

8. Restriction on Prisoner's Right to Vote Case

[21-1(B) KCCR 327, 2007Hun-Ma1462, October 29, 2009]

Questions Presented

1. Whether the former part of Article 18, Section 1, Item 2 of the Public Official Election Act (hereinafter, the 'Instant Provision') which stipulates that a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated (hereinafter, the 'prisoner') shall be disfranchised is unconstitutional as it infringes upon the basic rights of the complainant, who is a prisoner, including the right to vote, in violation of the rule against Excessive Restriction

2. A case in which filing of constitutional complaint was denied for the reason of failing to reach a quorum for rendering a decision of unconstitutionality although majority of Justices, five Justices in this case, uphold this complaint

Summary of the Decision

1. A. Unconstitutionality Opinion of Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon, and Justice Song Doo-hwan

(1) Filing Period Issue

The Instant Provision limits the right to vote of 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day'. Therefore, the basic rights including the right to vote would be considered as being infringed by the Instant Provision only when a specific cause of action for such violation arises. And in this case, the specific cause of action arises from the Election Day.

(2) Violation of the Rule against Excessive Restriction, etc.

(Level of scrutiny)

Given the importance of the right to vote as a pivotal means to realize popular sovereignty and representative democracy in a democratic nation, the question as to whether the right to vote is excessively restricted should be scrutinized under the strict review of proportionality pursuant to Article 37, Section 2 of the Constitution, from the viewpoint of the principle of universal suffrage and its limitation.

(Legitimacy of purpose and appropriateness of means)

The deprivation of the right to vote by the Instant Provision, as one of the criminal sanctions imposed on a criminal offender, functions as retribution to the crime committed by the offender. Moreover, such deprivation by the Instant Provision, apart

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from the imposition of life sentence or prison sentence, can help citizens including the prisoners themselves to cultivate responsibility as a citizen and improve respect to the rule of law. Such purposes of the Instant Provision are legitimate and imposing restriction on the prisoner's right to vote is one of the effective and appropriate means to achieve the purposes.

(The rule of the least restrictive means)

The Instant Provision imposes overall and uniform restriction on the right to vote of a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated. In other words, such restriction extends to those who negligently commit a crime without knowledge or intention to undermine law and order of the community. Also, the right to vote of a parolee, who is released from the prison and returns to the society prior to the completion of sentence after successfully going through the parole review committee's examination on the overall circumstances including motive for the crime, possibility of recidivism, etc., is limited under the Instant Provision as well. Further, the Instant Provision also restricts the right to vote of the prisoners who are sentenced to short term imprisonment for negligence nothing to do with any crime against the nation that denies the constitutional order. Such extensive restriction, however, seems not compatible with the election system in a democratic nation that strives to accomplish the community order through free participation of various people in the election process whose backgrounds or ideologies are diverse, on the basis of a pluralistic worldview. Therefore, the legislators should carefully impose restriction on the right to vote only in a limited situation, considering the importance of such a right. Nevertheless, the Instant Provision easily and uniformly limits the prisoner's right to vote simply by establishing the standard of 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated', without carefully contemplating 'the relation between the type, content or degree of illegality of each crime and the restriction on the prisoner's right to vote'. Therefore, the Instant Provision violates the rule of least restrictive means.

(Balance between legal interests)

The Instant Provision restricts the right to vote too broadly and includes no actual relation between the characteristics of a crime and restriction on the right to vote. Therefore, 'the prisoner's private interests or the public value in the democratic election system' infringed by the Instant Provision outweigh the public interest of 'punishing a person who commits a felony and improving citizen's respect to the rule of law' intended to be achieved by the Instant Provision. As a result, the Instant Provision fails to strike balance between the conflicting legal interests in relation to restriction of the basic rights.

(3) Conclusion

The Constitutional Court should uphold this constitutional complaint, and declare the Instant Provision unconstitutional as it infringes on the prisoner's right to vote in

violation of Article 37, Section 2 of the Constitution and on the prisoner's equality right in violation of the principle of universal suffrage stipulated in Article 41, Section 1 and Article 67, Section 1 of the Constitution.

B. Denial Opinion of Justice Lee Kong-hyun, Justice Cho Dae-hyen, Justice Lee Dong-heub

(1) Restriction on the right to vote of a felon and its scope and method are the matters to be decided based on the circumstance of a country including its historical experience, criminal law system and the public's legal sentiment toward crime. The nature of the Instant Provision, which does not recognize prisoner's right to vote corresponding the provisions of the Criminal Act, is to criminally punish a felon who commits an anti-social crime and the issue of how to punish a crime, or in other words, the choice of types and scope of statutory punishment, should be decided by the legislature, considering various aspects related to not only the nature of crime and protectable legal interests but also our history and culture, the situation at the time when the statute was legislated, citizens' value system or legal sentiment in general and the criminal policy to prevent crimes. In this regard, broad legislative discretion or freedom of legislative formation should be recognized. Therefore, the Court should keep this in mind while reviewing constitutionality of the Instant Provision in this case.

(2) Whether the Instant Provision violates the rule against excessive restriction

(Legitimacy of legislative purpose and appropriateness of means)

The legislative purposes of the Instant Provision are to impose criminal sanction against a felon who deserted the basic obligations that must be observed by the member of the community, to heighten the responsibility of general citizens as components of community and to reinforce their respect toward the rule of law. And the restriction on prisoners' voting right is one of the effective and proper measures to achieve these legitimate legislative purposes.

(Rule of the least restrictive means and balance between legal interests)

According to the Korean Criminal Act, imprisonment without prison labor is a punishment imposing serious restriction on the prisoner's basic rights including the bodily freedom, by confining a criminal in prison for at least one month. And this punishment is graver than that of disqualification or suspension of qualification which limits the right to vote or the right to be elected. And, our Constitution stipulates that a judge may be removed from office by a 'sentence of the imprisonment without prison labor or a heavier punishment' and the State Public Officials Act provides that a public officer who is sentenced to 'imprisonment without prison labor or a heavier punishment' may be removed from office. Also, the statutory provisions specifying qualification of professionals such as lawyer stipulate certain grounds for disqualification in the case where those professionals are sentenced to 'imprisonment without prison labor or a heavier punishment'. Therefore, the standard of 'a sentence of the imprisonment without prison labor or a heavier punishment' is important enough to justify such restriction on

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the basic rights. Moreover, as the Instant Provision is applicable to prisoners who are sentenced to 'imprisonment without prison labor or a heavier punishment', not to persons who are under the suspension of the execution of punishment, preventing the prisoners who are sentenced to such grave punishment from exercising the right to vote during the period of execution of punishment does not seem excessive beyond necessary degree to achieve the legislative purposes.

The prisoner's disadvantage of being unable to exercise the right to vote due to the Instant Provision is merely one of the effects of the disqualification or suspension of qualification which is a less severe punishment than that of imprisonment without prison labor. The period during which the right to vote is limited does not uniformly apply to all the prisoners, but proportionally applies on the basis of each prisoner's sentence, or in other words, depending on the degree of one's criminal liability. The public purposes to be achieved by the Instant Provision including 'criminally punishing a person who commits a felony and improving citizen's respect to the rule of law' do not seem to be dwarfed by the prisoner's disadvantage that the right to vote is limited during his/her sentence execution period. Therefore, the Instant Provision strikes the balance between legal interests.

(3) Conclusion

As the Instant Provision neither violates the rule against excessive restriction stipulated in Article 37, Section 2 of the Constitution nor infringes on the complainant's right to vote and equality, this constitutional complaint should be denied for lack of merits.

