basic principles of people's sovereignty and of free democracy in relation to right of equality (Article 11), right to vote (Article 24) and right to hold public office (Article 25) of the Constitution.

The role of political parties is indispensable to democratic polity. The Constitution does extend special protection to parties. However, the deposit requirement for independent candidates amounting to twice the amount required of party nominees gives the independent candidates substantial competitive disadvantages and suppress their candidacy. Therefore, it violates the principles of equal election (Article 41) and of equality (Article 11) of the Constitution.

Forfeiting the deposits from the candidates who fail to gain one third of the effective votes is too stringent and unprecedented in comparative-legal perspectives. It encroaches upon the principles of election that forms the foundation of a state, and violates Article 116 of the Constitution that prohibits charging the expenses of elections to the candidates. However, having respect for the authority of the legislature and the homogeneity of its membership, the National Assembly must do the revisions themselves; and in the meantime, the Act remains effective until another re-election or by-election. The Court hereby finds the Act non-conforming to the Constitution.

Justice Byun Jeong-soo dissented to the modified form of decision, arguing that the Court can rule only on the issue of constitutionality, and the ruling should become immediately effective; and

the Court cannot arbitrarily decide on the effective periods of its ruling. Justice Kim Chin-woo also dissented, arguing that an unconstitutional statute can remain effective only under exceptional circumstances in which the vacuum in law implicates a threat to national security, and that the Act must be voided on the date of the ruling in this case.

C. Aftermath of the Decision

After this decision, the National Assembly enacted the Act on the Election of Public Officials and the Prevention of Election Malpractices which required a equal deposit of 10 million won from independents and party nominees and relaxed the conditions of forfeiture (Article 56 (1) (i)).

It was reported that the decision put an end to the product of self-serving compromises between the incumbents, and that it would open wide the door of candidacy to the economically disadvantaged, the young in their 20s and 30s and independents for the coming 14th National Assembly Election if it leads to revisions. It was also pointed out that the decision, while eliminating the evils of unequal election, now created a need for preventive measures for unrestrained mushrooming of candidates.

6. *National Seat Succession* case, 6-1 KCCR 415, 92Hun-Ma153, April 28, 1994

A. Background of the Case

In this case, the Court dismissed a suit petitioning the National Election Commission to transfer to the complainant the seat of an assemblyperson who changed his party affiliation after he was elected to that seat as a member from national seats.[55]

The so-called "migratory bird politicians" who change their party affiliation in pursuit of their personal interest after running on the party nominations have been criticized from the perspectives of political ethics, people's sovereignty, and representative democracy.

Reunification National Party earned seven national seats in the

55). According to the national total of his former party's votes – Trans. In Korea, there are regional seats filled up through multi-party elections in regional districts, and national seats distributed among parties according to the national total of their votes and filled up by the parties themselves through internal procedures.

14th National Assembly election conducted on March 24th, 1992. On June 11th of that year, Cho Yun-hyoung, a member from national seats, left the party. The Party requested the Commission to transfer his seat to a successor within the Party. The Commission refused, citing lack of provisions in the old Election of National Assembly Members Act (or the National Assembly Act) that could unseat a member from national seats who left the party that nominated him. The Party brought a constitutional complaint before the Court questioning the constitutionality of the Commission's forbearance.

B. Summary of the Decision

The Court, in the majority opinion of eight justices, dismissed the suit on grounds that a member from national seats formerly affiliated with a certain party does not lose his seat when he defects from that party, and that the Commission does not have a duty to transfer the seat to a successor.

Whether or not a member from national seats defecting from his party leaves his seat vacant depends on the legal relationship between the assemblypersons who are people's representatives and the people who elect them. Article 7 (1) of the Constitution states, "public officials shall be servants of the entire people and shall be responsible to the people." Article 45 also states, "no member of the National Assembly shall be held responsible outside the National Assembly for the opinions officially expressed, or the votes cast, in the Assembly." Article 46 (2) states, "members of the National Assembly shall give the first priority to national interests and shall perform their duties in accordance with their conscience." All these provisions, taken together, put assemblypersons on their own discretion pursuant to the principle of free mandate and, therefore, their membership is not affected by their defection from a party that nominated them to their seats.

Consequently, there is no vacancy, and even if there is, the National Election Commission have not received a notice of vacancy from the Speaker of the House; therefore, the Commission has no duty to transfer the vacant seat to a successor. The complaint does not meet the legal prerequisites.

Justice Kim Yang-kyun dissented in the following way: According to the constitutional principle of free mandate, members from regional seats do not, even by operation of law, lose their seats upon defecting from their parties. Members from national seats, on the other hand, should lose their seats in consideration of the practical implications of the principle of people's sovereignty, right to vote,

right to hold public offices, the constitutional protection of political parties, and the system of electing national seats in proportion to the number of each party's regional seats. If there is no legal mechanism bringing about that effect, the National Assembly is violating its legislative duty under the Constitution and should discharge its duty of protection through appropriate laws.

C. Aftermath of the Decision

This decision is significant because it makes clear that our Constitution adopted the principle of free mandate for the relationship between people and their representatives, and that the principle applies to members from national seats as well as regional one. However, the prevailing negative views on the politicians who change their party affiliations easily led to a question over the practical effects that the legalistic emphasis on the principle of free mandate will have on the *real politik*.

During the review, the problem found a legislative solution when a provision was inserted into Article 192 (4) of the Act on the Election of Public Officials and the Prevention of Election Malpractices to the effect that a member from national seats loses his seat when he defects or changes his party or affiliates with two parties, except in case of merger or dissolution of his party or his expulsion from the party. Some in the academia questioned the constitutionality of the new provision in view of the principle of free mandate.

7. *Excessive Electoral District Population Disparity* case, 7-2 KCCR 760, 95Hun-Ma224, etc., December 27, 1995

A. Background of the Case

In this case, the Court held that the National Assembly Election Redistricting Plan with excessive population disparities violates the constitutional principle of equality.

The voting patterns of our electorate in the past could be characterized by the prevailing rural support for the ruling party and the countervailing urban support for the opposition. Therefore, the ruling party has tried to reduce the number of urban electoral districts and increase the number of rural districts. However, when the provincial voting pattern began to prevail in the 80's, resulting in sweeping support for a particular party in each region, the parties did not welcome the reduction in the number of districts in their base region.

Even within each district, a smaller version of provincialism dictated the outcome. Accordingly, the parties and incumbents tried to draw the electoral districts in a manner advantageous to them, and the electoral districts with extreme population disparities emerged as a result.

According to the March 1, 1995 census conducted by the Ministry of Internal Affairs and the National Assembly Election Redistricting Plan of the Act on the Election of Public Officials and the Prevention of Election Malpractices (revised on August 4, 1995, by Act No. 4957), the smallest district is the 'Chonnam Changheung County' district with a population of 61,529. The 'Seoul Kangnam-Eul' has a population 4.64 times larger than that, and the 'Pusan Haewoondae & Kijang County' district is 5.87 times larger. Overall, about one fifth of the 260 electoral districts in total showed a population disparity larger than 3:1 with the smallest district. In addition, the new 'Chung-Buk Boeun & Youngdong Counties district was originally linked to the district of Okchun County, the three counties forming one electoral district. The new Table turned the Okchun County into a separate district, leaving the new district composed of the Boeun and Youngdong Counties which are geographically separated.

The complainants who reside in over-populated districts such as Seoul Kangnam-Eul filed a constitutional complaint, arguing that their right to vote and right to equality were violated because their votes are unreasonably depreciated compared to the voters in the 'Chonnam Changheung County' district. Other complainants, residing in Chung-Buk Boeun County, brought a complaint asserting that their right to vote and equal weight of votes were infringed when their county was combined with the geographically separate Youngdong County.

B. Summary of the Decision

The Court first gave its opinion on the principle of equal election and the permissible limit on population disparity and later found the 'Pusan Haewoondae & Kijang County' electoral district on the Plan violative of the permissible limit. The Court also found the 'Chung-Buk Boeun & Youngdong Counties' district arbitrarily defined and struck down the entire Plan in accordance with the inseparability of electoral district plan.

The principle of equal election is a manifestation of the principle of equality in elections. It not only refutes multiple votes, carries a meaning of equality in the number of votes, and recognizes one person one vote for all, but also mandates equality in their weight, that is, the extent that one vote contributes to the entire system of elec-

tion. Although the constitutional mandate of equal weight of votes is not the sole absolute standard and the National Assembly may seek other rational policy goals in certain particular instances of redistricting, it is the most important and basic standard after which other goals can be factored in.

When there is inequality in weight of votes, the Court reviews the rationality behind such inequality as a product of discretion within the constitutional limit, and when it cannot be perceived as reasonable even in light of various non-population-related factors that the National Assembly may consider, it is deemed unconstitutional.

Justices differed on the permissible limit of population disparity.

Five Justices Kim Yong-joon, Kim Chin-woo, Kim Moon-hee, Hwang Do-yun, and Shin Chang-on set the permissible maximum ratio between the most populous district and the least at 4:1, or equivalently set the permissible maximum deviation from the average district at 60%. (Since the average population per district is 175,460, the most populous district should not have more 280,736 voters and the least should not have less then 70,184). Therefore, they found the 'Pusan Haewoondae & Kijang County' and 'Seoul Kangnam-Eul' districts exceeding the permissible limit and found that the redistricting plan violated the scope of legislative discretion. Four other Justices Lee Jae-hwa, Cho Seung-hyung, Chung Kyung-sik, and Koh Joong-suk set the maximum deviation from an average district separately for different types of districts (i.e., rural or urban - Trans.) and set it at 50% for each type, and also found the above 'Pusan Haewoondae & Kijang County' violating the limit of legislative discretion.

On the issue of gerrymandering, the Justices unanimously held that a district should be composed of a contiguous geographical area except for certain extraordinary and inevitable circumstances. In this case, without any extraordinary reason of inevitability, the Boeun County and the Youngdong County that are completely separated from each other by the Okchun County in the middle are joined in one electoral district. Such redistricting is arbitrary and departs from the scope of legislative discretion.

C. Aftermath of the Case

This decision carries a historical meaning in that it stopped the give-and-take collusion of politicians around electoral redistricting and placed a cap on their discretion. It forced the politicians to revise the redistricting plan and accordingly adjust their campaign strategies

and party nominations. Also, it brought about another round of political battles around redistricting as the permitted number of districts in each party's stronghold changed, depending on what the minimum size of a district population is.

Some criticized the maximum population disparity set by the decision as being too generous, and the Court's stance as being too passive in realizing the political equality, the central principle of democracy. However, the Court set only the minimum, and it should not be ignored that the legislature can set a more stringent standard of optimization in order to realize actual equality if it sees fit for its understanding of the Constitution.

The challenged redistricting plan was changed as the Act on the Election of Public Officials and the Prevention of Election Malpractices was revised on February 6, 1996 through Law No. 5419. Two over-populated districts were partitioned, and nine under-populated ones were combined. Six districts were combined with their adjacent districts and then re-partitioned. As a result, the number of electoral districts nationwide was reduced to 253 from 260 and the number of national seats was increased to 46 from 39. The Chung-Buk Boeun and Youngdong County district, which the Court found to be gerrymandering, was recombined with the adjacent Okchun district. The operative standard in this new redistricting effort set the maximum population at 300,000 and the minimum at 75,000 and the maximum ratio between the two at 4:1.

8. *Legislative Railroading* case, 9-2 KCCR 154, 96Hun-Ra2, July 16, 1997

A. Background of the Case

In this case, the Constitutional Court held that the Speaker's railroading of a bill violated the rights of opposition party members to review and vote on proposed legislation.

Article 62 (1) (i) of the Constitutional Court Act defines competence disputes as between various state agencies and limits them as among the National Assembly, the Executive, the Courts and the National Election Commission.

When the first railroading case was brought before the Court (90Hun-Ra1, February 23, 1995), the Court narrowly interpreted Article 62 (1) (i) of the Constitutional Court Act as allowing competence disputes only among the entities enumerated above; and held that an individual assemblyperson or a party with negotiating rights

is only a component of the National Assembly that cannot petition for competency disputes, dismissing the petition.

The 182nd Extraordinary session of the National Assembly convened on December 23, 1996. The proposed revisions to the National Security Planning Agency Act, the Labor Standards Act, the Labor Relations Commission Act, the Labor-Management Consultative Council Act, and the revised Trade Union and Labor Relations Adjustment Act were on the agenda. However, the opposition party members, in opposing immature passage of the bills, occupied the Speaker's Office and interfered with the proceeding otherwise, and the National Assembly could not operate in a regular course of proceeding. Then, on the 26th of that month, the vice-Speaker, acting on behalf of the Speaker, convened the first Plenary of the 182nd Extraordinary session around 6:00 A.M. by notifying only the 155 members of the ruling New Korea Party of that meeting. He declared passage of the bills after a vote by those present. On the 30th of that month, the members of the opposition National Congress for New Politics and the United Liberal Democrats petitioned for review of a competence dispute. They argued that the Plenary convened in secret while the Speaker failed to notify them of the meeting, and that the passage of the bills in violation of the procedures specified by the Constitution and the National Assembly Act usurped their powers as independent constitutional entities to review and vote on the bills and therefore is unconstitutional.

B. Summary of the Decision

The Constitutional Court held that the individual members and the Speaker of the National Assembly can be the parties to a competence dispute and also that the railroad passage of the bills by the Vice-Speaker acting on behalf of the Speaker on December 26, 1996, around 6:00 AM took away the plaintiffs' powers to review and vote on them. But, the Court held that it does not amount to a clear violation of the provisions of the Constitution.

The Justices were divided on whether the individual representatives and the Speaker can be the parties to a competence of dispute.

Justices Kim Yong-joon, Kim Moon-hee, Lee Jae-Hwa, Cho Seung-hyung, Koh Joong-suk, and Lee Young-mo, proposed a departure from the Court's previous decision. Article 62 (1) (i) of the Constitution was not a definitive or enumerative provision but rather an illustrative one. The individual representatives and the Speaker are state agencies under Article 111 (1) (iv) and therefore can be

parties to competence disputes. The petition meets the justiciability requirements. Justices Hwang Do-yun, Chung Kyung-sik and Shin Chang-on dissented, following the reasoning in the *Competence Dispute between the Speaker and Representatives* case, 90 Hun-Ra 1, February 23, 1995. They posited that Article 62 (1) (i) of the Constitutional Court Act specifies and limits the permitted types of competence dispute and that the plaintiffs not listed there cannot request a review of a competence dispute.

The six Justices who held that the petition was lawful also held that the representatives' right to review and vote on the proposed bills was violated for the following reasons:

Representatives' power to review and vote on bills is not explicitly mentioned in the Constitution. But, the principle of parliamentary democracy, Article 40 granting exclusive legislative power to the National Assembly, and Article 41 (1) forming the National Assembly with the representatives elected by the people lend themselves to a guarantee of those powers to all representatives. Around 5:30 A.M., the deputy floor leader of the New Korea Party notified, by phone, the deputy floor leader of the National Congress for New Politics and the floor leader of the United Liberal Democrats Union of the change of the meeting time to 6:00 a.m. of December 26, 1996. The opposition party members cannot be expected to be present at the meeting on such a short notice. Such a late notification or lack of notification all together clearly does not meet the requirements of Article 76 (3) of the National Assembly Act.

Since the respondent Speaker's violation of Article 76 (3) of the National Assembly Act extinguished the plaintiffs' opportunity to attend the meeting and to review and vote on the proposed bills, such act of the respondent clearly violated the plaintiffs' power granted by the Constitution without any further violation of the National Assembly Act procedures.

However, the six Justices differed on whether the passage of bills is unconstitutional.

Justices Kim Yong-joon, Kim Moon-hee and Lee Young-mo noted that the five bills mentioned above were passed by a unanimous vote at a meeting attended by the majority of the representatives (155) which was not closed to the media or ordinary citizens in any way. Therefore, although a violation of the National Assembly Act might be a blemish, there was no clear violation of the constitutional provisions on legislative processes, i.e., the principle of majority vote in Article 49 and the principle of open session in Article 50.

Contrarily, Justices Lee Jae-hwa, Cho Seung-hyung and Koh Joong-suk considered the principle of majority vote and parliamentary democracy and interpreted that Article 49 does not formally demand that the majority of the members be present or the majority of the present vote. It demands that the majority presence and the majority vote be based on the opportunity to attend provided to all the members who could be notified of the meeting. Articles 72 and 76 of the National Assembly Act are concrete expressions of the principle of majority vote of Article 49 of the Constitution. Therefore, the failure to notify the opposition party members of the meeting, thereby forfeiting their opportunity to attend in violation of those provisions, followed by passing of the bills in attendance of only the ruling party members and only on their votes, violates Article 49.

In the end, the Constitutional Court held that the respondent's act of railroading the bills infringed on the plaintiffs' powers to review and vote on the proposed laws but denied the plaintiffs' request to find the act unconstitutional because it did not gather the number of justices required for such finding.

C. Aftermath of the Case

Some saw the decision, which departed from the Court's previous position, as a progress broadening the scope of permissible parties to competence disputes. Others assigned it great constitutional-historical significance as a check against the anti-representative legislative practice of 'bill railroading' and also as a show of the Court's strong commitment to boldly break away from the past practice of deifying legislative activities under the name of the legislative autonomy and to guarantee procedural legitimacy of the legislative processes.

It was also pointed out that, despite the Court's own precedents that the principle of due process of law applies to legislative and administrative procedures as well as criminal (CC 92.12.24, 92 Hun-Ka8; CC 93.7.29, 90Hun-Ba35; CC 94.4.28, 93Hun-Ma26), this decision completely lacks any consideration of due process issues. It was noted that the failure to notify the opposition party members would have constituted violation of due process of law if the Court considered it at all. Others found a contradiction in the Court's finding of usurpation of the representatives' power and its refusal to strike down the laws that are the product of that usurpation.

On that issue, it should be noted, however, that the Court was keen on maintaining the stability of the legal order. After this decision, the National Assembly revised the aforementioned labor rela-

tion laws on March 13, 1997.

9. *Appointment of Acting Prime Minister* case, 29 KCCR 583, 98Hun-Ra1, July 14, 1998

A. Background of the Case

When the National Assembly could not vote on ratification of Kim Jong-pil as the new Prime Minister, President Kim appointed him as the Acting Prime Minister. In this case, the entire group of the opposition party members brought a competence dispute against the President, but their request was dismissed for lack of justiciability requirements.

On February 25, 1998, the respondent President Kim Dae-jung took office, and on the same day appointed Kim Jong-pil as the Prime Minister and sought the consent of the National Assembly on that matter. The Speaker of the National Assembly, on the same day, tried to convene the 189th Extraordinary Session but to no avail due to the abstention of the opposition Grand National Party (hereafter "GNP") members. The National Assembly continued to run an empty cycle because of the partisan confrontation.

Then, the 189th Extraordinary session began around the 21st minute of the 15th hour of March 2, 1998 in bipartisan presence, and the Speaker brought out the above appointment as an item on the agenda around 15:44. Soon after, the representatives began anonymous voting according to Article 112 (5) of the National Assembly Act. Around 15:50, the members of the National Congress for New Politics (NCNP) and the United Liberal Democrats (ULD) interrupted the vote, accusing the GNP of casting blank votes, by blocking access to the ballot dispensers and the poll boxes. A noisy altercation with pushing and shoving ensued, making it difficult to continue the proceeding. The Speaker suspended the proceeding at 16:05 and resumed at 16:08 but the voting stopped again at 16:21 and 16:24. Although the Speaker encouraged the assemblypersons to finish voting by the 23rd hour, the voting did not continue in a normal course and passed the midnight, automatically adjourning the 189th Session.

As ratification of the appointment failed, the President went ahead to receive the outgoing Prime Minister Ko-kun's recommendations on appointment of ministers on March 2, 1998; and, on the 3rd of that month, appointed all the Cabinet positions based on his recommendations and appointed Kim Jong-pil as the *Acting* Prime Minister after accepting Ko's resignation.

The plaintiffs - all the 156 Representatives of GNP - submitted this competence dispute before the Court on the 10th of that month, contending primarily that the President infringed upon the power of the National Assembly and the plaintiffs to ratify appointment of the Prime Minister, or alternatively that he infringed on their power to review and vote on the same issue. They sought invalidation of the appointment of the Acting Prime Minister.

B. Summary of the Decision

Justices Kim Yong-joon, Cho Seung-hyung, Shin Chang-on, Chung Kyung-sik, and Koh Joong-suk joined dismissing the dispute. Justices Kim Moon-hee, Lee Jae-hwa, and Han Dae-hyun joined in invalidating the appointment as being unconstitutional, and Justice Lee Young-mo would have upheld it. Accordingly, the request was dismissed by the majority opinion of five justices.

Justice Kim Yong-joon reasoned that the power to ratify appointment of the Prime Minister belongs to the National Assembly, which, therefore, must be a party to this competence dispute. Only when the majority in the National Assembly does not consent to becoming a party, the Court may grant a third party standing to partial components of the National Assembly in order to protect the minority. In this case, the plaintiffs account for a majority in the National Assembly, which therefore can contemplate venues to restore the power of the legislature through its resolution. Therefore, it is not necessary to commandeer for this case a third party standing, which is not statutorily sanctioned anyway. As to the claims of prospective infringement, the power to review and vote concerns a legal relationship among the representatives themselves or between them and the speaker, and does not concern the relationship between the President and the representatives. His appointment is not likely to infringe upon the representatives' power.

Justices Cho Seung-hyung and Koh Joong-suk pointed out that the President neither refused to submit the appointment for ratification nor finalized it against the legislature's disapproval. His action amounts to merely appointing a temporary substitute to the Prime Minister as authorized by Article 23 of the Governmental Organization Act. Even if there had been any procedural fault in his action, it does not and is not likely to infringe upon the power of the legislature or its members. The National Assembly can still vote on the appointment, and the plaintiffs who form the majority in there can influence the outcome of such vote and resolve the dispute thereby. There is no legally protectable interest in this case.

Justices Shin Chang-on and Chung Kyung-sik continued to maintain their previous position that the permissible parties to competence disputes under Article 62 (1) (i) of the Constitutional Court Act do not include such components or parts of the legislature as individual representatives or negotiating bodies.

Justices Kim Moon-hee, Lee Jae-hwa, and Han Dae-hyun held as follows: The legislature is a conferential body. Its position is the aggregate of individual representatives' position expressed through their votes. The plaintiffs can file a competence dispute alleging simultaneous infringement on the ratification powers of the legislature and on their own power to review and vote. Also, even if the legislature still can disapprove the appointment in the future, there is legal interest subject to competence dispute in the meantime.

They continued, ratification by the Assembly is an indispensable substantive prerequisite to appointment of Prime Minister. Appointing one without ratification clearly violates the Constitution and cannot be justified by existence of such custom in the past. Custom does not take precedence over the Constitution just because it has been repeated. Neither can it be justified as a measure to prevent vacuum in administration when a system of stand-ins is already in place.

Justice Lee Young-mo stated that the appointment in principle required the consent of the legislature before it became effective. But, the vacuum in constitutional provisions for the possibility of vacancy can be mended by various means within a reasonable scope of interpretation under such special circumstances as the Assembly's failure to reach a decision, the anticipated vacuum in administration, the need for swift policy-making in the economic crisis. Under the circumstances of this case, the President could appoint an Acting Prime Minster until the decision is made in the Assembly. His action did not infringe upon the ratification power of the National Assembly.

C. Aftermath of the Case

The plaintiffs condemned this decision as a political, not a judicial, decision and as the Court's self-negation of its own *raison d'être*. Some chided that the Court should not evade substantive review of politically important cases through legalistic techniques or procedural pretexts, thereby legitimizing the establishment. Others interpreted it as urging politicians to resolve a political dispute on their own, not through judicial resolution.

The press misleadingly reported the decision as if the main reason of the dismissal was inherent lack of the standing of individual

representatives in competence disputes. However, that was the opinion of only two justices. It was joined with an opinion of three other justices dismissing on other grounds (e.g., lack of justiciable interest - Trans.) to result in the majority decision of dismissal.

The main controversies in this case were whether to consider the ratification power of the legislature and the review and vote power of the representatives separately and whether the plaintiffs composed of all the members of the majority party need legal protection. These controversies made it difficult for the Court to proceed to a review on the merits. If this competence dispute had been approved by a majority vote in the Assembly and submitted under its name, the Court should have had no reason to dismiss it.

On August 17, 1998, about one month after this decision, the appointment of Kim Jong-pil as the Prime Minister was ratified in the National Assembly in the presence of 225 members: 171 in favor, 65 opposed, 7 abstentions and 12 invalid votes.

IV. Cases Concerning Economic and Property rights and Taxation

1. *The Act on Special Cases concerning Expedition, etc. of Legal Proceedings* case, 1 KCCR 1, 88Hun-Ka7, January 25, 1989

A. Background of the Case

The Court delivered its first *en banc* unconstitutionality decision in this case. The Court struck down the proviso of Article 6 (1) of the Act on Special Cases concerning Expedition, etc. of Legal Proceedings (Act No. 3361, hereafter the Act) which grants the state a superior legal status of being immune from provisional execution.

Article 6 (1) of the Act provides that all judgements on property rights in favor of plaintiff should also include an order of provisional execution regardless of the party's request unless there is a good cause. However, it states in the proviso that "an order of provisional execution cannot be granted in event of a claim of property rights against the state," making it impossible for the prevailing private individual to execute the judgment provisionally against the state.

While there has been much controversy on this proviso, the

claimant who was suing the state to recover his deposit requested a constitutional review of it to the Seoul District Court, which granted the motion and brought the case to the Constitutional Court on December 16, 1988.

B. Summary of the Decision

The Constitutional Court struck down the proviso of Article 6 (1) of the Act after making a statement about the principle of equality and operation of the national treasury as follows:

In light of the preamble of the Constitution that purports to afford equal opportunities to every person in all fields, including political, economic, social and cultural life, and Article 11 (1) that guarantees the principle of equality or equal opportunity, the principle of equality is the supreme principle in the field of protection of basic rights. It provides a standard which the state must abide by in interpreting or executing laws and a mandate on the state not to discriminate without reasonable cause. It is everyone's right and the most basic of all basic rights

Since the principle of equality rightly applies to "the property rights of the people" guaranteed by Article 23 and the "right to speedy trial" guaranteed by Article 27 (3) of the Constitution, no party should be discriminated based on his identity in civil proceedings on private rights such as property rights. Even the state should not be favored without reasonable basis. This is because, in a civil suit on the legal relations formed by operation of the national treasury, not by exercise of the state power, the state must be treated the same as a private person.

An order of provisional execution deters unnecessary abuses of appeals and allows expedited enforcement of rights, thereby protecting his or her property right and right to speedy trial. Article 6 (1) of the Act mandates granting an order of provisional execution to the prevailing state but prohibits such order for a prevailing private person no matter how convincing his or her judgment is. The provision therefore discriminates against parties in protecting property rights and rights to speedy trials, and such discrimination is without reasonable cause.

An order of provisional execution is not intended to preclude the possibility that the judgment may not be executable (i.e., because the defendants' assets have evaporated - Trans.) and therefore, it still applies to the state against which all judgments are executable. The state can always prepare in advance for any disruption of the

government accounting by the provisional execution. At times, it may become difficult to restore the original condition when the judgment is overturned at the appeal after provisionally executing it. However, this problem is not exclusive to when the state is the defendant but general to the entire practice of provisional execution. Like all other instances, this problem can be addressed by weighing the good cause for not issuing the order, requiring deposit of a security as in Article 199 (1) of the Civil Procedure Act, or using exemptions in (2) of the same provision. The state can also apply for a restraining order against the provisional execution pursuant to Articles 473 and 474 of the same Act. This problem cannot be the reason for excluding the state from orders of provisional execution.

C. Aftermath of the Case

This decision is the first decision of the Court after its inception and also its first decision of unconstitutionality. It was the intent of the First Term Justices to show their commitment to constitutional adjudication to make their first decision a decision of unconstitutionality. It can be interpreted as an expression of their resolve to discharge their duties faithfully in response to the fact that the people's will brought about the constitutional amendment and the Constitutional Court when many bad laws and practices have marred our constitutional history.

Major newspapers reported this case as the first decision of unconstitutionality in eighteen years since the Supreme Court's ruling of unconstitutionality on Article 2 (1) of the State Compensation Act in 1971. Furthermore, the editorials praised it as a turning point in our state-centered way of thinking in making and enforcing of the laws.

In an interview with a daily newspaper, Justice Byun Jeong-soo, who wrote for the Court in this case, signified the case as breaking the wall of authoritarianism that discouraged decisions of unconstitutionality in the past.

This decision increased people's attention to the functions of the Court. Some reported that more diverse people, including farmers and fishermen, were now bringing constitutional complaints, and that the number of questions about constitutional review, constitutional complaints, and other grievance procedures was exploding.

2. *Deeming Title Trust as Gift* case, 1 KCCR 131, 89Hun-Ma38, July 21, 1989

A. Background of the Case

Article 32-2 (1) of the Inheritance Tax Act (hereafter "the ITA") deems the properties, that are subject to compulsory registration, *gifted* the recorded owner even if another person is the equitable owner. In this case, the Court upheld the statute to the limited extent that it does not apply to the title trust set up for non-tax-evasive purposes.

Article 32-2 (1) of the ITA (revised Law No. 3474 on December 31, 1981) states that, as to the property subject to compulsory recording, registration or renewal for all transfers of its rights, if the real owner differs from the owner on record, it will be deemed to have been gifted to the recorded owner on the day of such registration despite the stipulation of Article 14 of the Framework Act on National Taxes.

In the past, the National Assembly has been lacking in action in taxation and the Administration made makeshift revisions out of convenience, even delegating vital issues to lower rules. The principle of *statutory taxation* has lost its color. In this case, one of the various deeming rules and other tax rules, which are customarily made out of administrative convenience but under the pretext of preventing tax evasion, became the subject of review of the Constitutional Court for the first time.

The claimant was the president of Seoul Petroleum Company which was in the process of purchasing some land. According to the claimant, because he had difficulty obtaining the certificate of farmland sales and the seller was unwilling to transfer the ownership registration to the Company, he had the title transferred to himself and later to the company. However, the Director of Yongsan Tax Office deemed the initial purchase under the claimant's name as a gift to the claimant pursuant to Article 32-2 (1) of the ITA, and levied a gift tax. At the Seoul High Court, the claimant sued the director for nullification of the levy, arguing that taxation on *pseudo* gift is illegal. He lost and appealed to the Supreme Court; when his motion for constitutional review of the ITA was turned down, he also filed a constitutional complaint.

B. Summary of the Decision

Through the following majority opinion of seven justices, the Court upheld Article 32-2 (1) of the ITA to the limited extent that it does not apply to the property registered under someone other than a real owner, but not for the purpose of tax evasion:

Article 32-2 (1) of the ITA statutorily defines the parties to be taxed, the basis for taxation, the methods of taxation, and other elements of tax liability: therefore, it satisfies the principle of statutory taxation in formality. It does so in reality as well because, externally, the recorded owner of a property subject to compulsory recording has the full right of ownership. Somewhat vague and result-oriented expressions in the provision can be narrowly interpreted in view of the legislative intent without harming the stability or predictability of law and the right to property, which is the ultimate goal of *statutory taxation*.

However, from the perspectives of the principle of equal taxation and its derivative principle of taxation on real worth, the statute indiscriminately deems all compulsorily recorded properties to have been gifted to the recorded owner, regardless of the reasons for the real owner's presence or their internal relationship, and imposes gift tax thereby. Such imposition may be an exception from the principle of taxation on real worth, and therefore, violate equal taxation or justice in taxation. However, the title trusts used as an evasive cover for gift cannot be neglected, and some exceptions to taxation on real worth are allowed by the Constitution.

The statute does aim for efficient prevention of tax evasion and establishes a blanket deeming rule, sacrificing equal protection. However, the title trust has been upheld by precedents and established as part of the legal system. Setting up the title trust, not for the purpose of tax evasion, but because of restriction in positive laws or the third party's refusal to cooperate, should not be subject to indiscriminate assessment. Such result will violate *statutory taxation* premised on protection of right to property or equal taxation premised on equality.

In conclusion, the above statute should be interpreted to deem the properties subject to compulsory recording to have been gifted to the recorded owner on the day of recording, except in an exceptional situation where registering under the real owner was impracticable due to restrictions in other positive laws or a third party's non-cooperation. It has limited constitutionality only under such interpretation.

Justices Byun Jeong-soo, and Kim Chin-woo dissented, finding violation of Articles 38 and 59 of the Constitution which prescribe the principle of *statutory taxation.*

C. Aftermath of the Case

This decision was reported as the Court's acceptance of a view that property rights were being infringed under the pretext of increasing tax revenue and facilitating fiscal administration, and also as the Court's first check on indiscriminate imposition of gift taxes even on inevitable title trusts without any evasive purpose.

After the decision, Article 32-2 (1) of the ITA was revised through Act No 4283 on December 31, 1990: a proviso stating, "Provided, it shall not be so if a title transfer under another person's name qualifies as a title trust under Article 7 (2) of the Act on Special Measures for the Registration of Real Estate or was done without a purpose of tax evasion as described by the presidential decrees" was added.

Thereafter, the question of what legal import should be given to a purpose of tax evasion emerged in tax practice. However, the question soon disappeared on July 1, 1995 when the Act on the Registration of Real Estate under Actual Title holder's Name was enacted, nullifying the so-called 'hidden title trust,' and title trust could no longer be used for tax evasion. Soon, the Inheritance Tax and Gift Tax Act enacted later (Act No. 5193, December 30, 1996, complete revision) was revised to presume only the stocks held in another's name to be transferred to that person (Article 43).

3. *Land Transaction Licensing* case, 1 KCCR 357, 88Hun-Ka13, December 22, 1989

A. Background of the Case

In this case, the Court upheld Article 21-3 (1) of the Act on the Utilization and Management of the National Territory (AUMNT) through which the government required licenses for land transactions in order to control land speculation and the nation-wide land prices in a country with high population density, small territory, and traditional preference for land ownership.

Article 21-3 (1) of AUMNT (revised by Act No. 3642, December 31, 1982) states that the parties to a transaction concerning a prop-

erty located in the regulated areas must apply for and receive approval of the governor of that province. Article 31-2 (1) of the Act (Act No. 4120, revised on April 1, 1989) then punishes unlicensed transactions with a fine up to five million won or a term of imprisonment up to two years.

The claimant sold, and thereby made profits from, forests located in the regulated areas in Chungnam, Dangjin County, Songak-myun, Youngchun-ri without approval of the governor and was sentenced to one year imprisonment at the Southern Branch of the Seoul District Court. He requested constitutional review of the statute, and the court granted the motion and referred the case to the Court.

B. Summary of the Decision

In the following majority opinion of five justices, the Court upheld Article 21-3 (1) of AUMNT that imposed a licensing requirement on land transactions in certain areas, and also upheld Article 31-2 of the same statute because the majority of five justices finding it unconstitutional is not sufficient for a decision of unconstitutionality pursuant to Article 23 (2) (i) of the Constitutional Court Act.

AUMNT does not regulate all privately owned areas: it is limited to those vulnerable to speculation and drastic increases in price. It also regulates each area only for five years. Exercise of right to dispose of the property is not completely impaired but approved without fail as long as the purpose, the size, and the price of the transaction meet the requirements. If not, one can appeal the decision. In light of all these facts, licensing of land transactions does not negate private property but merely restricts it. Land cannot be manufactured. The right to dispose of it is inevitably restricted. The licensing system, a form of restriction on property right, explicitly permitted by the Constitution, does not infringe on the essential content of property right.

Then, the question is whether the licensing of land transactions violates the rule against excessive restriction. This question should be examined in light of the relativity of land ownership, the social responsibility in land ownership, the industrial and economic problems closely related to our land problems, the gravity of housing shortage, the reality of land transactions, and the severity of speculation. If no circumstance suggests that the licensing scheme is not appropriate for its purpose or that there is or can be easily found a better solution that satisfies the requirement of the least restrictive means, it does not violate the principle of proportionality or the rule against excessive restriction.

In evaluating the penalty provisions against the principle of clarity, the Court stated the following: all transaction first requires a meeting of mind among the parties to the transaction even before they can apply for approval. Loose interpretation of the penalty provisions will punish even those who have reached some type of agreement although they were intending to seek the required approval in the future. However, such a problem can be corrected when judges with fine sensibilities and of sound mind supplement the provision and concretize its meaning in their interpretation of it, preempting violation of the clarity rule.

Justice Lee Shi-yoon dissented as follows: The licensing system provided in Articles 21-2 to 21-4, although restricting right of ownership such as right to dispose or acquire, falls under public welfare regulations and does not violate the essential contents of right to property. However, when Article 21-15 of the same statute grants the disapproved land owner a right to compel the state to purchase the land, the provision violates the principle of *just compensation* in Article 23 (3) of the Constitution. But, since the provision does not form the premise of the underlying trial, its defect need not be mentioned in the holding of this decision but should be cured by legislative revisions. He opined that Article 31-2 penalty provisions for the licensing violations violates the Article 37 (2) rule against excessive restriction of the Constitution and does form the premise of the underlying trial, and therefore that the holding should include a decision of its unconstitutionality.

Justices Han Byung-chae, Choe Kwang-ryool, and Kim Moon-hee dissented as follows: Articles 21-3 (1), 21-2, 21-3 (3) and (7), 21-4, 21-5 and 21-15 of the Act are inseparable from one another and must be reviewed together. Since the last one[56] violates Article 23 (1) and (3) of the Constitution, the entire statute is unconstitutional. In order to avoid confusion in a regulatory hiatus, the Justices would not give immediate effect to their decision but simply beseech the legislature to amend within some time. Furthermore, the Article 31-2 penalty provisions are premised on the unconstitutional licensing scheme and therefore, they must be declared unconstitutional immediately.

Justice Kim Chin-woo adhered to a simple decision of unconstitutionality, finding no legal hiatus or social confusion threatening the nation anticipated by invalidation of the Articles 31-2 or 21-3 and therefore no need to settle with a call for revision by the legislature.

---

56). Article 21-5 about right to request the state to purchase the land when its proposed sale was disapproved.

C. Aftermath of the Case

Some reported it as the first constitutional interpretation that realized justice in income distribution by supporting the speculation policy of easing the social strain caused by land speculation and preventing the speculative sentiments of those seeking unearned income and recognized the concept of *land as public property.* Others found in the decision the judiciary taking into account the grave land problems and making a progressive departure from the conservative line that it takes in comparison to the executive or the legislative. Yet others surmised that the licensing system and its penalty provisions were problematic in points of law but were justified by a realistic consideration that it is an effective policy to prevent land speculation. They urged that those problems identified by the Court be solved in future administration of the statute.

The question of unconstitutionality of this system had been amply debated even before the decision. It is in the same light that there was a sharp disagreement among the scholars who testified as *amici curiae* in the Court's proceeding.

On December 24, 1991, the Supreme Court in an *en banc* decision (90Da12243) applied the "variable voidity theory" toward the land transaction licensing system, adding another layer of jurisprudence to the effects of land transaction regulations. In this decision, the Supreme Court ruled that a real estate sales contract is without any *in rem* or contractual effect until it is approved or disapproved. The Supreme Court reasoned that the subsequent approval gives retroactive effects to the contract, and the disapproval affirms it void finally. The contract remains *void* until it is approved. During this period, it does not have any contractual force with which one can demand any performance on transfer of rights. Only after it is approved, the contract comes into force retrospectively, obviating need for a new contract.

4. *Rules implementing the Certified Judicial Scriveners Act* case, 2 KCCR 365, 89Hun-Ma178, October 15, 1990

A. Background of the Case

In this case, the Court struck down Article 3 (1) of the Rules implementing the Certified Judicial Scriveners Act for violating the principle of equality and the freedom to choose one's own occupation.

This Article gave the Minister of Court Administration discretion in conducting judicial scriveners' license exams.

Article 4 of the Certified Judicial Scrivener Act grants a judicial scrivener's license, firstly, to a person with seven or more years of experience in the ordinary courts, the Constitutional Court, or the Prosecutor's Offices as a clerk or a higher position; secondly, to a person with more than five years of experience in the ordinary courts, the Constitutional Court, or the Prosecutor's Offices as an administrator or a higher position, who had been certified by the Chief Justice of the Supreme Court as having necessary legal knowledge and ability to carry out the tasks of a certified judicial scrivener; thirdly, to a person who passed the judicial scrivener's license examination (Section 1). Section 2 of the provision delegates matters concerning certification and exam administration to be determined by the Rules of the Supreme Court.

However, Article 3 (1) of the Rules (Supreme Court Rule No. 1108, February 26, 1990), authorized by the above provisions, states "the Minister of Court Administration may administer the examination upon approval from the Chief Justice of the Supreme Court when he recognizes need for additional judicial scriveners". The Supreme Court conducted only three examinations since the founding of this country for the reason that the retirees of the courts and the prosecutor's offices filled the need for judicial scriveners.

The complainant worked as a clerk in a judicial scrivener's office and was preparing to take the examination. He filed a constitutional complaint, asserting that Article 3 (1) of the Rules contravenes Article 4 (1) (ii) intended to administer the exam regularly, and leaves to the discretion of the Minister of Court Administration whether the exam is administered. Due to this provision, the Minister of Court Administration has refused to administer any exam for a reason that the need is filled by the retired Court and Prosecutor Office employees with sufficient experience. The complaint asserts that Article 3 (1) of the Rules took away his opportunity to take the examination and thus violated his right of equality.

B. Summary of the Decision

The Court struck down Article 3 (1) of the Rules implementing the Certified Judicial Scriveners Act for violating right of equality and occupational freedom after recognizing the rules of the Supreme Court as a proper subject of constitutional adjudication.

