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Notable Cases on Constitutional Law

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*Translated by JKL student editors***

I. Constitutional Court Decision 2017Hun-Ba127, Decided Apr. 11, 2019. - Case on the Crime of Abortion -

□ *Background of the Case*

The petitioner is an obstetrician-gynecologist indicted for performing abortions under the request or with the consent of pregnant women. While the case was pending in its first trial, the petitioner filed a motion requesting the trial court to refer Article 269 Section 1 and Article 270 Section 1 of the Criminal Act to the Constitutional Court for constitutional review. After the motion was declined, the petitioner filed a constitutional complaint against the above provisions.

□ *Subject Matter of Review*

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

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

Article 269 (Abortion) (1) A woman who procures her own abortion through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won.

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

□ *Holding of Decision*

The Abortion Provision and the Abortion by Doctor Provision do not conform to the Constitution. The provisions shall remain effective until the legislature amends them within the time limit of December 31, 2020.

□ *Reasoning of Decision*

1. Opinion of Nonconformity to the Constitution by Four Justices (Nam-seok Yoo, Gi-seok Seo, Seon-ae Lee, and Young-jin Lee)

A. The right to self-determination and abortion

The right to self-determination derived from the first sentence of Article 10 of the Constitution includes the right of women to autonomously establish their own lives based upon their human dignity and encompasses the right of pregnant women to decide whether to continue their pregnancy and give birth. The Abortion Provision completely and indiscriminately bans all abortions throughout all stages of gestation and forces pregnant women to continue their pregnancy by imposing criminal punishment. Thus, the Abortion Provision restricts on the right to self-determination of pregnant women.

B. Whether the Abortion Provision violates the right to self-determination of pregnant women

1) The right to life of a fetus and the obligation of the state to protect life

Although the right to life is not expressly stipulated in the text of the

Constitution, it is evident that the right to life is an *a priori* natural right based upon the human instinct to survive and the very purpose of human existence, functioning as a premise for all other constitutional rights and being the "right of rights." All humans are subjects of the right to life and this right should also be extended to fetuses which are lives in the making. This is because even though a fetus relies upon its mother for its survival, it is still a living being independent from its mother and there is a high probability for a fetus to grow into a full human being. Therefore, a fetus also is a subject of the right to life and the state is compelled to protect fetal life under the second sentence of Article 10 of the Constitution.

2) Standard of review

This case concerns whether the Abortion Provision, legislated by the state to protect the fetal right to life, violates the principle of proportionality and thus is unconstitutional. In light of the enactment of the Abortion Provision, it is improper to review this case on the standard of "the conflict of constitutional rights" between the right to self-determination of a pregnant woman and the right to life of a fetus.

3) Legitimacy of the legislative purpose and the appropriateness of means

The Abortion Provision aims to protect the life of a fetus, and therefore is an appropriate means to reach a legitimate purpose.

4) Principle of least restrictive means and the balance of legal interests

If provided with the best medical care, a fetus may survive autonomously from around 22 weeks of gestation. Meanwhile, in order for the right to self-determination to be guaranteed, a pregnant woman should be given enough time to decide whether to continue her pregnancy and execute that decision. Given these considerations, the abortion may be allowed if it is before 22 weeks of gestation and after a sufficient amount of time has been granted for the pregnant woman to exercise her right to self-determination (hereinafter, the period from the time of implantation to said point will be referred to as "Permissible Period for Determination").

As the threat of criminal punishment has only limited effects on the decision of terminating pregnancy and the number of cases leading to actual punishment is very rare, the Abortion Provision is ineffective in

protecting fetal life. On the other hand, women who find themselves in the dilemma of abortion are led to seek precarious ways to abort due to threats of criminal punishment.

The Abortion Provision forces the continuation of pregnancy and childbirth without any concern with respect to the various and far-reaching socioeconomic complications pregnant women face that may lead to abortion, only allowing exceptions stipulated in the Mother and Child Health Act. However, exceptions recognized by the Mother and Child Health Act are extremely limited and therefore are unable to encompass the various social and economic reasons for seeking abortions. For instance, concerns about difficulty in continuing jobs, studies, or other social activities; low or unstable income; lack of resources to care for another child; no desire to continue a dating relationship or enter into a marital relationship with the partner; discovery of pregnancy at a point when the marriage has in effect broken down irretrievably, break-up of a dating relationship with the partner; unwanted pregnancy of an unmarried minor woman; etc., may be included in such cases.