C. Dismissal Opinion of Justice Lee Kang-kook

As the Instant Provision reflects the effect of Article 43, Section 2 of the Criminal Act (a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited terms shall be under suspension of qualifications including suffrage and eligibility under the public Act.), the cause of action for infringement on the basic rights, such as restricting the right to vote, is also considered to arise when the sentence is finalized, like in Article 43, Section 2 of the Criminal Act. This constitutional complaint, however, was filed on December 27, 2007, after the lapse of one year since the final sentence was announced on November 23, 2006 so that his qualification under the public Act such as the right to vote was suspended. Therefore, this constitutional complaint should be dismissed, as it failed to satisfy the time limit for filing under Article 69, Section 1 of the Constitutional Court Act.

2. Regarding the Instant Provision, five Justices including Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon and Justice Song Doo-hwan present a unconstitutionality opinion; three Justices including Justice Lee Kong-hyun, Justice Cho Dae-hyen and Justice Lee Dong-heub present a denial opinion of; and Justice Lee Kang-kook presents a dismissal opinion. The unconstitutionality being the majority opinion, nevertheless, falls behind the quorum of six Justices needed for the holding of unconstitutionality. Therefore, this complaint is denied.

Party

Complainant Song ○-wook
Court-Appointed Counsel: Woo Yank-tae

Holding

Complainant's constitutional complaint is denied.

Reasoning

I. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

1. On April 3, 2006, complainant who was born on April 12, 1979, received a draft notice for active duty service from the Commissioner of the Military Manpower Administration which ordered him to enlist in the 306 replacement depot on May 9, 2006. The complainant, however, consciously objected to military service based on his personal conviction of pacifism and therefore, refused to join the army even after three days passed from the date of enlistment, thereby being indicted for violating Article 88, Section 1, Item 1 of the Military Service Act. On November 23, 2006. The Seoul Western District Court sentenced him to one and half year in prison and, as he decided not to appeal on the same day, the sentence was finalized.

2. While serving his time, the complainant tried to cast a vote in the presidential election held on December 19, 2007 but failed to do so due to Article 18, Section 1, Item 2 of the Public Official Election Act. At this, the complainant filed this constitutional complaint against the Instant Provision, arguing that Article 18, Section 1, Item 2 of the Public Official Election Act violate his right to pursue happiness under Article 10 of the Constitution, right to equality under Article 11 of the Constitution and right to vote under Article 24 of the Constitution.

B. Subject Matter of Review

The subject matter of review in this case is the constitutionality of the former portion of Article 18, Section 1, Item 2 of the Public Official Election Act (hereinafter, the "Instant Provision") which stipulates that "a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated". The instant provision (underline added) and related provisions are followed as below:

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Public Official Election Act

Article 18 (Disfranchised Persons)

(1) A person falling under any one of the following items, as of the election day, shall be disfranchised:

1. A person who is declared incompetent;
2. A person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted;
3. A person who commits an election crime, who commits the crimes provided for in the provisions of Article 45 and Article 49 of the Political Fund Act or who commits the crimes in connection with the duties while in office as the President, member of the National Assembly, member of local council, and head of local government, which are referred to in Articles 129 through 132 of the Criminal Act (including the Act on the Aggravated Punishment, etc., of Specific Crimes) and Article 3 of the Act on the Aggravated Punishment, etc., of Specific Crimes, and for whom five years have not passed since a fine exceeding one million won is sentenced and the sentence becomes final or ten years have not passed since the suspended sentence becomes final, or for whom ten years have not passed since imprisonment was sentenced and the decision not to execute the sentence became final or since the execution of the sentence was terminated or exempted (including a person whose punishment becomes invalidated); and
4. A person whose voting franchise is suspended or forfeited according to a decision by court or pursuant to other Acts.

(2) For the purpose of Section 1, Item 3, the term "person who commits an election crime" means a person who commits a crime provided in Chapter XVI Penal Provisions or a crime in violation of the National Referendum Act.

(3) A person who currently commits the crimes referred to in Section 3, Item 3 and other offences shall be tried and sentenced separately for each offence, despite the provisions of Article 38 of the Criminal Act.

[Related provision]

Criminal Act

Article 43 (Imposition of Sentence, Deprivation of Qualifications and Suspension of Qualification)

(1) A person who is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, shall be deprived of the qualifications prescribed as follows:

1. Qualifications to become public officials;
2. Suffrage and eligibility under the Public Act;
3. Qualifications concerning business under the Public Act, for which necessary conditions have been prescribed by Acts; and
4. Qualifications to become a director, auditor or manager of a juristic person or an inspector or custodian concerning the business of a juristic person.

(2) A person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications as

mentioned in Items 1 through 3 of the preceding Section until the execution of punishment is completed or remitted.

Article 44 (Suspension of Qualifications)

(1) Suspension of all or part of the qualifications specified in the preceding Article shall be for not less than one year nor more than fifteen years.

(2) When both limited imprisonment or limited imprisonment without prison labor and suspension of qualifications have been concurrently imposed, the term of suspension shall be calculated from the day when the execution of imprisonment or imprisonment without prison labor is completed or remitted.

II. Arguments of Complainant and Related Bodies

(intentionally omitted)

III. Review

A. Unconstitutionality Opinion of Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon, and Justice Song Doo-hwan

1. Review on justiciability

(A) Time limit for filing

According to Article 69, Section 1 of the Constitutional Court Act, a constitutional complaint against statute shall be filed within 90 days after learning the enforcement of the statute at issue or within one year after the statute is enforced if the complainant's basic right is infringed at the same time when the statute at issue is enforced, or within 90 days after the existence of a cause of action is known and within one year after the cause occurs if the basic rights are infringed by a cause which occurs after the enforcement of the statute.

As the Instant Provision prevents 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated as of the election day' from casting a vote for the relevant election while being imprisoned, the complainant's basic rights including the right to vote are infringed by the Instant Provision when the specific cause of action for such infringement arises, and in this case, the cause of action arises at the election day.

The complainant's right to vote is limited pursuant to the Instant Provision when the 17th Presidential Election was held on December 19, 2007, as his sentence had not been terminated at the day. Therefore, it can be said that the cause of action for the infringement of basic rights arose and the complainant finally was aware of this at that time. This constitutional complaint was filed on December 27, 2007, within 90 days from that day, and therefore, does not exceed the filing period.

(B) Legally protectable interests and necessity of constitutional clarification

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The purpose of the constitutional complaint system is to provide relief for violation of citizens' basic right. Therefore, a constitutional complaint may be filed only when there are legally protectable interests which should exist not only at the time of filing but also at the time of announcement of decision. But in this case, the Presidential Election where the complainant intended to participate had already ended on December 19, 2007, before this constitutional complaint was filed. And, although the 18th Election of Members for the National Assembly was scheduled to be held on April 9, 2008 during the complainant's imprisonment, currently, the aforementioned election already ended and the complainant completed his time and was released from prison on May 22, 2008. Therefore, even though this constitutional complaint is upheld by the Court, since the legally protectable interests already evaporated, any decision on its part would not provide subjective legal relief to the complainant.

As the Court also has the objective function of protecting the constitutional order, however, it may recognize exceptions where constitutional complaints can be maintained even after the subjective legally protectable interest has been extinguished in the course of proceedings due to changes in fact or in law. These include cases where a decision on the merits involves issues critical to the defenses and maintenance of the constitutional order such that their clarification is of constitutional significance or cases where violations are likely to be repeated in the future (7-1 KCCR 687, 693-694, 91Hun-Ma44, May 25, 1995).

The constitutionality of the Instant Provision has been already clarified by the Court in 2002 Hun-Ma411 decision announced on May 25, 2004. After the decision, however, there were changes in the 'legal regulations on the prisoner's status in correction facility' on which the former decision was based and consequently, questions regarding the constitutionality of restricting prisoner's right to vote have been continuously raised. Since a decision on the constitutionality of the Instant Provision is critical to the defenses and maintenance of the constitutional order and the clarification of such an issue is of constitutional significance, the legally protectable interests of the constitutional complaint in this case should be acknowledged as an exception.