Article 107 (2) of the Constitution grants the Supreme Court

the final review power over the constitutionality of rules and regulations. However, it only means that, when a trial depends on the constitutionality of rules or regulations, there should be no need for the issue to be referred to the Constitutional Court but, unlike statutes, it should remain within the Supreme Court's jurisdiction and therefore subject to its final review. The provision does not apply to a constitutional complaint filed on grounds that basic rights have been violated by rules and regulations themselves. The 'governmental power' subject to constitutional adjudication, as in Article 68 (1) of the Constitutional Court Act, refers to all powers including legislative, judicial and administrative. Statutes enacted by the legislature, regulations and rules promulgated by the executive, and rules made by the judiciary may directly violate basic rights without awaiting any enforcement action, in which case they are immediately subject to constitutional adjudication.

Article 4 (1) of the Certified Judicial Scriveners Act grants the license not only to retirees with seven or more years of experience at the ordinary courts, the Constitutional Court or public prosecutor's offices, but also to those who have passed the examination. The intent behind such provision is to open the opportunity fairly to all people according to the constitutional principle of equality and allow anyone that passed the statutory exam to choose and practice in the occupation of a judicial scrivener. By doing so, it excludes the monopoly of the occupation by certain individuals or groups and aims at realizing the freedom to choose one's occupation as a means to nurture his or her individuality through free competition (Article 15 of the Constitution).

Article 4 (1) (ii) grant of the license to the successful examinee is premised on the examination administered reasonably and surely. Accordingly, 'matters concerning exam administration, 'delegated by Article 4 (2) of the same Act to the Rules of the Supreme Court, mean the concrete methods and procedures of the examination and not whether or not it is given at all.

Article 3 (1) of the Rules authorizes the Minister to not give the exam if he does not see the need for more judicial scriveners. The inferior law deprives the complainant and all others of the opportunity to become certified judicial scriveners, which was granted to them by its superior law, Article 4 (1) of the Certified Judicial Scriveners Act. At the same time, it grants to the court and prosecutor's office retirees a monopoly on the work of judicial scriveners. In the end, it is the Supreme Court's departure from the delegated rule-making authority and a violation of the Article 15 occupational freedom and Article 11 (1) right to equality belonging to the com-

plainant and other people who wish to become a certified judicial scrivener.

C. Aftermath of the Case

Article 107 (2) of the Constitution gives the Supreme Court the final authority on constitutionality of the rules and regulations that form the premise of a trial. Whether it can be interpreted to give the Constitutional Court a review power on rules and regulations has been debated. This decision made it clear that, when rules and regulations directly violate people's basic rights, their constitutionality is reviewed by the Constitutional Court, and upon that premise, invalidated, for the first time, a provision of the Rules of the Supreme Court.

Immediately after the announcement of the decision, the Supreme Court officially objected to it by publishing the Constitution Research Group of the Ministry of Court Administration's report on rules and regulations review. The gist of the report is that Article 101 of the Constitution identifies the Supreme Court as the highest court overseeing the judiciary while Article 107 (2) gives the Supreme Court and other ordinary courts the exclusive power to review non-statutory inferior laws such as rules and regulations. The report went on to argue that it is possible and also necessary to first challenge the rules and regulations that directly infringe upon basic rights in judicial review of administration, in order to satisfy the rule of exhaustion of prior remedies. Therefore, the report pointed out, if the Constitutional Court were to review rules and regulations, exercise of such power must be preceded by an organization and structure that can sustain such exercise.

Responses from the academia and law practitioners were mixed. Some supported the view of the Supreme Court while the majority supported the Constitutional Court's decision.

Supporters of the Court's decision argued that the converse of Article 101 (2) mandates, if rules and regulations *do not* form the premise of a trial, their review must be left with the Court. They also argued that the term 'final' in Article 107 (2) describes the Supreme Court's position in the hierarchy of the ordinary courts' system, not any final review power it has over its relationship with the Constitutional Court. Others noted contradictions in Article 107 (2) that the provision intended for review of laws covers administrative actions, which are not laws, while failing to mention local government laws such as ordinances and rules. They argued that it

should not be treated as absolute, and should be revised or repealed through constitutional amendments. On the Supreme Court's position that the rules and regulations, which directly infringe on basic rights, are essentially administrative actions and therefore can be subject to ordinary judicial review, some argued that not all such rules and regulations are action-like, and many of them may infringe through their norm-like aspects.

Almost two years after this decision, on July 19, 1992, the Ministry of Court Administration conducted its first judicial scriveners' examination and four more by 1998.

This decision made it clear that all instances of exercise of governmental power (rules and regulations, including the rules of the Supreme Court) can be challenged through constitutional complaints, and in doing so, it made relief of basic rights more efficient.

5. *Prescriptive Acquisition of Miscellaneous State Property* case, 3 KCCR 202, 89Hun-Ka97, May 13, 1991

A. Background of the Case

In this case, the Court struck down Article 5 (2) of the State Properties Act that exempted 'miscellaneous state-owned properties' from prescriptive acquisition.[57]

Article 5 (2) of the Act (Act No. 2950, 1976.12.31) states, "[n]otwithstanding Article 245 of the Civil Act, state-owned property is exempt from prescriptive acquisition," and also exempts miscellaneous properties.

Since 1961, the claimant has occupied and managed a tract of forest located in Kyunggi Yichun County. The state recorded preservation of the title on the property in 1987. The claimant sued the state at the Suwon District Court, demanding cancellation of the recording on the basis of time bar, and requested constitutional review of Article 5 (2) of the State Properties Act, challenging its inclusion of miscellaneous properties as being violative of Article 11 (1) right to equality and Article 23 (1) right to property. The Suwon District Court granted the motion and referred the case to the Constitutional Court for review.

57). Prescriptive acquisition is a term describing the vernacular adverse possession. The Korean word is more descriptive of the essence of adverse possession and can be literally translated into 'acquisition by time-bar'

B. Summary of the Decision

The Court struck down Article 5 (2) time bar exemption of miscellaneous properties after ascertaining the nature of transactions on miscellaneous properties. The following majority opinion of six justices expresses the Court's decision:

Unlike administrative property or preservation property, miscellaneous property is subject to purchase, lease, and other private transactions governed by general principles of private economic order in accordance with its economic value. In the case of miscellaneous property, the state has rights as a corporation in equal legal relations with private persons in which its action and the changes in rights are given effects. The state is in principle subject to private law.

The state's act of lending or selling miscellaneous property is a private act carried out by a private economic actor, and its legal relations are private legal relations subject to private laws. Therefore, just as the state may acquire a private person's property by operation of time bar, the private person must be able to do the same to the state.

However, under Article 5 (2), miscellaneous property is included in state properties exempt from prescriptive acquisition. It is a fundamental constitutional principle that there should not be any discrimination based on the party's identity in legal relations governing private rights. Even the state must be treated equally in relation to private persons when it comes to private relations created by operation of the national treasury. The provision violates these principles. It is also clearly not justifiable as a means for efficient and balanced use, as well as development and preservation of, national land and therefore, violates the principle of proportionality governing exercise of legislative discretion, failing to come under the Article 37 (2) exception allowing restriction of basic rights. It also favors the state at the expense of ordinary citizens without any reasonable cause. It is an unequal as well as excessive legislation, violating Articles 11 (1), 23 (1) and 37 (2) of the Constitution.

Justices Cho Kyu-kwang, Byun Jeong-soo and Kim Yang-kyun dissented: state-owned property, especially the state-owned land, must be reserved for welfare of the entire people. Exempting it from time bar acquisition may be necessary in order to promote efficiency of land management and to prevent its erosion through privatization.

C. Aftermath of the Case

Some saw this decision as putting the brakes on the practices premised on and furthering the idea of state superiority whereby the state took precedence over private persons in economic relations.

With this decision, people who had occupied state-owned miscellaneous land for more than twenty years could file a suit against the state for transfer of title, and acquire the land if all the requirements of time bar are met. Now, the ordinary courts had to decide how far back this decision would apply. They first limited its effects to the case referred to the Court for constitutional review, but gradually expanded them to the new cases filed after the decision (Supreme Court 92Da12377, January 15, 1993).

After the decision, the National Assembly revised the State Properties Act through Act No. 4698 on January 5, 1994 and added a proviso to Article 5 (2), stating "[n]otwithstanding Article 245 of the Civil Act, state-owned property is exempt from prescriptive acquisition, provided, however, that miscellaneous property is not," thereby eliminating unconstitutional elements.

6. *Mandatory Fire Insurance* case, 3 KCCR 268, 89Hun-Ma204, June 3, 1991

A. Background of the Case

In this case, Article 5 (1) of the Act on the Indemnification for Fire-Caused Loss and the Purchase of Insurance Policies requiring certain building owners to purchase insurance policies was found to be violating freedom of contract.

Article 5 (1) of the Act on the Indemnification for Fire-Caused Loss and the Purchase of Insurance Policies (Act No. 2482, February 6, 1973) requires the owners of four or more story buildings and other "special buildings" defined by Article 2 (iii) of the same Act to purchase a special fire liability insurance for bodily injury.

The complainant, who owns a four-storied building in Seoul Dongjak-gu Hukseok-dong, has paid a premium on a fire insurance for this building purchased from Korean Fire Protection Association acting for fire insurance companies who have signed the Agreement for Joint Underwriting of Liability Insurance. He sued Korean Fire Protection Association at the Southern Branch of the Seoul District Court, demanding reimbursement of the premium, and requested con-

stitutional review of the above provision. Upon denial, he filed a constitutional complaint.

B. Summary of the Decision

After finding constitutional basis for freedom of contract, the Court ruled, in a majority opinion of seven justices, that inclusion of "four- or more story building" under the "special building" category of Article 5 of the Act on the Indemnification for Fire-Caused Loss and the Purchase of Insurance Policies is partially unconstitutional.

Freedom of contract refers to freedom to decide, by one's own volition, whether to form a contract or not, what kind of contract to form and with whom. It also includes freedom not to form a contract, meaning that one should not be forced into an undesired contract by law or state. It is derived from the general freedom of action implied in the right to pursue happiness of Article 10 of the Constitution.

Article 5 blanket inclusion of all four- or more story buildings in the 'special buildings' category subject to compulsory insurance forces one into a private insurance contract with a for-profit insurance company; and therefore, restricts both freedom of contract and general freedom of action. Neither can it be justified by Article 34 (6) of the Constitution requiring the state to endeavor to prevent disasters and protect people from the risk of disasters. Therefore, it violates the principles concerning limitation on basic rights.

In addition, since the mandatory insurance clause of Article 5 (1) of the Act has the problem of systemic disharmony with a possibility of infringement upon basic rights, it must be allowed only in exceptional conditions in the economic order founded on respect for individual's economic freedom and creativity. Moreover, such a statute must be limited to the very minimum necessary to realize its purpose and replaced with other alternative constitutional means if possible. Reckless over-legislation does not follow the rule against excessive restriction.

In conclusion, the Article 5 (1) blanket insurance requirement for all four- or more story buildings cannot be legitimized as indispensable under Article 37 (2) of the Constitution and therefore, it violates Articles 10, 11, 15, 23, 34 (1) and 119 (1) of the Constitution.

Justices Byun Jeong-soo and Kim Yang-kyun dissented, observing that the standard of review for property and economic rights allows the state a broader discretion than for physical or mental freedom, and such tendency in modern states is based on the principle

of a double standard.

C. Aftermath of the Case

The significance of this decision can be found in its declaration that freedom of contract is included in the general freedom of action as part of the constitutional right to pursue happiness; forcing one to enter into contract by law cannot be an appropriate means to accomplish any legislative intent, and the legislation limiting basic rights must observe the rule against excessive restriction.

Following this decision, approximately 26,000 buildings were relieved of compulsory insurance with the total estimated insurance premium of 16 billion wons.

After the decision, the Administration initiated a revision of the regulations of the Act (Presidential decree No. 13459, Sep. 3, 1991) and changed the "four- or more story buildings" in Article 2 (1) (xiii) into "six- or more story buildings with 1,000 square meters or more of floor space."

Finally, on January 13, 1997, the National Assembly amended the statute through Act No. 5258, replacing the phrase "four- or more story buildings" with "special buildings" more narrowly defined as "state-owned buildings, educational facilities, department stores, market, medical facilities, entertainment facilities, lodging facilities, factories, collective residential facilities, and other buildings where many people enter, work, or live as designated by the presidential decree." Furthermore, the government amended the regulations of the same statute with the Presidential decree No. 15392 (June 13, 1997) further narrowing down the range of 'special buildings' subject to compulsory insurance to those with 3,000 square meters or more of floor space, sixteen-story or more apartment and attached buildings, and large buildings with eleven or more stories.

7. *Billiard Hall Entry Restriction* case, 5-1 KCCR 365, 92Hun-Ma80, May 13, 1993

A. Background of the Case

In this case, the Court struck down Article 5 of the Rules enforcing the Installation and Utilization of Sports Facilities Act that required billiard halls to post signs prohibiting minors under certain age from entering the halls, for violating the freedom to choose oc-

cupation.

Article 5 of the Rules (revised by the Ministry of Culture and Sports Order No. 20, February 27, 1992) regulates the facility, equipment, safety management, and sanitation standard, and requires billiard halls "to post a notice on the door of the entrance prohibiting persons under eighteen from entering."

The complainant had recently opened Eung-Am Billiard Hall after obtaining a notice of registration for sports facilities from the Mayor of Seoul pursuant to the above Rules, and filed a constitutional complaint arguing that the above provision infringes upon his freedom to choose occupation.

B. Summary of the Decision

In the following opinion, the Constitutional Court struck down Article 5 of the above Rules requiring the owners of billiard halls to post a notice at the door barring persons under 18:

Article 5 of the Rules directly imposes a duty on the complainant to post the notice and has actual regulatory force barring those under eighteen from entering the billiard hall, eliminating a certain range of customers from the complainant's clientele. Therefore, it does limit all billiard hall operators, including the complainant, in their freedom to pursue their occupations (perform their occupational functions), thereby violating the constitutionally guaranteed freedom to choose occupation.

The Installation and Utilization of Sports Facilities Act and its Rules subject only billiard halls to the duty to post a notice banning those under eighteen from entering and limit their clientele. Considering the legislative intent declared in the Act, it is difficult to be seen as a rational or reasonable discrimination in comparison to other facilities. Without any rational basis, Article 5 of the Rules discriminates only against billiard hall operators amongst all other operators of sports facilities, and therefore violates the Article 11 (1) right of equality of the Constitution.

Such restriction or ban on entry into billiard halls should be done by a statute or a regulation authorized by a statutory mandate that specifies the concrete scope of the regulation. The above provision regulates matters not delegated to it by its parental statute, and deviates from the scope of delegation.

C. Aftermath of the Case

Originally, billiard halls were classified as places of dissipation and diversions and as such, banned from youths, but subsequently classified anew as a sports facility by the Installation and Utilization of Sports Facilities Act. Be that as it may, the public continued to see opening billiard halls to youths in a negative light.

Some opposed this decision citing the possibility of youths engaging in transgressionary activities in billiard halls and the negative effects access to billiard halls might have on their education. Others found problems in the illegal acts related to billiard, not billiard itself which youths should be allowed to play as a matter of course.

However, the Court's decision was not as much a constitutional judgment on juvenile access to billiard halls as an invalidation of a lower law under the principle of legal hierarchy for its deviation from the stricture of its parental law.

Article 5 of the Rules that became the issue at this trial was amended on June 17, 1994, through the Ministry of Culture and Sports Order No. 12 that eliminated the requirement to post a notice turning away those under eighteen at the door.

On February 29, 1996, in the decision 94Hun-Ma13 (8-1 KCCR 126, 138), the Constitutional Court upheld Article 5 (vi) of the regulations of the Act on the Regulation of Amusement Businesses Affecting Public Morals (prior to revision by the Presidential decree No. 14336, July 23, 1994) that prohibited those under eighteen from entering noraebang (sing along room). The Court did find restriction of the freedom to perform one's occupational functions but found in it a legitimacy of purpose and appropriateness of means and no violation of the rule of the least restrictive means and the balancing between the relevant legal interests. Therefore, the Court held that the provision does not violate the rule against excessive restriction in restricting the complainant's freedom to perform one's occupational tasks. The Court also found the entry ban of those under eighteen to the noraebang (sing along room) supported by the unique ambience of the place and the extent of mental and physical maturity of youths. The Court therefore held that it cannot be considered as arbitrary, baseless discrimination against the operators of noraebang (sing along room) or violation of the principle of equality.

8. *Kukje Group Dissolution* case, 5-2 KCCR 87, 89Hun-Ma31, July 29, 1993

A. Background of the Case

In this case, the Constitutional Court held that those exercises of governmental power aimed at dissolution of Kukje Group, as *de facto* exercise of power, violated equality and freedom of entrepreneurship, and therefore were unconstitutional.

The complainant, the founder of Kukje Group ("Kukje") that was led by the flagship company, Kukje Trading, Inc. and had about twenty or so member companies, had owned the stocks of those companies. In 1985, under the 5th Republic regime, the primary lender of Kukje Group, Korea First Bank, announced its plan to dissolve the Group. After a series of subsequent actions, Kukje was dissolved. Kukje Group's dissolution has been popularly spoken of as an example of state control of the constitutional economic order of free democracy, and the true intention and legitimacy behind the dissolution have been in doubt.

The complainant filed a constitutional complaint, demanding nullification of the following series of exercises of governmental power for infringing on his basic rights: the Minster of Finance, during the Fifth Republic, reporting to and following the directives of the President, decided on dissolution of Kukje Group and the acquiring company; he instructed Korea First Bank to prepare for the dissolution by taking control of the finance of the Group's member companies and obtaining the right to dispose of them; he instructed the Bank to release a press report about the dissolution.

B. Summary of the Decision

In the following majority opinion of eight Justices, the Constitutional Court first recognized the legality of the complaint and held that those exercises of governmental power aimed at dissolution of Kukje Group, as *de facto* exercise of power, violated equality and freedom of entrepreneurship and therefore were unconstitutional:

State's active, patriarchal intervention into management of a private business paralyzes the problem-solving capability of the business and its self-sustainability, and weakens its ability to respond to operation of the principles of market economy.[58] Such intervention does

58). If at all, state should have left the check on its management to another au-

not show respect for economic freedom and creativity of enterprises in Article 119 (1) of the Constitution. The government's exercise of governmental power intervening in the management of a private enterprise and forcefully turning its control over to a third party without any statutory basis violates freedom of individual enterprise and the rule against intervening into management in Article 126 of the Constitution.

No matter how well intended, restrictions on individual's rights and imposition of responsibility must be based on predictable statutes. The same applies to intervention into and restriction of management of an enterprise. Exercise of governmental power without any statutory basis violates the procedural requirements of the rule of law. It was also arbitrary without any statutory authorization and therefore violates the rule against arbitrariness, derived from the rule of equality in Article 11.

Here, the Minster of Finance, reporting to and following the president's directives, decided on dissolution of Kukje Group as a basic objective and also on acquiring the company. To achieve the objective, he instructed Korea First Bank to prepare for the dissolution by taking control of the bank deposits of the Group's member companies and obtaining a power of attorney giving the Bank the right to dispose of the companies. He also instructed the Bank to release "Kukje Group Normalization Plan" drafted by him in the form of the Bank's own press release. These actions violated the principle of the rule of law and Articles 119 (1), 126 and 11, infringing upon the petitioner's right to equality and freedom of entrepreneurship.

Justice Choe Kwang-ryool dissented, opining that the complaint should be dismissed because it passed the time limit for filing the complaint.

C. Aftermath of the Case

The decision clearly declared the meaning of the rule of law and established the meaning of equality and market economy; it therefore holds much significance for the development of the rule of law in our country. The press paid close attention to the decision and extensively reported on the meaning and impact of the decision.

According to one editorial, this decision clarifies the relationship between the government centered around the President and a corporation as one of the central players in national economy. Firstly,

---

tonomous private business, its banks, the decision implies. - Trans.

exercise of the presidential authority is subject to the requirements of due process set up within the boundaries of the Constitution and the mandate of government by the rule of law. Secondly, the renewed emphasis on individuals' freedom of entrepreneurship and the principle of non-intervention in management demands more than ever the efforts and commitment of both parties to form their relationship according to the principles of market economy.

Some focused on the question of why dissolution of Kukje Group by Korea First Bank is a *de facto* exercise of power. Under the so-called "extension theory" as a constitutional-theoretical tool, the legal relations of the case could be restructured as follows: the Finance Minister's coercive instruction to Korea First Bank constituted the original violation, a violation of basic rights of the Bank, from which violation of the rights of the complainant flowed as its direct extensions.

As a result of this decision, the complainant, the founder of Kukje Group, gained an opportunity to recover the dissolved companies. However, the events after the decision were not necessarily advantageous to the complainant. On May 4, 1994, the Seoul High Court dismissed the complainant's appeal of the suit in which he demanded the stocks of Hanil Synthetic Fiber Co., Ltd. to be returned to him. The court reasoned that the stock sales contract is neither void nor voidable, because the government's baseless infringement upon entrepreneurial freedom, although wrong in itself, does not transform contracts between private parties into violations of the social order or unfair legal actions. This judgment fails to fully weigh in the fact that the exercise of governmental power struck down by the above decision was the essential premise for the stock transfer, and therefore it fails to fully apply the constitutional rights-values to the provisions specifying the requirements for voidability in positive private law.

The complainant also filed criminal complaints against the former President Chun Doo-hwan and the representatives of the companies that acquired Kukje Group, charging breach of professional trust, threatening, robbery, etc. at the Seoul District Public Prosecutor's Office. They were dismissed on lack of suspicion on September 13, 1994. The complainant did prevail in a suit to recover the stocks of Court ordered Korea First Bank to return 1.3 million stocks of Shinhan Investment Finance Co. to the previous owner Kim Jong-ho on grounds that the original transfer of stocks to Korea First Bank in the course of dissolution of Kukje Group took place under duress.

9. *Repurchase Period Limitation* case, 6-1 KCCR 38, 92Hun-Ka15, etc., February 24, 1994

A. Background of the Case

In this case, the Constitutional Court upheld Article 9 (1) of the Act on Special Cases concerning the Acquisition of Lands for Public Use and the Compensation for Their Loss that limits the period in which the seller could repurchase the land.

Article 9 (1) of the Act (revised by Act No. 4484, Dec. 31, 1991) states, "when the land acquired for a public project is no longer needed in whole or in part due to cancellation of or change in the project within 10 years of the acquisition, the original owner or his or her inclusive successors (hereafter the "repurchasers") may repurchase it within one year from the date that such no-need becomes clear or ten years from the date of the acquisition, by returning the fund paid for compensation to the project operator."

The claimants each had owned lands in City of Changwon when the Industrial Complex Development Corporation, the project operator for the Changwon Industrial Complex No. 2 Ancillary Area Development Project, requested the lands for use as railroad lots. Around 1978, pursuant to the relevant statutes, the project operator acquired the lands on an agreement with the claimants and completed the transfer of title by August 16, 1979. About three years passed, but only part of the acquired lands was used as railroad lots and the rest were left unused by the company until November 23, 1990, when the project was completed.

The claimants filed a suit under the above said Article 9 (1) at the Changwon District Court against the Korea Water Resources Corporation that inclusively succeeded to ownership of the assets, rights and responsibilities of the Industrial Complex Development Corporation. They demanded that service of their complaint be considered as a request for repurchase made within one year of November 23, 1990, the date that the lands became no longer needed, and their payment corresponding to the amount of original compensation be accepted, upon which the title to the lands should be returned to them. At the same time, they requested constitutional review of the said provision which requires that the purchased lands become unneeded 'within ten years of the acquisition,' in order for the original sellers to gain the right to repurchase, citing violation of right to property. The Changwon District Court granted the motion and referred the case to the Constitutional Court for review.

B. Summary of the Decision

The Court upheld the first part of Article 9 (1) of the Act, namely, "within ten years of the date of acquisition," after examining the legal nature of the acquisition upon agreement pursuant to the Act as follows:

Taking land for public use must be supported by the public necessity great enough to justify forceful acquisition of property against the owner's will; it must be based on statutes, and be compensated for justly, as prescribed in Article 23 (3) of the Constitution. Therefore, even after all the requirements are met and the taking is completed, if the public project for which the land was taken is not carried out, or no longer needs or simply does not use the acquired property, then the constitutional legitimacy of the expropriation ceases to exist in the future and so does the basis for the project operator's ownership of the property rights.

Therefore, the right to recover the ownership of the land unneeded or unused for the public project pursuant to Article 71 of the Land Expropriation Act (equivalently, right to repurchase) is derived from, and therefore included in, the constitutional guarantee of right to property. Moreover, this right is not extinguished by the fact that the taking was justly compensated for. Just compensation is only one of the conditions for expropriation, and the original owner's duty to endure deprivation of his property is conditioned on its public use.

The Act on Special Cases concerning the Acquisition of Lands for Public Use and the Compensation for Their Loss provides for consensual transfer of property that takes on the legal form of a buy-sell agreement in private law. However, it involves elements of public law such as Article 5 and 6 of the Act and is backed up by the last resort of compulsory acquisition pursuant to the Land Expropriation Act if not agreed on. In reality, many owners agree to the acquisition due to psychological pressure: they will be forced to give in even if they refuse. Consensual acquisition should be treated as 'taking of property' in Article 23 (3) of the Constitution. Such interpretation is more realistic and soundly prevents various unconstitutional attempts by the state to weaken or dissolve the constitutional guarantee of property right in forms of private law. The right to repurchase in Article 9 of the Act should be treated equally as the right to repurchase in Article 71 of the Land Expropriation Act and included in the content of property right protected by the Constitution.

Nevertheless, the limit on the maximum period in which such right to repurchase could be granted is needed, and the period of "ten years from the date of acquisition" in Article 9 (1) of the Act is not so short as to lose appropriateness. Therefore, it does not conflict with the basic constitutional ideas concerning the guarantee of people's right to property.

Justices Cho Kyu-kwang, Han Byung-chae, and Kim Yang-kyun wrote a separate opinion, characterizing consensual acquisition as a simple act of purchase in private law. They found the source of the right to repurchase, not in a constitutional mandate, but in a mere legislative policy of making the public land procurement processes efficient by factoring in the original owner's sentiment and the principle of fairness. Therefore, the contents and conditions of the right to repurchase should be, in principle, left to the legislative discretion and does not implicate the right to property. Article 9 (1) of the Act does not violate the Constitution.

C. Aftermath of the Case

After the decision, the Court also found the repurchase rights under Article 20 (1) of the Act on Special Measures for Readjustment of Requisitioned properties included in the content of property rights in Article 23 (1) of the Constitution when it struck down Article 20-2 (1) of the same statute in 92Hun-Ma256. There, a private property previously confiscated by the military pursuant to confiscation laws may later be purchased by the state when it is found to have lasting needs vital for the military. Now, the purchase here will materialize unilaterally even if the owner does not respond to the National Defense Minister's notice, and therefore constitutes a public taking under Article 23 (3) of the Constitution despite its legal form. There were a total of six cases where the Article 20 (1) right to repurchase was held to be one of the property rights in Article 23 (3) of the Constitution, including the above and 95Hun-Ba9 on April 25, 1996.

In the above decisions, the Court extended a constitutional mandate for the right to repurchase under the Land Expropriation Act to other repurchase rights in the Act on Special Cases concerning the Acquisition of Lands for Public Use and the Compensation for Their Loss and the Act on Special Measures for Readjustment of Requisitioned properties. It is observed that those decisions prevented possible weakening and dissolution of right to property from the exercises of governmental power disguised as private legal actions, and meet the needs of the reality squarely, contributing to substantive

protection of right to property.

10. *Land Excess-Profits Tax Act* case, 6-2 KCCR 64, 92Hun-Ba49, etc., July 29, 1994

A. Background of the Case

Since 1989, a vicious cycle of land price increases and speculation has worsened the inequality in wealth and the growing sentiments of alienation among people, which in turn prompted legislation of the Land Excess-Profits Tax Act ("the Act", hereinafter). In this case, the Court found some provisions of the statute violative of right to property and the principle of *statutory taxation*, and the entire statute nonconforming to the Constitution.[59]

Article 8 (1) of the Land Excess-Profits Tax Act (revised by Act No. 4563, June 11, 1993, hereafter "Act") identifies lands annexed to unlicensed buildings (iv), rental properties (xiii), etc. as the objects of taxation; and Section 10 describes the method of calculating the tax. Article 11 prescribes the standard for deducing a tax basis from unrealized gains and for assigning the standard market land prices needed for such assessment. Article 12 stipulates a 50% uniform rate for the land excess-profits tax, and Article 22 authorizes the in-kind payment of the tax upon request from the taxpayer.

The complainants filed for judicial review of administrative action at the Seoul High Court, demanding nullification of the tax when the tax office director categorized their lands under the above said Article 8 (1) (iv) and 8 (1) (xiii) and imposed the land excess-profits tax. They also requested constitutional review of Article 8, 11 and 12 of the statute on grounds that those provisions violated the principle of *statutory taxation* in Articles 38 and 59 of the Constitution and its Article 119 describing our economic order. When denied at the High Court, they filed a constitutional complaint.

B. Summary of the Decision

The Court found the Land Excess-Profits Tax Act violative of the Constitution but pointed out the possible problems that might arise out of a simple decision of unconstitutionality and issued a decision of nonconformity to the Constitution as follows:

---

59). The translation of the term 'Land Excess-Profits' focused on the fact that what is taxed is the increase in the value of the land.

Whether taxation on capital should be limited to realized incomes or should include unrealized gains is a matter of legislative policy that should be adjusted according to the purpose of the tax, the characteristics of the taxed incomes, and the technical problems in taxation. Either side of the issue does not implicate or contradict constitutional principles on taxation.

According to the standard of determining a tax basis in Article 11 of the Act, standard public land prices have so great a consequence on the existence and the scope of people's tax obligations that their determination is not adequate for blanket delegation to lower laws. They should be outlined at least generally in the statutory provisions. Article 11 (2) completely entrusts presidential decrees with determination of the standard public land prices, thereby violating the principle of *statutory taxation* in Articles 38 and 59 of the Constitution and the Article 75 requirement that the scope of delegation be specific. However, lest rash invalidation of the provisions cause a major confusion in tax administration, it would be appropriate to demand their immediate amendment instead of striking them down.

Furthermore, *standard tracts* are too few nationwide, making the choice of a standard tract in a particular instance of taxation difficult.[60] Yet the task of determining the standard public land prices for each tract of land is charged to low-level administrative employees without any professional knowledge. The structural lack of preparedness in the tax calculation apparatus is likely to lead to taxation on the prices themselves (the so-called principal - Trans.), not the gains on them, and thereby violate the property right of the people protected by the Constitution. It would be appropriate to demand those in charge to repair the rules related to determination of the standard public land prices and improve on their administration as well.

Also, in the case of long-term ownership of the land, there are no provisions that take price fluctuations over the entire period of ownership into account. As a result, when a piece of land goes through the repeating cycle of appreciation and depreciation over a long period of time, the owner may be taxed for short-term appreciation when there is no increase in comparison to the price at the enactment of the statute. The land excess-profits tax thus calculated may engulf the principal, contravening its nature as income tax and thus violating right to private property in Article 23 of the Constitution.

---

60). A gain on a particular tract of land is the difference between the standard public land price and the actual market price. The standard public land price of a tract is determined by the price of a standard tract in that locality.

Also, the uniform rate of 50% in Article 12, when applied to the unrealized gains that are by nature difficult to be measured objectively, is so high that it may constitute tax on artificial gains and again engulf the principal, violating right to property. Also, land excess-profits tax is an income tax that must be geared toward vertical equality in taxation and achieving substantive equality among people at different income levels, and also has a feature of prepayment on transfer profit tax. Subjecting it to a uniform rate impedes substantive equality among taxpayers at different income levels.

As to the definitions of 'unused lands' in Section 8 of the Act, the Ceiling on the Ownership of Housing Sites Act is already in place to equalize more or less the amount of the residential land owned by each household. Under the latter statute, one is allowed to just acquire the land for now and save it for future use, as he or she may want to do depending on his present economic ability. However, the land excess-profits tax is levied on the unused land even if it falls below the ceiling provided for by the latter statute. Then, such taxation overly focuses on efficient use of the land and gives incentives for unplanned and disorderly constructions designed solely to make immediate use of the land. It does not harmonize well with the latter statute in a legislative scheme and contradicts the constitutional right to humane livelihood and the constitutional duties of the State to guarantee social welfare and comfortable residential life.

Article 8 (1) (xiii) of the Act includes in principle *all* rental lands under the levied 'unused lands' and yet exempts such lands 'designated by presidential decrees' without specifying what or how large they may be. Therefore, existence of the tax obligation is determined by administrative authority without any legislative control. Hence a conflict with the principle of *statutory taxation* in Article 59 of the Constitution. The provision also discriminates against the lessors more than it does other owners solely because they are not using the lands themselves. It also interferes with free sharing of capital between the lessees and the lessors, conflicting with our constitutional economic order that respects individuals' and business's economic freedom and creativity.

Article 26 (1) and (4) of the Act allows only a portion of the land excess-profits tax to be deducted from the transfer profit tax when the former is by nature a prepayment of the latter since they completely overlap in the objects of taxation and have similar purposes. Failure to allow deduction of the entire amount of the excess land value tax from the transfer profit tax violates the principle of taxation on real worth, a component of the constitutional principle of taxation by law.

The Act needs to be amended since some parts of the Act violate the Constitution while others do not conform to the Constitution. Article 11 (2) on land prices and Article 12 on tax rates are the basic elements of the entire system. Striking down any one of them will incapacitate the entire statute. We have no choice but to strike down the Act in its entirety pursuant to the proviso of Article 45 of the Constitutional Court Act.

Nevertheless, the above statute is intricately related in content and structure to other tax laws like the Restitution of Development Gains Act. Its invalidation will create confusion and vacuum in law both in the legislative and financial sectors. Moreover, repairing the unconstitutional provisions must be left to the discretion of the legislators. Simple invalidation will cause yet another problem of fairness between the parties to this case who will be affected by the decision and many taxpayers who have already paid the land excess-profits tax.[61] Instead, the Court hereby gives a decision of nonconformity to the Constitution whereby the Act remains in effect formally until it is abolished or amended by the legislators pursuant to the above mentioned reasons of unconstitutionality. However, it is not to be applied to or enforced in any future case by the ordinary courts and other state agencies in the meantime.

C. Aftermath of the Case

Some praised that the decision emphasized people's property right and the principle of *statutory taxation* that might have been neglected in favor of the legislative purpose, namely, *land as public property.* It was also observed that the decision accommodated the discontent of the taxpayers that had been rising continuously throughout the processes of imposing land excess-profits tax. Others acclaimed the Court for examining the problem not from a policy perspective but from a constitutional standard of equal taxation. Yet some criticized that the Court focused on protecting the property rights of the privileged class while neglecting the substantive equality and the balanced growth of all people. They continued that the Court turned a blind eye to the purely beneficial aspect of the Land Excess-Profits Tax Act, such as prevention of land speculation, and, by holding it unconstitutional, constrained the idea of land as public property. Others criticized the decision for taking the form of a decision of noncon-

61). The concern is that the complainants will not be paying any tax at all if the statute is struck down in its entirety. Instead, this modified forms of decision suspends their obligations pending the revisions. In other words, the complainants will pay the taxes under the new law.

formity, failing to provide a clear guidance in adjusting the various statutes involved.

After the decision, the National Assembly amended the Act through Act No. 4807 on December 22, 1994 and showed the Court's concerns in strengthening protection for property rights. In summary, it adopted progressive rates to make tax amount reasonable, supplemented the statute to accommodate the instances of land depreciation, allowed the entire amount of land excess-profits tax to be deducted from the transfer profit tax incurred within a certain period. It also limited routine taxation only in the areas of rapid appreciation when the land prices are stable nation-wide, reducing the cost of collection and minimizing the possibility of disputes. The main points of the revised Act are repeated as follows:

Article 8 of the Act was revised to exclude from land excess-profits taxation rental lands with improvements upon them up to the permissible limit of annexation. The new provision expanded the scope of exclusion for unused lands owned by those who do not own houses from 60 or 80 *pyung*[62] per household per lot and matched 200 *pyung*, the limit set up by the Residential Lands Maximum Ownership Act.

Article 11 was revised to specify that the publicly noticed land values determined under the Public Notice of Values and Appraisals of Lands, etc. Act will be used as the standard public land price for each tract of land. It was also revised to deduct from the amount of gains the amount of depreciation in the immediately preceding fiscal period, in order to prevent erosion of the principal.

Article 12 was revised to apply 30% to a tax basis less than 10 million won and 50% to a tax basis exceeding 10 million won, to make taxation fair.

Some criticized the revisions as immature and sabotaging the intent of the Court in issuing a decision of nonconformity.

Especially, Article 2 of the Supplementary Provision of the revised Act became a problem when it stipulated "this statute shall apply to land excess-profits accumulated after it becomes effective," thereby failing to impose any tax on for example the complainants in this case.

After the decision, the Court had to interpret the old Act[63] again in 93 Hun-Ba 1 on July 27, 1995. There, despite the first decision

62). 1 pyung is about 10 square meters or 35 square feet.

63). This time, the Court reviewed an older version which has the same provisions as the 1993 Act reviewed in *Land Excess-Profits Tax Act* case.

that found the entire statute nonconforming, the Court held that Sub-items A and B of Article 8 (1) (iv), the (3) phrase "... after acquisition" and (5) of the same Article, and Article 22 of the former Act do not violate the Constitution (*Land Excess-Profits Tax Act case II*, hereinafter). However, the Court held that the new provisions, namely, those of the 1994 Act, should be applied to the complainants of original case and to other paralleled cases (just as the complainants in *Land Excess-Profits Tax Act case I*, whose payment was deferred until the 1993 Act was revised in 1994 - Trans.).

The Supreme Court held that, despite *Land Excess-Profits Tax I*, not until the former act is declared unconstitutional, it is objectively unclear whether the act is unconstitutional or not. Therefore, since any defect due to the 1993 Act only becomes a reason for cancelling the administrative action, land excess-profits tax under the 1993 Act does not automatically become void. (96Nu1 689). As to the cases which the taxpayers would have won before *Land Excess-Profits Tax Act* case *II* was announced, the Supreme Court settled them according to the 1993 Act.

However, as to those cases affected by the provisions specifically dealt with in *Land Excess-Profits Tax Act* case *I*, the Supreme Court respected the Constitutional Court's request in *Land Excess-Profits Tax Act* case *II* that the new 1994 Act be applied. As to those cases not specifically affected by *Land Excess-Profits Tax Act* case *I* (and not dealt with in *Land Excess-Profits Tax Act* case *II*, either), the Supreme Court applied the new 1994 Act as long as it is not unfavorable to the taxpayers (93Nu17911).

11. *Chosun Railroad Stock* case, 6-2 KCCR 395, 89Hun-Ma2, December 29, 1994

A. Background of the Case

This was the first case in which the Court held that legislative omission is unconstitutional.

The United States Army Military Government in Korea (hereafter, "USAMGK") issued an order No. 75 titled Unification of Korean Railroads (hereafter, "the Order") on May 7, 1946. Article 2 of this Order expropriated the properties of all private railroad companies, including those of the Chosun Railroads, with reasonable compensation and forfeited them to the Chosun government.

Daehan Credit Union Federation owned 67,166 shares of the stocks

of Chosun Railroads and requested compensation pursuant to the Order. Before the compensation was processed, the related documents were lost during the Korean War. On February 11, 1961, the Minister of Transportation of the Korean government publicly requested registration of all shareholders of the expropriated private railroad companies. The successor to Daehan Credit Union Federation, the National Agricultural Cooperative Federation (NACF) completed the registration. On October 20, 1961, the NACF then transferred 59,176 shares of stocks and related compensation right to a third party. However, the Order was abolished by the Act on Repealing the Unification of Korean *Chosun* Railroads Order ("the Repeal Act", hereinafter) and the compensation procedure terminated accordingly. The third party then sued the Republic of Korea to affirm the right to request compensation on December 30, 1961, and won the suit successively at the Seoul High Court and the Supreme Court. However, the Korean government has refused the compensation for reasons *inter alia* that there is no legal basis for calculation and payment of the compensation.

The complainant received the stocks and related compensation right from that third party and requested compensation from the state. When the request was turned down, the complainant filed a constitutional complaint on January 11, 1989, challenging the legislative omission to enact the necessary laws providing compensation for the expropriation of the private railroads, the administrative omission to calculate and pay the compensation, and constitutionality of the Repeal Act itself.

B. Summary of the Decision

The Court first recognized legality of the complaint. The Court then held that it was unconstitutional for the legislature not to specify by law the process of compensating for the USAMGK's expropriation of Chosun Railroads, Kyungnam Railroads, and Kyungchun Railroads to those who had confirmed their rights to the compensation by filing necessary forms before the USAMGK's Order was repealed by the Repeals Act and to those who succeeded to such right. The Court did not rule on other issues.

The legislature's failure to take any legislative action despite an explicit constitutional delegation of defense of basic rights to legislation or a clear legislative duty arising out of interpretation of the Constitution as applied to a particular person can be a subject of a constitutional complaint. There is no period of limitation for a legislative omission. Especially, the complainant here could not exercise

his right to compensation since enactment of the Repeal Act and therefore, if at all, the period of limitation has not accrued since then. The complaint meets all the legal prerequisites.