Therefore, the Abortion Provision does not satisfy the principle of least restrictive means since it restricts a pregnant woman's right to self-determination beyond the minimum extent necessary to achieve its legislative purpose. Moreover, the Abortion Provision violates the principle of balance of interests since it gives absolute and unilateral superiority to the public interest in protecting fetal life. For these reasons, the Abortion Provision violates the principle of proportionality and infringes the right to self-determination of a pregnant woman. The Abortion by Doctor Provision is unconstitutional for the same reason the Abortion Provision is unconstitutional.

C. A decision of nonconformity to the Constitution

The unconstitutionality of the Provisions at Issue lies in the fact that all pregnant women who do not fall under the exceptions referred to in the Mother and Child Health Act are criminally punished with no exceptions, even if they undergo the conflict of determining the abortion based on social and economic reasons. Banning and criminalizing abortions is not in itself unconstitutional for all cases. Thus, delivering a decision of simple unconstitutionality for each of the Provisions at Issue would create an

intolerable legal vacuum in which no one is punished for abortions procured during all periods of pregnancy.

It is within the discretion of the legislature to remove the unconstitutional elements from the Provisions at Issue and decide how abortion will be regulated. The legislature has, within the limits that we have noted above, the discretion to decide "the length and end date of the Permissible Period for Determination," "the social and economic determinants," "additional procedural requirements such as counseling or deliberation period before an abortion could take place," and so forth.

Therefore, the Court renders a decision of nonconformity to the Constitution for the Provisions at Issue, and it is reasonable to order their temporary application until the legislature amends them. The legislature should amend them by December 31, 2020, and if amendments are not made by then, the Provisions at Issue lose their effect from January 1, 2021.

2. Opinion of Simple Unconstitutionality by Three Justices (Seok-tae Lee, Eun-ae Lee, and Ki-young Kim)

While the State has the obligation to pursue the public interest of protecting fetal life, the fact a fetus is a living being does not necessarily require the same legal effect throughout the successive stages of growth. It is not impossible for the legal order to classify human growth into certain stages and to apply different legal effects to each stage of development, although the life itself remains identical. Therefore, the state can differentiate the degree and the means of protection according to the evolving states of human life as it takes legislative actions to protect life (see Constitutional Court Decision 2004Hun-Ba81 Decided Jul. 31, 2008).

The Provisions at Issue violate the principle of proportionality by imposing a complete and indiscriminative ban on all abortions including safe ones during the first trimester of pregnancy (up to 14 weeks of gestation since the first day of the last menstrual period). Therefore, they infringe the right to self-determination of pregnant women.

Furthermore, we do not see that striking down the Provisions at Issue would cause immense legal confusion or impose social costs, because these provisions have had only a limited effect on deterring abortions and have not functioned properly as penalty provisions. Meanwhile, rendering a

decision of nonconformity on criminal laws not only contradicts with principle of the retroactive effects of nullification of unconstitutional criminal law, it is also severe in that it imposes the burden of the legal vacuum to individuals. In addition, as stated above, the parts of the Provisions at Issue concerning criminalizing abortion during the first trimester of pregnancy clearly violate the Constitution, so the scope of punishment is not uncertain. Therefore, the Court should deliver a decision of simple unconstitutionality for the Provisions at Issue.

3. Dissenting Opinion by Two Justices (Yong-ho Cho and Jong-seok Lee)

Since a fetus and a person are at sequential stages of human development, we hardly see any essential difference between the two in terms of the level of human dignity and need for life protection. As such, we find that a fetus has the right to life as well.

The legislative purpose of the Abortion Provision, the protection of fetal life, is of considerable significance. Moreover, we do not see other effective means which restrict a pregnant woman's right to self-determination to a lesser degree while equally protecting the public interest in protecting fetal life than banning and criminalizing abortion.

We do not see that the importance of the public interest in protecting fetal life varies according to the stages of fetal development and that the right to life of fetus could be outweighed by the right to dignity or right to self-determination of a pregnant woman.

The majority opinion suggests that "social and economic determinants" should be recognized as permissible grounds for abortion; however, the concept and scope of such reasons are very vague, and it would be difficult to objectively ascertain whether a woman's social and economic situations qualify as permissible reasons justifying abortion. We are concerned that legalization of abortion on social and economic grounds would produce the same result as the complete legalization of abortion – the widespread disrespect for human life in our society.

Although it is true that the Abortion Provision restricts the right to self-determination of pregnant women to some extent, such a restriction does not outweigh the substantial public interest in protecting fetal life to be served by the Abortion Provision. Thus, the Abortion Provision does not

violate the balance of interests.