(C) Sub-conclusion

Other than reviewed above, there also exist no other flaws in the justiciability requirements. Therefore, this constitutional complaint is justiciable.

2. Review on Merits

(A) Legal meaning of the right to vote and limitation in restricting prisoner's right to vote

1) In 2005Hun-Ma644 etc. case announced on June 28, 2007, our Court clarified the 'legal meaning of the right to vote and limitation in its restriction' (19-1 KCCR 859, 873-875). The summary of the decision is as follows and the grounds for the Court's decision are also applied in this case:

The significance of the principle of popular sovereignty stipulated in Article 1 of the Constitution is that the State authority shall be formed according to the consensus of the people. In order to make such objective be reality, the opportunity for the sovereign people to participate in the political process must be ensured to the greatest extent possible. In modern democracy, in which democracy through representation is the dominating principle, the participation of the people is achieved, first and foremost, through elections. Therefore, elections are the paths through which the sovereign people exercise their sovereignty.

To ensure the maintenance of this principle of popular sovereignty and the participation of the people through elections, Article 24 of the Constitution guarantees all citizens the right to vote as prescribed by relevant laws. Also, Article 11 prescribes the right to equality in the political aspect of people's life, and Article 41 Section 1 and Article 67 Section 1 ensure the principles of universal, equal, direct, secret voting in presidential and general elections. The reason why the Constitution clearly guarantees the right to vote and the principles in election is because under the system of popular sovereignty and democracy through representation, people's exercising their right to vote is the only way to enable the establishment and organization of the State and State authority and to provide democratic legitimacy.

Such exercise of the people's right to vote is, on the one hand, as the actual method for exercising popular sovereignty, an important way to reflect the ideas of the people in State affairs. On the other hand, it acts as a method of controlling State authority through regular elections. This is why the people's right to vote is regarded as the most basic and necessary right for realizing the principle of popular sovereignty, and to be superior to other basic rights.

Though Article 24 of the Constitution takes on the form of statutory reservation by stating that all people shall have the right to vote 'under conditions prescribed by statute', such statutory reservation is to realize and ensure the right to vote and not to restrict it. Therefore, even when the contents and process regarding the right to vote is stipulated by law, such stipulation must conform to Article 1 of the Constitution which declares popular sovereignty, Article 11 which speaks of equality, and Articles 41 and 67 which guarantee universal, equal, direct, secret elections for presidential and national assembly elections. Also, pertaining to the importance the right to vote in a democratic nation as the apparatus for realizing popular sovereignty and democracy through representation, the legislative branch should enact laws that guarantee the right to vote to its fullest. Accordingly, in cases where the constitutionality of legislation that restricts the right to vote is examined, said examination must be strict.

Therefore, legislations that restrict the right to vote cannot be justified directly by Article 24 of the Constitution, but can only be justified according to Article 37 Section 2 of the Constitution in exceptional and unavoidable cases only when necessary for national security, the maintenance of law and order or for public welfare. Even then, the essential aspect of the right to vote cannot be violated.

Moreover, as the principle of universal election disregards all actual factors such as the competence, wealth, or social status of the voter and demands that anyone of age is given the right to vote, the requirements and limits laid out in Article 37 Section 2 of the Constitution should be abided by even more strictly when enacting legislation that

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restrict the right to vote in violation of the principle of universal election.

2) Meanwhile, the Criminal Act provides for deprivation of qualification and suspension of qualification as kinds of punishment (Article 41, Item 4 and 5, Article 43 and Article 44) and stipulates that "a person who is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life" and "a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term but whose sentence execution has not been terminated" or in other words, "a person who is sentenced to a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated" is subject to deprivation or suspension of suffrage and eligibility under public Act (Article 43, Section 2, former part of Item 2). Regarding this, the Court, in 2002Hun-Ma411 decision, viewed the issue of restricting prisoner's right to vote as a matter of "choosing which of the specific method for the punishment of a certain crime", considering that restriction on the prisoner's right to vote imposed by the Instant Provision is natural consequence of Article 43 of the Criminal Act which provides for deprivation of qualification and suspension of qualification by criminal sentence and focusing on the fact that the legislators already recognized restriction on the right to vote as one type of punishment (deprivation of qualification and suspension of qualification). As a result, the Court acknowledged wide discretion of the legislators or freedom of legislative formative right in this matter (*see* 16-1 KCCR 468, 478-479, 2002 Hun-Ma411, March 25, 2004).

Of course, as the precedent shows, it is true that the matter of choosing "which of the specific method for the punishment of a certain crime" should be decided by the legislators considering many factors such as our history and culture, contemporaneous social situation at the time when the law is enacted, people's prevailing sentiment on law or values and the criminal policy to deter crimes, and therefore, wide legislative discretion should be allowed for this (7-1 KCCR 478, 487, 91 Hun-Ba11, April 20, 1995).

But as reviewed before, given the importance of the right to vote as a critical means to realize the popular sovereignty and representative democracy system, if the right to vote is restricted as a punishment of crime, legitimacy of the punishment itself and its scope of application should be scrutinized under the strict proportionality test following Article 37, Section 2 of the Constitution, from the perspectives of protection of the right to vote and its restriction based on the principle of universal suffrage.

Therefore, the question as to whether the restriction of prisoner's right to vote by the Instant Provision infringes upon the basic rights of prisoners, including the complainant himself, or not should undergo a strict review of the principle of proportionality, and if the result of the strict test reveals that the Instant Provision excessively restricts the complainant's basic right, amounting to violation of the Constitution, the part of Article 43 of the Criminal Act regarding deprivation or suspension of suffrage and eligibility under the Public Act, which stipulates the same restriction as the Instant Provision within the same scope, should also be declared unconstitutional.

(B) Legitimacy of purpose and appropriateness of means of the Instant Provision

1) In 2002Hun-Ma411 decision announced on March 25, 2004, the Court presented several grounds for the 'legitimacy of purpose' of the Instant Provision. But since the decision, there have been changes in legal regulations regarding treatment of prisoners within correctional facilities, and as some of the grounds presented in the above precedent seem questionable, those points will be reexamined in the following paragraphs.

Our first review goes to this ground for argument in the precedent: "under the former Criminal Administration Act, it is doubtful that prisoners can properly cast an informed vote, given the fact that they are only granted to have limited access to communication with other people, letter, telephone, books, newspaper, radio and television, thereby failing to get enough information related to election".

The State bears responsibility to properly provide the people with sufficient information on a candidate's profile and his/her political view and a political party's policy and platform. Although incarceration in correctional facility possibly makes prisoners have less access to information on election, such insufficiency should not be the ground for restricting prisoner's right to vote. Rather, it is the State that has the duty to provide adequate information on election with which prisoners can reasonably exercise their right to vote.

Meanwhile, according to the 'Administration and Treatment of Correctional Institution Inmates Act', which was enacted on December 12, 2008 after 2002Hun-Ma411 decision was rendered, prisoners may apply for subscription to newspapers, magazines or books at their own expenses and each warden shall permit the subscription unless the newspapers, etc. to which prisoners have applied for the subscription are harmful publication under the 'Publishing Industry Promotion Act' (Article 47), and prisoners may listen to radio and watch television and the warden may temporarily prevent an individual prisoner from listening to radio or watching television when it is likely to harm to edification of convicted prisoners or their sound rehabilitation into society or when it is necessary for the maintenance of security and order of the institution (Article 48). Therefore, prisoners now, different from the treatment under the former Criminal Administration Act, seem to enjoy sufficient opportunity to obtain information necessary for exercising their right to vote, as it becomes far easier to have access to newspapers or television, which are considered as the main conduits through which information regarding election can be achieved.

Also, it seems unreasonable to present prisoner's lack of access to sufficient information on election as a ground for restricting prisoner's right to vote as opposed to unconvicted prisoners (a criminal suspect or a criminal defendant arrested or subject to execution of a warrant of confinement), despite the same treatment between (convicted) prisoners and unconvicted prisoners in terms of the opportunity to obtain information through subscribing newspapers, listening to radio or watching television.