As to the legislature's constitutional duty with respect to a compensation statute, the USAMGK Order to expropriate the private railroads for public use did include a provision for compensation and therefore did not violate the right to property provision in the Founding Constitution. The USAMGK's Order remained valid as a law of Korea untill repealed until repealed even after adoption of the Founding Constitution. However, the Order was repealed by the Repeal Act before the compensation procedure pursuant to Article 4 and 5 of the Order was completed. Since then the state of affairs has continued, in which expropriation took place by a law of Korea but there was no law laying out a procedure of compensation for it. There arose a duty for the legislature, a constitutionally explicit duty to compensate by law for expropriation that took place according to another law, and the Republic of Korea has not carried out that duty.

The legislature cannot refuse or arbitrarily delay enactment of a law entrusted concretely by the Constitution. For example, if the legislature resolves not to enact or fails to enact for a substantial period, it violates the limit of its discretion. The complete lack of legislative activity for more than 30 years in this case constitutes such violation.

Whereas the property right protected by the Constitution in this case has also been recognized by a statute and its continued existence guaranteed, the legislature has failed to enact laws concerning such compensatory procedures as calculating the amounts of compensation and left the property right effectively impossible to exercise upon. Such omission clearly violates the constitutional provisions that have protected right to property since the time of the Founding Constitution.

C. Aftermath of the Case

This decision placed not only the contents of an enacted statute but the legislature's failure to enact a particular statute under constitutional evaluation, and thereby explicitly confirmed the supremacy of the Constitution and the rule of law embodied in the Constitution.

The press reported its significance as the first decision of unconstitutionality against legislative omission and took interest in the resuscitation, after 48 years, of the applications for compensation filed by the shareholders of the private railroad companies during the Japanese colonial period.

Comments on the decision are as follows: The first view is that, the decision did not fully embrace the theory that a taking becomes void if not justly compensated, which conflicts with other legal theories of the right to compensation for expropriation. The decision gives out an impression that it did because it does condemn the legislative omission to provide compensation. However, the Court did not strike down the expropriation itself and remained silent on whether the initial denial of the request for compensation was unconstitutional or not (although ruling on this issue was admittedly optional). At any rate, the result is that it remains unclear how the complainant's rights can be redeemed if there is no immediate legislation after the decision. The second view is that this decision elevated the potential of constitutional adjudication one step further and broadly recognized the standing of many complainants down and along the line of succession of rights. It is suggested, it would have been more convincing to be preceded by an evaluation of the state's *affirmative duty of protection.*

The National Assembly has yet to legislate on the compensation at issue.

After the decision, the Court also issued a decision of unconstitutionality on the administrative failure to make rules. In the *Failure to Administer Medical Specialist Certification Exam* case, 96Hun-Ma 246, the Court on July 16, 1998 found that the Medical Service Act and the Medical Specialist Training and Certification Rules delegated to the Minister of Health and Welfare a rule-making duty to set up the procedures for the Dental Specialist Certification Exam. The failure to discharge that duty for a long time without just cause was held unconstitutional.

12. *Standard Public Land Price-based Transfer Profits Tax* case, 7-2 KCCR 562, 91Hun-Ba1, etc., November 30, 1995

A. Background of the Case

Article 60 of the Income Tax Act delegates determination of standard public land prices, on the basis of which the tax basis for the transfer profits tax is computed, to a presidential decree. In this case, the Court found the provision nonconforming to the Constitution as an impermissible blanket delegation, violating the principle of *statutory taxation* in Article 59 of the Constitution.

Article 23 (4) of the former Income Tax Act (prior to being

revised by Act No. 4281, Dec. 31, 1990) stipulates that the transfer value is the standard public land price of that asset at the time of the transfer.[64] Article 45 (1) (i) of this Act stipulates that the cost of acquisition is the standard public land price of the asset at the time of acquisition but allows a presidential decree to make exceptions and use the actual transaction price instead. Article 23 (4) (i) of the Income Tax Act (prior to being revised by Act No. 4661, Dec. 31, 1993) and Article 45 (1) (i) (A) are identical in contents to their counterparts in the predecessor statute. Also, Section 60 of the former Income Tax Act (revised by Act No. 3098 on Dec. 5, 1978 but prior to being revised by Act No. 4803, Dec. 22, 1994) left the *standard public land prices* above to be determined by a presidential decree.

The complainant filed for nullification of the transfer profits tax levied by the local Tax Office Director at an ordinary court and requested constitutional review of the former Income Tax Act, and when turned down, filed a Article 68 (2) constitutional complaint.

B. Summary of the Decision

The Court upheld Article 23 (4) and 45 (1) (i) of the pre-1990 Act and Article 23 (4) (i) and 45 (1) (i) (A) of the pre-1993 Act and found only Article 60 nonconforming to the Constitution.

Article 23 (4) and 45 (1) (i) of the pre-1990 Act and Article 23 (4) (i) and 45 (1) (i) (A) of the pre-1993 Act adopted standard public land prices as the basis for computing the tax basis of the transfer profit tax. Such adoption has rational reasons and does allow an exception for deducting the actual cost of acquisition instead of the standard public land price at the time of acquisition. These provisions may constitute an exception to the principle of *taxation on real worth* and that of *taxation based on ground of assessment of* the Framework Act on National Taxes and the general system of income taxes. That, in itself, does not constitute a violation of *equal taxation* or *statutory taxation* or *the rule against excessive restriction.*

Article 60 of the pre-1994 Act, however, entrusts the task of defining a standard public land price and the process of computing it wholly to a presidential decree without specifying any guidance or setting any limit on them. It grants too broad a discretion to the tax authority on what circumstances to consider, what substance to

64). The tax basis of transfer profit tax is the profit at the time of transfer of an asset. The transfer profit is computed by subtracting the cost of acquisition from the transfer value.

achieve, and what processes to follow in computing the standard public land price, which is not only an important component but the essential substance of tax obligations for the transfer profits tax. It makes impossible for people to predict, even in an outline, the scope and the existence of their tax obligations and leaves room for an arbitrary exercise of administrative rule-making power or tax power to violate their right to property. Therefore, it impairs the legal stability of their economic life and violates the principle of *statutory taxation* and the limited scope of delegated legislation set down in the Constitution.

Be that as it may, a simple decision of unconstitutionality on and immediate invalidation of Article 60 will stop standard-public-land-price-based assessment of the transfer profit tax on others, and will immediately incapacitate the regulations authorized thereunder (e.g., the former Article 115, for instance) and other regulations incorporating those regulations by reference (e.g., the former Article 124-2 (8) of the former Corporate Tax Act regulations). It will create a vacuum in law, reduce tax revenues, affect the national finance profoundly, and cause unfairness with respect to the taxpayers who have already paid the taxes. Moreover, the unconstitutionality of the statute here originates from a *formal* error by the legislature, and therefore leaving it in effect for a limited time[65] will not severely harm its concrete propriety or contradict such constitutional principles as those of justice and fairness. Furthermore, in this particular case, the unconstitutional provision was cured by Act No. 4803 on December 22, 1994. Therefore, the Court hereby finds it nonconforming instead of issuing a simple decision of unconstitutionality.

C. Aftermath of the Case

In this case, the Court ordered to apply the revised provision instead of Article 60. The aforementioned Act No. 4803 replaced Article 60 with Article 99 on Dec. 22, 1994 that provided a concrete definition of a standard public land price. Article 99 (1) (i) (A) defines it as a publicly noticed value, determined pursuant to the Public Notice of Values and Appraisal of Lands, etc. Act, or the value of a particular lot determined by local mayors, county supervisors, and district chiefs, again in accordance with Article 10 of the latter

65). The Court is not really 'leaving the statute in effect' for any period of time. In a normal nonconformity decision, the Court leaves a statute in effect until the legislature revises it while suspending its application to the complainant and all subsequent cases. In this case, the statute was already revised during the Court's review, and therefore, the complainant is immediately subject to the new law without having to wait.

Act. For a land without the publicly noticed value, the standard public land price will be the amount appraised by the Tax Office Director according to the method determined by presidential decree using the publicly noticed value of similar lands in proximity. For an area with rapid price increases selected by a presidential decree, the value will be assessed using a multiplier.

However, the new provision simply transposed Article 115 of the regulations of the former Income Tax Act. Now, those regulations were instituted on September 1, 1990, and therefore, the transfers or acquisitions that took place before that date could not be assigned publicly noticed land values (and therefore could not levied upon without using the provisions found nonconforming by the Constitutional Court in this case - Trans.).

As a result, the Supreme Court in 96Nu11068 on March 28, 1997 reinterpreted the Constitutional Court's decision as meaning to preserve the validity of tax obligations imposed or incurred before the effective date of the new statute under the old statute. The Supreme Court noted that, although the Constitutional Court proposes to apply the new statute retroactively to those obligations incurred before its effective date, there is no legal basis for such retroactive application. The Supreme Court therefore construed the Constitutional Court's decision as a proposal for applying the old Article 60 *provisionally* for the tax obligations incurred before the effective date of the new statute. However, Some might argue that the Supreme Court should have waited for the legislature to fix again the vacuum through supplementary provisions or revisions, and applied the brand new statute. Only if the vacuum still remains, it could exceptionally apply the old provision. Or even then, the Court could use various interpretive techniques such as analogies to solve the problem.

13. *Actual Transaction Price-based Transfer Profits Tax* case, 7-2 KCCR 616, 94Hun-Ba40, etc., November 30, 1995

A. Background of the Case

In this case, the Court reviewed the provision of the Income Tax Act on transfer profits tax, which allowed the transfer value and the acquisition cost to be the actual transaction prices under the exceptional circumstances prescribed by a presidential decree.[66] The Court found that it could be a blanket delegation violating the prin-

66). Remember Article 45 (1) (i) of the pre-1990 Income Tax Act in the immediately preceding case. It is exactly the same provision. - Trans.

ciple of *statutory taxation* and the rule against blanket delegation under limited circumstances.

Article 23 (2) of the former Income Tax Act (prior to being revised by Act No. 4019 on Dec. 26, 1988) stipulates that the transfer income is the total income from the transfer of an asset minus the cost of acquisition defined by Article 45 and certain deductions. Article 23 (4) of the former Income Tax Act (prior to being revised by Act No. 4281, Dec. 31, 1990) stipulates that the transfer value is the standard public land price of that asset at the time of the transfer. Article 45 (1) (i) stipulates that the cost of acquisition is the standard public land price of the asset at the time of acquisition but allows a presidential decree to make exceptions and use the actual transaction price instead.

The complainant filed judicial review and nullification of assessment of the transfer profits tax by the Tax Office Director whereby he applied new conversion values for the reason that the actual transaction prices could not be confirmed. The complainant lost at trial and appealed to the Supreme Court, requesting constitutional review of the underlying statute at the same time. When the motion was denied, he filed a constitutional complaint.

B. Summary of the Decision

The Court upheld that Article 23 (2) of the former Income Tax Act unanimously. However, the Court held that the provisos of Article 23 (4) and 45 (1) (i), which permit the use of the actual transaction prices, violate the Constitution insofar as they are interpreted as allowing the presidential decree to use the actual transaction prices when it results in a higher tax amount than the standard public land price is used in the following majority decision of eight justices:

With respect to the rule that *the elements of tax liability be clear*, Article 4 (1), 20 (1) (viii), 23 (1) (i), etc. of the former as well as the current Income Tax Act define transfer profit as income arising out of transfer of a land or a building. They categorize the incomes by different types of transfers and provide different tax bases and standards of computation for fair and reasonable taxation. Viewed in light of the overall structure and related provisions of the Income Tax Act, the income from transfer of realty will be considered a business income if the transfer is deemed for profit by social custom and amounts to a business activity in its size, frequency, and features. The incomes from these frequent and repetitive transfers are taxed

together under the general income tax, and all other transfer incomes clearly fall and will be taxed under the transfer profit tax. Therefore, Article 23 (2) of the former Income Tax Act does not lack the requisite clarity as a provision defining the tax basis for the transfer profits tax.

With respect to the principles of *statutory taxation* and the rule against blanket delegation, the main texts of Articles 23 (4) and 45 (1) (i) of the successive versions of the Income Tax Act since the revision on December 21, 1982 by Act No. 3576 have maintained that the transfer value, the acquisition cost in computation of the tax basis, and the transfer profit, are determined in principle by the standard public land prices, not the actual transaction prices. And the provisos have maintained that the exceptions can be made by presidential decrees where the actual transaction prices are used in calculation of the transfer profit. However, the provisos themselves do not specify the scope of delegation to the presidential decrees and, alone, do not make clear when the actual transaction prices can be used to calculate the transfer profit.

Even though the provisos do not explicitly and directly stipulate the scope of delegation, they can be reasonably interpreted as doing so in view of the overall structure of the Income Tax Act, the nature of transfer profit tax, and the constitutional limits inherent in the standard public land price-based system. Thus interpreted, the provisos are measures to protect taxpayers from being at a disadvantage by use of the standard public land prices, as opposed to that of the actual transaction prices. Therefore, the provisos delegate the authority of deciding when to use actual transaction prices to presidential decrees only for the situations where the tax amount thus calculated does not exceed the tax amount calculated with standard public land prices. Thus interpreted, the provisos concretely specify the scope of delegation and do not violate the constitutional principles of *statutory taxation* or the rule against blanket delegation.

Contrarily, if the provisos read to have departed from that scope of delegation and included in that delegation the authority for a situation where actual transaction prices produce higher tax amounts than standard public land prices, they violate the principle of *statutory taxation* of Articles 38 and 59 and the rule against blanket delegation of Article 75 of the Constitution to that limited extent.

Justice Kim Chin-woo called for a decision of nonconformity in order to prevent any contravention of fairness caused by the majority's decision of limited constitutionality.

C. Aftermath of the Case

After the Constitutional Court made the ruling, the National Assembly revised the provisions at issue through Act No. 5031 on December 29, 1995 as follows:

Firstly, the proviso of Article 96 (i) of the new Income Tax Act replaced the proviso of Article 23 (4) of the former Income Tax Act. The new provision stated "provided, actual transaction prices shall be used when a presidential decree requires so in consideration of the category of the asset, the period of ownership, the size and method of the transactions, etc."

Secondly, the proviso of Article 97 (1) (i) (A) replaced the proviso of Article 45 (1) (i) of the former Act, stating essentially the same as above.

In spite of the above decision by the Constitutional Court, the Supreme Court in 95Nu11405 on April 9, 1996 objected that the provisos cannot be interpreted as delegating to a presidential decree only those situations favorable to the taxpayers. The Supreme Court continued that it would be severely unjust to bar transfer profit taxes from being imposed on the complainant who made a large transfer profit in a short period of time. It finally denied the complainant's appeal of the assessment (levying of the transfer profit tax calculated with the actual transaction prices even when it is higher than the one calculated with the standard public land prices).

In response, the Constitutional Court in 96Hun-Ma172 (the Constitutional Court Act Section 68 (1) case) on December 24, 1997 cancelled the decision of the Supreme Court for the reason that it ignored the Constitutional Court's decision of limited constitutionality and thereby violated the complainant's right to property.

14. *Mandatory Filing Stamp* case, 8-2 KCCR 46, 93Hun-Ba57, August 29, 1996

A. Background of the Case

In this case, the Court upheld Article 1 of the Act on the Stamps Attached for Civil Litigation, etc. that requires a private party to affix a certain amount of filing stamps to the complaints.

Article 1 of the Act on the Stamps Attached for Civil Litigation, etc. Act (revised by Act No. 4299, Dec. 31, 1990) requires affixing of filing stamps on all complaints for civil suits except where other

statutes provide otherwise, and determines the required amounts.

The Court had already ruled in 91Hun-Ka3 on February 24, 1994 that Article 2 of the Act on Special Cases concerning Stamp Affixing and Deposit Offering exempting the state from the requirement of affixing stamps does not favor the state without any rational basis. The Court held that the provision does not violate Article 11 of the Constitution, the principle of equality. Furthermore, the Court had upheld in 93Hun-Ba10 on February 24, 1994 Article 3 of the Act on the Stamps Attached for Civil Litigation, etc. that required for appeals a double or triple the amount of stamps required for initial complaints. The Court held that the provision does not unreasonably discriminate between appellants at appeals and plaintiffs at trial court; and that it does not unreasonably limit or discriminate against the indigent's right to trial.

At the Pusan District Court, the complainant filed a suit against the state for emotional damages for a governmental tort, but was ordered by the court to affix stamps to the complaint. Upon such order, the complainant claimed economic hardship and requested aid for litigation costs, but was turned down for not having made a showing that he will not clearly lose on merits. Consequently, the complainant requested constitutional review of the provision requiring the stamps even on complaints *against the state*, alleging infringement upon right to trial, and when denied, filed a constitutional complaint.

B. Summary of the Decision

In a unanimous decision, the Constitutional Court upheld Article 1 of the Act on the Stamps Attached for civil Litigation, etc.:

The purport of the previous decision upholding Article 2 of the Act on Special Cases concerning Stamp Affixing and Deposit Offering in 91Hun-Ka3, February 24, 1994 meant not only that the provision does not favor the state without any rational basis but also implied that it does not discriminate against ordinary citizens without rational basis. The Court adheres to the purport of that decision in this case.

Article 1 of the Act on the Stamps Attached for Civil Litigation, etc. requires a certain amount of stamps to be affixed to all complaints. Insofar as the current civil procedure is equipped with a system of providing aids for litigation costs, such requirement does not hamper or obstruct completely the indigent's opportunity for a trial, nor infringe upon right to trial nor discriminate irrationally.

Furthermore, court fees, especially the form and the amount of filing fees, must take into account comprehensively the structure and

preparedness of our judicial system, the history of filing stamps, the sentiments of the people using the system, our economic conditions, and comparable statutes in foreign countries, etc. To the extent that the method of computing the fees is not so extremely irrational or the resulting fees are not so high compared to the amount in controversy so as to constitute an infringement on the right to trial, the legislature has a wide discretion. The present Act on the Stamps Attached for Civil Litigation, etc. unified the rates for all civil suits to 5/1000 (Article 2 (1)) of the amounts in controversy, which is the lowest so far and therefore has reduced the burden on the people. Objectively, the rate is not so high as to infringe upon right to trial or the constitutional principle of equality.

C. Aftermath of the Case

After this decision, the Court heard in 95 Hun-Ka 1 & 4 (consolidated) on October 4, 1996 an argument that Article 2 (1) requirement of stamps in amounts proportional to the amounts in controversy discriminates against the plaintiffs suing for a higher amount. The Court noted that the adopted system of proportionality increases the fees as the amounts in controversy go up, but noted also that the larger amount in controversy means the greater potential interest that the plaintiff has secured through filing the suit. The Court held that, therefore, the provision does not go beyond the line of appropriateness and does not violate the constitutional principle of equality since there is a rational reason behind it.

Justices Kim Moon-hee and Hwang Do-yun dissented, opining that the filing fees are aimed partially at preventing abuses of lawsuits but also meant as *fees for service*. Always requiring a proportionally larger amount of filing stamps for a suit for a larger amount in controversy eviscerates the nature of the stamps as fees for services, and hampers the plaintiff's right to relief through trial. It excessively limits one's right to trial.

Through these decisions, the Court affirmed almost all possibly controversial provisions of the Act on the Stamps Attached for Civil Litigation, etc. leaving the forms and amounts of court fees, and especially those of filing fees, to the broad discretion of the legislature.

15. *Local Soju*[67] *Compulsory Purchase System* case, 8-2 KCCR 680, 96Hun-Ka18, December 26, 1996

A. Background of the Case

In this case, the Court struck down the Liquor Tax Act that required wholesalers of *soju* to purchase *soju* produced in their local areas, for excessively limiting not only *soju* wholesalers' occupational freedom but also *soju* makers' freedom of competition and entrepreneurship.

Since the beginning of the 1970s, the government sought to consolidate, under a policy of one maker for one province, more than 400 *soju* makers then competing nationwide and in 1981, reduced them into the present 10 makers. Also, in order to prevent monopoly by one particular company and promote a regionally balanced growth, a system was introduced that requires *soju* purchases to be made locally (National Tax Service Order No. 534, June 24, 1976). The system was abolished in 1991 but was revived as a provision in Section 38-7 of the Liquor Tax Act on October 1, 1995.

Article 38-7 (1) of the Liquor Tax Act (revised by Act No. 5036 on December 29, 1995) provided that *soju* wholesalers must purchase more than 50% of the total monthly purchase from the producers located in the same province or city. Article 18 (1) (ix) allowed the director of the tax office to suspend the liquor sales or the license if the above provision was violated.

The claimant was suspended from operating his business by the local tax office for violation of Article 38-7, and sought nullification of the suspension through judicial review of the administrative action. At the same, he requested constitutional review of the provision, which was granted by the presiding court and referred to the Constitutional Court.

B. Summary of the Decision

The Constitutional Court struck down Articles 38-7 and 18 (1) (ix) of the Liquor Tax Act in the following majority opinion of six justices:

If monopoly regulation mandated in Article 119 (2) of the Constitution is aimed at resuscitation of competition, it must be achieved

67). *Soju* is a uniquely Korean alcoholic beverage made of fermented sweet potatoes.

through means that also allow free and fair competition. The compulsory purchase program excludes free, nationwide competition, fosters ascendancy of regional powers through self-serving give-and-takes, guarantees regional *soju* makers a 50% regional market share, and thereby solidifies the regional monopolies. It is not an appropriate means to achieve the aimed public interest, the regulation of monopoly.

The primary aim of regional economic development stated in Article 123 of the Constitution is the reduction of economic disparity among regions. While the Liquor Tax Act seeks to maintain one *soju* maker in every province, there is no concrete regional disparity calling for such adjustment. There is no relationship between promoting regional economy and maintaining one *soju* maker in each province, which therefore cannot be the public interest justifying the infringement of basic rights.

Article 123 (3) of the Constitution expressly states protection of small-to-midsize businesses as a national economic policy goal. However, it must be realized in principle by strengthening the rules of competition on the foundation of a competitive order and by making up for the disparities arising out of free competition through the support of the state for the purpose of maintaining and promoting competition. The compulsory purchase system cannot be an appropriate means to achieve such public interest.

Therefore, Articles 38-7 and 18 (1) (ix) of the Liquor Tax Act limit excessively not only *soju* wholesalers' occupational freedom but also *soju* makers' freedom of competition and entrepreneurship and the consumers' right to self-determination derived from the right to pursue happiness, and therefore, are unconstitutional.

In relation to equality, if the compulsory local purchase were aimed at monopoly regulation and protection of small-to-midsize enterprises, there is no rational reason to apply it only to *soju* wholesalers among all other wholesalers. If it were aimed at reducing the cost of distribution and the amount of traffic arising out of transportation of goods, there is no rational reason to regulate *soju* wholesalers differently from wholesalers of other products, which also cause more traffic and incur more cost in transit. Therefore, the above provisions violate the principle of equality.

Justices Cho Seung-hyung, Chung Kyung-sik, and Koh Joong-suk dissented, characterizing the statutes as a program preventing monopoly by a big business and protecting *regional* soju makers, thereby giving effect to the constitutional economic objectives of monopoly regulation and regional economic development. Therefore, even if

the program gives rise to a minor instance of discrimination, there is a rational reason for it. The compulsory purchase program is a product of consideration of various circumstances within the legislative privilege of policy-making and is an inevitable and reasonable limitation on basic rights within the bounds of Article 37 (2) of the Constitution.

C. Aftermath of the Case

It was commented that the compulsory local purchase program was introduced to ease financial hardship of local *soju* makers who were in the shadow of the giant *soju* company, *Jinro*, and did result in an increase in sales of local brands. However, the comment continued, the government protected only the local businesses in a certain industry when there is no reason for such protection under the capitalist economic order run on the logic of competition. Therefore, the comment found the decision appropriate for a program that has brought waves of questions about its constitutionality from its inception.

16. *Automobile Driver's No-Fault Liability* case, 10-1 KCCR 522, 96Hun-Ka4, etc., May 28, 1998

A. Background of the Case

In this case, the Constitutional Court upheld the provisions of the Guarantee of Automobile Accident Compensation Act requiring the driver to compensate for any injury to or death of all passengers including free riders and guests of his courtesy, regardless of his fault.

The second proviso of Article 3 of the Guarantee of Automobile Accident Compensation Act (revised by Act No. 3774 on Dec. 31, 1984) stipulates that one who drives an automobile for his or her benefit shall be liable for any injury to or death of a passenger arising out of the ride except when it was caused by the passenger intentionally or in an act of suicide.

Today, automobiles, even with in the inevitable risk of accidents, have become an indispensable means of transportation in people's daily lives. Yet automobile accidents occur in matters of seconds, making it difficult to allocate the responsibility for them. There has been a controversy around how to regulate liabilities of the negligent drivers and provide compensation for auto accidents. An argument was continuously raised amongst the insurance companies and

business-legal scholars that the rule of no-fault liability of a driver to all passengers violates the Constitution.

This decision concerned the requests for constitutional review in 96Hun-Ka4 and 97Hun-Ka6 and 7 and the constitutional complaint in 95Hun-Ba58. The claimants and complainant were either the drivers or their insurance companies in accidents where passenger death or injury occurred. When sued for the loss, they requested constitutional review of the above provision in the Constitutional Court. Some of them were denied in their requests but filed constitutional complaints.

B. Summary of the Decision

In a unanimous decision, the Constitutional Court upheld the second proviso of Article 3 of the Guarantee of Automobile Accident Compensation Act for as follows:

The free-market economic order forms the basis of the Korean Constitution. The Constitution, however, also adopts the principles of a social state. In light of that, even when the liabilities for general torts are allocated according to fault, it is within the discretion of the legislators to single out one type of tort and apply the principle of risk-liability. Considering the special nature of auto accidents, mere imposition of no-fault liability on the driver for having created the risk in cases of passengers' deaths or injuries does not breach the free-market economic order.

In relation to right to property, it should be noted that the driver controls operation of the automobile and benefits from it. He also has abstractly or indirectly consented to the passengers' boarding of the vehicle, thereby bringing them within the danger of direct injuries arising out of an auto accident. Holding him liable, regardless of his fault, for any damage to all passengers including free riders and guests of his courtesy does not violate the essence of his property right. The provision is the minimum rational regulation necessary for public welfare that follows the constitutional ideology of a social state. It does not infringe upon the driver's right to property.

In relation to the principle of equality, it should be noted that there is a fundamental difference between passengers who have joined in the risk of a car accident and the non-passengers. Contrarily, there is no fundamental difference between the driver at fault and the driver without fault in their control of the source of danger, the vehicle. Therefore, the above provision differentiating the passengers from the non-passengers and applying no-fault liability to both the

drivers at fault and those without has a rational basis and does not violate the principle of equality.

C. Aftermath of the Case

This decision is significant as the first approval by the Court of a law that modifies the traditional rule of liability for fault and holds the person in control of the source of danger liable for any part of the danger materialized, thereby introducing the principle of risk-liability. In modern industrial societies, the sources of danger such as high-speed transportation, mining, and nuclear power have grown and the damages from industrial accidents and environmental pollution have increased. Therefore, many countries are adopting the principle of risk-liability to realize the ideals of a social state. Korea also adopted the rule of risk-liability in various statutes including the Nuclear Damage Compensation Act. This decision can be a touchstone for future constitutional disputes surrounding the principle of liability for risk-creation.

17. *Inheritance by Default* case, 10-2 KCCR 339, 96Hun-Ka22, etc., August 27, 1998

A. Background of the Case

In this case, the Constitutional Court found nonconforming to the Constitution Article 1026 (ii) of the Civil Act that imputes absolute acceptance to an heir who fails to give qualified acceptance or relinquish within three months from the date of his or her knowledge of the inheritance.

Article 1026 (2) of the Civil Act stipulates that if an heir does not give qualified acceptance or relinquish within three months after learning the existence of inheritance, he or she will be considered to have approved the inheritance in its entirety by default.

The claimants and complainant passed the three-month periods of consideration, not knowing the amounts of debt of the deceased not due to their own fault. They argued that the above provision violates the constitutional rights to property, pursuit of happiness, and equality, and requested constitutional review. Some motions were granted and referred to the Constitutional Court and those who were denied filed constitutional complaints.

B. Summary of the Decision

The Court examined whether or not Article 1026 (ii) imputing absolute acceptance of the inheritance to an heir who has knowingly defaulted for three months on his or her inheritance violates property right and private autonomy. The Court decided that above provision does not conform to the constitution and should become void on January 1, 2000 and that, meanwhile, courts, other state agencies, and local governments should not apply it is revised by the legislature.

Article 1026 (ii) period of consideration starts from the date "when the heir knew commencement of the inheritance". The Supreme Court interprets this date as when the heir first learned of the death of the predecessor, not of the existence or the lack of inherited assets. In light of this interpretation, the provision may impose all the liabilities of the deceased on the heir even when he has not acknowledged selectively or relinquished the inheritance because he, due to none of his fault, did not know that negative assets exceeded the positive ones. The provision is an exception to the constitutional principles of private autonomy and liability for fault, violating the heir's right to property and private autonomy protected by the Constitution, and is therefore unconstitutional.

Today, extended families are dissolving into nuclear ones: heirs often live far from the predecessor and business transactions have become more complicated. It is now difficult for heirs to learn all the details about the inherited assets within the period of consideration. Moreover, when the predecessor guarantied indefinite debts arising out of a continuing business relationship, the primary debt may arise even after the period of consideration. In such cases, the heirs can easily decide not to partially acknowledge or relinquish the inheritance not knowing that the negative assets exceed positive ones. The above provision does not provide any measure of relief for such heirs and imposes all the inherited debts on the heirs regardless of their will. It is not an appropriate means of limiting basic rights.

Although the above provision should be declared unconstitutional for the reasons mentioned above, an unqualified decision of unconstitutionality will create a vacuum in law whereby the legal relations surrounding the inheritance cannot be established by default when the heirs are silent. Such decision will also create a confusion in law whereby even the negative assets not exceeding the positive ones cannot be imputed to the heirs and even the heirs who passed the period of consideration due to their own fault cannot be subject to a

default rule. Also, any correction of unconstitutional provisions falls under the legislative discretion. In consideration of all these, the Constitutional Court hereby issues a decision of nonconformity. However, if the provision is not revised before December 31, 1999, it becomes void starting January 1, 2000, and it cannot be enforced by courts, state agencies and local governments until it is revised by the legislature.

C. Aftermath of the Case

In this case, the Court strongly called for legislative revision by imposing a time limit while preventing the vacuum in law by keeping the statute effective in the meantime.

After the decision, some argued that the above provision can still be applied to most cases of inheritance where positive assets exceed negative ones, since the reasoning of the Court in the decision would permit passing of the non-negative inheritance to the heirs by a default acknowledgment.

After the decision, the Ministry of Justice drafted an amendment adding Article (3) to Article 1019 of the Civil Act. Article (3) reads: "Notwithstanding Article (1), when the heir, not due to any gross negligence on his part, did not know the fact that the debt inherited exceeds the asset during the period of consideration prescribed in (1) and therefore acknowledged the inheritance in its entirety (including constructive acknowledgment pursuant to Article 1026 (i) and (ii)), he can give partial acknowledgment within three months from the date he or she became aware of that fact." The Ministry presented to the National Assembly after a review in the Administration.

However, in order to provide relief to the claimants and complainant, there is a need for a transitional clause that applies the benefit of the new statute to them regardless of the prescribed grace period of "three months from the date he or she became aware of that fact." The claimants and complainant knew that negative assets exceeded the positive ones when the dispute began through a trial. If the grace period is construed to have accrued from that point, the Court's purport behind this decision cannot be applied to them.[68] The scope of such transitional clause is within the legislative discretion. It, however, is desirable for the legislature to give life to the Court's intent in fashioning the decision of nonconformity and provide relief to

68). The Court could have benefited the claimants and complainant directly by holding the statute simply unconstitutional. In order to prevent a vacuum or confusion in law, the Court chose to issue a decision of nonconformity while fully intending to provide relief to the petitioners.

the claimants and complainant and to those similarly situated.

The Supreme Court also saw the need for a transitional clause in making the new statute consistent with the reasoning of the Constitutional Court and proposed the following addition to the new statute: The heirs may give partial acknowledgment three months from the date when this Act goes into effect in 1) the cases that provided the Constitutional Court an opportunity for the decision of unconstitutionality on Article 1026 (ii) through constitutional complaints or requests for constitutional review; 2) the cases where similar questions of constitutionality were referred to the Constitutional Court or were motioned for review in the ordinary courts before the decision of unconstitutionality; 3) the cases that were pending on the premise of the old Article 1026 (ii) when this Act went into effect; and 4) the cases in which debts inherited between May 27, 1998 and December 31, 1998 exceeded the assets but the heirs acknowledge the inheritance in its entirety without knowing the fact.[69]

V. Cases Concerning Social Relations such as Family, Industrial Relations

1. *Adultery* case, 2 KCCR 306, 89Hun-Ma82, September 10, 1990

A. Background of the Case

In this case, the Constitutional Court upheld the Criminal Act provision on adultery, which has long been subject to a dispute on a contention that the state's attempt to restrict individuals' sexual life has been excessive and is against the principle of equality.

The complainant was charged with adultery and sentenced to one year in prison at the first trial and to eight months by the appellate court. Upon appeal of the conviction to the Supreme Court, he requested constitutional review of Article 241 of the Criminal Act outlawing adultery. When the Supreme Court denied the motion, the complainant filed a constitutional complaint with the Constitutional Court.

69). August 27, 1998 is the date of this decision.

B. Summary of the Decision

Explaining the relationship between the right to sexual selfdetermination and the crime of adultery, the Constitutional Court upheld Article 241 of the Criminal Act on adultery in the following majority opinion of six Justices:

On matters of sexual self-determination, Article 10 of the Constitution on the right of personality and the right to pursue happiness presumes the individual right to self-determination, which includes right to sexual self-determination, namely, right to decide whether and with whom to enter into sexual relationships. The legal prohibition of adultery by Article 241 of the Criminal Act does limit the right of individuals to sexual self-determination. However, protection for the right to sexual self-determination is not absolute. The right has an inherent limit where it concerns the rights of others, public morality, social ethics and public welfare in the context of national and social community life.

Article 241 of the Criminal Act is aimed at maintaining sexual morality and the monogamous conjugal system, protecting sexual fidelity between husbands and wives, guaranteeing a family life, and deterring social evils arising from adultery. To that end, it bans adultery by a married person and subjects the transgressors to a punishment of up to two years of incarceration. They constitute a necessary minimum regulation on sexual self-determination and do not violate the rule against excessive restriction and the rule against violation of the essence of basic constitutional rights.

The provision, when applied, produced different results depending on the degree of patience and retaliatory intent on the part of the victim and the economic ability of the wrongdoer. Its application is admittedly prone to be favorable to the economically more resourceful male than female. However, those phenomena result from the fact that, for the purpose of protecting reputation and privacy, adultery was made a crime prosecutable upon a complaint. These phenomena are inevitably general to all crimes prosecutable upon complaints under the Criminal Act and are not unique to adultery. The provision does not violate the principle of equality.

The adultery provision is not in violation of Article 36 (1) of the Constitution, which provides that "marriage and family life should be based on and maintained by individual dignity and gender equality, and the state shall guarantee this institution." Rather, the provision is consistent with the aforementioned constitutional duty of the state to guarantee marriage and family life on the basis of indi-

vidual dignity and gender equality.

Two dissenting Justices, Han Byung-chae and Lee Shi-yoon expressed the opinion that criminal punishment for adultery itself was constitutional, but the adultery provision provides incarceration as the only form of punishment without allowing more moderate forms of penalty, and is therefore unconstitutional. Justice Kim Yang-kyun also dissented, stating that the adultery prohibition was unconstitutional as a violation of right to withhold private matter from disclosure or of the principle against excessive restriction. He further went on to say that even if the prohibition itself is constitutional the penalty provision allows only a sentence of imprisonment of up to two years, violating the rule against excessive restriction.

C. Aftermath of the Case

In the decision, the Constitutional Court, while holding that the right to pursue happiness guaranteed by Article 10 of the Constitution includes sexual self-determination, ruled that sexual selfdetermination could be limited for maintaining and securing marriage and family life. The decision ignited a series of debates on where to draw the line between ethics and law, and on the limit of state's intrusion upon personal lives. During a revision process of the Criminal Act after the decision was held, there was a discussion about modifying the adultery provision to include fine as punishment in addition to imprisonment but it was not reflected in the legislation.

The Constitutional Court upheld its decision on March 11, 1993, in yet another constitutional adjudication on the prohibition of adultery (90Hun-Ka70).

2. *Statute of Limitation for Suits to Dispute One's Own Paternity* case, 9-1 KCCR 193, 95Hun-Ka14, etc., March 27, 1997

A. Background of the Case

This case concerns Article 847 (1) of the Civil Act which limits the period in which a father can dispute his biological fatherhood to a child to one year after the birth of the child for the sake of stability in family relations, and the Constitutional Court held it to be nonconforming to the Constitution.

Article 847 (1) of the Civil Act stipulates that a person presumed

to be a father under Article 844 of the same Act must file a lawsuit to dispute his parenthood within 'one year after the birth of the child is known'. Some argued that this provision is inappropriate in light of the Korean people's strong preference for a genuine hereditary relationship, and that it is especially so in light of the tremendous increase in women's participation in society and the change in their concern for chastity.

The claimant filed a suit to dispute parenthood of a person born from his spouse after the period of limitation set by Article 847 (1) of the Civil Act, and requested constitutional review of the article to the trial court, which then referred the case to the Constitutional Court.

B. Summary of the Decision

The Constitutional Court ruled that the limitation on the period for filing a lawsuit to dispute parenthood is nonconforming to the Constitution, by reaffirming the legislative intent behind Article 847 (1) of the Civil Act as follows:

The above provision provides an opportunity to dispute parenthood and at the same time promotes stability in family relation by setting a statutory period of limitation by which such suit is to be filed.

The length of the period of limitation on such lawsuit, in principle, falls under the legislative discretion. However, if the period of limitation is too short or irrational so that the statutory period expires before the father is convinced of his fatherhood, making it very difficult or effectively impossible to file the suit, and thereby extremely narrowing his opportunity to deny the father-child relationship, then such a limitation goes beyond the legislative discretion and is unconstitutional.

The above mentioned statutory period of limitation is very unfair to the father because it starts accruing from the date when the birth was known, regardless of when the father first knew of reasons to dispute the fatherhood. In addition, the duration of one year was set in light of the tradition that fidelity is observed during marriage. In modern society, the traditional values have changed drastically due to the increase in women's participation in society, confusion of values, and relaxation of ethical awareness. Furthermore, when many babies are born en masse in hospitals and other specialized institutions, one cannot exclude the chance of babies being switched. Due to all these changing social conditions, there exists an increasing

possibility of illegitimate children and therefore a heightening need to grant a father the right to deny his fatherhood. Yet Korea still adheres to the emphasis on one's ancestry and the strong attachment to the hereditary ties. In consideration of all these factors, limiting the period in which to file a legal dispute to one year from the date of knowing the birth is too short.

Therefore, the above provision departs from the scope of the legislative discretion, violating Article 10 of the Constitution guaranteeing human dignity and worth and the right to pursue happiness and Article 36 (1) prohibiting infringement upon family life and marriage.

Nevertheless, an unqualified decision of unconstitutionality on the above provision may create vacuum in law. In order to prevent the ensuing confusion and defer to the legislature's formative discretion, the Court hereby issues a decision of nonconformity. As a point of reference in eliminating the nonconformity, we point to the Civil Act of Switzerland which requires the paternity dispute to be filed within one year of *knowing* the illegitimacy of parenthood but at any rate within five years of the birth of the child.

Justice Kim Chin-woo gave a separate opinion, refuting the Switzerland legislation as a remedy to the constitutional nonconformity. He stated that it seriously limits the father's general right to personality and his access to judicial process, violating the rule against excessive restriction.

C. Aftermath of the Case

Through this decision, the Constitutional Court cured the irrational state in which the short period of limitation effectively blocked the possibility of disputing parenthood. For the above provision became no longer effective, the legislature needed to revise the law to lengthen the period of limitation immediately.

3. *Livelihood Protection Standard* case, 9-1 KCCR 543, 94Hun-Ma33, May 29, 1997

A. Background of the Case

The issue was whether the livelihood protection standards, which provides less than the minimum cost of living, violates the right to humane livelihood.

The complainants, husband and wife, were protected under Article 6 (1) of the Protection of Minimun Living Standards Act (the Act) and Article 6 (i) of its regulation, and were recipients of the living assistance payment calculated under "the 1994 Livelihood Protection Standard" in the 1994 Guidelines for Livelihood Protection Programs, which was promulgated by the Minister of Health and Welfare in January. The couple filed a constitutional complaint against the "1994 Livelihood Protection Standard", alleging that the amount of the payment was far less than the minimum living cost and therefore infringed on the constitutionally guaranteed rights to pursuit of happiness and humane livelihood.

Despite the rapid economic growth, Korea's standard of social welfare lags far behind other countries. Her constitution, in contrast, guarantees the people the right to humane livelihood and other social rights, generating some amount of expectation of social welfare programs toward the state among the people. It was under this circumstance that the elderly couple with no ability to work filed the complaint and argued that the amount of the welfare payment was far short of the minimum living cost. Many organizations on social welfare kept close attention to the case, since it would reflect on the Constitutional Court's position on whether the alleged basic social rights is in essence individual rights of the people and how much benefit people can request from the state.

B. Summary of the Decision

After reaffirming the state's responsibility to protect people's living standards, the Constitutional Court dismissed the case, holding that the "1994 Livelihood Protection Standard" does not violate the Constitution.

In the process of development of capitalism, poverty was recognized as a task of the state. Our constitution accordingly guarantees to the people the right to humane livelihood (Article 34 (1)) and imposes on the state a duty to increase social protection and welfare ((2) of the same Article). The Constitution also accepts the principles of a *social state* by broadening defining various basic social rights. In particular, Article 34 (5) of the Constitution explicitly states the state's duty to protect those who do not have economic ability due to their age or other reasons. This duty was further elaborated by the Livelihood Protection Act, which was enacted by the legislature for the purpose of carrying out such duty (Act No. 3623, Dec. 31, 1982).