4. Conclusion

Since the opinion of simple unconstitutionality is rendered by three Justices and the opinion of nonconformity to the Constitution is rendered by four Justices, the number of the opinion of simple unconstitutionality itself does not satisfy the quorum (six) required for decision of unconstitutionality. Therefore, the Court declares that the Provisions at Issue does not conform to the Constitution.

□ *Comments*

Since the "abortion" is a matter related to world-views, views on life, and ethical or religious value judgments, the controversies on the abortion will go on despite the decision of the Constitutional Court. However, at least on the normative level of constitutional interpretation, the controversy on the constitutionality of anti-abortion clauses has come to an end.

The opinion of nonconformity to the Constitution is that women who are in the dilemma of abortion due to social and economic reasons should be permitted to undergo abortions until some point (so-called "Permissible Period for Determination") up to 22 weeks of gestation, which is the point when the fetus is able to survive independently outside the womb, while the opinion of simple unconstitutionality takes the position that abortions cannot be restricted in the first trimester of pregnancy, which means up to 14 weeks of gestation since the first day of the last menstrual period. Both positions are based on the premise that the degree of protection for life can be varied according to the stages of fetal development while also recognizing the fetus's right to life. Those are based on the special situation of fetuses, which must rely on the mother for survival.

In the case of the opinion of nonconformity to the Constitution, it is unclear what "social, economic reason" means; while in the case of the opinion of simple unconstitutionality, dividing the pregnancy period into trimesters is arbitrary, and the argument that abortion should be permitted in the first trimester "because a safe abortion is possible" is questionable.

The opinion of constitutionality is based on the premise that the degree

of protection of life cannot be varied according to the stages of fetal development since fetal life is identical to human life. According to the opinion of constitutionality, the fetus's right to life always outweighs a pregnant woman's right to self-determination, and this conclusion is in fact the same as dismissing the right to self-determination in when abortion is concerned.

On the issue of conflict of constitutional rights, the opinion of nonconformity to the Constitution stated that the principle of proportionality should be applied to the Provisions at issue, and that it is inappropriate to apply "the conflict of constitutional rights" to this case, while the opinion of constitutionality saw the issue as the conflict of constitutional rights between the fetus's right to life and the pregnant woman's right to self-determination. The opinion of nonconformity to the Constitution is understood to mean that if there are already statutory enactments to protect conflicting constitutional rights, there is no need to evaluate the conflict of constitutional rights, and the principle of proportionality should be applied in a judicial review on the existing statutes. This attitude is different from the traditional position of the Constitutional Court, which reviewed the "conflict of constitutional rights" even when statutory enactments already exist. It could be possible that the Constitutional Court has changed its position on which cases to apply the conflict of constitutional rights. This decision, however, made no explicit statement regarding the precedents relating to previous positions on the conflict of constitutional rights.

As for a decision of nonconformity to the Constitution, it is possible raise such criticism as follows. First, on general grounds, an opinion of nonconformity to the Constitution on criminal penalty provisions cannot be allowed in that it is contrary to explicit provisions of the Constitutional Court Act. Second, while the opinion of nonconformity to the Constitution insists that decision of simple unconstitutionality would lead to a legal vacuum where punishment of acts of abortion that actually require punishment is impossible, this logic is contradictory to its own judgement that provisions criminalizing abortion lack effectiveness.

II. Constitutional Court Decision 2015Hun-Ma1204, Decided February 28, 2019 - Case on Rights to Interview of a Potential Counsel -

□ *Background of the Case*

Upon request of criminal suspect A's family, the petitioner (a lawyer) visited the prosecutor's office and asked for permission from the prosecutor to interview the criminal suspect as a potential defense counsel, which was denied. The petitioner remained in the prosecutor's office but eventually left without being able to interview the criminal suspect. The prosecutor continued to interrogate the criminal suspect afterwards, and the petitioner was not retained as the criminal suspect's defense counsel. The petitioner filed a constitutional complaint, arguing that the act by the prosecutor of denying the request for interview infringed upon his constitutional right to become a defense counsel.

□ *Subject Matter of Review*

The subject matter of review in this case is whether the prosecutor's action that denied the petitioner's request to interview the criminal suspect at 19:00 on October 6, 2015 infringed on petitioner's constitutional right.

□ *Holding of Decision*

The action of denying the petitioner's request for interview of the criminal suspect A is unconstitutional in that it infringes upon the interview and communication rights of the petitioner who desires to become a defense counsel.