Therefore, it is not proper to consider the possibility that 'prisoners who are incarcerated in correctional facility may not properly exercise their voting right due to insufficient information regarding election' as a legitimate ground for restricting prisoners' voting right.

Second, we turn to the next ground for restricting prisoner's voting right in the

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precedent: "if prisoners are allowed to exercise their voting right in prison, such exercise would be possible only through absentee voting system. But granting absentee voting within correctional facility can impair fairness of election because it is easily conceivable that prison managers can wield influence over the process of forming political opinions of prisoners, thereby distorting them".

Since the State primarily has the duty to manage and protect the fairness of election, it is simply absurd to deny prisoner's voting right on the ground of concerns over the fairness of election. The State should exert its effort to take precautionary measures to prevent prison managers from unduly influencing formation of political opinions by prisoners, and should not shift the responsibility on prisoners who are actually victims of such an unfair activity, denying their voting right.

Also, under the current situation of our nation where democracy takes deep root, it is doubtful that prison managers, not simply out of concern but in reality, can distort prisoner's formation of political opinion by ways of blocking information from outside or selectively conveying information favorable to a specific political party or a candidate.

Therefore, it is also unreasonable to discuss the legitimacy of restricting prisoner's voting right on the ground of the possibility of unfair election caused by influence of prison managers, etc.

Third, with regard to the ground that "a prisoner, taking advantage of the absentee voting, can communicate with his/her accomplice outside the prison by putting a personal letter in the absentee ballot envelope, which can have a negative effect on effective administration of punishment", not only should such a problem be prevented by close supervision over absentee voting within correction facilities, but also it is unsure whether it is technically possible for a prisoner to communicate with an accomplice outside the prison by using an absentee ballot envelope, given the fact that an absentee ballot envelope is clearly distinguishable from other ordinary letter envelopes and addressed to the relevant office of election management. It is hard to accept the reasoning that such abstract and unclear danger can be a reason to restrict prisoner's voting right.

Lastly, let's discuss the ground presented in the precedent that "as prisoners usually have antisocial tendency in many cases and have a grudge against being punished, it is possible that their political opinions may not be properly formed. Thus, it seems unreasonable to allow prisoners to exercise their casting vote right in case where the result of an election would be decided by a small margin, although rare".

The principle of universal suffrage disregards all actual factors such as competence, wealth, or social status of voters and demands that anyone of or above certain age is given the right to vote. Therefore, that the citizen who reaches the legally designated age can and should be able to affect the outcome of the elections is the ideological premise and inevitable conclusion of the principle of universal suffrage. For the reason, assertion that the right to vote should be restricted as it may affect the outcome of the election is unacceptable, violating the principle of universal suffrage (*see* 9-1 KCCR 859, 876, 2004Hun-Ma644 etc., June 28, 2007).

2) Next, we will discuss points related to legitimacy of purpose and appropriateness

of means of the Instant Provision other than suggested in (A).

As we have reviewed before, exercising the voting right, as a means to realize the popular sovereignty and the representative democracy, is an important act to directly and indirectly participate in organization and management of state power. The people, as members of the state and society, have duty to refrain from committing crimes specifically prohibited by the state for maintaining the community and protecting other members' rights and interests such as life and body. Prisoners, however, are those who are sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, imprisonment for a limited term or imprisonment without prison labor for a limited term but whose sentence execution has not been terminated as punishment of the crime they have committed and the ones who destructed social order and threatened security of our society by causing considerable harm to the state, society and community members.

The Instant Provision in this case is based upon the basic perception that it is not desirable to allow those individuals who have deserted the basic obligations that must be observed by the members of the community and harmed the maintenance of the community, to directly and indirectly participate in constituting the governing structure leading the operation of the community, and has a meaning as the social sanction against such anti-social behavior (16-1 KCCR 468, 479, 2002Hun-Ma411, March 25, 2004). Furthermore, our Criminal Act provides for provisions which contain the same purpose as the Instant Provision, by stipulating deprivation or suspension of qualifications such as suffrage and eligibility under the Pubic Act as a kind of punishment (Article 41) and providing that a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications until the execution of punishment is completed or remitted. Therefore, the deprivation of the right to vote by the Instant Provision functions as retribution for crime as an extension of criminal sanction against criminals, which can be regarded as an important purpose for the legislators to impose criminal sanctions or restrictions against grave crimes.

Further, the deprivation of the right to vote imposed on a prisoner by the Instant Provision, on top of the capital punishment or deprivation of liberty to which the prisoner is sentenced, can contribute to heighten the responsibility of general citizens including the prisoner himself/herself as a citizen and reinforce the their respect toward the rule of law.

Such legislative purposes of the Instant Provision are legitimate, and the restriction on prisoners' voting right is one of the effective and proper measures to achieve the legislative purposes. Therefore, the Instant Provision cannot be said to meet legitimate legislative purposes and appropriateness of means.

(C) The least restrictive means

1) Election is a system that forms state institutions by competition and majority vote. Court Opinion expressed by election also has binding force on minority, and the legitimacy of such binding force comes from the fact that the same chance to participate in election is also equally given to individuals who fall under the minority

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group, in other words, the principle of universal suffrage is observed. Therefore, the principle of universal suffrage both shows the limitation of the principle of majority rule and provides legitimacy to the rule of majority rule. This is why Article 41 and Article 67 of our Constitution specifically elucidate the principle of universal suffrage for the election of the National Assembly members and the Presidential Election. Therefore, the principle of universal suffrage and the right to vote based on it should be restricted to the minimum extent if necessary.

Meanwhile, the core of punishments, such as death penalty, life imprisonment, imprisonment without prison labor for life, imprisonment for a limited term or imprisonment without prison labor for a limited term, is 'deprivation of life' or 'incarceration in correctional facility', and the decision as to which part of other freedoms and rights prisoners may enjoy as citizens would be restricted is not made directly based on each types of punishment mentioned above. So, a prisoner, in principle, still has right to enjoy their basic rights other than those restricted by the particular punishment sentenced to him/her. As restriction on the right to vote does not naturally derive from the essence of capital punishment or imprisonment sentenced to prisoners, prisoner's right to vote should be restricted to minimum necessary extend based on the principle of universal suffrage.

2) The Instant Provision, however, fully and uniformly restrict the right to vote of those who are sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated. The restriction imposed by the Instant Provision is extended not only to those who are sentenced to death penalty, life imprisonment, imprisonment without prison labor for life, imprisonment for a limited term or imprisonment without prison labor for a limited term, for example, from one month to 25 years but also to those who are released on parole after fulfilling relevant requirements. In this sense, the scope of application of the Instant Provision is very broad, spanning from and neither does consider the type of crimes such as whether it is a criminal negligence or intentional offence nor the type of legal interests infringed by the crimes such as whether it is state interest, social interest or personal interest.

3) But, regarding a person who is sentenced to imprisonment without prison labor for criminal negligence, although the result of infringing legal interests by his/her fault is grave enough to be sentenced to imprisonment, from the perspective of illegality of the act, such illegality is far less than that of intentional offence. For example, since the one who is serving prison terms after being sentenced to imprisonment without prison labor for causing a traffic accident due to negligence did not knowingly or intentionally commit the crime, he/she does not have any intention or awareness to do harm to the legal order of the community, either. Therefore, it is hard to accept to restrict such negligence offenders' right to vote, which is the means to realize the people's sovereignty.