The legislature violates the constitutional provisions on the state's duty to protect the people without economic ability and the people's right to humane livelihood when the state did not legislate at all in that area or the content of the legislation is so irrational that the state has clearly deviated from its discretion. However, constitutionality of the livelihood protection standards set by the Administration cannot be judged on the living assistance payment under the Protection of Minimum Living Standards Act alone but on the aggregate including those living protection payments or exemptions provided by other laws.

In 1994, for example, the in-house recipients (like the complainants), in addition to the living assistance payment of 65,000 won per month, received a winter subsidy of 61,000 won per year. Those who are 70 years or older received an elderly allowance of 15,000 won a month under the Welfare of the Aged Act. Those over 65 of age receive a bus fare allowance of 3,600 won per month. All welfare recipients also received exemptions on water supply and drainage taxes from local governments (a flat exemption of 2,500 won from the monthly basic fee in Seoul) pursuant to the related ordinances; a monthly exemption of 2,500 won on television reception charges pursuant to the regulations of the Korea Broadcasting System Act; and a monthly exemption of 6,000 won on telephone charges (the base rate plus 150 calls).

In consideration of all these benefits, even if their aggregate sum does not meet that year's minimum cost of living for a household of two (a per capita monthly amount of 190,000 won for a major city, 178,000 for a small to medium city, and 154,000 for rural areas in 1994), that fact alone does not render the "1994 Livelihood Protection Standards" state's failure in providing for the objective minimum necessary for humane livelihood or a clear departure from the constitutionally permitted scope of discretion. It did not violate the complainants' right to pursue happiness and to humane livelihood or otherwise violate the Constitution.

C. Aftermath of the Case

The case, which the complainants filed with help from professors and *pro bono* lawyers, came to a close after three years as the Court dismissed it, but generated responses throughout the society on welfare policies.

The decision is significant as one setting the direction on the question: to what extent the right to humane livelihood confines

the policy decisions of the state concerning the level of protection it provides to the people without economic ability.

Critics of the decision, however, argued that the Court was excessively conscious of the impact that the state's active intervention in the sphere of public benefits would bring about on its fiscal and economic policies and allowed too broad a policy discretion to the state in its setting of the level of protection for the people without economic ability.

4. *Same-Surname-Same-Origin Marriage Ban* case, 9-2 KCCR 1, 95Hun-Ka6, etc., July 16, 1997

A. Background of the case

In this case, the Constitutional Court held that Article 809 (1) of the Civil Act, which prohibits same-surname-same-origin marriage, broadly restricts sexual self-determination which originates from the right to pursue happiness and especially the right to choose the spouse in marriage and that the provision is nonconforming to the Constitution.

Article 809 (1) of the Civil Act prohibits marriage between two persons who have the same family name and come from the same ancestral line ("Dongsungdongbon").

The ban on same-surname-same-origin marriage has been the subject of a long dispute between the Confucian adherents who emphasize its unity with the national tradition and the women's groups who demand its revision or abolition on the ground that it is not only too broad a prohibition on marriage without any genetic evidence but also a relic of patriarchy and male supremacy. As interim solutions, the National Assembly, using the Act on Special Cases concerning Marriage, saved many same-surname-same-origin couples from the hardship in schooling of their children and their marriage life by recognizing their *de facto* marital status. It, however, failed to provide a final resolution on the issue. Eventually, the provision came to the Constitutional Court for constitutional review.

The claimants who would like to marry people with same surnames from same ancestral lines sought nullification of the administrative action that rejected their marriage registrations in the Seoul Family Court and requested constitutional review of the provision. The Family Court accepted the request and referred the issue to the Constitutional Court on May 17, 1995.

As the case came to the Constitutional Court, the Confucian adherent groups made substantial efforts to deter the Court from striking down the provision by sending petitions to the Justices.

B. Summary of the Decision

The Constitutional Court found Article 809 (1) of the Civil Act nonconforming after examining the following historical backgrounds of the provision.

Even putting aside Article 809 (1), incestuous marriage prohibited by other laws is defined broadly enough. Yet Article 809 (1) not only voids all same-surname-same-origin marriages regardless of the degree of kinship but prohibits even their registration.

The modern society of Korea has changed drastically from the period on which the ban on same-surname-same-origin marriage could take roots, and the institutional foundation of the ban is being greatly questioned. Firstly, the modern society is a free democratic society that is based on the fundamental ideas of freedom and equality and opposes sexism and any form of caste or class. Accordingly, Article 36 (1) of the Constitution not only mandates that establishment and maintenance of marriage and family life be based on gender equality and individual dignity but even provides for the state's responsibility to guarantee fulfillment of the mandate. Secondly, the prevailing view of marriage changed from that of union between two families to that of union between two individuals whose free wills should be respected in the process. The prevailing idea and form of family also changed from that of an extended family based on patriarchy to that of a nuclear family. The idea of gender equality has also become widely accepted due to the expanding education of women since the founding of the country. Thirdly, the self-sustaining agrarian society or the feudal and isolated rural-centered society has transformed itself into a highly advanced industrial society. With astronomical growth of the population, the numbers of those with the major family names such as Kim from Kimhae, Lee from Chunju, Park from Milyang were 3,892,342, 2,379,537 and 2,704,819, respectively according to the 1985 figures, making surnames and origins difficult to accept as rational standards of a marriage ban. The growing urbanization of the population is diluting such concept as a house or a lineal origin (bon-gwan).

Based on such an evaluation, Article 809 (1) of the Civil Act loses its social acceptability or rationality as a marriage ban and is in direct conflict with the principle of sexual self-determination, es-

pecially, the constitutional ideas and provision (Article 10) on human dignity and worth and the right to pursue happiness, which is the basis of the right to choose one's destiny including freedom of marriage and freedom to choose one's partner in marriage. It also directly conflicts with the constitutional provision calling for establishment and maintenance of marriage and family life on the basis of individual dignity and gender equality. In addition, since the scope of prohibition is limited to the same surnames, in other words, those with the same patrilineal blood ties, it is gender discrimination. Since there is no rational ground to justify such discrimination, it also violates the constitutional principle of equality (Article 11). And since its legislative purpose no longer qualifies as public welfare or social order that justifies limitation on people's rights and freedom, it also violates Article 37 (2).

All Justices except Justices Lee Jae-hwa and Cho Seung-hyung agreed that the provision violates the Constitution. However, Justices Chung Kyung-sik and Koh Joong-suk advocated for respect of the power of legislative formation of the National Assembly and therefore a decision of nonconformity instead of simple invalidation. Although the remaining five Justices Justices Kim Yong-joon, Kim Moon-hee, Hwang Do-yun, Shin Chang-on, and Lee Young-mo were in agreement on a simple decision of unconstitutionality, they were not enough for such ruling under Article 113 (1) of the Constitution. Therefore, the decision of the Court ended up being the greatest common denominator between the above two views, i.e., a decision of nonconformity. The Court, at the same, stopped the provision from being applied in any manner and ordered the legislature to cure the defect by December 31, 1998, after which the provision becomes void as of January 1, 1999 if not so cured.

On this matter, Justices Lee Jae-hwa and Cho Seung-hyung argued that even if the above clause restricts the people's right to pursue happiness, in other words, the freedom of marriage and the freedom to choose with whom to marry, it does not rise to violation of the principle of excessive restriction. In addition, even if the ban is based only upon partilineal blood ties, it is not arbitrary gender discrimination because the Korean Civil Act adopted it as a codification of a traditional custom.

C. Aftermath of the Case

After the decision suspended the effect of the ban, the estimated two hundred thousand couples who were forced to remain only in *de facto* marriages were now able to obtain legal marital status. They

were able to register their marriage right after the decision, and their children were freed from the shackle of being children out of wed-lock while the spouses could now enjoy the previously unavailable benefits such as medical insurance, family allowances and tax exemptions, etc. The decision also provided a breakthrough for the attempts to revise the other related family law statutes that were in standstill.

Confucian adherents criticized the decision as "a shameful sell-out of the whole nation going beyond sell-out of the country" while women groups welcomed it as "a calm announcement but a thunder that broke down the bad law in the time of change." It was also reported that the decision "put an end to an ineffective relic of the old age" or that "it was a progressive decision upholding gender equality and abolishing the ideology of patriarchy."

In accordance to the Court's declaration that "courts, other state institutions and local governments must stop applying the provision until it is revised by the legislature," the Supreme Court announced new family registration procedures for the applications filed by same-surname-same-origin couples before the revision. Also, parts of the Rules of the Supreme Court on Family Register that prohibited the registration of same-surname-same-origin marriage (Rule No. 172) and that concerned mistaken registration of same-surname-same-origin marriage (Rule No. 176) were abolished.

5. *Gift Tax on Matrimonial Property Distribution* case, 9-2 KCCR 454, 96Hun-Ba14, October 30, 1997

A. Background of the Case

In this case, the Constitutional Court ruled that the former Inheritance Tax Act imposing a gift tax to the property received from divorce violates the principle of equality in taxation.

Article 29-2 (1) (i) of the former Inheritance Tax Act (prior to revision by Act No. 4805 on December 22, 1994, hereafter, "Tax Act") imposes a gift tax on the person who has acquired a property due to another person's donation and has a domestic address at the time of the donation. It also provides that a divorcee who acquires properties exceeding a certain amount from the other spouse through property distribution pursuant to Article 839-2 or Article 843 of the Civil Act, is deemed to have acquired them due to another person's donation and is therefore liable for a gift tax.

The complainant divorced her husband on consent, transferred her title to some realties to the husband while applying for transfer of title to other real properties to her on the ground of marital property distribution. The tax office director levied a gift tax on the transferred property. The complainant sought nullification of the administrative action at the Pusan High Court and requested constitutional review of Article 29-2 (1) (i) of the "Tax Act" which formed the basis of that action. When the Pusan High Court denied the motion, the complainant filed a constitutional complaint against the provision at the Court.

B. Summary of the Decision

After examining the nature of property distribution in a divorce proceeding, the Court struck down the part of Article 29-2 (1) (i) of the former Tax Act that levies a gift tax on such transfer from the other spouse.

Property distribution upon divorce is by nature settlement of accounts on the properties communally owned by the husband and the wife. The property distributed to a spouse has already belonged to that spouse before such distribution. Transfer of title in this case is nothing more than partition of a communally owned property or realization of that spouse's potential interest in the property. Such transfer is in no way equivalent to donation in which one acquires a new property without compensation. Rather, it has a feature of discharge of one's duty of support for his or her former spouse. The Civil Act already exempts from taxation spouse-to-spouse transfer of medical costs, living expenses or educational costs that are considered to be common necessities. There is no basis for imposing gift tax on property distribution upon divorce.

Even from a policy perspective, although property distribution upon divorce can be deemed a taxable transfer on some policy grounds if it is used for tax evasion, it is inconceivable for a regular couple to contemplate a divorce for such purpose (when they could commonly own it without raising any tax implication - Trans.). Furthermore, any property distribution in a divorce proceeding is different from a gift both in its nature and in its socio-economic effects, allowing no policy reason to treat it as one. The above provision violates the principle of taxation on real worth because it is clearly irrational and arbitrary and is incompatible with the constitutional right to property.

From the perspective of fairness in taxation, divorce and the death of a spouse differ in their property relations and personal re-

lations and therefore the property transfer in the former situation must be treated differently from the latter. Yet the above provision imposes a gift tax on it as well. It conflicts the mandate of equality to 'treat equals equally and treat unequals unequally' and constitutes irrational discrimination that violates the equality in taxation.

Justice Lee Young-mo dissented as follows: Today, the task of structuring progressive tax rates to achieve the fairest distribution of wealth and deciding on other methods of redistribution is a matter of tax policy or tax principle that should take into account the political, economical, social and ethical contexts of the given period. Property allocation upon divorce is in principle settlement of accounts on the communally owned properties. However, it sometimes includes support payments that are already exempt from a gift tax. And it is very difficult to set a legal standard that provides for objective allocation in light of each spouse's contribution to formation and maintenance of the communal property.

The legislature set the per-person deduction very high for the properties obtained through a divorce proceeding and thereby levies on a sector of the people that have exorbitant amounts of properties to be distributed. Therefore, the provision can be interpreted as allowing tax-free property distribution below the level set by the deduction and also allowing exemption from taxation for the part of property that exceeds that level when the acquiring spouse can demonstrate his or her contribution to its formation as a special circumstance. Therefore, the provision has validity and rationality both in the means and ends of legislation and is therefore within the broad scope of legislative discretion.

C. Aftermath of the Case

Property distribution upon divorce had previously advocated for as a theory and was actually legislated as Article 839-2 of the Civil Act, especially to protect the divorced women, when the Act was partly amended in 1989. The decision provided significant relief to the economic stability of unemployed divorcees, and was welcomed by women groups.

Nevertheless, the nearly same content of Article 29-2 (1) (i) of the former act was preserved in Article 31 (2) of the current Inheritance Tax and Gift Tax Act (Act No. 5193) even when it was entirely revised on December 30, 1996.

6. *Prohibition of Third-Party Intervention in Labor Disputes* case, 2 KCCR 4, 89Hun-Ka103, January 15, 1990

A. Background of the Case

In this case the Constitutional Court upheld the Labor Dispute Adjustment Act (LDAA) that prohibits third party intervention in a labor-management dispute.

Article 13-2 of LDAA (revised by Act No. 3926, December 31, 1986) prohibits in principle any manipulation, instigation or obstruction of the involved parties or any other intervention in the dispute, except by the union in the direct labor relationship with the management, the management, or anyone else authorized by law. Article 45-2 of the LDAA prescribes imprisonment of up to five years and a fine of up to ten million won for the violators.

Some argued that the above provision is unconstitutional since workers need advice and assistance from third parties such as experts on labor issues, scholars, legal professionals, etc. in order to exercise their three basic labor rights guaranteed by the Constitution.

The claimant, a minister of an urban-industrial mission church, was prosecuted for violation of the above provision on a charge of having intervened in the labor dispute of a taxi company with intent to influence the dispute. He requested constitutional review of Articles 13-2 and 45-2 of the LDAA, and the Chungju District Court granted the motion, referred the case to the Court.

B. Summary of the Decision

The Court held that the ban on third party intervention in Article 13-2 of the LDAA does not violate the Constitution after explaining the legislative intent of the statute as follows:

The above provision, in light of its legislative intent to protect a labor dispute from any distortion that may arise due to third party intervention, does not limit the three basic rights of labor. The provision allows the workers involved in the dispute to seek assistance from the federation of trade unions or the trade union to which their union belongs. The prohibited conduct, that is, manipulation, instigation, and obstruction, goes beyond simple assistance to the workers. Such conduct distorts and hinders the parties' independent decision-making in initiation, planning, implementation and resolution of a labor

dispute. It goes beyond what can be tolerated for the purpose of upholding right to collective action. Therefore, the provision bans only the conduct exceeding the scope of the three labor rights and does not prevent simple consultation or assistance, and therefore does not abridge on the three labor rights at all.

From the perspective of equality, the ban applies to third party intervention on the management side as well as that of the workers. It also does not prohibit workers from receiving necessary third party assistance without compromising their independent decision-making in their exercise of three labor rights. For instance, they are allowed to receive help from attorneys and certified labor affairs consultants. Therefore, it is not irrational *de facto* discrimination against the workers.

From the perspective of the principle of clarity related to the principle of statutory punishment (*nulla poena sine lege*), the act of "intervening with intent to influence..." in the provision can be defined as an inclusive act from which overall evaluation of all the acts of the intervening party reveals intent to influence the free and independent decision of the involved parties in labor relation. Since anyone can predict whether his conduct falls under the ban, it does not violate the principle of *nulla poena sine lege* by violating that of clarity in Article 12 (1) of the Constitution.

Justices Kim Chin-woo and Lee Shi-yoon found the provision constitutional only on the condition that it does not apply to intervention incident upon a lawful course of dispute. Justice Kim Yang-kyun upheld the provision only in the limited extent of banning a third party's agitation of a new dispute without any legitimate reason. Justice Byun Jeong-soo wanted to strike it down for violation of the clarity.

C. Aftermath of the Case

Some sectors of the labor and the press criticized the decision of simple constitutionality as reflective of the Court's conservative position on the labor issues. They argued that, in the reality of labor disputes, the provision can operate as a poison pill blocking the lawful intervention of the third party, and the Court at least should have issued a decision of limited constitutionality.

However, the Court clearly indicated in the holding the premise of the decision, that the above provision does not prohibit the third party assistance necessary for independent decision-making in exercise of the three labor rights and only prohibits intervention with the intent to manipulate, instigate and obstruct the parties in dispute in

the text of the ruling. The Court may have simply put a higher priority on prevention of distortion of a labor dispute.

7. *Korean Teachers and Educational Workers Union* case, 3 KCCR 387, 89Hun-Ka106, July 22, 1991

A. Background of the case

In this case, the Constitutional Court upheld the Private School Act that limits private school teachers' forming or joining of a trade union.

Article 55 of the Private School Act (revised by Act No. 4347, March 8, 1991) provided that, pursuant to Articles 1 and 53 (4) of the Public Educational Officials Act, the ban on labor activities under Article 66 (1) of the State Public Officials Act should apply also to private school teachers. Article 58 (1) (iv) of the Private School Act recites participation in a labor activity as cause for termination.

The formation of the Korean Teachers and Educational Workers Union in 1989 and the government's subsequent ban on the Union led to a series of disciplinary actions against the teachers involved, and raised a fundamental question: whether prohibiting teachers from forming a trade union for reason of their special occupational status as educators is appropriate in light of their realistic status as workers.

The claimants were dismissed from their positions and later terminated at a private school for participating in a labor activity, i.e., having concurred in the founding mission of the Korean Teachers and Educational Workers Union and joining the Union and its activities. They sought nullification of the dismissal at the Seoul District Court, West Branch, and requested constitutional review of the underlying provisions of the Private School Act under Article 33 (1) of the Constitution. The court granted the motion and referred the case to the Court.

B. Summary of the Decision

The Court upheld Articles 55 and 58 (1) (iv) of the Private School Act (PSA) after examining the special status of educators:

Teachers are workers. However, due to their special status applicable to both public and private school teachers, the labor relation of teachers cannot be subject to traditional labor relations laws, which were formed through conflicts and compromises premised on the du-

alistic confrontation of 'workers vs. management' and developed as a measure to control and balance the supply of labor according to the market principle. Their labor relations must be adapted to their special status.

Article 31 (6) of the Constitution provides that the status of teachers shall be created by law. On this basis, the statute can state not only the rights of teachers but also their duties. Therefore, the statutes can provide security for their status and guarantee their economic and social position, and at the same time prohibit them from engaging in the conduct likely to hinder people' right to education. Therefore, the statutes can include restriction of the basic rights of teachers.

Articles 55 and 58 (1) (iv) of the PSA, similar to the Education Act and the Public Educational Officials Act, were legislated on the basis of Article 31 (6) of the Constitution. They were enacted after consideration of the structure of the educational system emanating from the nature of education, the public and specialized nature and autonomy of the occupation, the nation's tradition on and the people's awareness of education, and other on-going circumstances. Therefore, even if the above articles of the PSA restrict the basic rights of teachers, that alone cannot be the reason to invalidate them for reason of Article 33 (1) of the Constitution on basic labor rights.

In addition, although the above provisions ban private teachers' exercise of their three labor rights, they enjoy legal protection of their salary and position and they are allowed to promote their economic and social interests through another form of professional association, the educational association. Therefore, the above provisions do not infringe upon the essential content of the labor rights guaranteed by the Constitution. Also, they do not violate the rule against excessive restriction because they were necessary and appropriate in light of the legislative purpose of preserving the essence of educational system and adapting to the special status of teachers and the nation's unique history.

From the perspective of equality, there is a rational reason for treating teachers from other workers in relation to exercise of the three labor rights. Among the teachers, the provisions are not more disadvantageous to private school teachers than the Public Educational Officials Act and the State Public Officials Act are to public school teachers. They do not violate equality.

Justice Lee Shi-yoon, in a dissenting opinion, asserted that the term 'labor movement' under Articles 55 and 58 (1) of the PSA must be interpreted narrowly to exclude exercise of right to organization.

Justice Kim Yang-kyun also dissented, arguing that private school teachers in principle should be given the same three labor rights as given to other workers. Justice Byun Jeong-soo also dissented, arguing that Article 33 (2) of the Constitution excludes only public employees from enjoyment of the three labor rights.

C. Aftermath of the Case

The decision of the Constitutional Court made it impossible for the Korean Teachers and Educational Workers Union to gain legitimacy and blocked all venues of legal relief for more than 1,600 teachers who were dismissed for joining the Union. Some characterized the decision as revealing of the Court's conservative position on labor issues while others praised its contribution to the social stability for it slowed down the rapid expansion of labor disputes into schools in a country with a short history of labor movement.[70]

8. *Prohibition of Labor Dispute by the Public Sector Laborers* case, 5-1 KCCR 59, 88Hun-Ma5, March 11, 1993

A. Background of the Case

In this case, the Constitutional Court found Article 12 (2) of the Labor Dispute Adjustment Act nonconforming to the Constitution when it deprived the public sector laborers of right to collective action.

Article 12 (2) of the Labor Dispute Adjustment Act (revised by Act No. 3967, Nov. 28, 1987, hereafter, the Act) provides that workers in state agencies or local governments or defense industries designated by the Act on Special Measures for Defence Industry cannot engage in a labor dispute.

The complainant, an employee of the Ministry of Postal Communication, who is also a member of the National Postal Workers Union and the chairperson of the National Federation of Civil Servants Unions, filed a constitutional complaint claiming that the right to collective action of the complainant, who engages in what is essentially physical labor, was directly infringed by the above provision.

---

70). Korean Teachers and Educational Workers Union was legalized when the Act on the Establishment and Operation of Teachers Union was enacted on January 29, 1999 (Act No. 5727)

B. Summary of the Decision

The Court found Article 12 (2) of the Act nonconforming to the Constitution after examining the three labor rights of public employees:

Unlike the former Constitution, Article 33 (2) of the Constitution does not entirely ban right to collective action to public employees and permits certain employees such right to collective action as including right to organization and collective bargaining. The Constitution delegates to statutes the task of determining the scope of the permissible employees.

Article 12 (2) of the Act facially denies the right to collective action, in other words right to engage in dispute, to *all* public employees. It denies the right even to those public employees who should have been granted that right under Article 33 (2) of the Constitution. It, therefore, violates the rule against excessive restriction and the essence of the basic rights themselves.

Whereas it is the legislature's duty to cure as soon as possible the nonconformity of the above provision to Article 33 (2) of the Constitution, we, in respect of its power of legislative formation, hereby demand the legislature to realize the constitutional mandate in form of a law and thereby eliminate the defect by the end of 1995, after which the provision shall be void if not revised.

Justice Byun Jeong-soo dissented, asserting that the provision infringes upon the essence of the three labor rights, and that the Court has no legal ground to withhold immediate invalidation and merely issue a demand to the National Assembly.

C. Aftermath of the Case

The decision opened the way for public sector laborers to exercise right to collective action.

The National Assembly, as part of a major revision of labor relations laws, enacted the Trade Union and Labor Relations Adjustment Act through Act No. 5310 on March 13, 1997 and resolved the problem raised by the above provision. The new law narrowed the scope of public employees subject to the ban as follows: "Among the employees in important defense industries designated under the Act on Special Measures for Defense Industry, those primarily involved in manufacture of defense materials such as electric power and water are prohibited from engaging in dispute. Those primarily

involved in manufacture of defense materials shall be defined by a presidential decree (Article 41)."

9. *Redress for illegally-fired Civil Servants* case, 5-1 KCCR 253, 90Hun-Ba22, etc., May 13, 1993

A. Background of the Case

In this case, the Constitutional Court upheld the Act on Special Measures concerning Compensation, etc. of Public Officials Dismissed against Their Will in 1980 because it could not gather the required number of justices for a decision of unconstitutionality. The statute was designed to compensate or reinstate the public employees who were dismissed in 1980 as part of the purification campaign of the National Security Emergency Measure Council but did not include the employees of the entities under state control.

The above statute, in Article 2, provides compensation only to the public employees who were forcefully terminated between July 1 and September 30, 1980 as part of the purification plan, and in Article 5, provides that the state shall provide administrative guidance to the entities under state control so that their employees receive benefits equivalent to the public employees.

The complainants, the former employees of the state-controlled entities, who were terminated in the purification plan of the National Security Emergency Measure Council in July 1980, sought compensation from their employers or the successor corporations for reason of Articles 2 and 5 of the above statute, and at the same time requested constitutional review of that statute. When denied, they filed a constitutional complaint at the Court.

Aside from this case, there were several constitutional complaints or requests for constitutional review pending on the same statute, which were consolidated (89Hun-Ma189, 89Hun-Ma281, 90Hun-Ma17, 90Hun-Ba47 or 58, 91Hun-Ka2, 92Hun-Ba21, 92Hun-Ba44, 93Hun-Ma 41, 93Hun-Ma258, etc.).

B. Summary of the Decision

Five Justices joined in an opinion of unconstitutionality on grounds that Articles 2 and 5 of the Special Compensation Act violates the principle of equality, but four joined to dismiss the complaint for not meeting the legal prerequisites such as whether its resolution forms the premise of the underlying proceeding. As a result, the statute

was not struck down for lack of the required six votes. The justices began by evaluating the complaint on its legal prerequisites as follows:

If Court strikes down the provision and the National Assembly revises it, the employees of the state controlled entities can sue the state directly for compensation. If the complainants had sued the state in anticipation of such result, constitutionality of the provision would have been the premise of that suit. In this case, the presiding court should wait for the Court's constitutional adjudication and, if the Court finds the statute unconstitutional, then wait for legislative revision of the statute. In other words, the presiding court cannot dismiss the underlying suit in event of the Court's decision of unconstitutionality. Therefore, this complaint does form the premise of the underlying suit.

The legislative purpose of the statute is to provide compensation and restoration of honor to the victims of illegal and unjust exercises of governmental power by the National Security Emergency Measure Council. It carries out the state's duty to compensate for torts committed by public authorities and guarantee social welfare as required by Article 34 (2) of the Constitution. Therefore, the compensation plan that distinguishes the victims of the same exercise of governmental power on the basis of whether they are employees of the state or the state controlled entities violates Article 11 (1) of the Constitution, the principle of equality.

Justices Cho Kyu-kwang, Choe Kwang-ryool, Kim Moon-hee, and Hwang Do-yun argued to dismiss the case for the following reason: The statute is titled the Special Compensation Act for Public Employees, and its Article 1 states that it applies only to public employees. Article 2 or 4 provides compensation or special reinstatement in limited circumstances only to public employees. Of course, Article 5 concerns state controlled entities but only amounts to a declaration that the state should provide 'administrative guidance' to them so that they provide their employees with the same benefits as public employees. Administrative guidance is not legally binding and only requests voluntary cooperation of the other party. It amounts *de facto* to recommendation. Also, the party receiving guidance is state controlled entities, not their employees. Therefore, Article 5 does not create any legal duty on the part of the state vis-à-vis the employees of the state controlled entities or any right to compensation in the latter to the former. In other words, Article 5 does not apply to the underlying suit, and therefore, unquestionably, its constitutionality does not form its premise.

The record shows that the complainants filed the underlying suit only against their former employers but not against the state. Only one of the complainants joined the state as a co-defendant in his suit for compensation, arguing that the administrative guidance provision in Article 5 gives rise to joint liability of the state. All in all, a decision of unconstitutionality will not turn the present lawsuit into a trial on the state's liability. Therefore, it does not form the premise of that suit.

C. Aftermath of the Case

Prior to the decision, the Constitutional Court struck down Article 2 (2) (i) of the Special Compensation Act which included judges in the exclusion of "those who were paid more than the salary level of a deputy minister", finding it violative of Article 106 (1) of the Constitution that provides for status protection of judges and Article 11 of the Constitution, the equality (91Hun-Ka2, Nov. 12, 1992).

After the decision, several more decisions were reached on the above statute. The Court upheld the Article 4 exclusion of 'those public employees above the level 6' from reinstatement (92Hun-Ba 21, September 27, 1993; 92Hun-Ba44, June 30, 1992) and also upheld the Article 2 (5) exclusion of the period of emigration from the period to be compensated (89Hun-Ma189, Dec. 23, 1993). The Court dismissed constitutional complaints against Article 2 (90Hun-Ba47, Nov. 25, 1993; 90Hun-Ma17, Nov. 25, 1993; 89Hun-Ma281, Dec. 23, 1993; 93Hun-Ba41, March 28, 1996) and also dismissed one on the legislative omission (93Hun-Ma258, Nov. 28, 1996).

10. *Violation of the Remedial Order of the Labor Relations Commission* case, 7-1 KCCR 307, 92Hun-Ka14, March 23, 1995

A. Background of the Case

In this case, the Constitutional Court struck down the Labor Union Act that provides criminal punishment for violation of the unfinalized order of the Labor Relations Commission.

Article 42 (1) of the Labor Union Act (revised by Act No. 3350, Dec. 31, 1980, hereafter, the Act) provides that the Labor Relations Commission shall issue an order of relief to the employer when it makes a finding of an unfair labor practice. Article 46 of the same statute subjects the violators of the order to a fine not exceeding 30

million won or imprisonment up to two years.

The claimant received a Labor Relations Commission's order of relief but had it annulled on appeal. However, he was prosecuted summarily on charges of violating the Labor Standards Act and Labor Union Act and fined by the Cheju District Court on a summary trial. He appealed to a full trial and requested constitutional review of the portion of Article 46 that says "when the order of relief pursuant to Article 42 is violated." The Cheju District Court accepted the challenge and referred the issue to the Court for constitutional review.

B. Summary of the Decision

The Constitutional Court struck down the part of Article 46 where it states "when the order of relief pursuant to Article 42 is violated". The Court found violations of due process of law and the rule against excessive restriction after examining the nature of a remedial order as follows:

An order of relief is issued by the Labor Relations Commission to the employer when it makes a finding of a unfair labor practice. However, an order of relief can be nullified on appeal or judicial review as being illegal or unreasonable. Punishing the employer for violation of an order yet to be finalized or an order already annulled, with a fine or long periods of imprisonment and the attendant mental and physical pain, conflicts with a sense of justice. It is also unreasonable and unjust in light of the nature of criminal punishment as a supplementary measure or the last resort to obtain administrative compliance. Criminal punishment for violation of an administrative order rarely takes place before the order is validated in court. Moreover, there is no legislative precedence anywhere in the world where a statutory criminal penalty is to proceed as if the order was validated when it, in fact, had been annulled on appeal.

Considering all these points, the punishment provided by the above provision is not appropriate as a means to obtain compliance to the order of relief that it seeks to achieve. Its restriction of basic rights is not the necessary minimum. It fails to balance the public interest to be upheld and the employer's interest to be infringed. Therefore, the provision, "when the order of relief pursuant to Article 42 is violated", violates due process of law and the rule against excessive restriction.

C. Aftermath of the Case

Some characterized the decision as blind to the reality of labor relations and permissive of illegal practices by employers. In fact, many employers have evaded the Labor Relations Commission's orders simply by disobeying them or by paying small fines. However, the significance of the decision can be found in that the Constitutional Court realized the principle of due process of law in the remedial system for unfair labor practice.

The National Assembly enacted by Act No. 5310 the Trade Union and Labor Relations Adjustment Act on March 13, 1997 and added a new Article 85 (5) which reads as follows: "if the employer seeks judicial review of administrative action pursuant to (2), the presiding court may, upon motion by the National Labor Relations Commission, order compliance to all or some parts of the National Labor Relations Commission's order pending the review, and at a later time can cancel that order *sua sponte* or on motion." Furthermore, Article 95 is added to provide that "the violator of the order of the court pursuant to Article 85 (5) will be fined 5 million won or less (if the order is demanding affirmative action, the fine will be the number of days of noncompliance multiplied by 500,000 won or less)." The above amendment replaces a fine or imprisonment with a civil fine and involves the judiciary in obtaining compliance to the order of relief, thereby making legislative improvement toward due process of law.

11. *Priority of Employees' Retirement Allowances* case, 9-2 KCCR 243, 94Hun-Ba19, etc., August 21, 1997

A. Background of the Case

In this case the Constitutional Court found nonconformity to the Constitution in the former Labor Standards Act that granted employee's retirement allowances priority over mortgages or pledges.

Article 30-2 (1) of the former Labor Standards Act (revised by Act No. 4099 on March 29, 1989 and repealed by Act No. 5305 on March 13, 1997) provides that debt incurred in labor relations like wages, retirement allowances, etc. has priority over taxes, public excises, and other liabilities except mortgages or pledges while Item 2 grants the wages and retirement allowances for the last three months priority over pledgees or mortgages. The newly enacted Labor Standards Act (enacted by Act No. 5309 on March 13, 1997)

inherited the same content in Article 37 (2).

The Industrial Bank of Korea, the secured creditor, filed a lawsuit against the debtor's retiring employees, objecting to distribution of assets at the Suwon District Court and the presiding court, on *sua sponte*, requested constitutional review of the statute on the portion concerning 'retirement allowances' at the Constitutional Court for constitutional review.

B. Summary of the Decision

The Court in the following majority opinion of eight Justices found the 'retirement allowance' portion of Article 30-2 of the former Labor Standards Act and Article 37 (2) of the Labor Standards Act nonconforming to the Constitution and ordered that that portion will become void on January 1, 1998 if it is not revised by the legislature till December 31, 1997. The Court ordered that, in the meantime, courts, state agencies or local governments suspend its application:

The above clause grants the employees a priority over mortgagees and pledgees for the entire amounts of retirement allowances. Then, all or nearly all of the claims of mortgagees and pledgees may go unpaid, losing their meaning as right to a priority in satisfaction of debt. Therefore, the "retirement allowance" portion of the provision may infringe on the essential content of rights arising out of mortgages and pledgees.

Unlike wages, unlimited amounts of retirement allowance can be satisfied before claims of mortgages or pledges. Due to the obvious disincentive to potential creditors, companies short on cash flows may not be able to obtain loans and go bankrupt even when they have sufficient collaterals, a result disastrous for the workers' livelihood and welfare. Security of post-retirement living can be more properly achieved by expanding a social security system, i.e., improving on a retirement insurance system or introducing a corporate pension system or any new form of a corporate finance that does not eviscerate the existing one. Therefore, it is unjust to disturb the legal foundation of secured transactions in a blind focus on the legislative goal of security of workers' living. It is also unjust to go as far as shut down corporate finance just to obtain priority in debt satisfaction for retirement allowance. The provision is not appropriate as a means of restricting the secured creditors' right to advance the public interest of workers' welfare, and also violates the mandates of minimum restriction and balancing of interests. Hence a violation of the rule against excessive restriction.

It is just to give priority to a reasonable portion, not the full amount, of retirement allowances to the extent necessary to guarantee workers' minimum living standard and achieve social justice. Such arrangement is consistent with the nature of retirement allowance as deferred wages or as welfare payments. The 'reasonable' portion should, characteristically, be left to the legislative policy-making. It is also within the legislature's domain of social policy-making to contemplate a social insurance as a means to protection of retirement pay or, substitute or supplement or harmonize the latter goal with such program. In consideration of all these points, we declare the above provision nonconforming to the Constitution and demand the legislature to determine the reasonable scope of retirement pay that will be given priority over mortgagees and pledgees, and that does not disturb the legal foundation of secured transactions, by December 31, 1997. Until that time, application of the "retirement allowance" portion in the above provision should be suspended.

Justice Cho Seung-hyung issued a dissenting opinion that the portion of retirement allowances that accrued for three or shorter years preceding the date of retirement since the enactment of provision on March 29, 1989 is entitled to priority without violating the Constitution, and that the provision is constitutional to that limited extent.

C. Aftermath of the Case

The decision, welcomed by the financial sector, was criticized by the labor. They even organized protest rallies calling for cancellation of the decision. They argued that Korea has an inferior social security program and its system of guaranteeing workers' pay is not strong, and that workers are taking lack of protection for their retirement pay as a threat to their livelihoods.

Others found sensible the Court's opinion that the unlimited priority, though aimed to help workers, may fan the company's bankruptcy and cause them to lose their jobs, and therefore that it is unjust to give priority to workers whose claims end up being partially responsible for the bankruptcy. Yet others pointed out that the decision helped alleviate cash shortages because the companies could now increase the capacity to secure their loans by the amount of the retirement fund. The lenders also could give out loans more easily, the secured amounts of which now increased by the same amount.

The labor sector may have misunderstood the intent behind the

Court's decision. The Court did not condemn the provision on its policy goal but on its disproportionality as a means. Also, the Court did not immediately invalidate the provision but found nonconforming to the Constitution in order to demand the National Assembly to make adjustments more appropriate for protection of workers' rights. The decision was not unilaterally disadvantageous to the workers.

After the decision, the National Assembly revised Article 37 (2) of the Labor Standards Act through Act No. 5473 on December 24, 1997 and limited priority in debt satisfaction to the portions of retirement pays that accrued in the last three years of employment.

12. *Violation of Collective Bargaining Agreement* case, 10-1 KCCR 213, 96Hun-Ka20, March 26, 1998

A. Background of the Case

The Constitutional Court struck down the provision of the old Labor Union Act that failed to state the elements of a crime on the face of the statute and delegated their determination completely to collective bargaining agreement.

Article 46-3 of the former Labor Union Act (repealed upon enactment of the Trade Union and Labor Relations Adjustment Act, Act No. 5244, on Dec. 31, 1996) imposes a fine not exceeding ten million won on any person who violates a collective bargaining agreement between the management and the union.

A worker of a company in the Greater City of Woolsan was prosecuted in the Woolsan Branch of the Pusan District Court for violating the above mentioned Labor Union Act. He allegedly violated a so-called peace clause of the collective bargaining agreement by instigating fellow workers to engage in labor dispute. The presiding court requested constitutional review of the provision *sua sponte* on a suspicion that it may violate the principle of *nulla poena sine lege* (*statutory punishment*).

B. Summary of the Decision

The Court struck down the portion of Article 46-3 of the former Labor Union Act that imposes a fine up to 10 million won for violation of a collective bargaining agreement. The Court found it violative of the principle of *statutory punishment* after explaining the principle as follows:

The principle of *nulla poena sine lege* requires in principle that the elements of a crime and its penalty be determined in form of a law by the legislature. In an exceptional case where such determination is delegated to a lower rule-making, the condition and scope of delegation must be narrowly set so that one could predict the elements of a crime from the statute.

Therefore, the provision at least should have specified which item on a collective bargaining agreement would trigger punishment upon a violation. Article 46-3 of the former Labor Union Act makes no such attempt and simply states "violation of a collective bargaining agreement." It merely describes the outer shell of the elements of a crime and leaves their essential content, the real kernel of the prohibition, to the collective bargaining process. A collective bargaining agreement is nothing but an agreement between the management or a management organization and the union. Therefore, the provision amounts to entrusting determination of the elements of a crime with the labor and management. The provision violates the principle of *nulla poena sine lege* and its basic mandate of *statutory statement* by failing to state the substantive content of the elements of crime and leaving it to determination by the collective bargaining process.

The element of the crime is satisfied by any violation of a collective bargaining agreement. Since the management and labor can freely enter into agreement on all aspect of individual or collective labor relations with no limitation, the scope of the violative act is inclusive and overbroad. It is difficult to predict which conduct will be punished. The provision completely fails to provide for predictability, one of the essential elements of the principle of *nulla poena sine lege.* Furthermore, the above provision, overly ambiguous and broad on its elements, violates the principle of clarity, another component of the principle of *nulla poena sine lege.*

A collective bargaining agreement does not only provide for wages, hours, and other issues directly concerning the terms and conditions of employment and for personnel and labor dispute fundamental and important to a labor relation. It may contain minor procedural rules or abstract and unclear contents. It may even contain contents repulsive to social customs. A violation of a collective bargaining agreement should vary drastically in its character or weight or culpability. Uniform punishment on all such violations are hardly a means to obtain justice and fairness in criminal punishment. At the same time, the authorities may find in it an opportunity to apply law arbitrarily and selectively.

C. Aftermath of the Case

The Court, since its inception, has applied a strict standard of review to any delegation of rule-making authority on criminal statutes (91Hun-Ka4, July 8, 1991; 93Hun-Ka4, etc., July 29, 1994; 94Hun-Ba22, etc., May 29, 1997). The decision can be understood in line with the precedents.

The press welcomed the decision as a check on the management's abuse of labor laws in restricting workers' labor disputes while some in the labor sector protested that it may weaken the workers' ability to obtain the management's compliance to a collective bargaining agreement. Some argued that the contents of a collective bargaining agreement are specifically determined at the time of entering the contract, enabling the parties to the contract to notice or predict which conduct would constitute a crime. Hence no violation of the principle of clarity in *nulla poena sine lege*.

The similar provisions of Article 92 (1) of the current Trade Union and Labor Relations Adjustment Act are expected to be revised according to the purport of the decision.

13. *Preferential Hiring of Teachers* case, 2 KCCR 332, 89Hun-Ma89, October 8, 1990

A. Background of the Case

In this case, the Court struck down the system of preferential hiring of the graduates of public or national teachers' colleges over those of private teachers' colleges specified in the Public Educational Officials Act:

Article 11 (1) of the Public Educational Officials Act (revised by Act No. 3458, Nov. 23, 1981) provides that, in hiring new teachers, preference shall be given to the graduate of public or national educational colleges, teachers' colleges or other educator training institutions.

The preference for public or national college graduates in public or national secondary schools' hiring of teachers was instituted as an incentive to obtain qualified students, together with tuition and registration fee exemptions when there was a shortage of teachers. However, since 1980s, the population growth has flattened while the number of teachers' college graduates continued to grow, resulting in a surplus. Many graduates of training institutions were not hired.