□ *Reasoning of Decision*

1. Opinion of Unconstitutionality by Six Justices (Nam-seok Yoo, Gi-seok Seo, Seon-ae Lee, Seok-tae Lee, Young-jin Lee, and Ki-young Kim)

A. Acknowledgement of the right of a potential counsel to interview and communication with the suspect as a constitutional right

The right to interview and communication of criminal suspects and defendants (hereinafter referred to as "suspects") with a "person who desires to become a defense counsel" (hereinafter referred to as "potential counsel") should be protected as a constitutional right under the Constitution. The right of interview and communication of a potential counsel is in effect to enhance the right of the suspects to retain a defense counsel to obtain legal assistance, and if a potential counsel's right to interview and communication is not ensured, it would be difficult for the suspects to receive sufficient legal assistance from an attorney. Thus, the interview and communication right of a potential counsel is essential to effective assistance for the suspects and must be viewed as identical with the right of the suspects to interview and communication with a potential counsel, which is a constitutional right. Hence, the interview and communication right of a potential counsel should also be guaranteed as a constitutional right to substantively ensure the right of the suspects to receive legal assistance from a potential counsel.

B. Denial of a potential counsel's request to interview the criminal suspect infringes upon the interview and communication right of the potential counsel

The petitioner's interview and communication right with regard to the criminal suspect was restricted as the petitioner left the office without interviewing the suspect due to the denial by the respondent prosecutor. A measure to allow the interview and communication between the petitioner and the criminal suspect could have been taken at the prosecutor's office or a separate counsel consultation room before the interrogation took place, since the criminal suspect was set to be interrogated during nighttime of the same day. While the right to interview and communication of the defense counsel can be restricted based on the legal statutes, neither the Constitution nor the Criminal Procedure Act has a provision which allows restriction or denial of the request of a defense counsel or a potential

counsel to interview the suspect during interrogation. The denial by the prosecutor infringed upon the petitioner's right to interview and communication as it limited this right without constitutional or legal grounds.

2. *Dissenting Opinion by Three Justices (Yong-ho Cho, Eun-ae Lee, and Jong-seok Lee)*

A. *The right to interview and communication of a potential counsel is not a constitutional right*

The potential counsel's right to interview and communication with suspects is merely a statutory right formed by individual laws such as the Criminal Procedure Act and cannot be deemed as an independent constitutional right protected by the Constitution.

The main purpose of the potential counsel for interviewing and communicating with the suspects lies in taking a case rather than providing legal assistance to the suspects. The disadvantage for the potential counsel which results from a failure to interview the suspects or to take a criminal case simply consists of indirect, factual, and economic interests. Considering that the right to interview and communication of the potential counsel is recognized before any legal assistance is actually provided for the suspects, the right to interview and communication of a potential counsel cannot be viewed as identical with the right of the suspects to receive legal assistance. The failure to guarantee the potential counsel's right as a constitutional right does not lead to the failure to protect the right of the suspects to receive sufficient legal assistance. Consequently, even though we agree that the essence of the right of the defense counsel to provide legal assistance for the suspects should be protected as a constitutional right, this does not necessarily mean that the right to interview and communication of the potential counsel must be regarded as a constitutional right.

□ *Comments*

Article 12 Section 4 of the Constitution stipulates only the right of criminal suspects or defendants to receive legal assistance, and the right of the defense counsel or the potential counsel to interview criminal suspects

or defendants is stipulated in the Article 34 of the Criminal Procedure Act. The Constitutional Court had ruled that the right to interview and communication of the defense counsel is not a constitutional right but only a statutory right stipulated in the Criminal Procedure Act (Constitutional Court Decision 89Hun-Ma181, Decided Jul. 8, 1991). But afterwards, the Court has ruled that the essence of the right of the defense counsel to provide legal assistance for the criminal suspects and defendants is protected as a constitutional right(Constitutional Court Decision 2000Hun-Ma474, Decided Mar. 27, 2003; Constitutional Court Decision 2016Hun-Ma503, Decided Nov. 30, 2017). There has been a dissenting opinion that the "right to provide legal assistance as a counsel" is merely a statutory right to guarantee sufficiently the "right to receive legal assistance from the defense counsel" which is a constitutional right protected by the Constitution.

This decision is a case where the "right of the counsel to provide legal assistance for the criminal suspect or the accused" is applied not only to the "defense counsel," who is currently retained as a defense counsel, but also to the "person who desire to become a defense counsel (potential counsel)" who is yet to be retained as a defense counsel.