A parolee is a person under execution of imprisonment or imprisonment without prison labor who has behaved himself/herself well and shown sincere repentance, and therefore returns to society before the completion of his/her prison term when ten years of a life sentence or one third of a limited term of punishment has been served after

many factors such as the prisoner's age, motive of crime, name of the crime, prison terms, behavior in prison, living condition or situation after parole and possibility of recidivism are thoroughly reviewed by the Parole Board. As a result, although a parolee's sentence execution has not been terminated as of the election day, it is not reasonable to maintain the sanction of restricting parolee's voting right incidental to the main punishment, considering the fact that a parolee is the one who is released from imprisonment, which is the main punishment, for the various reasons we have reviewed before.

Further, the Instant Provision's wide-ranging restriction on the right to vote, even applying to the one who is sentenced to a short term imprisonment for a crime of little gravity nothing to do with any anti-state offence that denies the constitutional order such as the democracy, seems discrepant from the election system of a liberal democratic country that aims at creating and maintaining order within the community by allowing various people with diverse ideological backgrounds and personal history to freely participate in elections based on pluralistic worldview.

To sum up, although it is important for the legislature to be very careful in restricting the right to vote in consideration of its importance, the Instant Provision simply and uniformly restricts prisoner's right to vote by setting the standard stipulating that 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated', without carefully considering as to whether there is any direct relationship between the type, content or illegality of each crime and the restriction on prisoner's voting right.

Therefore, the Instant Provision violates the rule of the least restrictive means in restricting basic rights.

(D) Balance between legal interests

The right to vote, as a means through which the right holders can realize their political opinions, is a right every citizen holds. Further, maximum guarantee of the right to vote pursuant to the principle of universal suffrage is the core element for realizing 'the representative democracy on the basis of the popular sovereignty', which is the basic tenant of our Constitution and has the public value of guaranteeing democratic legitimacy of state power achieved by election to the maximum level. Therefore, arbitrary restriction on the voting right infringes on not only private interests of the right holders but also the above mentioned public interest.

As the restriction on prisoner's right to vote by the Instant Provision, however, is too broad as reviewed earlier and in some sense, not directly related to the specific characteristics of a crime, the public interests expected to be achieved by the restriction including 'sanction against criminals who commit grave crimes or reinforcement of citizens' respect to the rule of law' is less valuable than 'prisoner's private interests or the public value of democratic election system' expected to be infringed by the Instant Provision.

Therefore, the Instant Provision fails to strike balance between the conflicting legal interests regarding the restriction on the basic rights.

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(E) Sub-conclusion

The Instant Provision infringes on prisoner's right to vote in violation of Article 37, Section 2 of the Constitution and also on prisoner's right to equality in violation of the principle of universal suffrage stipulated in Article 41, Section 1 and Article 67, Section 1 of the Constitution.

3. Conclusion

As reviewed above, the constitutional complaint should be upheld and the Instant Provision should be declared unconstitutional.

B. Denial Opinion of Justice Lee Kong-hyun, Justice Cho Dae-hyen, Justice Lee Dong-heub

1. Meaning of restriction on the prisoner's right to vote and legislative examples

(A) Under the principle of popular sovereignty and the representative democracy in which establishment and composition of a state and the state power and its democratic legitimacy can be achieved only through citizens' exercising their right to vote, the right to vote bears special importance as a means to realize them.

But the right to vote cannot be regarded as an absolute right that should not be restricted in any case because it is not a 'natural right' that inherently exists even before the establishment of the Constitution but a 'legal right' that is created or recognized by the Constitution within a certain community.

Therefore, the right to vote, like any other basic rights, may be restricted when necessary for national security, the maintenance of law and order or for public welfare under Article 37, Section 2 of the Constitution as long as such restriction does not infringe on the core value of the right, and historically the right to vote has been restricted against those who have yet to reach a certain age or commit serious crimes destructing the social rule and doing harm to the community order.

The Instant Provision, while preventing felons who fail to observe their fundamental duties as members of a community from directly and indirectly participating in the organization and management of the community, is meant to impose social sanction against the persons who commit antisocial behavior. The restriction on criminal's voting right, as a type of so-called 'social death' in the Greek-Roman period, has a deep rooted history and has been limitedly practicing within a certain boundary in the following countries as modified pursuant to each country's history and circumstances.

(B) Legislative examples in foreign countries achieve

In the United States, as of 2006, 48 states and the District of Colombia have statutes that deprive prisoners who commit felony of their right to vote while imprisoned. Among them, 13 states deprive a person of the right to vote while he/she is imprisoned, 5 states do so while imprisoned and paroled, and 18 states do so not only

while imprisoned and paroled but also during the period of suspension of execution. In 13 states, the right to vote is deprived even after the execution of sentence is terminated, such as while on probation, and especially 6 of them permanently deprive a felon of the right to vote. The US Supreme Court also ruled that based upon Section 2 of the 14th Amendment, a state may deprive a prisoner of his/her right to vote unless it is intended to be racially discriminatory.

In Japan, same as the Instant Provision, 'a person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated' is deprived of the right to vote (Article 11 of the Public Officials Election Act). In France, a person who is convicted of concealing criminal activity and committing a crime cannot be on the voter's list for five years after the sentence is finalized. Germany removes some of prisoner's right to vote by authorizing the court to restrict prisoner's voting right pursuant to related statutory provisions.

Besides, many advanced countries, where the system of representative democracy is well developed, also impose various types of restriction on the right to vote for those who commit a serious crime, although different in terms of the requirements, scope and means. Therefore, regarding question as to whether the right to vote for those who commit serious crime should be restricted and the scope and methods of such restriction, it depends on specific circumstances where each country is situated such as historical experience, criminal law system, people's legal sentiment toward crime and others.

2. legal character of restriction on prisoner's right to vote

Our Criminal Act provides for disqualification or suspension of qualification as a type of punishment (Article 41) and stipulates that qualification to become public officials and suffrage and eligibility under the Public Act, etc., are the qualifications that can be suspended or forfeited (Article 43). According to the Criminal Act, judges may impose a disqualification to a person who commits a certain crime for a specific period of time if there is a statutory provision that stipulates disqualification (from 1 year to 15 years) as a statutory punishment for the crime (Article 44, Section 1), but even when judges do not separately impose a disqualification, if a person is sentenced to death penalty, imprisonment for life or imprisonment without prison labor for life, he/she shall automatically be deprived of the qualification mentioned above (Article 43, Section 1), and if a person is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term, he/she shall be under suspension of above mentioned qualifications until the execution of punishment is completed or remitted (Article 43, Section 2). As such, disqualification or suspension of qualification regarding suffrage and eligibility under Public Law, against those who are sentenced to imprisonment without prison labor or a heavier punishment but whose sentence execution has not been terminated bear the characteristics of punishment imposed against them.

In response to those provisions of the Criminal Act, the Public Officials Election Act does not recognize the right to vote for a person who is sentenced to imprisonment without prison labor or a heavier punishment but whose sentence execution has not

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been terminated. Considering the punishment system in our Criminal Act, as we reviewed above, the restriction on the right to vote imposed by the Instant Provision reveals characteristics of criminal sanction imposed on felons who commit anti-social crimes.

But, the question as to how a crime should be punished, or in other words, the issue of choosing the type and scope of statutory punishment against a crime is the matter to be decided by the legislators, considering not only the nature of crime and the protectable legal interests but also our history and culture, situation at the time of legislation, the public's values or legal sentiment in general and the criminal deterrence policy, and therefore, this is an area where wide range of legislative discretion or formative freedom should be granted. Hence, unless clear violation of the principle of equality and the principle of balance guaranteed by the Constitution is perceived, for example, when a statutory punishment of a certain crime is so cruel and excessive, compared to the nature of the crime and the corresponding responsibility of the criminal, that the balance in criminal punishment system is remarkably broken or the punishment is beyond the degree necessary to achieve its original purpose and function, we should be very careful in making a conclusion that a statutory punishment violates the Constitution. This consideration should also be taken in this case when we review the constitutionality of the Instant Provision that bears the characteristics of criminal sanction.