The preference began to be perceived as a poison pill blocking the career paths of many graduates of private teachers' training institutions who took the issue to street.

The complainants are the graduates or students of private teachers' colleges hoping to be hired as Public Educational Officials. They filed a constitutional complaint, arguing that the provision giving preference to public or national college graduates effectively extinguishes their opportunity to be hired.

B. Summary of the Decision

The Constitutional Court gave a decision of unconstitutionality on Article 11 (1) of the Public Educational Officials Act (hereafter, the Act), finding its legislative purpose no longer valid for the following reasons:

Article 11 (1) of the Act not only fails to contribute to its original legislative purpose of securing qualified teachers but has a possibility of deteriorating their quality. The extent of discrimination among teachers' degree holders is extreme and violates the principle of proportionality. Moreover, the system requiring the graduates of public or national teachers colleges to serve public secondary schools is now abolished, and therefore discrimination in hiring based on their originating schools has neither necessity nor validity. The discrimination reached a point beyond the limit tolerated by the prevailing sentiments in the society.

The provision, taken together with the oversupply of teachers, places a severe limitation on the graduates of private teachers' colleges in their right to choose the occupation of Public Educational Officials regardless of their individual qualifications. It therefore violates the principle of proportionality. Since the discrimination has not rational ground, it also violates right to equality and occupational freedom.

C. Aftermath of the Case

The decision struck down the preferential hiring practice of public and national teachers' college students that did not keep up with the changing time. It forced the students of public and national teachers' colleges to compete with those of private teachers' colleges on an equal footing. The decision prompted the Ministry of Education to implement the public hiring of teachers earlier than it had planned, which was three years from the time of the decision.

However, the students of public and national teachers' colleges staged demonstrations against the decision to defend their interest in the *status quo*. There also arose an issue of how the Court should protect the expectation interest of those who enrolled in public and national teachers' colleges in reliance on the preferential hiring system.

On this issue, those who enrolled in public and national teachers' colleges before the above decision filed a constitutional complaint against the Ministry of Education and the National Assembly for their legislative or administrative omission to protect the complainants' expectation interest on November 22, 1999, about one month after the above decision. The Court, however, dismissed it for expiration of the filing time limit (90Hun-Ma196, May 25, 1995).

The National Assembly, through Act No. 4304 on December 31, 1990, revised Article 11 (1) to read "hiring of new teachers shall be open to public hiring." Article 2 of the Supplement to the Act provided that "until 1993, the hiring schools may maintain a quota for those graduates of teachers' institutes who had enrolled in public or national colleges before 1989," protecting the expectation interest of the students of public or national teachers' colleges through the transitional clause and easing the tension brought about by the decision of the Court.

14. *Seoul National University's Entrance Examination Plan* case, 4 KCCR 659, 92Hun-Ma68, etc., October 1, 1992

A. Background of the Case

In this case, the Constitutional Court upheld the Seoul National University's new entrance examination plan to exclude Japanese in one of the Foreign Language Electives after a grace period of two years. The Court held that the plan does not violate the basic rights of those preparing for the college entrance examination.

On April 2, 1991, the Ministry of Education, after deciding on the new college entrance examination system to be implemented in 1994, sent the Plan to Improve College Entrance Examination Systems to universities. Pursuant to the Plan, on April 2, 1992, Seoul National University (SNU) announced its 1994 Entrance Examination Plan that excluded Japanese among the Electives for prospective humanity majors. The complainants, first and second year high school students who are preparing for university entrance examinations in 1994 or

1995, filed a constitutional complaint against the SNU's decision to exclude Japanese.

B. Summary of the Decision

The Court rejected the complaint, ruling that the plan does not violate the basic rights of the petitioners after deciding that the 1994 University Entrance Examination Plan is an exercise of governmental power subject to constitutional review as follows:

As to the legal prerequisites of the complaint, the University Entrance Examination Plan is only a preparatory act or an advance notice and therefore not subject to ordinary administrative lawsuit[71]. However, its content will directly influence the people's basic rights and will be surely implemented through the future laws and regulations. To those whose basic rights will be infringed upon, the harm arising out of those laws and regulations has presently obtained. Therefore, it is an exercise of governmental power subject to challenge on a constitutional complaint.

A national university can be the bearer of basic rights such as academic freedom and autonomy of university. SNU, a state actor, must be considered at the same time in its capacity as the bearer of basic rights. Then, the right to formulate its entrance examination seems to fall under the domain of autonomy guaranteed to universities. In other words, even if the exclusion of Japanese from the foreign language electives in the SNU entrance examination is disadvantageous to students who have been preparing to take the foreign language exam on Japanese, the disadvantage is incidental to a lawful exercise of autonomy within the permissible scope of law pursuant to an independent academic judgment made by SNU as the bearer of academic freedom and autonomy of universities.

Not only did SNU replace Japanese with Chinese Letters, a subject taught in all high school as a requirement but also announced it two years before its implementation, allowing two or three years of a preparatory period for the complainants and other first or second year high school students. The SNU Plan did not infringe on the complainant's expectation interest or their right to equal educational opportunity.

On this matter, Justice Cho Kyu-kwang gave a dissenting opinion that the relationship between the complainants and the respondent

71). Administrative lawsuit is judicial review of administrative action by the ordinary courts.

should not be seen as a mutual one between the bearers of basic rights but as between a bearer of basic rights and a state actor. He argued that, in the case of the complainant who is second year in high school, his or her equality, right to equal education, and expectation interest were violated. Also in dissent, Justice Kim Yang-kyun asserted that the above University Entrance Examination Plan is an unconstitutional exercise of governmental power as it lacks a proper transitional measure.

C. Aftermath of the Case

The decision was criticized for analyzing the entrance examination plan in an equal relationship between the two subjects of basic rights and not in a relationship between the state and the people but was also given recognition for its broad interpretation of the justiciability requirements, and in particular that of exercise of governmental power, that opened widely the venue for relief to infringement of basic rights.

15. *Rehiring of Private University Professors* case, 10-2 KCCR 116, 96Hun-Ba33, etc., July 16, 1998

A. Background of the Case

In this case, the Constitutional Court held that Article 53-2 (3) of the former Private School Act (PSA) authorizing for a term em- ployment contract for private college teachers does not violate the Constitution.

Article 53-2 (3) of the former PSA (prior to revision by Act No. 5274, Jan. 13, 1997) provides that the teachers of universities may be employed on a contract for a certain period according to the bylaws of the university.

The complainants, the university professors whose contracts with the universities expired and who were not rehired thereafter, sought annulment of the schools' decision not to rehire in court and requested constitutional review of Article 53-2 (3) of the former PSA and the court's adverse judgment. When the motion was denied, they filed a constitutional complaint to the Court.

B. Summary of the Decision

The Constitutional Court upheld Article 53-2 (3) of the former PSA after analyzing the principle that the status of teachers shall be created by law as follows:

Article 31 (6) of the Constitution provides that the status of teachers shall be determined by law. The Article does not merely aim to protect teachers' rights or protect their position from any wrongful infringement by administrative authority. It also aims to guarantee people's right to receive education. Therefore, any statute determining of the status of teachers must include in it both provisions for protection of teachers' rights and positions and for people's basic right to education.

Article 22 (1) of the Constitution provides for academic freedom. However, the Article does not protect it merely as a human right accruing to one individual but also as freedom guaranteed *to a place*, i.e., freedom in all forms of academic research and teaching conducted *on college campuses*. *Freedom on college campuses* can be guaranteed only by guaranteeing autonomy of universities.[72]

Moreover, Article 31 (4) of the Constitution also provides that "independence, professional quality, and political neutrality of education and autonomy of institutions of higher learning are guaranteed under the conditions as prescribed by statute." It aims to remove any interference by governmental power or outside forces from a university and allow it to be managed by its members. Only then, the members can freely engage in research and education and fully realize the function of university: nurturing of leadership and pursuit of truth. Independence of education or autonomy of university is a necessary means to guarantee academic freedom of Article 22 (1) of the Constitution. It is a basic right given to universities. Furthermore, autonomy of university should not be limited to management or operation of university facilities but should be comprehensive to include the contents of research and education, the methods and audience of research and education, curriculum, selection of students and admission and especially employment of teachers.

Article 53-2 (3) of the former PSA that authorizes contractual employment of professors is aimed at allowing rational employment practices of excluding from rehiring those professors whose professional qualifications and research products are in question. Therefore, its legislative purpose is valid. Moreover, contractual employment

72). The concept of 'a right guaranteed to a place' is only implicit in the original text.

and a tenure system each has both positive and negative aspects as means for the state to carry out its constitutional duty to promote national culture and academia or to realize people's right to education. Therefore, the choice between the two in each instance should be left to the legislative policy-making. Therefore, the provision does not violate Article 31 (6) of the Constitution providing for legal creation of teachers' status.

In addition, the contractual employment is simply a practice hiring professors for a certain term of employment. It does not regulate the content or methods of academic research. Also, it does not limit autonomy of university in deciding who should be rehired. Therefore, Article 53-2 (3) of the former PSA does not infringe upon Article 31 (4) of the Constitution that provides for independence, professional quality, and political neutrality of education, and the autonomy of university, and Article 22 (1) that provides for academic freedom.

Also, the fact that term employment applies only to private college professors and not to other private school teachers or public college professors has rational and valid grounds. There is no violation of equality.

On this matter, Justices Lee Jae-hwa, Cho Seung-hyung, Jung Kyung-sik, and Koh Joong-suk gave a dissenting opinion, arguing that Article 53-2 (3) of the former PSA violates Article 31 (6) of the Constitution because it authorizes term employment without stating reasons for no-renewal or providing procedures of relief for those not rehired.

C. Aftermath of the Case

The Court had recognized constitutionality of the term employment of public university professors by upholding a decision not to recommend for renewal on May 13, 1993 (91Hun-Ma190). The Court there reasoned that the term hiring of assistant professors by the National College of Tax was based on Article 11 (3) of the current Public Educational Officials Act and Article 5-2 of the Educational Civil Servants Hiring Regulation both of which had legitimate purposes. Through this case on private school professors, the Court maintained its consistent position on term employment of professors.

The new Article 53-2 (3) of the Private School Act revised on Jan. 13, 1997 (Act No. 5274) added a new proviso provides that a term employment contract for private university professors shall be governed by the provisions applicable to public university professors.

VI. Cases Concerning Procedural Rights and Criminal Justice

1. *Preventive Detention* case, 1 KCCR 69, 88Hun-Ka5, etc., July 14, 1989

A. Background of the Case

In this case, the Court reviewed constitutionality of Article 5 of the former Social Protection Act, one of the statutes enacted by the National Security Emergency Legislative Council during the Fifth Republic. It was also the first case concerning one of the justiciability requirements to requesting constitutional review of a statute during an ordinary judicial proceeding, namely, whether the statute forms the premise of that proceeding.

Article 5 of the former Social Protection Act (prior to amendment by Act No. 4089, Mar. 25, 1989) subjected criminal convicts to seven to ten years of preventive confinement in addition to the regular sentences when the following conditions are met: when those with prior convictions commit the same or similar crimes for which the statutory sentences are higher than a certain level (under Sections 1 and 2 of the Article); and when habitual criminals or specially dangerous criminals (e.g. the heads and officers in a criminal organization) commit a crime for which statutory sentences are higher than a certain level (Section 2 of the Article).

Under Section 1, if certain conditions were met, judges were required to sentence a preventive confinement of ten years (seven years for those above 50 years of age) regardless of the likelihood of recidivism. Hence, mandatory preventive confinement. Under Section 2, judges could sentence preventive confinement of seven years only when they make a finding of likelihood of recidivism. Hence, discretionary preventive confinement.

The claimants, who were sentenced to seven and ten years of preventive confinement respectively, appealed the sentences to the Appellate Court. When their appeals were rejected, they brought the cases to the Supreme Court which *sua sponte* sought constitutional review of the above provisions at the Constitutional Court.

During the Court's review, the provisions were amended. The thrust of the amendment was repeal of mandatory preventive confinement. Now, all sentences of preventive confinement were allowed only when the judges make finding of likelihood of recidivism. The

amendment also set the maximum duration of preventive confinement to seven years. Also, the new provisions were made to apply retroactively to all the cases pending at the time of the amendment.

B. Summary of the Decision

Opinions of the Court were divided along several lines. Four justices, whose opinion became the opinion of the Court, found the Article 5 (1) mandatory preventive confinement unconstitutional and the Article 5 (2) discretionary preventive confinement constitutional. They were opposed by two Justices who argued for dismissing the request for constitutional review on the ground that the statute under review did not form the premise of the underlying trial. However, yet two other Justices agreed with the plurality opinion of four justices in striking down the Article 5 (1) mandatory confinement although they wanted to strike down the discretionary confinement under Article 5 (2) as well. Also, the last one justice concurred with the plurality in all aspects except for (i) of Article 5 (1) for which he wanted to dismiss the suit. As a result, the following plurality opinion was adopted as the opinion of the Court[73]:

The Constitutional Court can review constitutionality of a statute only when its constitutionality forms the premise of a trial. During review, Articles 5 (1) and 5 (2) of the former Social Protection Act were revised favorably for the detainee-claimants. The new law was made to apply retroactively to the claimants' cases that were pending at the time of the amendment. However, retroactive force of the new law is premised upon validity of the old law. The new law is valid only as improvement upon the old law for the claimants. Therefore, constitutionality of the old law is the premise of the underlying proceeding even if it can now apply the new law to the claimants.[74]

Preventive confinement and criminal punishment are equally deprivation of personal liberty and are indistinguishable in enforcement. However, their essence, objectives, and functions are entirely different.

---

73). As six justices concurred in striking down Article 5 (1) entirely while only two wanted to strike down Article 5 (2), the ultimate result is the same as the plurality's.

74). Here, the Court could have said that the new law is exactly what it would have ordered as replacement for the invalid old law, and therefore there is no justiciable interest in the case. However, the Court then would have lost an opportunity to point out why the new law is constitutional while the old one unconstitutional. Also, there is always a possibility that even the new law is unconstitutional, which is not the case here. The question of whether the justiciability requirements to a challenge to a statute are met should not depend on how that statute was changed later.

Therefore, consecutive imposition of preventive confinement and criminal punishment does not constitute double punishment banned by Article 13 (1) of the Constitution.

Every preventive measure is a measure of special deterrence applied to those with likelihood of recidivism. The essential target of preventive measure is recidivism. Therefore, the Article 12 (1) statement of the constitutional principle of *nulla poena sine lege* - "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" - should be interpreted to mean that there shall be no preventive measure if there is no likelihood of recidivism. Furthermore, in view of the attendant limitation on human rights that implicates bodily freedom, the mandate of proportionality requires more than a simple possibility of recidivism and substantial probability. The probability must be measured by considering as a whole the prior convictions, the essential nature, motive, and methods of the present crime, the age, personality, family relationship, educational level, occupation, and environment of the actor, his conduct before and after commission of the crime, and his resolve to redeem himself.

The former Article 5 (1) do not include a showing of likelihood of recidivism when it sets out the legal requirements for preventive confinement. Therefore, it violates the principle of *nulla poena sine lege*. Furthermore, taken together with the proviso of Article 20 (1) of the same Act, it imposes on the judge a duty to impose preventive confinement regardless of likelihood of recidivism. It deprives the judge of his discretion and thereby violates people's right to fair trial by a judge.

The former Article 5 (2) also provides for 'preventive confinement of seven years' in the form of a definite period. However, it is clear that the confinement is supposed to discontinue when the likelihood of recidivism disappears. Such legislative intent is clearly indicated in Article 25 (1), which requires biannual parole review. In other words, the seven year period can only be interpreted as stating the maximum period allowed in enforcement of the confinement. Therefore, the provision does not infringe on people's right to fair trial by a judge.

Justices Han Byeong-chae and Kim Yang-kyun dissented: the request for constitutional review should be dismissed. The old law was revised and the new law applies to the claimants' cases by its own provisions. Therefore, constitutionality of the old law no longer forms the premise of the trial (Han) or the court requesting constitutional review can dispose of the cases according to new law (Kim).

The suit must be dismissed.

Justices Byun Jeong-soo and Kim Chin-woo wrote: preventive confinement under Article 5 is the same as criminal punishment. Consecutive imposition of such measure and the regular sentences is in conflict with Article 12 (1) and Article 13 (1) of the Constitution. Even Article 5 (2) is invalid because it forecloses judicial discretion in making a finding of likelihood of recidivism immediately after the end of the regular sentence.

Justice Choe Kwang-ryool made the case for dismissal only as to Article 5 (1) (i), which failed to state likelihood of recidivism as one of the prerequisites to preventive confinement. In his opinion, the unconstitutionality was cured by the revision and any review on the provision is unnecessary.

C. Aftermath of the Case

The Court solicited diverse opinions from academic and other circles and spent over one hundred hours in discussion before ruling on this case.

This case received attention as a broad stroke across the area of bodily freedom but was also significant as the first check on undemocratic legislative activities of the National Security Emergency Legislative Council in the early Fifth Republic.

2. *Military Discipline Maintenance Exercise* case, 1 KCCR 309, 89Hun-Ma56, October 27, 1989

A. Background of the Case

In this case, the Court questioned a military prosecutor's decision to exempt, and not dismiss, a charge for which the basis of suspicion was clearly lacking, and reviewed whether the decision infringes upon right to pursue happiness and equality. The Court, for the first time, recognized the right to pursue happiness as a concrete constitutional right and cancelled the charge.

The complainant, a sergeant, was receiving bayonet training from a petty officer who had less years of seniority. For not participating in the training diligently, the instructor administered a discipline maintenance exercise on the trainees.[75] The complainant, together

75). Under the order, men are supposed to race each other continuously be-

with Corporal A, disobeyed the order and a fight ensued. The complainant was injured in the eye in the fight and was later discharged from the military service for reason of physical disability. Later, the military police arrested and investigated him for disobeying the exercise order. The military prosecutor, on receiving the case from the military police, acknowledged that the complainant did disobey a lawful order of a superior officer and, after considering all the circumstances, disposed of the charge by exemption of prosecution. The prosecutor, however, prosecuted Corporal A who also disobeyed the order. Corporal A was found not guilty both at the Ordinary Military Court and the Appellate Military Court.

The complainant brought a constitutional complaint on grounds that, even when his disobedience clearly did not constitute a crime of insubordination, the military prosecutor failed to make a finding of no suspicion and instead issued a exemption decision, which is substantively a finding of guilt. The complainant alleged that the prosecutor's decision damaged his reputation and made him ineligible for injured veterans' benefits and disability compensation guaranteed under the Veterans' Pension Act on grounds that he himself was responsible for his injury. He also argued that the decision to exempt prosecution deprived him of an opportunity to prove his innocence affirmatively. Overall, he alleged that the abuse of governmental power violated his basic rights.

B. Summary of the Decision

The Court struck down the military prosecutor's decision of exemption of prosecution after giving concrete effects to the right to pursue happiness as follows:

As to the legal prerequisites for a constitutional complaint, the prosecutor's exemption decision is in substance equivalent to a decision that the case has sufficient basis for suspicion and meets all the requirements for prosecution although the prosecutor merely chooses not to proceed for other reasons. Therefore, such decision is an exercise of governmental power under Article 68 (1) of the Constitutional Court Act. When the prosecutor places a clearly innocent man on exempted prosecution arbitrarily or as a compromise, such act constitutes a discriminatory exercise of governmental power prohibited by the Constitution and the man thus accused has a standing to file a constitutional complaint on ground of violation of equal-

---

tween two given points, and they rest one by one as each becomes the first in each race.

ity. Also, since exemption is tantamount to a finding of sufficient basis for suspicion, it may put the accused at disadvantages, legal or factual, and cause him harms, tangible or intangible, in his life. Therefore, arbitrary disposal of a case by exemption, even when the case clearly lacks a basis for suspicion, constitutes infringement on the Article 10 right to pursue happiness in the Constitution.

The exercise order of the bayonet training instructor was not only beyond the scope of his authority as a bayonet instructor but also violated the procedures applicable to discipline maintenance exercises in contravention of due process of law. Even its substance was not something permitted under discipline maintenance exercises and amounted to cruelty. That particular order does not constitute a lawful order of a superior officer, one of the elements of the crime of insubordination.

In short, the military prosecutor's decision to exempt, and not dismiss, the charge of insubordination on the basis that any order from a superior officer satisfies the element of the charge violates the rule against arbitrariness, violating the complainant's equality and his right to pursue happiness.

C. Aftermath of the Case

The Court's decision was the first one to strike down a decision to exempt prosecution. It also clearly announced that discipline maintenance exercises administered in contravention of due process are cruel treatments. Also, it was the first one to make a finding of infringement of the right to pursue happiness since the establishment of the Court, thereby give that right a concrete content. There has been a debate on the nature and contents of the right to pursue happiness since its introduction to the Constitution in 1980. Some doubted the theoretical basis for its uniqueness as a right. The Court's decision put an end to such debate.

The Court did not elaborate clearly on the contents and constitutional role of that right in this case. However, in the ensuing cases, i.e., 89Hun-Ma204 announced on June 3, 1991 and 90Hun-Ba23 announced on April 14, 1992, the Court added more content by ruling, for example, that the right to pursue happiness included the general freedom of action and the right to free development of personality, and also that the freedom of contract is derived from the general freedom of action.

3. *Driver's Duty to Report Car Accident to Police* case, 2 KCCR 222, 89Hun-Ka118, August 27, 1990

A. Background of the Case

In this case, the Constitutional Court reviewed Article 50 (2) of the Road Traffic Act (RTA) that requires those involved in a vehicle accident to report it voluntarily to the police and upheld it to the limited extent that it is not applied to criminal matters.

Article 50 (2) of RTA (revision by Act No. 3744, Aug. 4, 1984) provides that, if a driver of a vehicle causes a traffic accident that results in personal injury or property damage, the driver must report immediately the location of the accident, the number and extent of the casualties and injuries, the properties damaged, and the extent of the damage to a police officer or the nearest police station. Article 111 (iii) of the same Act punishes violation of the duty to report with a fine up to two hundred thousand won or a short term of incarceration.

Therefore, in practice, the driver had to report the accident to the police regardless of its severity and preserve the scene of the accident, awaiting the arrival of a police officer. The officer then could easily gather testimonies and evidence necessary for any possible criminal prosecution of the reporting driver.

The claimant was prosecuted for violation of the Road Traffic Act. It was alleged that he caused an accident while driving a car and failed to report the accident to the police, committing a crime under Articles 50 (2), 111 (iii) of the Act. The claimant requested constitutional review of the Act, and the trial court granted the motion, referring the case to the Constitutional Court.

B. Summary of the Decision

The Court upheld the provisions with a decision of limited constitutionality after reconfirming the right to refuse self-incrimination as follows:

The Article 12 (2) guarantee of the right to refuse to testify against oneself aims at upholding the defendant's human rights over the goals of criminal prosecution, namely, the public's interests in finding substantive truths[76] and achieving concrete social justice[77].

76). By 'substantive truths', the justices distinguish from procedural truths which would, for instance, exclude the contents of confessions illegally obtained

The guarantee thereby protects human dignity and worth and further prevents inhumane coercion and tortures aimed at inducing confessions. The guarantee does not apply only to criminal proceedings but creates the right to silence in witnesses in administrative proceedings, legislative hearings, and all other proceedings where a requested testimony may incriminate the witness himself criminally. Therefore, the guarantee does not apply only to suspects and defendants currently subject to criminal investigations or trials but also to the drivers of accident vehicles who may be subject to the criminal processes in the future, and grants them the right not to make a self-incriminating statement. Also, the right to refuse to make a statement means a ban on any form of coercion directed at inducing such statement, whether by torture, force, or even law.

Negligent homicide, negligent infliction of injuries, and negligent destruction of property under the Act on Special Cases concerning the Settlement of Traffic Accidents are crimes of negligence. The elements of a crime of negligence can be satisfied by such objective data as the date and place of the accident, the number and extent of the casualties and injuries, and the character and value of the damaged properties. Those facts are also crucial data for sentencing on those crimes. Article 50 (2) of RTA forces the driver to report the facts that constitute the elements of these crimes and are important for sentencing. Therefore, the provision amounts to forcing the driver to report on his own crime, violating the privilege against self-incrimination.

The legislative goals of the provisions are expeditious facilitation of aid to the injured and restoration of the traffic, and therefore the provisions are limited to objective information necessary for such purpose. However, in reality, the provisions have been used expansively by the police to facilitate making further inquiries, taking statements, making the scene-of-the-accident reports, which constitute criminal investigation geared ultimately toward prosecution of the driver. The provisions therefore impose on the reporting driver the risk of criminal punishment, violating the right not to testify against oneself in the Constitution.

Nevertheless, the rates of traffic accidents have consistently increased due to the lack of an infrastructure necessary for traffic order maintenance. There is a high risk of second accidents in event of

---

because they are 'procedurally' true.

77). By using 'concrete justice', the justices refer specifically to the victims' right to justice. The act of making laws against crimes will not amount to concrete justice by itself until those laws are actually applied against the offenders in the concrete instances of the violations.

delayed responses to the first accidents. Hence exists the need for expeditious accident responses. Simple invalidation of the provisions will paralyze the traffic, the artery of the modern society, and thereby threaten the economic and social stability of people's livelihood. Therefore, we decide to uphold the statute so long as it is interpreted to apply only to the extent necessary for aid to the injured and restoration of traffic, and not to the matters involving criminal punishment.

Justice Byun Jeong-soo dissented, arguing for a simple decision of unconstitutionality on grounds that the provisions violate the essential content of the right not to testify against oneself.

C. Aftermath of the Case

After this decision, the drivers who caused car accidents were still required to report and were criminally liable upon failure to do so. However, the reporting driver could now refuse to provide the officer on the scene with information adverse to oneself. The officer on the scene now could not engage in any investigation for the purpose of criminal prosecution beyond collection of objective[78] data about the accidents, obtaining the aid to the injured, and restoration of traffic unless the reporting driver consented. Therefore, criminal investigation on vehicle accidents now had to be carried out on a basis independent of the facts reported by the driver.

Some pointed out that the decision of limited constitutionality was not reached from a purely legal perspective but from one of compromise in which the Court focused on the real-life issues arising out of application of law. Others found it realistically implausible that the police officer, under a duty and authority to investigate any crime that he becomes aware of, cannot conduct such investigation simply because there was no report of crime. Yet others found the case an unrealistic decision underestimating the importance of the initial on-the-scene investigation to allocation of the responsibility for the accident.[79] However, the Court's decision is important as an effort to uphold in the context of vehicle accident reporting the constitutional right not to be coerced into a testimony against oneself.

78). By 'objective' data, the Court distinguishes from the subjective data that is collected for the purpose of a *subjective* purpose such as criminal investigation.

79). Allocation of responsibility is important also for a civil suit, not just for criminal purposes.

4. *Blanket Delegation of Punishment for Speculative Activities* case, 3 KCCR 336, 91Hun-Ka4, July 8, 1991

A. Background of the Case

In this case, the Court for the first time struck down a criminal statute which delegated the task of defining the elements of crime to the lower rule-making processes on the ground that it violated the rule against blanket delegation.

Article 5 of the Lottery, Prizes, and Other Speculative Activities Control Act (Act No. 762 enacted on November 1, 1961) provides that: the scope of permitted activities under the licenses granted under the Act, the processes of conducting the activities, the relationship between the organizers of the activities and the participants, and other rules necessary for implementation and enforcement of the Act shall be determined by regulations unless otherwise prescribed in the Act. Then, Article 9 of the same Act provides punishment for the violators of those regulations that were promulgated under the authority of Article 5 and protected under the penalty prescribed under the parental statute. It subjects the violators of the regulations to imprisonment of up to one year, a fine of up to one hundred fifty thousand won, a short term of incarceration, or a minor fine.

The claimant, an operator of a game business in a hotel, was charged with violation of the above statute when he allegedly violated the Special Reward Rules, part of the ministerial decrees of the Ministry of Home Affairs.[80] He was fined for one hundred and fifty thousand wons in the first trial court and also in the appeals court. When he appealed to the Supreme Court, he requested constitutional review of the above statute and the Supreme granted the motion, referring the case to the Constitutional Court.

B. Summary of the Decision

The Court struck down the portion of Article 9 of the Lottery, Prizes, and Other Speculative Activities Control Act that punishes "those who violate the regulations promulgated under authority of Article 5 when those regulations hold the violators punishable by the statutory penalty prescribed in the parental statute." The Court

80). Ministry of Home Affairs merged with Ministry of Government Administration to form the current Ministry of Government Administration and Home Affairs.

first explained how the provision contravened the principle of *nulla poena sine lege* and departed from the constitutional limit on legislative delegation as follows:

The principle of n*ulla poena sine lege*, i.e., "if there is no law, there shall be neither crime nor punishment" requires that no one be punished except by a just law already enacted. The principle requires that punished activities be defined in words from which people can predict what they are in real life. The principle thereby protects the individuals' sense of stability in law and protects the positive legal order pursuant to written laws concerning criminal punishment. It is a basic principle of criminal law in a government by the rule of law, which is intended to protect individual's right and freedom from arbitrary exercise of the state's power of criminal punishment.

Delegation of legislation, if done in a general and overinclusive form, is practically no different from turning over the legislative power on a blank check. Such delegation constitutes denial of the principle of parliamentary legislation and the rule of law and could easily lead to unjust arbitrary administrative exercises of the power and unlimited encroachment on basic rights. Therefore, delegation of the law-making power must be limited to a matter concretely and individually defined. Article 75 of the Constitution also states that "[T]he President may issue presidential decrees concerning matters delegated to him in a concrete, limited scope by statute . . .". The phrase "matters delegated to him in a concrete, limited scope by statute" means that the parental statute should specify the basic contents and scope of the matters to be determined by the presidential decrees in sufficient details so that anyone could predict their content in outline.

In particular, delegation of criminal legislation is further restricted by the constitutional principles of *nulla poena sine lege* and due process of law. It must be limited to a situation of urgent necessity or other circumstances that make it impossible for the legislature to articulate the details in the parental statute. Even in these situations, the statute must define the elements of crime in sufficient details from which one can determine what kinds of conduct are punished, and clearly specify the types and permitted scope of punishment.

Article 5 of the Lottery, Prizes, and Other Speculative Activities Control Act leaves the definition of the crime merely as violation of "other regulations required for implementation and enforcement of the Act" and delegates the contents of these regulations to lower rule-making processes. It therefore does not predetermine the regulated conduct in a situation where it could and delegates such determina-

tion inclusively to the lower rule-making process without setting any standard of what should be inferred from the statutory language. Such delegation constitutes a significant departure from the limit of legislative delegation and violates the principle of *nulla poena sine lege*.

Then, Article 9 of the same Act simply takes violations of the regulations, which are the product of the aforementioned blanket delegation, as the elements of the crimes (except a portion of Article 9 concerning punishment of the conduct specifically identified in Article 7). The provision even allows the regulations to single out which of the aforementioned violations will be subject to punishment. In other words, the statute specifies punishment for crimes while leaving the elements of the crimes completely up to the lower regulations.

The Supreme Court requested the Constitutional Court to review constitutionality not only of the Article 9 punishment provision but also of the Article 7 element-of-crime provisions. However, Article 7 concerns matters other than criminal punishment. Also, disposition of the underlying trial may not require review of the element-of-crime provision when the Article 9 punishment provision is invalidated. Therefore, we find only Article 9 unconstitutional on grounds that it violates Article 75 of the Constitution that sets the limit on legislative delegation and Articles 12 (1) and Article 13 (1) that declare the principle of *nulla poena sine lege*.

C. Aftermath of the Case

Some found the decision significant as the first instance in which the highest institution of constitutional interpretation clarified the standard for delegation of the law-making in the criminal law where people's bodily freedom is implicated. They also pointed out that there are many laws that delegate defining of the element of the crimes to the regulations, and observed that the Administration and the Legislature should pay attention to this decision as a fundamental ban on any legislative delegation in a criminal statute.

As soon as review of the provisions was requested, the Ministry of Justice perceived the problem and began incorporating the contents of the regulations into the statutory language. The newly named the Speculative Activities Control Act was enacted by Act No 4339 on March 8, 1991 and went into effect on September 8 of the same year.

The decision for the first time set the constitutional standard of the permitted scope of legislative delegation in criminal statutes and the standard was adopted in the ensuing cases. The Court, in those

decisions, further elaborated on the standard: the predictability of the statutory language should not be measured on one individual provision but through comprehensive and systemic analysis of all the related provisions and also through a concrete and individual analysis in light of the nature of each statute reviewed. (90Hun-Ka27, Feb. 11, 1991; 93Hun-Ka12, July 29, 1994; 94Hun-Ma125, July 21, 1995; 94Hun-Ba42, March 28, 1996; 95Hun-Ba7, October 30, 1997; 96Hun-Ba52, July 16, 1998, etc.). Also, a line of precedents was established that the criminal provisions such as the one reviewed here and the tax provisions, which are likely to directly restrict or infringe on people's basic rights, should be scrutinized more strictly (93Hun-Ka15, June 30, 1994; 93Hun-Ka12, July 29, 1994; 93Hun-Ba 50, September 28, 1995; 94Hun-Ba22, May 29, 1997; 96Hun-Ka16, September 25, 1997).

The Court further ruled that the law-making must be preferably delegated to the regulations such as presidential decrees, prime-ministerial orders, or ministerial orders as opposed to the administrative guidelines. Also, such statutory language 'as prescribed by the Minister of Health and Welfare' could be construed as delegation either to the regulations promulgated by the Ministry or to the internal rules of the Ministry. Such equivocal delegation should be avoided and will be more strictly scrutinized for any possible departure from the limit on legislative delegation (96Hun-Ka1, May 28, 1998).

5. *Interference with Attorney Visits* case, 4 KCCR 51, 91Hun-Ma111, January 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.*[81] On September 25, 1990, the Supreme

81). 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 con-

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 (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 (4) of the Constitution.

---

sulting 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.

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 (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 (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 (3) to unconvicted detainees' visits with attorneys, pursuant to Article 75 (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."

6. *Restriction on Judge's Discretion in Releasing Defendants of Serious Crimes* case, 4 KCCR 853, 92Hun-Ka8, December 24, 1992

A. Background of the Case

The Constitutional Court in this case ruled that, in light of the Article 12 (3) principle of arrest by warrant and due process of law, the continuing effect of an arrest warrant must be determined by an independent judge's judgment and not be swayed by the opinion of the prosecutor. The Court then struck down Article 331 of the Criminal Procedure Act (hereafter "CPA") that maintained the effect of the arrest warrant even after acquittal when the prosecutor had demanded serious punishment on the defendant.

Article 331 of the above Act (Act No. 341 enacted in September 23, 1954) provided that a writ of arrest lost its effect in event of acquittal, judicial exemption of prosecution, exemption from punishment, suspension of sentencing, suspension of punishment, dismissal of the prosecution, or sentence of a fine or minor fine. However, a proviso to the Article made an exception when the prosecutor had demanded a death penalty, a life sentence, or a sentence of imprisonment for more than ten years. Therefore, in such a case, the acquittal in the first trial court and the appellate court could not set the accused free until it is upheld in the Supreme Court.

The defendants in this case were arrested and prosecuted for

assault in robbery and special assault in the Seoul District Criminal Court on March 20, 1992. They confessed to all the facts alleged in the prosecution on the first day of the trial, and after inspection of evidence and other trial procedures, the prosecutor demanded a sentence of imprisonment between ten and seven years. The trial court found the proviso of Article 331 violative of the Constitution and requested constitutional review of the Article *sua sponte*.

B. Summary of the Decision

The Constitutional Court struck down the proviso of Article 331 of CPA after first examining the role of a judge in an arrest as follows:

All people are guaranteed the right to bodily freedom(the first paragraph of Article 12 (1) of the Constitution). In event that it be restricted by such legal process as arrest, due process of law (the second paragraph of Article (1), Article (3)) and the general rules of statutory restrictions on basic rights[82] (Article 37 (2)) demand that the restriction remain at the minimum extent necessary. Therefore, a judge or the court, after having issued an arrest warrant, must cancel it, *sua sponte* or upon the party's request, immediately at any stage of criminal procedure whenever they find that the causes of arrest did not existed or no longer exist.

The due process of law in Articles 12 (1) and (3) is an independent constitutional principle. Its related principle of *arrest by warrant* applies not only to the question of whether to issue a warrant but also to whether its effects be continued, and operates to place both questions under determination by a judge whose impartial status is protected by the principle of judicial independence. Therefore, the proviso makes the continuing validity of a warrant depend on a prosecutor's decision and therefore violates due process of law.

Some focus on the legislative purpose of the proviso and argue that a defendant, once released on a judge's misjudgment, may become difficult to bring back into custody and under the criminal justice system despite the seriousness of his crime. They argue that it is inevitable to hold the defendant under the arrest warrant. However, Article 93 of the Criminal Procedure Act allows the prosecutor to appeal a judge's cancellation of a warrant immediately. Other provisions of the Act also allow the appeals court to rearrest the defendant upon a showing of need. In light of the existence of these

82). Article 37 (2) has been, for instance, interpreted to give rise to the rule against excessive restriction.

provisions, the proviso in question contravenes the basic principles of statutory abridgement of basic rights such as the legitimacy of the end, the appropriateness of the means, the doctrine of the least restrictive means, and the balance between the interests. It therefore violates the rule against excessive restriction.

C. Aftermath of the Case

Some reported that the decision corrected an unreasonable provision of law and advanced basic rights to one dimension higher. Many defendants used to live in captivity until the Supreme Court's final decision even after they were acquitted or received suspension of punishment in the lower court, and they all benefited from this decision.

In the wake of this decision, on December 29, 1995, the National Assembly revised the Criminal Procedure Act by Act No. 5054 and eliminated the proviso in question.

The Court reaffirmed the constitutional significance of the principles of *arrest by warrant* and due process of law in the ensuing cases. In 93 Hun-Ka 2 (December 23, 1993), the Court reviewed Article 97 (3) of the Criminal Procedure Act that established a prosecutor's right to immediate appeal of a judge's decision to release a defendant on bail. Under the provision, the defendant was to be held in confinement for three days after a judge decided to release him on bail, during which the prosecutor could appeal the bail decision. If the prosecutor filed the appeal, he was detained until the appeal was resolved in his favor. Therefore, the provision gives precedence to the prosecutor between the judge's decision that the defendant needs not be detained during the trial and the prosecutor's objection to it. It violates the principle of *arrest by warrant* according to which an independent judge must decide whether to detain or continue detaining the defendant. It restricts the defendant's bodily freedom without reasonableness and justness, violating due process of law and the Article 37 (2) rule against excessive restriction.

7. *Retroactive Effect of the Decision of Unconstitutionality* case, 5-1 KCCR 226, 92Hun-Ka10 etc., May 13, 1993

A. Background of the Case

In this case, the Court upheld Article 47 (2) of the Constitu-

tional Court Act (Act No. 4017 enacted in August 5, 1988) that made the effect of an unconstitutionality decision apply to future cases when the decision concerned a non-criminal statute.

The provision in question states that "Any statute or provision thereof decided as unconstitutional shall lose its effect *from the day on which the decision is made.*"

The Supreme Court, through precedents, has narrowed the literal effects of the above provision by expanding an exception where the Constitutional Court's decision of unconstitutionality was applied *retroactively*. The Supreme Court at first applied the effects of an unconstitutionality decision retroactively only to "the original case that provided the Constitutional Court with the opportunity to review the invalidated statute through a request-for-constitutional-review process or a constitutional complaint process." (Supreme Court Decisions 90Da 5450, June 22, 1991; 90Nu9346, June 28, 1991). Later, the Supreme Court expanded the scope of the retroactive effect to "all the cases pending in court at the time of the decision, to which the invalidated statute formed the premise" (Supreme Court Decisions 92Da12377, January 15, 1993; 91Nu5761, January 15, 1993; 92Nu 12247, February 26, 1993).

This case was consolidated from one request for constitutional review and three constitutional complaints. Claimant and some complainants sought to apply an unconstitutionality decision to their disputes which allegedly arose out of the invalidated statute (92Hun-Ka 10, 91Hun-Ba7, 92Hun-Ba24). The other complainant sought relief from a administrative action based on a statute even before that statute was struck down (92Hun-Ba50).

B. Summary of the Decision

The Constitutional Court found Article 47 (2) of the Constitutional Court Act constitutional to the extent that it was interpreted as a principle to which exceptions are allowed.

The question of whether the Court's decision striking down a law should be applied retrospectively or only prospectively seems to be a matter of legislative policy rather than that of constitutionality. It should be decided by balancing various interests such as the stability in law and the relief to individuals' rights. The Legislature clearly opted for a measure favoring the legal stability, except in criminal cases, in enacting Article 47 (2) of the Constitutional Court Act. Even if the statute does not ensure justice in all concrete cases or perfect equality, it can be justified as a measure to protect

the legal stability or the public's confidence in law, both of which are derivative of the principle of rule of law. The statute is constitutional, barring exceptional circumstances.

The Constitution itself is silent on the effect of an unconstitutionality decision. Instead, the Constitutional Court Act, through its Article 47 (2), has a provision on the issue. The provision originated from Article 20 of the Constitutional Committee Act (Act No. 100, February 21, 1950) during the First Republic. It was passed on to Article 22 (2) of the Constitutional Court Act (Act No. 601, April 17, 1961) of the Second Republic and then to Article 18 (1) of the Constitutional Committee Act (Act No. 2530, February 16, 1973) of the Fourth and Fifth Republics.