III. Constitutional Court Decision No. 2015Hun-Ka38, Decided August 30, 2018 - Case on Professors' Union -

□ *Background of the Case*

The petitioner is a national-level union with teachers of universities or colleges as its members. The petitioner applied for establishment of a labor union to the Minister of Employment and Labor, which was rejected by the Minister on the grounds that the labor union of teachers of university or college is not allowed. Under current laws, the Trade Union and Labor Relations Adjustment Act (hereinafter the "Labor Union Act") and the Act of Establishment, Operation, etc. of Teachers' Union (hereinafter the "Teacher's Union Act") limits the scope of teachers' union only to elementary and secondary school teachers. The petitioner filed against the rejection of the Minister of Employment and Labor, and in the course of the trial, raised

the motion to request a constitutional review on the constitutionality of the provisions at issue. The trial court granted the motion and referred the request to the Constitutional Court to adjudicate the constitutionality of the provisions.

□ *Subject Matter of Review*

The subject matter of review in this Case is the constitutionality of Article 2 of the Teacher's Union Act (amended by Act No. 10132 on March 7, 2010) which limits the scope of teachers' union only to elementary and secondary school teachers.

The Teacher's Union Act (amended by Act No. 10132 on March 7, 2010)
Article 2 (Definition)
The term "teacher" means a teacher referred to in Article 19 (1) of the Elementary and Secondary Education Act.

□ *Holding of Decision*

Article 2 of the Teacher's Union Act (amended by Act No. 10132 on March 7, 2010) does not conform to the Constitution.

The above provision shall remain effective until the legislature amends them within the time limit of March 31, 2020.

□ *Reasoning of Decision*

1. Opinion of Nonconformity to the Constitution (Jin-sung Lee, Yi-soo Kim, Chang-ho Ahn, Il-won Kang, Gi-seok Seo, Seon-ae Lee, and Nam-seok Yoo)

A. Issues and Standard of review

Article 33, Section 1 of the Constitution states that "to enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action," thereby declaring the three labor rights including the right to independently associate, namely to organize, as basic constitutional rights. "Workers" here is taken to mean

"any person who lives on wages, a salary, or any other income equivalent thereto, regardless of the person's occupation," i.e. wage laborers (as defined in Article 2, Subparagraph 1 of the Labor Union Act), and includes teachers, as teachers engage in labor to provide instruction and education to students and live on wages, salaries, or any other income equivalent thereto received as compensation for that work.

The issue at hand in this case, then, is whether the denial of the right of university professors to unionize can be constitutionally justified. In this case, the argument on equality is essentially identical to the argument on the unconstitutionality of the violation of the right to independent association.

Article 33 Section 2 of the Constitution stipulates that "only those public officials who are designated by law shall have the right to association, collective bargaining and collective action." The Court reviews the case at hand by differentiating "university faculty who are not public educational officials" and "university faculty who are public educational officials," and assessing whether the restriction on the right to independent association violates the Constitution in the case of each group. The review criteria shall be the principle of proportionality in the case of university faculty who are not public educational officials, while the rational test, which examine whether restriction is excessive beyond the scope of legislative discretion, in the case of university faculty who are public educational officials.

B. Infringement on university faculty members' right to organize

1) The case of university faculty who are not public educational officials

The right to organize is the core fundamental right among the three constitutionally guaranteed labor rights. The legislative purpose of the provision at issue cannot be justified and the appropriateness of its means also cannot be acknowledged, in limiting the qualifications for establishing, joining, and participating in teachers' unions only to elementary and secondary schoolteachers, thereby systematically denying to university faculty who are not public educational officials the right to organize, which lies at the core of basic constitutional labor rights.

Even if the particular characteristics of university faculty which differentiate them from elementary and secondary schoolteachers or from ordinary workers are to be acknowledged, the sweeping denial of their

right to organize cannot be deemed a necessary and minimal restriction of rights, since such alternative methods as allowing the formation of unions while placing university faculty unions under heavier restrictions compared to other labor unions would be readily available. In addition to this, considering the current situation which, following the diversification of institutions of higher education, calls for improvements to the socioeconomic status of university faculty, the disadvantages imposed on university faculty members who, unable to unionize, can only individually demand improvements in working conditions through faculty councils, etc. formed within each institution, would be intolerably grave. It follows, then, that the provision at issue violates the constitutional principle of proportionality.