In relation to this, our Court, in reviewing the constitutionality of Article 18 Section 2 Item 1 of the 'Public Officials Election and Prevention of Election Malpractice Act' (revised by Act No. 4739, March 16, 1994), has already considered the restriction of the right to vote pursuant to the aforementioned provision as criminal sanction and ruled that the above mentioned statutory provision does not violate the Constitution, as it is neither clearly unreasonable or unfair going far beyond the scope of legislative discretion nor in violation of the rule against excessive restriction (16-1 KCCR 468, 2002 Hun-Ma411, March 25, 2004).

3. Issues in this case

The issues in this case are whether preventing prisoners whose sentence execution has yet to be terminated from exercising the right to vote during the period of sentence execution, under the standard of 'sentenced to imprisonment without prison labor or a heavier punishment' stipulated in the Instant Provision with characteristics of criminal sanction against felons, infringes the complainant's voting right in violation of the rule against excessive restriction under Section 2, Article 37 of the Constitution and the complaint's right to equality by discriminating prisoners who are sentenced to imprisonment without prison labor or a heavier punishment against other citizens in the political aspect of people's life.

In reviewing these issues, as the issue of infringement of the right to vote of the prisoners who are sentenced to imprisonment without prison labor or a heavier punishment and the issue of infringement of the right to equality thereof against other citizens are closely interconnected, the issue of infringement of the right to vote will be reviewed first, and on the basis of this, the issue of infringement of the right to

equality will be review analyzed.

Meanwhile, although the complainant also argue that his right to pursue happiness is infringed by the Instant Provision, the issues regarding the right to pursue happiness will not be reviewed in this case as the right to pursue happiness under Article 10 of the Constitution is a basic right that is supplementarily applied only when the other basic rights cannot be applied (*see* 20-1(B) KCCR 447, 451-452, 2007Hun-Ma917, June 26, 2008).

4. Question regarding infringement of the right to vote

(A) legitimacy of legislative purpose and appropriateness of means

In general, exercising the right to vote is regarded as important in that it can determine the destiny of a national community and give direction to the community. And, citizens, as components of the national community, take various social responsibilities and duties such as paying tax, serving in the military and abiding by law in order to maintain the community order and respect and guarantee other people's rights and interests including their life and body. Prisoners who committed serious crimes, however, are the ones who destructed social order and endangered the security of the community.

In relation to this, the Instant Provision was legislated in order to prevent crimes by imposing a criminal sanction of placing restriction on the right to vote of felons who fail to fulfill the basic duty as components of community and foster responsibility and law-abiding spirit of general citizens, which is legitimate to be constitutionally pursued by the legislature, and the voting right restriction imposed by the Instant Provision against prisoners sentenced to imprisonment without labor or a heavier punishment is found to be an appropriate means to achieve the purposes.

(B) The least restrictive means and balance between interests

1) The Instant Provision does not uniformly restrict the voting right of all prisoners or criminals but suspend the voting right of those who are 'sentenced to imprisonment without prison labor or a heavier punishment' until 'the end of execution of the sentence', which means that it restricts the right to vote only during the period of time proportional to the sentence imposed. On the other hand, if a person is sentenced to less than 30 days' detention for misdemeanor or sentenced to lockup at workhouse for failure to pay a fine or a minor fine, his/her right to vote is not restricted. Therefore, restriction of prisoner's right to vote as a criminal sanction is imposed not because of his/her confinement in a detention facility like prison but because of his/her own criminal responsibility for committing a serious crime. for this reason, in order to make a decision on the constitutionality of the Instant Provision, it is appropriate to review whether the requirement for restricting voting right, which is 'sentence of imprisonment without prison labor or a heavier punishment', and the period of suspension of the voting right imposed pursuant to it are excessive beyond the scope necessary for achieving the legislative purposes and whether the balance between the public interest to

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be achieved by the Instant Provision and the personal disadvantage of prisoners is well maintained.

2) Severity of 'sentence of imprisonment without prison labor or a heavier punishment' in our legal system

As our Criminal Act prescribes death penalty, imprisonment, imprisonment without prison labor, deprivation of qualifications, suspension of qualifications, fine, detention, minor fine and confiscation as types of punishment (Article 41), the deprivation of qualifications and the suspension of qualifications that impose restriction on the right to vote and the right to be elected are also types of punishment like imprisonment without prison labor. The severity of punishment follows the above mentioned order. Among them, punishments that deprive of a person's freedom include imprisonment, imprisonment without prison labor and detention and imprisonment or imprisonment without prison labor shall be either for life or for a limited term, and the limited term shall be from one month to fifteen years and detention shall be from one month to thirty days. And when the length of a fixed term of imprisonment without prison labor exceeds the length of a fixed term of imprisonment, the imprisonment without prison labor shall be deemed to be more severe (Article 42, Article 46, Article 50, Section 1 and 2). Therefore, the imprisonment without prison labor, as a punishment that imposes serious restriction on the basic rights including the bodily freedom by confining criminals in prison for at least one month and more, should be regarded as more severe than the deprivation or suspension of qualification which restricts the right to vote or the right to be elected.

Also, our Constitution stipulates that 'no judge shall be removed from office except by impeachment or a sentence of imprisonment without prison labor or a heavier punishment (Article 106, Section 1)' in order to guarantee independence of the judiciary, thereby imposing serious restriction on judge's right to hold public office by making it possible to remove him/her from the position if a judge is sentenced to imprisonment without prison labor or heavier punishment. Especially, considering that application of the above mentioned constitutional provision will not be swayed by whether the crime committed by a judge is related to the office or due to negligence, being sentenced to imprisonment without prison labor or a heavier punishment through criminal procedure itself may implicate the possibility of being seriously blamed by the society, regardless of the name and nature of crime or whether it is related to the office or criminal negligence.

Also, according to the State Public Officials Act, if a public official in whose case five years have not passed since his/her imprisonment without prison labor or a heavier punishment as declared by a court was not completely executed or exempted, or if a public official is sentenced by the suspension of the execution of imprisonment without prison labor or a heavier punishment and two years have not passed since the period of suspension is expired, he/she shall retire ipso facto (Article 69, Article 33, Item 3 and 4). In the cases of lawyer, certified public accountant, certified tax accountant, patent lawyer, certified judicial scrivener and property appraiser, there are related statutory provisions that prescribe certain grounds for disqualification (Article 5, Section 1 of the Attorney at Law Act; Article 4, Section 2 of the Certified Public Accountant Act;

Article 4, Section 7 of the Certified Tax Accountant Act; Article 4, Section 1 of the Patent Attorney Act; Article 6, Section 3 of the Certified Judicial Scrivener Act and Article 24; and Section 3 of the Public Notice of Values and Appraisal of Real Estate Act). Each of the above mentioned statutory provisions did not exclude a person who commits a negligence crime or a crime not related to the office from being subject to the provisions, with consideration of the gravity of sentencing imprisonment without prison labor or a heavier punishment.

Meanwhile, according to the statistics on the criminal cases in 2008, among 1,494,680 criminal trial and summary judgment cases, 44,861 cases are about imprisonment without labor or a heavier punishment at trial court level, and the imprisonment without labor or a heavier punishment has been sentenced only against serious crimes that occupy only 3% of all the criminal cases (*see* 2009 Annual Report of the Judiciary).

3) Given our criminal system and various provisions of the Constitution and other statutes, the standard of 'imprisonment without prison labor or a heavier punishment' is deemed to be grave enough to justify the restriction imposed on the basic rights including deprivation of status as public officer or judge or limitation on achieving professional licenses. Moreover, as the Instant Provision is not applicable to the person who is under the suspension of the execution but to the prisoner who is sentenced to 'imprisonment without prison labor or a heavier punishment' and whose sentence is being executed, the suspension of the voting right of the prisoner who is sentenced to such a grave punishment during the period of execution of the sentence does not seem excessive beyond the scope necessary for achieving the legislative purposes we have reviewed in the previous section.