When a law is unconstitutional, it can be so in various ways. In light of the role and nature of constitutional adjudication, constitutional review, through a decision of unconstitutionality, should not overthrow the entire legal order of the past or bring about a social revolution, turning the past into a blank page. Constitutional review should be aimed at conforming the lower laws to the highest constitutional order and therefore building a prospective legal order for the future. Demolition of the past legal order should be permitted only when justice and fairness cannot forgive it in any way and only the minimum extent necessary.

Legislative precedents in foreign countries on this issue vary. Some in principle assign unconstitutionality decisions the retroactive (*ex tunc*) effect but limit its application (Germany, Spain, Portugal). Others maintain the prospective (*ex nunc*) effect as the principle and allow retroactive application in exceptional cases (Austria, Turkey). Yet a third group determines the retroactive effect on a case-by-case basis (the United States, some states of Germany). Our system falls into the second category.

An unconstitutionality decision can have diverse effects. Therefore, it is substantially just to recognize partial exceptions in some cases.

Firstly, a decision to invalidate a statute after a request-for-constitutional-review process or a constitutional complaint process must be retroactively applied to the original case that gave rise to that process and thereby presented the Constitutional Court with an opportunity to review the statute. Likewise, the invalidating decision must be retroactively applied to other pending requests for constitutional review or constitutional complaints that were filed before the decision but presented the same issue. At the same time, the decision must be applied to those cases pending in the ordinary courts

that have not yet resulted in requests for review or complaints but are premised on the same statute as the one invalidate.

Secondly, retroactive application should also be permitted when the concrete circumstances of the particular case shows great need for providing relief for the party's rights as long as it does not threaten the stability of the legal order and other people's vested interests in that order. Also, refusal of retroactive application must contravene the constitutional ideal of justice and equality. What cases fall into this category should be determined and expressed by the Court in its holding in each decision of unconstitutionality. If there is no explicit mention in the Court's holding, the ordinary courts should weigh the history, nature, and protected interests of the invalidated law and exercise reasonable discretion.

C. Aftermath of the Case

Some pointed out that the Supreme Court has expanded the retroactive effect of unconstitutionality decisions in ordinary civil and administrative suits, practically fossilizing Article 47 (2) of the Constitutional Court Act, and that the Court's decision expressed its concern on the Supreme Court's *ultra vires* action.

8. *Censorship of Letters of Detainees Pending Appeals* case, 7-2 KCCR 94, 92Hun-Ma144, July 21, 1995

A. Background of the Case

In this case, the Court reviewed the Criminal Administration Act provision that authorized the prison warden's censorship of letters sent or received by detainees pending appeals.[83] The Court found it unconstitutional to a limited extent for violating the freedom of confidential communication (Article 18 of the Constitution) and the right to assistance of counsel (Article 12 (4) of the Constitution).

Article 18 of the former Criminal Administration Act (prior to revision by Act No. 4936 on January 5, 1995; "CAA", hereinafter) required that a prisoner's correspondence be censored by a correction officer. Article 62 of the same Act applied the same provisions as applied to the prisoners serving finalized sentences to the detainees pending appeals, unless otherwise provided. According to these pro-

83). Viz. the so-called 'unfinalized detainees' means the prisoners whose appeals have not been exhausted.

visions, all correspondences of a detainee pending appeals, including the ones with his or her attorney, were inspected.

Complainant A, a teacher and the then Vice-President of the Korean Teachers and Educational Workers Union ("KTEWU", hereinafter), was arrested and prosecuted for spearheading illegal demonstrations including the "Rally for Legalization of the Korean Teachers and Educational Workers Union and Reinstatement of the Teachers" in violation of the Assembly and Demonstration Act. He was found guilty and sentenced to imprisonment both in the first trial court and the appellate court. He subsequently filed an appeal with the Supreme Court and was then detained at Jinju Correctional Institution. Complainant B was Complainant A's attorney in the lower courts and also submitted the letter of appointment to the highest court as well. The respondent, the Warden of Jinju Correctional Institution, inspected A's letters intended for an KTEWU member of the Jinju branch, and refused to forward it. The Warden also inspected the attorney's letters to Complainant A and delayed the delivery for three days, and on another occasion, delayed Complainant A's letter to Complainant B for five days after inspection.

The complainants filed constitutional complaints alleging that their constitutional rights were infringed by the respondent's in spection, refusal to forward, and delay of the delivery of their correspondences.

B. Summary of the Decision

The Court found Article 62 of the Criminal Administration Act invalid to the extent that it permitted inspection of the correspondences of a detainee pending appeals with his or her attorney when their contents do not give rise to any suspicion of criminal laws and rules violation. The Court first held that the warden's delay of forwarding and delivery was not unconstitutional as follows:

The delay in dispatch and delivery lasted several days but was inevitable in the normal operation of the penitentiary and was not deliberate or negligent on the part of the respondent. Therefore, the complainants' right to privacy of correspondence and Complainant A's right to assistance of counsel was not infringed.

We now examine inspection of correspondence in light of the Article 18 freedom of confidential communication. As long as detention is permitted by the laws and the Constitution, the confidentiality of communication of a detainee pending appeals may be restricted to an extent necessary to accomplish the legislative purpose

of the detention. In other words, if the detainee is allowed to correspond with people outside with no limitation, he may request destruction of evidence, threaten people with retaliation after his or her release, or coerce people into supporting him or her financially during his time. When many people learn of these cases of threats, they may refuse to give statements in investigation or testify in court and shut their eyes to various crimes, leaving fair administration of the criminal justice system in jeopardy. Therefore, as a measure to prevent destruction of evidence and escape, maintain order inside the prison, administer effectively the system of detaining defendants pending appeals, and dispel people's anxiety, we find the need for inspection of the detainees' correspondences legitimate.

Also, Article 78 of the Correction Officer Work Duties Regulations and Article 284 of the Inmate Supervised Work Duties Rules provide for the standards of inspection and the inspector's duty of confidentiality. Since the apparatus are in place to minimize the extent of infringement on the freedom of confidential communication, the censorship itself does not violate the Constitution.

We now examine censorship of correspondence in light of the Article 12 (4) right to assistance of counsel. The right to assistance of counsel calls for special protection of confidentiality for those correspondences between a detainee undergoing appeals and his or her attorney. A detainee's or defendant's right to freely communicate and meet with an attorney is the most important component of the right to assistance of counsel, and cannot be abridged in any circumstance for any reason (See 91Hun-Ma111, in January 28, 1992). The right to assistance of counsel covers not only meetings but also operates to protect confidentiality of communication between suspect-detainees and defendants and their attorneys (or those seeking to be their attorneys).

Nevertheless, the freedom of confidential correspondence with counsel is not unlimited. If there is reasonable suspicion that the correspondence contains contrabands such as drugs or concern escape, destruction of evidence, disruption of the order of the prison, and other contents violative of criminal laws and rules, the freedom can be abridged. In this case, there was no such for limitation, and the respondent yet inspected the correspondences, violating the Complainant A's right to assistance of counsel.

Article 18 (3) of the former Criminal Administration Act and its regulation Article 62 subject the correspondences of the prisoners serving finalized sentences to inspection. Article 62 of the same Act applies those provisions to the detainees pending appeals. Inspection

of the complainants' correspondences was also done pursuant to this provision. Therefore, we find unconstitutional the portion of Article 62 of the former CAA that permits inspection of correspondence with counsel in absence of necessary justifications.

C. Aftermath of the Case

In this case, the Court reconfirmed the detainee-pending- appeal's right to free visit with counsel, previously upheld in the Interference with Attorney Visit case (91Hun-Ma111, January 28, 1992) and emphasized the importance of a detainee's right to assistance of counsel.

Prior to the Court's decision, the National Assembly, on January 5, 1995, revised the Criminal Administration Act with the legislative intent similarly aligned to the holding of this decision. (Act No. 4936) The new Article 18 (3) now provides that "Visits and correspondences of an inmate shall be attended and inspected by a correction officer. Provided, the instant provision does not apply to a detainee-pending-appeal's visit with his or her attorney provided for in Article 66."

9. *Patent Litigation Procedure* case, 7-2 KCCR 264, 92Hun-Ka11, etc., September 28, 1995

A. Background of the Case

In this case, the Court found the former Patent Act and the former Design Act nonconforming to the Constitution, whereby the first and second trials on patents disputes, which are fact-finding proceedings, were to be conducted by an administrative agency, not a judge.

The former Patent Act (prior to revision by Act No. 4892 on January 5, 1995) provided that the first trial and appellate trial on patent disputes should be conducted by the Korean Intellectual Property Office, an administrative agency. It also provided that the rulings of the appellate trial should be appealed directly to the Supreme Court but only on the ground that they violated the laws and regulations. The former Design Act (prior to revision by Act No. 4894 on January 5, 1995) provided that the above provisions in the former Patent Act should be applied to design disputes. These procedures were unique to patent and design disputes. Other administrative proceedings were reviewed by the Appellate Court for a trial of fact and then by the Supreme Court for a trial of law.

This case arose out of consolidation of four requests for constitutional review. The claimants sought nullification of the decisions of the Korean Intellectual Property Office to reject their patent applications. During the proceedings conducted in the Seoul High Court and the Supreme Court, the presiding courts granted their motions for constitutional review and referred the cases to the Constitutional Court.

B. Summary of the Decision

The Constitutional Court found Article 186 (1) of the former Patent Act and Article 75 of the former Design Act incorporating the Patent Act provision by reference nonconforming to the Constitution. The Court, however, held that the above provisions control all the patents and design disputes including the original cases until the day before March 1, 1998 when the new Patent Act and the new Design Act come into effect.

"The right to trial by judge" guaranteed by Article 27 (1) of the Constitution means that everyone is entitled to a trial in which a judge both finds facts and interprets and applies laws. Therefore, there shall be no obstacle to people's access to an opportunity to obtain findings of fact and interpretations and applications of law made by a judge. Otherwise, the essential content of the right to trial is infringed.

Under Article 186 (1) of the former Patent Act, however, a person objecting to the appellate rulings of the Korean Intellectual Property Office can appeal only to the Supreme Court and only on the basis that the rulings violate the statutes and regulations. Therefore, he is not given an opportunity to obtain the findings both of fact and law by a judge.[84] The decisions of the Korean Intellectual Property Office are made by administrative employees and do not satisfy the requirement of trials by judge in the Constitution. Article 186 (1) of the former Patent Act therefore deprived the claimants of their opportunity to obtain the judge-made findings of fact and law, violating the essential content of the right to trial 'by judge.'.

Article 101 (1) and (2) of the Constitution vests judicial power with the Judiciary. At the same time, Article 107 (3) of the Constitution does recognize administrative adjudication as a proceeding preliminary to a judicial proceeding. Together, they mean that all legal disputes are to be adjudicated by the Supreme Court and its

84). Obviously, the focus should be on the opportunity to obtain a finding of fact since a finding of law can be made the Supreme Court.

inferior courts unless the Constitution says otherwise, and that all administrative adjudications are merely preliminary to the judicial proceedings at those courts. However, in this case, the appellate proceeding at the Korean Intellectual Property Office operates as a final review on the facts, violating Article 101 (1) and 107 (3).

The Patent Act provision also eliminates an opportunity to obtain a finding of fact made by the Appellate Court only for the parties to patent disputes, discriminating them relatively to the parties to other administrative proceedings. Patent cases do require technical expertise unlike other administrative matters. Therefore, the discriminatory provision has a legitimate legislative goal of making the fact-finding accurate and efficient, resolving the disputes reasonably and efficiently, and thereby providing strong protection for the inventors' rights. However, the method of discrimination chosen by Article 186 (1) entrusts the entire fact-finding process to the Korean Intellectual Property Office and eliminates judicial fact-finding. Such means has little necessary or substantive[85] relationship to accomplishment of the legislative goal, and is inappropriate in the discriminatory extent. It constitutes discrimination without rational basis, violating the principle of equality.

C. Aftermath of the Case

By this decision, the Court struck down the extraordinary patents adjudication system that has been maintained for almost half a century since 1946. The invalidated Patent Act provision was being adopted by reference not only the former Design Act (Article 75) but also by the former Trademark Act (Article 86 (2)) and the former Utility Model Act (Article 35). The decision brought about a pervasive change in the longstanding adjudicative system for intellectual properties.

However, before this decision, the National Assembly had voluntarily revised the relevant provisions of those statutes, conforming to the Constitution. On July 27, 1994, the National Assembly revised the Court Organization Act by Act No. 4765 and thereby created the Patent Court, which became the first trial court for patent disputes. On January 5, 1995, the National Assembly also revised the former Patent Act by Act No. 4892, replacing the double-tier administrative process at the Board of Hearing of the Korean Intellectual Property Office and its Board of Appeals by one-step process at the new consolidated Intellectual Property Tribunal. Under the new law, the

85). "Necessary" means whether the law is a necessary means to the legislative end. "Substantive" means whether the law *substantially* achieves the legislative end, i.e., whether the law is a substantially sufficient means to the legislative end.

Patent Court had exclusive jurisdiction over appeals from the Intellectual Property Tribunal. In addition, the reference provisions of the Trademark Act, the Design Act, and the Utility Model Act were revised accordingly. However, because the National Assembly made the new laws come into effect on March 1, 1998, the Constitutional Court permitted provisional applications of the invalid provisions until that date, by issuing a decision of nonconformity.

10. *Act on the Special Measures for the Punishment of Persons Involved in Anti-State Activities* case, 8-1 KCCR 1, 95Hun-Ka5, January 25, 1996

A. Background of the Case

In this case, the Constitutional Court struck down the Act on the Special Measures for the Punishment of persons Involved in Anti-State Activities (SPAA) enacted in the so-called "Yusin" period on the ground that it contravened due process of law and the right to trial.

Article 7 (5) of SPAA provided that if the accused did not attend a trial date for no good cause, a trial should be held in his absence. Sections (6) and (7) prohibited the attorney or the agent for the accused from appearing on his behalf at this default trial and required that the court reach its final judgment and hand out the sentence on the first trial date on the basis of the prosecutor's arguments and the facts stated in the prosecuted without any examination of evidence. Article 8 of the same Act provided that, if the accused did not comply with the prosecutor's summons twice, forfeiture of his properties should be ordered in addition to the statutory penalties for each crime committed.

Despite its general language, the statute was in reality aimed at punishing Kim Hyong-wook, the former Director of the Korean Central Intelligence Agency or confiscating his properties, who had publicly criticized the then President Park Cheong-hi before disappearing in Paris in 1975.

Pursuant to the SPAA, he was prosecuted in the Seoul District Criminal Court in 1982 and sentenced to seven years of imprisonment, seven years of disqualification from public offices, and confiscation of all his domestic assets in a default trial. His wife, acting on his behalf, requested appeal of the judgment on May 16, 1990. However, Article 11 of SPAA had eliminated the right to appeal such judgment. She requested constitutional review of Article 11, and upon

denial, filed a constitutional complaint challenging the provision on November 9, 1990 (90Hun-Ba35). On July 29, 1993, the Court struck down Article 11 (1) of SPAA, which had eliminated the right to appeal from the default trial in all cases but when the accused was arrested or turned himself into the prosecutor. The Court also struck down Article 13 (1) of the same Act that barred one from filing a motion for leave to allow the appeal. The Court's decision was based on the findings of violations of due process of law and the right to trial.

Pursuant to the Court's decision, the appeal began in November 1993 in the Seoul District Court. During the appeal, the appellant, Kim's wife, requested on his behalf constitutional review of Article 7 (5), (6) and (7) and Article 8 of the SPAA. The presiding court granted part of the motion, referring the case accordingly to the Constitutional Court.

B. Summary of the Decision

The Court first found Article 7 (5), (6), (7) and Article 8 of SPAA unconstitutional, and noted that, if these provisions were invalidated, the remaining provisions would become unenforceable, and pursuant to Article 45 of the Constitutional Court Act, struck down the entire statute. The Court's reasoning of invalidation of the individual provisions as follows:

We first examine the legal prerequisites to constitutional review. It is very probable that Kim had died but there is no such proof. The underlying proceeding had not concluded but had been suspended so that the instant constitutional review process can proceed. Although Article 7 (6) of SPAA bars the representatives of the accused from participating in criminal proceedings, the provision could not be construed to apply also to a constitutional review process.

We now examine the merits of the challenged provisions. Article 7 (5) of SPAA mandates the court to hold a default trial upon the prosecutor's request and does not allow postponement of the trial, barring the defendant entirely from defending himself against the charge of a serious offense. Therefore, the provision, in limiting the defendant's right to trial, exceeds the minimum extent necessary to achieve its legislative goal. Also, the provision, even when the charged offense is serious, does not allow a defendant an opportunity to attend his own trial, and therefore forfeits his right to answer to or disprove the prosecutor's case or establish an affirmative defense. In other words, the provision permits a default trial to proceed even when the defendant may not be responsible for the absence. Such

process is insufficient to constitute due process of law.

Article 7 (6) and (7) provide death penalty, life imprisonment and imprisonment for not less than three years as statutory penalties. Despite the seriousness of the penalties, the defendant cannot have an attorney appear on his behalf and he is sentenced without examining the evidence against him, completely barred from an opportunity to impeach or defend. Hence the violation of due process of law and excessive restriction on the right to trial. The essence role of the judiciary is resolution of legal disputes or redress of violations of laws by issuance of an authoritative judgment of an independent court on the basis of an objective fact-finding process and a law-applying process. Also, in principle, the court must directly examine the evidence in the fact-finding process. Our Constitution, in upholding the system of checks and balances, does not endow the legislature with the power to undertake judicial function unless it expressly provides so. Article 7 (7) exceeds the limit of the legislative power and trespasses upon the boundary of the judiciary in forcing courts to sentence the defendants without examination of evidence.

Article 8 of SPAA provides for confiscation of all the properties of the defendant. Unlike other crimes and punishments, the confiscation has no direct or indirect relationship with the crimes it is supposed to redress. Further, the defendant may fail to appear because he is not aware of the trial date or because of other reasons such as death or illness that cannot be imputed to his responsibility. Even if the provision is intended to create a new offense out of an anti-state activist's intentional failure to respond to the summons, total confiscation of his properties is too severe for the culpability of the crime, causing disharmony with the general criminal justice system. The provision violates the principle that one be responsible only for his own conduct, and opens a way to arbitrary punishment fraught with emotion, deviating from the requirement of justice and fairness of criminal punishment and violating due process of law and the rule against excessive restriction.

Furthermore, Article 8 of SPAA, combined with Article 10 of the same Act, makes it possible to confiscate even the properties of the defendant's relatives without examination of evidence, lending itself to a possible system of guilt-by-association prohibited by Article 13 (3) of the Constitution.

C. Aftermath of the Case

The decision is significant in upholding the right to trial pursuant

to due process of law even for anti-state activists. Indeed, SPAA was enacted under the past authoritarian regime for the purpose of punishing a particular person and confiscate his properties, and therefore created discord with the existing criminal justice system and the prevalent legal theories. No one except Kim Hyong-wook was punished under the Act.

When the appeal resumed after the Court's decision, the prosecutor amended the prosecution and charged Kim only with violation of Article 4 (1) of the Anti-Communist Act (equivalent to praising, encouraging, and concurring with anti-state organizations under Article 7 (1) of the National Security Act). On August 27, 1996, the Seoul District Court found Kim not guilty, and the prosecutor left the judgment in tact by foregoing appeal. Thereafter, the confiscated tract of 400 *pyong* located in 2 Samsun-dong, Seoul was returned to Kim's family on February 25, 1997 and the remaining properties were returned on February 22, 1998, upon a series of successful suits.

The default trial system was reviewed in the recent case on the Act on Special Cases concerning Expedition, etc. of Legal Proceedings. Article 23 of this Act provides: "The first trial can proceed in the defendant's absence pursuant to the Rules of the Supreme Court, if the place of defendant cannot be located for six months after a report, that the summons could not be delivered to him, is filed. The above clause does not apply to the cases concerning death penalty, life imprisonment or imprisonment of no less than three years." Constitutionality of this provision was dealt with in 97Hun-Ba22.

On July 16, 1998, the Constitutional Court struck down the above provision on the ground that it neither excluded the possibility of imposing heavy penalties in the defendant's absence nor limited the possibility of default trial by the nature of the reason for the absence. The Court held that the law may have been aimed at a legitimate legislative purpose but infringed right to trial excessively and failed to satisfy due process of law.

11. *Capital Punishment* case, 8-2 KCCR 537, 95Hun-Ba1, etc., November 28, 1996

A. Background of the Case

In this case, the Court reviewed the question whether capital punishment, depriving of a death row prisoner's life, is in conflict with the proviso of Article 37 (2) of the Constitution that prohibits any infringement upon the essential content of basic rights or with

Article 10 that protects human dignity.

In Korean society, the disagreement on whether to retain capital punishment has been in a tight balance. The abolitionists have argued that death penalty has not been proved as an effective measure of deterrence, has not been safe from miscarriage of justice or political abuse, and goes against the increasing worldwide trends of humanitarianism, decimating human dignity. The advocates for death penalty have argued that it is indispensable to our society fraught with violent crimes as a powerful measure of deterrence. They also have argued that the victim's right to life is more valuable than the aggressor's right to life, and therefore, a failure to sentence the violent murderer to death would violate the principle of justice and fairness. This debate has continued despite the Supreme Court's decisions upholding death penalty as constitutional before the Constitutional Court was formed. (Supreme Court Decision 69Do988, Sep. 19, 1969; Supreme Court Decision 87Do1458, Sep. 8, 1987)

The first constitutional complaint challenging constitutionality of capital punishment was filed on February 28, 1989. Complainant A, against whom a death sentence for robbery-murder had been finalized in the Supreme Court, was on death row when the Constitutional Court was formed. Then, he filed a complaint challenging constitutionality of Article 338 of the Criminal Act (robbery-murder, robbery-manslaughter) that formed the statutory basis of the death sentence and Article 57 (1) of the Criminal Administration Act (execution of death penalty) (89Hun-Ma36). Complainant B, also sentenced to death for robbery-murder in the Suwon District Court, appealed to the Supreme Court and simultaneously filed a motion to refer the case to the Constitutional Court for review of Article 338 of the Criminal Act. When the Supreme Court both denied the motion and rejected the appeal on the merit, he filed a constitutional complaint on May 1, 1990 (90Hun-Ba13).

The Constitutional Court did not reach its decision for about two years due to the importance of the issue and finally held the first oral argument on May 12, 1992. There, three scholars in criminal law and one in constitutional law, who were appointed as *amici curiae*, gave conflicting opinions. Professors Shim Jae-woo and Kim Il-soo made a case against death penalty and Professor Kim Jong-won a case for. Professor Lee Kang-hyuk opined that all death sentences are not uniformly unconstitutional but are likely to be invalid if statutory guidance and procedure are not provided for death sentences. The courtroom for this oral argument was filled to capacity by more than 100 people consisting of the members of the Council for Abolition of Capital Punishment and the family members of the complainants.

Outside the courtroom, the mother of a convict sentenced to death, wrote in blood a petition for abolition of death penalty.

However, the Court did not rule on the merit of whether capital punishment is unconstitutional. It dismissed Complainant A's complaint for passing of the filing time limit. Complainant B's sentence was carried out during the Court's review, and therefore, the Court announced closure of the case for reason of the complainant's death. In relation to the decisions, some criticized that the Court was allowing executions by taking no action or that the Court became overly cautious and considerate of policy concerns as it had done in the past when faced with an important and sensitive constitutional issue.

On October 6, 1994, fifteen convicts of violent crimes were executed. Then, on January 3, 1995, another constitutional complaint challenging the constitutionality of capital punishment was filed while forty-two criminals were sentenced to death and waiting for execution. Complainant C, was convicted of murder and special rape and sentenced to capital punishment in the first and second trial courts.[86] When he appealed to the Supreme Court, he requested constitutional review of Article 41 (i) of the Criminal Act that provided capital punishment as a lawful penalty, Article 250 (1) of the same statute that provided it as one of the statutory penalties for murder, Article 66 that prescribed the method of execution, and Article 57 (1) of the Criminal Administration Act that provided for the place of execution. When the Supreme Court denied the motion, Complainant C filed the constitutional complaint.

B. Summary of the Decision

The Constitutional Court found Articles 41 (i) and 250 (1) of the Criminal Act constitutional in the following majority opinion of seven justices:

The right to life is the most basic of all basic rights and an absolute right. Ideally, it cannot be restricted even by statute. However, in reality, the right to life cannot avoid being subject to statutory limitation. We must not pass rash social-scientific or legal judgments on human life. However, when we scrutinize its legal significance as a basic right, we cannot leave it permanently as an absolute right surpassing all other norms. From a practical perspective, when other people's lives are negated or equally important public

86). Remember that the second trial court is an appellate court. In Korea, the appellate court makes findings of fact as well as determination of law. Hence the term 'the second *trial* court.'

interests are endangered for no good cause, the state must set a standard by which others' lives and the public interests are given priority over the aggressor's life. Even if human life is ideally of absolute value, we must allow legal assessment of such value in those exceptional cases, and the right to life thereby becomes subject to statutory restriction stipulated by Article 37 (2) of the Constitution.

Although the restriction on the right to life by death penalty means absolute deprivation of that right, it does not constitute an Article 37 (2) infringement upon the essential content of that right if it is applied only to the exceptional cases of compelling necessity. In those cases, the death penalty must be necessary to protect other human lives or public interests that are at least as valuable as the life taken, pursuant to the principle of proportionality.

Presumably, death penalty, the harshest ultimate punishment, operates through people's fear of death and therefore is the most effective measure of general deterrence.[87] Some have argued that death penalty may not produce significantly or clearly stronger deterrence than life imprisonment, and that scientific and positivistic evidence proving otherwise is weak. However, an argument that life imprisonment is equally deterrent as and can replace death penalty is no less speculative.

In the end, it cannot denied that death penalty does serve certain public interests and perform certain social functions. Also, even the Constitution itself anticipates death penalty as a form of punishment (Article 110 (4)). The death penalty does not contravene Article 37 (2) of the Constitution.

However, if the individual crimes punishable by death penalty do not require as the elements a high degree of culpability and responsibility proportional to the severity of the penalty, death penalty constitutes cruel and unusual punishment impairing human dignity or exceeds the extent necessary for the goal of criminal punishment. Then, it would violate the principle of proportionality. In this case, Article 250 (1) of the Criminal Act requires murder for death penalty. We do not find the penalty conspicuously disproportional to the degree of culpability of the act and that of responsibility of the actor.

Justices Kim Chin-woo and Cho Seung-hyung argued for unconstitutionality of capital punishment. For Justice Kim, capital punishment not only conflicted with the respect for and protection of human dignity and worth mandated by Article 10 of the Constitution

87). By 'general deterrence', the Court distinguishes from specific deterrence, i.e., deterring the convict himself from committing crimes;

but also violated freedom of consciousness and human dignity of the judges handing down the death penalty and the executioners carrying it out. Justice Cho argued that abolition of death penalty is a mandate of the contemporary society, that the right to life cannot be subject to statutory limitation, and that death penalty infringes on the essential content of that right.

C. Aftermath of the Case

The decision upheld death penalty but did not end the public debate on it. Rather, it provided an opportunity for all of us to reflect on whether to retain or abolish the death penalty. In this light, the Court pointed out the effect of general deterrence and the people's prevailing sentiment on law as the basis of the decision. The Court stated: "as soon as death penalty becomes ineffective as a measure of general deterrence over time or a change in the people's sentiments makes it so, capital punishment should be immediately abolished or will be held unconstitutional."

The Council for Abolition of Capital Punishment publicly denounced the decision. The Korean Branch of Amnesty International expressed regret at "the inhumane decision in conflict with the recommendation of the United Nations and other members of the international community", and some editorials followed suit.

Complainant C proceeded with the appeal at the Supreme Court, which overturned and remanded his conviction on the ground of insufficiency of evidence. He was sentenced to life imprisonment, which was finally upheld by the Supreme Court.

Immediately before the decision, the Administration inserted, in a proposed revision of Criminal Act, Article 44 (3) that read: "a sentence of death penalty should be handed down with caution." However, the declaration of 'caution on death penalty' did not reach the final draft of the revised Criminal Act (Act No.5057) of 1995.

12. *Pretrial Examination of Witnesses* case, 8-2 KCCR 808, 94Hun-Ba1, December 26, 1996

A. Background of the Case

In this case, the Constitutional Court struck down Article 221-2 of the Criminal Procedure Act that authorized the prosecutor to examine[88] witnesses before the opening of the trial on the ground that

it restricted excessively the defendant's right to offense and defense in trial.

Pretrial examination of witnesses means the procedure in which the prosecutor obtains the testimony of material witnesses in front of a judge and submits the transcript of the testimony as evidence to the court. The purpose of this procedure is to preserve in advance a third party witness' testimony or reinforce the probative value of his or her statement made during the investigation when the witness' testimony is indispensable to the prosecutor's case. The procedure addresses the possibility that the witness may refuse to appear or testify in court or change the testimony from his or her prior statements made in the investigation stage.

Article 221-2 (1) of the Criminal Procedure Act (prior to revision by Act No. 2450 on January 25, 1973) authorizes the prosecutor to request leave to examine a witness before the judge before the opening of the trial if the witness has refused to testify or appear before the prosecutor or police and he or she is clearly established to have information indispensable to the prosecutor's case.[89] Now, in addition, Item 2 of Article 221-2 authorizes pretrial examination of a witness when the witness is likely to change his statements in trial after having made statements indispensable to the prosecutor's case before the prosecutor or police. Section 5 of Article 221-2 states that the judge *may* allow the suspect or defendant or his attorney to participate in that examination if their participation does not interfere with the examination, thereby providing limited protection for the defendant's right. Article 311 of the Criminal Procedure Act states that the transcript of the testimony at the pretrial examination is admissible.

Prosecutors took advantage of the pretrial examination when they prosecuted the suspect only on the basis of witnesses' statements without any physical evidence. The procedure was widely depended on by the prosecutors because many witnesses gave statements favorable to the prosecution at the investigation stage and later changed their statements in the trial because of their relationship with the defendant or in fear of retaliation. However, since its adoption on January 25, 1973 immediately after the Yushin Reconstitution of Oc-

88). Here, 'examination of witnesses' and 'inspection of evidence' usually denote proceedings before the judge as part of the trial proceeding. They should be distinguished from the American deposition and discovery, which does not exist in any meaningful form in Korean civil or criminal procedure other than criminal investigation. What is extraordinary about the provision in this case is that the prosecutor could depose witnesses *in front of the judge*.

89). Note that Article 221-2 (1) authorizing pretrial examination in event of the witness' prior refusal to testify or appear before the prosecutor or police is not included in the subject matter for review.

tober 1972[90], it has been continuously criticized for not providing protection for the defendant's right to defend him or herself in trial.

The complainant was prosecuted for manslaughter and obstruction of discharge of official duties. Two days before the trial, the court conducted examination of witness upon the prosecutor's motion. The prosecutor submitted the transcript of the pretrial testimony as evidence, which was accepted by the court. The complainant then requested constitutional review of Article 221-2 (2) and (5)[91] and Article 311 of the Criminal Procedure Act on the ground that the pretrial examination held pursuant to the provisions does not provide for the defendant's right to cross examination and yet its transcript is admitted into evidence. Hence violation of the right to fair trial. When the motion was denied, the complainant brought a constitutional complaint.

B. Summary of the Decision

The Court first examined the right to fair trial and struck down Sections 2 and 5 of Article 221-2 in the following majority opinion of six justices:

The Article 27 right to fair trial includes a right to a expeditious trial before a judge in a courtroom open to the public, where all evidence and testimonies are examined and presented to which the defendant can present his offense and defense. In other words, the adversarial nature of the proceeding and the principle of *trial on oral argument*[92] must be abided by so that the defendant is guaranteed a sufficient opportunity to plead and prove an answer, a rebuttal, and an affirmative defense, and any other offense and defense.

Article 221-2 (5) aims to facilitate the truth-finding process through a pretrial examination in which the witnesses can testify comfortably outside the defendant's presence and by adopting the transcript of the pretrial testimony as evidence in the trial.

However, testimonial evidence can be easily affected by the witness's memory and style of expression and distorted by the examiner's method and technique. Testimonial evidence must be presented in front of the defendant and impeached through cross-examination

90). In October 1972, the then President Park Cheong-hi led amendment of the Constitution in which he could remain in presidency for life.

91). Note that Article 221-2 (1) authorizing pretrial examination in event of the witness' prior refusal to testify or appear before the prosecutor or police is not included in the subject matter for review.

92). The principle requires that the trial be conducted verbally in court.

so that the contradictions and irrational points in it can be divulged. Only then, it attains probative value as evidence. Admitting in evidence the testimonies not subjected to cross-examination or an opportunity thereof may make sure that criminals do not go free on procedural defects but can profoundly undermine the process of finding substantive truth. The very fact that a witness may change his testimony in front of the defendant only reinforces the reason for having cross-examination and not for excluding him or her from the process.

Therefore, the legislative goal of Article 221-2 (5) is insufficient to justify the restriction on the defendant's right to participation and cross-examination in the process. The provision restricts the defendant's right to trial offense and defense in excess of the extent necessary for accomplishment of the legislative goal.

Exclusion of the defendant provided for in Section 5 of Article 221-2 forms the essence of the pretrial examination provided for by Section 2 of the same Article. Once we strike down Section 5, it follows that Section 2 should be invalidated. Moreover, the principle of judicial impartiality and the trial-centered nature of the criminal justice system requires that judges be not involved in pretrial investigations unless such involvement is necessary for protection of individual rights (e.g. ruling on requests for warrants) or unavoidable for other reasons (e.g. preservation of evidence). However, the pretrial examination under Section 2 does not fall under one of the exceptional circumstances where a judge may be involved. Unlike other proceedings for preservation of evidence, only the prosecutor can request it, and it does not require urgency as a prerequisite. It merely facilitates investigative activities of the state. Therefore, the pretrial examination of witnesses not only restricts the accused's right excessively in light of the legislative goal but also interferes with judicial independence by undermining his free and impartial adjudication.

Justices Kim Chin-woo dissented, proposing that a pretrial examination itself is valid and instead the admissibility of its transcript should be questioned if at all. He first recognized legitimate need for a pretrial examination. Section 5 of Article 221-2, a discretionary provision, can be construed as a mandatory provision that *requires* judges to admit the defendant in the pretrial examination if such participation does not interfere with the process, and that the judge from a neutral and professional position can preside over the proceeding to safeguard the veracity of the testimony. Therefore, the provision itself does not violate due process of law or the right to fair trial. However, what should be reviewed in this case is the constitutionality of

Article 311 that automatically grants admissibility to the pretrial examination testimony.

Justice Shin Chang-on concurred with the majority that the Article 221-2 (5) exclusion of the defendant from the pretrial examination is unconstitutional but dissented on whether the process itself should be invalidated. He opined that the pretrial examination serves an investigative function and not an adjudicative one, and that the mandate of swiftness and secrecy of investigation makes it impossible to adhere strictly to the requirement of accusatory procedure and the adversarial nature applicable to the trial process. He noted that invalidation of Section 5 alone would be sufficient to cure the unconstitutional elements of the process and that there was no need to invalidate Section 2 of Article 221-2.

Justice Kim Yong-joon also acknowledged the unconstitutionality of Section 5 while justifying Section 2 on the ground that the pretrial witness examination had rational and justifiable basis.

C. Aftermath of the Case

Since 1973, prosecutors have used the pretrial examination conveniently when they do not have direct evidence in, say, bribery cases or have insufficient physical evidence and rely only on testimonial evidence. It was predicted that the decision would contribute to promotion of the accused's human rights by eradicating these practices and that the pattern of prosecutorial investigation would substantially change.

During the review, the National Assembly revised Article 221-2 (5) by Act No. 5054 to read "the judge *shall* allow the defendant, the suspect, or their attorney to participate in the examination provided in Section 1 or 2 unless there is a particular reason to believe that such participation will interfere with the process." The revision therefore made the defendant's attendance and cross-examination the rule and his exclusion an exception, curing unconstitutionality of the proceeding. However, some noted that unconstitutionality of Section 2 of Article 221-2 remained.

In the wake of the decision, an ordinary court, citing this decision, denied admission of a pretrial examination transcript into evidence, which the prosecutor relied on as the only evidence of guilt, and found the defendant not guilty in an important case.

13. *Change in Use of Building* case, 9-1 KCCR 529, 94Hun-Ba22, etc., May 29, 1997

A. Background of the Case

In this case, the Constitutional Court struck down Article 78 (1) of the Building Act that provided a criminal penalty for unlicensed construction when Article 14 of the same Act defined change in the use of a building as 'construction' and determination of what changes fall under that definition was completely delegated to presidential decrees.

Article 14 (1) of the Building Act (prior to revision by Act No. 4381 on May 31, 1991) deemed any change in use of a building specified by presidential decrees as construction and Article 78 (1) of the same Act punished construction not licensed by a mayor, a county supervisor, a district Chief within the City Planning Zone with imprisonment up to three years or a fine up to 50 million wons.

The complainant was sentenced to a fine of two million wons for unlicensed change in use of a building under Article 78 (1) in a summary trial held in the Seoul District Criminal Court. He appealed and requested a full trial, and at the same time requested constitutional review of the provision on the ground that it constituted blanket delegation. When denied, he brought a constitutional complaint before the Constitutional Court.

B. Summary of the Decision

The Constitutional Court struck down the portion of Article 78 (1) that applied criminal penalty to the Article 14 'construction' when it did not satisfy the Article 8 (1) licensing requirement. The Court reasoned that the provision violated the principle of *nulla poena sine lege* guaranteed by Articles 12 (1) and 13 (1) of the Constitution and the limit on legislative delegation specified by Article 75 of the Constitution as follows:

The Article 75 limit on legislative delegation applies to laws concerning crimes and punishment as well as other laws. Furthermore, the Constitution puts particular emphasis on protection of human rights from criminal punishment and for that reason provides for the principles of *nulla poena sine lege* and due process of law, requiring all punishments to have statutory bases. Therefore, legislative delegation in this area is undesirable and must abide by its requirements and scope more strictly. In order to delegate criminal leg-

islation to a lower rule-making process: firstly, there must be urgent necessity or about the matters that cannot be specified in detail in the parental statute; secondly, the statutory description of the elements of crimes must be specific enough to allow ordinary people to infer the scope of the punished conduct; and thirdly, the parental statute must prescribe the type, maximum severity, and scope of the applicable penalties clearly. Validity of legislative delegation must not be examined on an individual statutory provision but through an organic and systemic analysis of all the related provisions.

However, the Building Act delegates the task of determining the details of the regulation to the lower rule-making processes of presidential decrees or ordinances without providing any specific standard or scope. Article 14 leaves all the matters about the limit on *change in* use of a building "as determined by presidential decrees" just as all the matters about the limit on use of a building is delegated to other lower rule-making processes. As a result, ordinary people is unable to predict solely from Article 14 what types of change in use of their buildings the presidential decrees will place under the licensing requirement.

Article 14 leaves the elements of crimes to be determined by lower rules, contravening *nulla poena sine lege* of Article 12 (1) and 13 (1) of the Constitution and the limitation of legislative delegation in Article 75 of the Constitution.

C. Aftermath of the Case

There were many interested parties to the decision and accordingly had broad social impact. In its wake, the National Assembly revised the Building Act by Act No. 5450 on December 13, 1997 and the new Article 14 enumerates the following eleven types of change in building uses: residential, assembly and entertainment, business, lodging, education, manufacturing and industrial, dangerous substance storage and processing, medical, retail and transportation, and other facilities prescribed by presidential decrees.

14. *Limitation on the Scope of Request for the Institution of Prosecution by the Court* case, 9-2 KCCR 223, 94Hun-Ba2, August 21, 1997

A. Background of the Case

In this case, the Court upheld the Criminal Procedure Act that

limited the scope of request for the institution of prosecution by the court to those crimes likely to involve human rights violations by law enforcement agencies on the ground that such limitation was within the legitimate discretion of legislative formation and did not violate equality.

Request for the institution of prosecution by the court is a quasi-prosecution procedure instituted for the purpose of providing an exception to the state monopoly on prosecution power and restricting the discretionary nature of the prosecution system. When the Criminal Procedure Act was first enacted, the request for the institution of prosecution by the court was allowed to all crimes. It was later revised by Act No. 2450 on January 25, 1973 and now Article 260 (1) of the Criminal Procedure Act limited the process only to those crimes under Articles 123 to 125 of the Criminal Act that are likely to involve human rights violations by law enforcement officers.

The complainant, the representative of the *Samchung* Victims Association, filed accusations against the officials involved in the *Samchung* project (Choi Kyu-hah, Chun Doo-hwan, Lee Hui-sung, Kim Man-kee) for abuse of power, wrongful arrest, wrongful confinement, assault, cruelty, murder, and solicitation of murder at the Seoul District Prosecutor's Office. Upon the prosecutor's decision of lack of power to prosecute, the complainant requests for the institution of prosecution at the Seoul High Court. The Court found the statute of limitations for all crimes expired except murder and solicitation of murder which the Court found not available for a request for the institution of prosecution, pursuant to Article 260 (1) of the Criminal Procedure Act. The complainant appealed to the Supreme Court and at the same time requested constitutional review of the above provision. When turned down, he brought a constitutional complaint.

B. Summary of the Decision

The Constitutional Court upheld the portion of Article 260 (1) of the Criminal Procedure Act stating "those crimes under Articles 123 to 125 of the Criminal Act" in a majority opinion of five justices. The Court first examined the legislative purpose of the provision as follows:

The Constitution does not specify how we can control the prosecutor's abuse of the state monopoly on and the discretionary nature of the prosecution power. Therefore, how to prevent prosecutors'

arbitrary decisions not to prosecute is a matter of legislative policy under the legislative discretion. Therefore, even when the legislature decides to adopt the request for the institution of prosecution by the court as a measure to control the prosecutor's discretion, the extent of the control is not invalid unless it is so unreasonable as to amount to violation of the principle of equality.