2) The case of university faculty who are also public educational officials

While public educational officials are indeed public officials whose mission is to serve the general public through education, the nature of their work has the special characteristic of improving public welfare through providing labor in the form of education in order to meet the public's demand based on the public's right to receive education. In this sense, public educational officials cannot be deemed to exercise important and independent discretionary authority in forming the relationship between citizens and the state. Considering these vocational characteristics of public educational officials and the essence of Article 33, Section 1, 2 of the Constitution, the legislative decision to entirely deny the three core labor rights to public educational officials is excessive beyond reasonable discretion, and therefore inadmissible.

C. The need for a nonconformity decision

The provision at issue is unconstitutional because it violates university faculty members' right to organize; however, if the provision is declared null and void following a decision of simple unconstitutionality, the legal basis for elementary and secondary school teachers to establish a teachers' union would become nonexistent, thereby creating a legal vacuum. In addition, the legislature has discretion on how to amend the provision albeit limited by the intent of the Constitutional Court's decision. Therefore, there is a need to keep the provision at issue effective and applicable until the legislature amends the provision.

2. Dissenting Opinion (Chang-jong Kim and Yong-ho Cho)

The main issue of this case is whether the provision at issue violates the principle of equality because it denies university professors' right to organize while granting the same right to elementary and secondary school teachers. It is worth noting that the status of university faculty members is distinctive from those of elementary and secondary school teachers, in the sense that job security and working conditions of university faculty members are guaranteed by the Constitution and law, in addition to protecting their independence and autonomy through an institutional assurance of academic freedom. University faculty members, as subjects of autonomy of institutions of higher learning, participate in the decision-making process concerning overall educational management. Moreover, unlike elementary and secondary school teachers, university faculty members are able to join a political party or participate in an election campaign and thus can widely participate in developing social policies and institutional frameworks. They are also distinguished from elementary and secondary school teachers in that they can seek ways to advance their socioeconomic status through expert groups or professors' associations, even if it may not be an association in the form of a union. Therefore, the Instant Provision does not violate the principle of equality since there are reasonable grounds for the discriminatory treatment.

□ *Comments*

This case is about a decision on whether not permitting university faculty members to establish a labor union, which is permitted for elementary, middle and high school teachers, violates the constitutional rights of university professors.

Whereas the majority opinion considered the main issue of this case to be the violation of university professors' right to organize, the dissenting opinion of two justices regarded it as an issue of equality between professors on the one hand, and elementary, middle and high school teachers on the other.

The review of whether the right to organize has been violated has to be

conducted in light of the principle of proportionality, while for the right to equality, the review can be conducted using a rationality test which is a more lenient standard of review compared to the principle of proportionality. Such a difference in the level of scrutiny has resulted in the difference in conclusions.

In determining the unconstitutionality of the subject matter under review, the majority opinion conducted separate reviews for the case of private university professors and that of public university professors. This is because Article 33 Section 2 of the Constitution stipulates that for public officials, "[o]nly those who are designated by Act" have the three labor rights (rights to organize, collective bargaining and collective action), unlike for ordinary workers, who generally enjoy the three rights under the Constitution.

In this decision, the Constitutional Court regarded university professors as unequivocally falling under the category of "workers" in that "workers" refer to wageworkers regardless of the type of occupation, and university faculty members who receive wages or salary as remuneration for their service are without any doubt workers.

However, it is questionable whether university professors are workers with respect to the aforementioned labor rights, considering that the three labor rights are aimed at protecting laborers, including ensuring an improvement of labor conditions while bearing in mind the precarious position of laborers who are subordinate to employers in labor-management relations. From a historical point of view, it is hard to regard university professors as being tantamount to workers in labor-management relations; moreover, the Constitution specifically stipulates "autonomy of institutions of higher learning" in Section 4 of Article 31, which is a constitutional right guaranteed for university professors.

Yet, with socioeconomic changes, the status of university professors has undergone changes. Even among university professors, there are various statuses depending on the type of employment (for instance, contract workers, temporary workers, part-time lecturers, adjunct lecturers), and some of them are in a disadvantaged position in relation to their employers, which are universities (legal entity of private university, the government, or public legal entity). Such a position is not so different from that of ordinary workers. Taking these changes of circumstances into account, it is hard to

deny that at least some university faculty members are not different from workers. Above all, the members of the petitioner of the case at hand have claimed themselves to be workers.

Whether university professors can be deemed as "workers" within the meaning of the aforementioned Article is an issue open to further discussion.

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