Also, considering the facts that judges in criminal trial determine the type and severity of punishment after carefully considering the sentencing conditions such as age, character and conduct of the offender; the motive for the commission of the crime, the means and the result; and circumstances after the commission of the crime, and that imposition of a fine is also stipulated as an option for most crimes except serious crimes against which very severe punishments are imposed, if a judge decides to impose a fine or to sentence a person to imposition without prison labor or a heavier punishment without ordering the suspension of sentence or the suspension of execution with consideration of all the circumstances before and after the commission of the crime, it can be said that such a decision by the judge implies that the crime may be serious enough to be legally and socially blamable. And this reasoning also similarly applies to the case where a person commits a crime by negligence or a crime endangers private legal interest, not national or social legal interests.

Furthermore, in view of legislative technique, it is very hard to place limitation on the exercise of the voting right crime by crime, respectively considering individuality and distinctiveness of every single crime. Moreover, considering the legislative purpose of imposing criminal sanction against anti-social felons, such a legislative method cannot be more regarded reasonable in any case than the standard of punishment reflecting each crime's gravity. Given this, the Instant Provision, which restricts the right to vote based on the strict standard of 'imprisonment without prison labor or a heavier punishment', should not be deemed as going beyond the permissible boundary of

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legislative discretion or exceeding the scope necessary for achieving the legislative purposes.

4) Proportionality in the degree of restraint on the voting right

In this case, the disadvantage of the prisoners who are sentenced to imprisonment without prison labor or a heavier punishment is simply one of the effects resulted from the deprivation of qualification or suspension of qualification, which is less severe than the imprisonment without prison labor. And, it seems difficult to conclude that additional deprivation of qualification or suspension of qualification against a felon who is already sentenced to imprisonment without prison labor or a heavier punishment under Article 43 of the Criminal Act breaks balance in criminal punishment system or exceed the scope necessary for achieving the purposes and function of punishment against the crime. Therefore, the Instant Provision which restricts the right to vote corresponding to the aforementioned provisions of the Criminal Act should not be regarded as clearly unreasonable or unfair going far beyond the scope of legislative discretion.

Moreover, the Instant Provision strikes balance between legal interests, given the facts that the period of time during which prisoner's right to vote is suspended is not uniformly fixed, but until the 'end of execution of the imprisonment without prison labor or a heavier punishment', being decided based on each prisoner's sentence or in other words, proportionate to the gravity of the prisoner's criminal responsibility and the public interests of 'imposing criminal sanction on felons and enhancing people's respect to the rule of law' to be achieved by the Instant Provision are not dwarfed by the prisoner's private disadvantage of being suspended to exercise the voting right during the execution of punishment.

(C) As to whether the Instant Provision violates the Constitution for not excluding those who commit a crime of negligence; infringe private legal interests; are sentenced to short term imprisonment; and paroled

Now, the majority opinion of five justices stating that the Instant Provision violates the Constitution since the Instant Provision does not exclude, among criminals who are sentenced to imprisonment without prison labor or a heavier punishment, those who ① commit a crime of negligence; ② commit a crime related to private legal interest without relation to a anti state crime denying the constitutional order such as democracy; ③ are sentenced to short term imprisonment; and ④ are paroled is to be reviewed.

1) Whether the Instant Provision violates the Constitution for not excluding criminals who are sentenced to imprisonment without prison labor for negligence

The principle of responsibility, which is the basic principle of criminal law pertaining to punishment, contains two fold meanings: one is that punishment should be imposed only when causes for responsibility that makes it possible to blame an illegal act is recognized, which justifies the imposition of punishment itself (there is no crime without

responsibility), and another is that punishment that exceeds the responsibility cannot be imposed (the principle of balance between responsibility and punishment).

Therefore, in order for imposing punishment on a certain crime to be legitimate, responsibility of a criminal should be recognized and the statutory punishment should be proportionate to the degree of responsibility of the criminal. And judges should also pass sentence on the criminal corresponding to his/her responsibility within the prescribed scope of statutory punishment.

The principle of responsibility should apply to not only criminal negligence but also intentional offense. And, as the cause, for which a criminal who commits an intentional offense is responsible, means the possibility of being condemned for neglecting the duty of care, if a judge passes a reasonable sentence proportionate to the responsibility toward a specific crime on the basis of the principle of responsibility, the gravity of statutory punishments can be regarded as a clear and reasonable standard to decide the gravity of responsibility of a specific crime, or the degree of blamability, regardless of whether the crime is criminal negligence or intentional offense. In other words, under the premise that a statutory punishment is to be proportionate to the responsibility, if a person who commit a crime by negligence is sentenced to one year imprisonment without prison labor, it is reasonable to consider that the blamability of the person same or similar as that of a person who is sentenced to one year imprisonment without prison labor for committing an intentional crime and more than that of a person who is sentenced to imprisonment without prison labor for less than one year for committing an intentional crime. After all, when a person who commits a crime negligently is sentenced to imprisonment without prison labor, it is hard to say that his/her blamability is less than that of a person who commits a crime intentionally and sentenced to the same or less severe punishment only because he/she commits a crime by negligence.

As such, that the Instant Provision does not consider criminal negligence separately from intentional offense but restricts the right to vote on the basis of the standard of 'imprisonment without prison labor or a heavier punishment' seems reasonable. Rather, if a person is excluded from being subject to the Instant Provision simply because he/she commits a crime by negligence without considering the gravity of sentence, thereby possibly resulting in exclusion of a person who commits criminal negligence and is sentenced to a severe punishment as his/her responsibility is heavier than a specific criminal who commits a crime intentionally from being subject to the Instant Provision, this would be in violation of the equality among those who are sentenced to imprisonment without prison labor or a heavier punishment.

Therefore, we cannot state that the Instant Provision violates the Constitution simply because a person who commits a crime by negligence and is sentenced to imprisonment without prison labor or a heavier punishment is not excluded from being subject to the Instant Provision.

- 2) Whether the Instant Provision violates the Constitution as it does not exclude a person who commits a crime through infringing private legal interests not directly related to the right to vote and is accordingly sentenced to imprisonment without prison labor or a heavier punishment

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First of all, it is hard to conclude that all the crimes against private legal interests cause far less harm to the community than those against the state or society because even a crime against private legal interest also can seriously damage the social order depending on each crime's nature and degree of its illegality. Nevertheless, if crimes against private legal interests are uniformly excluded from being subject to the Instant Provision simply without considering gravity of each crime, there will be a problem of unequal treatment between prisoners who commit crimes against private legal interests and prisoners who commit crimes against social legal interests.

Also, there are several provisions in the Criminal Act which stipulate that the punishment of suspension of qualification pertaining to restriction on the right to vote can be imposed as an optional or concurrent punishment: optional punishments include crimes of inflicting bodily injury and violence (Article 257, Section 1) and concurrent punishments include homicide (Article 256), false arrest and illegal confinement (Article 282), fraud and extortion (Article 353), and embezzlement and misappropriation (Article 358).

According to the Instant Provision, although the aforementioned crimes are not directly related to the democratic order, the voting right, or the election system, it is possible to impose suspension of qualification pertaining to restriction on the right to vote. Given the fact that restriction on prisoner's right to vote also shares the characteristics of general punishment against crime, however, this discrepancy between the content of crime and punishment does not seem to be a serious problem. Namely, as it is impossible to conclude that a punishment that restricts physical freedom such as imprisonment without prison labor or imprisonment should be imposed only on a crime that infringes on a person's physical freedom or a punishment that restricts a person's property right should be imposed only on a crime that infringes a person's property right, it is also impossible to conclude that suspension of qualification such as restriction on the right to vote should be imposed only on a crime directly related to the democratic order, the voting right, or the election system.