Article 260 (1) preserves the foundation of the state monopoly of and the discretionary nature of the prosecution power and at the same time provides an exception to that foundation and reconciles with the interests of the accusers and reporters of crimes. Also, the provision limits availability of the request procedure to only those crimes defined by Article 123 (abuse of power), Article 124 (wrongful arrest and confinement) and Article 125 (assault and cruelty) of the Criminal Act. These crimes are crimes of human rights violations that are committed by law enforcement officers whose official duties frequently involve confinement of others. As to these crimes, there is an increased concern that prosecutors may abuse their discretion and that their self-correcting mechanism cannot be relied upon in remedying their unreasonable non-institution of prosecution decisions. Therefore, the provision provides a special measure to obtain objectivity in the process as to these crimes. Contrarily, as to other crimes, the legislature may have decided that the non-institution of prosecution decisions can be still reviewed by ordinary appeal procedure provided in the Public Prosecutor's Office Act, and that these crimes can be excluded from the request process for the institution of prosecution by the court.

In light of the legislative goal, the discrimination on the types of crimes available for the request-for-prosecution process has rational basis. Therefore, even if the Criminal Procedure Act does not provide full judicial control on the prosecutor's discretionary power of prosecution with respect to these crimes, it does not deviate the legislative discretion or violates the principle of equality in relation to the charging parties's or crime reporters' right to trial.

Justices Lee Jae-hwa, Cho Seung-hyung and Lee Young-mo dissented: The Criminal Procedure Act grants the state with monopoly on prosecution power and yet grants wide discretion on its exercise. The victims of crimes are left helpless against prosecutors' arbitrary decision not to prosecute. Requests for the institution of prosecution by the court are instituted as a measure of relief but are allowed only for the victims and reporters of only certain crimes, arbitrarily discriminating against them and excessively limiting on their rights to trial and rights to testify in the trial processes. There is no rational basis to believe that only those crimes arising out of abuse

of power by law enforcement officers give rise to a likelihood of prosecutors' arbitrary non-institution of prosecution decisions. With respect to the possible harms caused by prosecutors' arbitrary and unreasonable decisions, all crimes of victims stand equally.

C. Aftermath of the Case

After the decision, the public opinion has supported extension of the scope of the requests for the institution of prosecution by the court, and the Administration announced its active review of the issue. It is most likely that the provision will be revised in the near future.

Since the inception of the Constitutional Court, the Court has accepted complaints against the prosecutor's decision not to prosecute, complementing the deficiencies in the request-for-prosecution process (89Hun-Ma10, July 14, 1989).

15. *Defendant's Access to Criminal Investigation Records* case, 9-2 KCCR 675, 94Hun-Ma60, November 27, 1997

A. Background of the Case

In this case, the Constitutional Court ruled that prosecutor's refusal to grant the defendant's attorney the right to inspect and copy criminal investigation records was unconstitutional.

The complainant was prosecuted for violation of the National Security Act on March 21, 1994. His attorney requested the respondent Seoul District Prosecution Office the access to all the criminal investigation records including the complainant's confession, interrogation transcript, and witnesses' affidavits. When this request was rejected without any explanation, the complainant filed a constitutional complaint on April 16, 1994 on the ground that it contravened the complainant's right to assistance of counsel guaranteed by Article 12 (4) and his right to have a speedy and fair trial under Article 27 (1) and (3) of the Constitution.

B. Summary of the Decision

The Court in this case ruled that the prosecutor's refusal to grant the complainant the access to his criminal investigation records for

no reasonable cause, such as leakage of secrets concerning national security, breach of privacy, tampering of witnesses and evidence, infringed upon his right to assistance of counsel and to a speedy and fair trial in the following majority opinion of seven justices:

We first examine the legal prerequisites to the constitutional complaint, specifically, the rule of exhaustion of prior remedies. Appeal challenging the prosecutor's refusal to grant access to investigation records is not available under the Criminal Procedure Act. It is not clear whether the refusal can be challenged under the Administrative Adjudication Act or the Administrative Litigation Act. Even if it can be reviewed judicially under the latter, the likelihood of relief is nil. Requiring exhaustion of prior remedies to the complainant amounts to an unnecessary demand of detour. The circumstances justify an exception to the rule of exhausting of prior remedies.

The defendant counsel's access to his client's investigation records is indispensable to obtaining equality between the parties and realizing the right to a speedy and fair trial. Any excessive restriction on such right infringes on the accused's constitutional right.

Also, the right to assistance of counsel covers not only the accused's right to freely meet and communicate with his attorneys but also the right to have his attorney review and duplicate investigation records and all other materials and prepare his trial offense and defense based on that. Any excessive restrictions on the attorney's access constitutes violation of the complainant's right to assistance of counsel.

However, although the right to review and copy investigation records is derived from the right to a speedy and fair trial and the right to assistance of counsel, it is not unlimited and must be harmonized with other constitutional rights. It can be restricted by statute for reason of national security, maintenance of order and public welfare. Access to and duplication of criminal records held by the prosecutors should be permitted only to the extent deemed essential to the defendant's defense in consideration of the nature and circumstances of the criminal case, on the one hand, and the types and substance of evidence sought to be accessed, on the other. Also, it should be permitted only when there is no danger of leakage of national security secrets, tampering of evidence and witnesses, breach of privacy, or any hindrance to the investigation.

In conclusion, the prosecutor's denial on March 26, 1994 of the complainant's access to his criminal investigation records without citing any of the above causes, following his prosecution on the 26nd of the same month, infringed upon his right to assistance of counsel

and to a speedy and fair trial.

Justice Kim Yong-joon dissented: In light of the trial-centered nature of our criminal litigation system and the "indictment-on-one-form" rule[93], the right to access the records held by the prosecutors cannot not be directly derived from the Constitution. Only after the prosecution, the presiding court may grant the defendant's counsel the access, exercising its authority to conduct the trial. Justice Shin Chang-on concurred with Justice Kim that the attorney's access to materials held by prosecutors arises only under the court's power to preside a trial and only when the case comes under the court's jurisdiction after passing through the preparation and discovery stage.

C. Aftermath of the Case

This decision followed another decision concerning right to assistance of counsel in which the Court ruled that the right to meet and communicate with counsel is absolute and cannot be restricted even for reason of national security, maintenance of order or public welfare (91Hun-Ma111, January 28, 1992)[94]. The decision therefore strengthened the defendant's right to assistance of counsel by extending its scope to include the right to review and copy his own criminal investigation records and prepare his trial offense and defense based on the records. However, unlike the cases decided upon the basis of right to know such as the *Forests Survey Inspection Request* case (88Hun-Ma22, Sep. 4, 1989)[95] and the *Completed Criminal Trial Records Access* case (90Hun-Ma133, May 13, 1991), this decision did not mention the right to know.

Some pointed out that there remain after the decision a possibility of disputes between the prosecutors and defense about whether good cause exists for withholding access to the investigation records. However, a balancing act is inevitable between the defendant's right and other interests such as the reputation, dignity, privacy, life, personal safety, peace of mind of the co-defendants, charging partiess, witnesses, expert witnesses, and others related to the case. To that extent, the decision strengthened the protection of the defendant's human rights.

---

93). The rule requires that the indictment be a final and complete statement of all the facts incriminating the defendant, and that there not be included any evidence or any non-evidentiary that may prejudice the court.

94). Supra, Article 6, Case 5

95). Supra, Article 2, Case 1

16. *Constitutional Review of Judgments* case, 9-2 KCCR 842, 96Hun-Ma172, etc., December 24, 1997

A. Background of the Case

In this case, the Constitutional Court laid down a limited constitutionality decision on Article 68 (1) of the Constitutional Court Act that excluded ordinary courts' judgements from the jurisdiction of the Constitutional Court, and struck down a judgment of the Supreme Court that defied the Constitutional Court's unconstitutionality decision together with the original administrative action.

Article 68 (1) of the Constitutional Court Act provides that any person whose basic rights were infringed upon by exercise or non-exercise of governmental power, "excluding the ordinary courts' judgment", may file a constitutional complaint before the Constitutional Court.

On June 16, 1992, the respondent, Director of the Dongjak Tax Office, imposed transfer profit tax on the complainant who bought a property in his wife's name and sold it to a third party pursuant to the proviso of Article 23 (4) and the proviso of Article 45 (1) (i) of the former Income Tax Act, which levied upon transfers within one year of acquisition even when the acquisition had been made under another person's name. Pursuant to the provisions, the tax was imposed upon the transfer profit which was calculated by using the actual purchase price and the actual sale price.

When the Seoul High Court rejected the complainant's appeal challenging the taxation, he appealed to the Supreme Court (95Nu 11405). During the final review, on November 30, 1995, the Constitutional Court laid down a limited constitutionality decision on the above provisions in another case (94Hun-Ba40, etc.).

In that decision, the Constitutional Court first stated that the important matters relating to the duty to pay tax should be stated in the statute as explicitly as possible pursuant to the principle of *statutory taxation*, and that there existed a limitation on delegation of such matters to the inferior rules such as presidential decrees. The Court then interpreted a provision that delegated the task of determining when the actual transaction prices could be applied as opposed to the standard public land prices, and stated that the legislative aim of the provision was to remedy unjust and exorbitant taxation that might arise out of strict application of the standard-prices-based taxation. Therefore, the Court ruled that the provision would be unconstitutional if interpreted as authorizing the Adminis-

tration to apply the actual transaction prices even when such application worked against the taxpayer because the actual-prices-based tax exceeded the standard-prices-based tax. According to the Court, the provision would violate the principle of *statutory taxation* and the rule against blanket delegation if it be interpreted so broadly.

Despite this previous decision, the Supreme Court in 95Nu1405, on April 9 of 1996, upheld the same provision even as interpreted to authorize imposing the higher actual-price-based tax and rejected the complainant's appeal. The Supreme Court declared that a limited constitutionality decision does not bind on the ordinary courts because the decision merely specifies the meaning and scope of application of the provision and leaves in tact the statutory language. The Supreme Court then disagreed with the Constitutional Court and argued that the provision in question could not be construed to delegate legislative power only in the tax payer's favor and that the Constitutional Court's interpretation would unjustly relieve the complainant who made a considerable transfer profit over a very short time.

Upon this decision of the Supreme Court, the complainant filed a constitutional complaint, arguing that Article 68 (1) of the Constitutional Court Act which excludes the ordinary courts' judgements from the Court's jurisdiction, the imposition of transfer profit tax and the above decision of the Supreme Court were unconstitutional.

B. Summary of the Decision

In a 6-3 decision, the Court held that the challenged Article 68 (1) of the Constitutional Court Act should not exclude from constitutional review those judgments that applied the laws previously invalidated by the Constitutional Court. Therefore, the decision of the Supreme Court, i.e. 95 Nu 11405 and the transfer profit tax imposed on the complainant were annulled. The reasoning of this decision as follows:

Although making the ordinary courts' judgements subject to review of the Constitutional Court would be more desirable to strengthen the protection of constitutional rights, the failure to do so in Article 68 (1) does not amount to an unconstitutionality since it does not clearly go beyond the legislative discretion. Nevertheless, to the extent that the provision is interpreted to exclude from constitutional challenge those judgements that enforce the laws struck down in whole or part by the Constitutional Court and thereby infringe upon people's basic rights, the provision in question should be unconstitutional.

Unconstitutionality decisions of the Constitutional Court could take such forms as unqualified unconstitutionality, limited constitutionality, limited unconstitutionality, and nonconformity to the Constitution, and the decision in all these forms are binding. The Court's evaluation of a statute may vary according to how it interprets the text, meaning, and legislative intent of the statute. Then, the Court chooses the most favorable interpretation within the scope permitted by general rules of interpretation. After that, the Court may articulate the constitutional scope of the meaning of the statute and find it constitutional *within* that scope. Or the Court may articulate the possibilities of applying the statute beyond its constitutional scope and find it unconstitutional as applied *outside* that scope. The two forms are flip-sides of a coin and are the same for all practical purposes. They differ only in whether they actively or passively exclude the unconstitutional applications of an otherwise valid statute, and they are equally decisions of partial constitutionality.

The judgment of the Supreme Court enforces the statutory provision invalidated by the Constitutional Court in a decision of limited unconstitutionality, and it violates the binding force of the Constitutional Court's decisions. Therefore, the constitutional complaint against the Supreme Court's judgment must be allowed as an exception. Then, since the judgment infringes on the complainant's right to property, it should be cancelled according to Article 75 (3) of the Constitutional Court Act.

Finally, since both the judgment and the original administrative action applied the law already struck down, the latter is clearly unconstitutional as well. Since it is desirable for the realization of the rule of law to eliminate the unconstitutional state of affairs in one stroke as well as provide swift and efficient redress to peoples' infringed rights, the administrative action is hereby annulled according to Article 75 (3) of the Constitutional Court Act.

Justices Lee Jae-hwa, Han Dae-hyun and Koh Joong-suk dissented:

The legislative intent behind exclusion of judgment from the jurisdiction of the Constitutional Court is merely to exclude ordinary legal cases and constitutional review of executive orders, rules and regulations and administrative actions, which are allocated to the jurisdiction of the ordinary courts by the Constitution. It is not meant to exclude review of a case in which an ordinary court itself conducted constitutional review of a statute. In this case, the Supreme Court undertook constitutional review of a statute itself, and therefore, the complainant could challenge the Supreme Court's April 9,

1996 judgment. However, annulment of the judgment is undesirable when the Constitution specifies the mutual independence between the Constitutional Court and the Supreme Court. Annulment can also cause disputes about its own effect for there is no statutory provision applicable to its consequences. It is desirable to find the judgment unconstitutional and leave the rest to the Supreme Court. Also, considering the original intent of Article 107 (2) of the Constitution and Article 68 (1) of the Constitutional Court Act that endowed constitutional review of administrative action with the ordinary courts, the imposition of tax by the Director of Dongsak Tax Office on June 16, 1992 is not reviewable in constitutional complaints proceedings.

C. Aftermath of the Case

There were a number of comments on this case. First of all, there were criticisms that the Court's position was too cautious. According to the critics, Article 68 (1), by excluding the ordinary courts' judgments from the constitutional complaint process, also excludes from the process those exercises or non-exercises of governmental power that may be the subject of the judgments. Therefore, it can defeat and dissolve the purpose of the constitutional complaint process, i.e., conforming governmental power to the binding force of the basic rights. The Court reduced the problem too much when it found Article 68 (1) unconstitutional only with respect to exclusion of *those judgments that enforce the laws that the Court had invalidated.* Also, the Court's decision took the form of limited unconstitutionality, leaving room for more controversy, when the Supreme Court had denied the binding force of such a decision.[96] Another commentator suggested that the Constitutional Court should extend its jurisdiction over judgments by precedents.

On the positive side, some argued that the decision was a minimum necessary for preserving the primacy of the Constitution and the binding force of unconstitutionality decision, thereby protecting the integrity of the newly established constitutional adjudication system. Others viewed it inevitable to allow constitutional review of judgments to a limited extent in light of the ever-increasing need for legal unity and protection of constitutional rights.

---

96). As a matter of fact, it is on this ground that the Supreme Court applied 'the law struck down' by the Constitutional Court (or more accurately, applied the law in the manner prohibited by the Constitutional Court). It is unlikely that the Supreme Court would enforce a statutory provision if it is struck down on a decision of unqualified unconstitutionality.

On the negative side, some criticised that the decision arose out of the Constitutional Court's wayward interpretation of a statute[97] and that such decision conflicts with the supremacy of the Supreme Court and the independence of the judiciary and constitutes introduction of a four-trial system never anticipated by the Constitution. Article 68 (1) merely represents the legislative intent to carry out allocation of power provided for by the Constitution. The Constitutional Court's annulment of an ordinary court's judgment, despite the provision, is *ultra vires*.

However, the Supreme Court's judgment was not only direct defiance of the binding force of the Constitutional Court's unconstitutionality decision but also constituted a usurpation of power because it undertook constitutional review of the statute itself. It also ignored the constitutional ideas of right to property and the principle of *statutory taxation* while paying too much attention to the administrative expediency of levying on land speculation. Also, in light of other previous judgments by the Supreme Court that defied the decisions of the Constitutional Court, the decision was unavoidable on the part of the Constitutional Court in defending the binding force and integrity of the constitutional adjudication system.

In the ensuing cases where constitutional complaints were filed challenging judgments on the ground of the unconstitutionality of Article 68 (1) of the Constitutional Court Act, the Court has dismissed them unless they challenged the exceptional judgments such as shown in this case.

17. *Constitutional Complaint against Original Administrative Action* case, 10-1 KCCR 660, 91Hun-Ma98, etc., May 28, 1998

A. Background of the Case

In this case, the Constitutional Court dismissed a constitutional complaint against an administrative action that has been already upheld through judicial review in the ordinary courts.

97). The Constitutional Court is not supposed to interpret a statute but only decided whether an interpretation of a statute is valid or not. If you remember, the Constitutional Court's invalidation of the Transfer Profits Tax Act provision originated from its view that the legislative intent of the provision was to authorize the Administration to impose the actual-price-based tax only when doing so will reduce the tax liability. In this case, the Supreme Court had rejected such statutory interpretation and, upon that ground, went ahead to apply the provision in the manner already prohibited by the Constitutional Court.

Whether an original administrative action can be challenged on a constitutional complaint after it has been upheld in ordinary judicial review has been debated since the establishment of the Constitutional Court.[98] Because Article 68 (1) excludes all ordinary courts' judgements from the jurisdiction of the constitutional complaint process, including the ones affirming administrative actions, the exclusion of the original administrative action from constitutional scrutiny will restrict the constitutional complaint process as a protective measure for basic rights. Of course, the Constitutional Court's independent scrutiny of the original administrative action may conflict with the judgment of the ordinary court that had affirmed that action.[99]

The complainants challenged the imposition of transfer profit taxes in the ordinary courts but their appeals were rejected. Then, they brought constitutional complaints alleging that the imposition of transfer profit taxes was based on a unconstitutional regulation violative of the principle of *statutory taxation.*

B. Summary of the Decision

The Court dismissed the complaints on the ground that an administrative action already upheld by an ordinary court is not subject to a constitutional complaint process unless there are exceptional cir-

98). The problem arises out of the fact that the Constitution granted constitutional review power over administrative rules, regulations, and actions to the Supreme Court and that over statutes to the Constitutional Court. Some complainants, after not obtaining favorable appeals of an administrative action in the ordinary courts system headed by the Supreme Court, may resort to the Constitutional Court. But, because Article 68 (1) of the Constitutional Court Act excludes judgments of ordinary courts from the permissible subject matter of a constitutional complaint process, they can challenge only the original administrative rules, regulations, actions in the Constitutional Court. However, presumably, the ordinary court that affirmed that rule, regulation, or action had done so after conducting constitutional scrutiny since it had power of such scrutiny under the Constitution. Therefore, the question arises whether any additional review by the Constitutional Court should be allowed.

Now, the problem can be obviated for administrative rules and regulations because the complainants can go directly to the Constitutional Court *before appealing to the ordinary courts* if the rules and regulations *directly* violate basic rights, as the Constitutional Court, through a series of precedents, has established. In that scenario, the Constitutional Court is free to conduct its own review since there is no previous decision by an ordinary court with which it may conflict with.

However, such direct route is not readily available to administrative actions because they are held more strictly to the requirement of exhaustion of prior remedies. To satisfy the requirement, any administrative action suspected to be unconstitutional must be brought before an ordinary court *first.* Therefore, the Constitutional Court reviewing administrative action on a constitutional complaint will invariably face an ordinary court's judgment that has already affirmed it.

99). The problem here is that the Constitution granted the power of constitutional review of rules and regulations, ordinances, administrative actions to the ordinary courts, not the Constitutional Court.

cumstances, in a plurality opinion of four justices. One justice concurred with the plurality but on a different ground. Three justices also concurred with the plurality on a yet another separate ground. Only one justice dissented. The plurality opinion follows:

In 96Hun-Ma172, 173 on December 24, 1997, the Court had extended exceptionally a constitutional complaint jurisdiction to a judgment of the Supreme Court that enforced a law or its particular interpretation previously invalidated by the Constitutional Court. In that case, in striking down the nonconforming judgment, the Court also struck down the original administrative action that the Supreme Court's judgment affirmed.

However, the original administrative action was annulled there only because the judgment affirming that action was being annulled at the same time and the Court intended to obtain expedient and efficient relief to infringement of basic rights in such situation. When there is no judgement being annulled, the original administrative action should not be reviewed in the constitutional complaint process since the ordinary courts' review is already binding. Allowing such review will conflict with Article 107 (2) of the Constitution that granted to the Supreme Court the final authority on constitutional review of "executive orders, rules and regulations, administrative actions" when their validity forms the premise of a judicial proceeding. It also conflicts with Article 68 (1) of the Constitutional Court Act that excludes judgements from the jurisdiction of the constitutional complaint.

Justice Lee Young-mo concurred with the plurality on the following ground:

The 'judgement' exclusion of Article 68 (1) does not apply to those judgements that applied an unconstitutional law (which is broader than law declared unconstitutional).[100] In this case, indeed, the statute upon which the Supreme Court validated the imposition of tax, i.e. Article 60 of the former Income Tax Act (revised by Act No. 3098 on December 5, 1978 and prior to revision on December 22, 1994 by Act No.4803) had been invalidated by the Constitutional Court. Therefore, the complainants could challenge the Supreme Court's judgment in this constitutional complaint. However, they did not and challenged only the original administrative action of imposition of the taxes, and the period of amending the complaint expired. Therefore, the complaint should be dismissed.

---

100). 'Broader' in that it includes an interpretation of a law, not just a law itself, which has been invalidated by the Constitutional Court.

Justices Lee Jae-hwa, Koh Joong-suk and Han Dae-hyun concurred with the plurality on the following separate ground:[101]

The 'judgment' exclusion of Article 68 (1) of the Constitutional Court Act, taken together with its 'exhaustion of prior remedies' proviso, should be interpreted as excluding not only judgements but also administrative actions reviewed by the judgments. Any constitutional review of the original administrative action will be equivalent to a concurrent review of the judgment affirming that action, resulting in conflict with Article 68 (1) of the Act.

Justice Cho Seung-hyung dissented:

In light of the reason behind the Article 111 (1) (v) delegation to the Constitutional Court Act of determination of the subject matter and scope of the constitutional complaint process and the legislative intent behind the proviso of Article 68 (1) of that Act, the provision cannot be construed to exclude original administrative actions. Even Article 107 (2) of the Constitution that grants the Supreme Court the ultimate authority of review on administrative regulations, rules, and actions, applies only to a situation where the question of their validity arises as the premise of an underlying trial. Outside such situation, a constitutional complaint against an administrative action directly violative of basic rights should be allowed. Indeed, the Constitutional Court has already established through precedents that Article 107 (2) should be construed to allow constitutional complaints against administrative regulations and rules if they directly violate basic rights. Administrative actions are listed in parallel to rules and regulations in the constitutional provision, and there is no reason to treat actions differently from rules and regulations.

Furthermore, the exclusion of original administrative actions does not follow directly from the 'judgment' exclusion. Article 75 (3), (4) and (5) of the Constitutional Court Act specifically authorizes the Constitutional Court, in invalidating in an exercise of governmental power, also to invalidate statutes or statutory provisions upon which that exercise of governmental power was based. In light of this framework of the Constitutional Court Act, the constitutional complaint process and an ordinary court's constitutional review seem to have different subject matters, which the plurality fails to see. A judgement affirming an administrative action does not bind upon the constitutional question, i.e. whether people's constitutional rights were

101). Remember that these three justices dissented from the Court in the *Constitutional Complaint Against Judgment* case, 96Hun-Ma172, et al., Dec. 24, 1997, *supra,* Article 6, Case 16, in its decision to strike down the original administrative action *together* with the Supreme Court's judgment affirming it.

infringed, which can be decided through a constitutional complaint process. In addition, Article 75 (1) of the Constitutional Court provides that "a decision to uphold a constitutional complaint shall bind upon all state agencies and local government entities." Therefore, the Constitutional Court's decision invalidating the administrative action would take precedence and bind upon an ordinary court's prior judgment affirming it.

C. Aftermath of the Decision

The decision, not paid media attention due, deals with an important procedural issue surrounding the subject matter of the constitutional complaint process. Some public law scholars argued that the completion of ordinary judicial review should not preclude the Constitutional Court's own review of the administrative action, and that the possible conflict with the ordinary court's judgment is not problematic since a decision by the Constitutional Court binds not only on the administrative agency but also the ordinary court. They therefore found the Court's decision too passive.

Others pointed to the Court's own precedents that have already allowed constitutional complaints against rules and regulations, and found the Court's Article 107 (2) reasoning dubious. Rules and regulations may differ from administrative actions in some aspects. It may be harder to exempt a constitutional complaint against administrative action from the requirement of exhaustion of prior remedies than against the rules and regulations. However, there are exceptional circumstances where the Court will easily accept a complaint against an administrative action when other remedies against it have not been exhausted. The difference is not sufficient to justify the categorical ban on a constitutional complaint against administrative actions. The proponents of this view observe that it is more appropriate legislative policy in light of the intent behind introduction of the constitutional adjudication system to extend its jurisdiction of constitutional complaint process to ordinary courts' judgments by the revision of the Constitutional Court Act.

In the ensuing *National Defense Tax Annulment* case, 93Hun-Ma 150 (June 25, 1998) and other cases, the Constitutional Court has dismissed about ten complaints against original administrative actions.

Appendixes

The Wall Painting(Authority of Law and Defence of Truth)
at the right side of the First Floor
(Han Un-sung 488×230㎝)

I. The Constitution

Jul. 17, 1948
Amended by Jul. 7, 1952
Nov. 29, 1954
Jun. 15, 1960
Nov. 29, 1960
Dec. 26, 1962
Oct. 21, 1969
Dec. 27, 1972
Oct. 27, 1980
Oct. 29, 1987

PREAMBLE

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and

To destroy all social vices and injustice, and

To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and To help each person discharge those duties and responsibilities concomitant to freedoms and rights, and

To elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently.

Oct. 29, 1987

CHAPTER I GENERAL PROVISIONS

Article 1

(1) The Republic of Korea shall be a democratic republic.

(2) The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people.

Article 2

(1) Nationality in the Republic of Korea shall be prescribed by Act.

(2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.

Article 3

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4

The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

Article 5

(1) The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.

(2) The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality shall be maintained.

Article 6

(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.

(2) The status of aliens shall be guaranteed as prescribed by international law and treaties.

Article 7

(1) All public officials shall be servants of the entire people and shall be responsible to the people.

(2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.

Article 8

(1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.

(2) Political parties shall be democratic in their objectives, organization and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.

(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act.
(4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

Article 9
The State shall strive to sustain and develop the cultural heritage and to enhance national culture.

CHAPTER II RIGHTS AND DUTIES OF CITIZENS

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

Article 11
(1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.
(2) No privileged caste shall be recognized or ever established in any form.
(3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue therefrom.

Article 12
(1) All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures.
(2) No citizens shall be tortured or be compelled to testify against himself in criminal cases.
(3) Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: *Provided*, That in a case where a criminal suspect is an apprehended *flagrante delicto*, or where there is danger that a person suspected of committing a crime

punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an *ex post facto* warrant.

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.

(5) No person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. The family, etc., as designated by Act, of a person arrested or detained shall be notified without delay of the reason for and the time and place of the arrest or detention.

(6) Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention.

(7) In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

Article 13

(1) No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall he be placed in double jeopardy.

(2) No restrictions shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation.

(3) No citizen shall suffer unfavorable treatment on account of an act not of his own doing but committed by a relative.

Article 14

All citizens shall enjoy freedom of residence and the right to move at will.

Article 15

All citizens shall enjoy freedom of occupation.

Article 16

All citizens shall be free from intrusion into their place of residence. In case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented.

Article 17

The privacy of no citizen shall be infringed.

Article 18
The privacy of correspondence of no citizen shall be infringed.

Article 19
All citizens shall enjoy freedom of conscience.

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

Article 21
(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be 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
(1) All citizens shall enjoy freedom of learning and the arts.
(2) The rights of authors, inventors, scientists, engineers and artists shall be protected by Act.

Article 23
(1) The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act.
(2) The exercise of property rights shall conform to the public welfare.
(3) Expropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by Act: *Provided*, That in such a case, just compensation shall be paid.

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

Article 25
All citizens shall have the right to hold public office under the conditions as prescribed by Act.

Article 26
(1) All citizens shall have the right to petition in writing to any

governmental agency under the conditions as prescribed by Act.
(2) The State shall be obligated to examine all such petitions.

Article 27

(1) All citizens shall have the right to 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 as under the conditions prescribed by Act.

Article 28

In a case where a criminal suspect or an accused person who has been placed under detention is not prosecuted as provided by Act or is acquitted by a court, he shall be entitled to claim just compensation from the State under the conditions as prescribed by Act.

Article 29

(1) In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by Act. In this case, the public official concerned shall not be immune from liabilities.
(2) In case a person on active military service or an employee of the military forces, a police official or others as prescribed by Act sustains damages in connection with the performance of official duties such as combat action, drill and so forth, he shall not be entitled to a claim against the State or public organization on the grounds of unlawful acts committed by public officials in the course of official duties, but shall be entitled only to compensations as prescribed by Act.

Article 30

Citizens who have suffered bodily injury or death due to criminal

acts of others may receive aid from the State under the conditions as prescribed by Act.

Article 31

(1) All citizens shall have an equal right to 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

(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act.

(2) All citizens shall have the duty to work. The State shall prescribe by Act the extent and conditions of the duty to work in conformity with democratic principles.

(3) Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.

(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.

(5) Special protection shall be accorded to working children.

(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

Article 33

(1) To enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action.

(2) Only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective

action.

(3) The right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by Act.

Article 34

(1) All citizens shall be entitled to a life worthy of human beings.

(2) The State shall have the duty to endeavor to promote social security and welfare.

(3) The State shall endeavor to promote the welfare and rights of women.

(4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.

(5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.

(6) The State shall endeavor to prevent disasters and to protect citizens from harm therefrom.

Article 35

(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

(2) The substance of the environmental right shall be determined by Act.

(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

Article 36

(1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

(2) The State shall endeavor to protect mothers.

(3) The health of all citizens shall be protected by the State.

Article 37

(1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.

(2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Article 38

All citizens shall have the duty to pay taxes under the conditions as prescribed by Act.

Article 39
(1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.
(2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.

CHAPTER Ⅲ THE NATIONAL ASSEMBLY

Article 40
The legislative power shall be vested in the National Assembly.

Article 41
(1) The National Assembly shall be composed of members elected by universal, equal, direct and secret ballot by the citizens.
(2) The number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200.
(3) The constituencies of members of the National Assembly, proportional representation and other matters pertaining to National Assembly elections shall be determined by Act.

Article 42
The term of office of members of the National Assembly shall be four years.

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

Article 44
(1) During the sessions of the National Assembly, no member of the National Assembly shall be arrested or detained without the consent of the National Assembly except in case of *flagrante delicto*.
(2) In case of apprehension or detention of a member of the National Assembly prior to the opening of a session, such member shall be released during the session upon the request of the National Assembly, except in case of *flagrante delicto*.

Article 45
No member of the National Assembly shall be held responsible outside the National Assembly for opinions officially expressed or votes cast in the Assembly.

Article 46
(1) Members of the National Assembly shall have the duty to maintain high standards of integrity.
(2) Members of the National Assembly shall give preference to

national interests and shall perform their duties in accordance with conscience.

(3) Members of the National Assembly shall not acquire, through abuse of their positions, rights and interests in property or positions, or assist other persons to acquire the same, by means of contracts with or dispositions by the State, public organizations or industries.

Article 47

(1) A regular session of the National Assembly shall be convened once every year under the conditions as prescribed by Act, and extraordinary sessions of the National Assembly shall be convened upon the request of the President or one fourth or more of the total members.

(2) The period of regular sessions shall not exceed a hundred days, and that of extraordinary sessions, thirty days.

(3) If the President requests the convening of an extraordinary session, the period of the session and the reasons for the request shall be clearly specified.

Article 48

The National Assembly shall elect one Speaker and two Vice-Speakers.

Article 49

Except as otherwise provided for in the Constitution or in Act, the attendance of a majority of the total members, and the concurrent vote of a majority of the members present, shall be necessary for decisions of the National Assembly. In case of a tie vote, the matter shall be regarded as rejected.

Article 50

(1) Sessions of the National Assembly shall be open to the public: *Provided*, That when it is decided so by a majority of the members present, or when the Speaker deems it necessary to do so for the sake of national security, they may be closed to the public.

(2) The public disclosure of the proceedings of sessions which were not open to the public shall be determined by Act.

Article 51

Bills and other matters submitted to the National Assembly for deliberation shall not be abandoned on the ground that they were not acted upon during the session in which they were introduced, except in a case where the term of the members of the National Assembly has expired.

Article 52

Bills may be introduced by members of the National Assembly or by the Executive.

Article 53

(1) Each bill passed by the National Assembly shall be sent to the Executive, and the President shall promulgate it within fifteen days.

(2) In case of objection to the bill, the President may, within the period referred to in paragraph (1), return it to the National Assembly with written explanation of his objection, and request it be reconsidered. The President may do the same during adjournment of the National Assembly.

(3) The President shall not request the National Assembly to reconsider the bill in part, or with proposed amendments.

(4) In case there is a request for reconsideration of a bill, the National Assembly shall reconsider it, and if the National Assembly repasses the bill in the original form with the attendance of more than one half of the total members, and with a concurrent vote of two thirds or more of the members present, it shall become Act.

(5) If the President does not promulgate the bill, or does not request the National Assembly to reconsider it within the period referred to in paragraph (1), it shall become Act.

(6) The President shall promulgate without delay the Act as finalized under paragraphs (4) and (5). If the President does not promulgate an Act within five days after it has become Act under paragraph (5), or after it has been returned to the Executive under paragraph (4), the Speaker shall promulgate it.

(7) Except as provided otherwise, an Act shall take effect twenty days after the date of promulgation.

Article 54

(1) The National Assembly shall deliberate and decide upon the national budget bill.

(2) The Executive shall formulate the budget bill for each fiscal year and submit it to the National Assembly within ninety days before the beginning of a fiscal year. The National Assembly shall decide upon it within thirty days before the beginning of the fiscal year.

(3) If the budget bill is not passed by the beginning of the fiscal year, the Executive may, in conformity with the budget of the previous fiscal year, disburse funds for the following purposes until the budget bill is passed by the National Assembly:

1. The maintenance and operation of agencies and facilities

established by the Constitution or Act;
2. Execution of the obligatory expenditures as prescribed by Act; and
3. Continuation of projects previously approved in the budget.

Article 55

(1) In a case where it is necessary to make continuing disbursements for a period longer than one fiscal year, the Executive shall obtain the approval of the National Assembly for a specified period of time.

(2) A reserve fund shall be approved by the National Assembly in total. The disbursement of the reserve fund shall be approved during the next session of the National Assembly.

Article 56

When it is necessary to amend the budget, the Executive may formulate a supplementary revised budget bill and submit it to the National Assembly.

Article 57

The National Assembly shall, without the consent of the Executive, neither increase the sum of any item of expenditure nor create any new items of expenditure in the budget submitted by the Executive.

Article 58

When the Executive plans to issue national bonds or to conclude contracts which may incur financial obligations on the State outside the budget, it shall have the prior concurrence of the National Assembly.

Article 59

Types and rates of taxes shall be determined by Act.

Article 60

(1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

(2) The National Assembly shall also have the right to consent to the declaration of war, the dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.

Article 61

(1) The National Assembly may inspect affairs of state or inves-

tigate specific matters of state affairs, and may demand the production of documents directly related thereto, the appearance of a witness in person and the furnishing of testimony or statements of opinion.

(2) The procedures and other necessary matters concerning the inspection and investigation of state administration shall be determined by Act.

Article 62

(1) The Prime Minister, members of the State Council or government delegates may attend meetings of the National Assembly or its committees and report on the state administration or deliver opinions and answer questions.

(2) When requested by the National Assembly or its committees, the Prime Minister, members of the State Council or government delegates shall attend any meeting of the National Assembly and answer questions. If the Prime Minister or State Council members are requested to attend, the Prime Minister or State Council members may have State Council members or government delegates attend any meeting of the National Assembly and answer questions.

Article 63

(1) The National Assembly may pass a recommendation for the removal of the Prime Minister or a State Council member from office.

(2) A recommendation for removal as referred to in paragraph (1) may be introduced by one third or more of the total members of the National Assembly, and shall be passed with the concurrent vote of a majority of the total members of the National Assembly.

Article 64

(1) The National Assembly may establish the rules of its proceedings and internal regulations: *Provided*, That they are not in conflict with Act.

(2) The National Assembly may review the qualifications of its members and may take disciplinary actions against its members.

(3) The concurrent vote of two thirds or more of the total members of the National Assembly shall be required for the expulsion of any member.

(4) No action shall be brought to court with regard to decisions taken under paragraphs (2) and (3).

Article 65

(1) In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election

Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment.

(2) A motion for impeachment prescribed in paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: *Provided*, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly.

(3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated.

(4) A decision on impeachment shall not extend further than removal from public office: *Provided*, That it shall not exempt the person impeached from civil or criminal liability.

CHAPTER Ⅳ THE EXECUTIVE

SECTION 1 The President

Article 66

(1) The President shall be the Head of State and represent the State vis-à-vis foreign states.

(2) The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.

(3) The President shall have the duty to pursue sincerely the peaceful unification of the homeland.

(4) Executive power shall be vested in the Executive Branch headed by the President.

Article 67

(1) The President shall be elected by universal, equal, direct and secret ballot by the people.

(2) In case two or more persons receive the same largest number of votes in the election as referred to in paragraph (1), the person who receives the largest number of votes in an open session of the National Assembly attended by a majority of the total members of the National Assembly shall be elected.

(3) If and when there is only one presidential candidate, he shall not be elected President unless he receives at least one third of the total eligible votes.
(4) Citizens who are eligible for election to the National Assembly, and who have reached the age of forty years or more on the date of the presidential election, shall be eligible to be elected to the presidency.
(5) Matters pertaining to presidential elections shall be determined by Act.

Article 68
(1) The successor to the incumbent President shall be elected seventy to forty days before his term expires.
(2) In case a vacancy occurs in the office of the President or the President-elect dies, or is disqualified by a court ruling or for any other reason, a successor shall be elected within sixty days.

Article 69
The President, at the time of his inauguration, shall take the following oath: "I do solemnly swear before the people that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture."

Article 70
The term of office of the President shall be five years, and the President shall not be reelected.

Article 71
If the office of the presidency is vacant or the President is unable to perform his duties for any reason, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for him.

Article 72
The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.

Article 73
The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

Article 74
(1) The President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act.
(2) The organization and formation of the Armed Forces shall

be determined by Act.

Article 75

The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Acts.

Article 76

(1) In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.

(2) In case of major hostilities affecting national security, the President may issue orders having the effect of Act, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.

(3) In case actions are taken or orders are issued under paragraphs (1) and (2), the President shall promptly notify it to the National Assembly and obtain its approval.

(4) In case no approval is obtained, the actions or orders shall lose effect forthwith. In such case, the Acts which were amended or abolished by the orders in question shall automatically regain their original effect at the moment the orders fail to obtain approval.

(5) The President shall, without delay, put on public notice developments under paragraphs (3) and (4).

Article 77

(1) When it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law under the conditions as prescribed by Act.

(2) Martial law shall be of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act.

(4) When the President has proclaimed martial law, he shall notify it to the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members

of the National Assembly, the President shall comply.

Article 78
The President shall appoint and dismiss public officials under the conditions as prescribed by the Constitution and Act.

Article 79
(1) The President may grant amnesty, commutation and restoration of rights under the conditions as prescribed by Act.
(2) The President shall receive the consent of the National Assembly in granting a general amnesty.
(3) Matters pertaining to amnesty, commutation and restoration of rights shall be determined by Act.

Article 80
The President shall award decorations and other honors under the conditions as prescribed by Act.

Article 81
The President may attend and address the National Assembly or express his views by written message.

Article 82
The acts of the President under law shall be executed in writing, and such documents shall be countersigned by the Prime Minister and the members of the State Council concerned. The same shall apply to military affairs.

Article 83
The President shall not concurrently hold the office of Prime Minister, a member of the State Council, the head of any Executive Ministry, nor other public or private posts as prescribed by Act.

Article 84
The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.

Article 85
Matters pertaining to the status and courteous treatment of former Presidents shall be determined by Act.

SECTION 2 The Executive Branch

Sub-Section 1 The Prime Minister and Members of the State Council

Article 86
(1) The Prime Minister shall be appointed by the President with

the consent of the National Assembly.
(2) The Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President.
(3) No member of the military shall be appointed Prime Minister unless he is retired from active duty.

Article 87
(1) The members of the State Council shall be appointed by the President on the recommendation of the Prime Minister.
(2) The members of the State Council shall assist the President in the conduct of State affairs and, as constituents of the State Council, shall deliberate on State affairs.
(3) The Prime Minister may recommend to the President the removal of a member of the State Council from office.
(4) No member of the military shall be appointed a member of the State Council unless he is retired from active duty.

Sub-Section 2 The State Council

Article 88
(1) The State Council shall deliberate on important policies that fall within the power of the Executive.
(2) The State Council shall be composed of the President, the Prime Minister, and other members whose number shall be no more than thirty and no less than fifteen.
(3) The President shall be the chairman of the State Council, and the Prime Minister shall be the Vice-Chairman.