Therefore, it cannot be said that the restriction on the right to vote pursuant to the Instant Provision which contains characteristics of criminal sanction should be imposed only on an anti-state crime that denies the constitutional order such as democracy or a crime directly related to restriction on the right to vote. In this sense, the Instant Provision cannot be deemed violative of the Constitution simply because it does not exclude such crimes from the scope of its application.

3) Whether the Instant Provision violates the Constitution as it does not exclude a prisoner who is sentenced to short term imprisonment

First, since among those who are sentenced to short-term imprisonment, a prisoner who is sentenced to imprisonment for more than 1 day to less than 30 days is not subject to the Instant Provision, his/her right to vote will not be suspended. And, as reviewed before, the standard of 'imprisonment without prison labor or a heavier punishment' is a very strict standard in our legal system and criminal practice, and such a sentence cannot be deemed a light one imposed on misdemeanor even though imprisonment is for short term, in that important basic rights such as the physical

freedom are restricted while confined in correctional facility for at least one month.

Also, in terms of criminal practice, it is very rare for a judge to sentence a criminal to less than six months imprisonment without prison labor or imprisonment, and if so, the period during which the criminal's right to vote is suspended is less than 6 month, same as the period of sentence imposed. Therefore, the possibility that a prisoner who is sentenced to the short term imprisonment may not be able to exercise his/her right to vote in the Presidential Election held every five years or in the National Assembly Election and local elections held every four years under the Public Official Election Act in this case seems not very high, and although an election is held while a prisoner serves his/her time, and thereby the right to vote is limited, considering the fact that the aforementioned three types of election are held at certain intervals, practically speaking, restriction on the voting right will not be more than one or two times.

Given the strictness of the standard of 'imprisonment without prison labor or a heavier punishment' and the low degree of restriction on the right to vote in practice, it is hard to conclude that the Instant Provision runs afoul of the Constitution in violation of the rule against excessive restriction, simply because it does not exclude a prisoner who is sentenced to short term imprisonment without prison labor or imprisonment from the scope of its application.

- 4) Whether the Instant Provision violates the Constitution as it does not exclude a person who is sentenced to imprisonment without prison labor or a heavier punishment and paroled under execution of sentence.

As parole, stipulated in Article 72, Section 1 of the Criminal Act, should be understood as a measure for granting benefit to a prisoner by an act of the administrative authorities on the basis of the correctional policy of a correctional facility or a criminal policy decision, not by the individual application or request by a prisoner. Even though a prisoner satisfies the requirements for parole stipulated in the above provision, that does not necessarily mean that the prisoner acquires the subject right to request parole or the correctional facility has a legal duty to provisionally release the prisoner. Rather, a prisoner may achieve the factual interest of being released before the termination of prison term only by an administrative disposition by the correctional authorities based on the aforementioned provision (*see* 7-1 KCCR 416, 421-422, 93Hun-Ma12, March 23, 1995; 19-2 KCCR 158, 162-163, 2006Hun-Ma298, July 26, 2007).

Also, the disposition of parole neither exempts the punishment nor nullifies the existing sentence of imprisonment without prison labor or a heavier punishment, and the period of parole shall be ten years in case of the imprisonment for life and remaining term in case of the imprisonment for definite term and when the period of parole has elapsed without losing its effect or being revoked, after the disposition of parole is made, the execution of sentence shall be considered to have been terminated (Article 73, Section 2; Article 76, Section 1 of the Criminal Act).

Meanwhile, as a person under execution of imprisonment without prison labor may be paroled when ten years of a life sentence or one-third of a limited term of punishment has been served (Article 72, Section 1 of the Criminal Act), a prisoner's right to vote

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is not newly suspended by the Instant Provision for the reason that he/she is paroled after a certain period of sentence execution has been lapsed, but is suspended pursuant to the Instant Provision and Article 43 of the Criminal Act, separate from the execution of imprisonment after being sentenced to imprisonment without prison labor or a heavier punishment. In other words, the decision as to whether there should be a provision of exception by which the application of the Instant Provision is excluded is not about restriction on the basic rights, but about a matter as to whether the additional criminal sanction of restriction on the right to vote, which is imposed when the imprisonment without prison labor or a heavier punishment is sentenced, should be partially exempted due to the ex-post reason of being paroled. As it is difficult to say that the legislature has a duty to provide such a provision of ex-post exemption of such a criminal sanction for the benefit of prisoner, it is an issue to be decided from the perspective of legislative policy.

Moreover, according to Article 72, Section 2 of the Criminal Act, if a fine or a minor fine has been imposed concurrently with the punishment, the amount thereof shall be paid in full in order for the parole to be granted. This provision means that the causes for parole do not automatically relieve the other concurrent punishments. Given the provision of the Criminal Act, it is difficult to conclude that the legislature exceeds the limit of legislative discretion because it fails to provide a provision that exempts the separate criminal sanction other than the execution of imprisonment, which is the restriction on the parolee's right to vote.

For the foregoing reasons, the Instant Provision cannot be deemed unconstitutional as it does not provide a provision of exception by which a parolee is excluded from being subject to the Instant Provision.

(D) Sub-conclusion

The Instant Provision does not infringe on the complainant's right to vote as it is not in violation of the rule against excessive restriction under Article 37, Section 2 of the Constitution.

5. whether the Instant Provision infringes on the right to equality

Now, we turn to the issue as to whether the complainant, who is a prisoner sentenced to imprisonment without prison labor or a heavier punishment, is treated discriminatorily from other general citizens in the political aspect of life by the Instant Provision's restriction on the right to vote.

As such discrimination mentioned before is resulted from the restriction on the right to vote of a prisoner who is sentenced to imprisonment without prison labor or a heavier punishment imposed by the Instant Provision on the basis of the legislative purpose of imposing criminal sanction and deterring crime therefrom and heightening the law abiding spirits, and as we reviewed before, since the restriction on the right to vote by the Instant Provision does not violate the rule against least restrictive means, the resultant discrimination, which is based on rational causes, also should not be considered arbitrary, going far beyond the limit of legislative discretion.

6. Conclusion

For the foregoing reasons, this constitutional complaint should be denied.

C. Opinion of dismissal by Justice Lee Kang-kook

Article 43, Section 2 of the Criminal Act stipulates that a person who is sentenced to imprisonment for a limited term or imprisonment without prison labor for a limited term shall be under suspension of qualifications, such as the right to vote under the Public Officials Election Act, until the execution of punishment is completed or remitted. According to this, the suspension of qualifications takes effect when the sentence of imprisonment for a limited term or imprisonment without prison labor for a limited term is finalized. As the Instant Provision reflects the effect of Article 43, Section 2 of the Criminal Act, the cause of action for the infringement on the basic rights, including the restriction on the right to vote, by the Instant Provision also arises when the sentence is finalized, like in Article 43, Section 2 of the Criminal Act (*see* 16-1 KCCR 468, 476, 2002Hun-Ma411, December 27, 2007).

In this case, however, the complainant file this constitutional complaint on December 27, 2007, after one year has elapsed since November 23, 2006 when the complainant's sentence to imprisonment was finalized and the right to vote under Public Law was suspended therefrom.

Therefore, this constitutional complaint should be dismissed as it fails to meet the time limit for filing, stipulated in Article 69, Section 1 of the Constitutional Court Act, which requires a constitutional complaint to be filed within one year after the day when the basic rights are infringed.

IV. Conclusion

Regarding the Instant Provision, five Justices including Justice Kim Hee-ok, Justice Kim Jong-dae, Justice Min Hyeong-ki, Justice Mok Young-joon and Justice Song Doo-hwan present a unconstitutionality opinion; three Justices including Justice Lee Kong-hyun, Justice Cho Dae-hyen and Justice Lee Dong-heub present a denial opinion; and Justice Lee Kang-kook presents a dismissal opinion. The unconstitutionality opinion being the majority opinion, nevertheless, falls behind the quorum of six Justices needed for the holding of unconstitutionality. Therefore, we decide as the Holding.