Article 89
The following matters shall be referred to the State Council for deliberation:
1. Basic plans for state affairs, and general policies of the Executive;
2. Declaration of war, conclusion of peace and other important matters pertaining to foreign policy;
3. Draft amendments to the Constitution, proposals for national referendums, 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 Act; and
17. Other matters presented by the President, the Prime Minister or a member of the State Council.

Article 90

(1) An Advisory Council of Elder Statesmen, composed of elder statesmen, may be established to advise the President on important affairs of State.

(2) The immediate former President shall become the Chairman of the Advisory Council of Elder Statesmen: *Provided*, That if there is no immediate former President, the President shall appoint the Chairman.

(3) The organization, function and other necessary matters pertaining to the Advisory Council of Elder Statesmen shall be determined by Act.

Article 91

(1) A National Security Council shall be established to advise the President on the formulation of foreign, military and domestic policies related to national security prior to their deliberation by the State Council.

(2) The meetings of the National Security Council shall be presided over by the President.

(3) The organization, function and other necessary matters pertaining to the National Security Council shall be determined by Act.

Article 92

(1) An Advisory Council on Democratic and Peaceful Unification

may be established to advise the President on the formulation of peaceful unification policy.

(2) The organization, function and other necessary matters pertaining to the Advisory Council on Democratic and Peaceful Unification shall be determined by Act.

Article 93

(1) A National Economic Advisory Council may be established to advise the President on the formulation of important policies for developing the national economy.

(2) The organization, function and other necessary matters pertaining to the National Economic Advisory Council shall be determined by Act.

Sub-Section 3 The Executive Ministries

Article 94

Heads of Executive Ministries shall be appointed by the President from among members of the State Council on the recommendation of the Prime Minister.

Article 95

The Prime Minister or the head of each Executive Ministry may, under the powers delegated by Act or Presidential Decree, or *ex officio*, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

Article 96

The establishment, organization and function of each Executive Ministry shall be determined by Act.

Sub-Section 4 The Board of Audit and Inspection

Article 97

The Board of Audit and Inspection shall be established under the direct jurisdiction of the President to inspect and examine the settlement of the revenues and expenditures of the State, the accounts of the State and other organizations specified by Act and the job performances of the executive agencies and public officials.

Article 98

(1) The Board of Audit and Inspection shall be composed of no less than five and no more than eleven members, including the Chairman.

(2) The Chairman of the Board shall be appointed by the President with the consent of the National Assembly. The term of

office of the Chairman shall be four years, and he may be re-appointed only once.

(3) The members of the Board shall be appointed by the President on the recommendation of the Chairman. The term of office of the members shall be four years, and they may be reappointed only once.

Article 99

The Board of Audit and Inspection shall inspect the closing of accounts of revenues and expenditures each year, and report the results to the President and the National Assembly in the following year.

Article 100

The organization and function of the Board of Audit and Inspection, the qualifications of its members, the range of the public officials subject to inspection and other necessary matters shall be determined by Act.

CHAPTER V THE COURTS

Article 101

(1) Judicial power shall be vested in courts composed of judges.

(2) The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

(3) Qualifications for judges shall be determined by Act.

Article 102

(1) Departments may be established in the Supreme Court.

(2) There shall be Supreme Court Justices at the Supreme Court: *Provided*, That judges other than Supreme Court Justices may be assigned to the Supreme Court under the conditions as prescribed by Act.

(3) The organization of the Supreme Court and lower courts shall be determined by Act.

Article 103

Judges shall rule independently according to their conscience and in conformity with the Constitution and Act.

Article 104

(1) The Chief Justice of the Supreme Court shall be appointed by the President with the consent of the National Assembly.

(2) The Supreme Court Justices shall be appointed by the President on the recommendation of the Chief Justice and with the consent of the National Assembly.

(3) Judges other than the Chief Justice and the Supreme Court Justices shall be appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices.

Article 105

(1) The term of office of the Chief Justice shall be six years and he shall not be reappointed.

(2) The term of office of the Justices of the Supreme Court shall be six years and they may be reappointed as prescribed by Act.

(3) The term of office of judges other than the Chief Justice and Justices of the Supreme Court shall be ten years, and they may be reappointed under the conditions as prescribed by Act.

(4) The retirement age of judges shall be determined by Act.

Article 106

(1) No judge shall be removed from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action.

(2) In the event a judge is unable to discharge his official duties because of serious mental or physical impairment, he may be retired from office under the conditions as prescribed by Act.

Article 107

(1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

(3) Administrative appeals may be conducted as a procedure prior to a judicial trial. The procedure of administrative appeals shall be determined by Act and shall be in conformity with the principles of judicial procedures.

Article 108

The Supreme Court may establish, within the scope of Act, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court.

Article 109

Trials and decisions of the courts shall be open to the public: *Provided*, That when there is a danger that such trials may undermine the national security or disturb public safety and order, or be harmful to public morals, trials may be closed to the public

by court decision.

Article 110

(1) Courts-martial may be established as special courts to exercise jurisdiction over military trials.

(2) The Supreme Court shall have the final appellate jurisdiction over courts-martial.

(3) The organization and authority of 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

(1) The Constitutional Court shall have jurisdiction over the following matters:

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and
5. Constitutional complaint as prescribed by Act.

(2) The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President.

(3) Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court.

(4) The president of the Constitutional Court shall be appointed by the President from among the Justices with the consent of the National Assembly.

Article 112

(1) The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act.

(2) The Justices of the Constitutional Court shall not join any

political party, nor shall they participate in political activities.
(3) No Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

Article 113
(1) When the Constitutional Court makes a decision of the unconstitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required.
(2) The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act.
(3) The organization, function and other necessary matters of the Constitutional Court shall be determined by Act.

CHAPTER Ⅶ ELECTION MANAGEMENT

Article 114
(1) Election commissions shall be established for the purpose of fair management of elections and national referenda, and dealing with administrative affairs concerning political parties.
(2) The National Election Commission shall be composed of three members appointed by the President, three members selected by the National Assembly, and three members designated by the Chief Justice of the Supreme Court. The Chairman of the Commission shall be elected from among the members.
(3) The term of office of the members of the Commission shall be six years.
(4) The members of the Commission shall not join political parties, nor shall they participate in political activities.
(5) No member of the Commission shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.
(6) The National Election Commission may establish, within the limit of Acts and decrees, regulations relating to the management of elections, national referenda, and administrative affairs concerning political parties and may also establish regulations relating to internal discipline that are compatible with Act.
(7) The organization, function and other necessary matters of the election commissions at each level shall be determined by Act.

Article 115

(1) Election commissions at each level may issue necessary instructions to administrative agencies concerned with respect to administrative affairs pertaining to elections and national referenda such as the preparation of the pollbooks.

(2) Administrative agencies concerned, upon receipt of such instructions, shall comply.

Article 116

(1) Election campaigns shall be conducted under the management of the election commissions at each level within the limit set by Act. Equal opportunity shall be guaranteed.

(2) Except as otherwise prescribed by Act, expenditures for elections shall not be imposed on political parties or candidates.

CHAPTER Ⅷ LOCAL AUTONOMY

Article 117

(1) Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes.

(2) The types of local governments shall be determined by Act.

Article 118

(1) A local government shall have a council.

(2) The organization and powers of local councils, and the election of members; election procedures for heads of local governments; and other matters pertaining to the organization and operation of local governments shall be determined by Act.

CHAPTER Ⅸ THE ECONOMY

Article 119

(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.

(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic

agents.

Article 120

(1) Licenses to exploit, develop or utilize minerals and all other important underground resources, marine resources, water power, and natural powers available for economic use may be granted for a period of time under the conditions as prescribed by Act.

(2) The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.

Article 121

(1) The State shall endeavor to realize the land-to-the-tillers principle with respect to agricultural land. Tenant farming shall be prohibited.

(2) The leasing of agricultural land and the consignment management of agricultural land to increase agricultural productivity and to ensure the rational utilization of agricultural land or due to unavoidable circumstances, shall be recognized under the conditions as prescribed by Act.

Article 122

The State may impose, under the conditions as prescribed by Act, restrictions or obligations necessary for the efficient and balanced utilization, development and preservation of the land of the nation that is the basis for the productive activities and daily lives of all citizens.

Article 123

(1) The State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries.

(2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.

(3) The State shall protect and foster small and medium enterprises.

(4) In order to protect the interests of farmers and fishermen, the State shall endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems.

(5) The State shall foster organizations founded on the spirit of self-help among farmers, fishermen and businessmen engaged in small and medium industry and shall guarantee their independent activities and development.

Article 124

The State shall guarantee the consumer protection movement intended to encourage sound consumption activities and improvement in the quality of products under the conditions as prescribed by Act.

Article 125

The State shall foster foreign trade, and may regulate and coordinate it.

Article 126

Private enterprises shall not be nationalized nor transferred to ownership by a local government, nor shall their management be controlled or administered by the State, except in cases as prescribed by Act to meet urgent necessities of national defense or the national economy.

Article 127

(1) The State shall strive to develop the national economy by developing science and technology, information and human resources and encouraging innovation.

(2) The State shall establish a system of national standards.

(3) The President may establish advisory organizations necessary to achieve the purpose referred to in paragraph (1).

CHAPTER X AMENDMENTS TO THE CONSTITUTION

Article 128

(1) A proposal to amend the Constitution shall be introduced either by a majority of the total members of the National Assembly or by the President.

(2) Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

Article 129

Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Article 130

(1) The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the concurrent vote of two thirds or more of the total members of the National Assembly.

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

(3) When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.

ADDENDA

Article 1

This Constitution shall enter into force on the twenty-fifth day of February, anno Domini Nineteen hundred and 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.

II. The Constitutional Court Act

Aug. 5, 1988
Amended by Nov. 30, 1991
Dec. 22, 1994
Aug. 4, 1995
Dec. 13, 1997

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 jurisdiction over the following issues:

1. Constitutionality of statutes upon the request of the ordinary courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence dispute between state agencies, between a state agency and a local government, or between local governments; and
5. Constitutional complaint.

Article 3 (Composition)

The Constitutional Court shall consist of nine Justices.

Article 4 (Independence of Justices)

The Justices shall adjudicate independently according to the Constitution and laws, guided by their consciences.

Article 5 (Qualifications of Justices)

(1) The Justices shall be appointed from among those who are forty or more years of age and have held any of the following positions for fifteen or more years: *Provided*, That the periods of service of the person who has held two or more following positions shall be aggregated.

1. Judge, public prosecutor or attorney;
2. Person who is qualified as attorney, and has been en gaged in legal affairs in a state agency, a state-owned or public enterprise, a government-invested institution or other corpo-

ration; or

3. Person who is qualified as attorney, and has held a position equal to or higher than assistant professor of law in an accredited college.

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

1. Person who is disqualified to serve as a public official under the pertinent laws and regulations;
2. Person who has been criminally sanctioned with a sentence of imprisonment without forced labor or more severe sentence; or
3. Person for whom five years have not yet passed since his or her dismissal resulting from impeachment.

Article 6 (Appointment of Justices)

(1) The Justices shall be appointed by the President of the Republic.

(2) Among the Justices referred to in paragraph (1), three shall be elected by the National Assembly, and three shall be designated by the Chief Justice of the Supreme Court.

(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 reckoned from the date on which the term expires or the vacancy occurs: *Provided*, That if the term of a Justice who was elected by the National Assembly expires or the vacancy occurs during adjournment or recess of the National Assembly, the National Assembly shall elect his or her successor within thirty days reckoned from the commencement of the 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 a Justice 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 his or her office against his or her own will unless he or she falls under any of the following:

1. When an impeachment decision is rendered against him or her; or
2. When he or she is criminally sanctioned with a sentence of imprisonment without forced labor or more severe sentence.

Article 9 (Prohibition of Justices' Participation in Politics)

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

Article 10 (Rule-making Power)

(1) The Constitutional Court may make rules of adjudication procedure, internal discipline and management of general affairs, to the extent that those are not inconsistent with this Act and other laws.

(2) The Constitutional Court Rules shall be promulgated through publication in the Gazette of the government.

Article 11 (Expenses)

(1) The expenses of the Constitutional Court shall be appropriated independently in the budget of the state.

(2) The reserve funds shall be included in the expenses referred to in paragraph (1).

CHAPTER II ORGANIZATION

Article 12 (President of Constitutional Court)

(1) The Constitutional Court shall have a president.

(2) The President of the Republic shall, with the consent of the National Assembly, appoint the President of the Constitutional Court among the Justices.

(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 those public officials under his or her authority.

(4) Whenever the President of the Constitutional Court is unable to perform the duties of his or her office due to an accident or the office is vacant, other Justices shall, in the order prescribed by the Constitutional Court Rules, perform such duties in place of the President.

Article 13 Repealed.

Article 14 (Prohibition of Concurrent Service)

The Justices shall not conduct any business for profit or hold concurrently any of the following offices:

1. Member of the National Assembly or a local council;
2. Public official in the National Assembly, the Executive or an ordinary court; or
3. Advisor, officer or employee of a corporation and organization, etc.

Article 15 (Treatment of President of Constitutional Court and other Justices)

(1) The salaries and other treatments for the President and other

Justices shall respectively be equal to those of the Chief Justice and other Justices of the Supreme Court.

(2) Repealed.

Article 16 (Council of Justices)

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

(2) Decisions of the Council of Justices shall be taken with the attendance of seven or more Justices and by the affirmative vote of a majority of the Justices present.

(3) The Chairperson shall have the right to vote.

(4) Decisions on the following matters shall be taken by the Council of Justices:

1. Matters concerning the enactment, revision, etc. of the Constitutional Court Rules;
2. Matters concerning a request for budget, appropriation of reserve funds and settlement of accounts;
3. Matters concerning the recommendation for the appointment or dismissal of the Secretary General and matters concerning the appointment or dismissal of the Constitutional Research Officers and public officials of Grade III or higher; and
4. Matters deemed specially important and presented by the President of the Constitutional Court for discussion.

(5) Matters necessary for the operation of the Council of Justices shall be stipulated in the Constitutional Court Rules.

Article 17 (Department of Court Administration)

(1) In order to manage the administrative affairs of the Constitutional Court, the 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 to report on the administration of the Constitutional Court.

(5) The defendant in the judicial review of administrative action challenging an action of the President of the Constitutional Court shall be the Secretary General.

(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 behalf of him or her.

(7) The Department of Court Administration shall have offices, bureaus and divisions.

(8) The office chief shall be assigned to the office, the bureau chief, to the bureau, and the division chief, to the division. There may be directors or officers under the Secretary General, the Deputy Secretary General, the office chief or the bureau chief 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, which are not prescribed in this Act, shall be stipulated in the Constitutional Court Rules.

Article 18 (Public Officials of Department of Court Administration)

(1) The Secretary General shall be appointed as a public official in Political Service, 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 public official of Political Service, and his or her salary shall be equal to that of a Vice-Minister.

(3) The office chief and the bureau chief shall be appointed as public official of Grade II or III in General Service; the director, as public official of Grade III in General Service; the division chief and the officer, as public official of Grade III or IV in General Service.

(4) Public officials of the Department of Court Administration shall be appointed and dismissed by the President of the Constitutional Court: *Provided*, That the appointment and dismissal of public officials of Grade III or higher shall be subject to 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 of the Department of Court Administration.

(6) Except as otherwise provided in this Act, the provisions concerning public officials in General Service prescribed by the State Public Officials Act, shall apply to the public officials of the Department of Court Administration.

Article 19 (Constitutional Research Officers, etc.)

(1) The Constitutional Court shall have the Constitutional Research Officers or Assistant Constitutional Research Officers the number of whom shall be provided by the Constitutional Court Rules.

(2) The Constitutional Research Officers shall be appointed as public officials of Grade I to III in General or Special Service and the Assistant Constitutional Research Officers, as public officials of Grade IV in General or Special Service.
(3) The Constitutional Research Officers or Assistant Constitutional Research Officers shall be engaged in the investigation and research concerning the adjudication of cases under the direction of the President of the Constitutional Court.
(4) The Constitutional Research Officers shall be appointed or dismissed, with the resolution of the Council of Justices, by the President of the Constitutional Court from among those falling under any of the following:

1. Person who is qualified to be a judge, public prosecutor or attorney;
2. Person who has been an assistant professor or above of law in an accredited college;
3. Person who has been engaged in legal affairs for five or more years as a public official of Grade IV or higher in a state agency, such as the National Assembly, the Executive or the ordinary courts; or
4. Person who has served for five or more years as an Assistant Constitutional Research Officer in the Constitutional Court.

(5) The Assistant Constitutional Research Officers shall be appointed and dismissed, with the resolution of the Council of Justices, by the President of the Constitutional Court from among those falling under any of the following:

1. Person who is qualified to be a judge, public prosecutor or attorney;
2. Person who has been a full-time lecturer or above of law in an accredited college;
3. Person who holds a doctoral degree in jurisprudence and has expert knowledge in public laws; or
4. Person who has been engaged in legal affairs for four or more years as a public official of Grade V or higher in a state agency, such as the National Assembly, the Executive or the ordinary courts.

(6) 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 or Assistant Constitutional Research Officers.

Article 20 (Aide Office of President of Constitutional Court, etc)
(1) The Constitutional Court shall have the aide office of the President of the Constitutional Court.
(2) A Chief Aide shall be assigned to the aide office of the

President of the Constitutional Court. The Chief Aide shall be appointed as a public official of Grade I in Special Service, and 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 aide office of the President of the Constitutional Court shall be prescribed by the Constitutional Court Rules.

(4) The Constitutional Court shall have the aides of the Justices.

(5) The aides of the Justices shall be appointed as public officials of Grade IV in General or Special Service, and take charge of confidential affairs under the direction of the Justices.

Article 21 (Clerks and Courtroom Guards)

(1) Clerks and courtroom guards shall be assigned to the Constitutional Court.

(2) The President of the Constitutional Court shall designate clerks and courtroom guards from among the personnel of the Department of Court Administration.

(3) Clerks shall take charge of the affairs concerning the preparation, safekeeping or service of documents related to cases under the direction of the presiding Justice.

(4) Courtroom guards shall maintain order in the courtroom and execute other affairs directed by the presiding Justice.

CHAPTER III GENERAL PROCEDURE OF ADJUDICATION

Article 22 (Full Bench)

(1) Except as provided in this Act, the adjudication of the Constitutional Court shall be assigned to 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 by and 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 discussion: It requires a vote of six or more Justices in cases of falling under any of the following:

1. When it makes a decision of upholding on the constitutionality of statutes, impeachment, dissolution of a political party or constitutional complaint; and
2. When it overrules the precedent on interpretation and appli-

cation of the Constitution or laws made by the Constitutional Court.

Article 24 (Exclusion, Recusal and Evasion)

(1) When a Justice falls under any of the following, the Justice shall be excluded from the execution of the Justice's services:

1. When the Justice is a party or is or was the spouse of a party;
2. When the Justice is or was a relative, head of family, or a family member of a party [to the proceeding];
3. When the Justice bears testimony or gives an expert opinion on the case;
4. When the Justice is or was the counsel of a party with respect to the case; or
5. When the Justice was involved in the case outside of the Constitutional Court by reason of his duties or profession.

(2) The Full Bench may, *ex officio* or upon motion by a party, make a decision to exclude a Justice.

(3) When there is a circumstance in which it is difficult to expect the impartiality of a Justice, a party may move to recuse the Justice: *Provided*, That this shall not apply when the party has appeared and entered a plea on the hearing date.

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

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

(6) The provisions of Articles 40, 41, 42 (1), (2) and 44 of the Civil Procedure Act shall apply *mutatis mutandis* to the adjudication on the motion to exclude or recuse.

Article 25 (Legal Representative)

(1) When the Government is a party (including an intervener. Hereinafter the same shall apply) in any proceeding, the Minister of Justice shall represent it.

(2) In any proceeding, a state agency or local government which is a party, may select an attorney or an employee who is qualified as an attorney as a counsel and have him pursue the proceeding.

(3) When a private person is a party, in any proceeding, such person shall be represented by an attorney: *Provided*, That this shall not apply when he is an attorney.

Article 26 (Form of Request for Adjudication)

(1) The request for an adjudication of the Constitutional Court shall be made by submitting to the Constitutional Court a written request as prescribed for each matter to be adjudged: *Provided*,

That in an adjudication on the constitutionality of statutes, it shall be substituted by a written request by the court, and in an adjudication on impeachment, by an authentic copy of the impeachment resolution of the National Assembly.

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

Article 27 (Service of Written Request)

(1) The Constitutional Court shall, upon receiving a written request, serve without delay a certified copy thereof on the respondent agency or 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 written request shall be served to the Minister of Justice and the parties of the ordinary court case concerned.

Article 28 (Correction of Request for Adjudication)

(1) When the presiding Justice determines that a request for adjudication fails to meet its requirements but may satisfy them by correction, the Justice shall require that request be corrected within a reasonable time.

(2) The provision of Article 27 (1) shall be applicable *mutatis mutandis* to a written correction as referred to in paragraph (1).

(3) When a correction is made under paragraph (1), the corrected request shall be deemed to have been made at the time the initial request was submitted.

(4) The period for correction as referred to in paragraph (1) shall not be included in calculating the period of adjudication under Article 38.

Article 29 (Presentation of Written Answer)

(1) The respondent may, upon receiving a written request or correction, present a written answer to the Constitutional Court.

(2) The written answer shall include an answer to the claim and the bases of the request for adjudication.

Article 30 (Method of Review)

(1) The adjudication of impeachment, dissolution of a political party or competence dispute shall be conducted through oral arguments.

(2) The adjudication on the constitutionality of statutes or constitutional complaint shall be conducted without oral arguments: If it is deemed necessary, the Full Bench may hold oral proceedings, and hear the statements of parties, interested persons and amici curiae.

(3) When the Full Bench holds oral proceedings, it shall fix the date and summon parties and interested persons.

Article 31 (Inspection of Evidence)

(1) When the Full Bench deems necessary for the review of a case, it may, upon motion by a party or *ex officio*, inspect evidence as follows:

1. To examine the party or witness;
2. To demand presentation of documents, books, articles and other evidentiary materials which are possessed by the parties or interested persons, and to place them in custody;
3. To order a person of special learning and experience to evaluate evidence; and
4. To verify the nature or condition of relevant goods, persons, places and other things.

(2) The presiding Justice may, if necessary, designate one of Justices to inspect evidence under paragraph (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 send records or present materials: *Provided*, That with respect to records on a case for which a trial, prosecution or criminal investigation is under way, sending of the records shall not be demanded.

Article 33 (Place of Adjudication)

The oral arguments of the adjudication and the pronouncement of final decision shall be made in the courtroom: When the President of the Constitutional Court deems necessary, it may be made in a place outside of the courtroom.

Article 34 (Opening of Proceedings to Public)

(1) The oral arguments of the adjudication and the pronouncement of the decision shall be open to the public: Any review without oral arguments and deliberation shall not be open to the public.

(2) The proviso of Article 57 (1) and the provisions of Article 57 (2), (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 keep order in the courtroom, and preside over oral arguments and deliberations.

(2) The provisions of Articles 58 to 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 finishes the review, it shall make a final decision.

(2) Upon making a final decision, a written decision stating the following matters shall be prepared, signed and sealed by all the Justices participating in the adjudication:

1. Number and title of the case;
2. Indication of the parties and persons who pursue the proceeding for them or their counsels;
3. Holding;
4. Rationale; and
5. Date of decision.

(3) Any Justice who participates in an adjudication on the constitutionality of statutes, competence dispute or constitutional complaint, shall express his opinion on the written decision.

(4) When a final decision is pronounced, the clerk shall prepare without delay an authentic copy of the written decision and serve it on the parties.

(5) The final decision 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: The Expenses for the inspection of evidence upon request of a party may be borne by the party as prescribed in the Constitutional Court Rules.

(2) The Constitutional Court may order a person requesting an adjudication on a constitutional complaint to pay a deposit money as prescribed in the Constitutional Court Rules.

(3) The Constitutional Court may order a transfer of all or part of the deposit money to the national treasury as prescribed in the Constitutional Court Rules, in case of falling under any of the following:

1. When a request for adjudication on constitutional complaint is dismissed; or
2. When a request for adjudication on constitutional complaint is rejected, and such a request is deemed to be an abuse of right.

Article 38 (Time Limit of Adjudication)

The Constitutional Court shall pronounce 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 of Justices, 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 40 (Applicable Provisions)

(1) Except as otherwise provided in this Act, the provisions of the laws and regulations relating to the civil litigation shall apply *mutatis mutandis* to the procedure for adjudication of the Constitutional Court. Together with such provisions, the laws and regulations relating to the criminal litigation shall apply *mutatis mutandis* to the adjudication on impeachment, and the Administrative Litigation Act, to the adjudication on competence dispute and constitutional complaint.

(2) In case referred to in the latter part of paragraph (1), if the laws and regulations relating to the criminal litigation or the Administrative Litigation Act conflict with those relating to the civil litigation, the latter shall not be applicable *mutatis mutandis*.

CHAPTER Ⅳ SPECIAL ADJUDICATION PROCEDURES

SECTION 1 Adjudication on the Constitutionality of Statutes

Article 41 (Request for Adjudication on the Constitutionality of Statutes)

(1) When the issue of whether or not statutes are constitutional is relevant to the judgment of the original case, the ordinary court (including the military court; hereinafter the same shall apply) shall request to the Constitutional Court, *ex officio* or by decision upon a motion by the party, an adjudication on the constitutionality of statutes.

(2) The motion of the party as referred to in paragraph (1) shall be in writing, stating matters as referred to in sub-paragraphs 2 to 4 of Article 43.

(3) The provisions of Article 231 of the Civil Procedure Act shall apply *mutatis mutandis* to the examination of the written motion referred to in paragraph (2).

(4) No appeal shall be made against the decision of the ordinary court on the request for adjudication on the constitutionality of statutes.

(5) When an ordinary court other than the Supreme Court makes a request referred to in paragraph (1), it shall do so through the Supreme Court.

Article 42 (Suspension of Proceedings, etc.)

(1) When an ordinary court requests to the Constitutional Court an adjudication on the constitutionality of statutes, the proceedings of the court shall be suspended until the Constitutional Court makes a decision on the constitutionality of statutes: *Provided*, That if the court deems urgent, the proceedings other than the final decision may be proceeded.

(2) The period in which a proceeding is suspended under the main sentence of paragraph (1) shall not be included in calculating the detention period as prescribed in Article 92 (1) and (2) of the Criminal Procedure Act and Article 132 (1) and (2) of the Military Court Act and the period of judgment under Article 184 of the Civil Procedure Act.

Article 43 (Matters to be Stated in Written Request)

When an ordinary court requests to the Constitutional Court an adjudication on 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 any provision of the statute which is interpreted as unconstitutional;
4. Bases on which it is interpreted as unconstitutional; and
5. Other necessary matters.

Article 44 (Opinions of Parties, etc. to Litigious Case)

The parties to the original case and the Minister of Justice may submit to the Constitutional Court an amicus brief on the issue of whether or not statutes are constitutional.

Article 45 (Decision of Unconstitutionality)

The Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional: *Provided*, That if it is deemed that the whole provisions of the statute are unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute.

Article 46 (Service of Written Decision)

The Constitutional Court shall serve an authentic copy of the written decision on the requesting court within fourteen days from the day of decision. In this case, if the requesting court is not the Supreme Court, it shall be served through the Supreme Court.

Article 47 (Effect of Decision of Unconstitutionality)

(1) Any decision that statutes are unconstitutional shall bind the

ordinary courts, other state agencies and local governments.
(2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made: *Provided*, That the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively.
(3) In case referred to in the proviso of paragraph (2), the retrial may be allowed with respect to a conviction based on the statutes or provisions thereof decided as unconstitutional.
(4) The provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to the retrial as referred to in paragraph (3).

SECTION 2 Adjudication on Impeachment

Article 48 (Institution of Impeachment)
If a public official who falls under any of the following violates the Constitution or laws in the course of execution of his or her services, the National Assembly may pass a resolution on the institution of impeachment as prescribed in the Constitution and the National Assembly Act:
1. President of the Republic, Prime Minister, Members of the State Council or Ministers;
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; or
4. Other public officials as prescribed by relevant laws.

Article 49 (Impeachment Prosecutor)
(1) For the adjudication on impeachment, the Chairperson of the Legislation and Justice Committee of the National Assembly shall be the impeachment prosecutor.
(2) The impeachment prosecutor shall request adjudication by presenting to the Constitutional Court an authentic copy of the written resolution of the institution of impeachment, and may examine the accused person in the oral proceedings.

Article 50 (Suspension of Exercise of Power)
No person against whom a resolution of institution of impeachment is passed shall exercise his or her power until the Constitutional Court makes a decision thereon.

Article 51 (Suspension of Impeachment Proceeding)
When a criminal proceeding is under way for the same cause as in the request for impeachment against the accused person, the Full Bench may suspend the proceeding of impeachment.

Article 52 (Non-Attendance of Party)

(1) If a party fails to attend on the hearing date, a new date shall be fixed.

(2) If the party fails to attend even on the refixed date, the examination against the party shall be allowed without his or her attendance.

Article 53 (Decision)

(1) When a request for impeachment is upheld, the Constitutional Court shall pronounce a decision that the accused person be removed from the public office.

(2) If the accused person has been already removed from the public office before the pronouncement of the decision, the Constitutional Court shall reject the request for impeachment.

Article 54 (Effect of Decision)

(1) The decision of impeachment shall not exempt the accused person from the civil or criminal liabilities.

(2) Any person who is removed by the decision of impeachment shall not be a public official until five years have passed from the date on which the decision is pronounced.

SECTION 3 Adjudication on Dissolution of a Political Party

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 request to the Constitutional Court, upon a deliberation of the State Council, an adjudication on dissolution of the political party.

Article 56 (Matters to be Stated on Written Request)

The written request for adjudication on dissolution of a political party shall include the following matters:

1. Indication of the political party requested to be dissolved; and
2. Bases of the request.

Article 57 (Provisional Remedies)

The Constitutional Court may, upon receiving a request for adjudication on dissolution of a political party, make *ex officio* or upon a motion of the plaintiff or a decision to suspend the activities of the defendant until the pronouncement of the final decision.

Article 58 (Notification of Request, etc.)

(1) When an adjudication on dissolution of a political party is requested, a decision on the provisional remedies is rendered, or the adjudication is brought to an end, the President of the Constitutional Court shall notify the facts to the National Assembly and

the National Election Commission.

(2) The written decision ordering dissolution of a political party shall also be served, in addition to the defendant, on the National Assembly, the Executive and the National Election Commission.

Article 59 (Effect of Decision)

When a decision ordering dissolution of a political party is pronounced, the political party shall be dissolved.

Article 60 (Execution of Decision)

The decision of the Constitutional Court ordering dissolution of a political party shall be executed by the National Election Commission in accordance with the Political Parties Act.

SECTION 4 Adjudication on Competence Dispute

Article 61 (Causes for Request)

(1) When any 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, a state agency or a local government concerned may request to the Constitutional Court an adjudication on competence dispute.

(2) The request for adjudication referred to in paragraph (1) may be allowed only when an action or omission by the defendant infringes or is in obvious danger of infringing upon the plaintiff's competence granted by the Constitution or laws.

Article 62 (Classification of Adjudication on Competence Dispute)

(1) The adjudication on competence dispute shall be classified as follows:

1. Adjudication on competence dispute between state agencies: Adjudication on competence dispute between the National Assembly, the Executive, ordinary courts and the National Election Commission;
2. Adjudication on competence dispute between a state agency and a local government:
   (a) Adjudication on competence dispute between the Executive and the Special Metropolitan City, Metropolitan City or Province; and
   (b) Adjudication on competence dispute between the Executive and the City/County or District which is a local government (hereinafter referred to as a "Self-governing District").
3. Adjudication on competence dispute between local governments:
   (a) Adjudication on competence dispute between the Special

Metropolitan City, Metropolitan City or Province;
(b) Adjudication on competence dispute between the City/County or Self-governing District; and
(c) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province and the City, County or Self-governing District.

(2) When a competence dispute relates to the affairs of a local government concerning education, science or art under Article 2 of the Local Educational Self-Governance Act, the Superintendent of the Board of Education shall be the party referred to in paragraph (1) 2 and 3.

Article 63 (Time Limit for Request)

(1) The adjudication on competence dispute shall be requested within sixty days after the existence of the cause is known, and within one hundred eighty days after the cause occurs.

(2) The period as referred to in paragraph (1) shall be a peremptory period.

Article 64 (Matters to be Stated on Written Request)

The written request for adjudication on competence dispute shall include the following matters:

1. Indication of the plaintiff, and the persons who pursue the proceeding for it or its counsel;
2. Indication of the defendant agency;
3. Action or omission by the defendant agency, which is the object of the adjudication;
4. Bases of the request; and
5. Other necessary matters.

Article 65 (Provisional Remedies)

The Constitutional Court may, upon receiving a request for adjudication on competence dispute, make *ex officio* or upon a motion of the plaintiff a decision to suspend the effect of an action taken by the defendant agency which is the object of the adjudication until the pronouncement of the final decision.

Article 66 (Decision)

(1) The Constitutional Court shall decide as to the existence or scope of the competence of a state agency or a local government.

(2) In the case as referred to in paragraph (1), when an action or omission by the defendant agency has already infringed upon the competence of the plaintiff, it may be revoked or confirmed to be void.

Article 67 (Effect of Decision)

(1) The decision on competence dispute by the Constitutional

Court shall bind all state agencies and local governments.
(2) The decision to revoke an action of a state agency or a local government shall not alter the effect which has already been given to the person whom the action is directed against.

SECTION 5 Adjudication on Constitutional Complaint

Article 68 (Causes for Request)
(1) Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court: *Provided*, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.
(2) If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected, the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.

Article 69 (Time Limit for Request)
(1) A constitutional complaint under Article 68 (1) shall be filed within sixty days after the existence of the cause is known, and within one hundred eighty days after the cause occurs: *Provided*, That a constitutional complaint to be filed after taking prior relief processes provided by other laws, shall be filed within thirty days after the final decision in the processes is notified.
(2) The adjudication on a constitutional complaint under Article 68 (2) shall be filed within fourteen days after a request for an adjudication on constitutionality of statutes is dismissed.

Article 70 (Court-Appointed Counsel)
(1) If a person who desires to file a constitutional complaint has no financial resources to appoint an attorney as his counsel, he may request the Constitutional Court to appoint a court-appointed counsel. In this case, the time limit for request as prescribed in Article 69 shall be counted from the day on which such request is made.
(2) The Constitutional Court shall, upon receiving an application under paragraph (1), appoint a court-appointed counsel from among attorneys as prescribed in the Constitutional Court Rules.
(3) When the Constitutional Court makes a decision not to appoint a court-appointed counsel, it shall notify the applicant without

delay. In this case, the period from the day the request was made to the day the notification is given shall not be included in calculating the period for request as prescribed in Article 69.
(4) The court-appointed counsel under paragraph (2) shall be paid from the national treasury under the conditions as prescribed by the Constitutional Court Rules.

Article 71 (Matters to be Stated on Written Request)
(1) The written request for adjudication on constitutional complaint under Article 68 (1) shall include the following matters:
1. Indication of the complainant and his counsel;
2. Infringed rights;
3. Exercise or non-exercise of governmental power by which the infringement of the right is caused;
4. Bases of the request; and
5. Other necessary matters.
(2) The provisions of Article 43 shall apply *mutatis mutandis* to matters to be stated on the written request for adjudication on constitutional complaint under Article 68 (2). In this case, the term "indication of the requesting court" used in subparagraph 1 of Article 43 shall be considered as the term "indication of the complainant and his counsel".
(3) The document attesting the appointment of a counsel or a written notification of appointment of the court-appointed counsel shall be appended to the written request for adjudication on constitutional complaint.

Article 72 (Prior Review)
(1) The President of the Constitutional Court may establish the Panels each of which consists of three Justices in the Constitutional Court and have a Panel take a prior review of a constitutional complaint.
(2) Repealed.
(3) In case of any of the followings, the Panel shall dismiss a constitutional complaint with a decision of an unanimity:
1. When a constitutional complaint is filed, without having exhausted all the relief processes provided by other laws, or against a judgment of the ordinary court;
2. When a constitutional complaint is filed after expiration of the time limit prescribed in Article 69;
3. When a constitutional complaint is filed without a counsel under Article 25; or
4. When a constitutional complaint is inadmissible and the inadmissibility can not be corrected.
(4) When a Panel can not reach a decision of dismissal referred

to in paragraph (3) with an unanimity, it shall transfer by a decision the constitutional complaint to the Full Bench. When a dismissal is not decided within thirty days after requesting the adjudication on constitutional complaint, it shall be deemed that a decision to transfer it to the Full Bench (hereinafter, "decision to transfer to the Full Bench") is made.

(5) The provisions of Articles 28, 31, 32 and 35 shall apply *mutatis mutandis* to the review of the Panels.

(6) Matters necessary for the composition and operation of the Panels shall be provided by the Constitutional Court Rules.

Article 73 (Notification of Dismissal or Decision to Transfer to Full Bench)

(1) When a Panel dismisses a constitutional complaint or decides to transfer it to the Full Bench, it shall notify it to the complainant or his counsel and the respondent within fourteen days from the day of decision. The same shall also apply to the case provided in the latter part of Article 72 (4).

(2) When a constitutional complaint is transferred to the Full Bench under Article 72 (4), the President of the Constitutional Court shall notify it without delay to the following persons:

1. The Minister of Justice; and
2. A Party to the case concerned who is not the complainant, in case of an adjudication on constitutional complaint under Article 68 (2).

Article 74 (Presentation of Opinions by Interested Agencies)

(1) State agencies or public organizations which are interested in an adjudication on a constitutional complaint, and the Minister of Justice may present to the Constitutional Court an amicus brief on the adjudication.

(2) When a constitutional complaint prescribed in Article 68 (2) is transferred to the Full Bench, the provisions of Articles 27 (2) and 44 shall apply *mutatis mutandis* to it.

Article 75 (Decision of Upholding)

(1) A decision to uphold a constitutional complaint shall bind all the state agencies and the local governments.

(2) In upholding a constitutional complaint under Article 68 (1), the infringed basic rights and the exercise or non-exercise of governmental power by which the infringement has been caused, shall be specified in the holding of the decision of upholding.

(3) In the case referred to in paragraph (2), the Constitutional Court may revoke the exercise of governmental power which infringes basic rights or confirm that the non-exercise thereof is unconstitutional.

(4) When the Constitutional Court makes a decision to uphold a constitutional complaint against the non-exercise of governmental power, the respondent shall take a new action in accordance with such decision.
(5) In the case referred to in paragraph (2), when the Constitutional Court deems that the exercise or non-exercise of governmental power is caused by unconstitutional laws or provisions thereof, it may declare in the decision of uphold ing that the laws or provisions are unconstitutional.
(6) In the case, referred to in paragraph (5) and when a constitutional complaint prescribed in Article 68 (2) is upheld, the provisions of Articles 45 and 47 shall apply *mutatis mutandis* to such cases.
(7) When a constitutional complaint prescribed in Article 68 (2) is upheld, and when a case concerned in an ordinary court involving the constitutional complaint has been already decided by final judgment, the party may request a retrial of the case before the court.
(8) In the retrial referred to in paragraph (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 PENAL PROVISIONS

Article 76 (Penal Provisions)
Any person who falls under any of the following subparagraphs, shall be punished by an imprisonment not more than one year, or a fine not exceeding one million won:
1. Person who is summoned or commissioned as a witness, expert witness, interpreter or translator by the Constitutional Court but fails to attend without any justifiable reason;
2. Person who is demanded or ordered to present articles of evidence by the Constitutional Court but fails to present them without any justifiable reason; or
3. Person who refuses, interferes with or evades an inspection or examination of the Constitutional Court without any justifiable reason.

ADDENDA

Article 1 (Effective Date)
This Act shall enter into force on September 1, 1988: *Provided*, That the appointment of the President, Standing Justices and other Justices of the Constitutional Court under this Act, and the preparation for the enforcement of this Act may be done before this Act enters into force.

Article 2 (Repealed Act)
The Constitutional Committee Act (Act No. 2530) shall hereby be repealed.

Article 3 (Transitional Measures concerning Pending Cases)
Cases pending in the Constitutional Committee at the time when this Act enters into force, shall be transferred to the Constitutional Court. In this case, the adjudication procedures already done shall not lose effect.

Article 4 (Transitional Measures concerning Matters Occurred)
This Act shall also apply to matters which occurred before this Act enters into force: *Provided*, That it shall not prejudice the effect in force under the Constitutional Committee Act before the enforcement of this Act.

Article 5 (Transitional Measures concerning Previous Personnel)
Public officials in the Secretariat of the Constitutional Committee at the time when this Act enters into force shall be considered to be appointed as those in the Department of Court Administration of the Constitutional Court.

Article 6 (Transitional Measures concerning Budget)
The budget managed by the Constitutional Committee at the time when this Act enters into force shall be considered to be under the control of the Constitutional Court.

Article 7 (Succession of Rights and Duties)
Rights and duties which the Constitutional Committee has at the time when this Act enters into force shall be succeeded to by the Constitutional Court.

Article 8 Omitted.

ADDENDA (November 30, 1991)

Article 1 (Effective Date)
This Act shall enter into force on the date of its promulgation.

Article 2 (Transitional Measures)
Standing Justices and other Justices at the time when this Act enters into force shall be considered Justices appointed under this Act, and their terms shall be calculated from the time of their appointments before this Act enters into force.

Article 3 Omitted.

ADDENDA (December 22, 1994)

This Act shall enter into force on the date of its promulgation.

ADDENDA (August 4, 1995)

This Act shall enter into force on the date of its promulgation.

ADDENDA (December 13, 1997)

This Act shall enter into force on January 1, 1998. (Proviso Omitted.)