

The Right to Vote of Nationals Residing Abroad Case

[19-1 KCCR 859, 2004 Hun-Ma 644 et al., June 28, 2007]

Held, the Act providing that (1) voters need to be registered as residents in order to be able to cast their votes for the presidential election, national assembly election, local election, and national referendum as well as to be eligible to be elected in such elections, (2) registering for absentee ballots is allowed only for registered residents, thereby excluding Korean nationals abroad who are not allowed to register as residents, is not in conformity with the Constitution.

Background of the Case

The Public Official Election and Prevention of Election Irregularities Act and the National Referendum Act provide that (1) in order to exercise voting rights for the presidential election, national assembly election, local election, and national referendum as well as to be eligible to be elected in such elections, s/he needs to be registered as residents and (2) absentee voting is allowed only for those who reside in Korea. The complainants, Korean nationals holding Japanese or United States or Canadian green card, claiming that the statutory provisions at issue in this case, preventing people including the complainants who are unable to register because they reside outside Korea in this case from voting, violate their voting rights, the principle of popular election and the equal protection clause, filed the constitutional complaint.

Summary of the Opinions

The Constitutional Court unanimously has announced the decision holding that the statutory provisions at issue in this case are in violation of the Constitution. However, for the purpose of avoiding any confusion due to the legal vacuum generated by this holding and providing ample time to legislate new provisions, the Court issued a decision of nonconformity to the Constitution with the order of continuing application of the provisions at issue, making December 31st, 2008 as the deadline for new legislation. The majority opinion is followed by separate opinions by two Justices.

1. Summary of the Majority Opinion

A. Concerning Voting Rights for the Presidential and National Assembly Election (in short, Voting Rights for State Elections)

(1) Exercising the right to vote, as the practical means to realize the principle of popular sovereignty, functions both as an important channel to reflect people's wishes upon state affairs and as the means to control over state power via periodical elections. That is why political rights including the right to vote are considered to hold a supreme status over other fundamental rights in order to realize the principle of popular sovereignty. Although the Constitution provides that "all citizens shall have the right to vote under the conditions as prescribed by statute" (Article 24), it means that the right to vote should be realized

concretely through congressional legislation. Therefore, any legislation restrictive of the right to vote cannot be justified directly by Article 24 of the Constitution. Merely, under Article 37 Section 2 of the Constitution, any legislation restricting the right to vote can be justified "only when necessary for national security, maintenance of law and order, or public welfare." And even when such restriction is imposed, no essential aspect of the right to vote shall be violated.

(2) (A) Even if it is allowed for Korean nationals abroad to exercise the right to vote, under our special circumstances, putting restriction on the right to vote of North Korean nationals and Japanese Koreans with North Korean citizenship is allowed. Therefore, given the fact that Korean nationals abroad hold Korean passports, it is distinguishable to tell them from others. Also, in case we are able to utilize the registration system for Korean nationals abroad and the reporting system for Korean nationals abroad living in Korea, we can prevent the danger that North Korean nationals and Japanese Koreans with North Korean citizenship are eligible for the exercise of the right to vote.

(B) The government has prime responsibility for guaranteeing the fairness of election. Since raising an issue of fairness of election cannot be the reason of denying the right to vote of certain groups of people, any expected possibility of having unfair election can be eliminated by (1) putting a proper limitation on election campaign abroad, (2) introducing ways to identify voters (3) restricting on campaign fund spending beforehand and afterwards. Also, *ex post facto* control might be feasible by putting the matters on trial.

(C) Any technical problem in managing overseas election can be overcome by innovation of information and communications technology. Considering that Korean nationals abroad are able to access the information on candidates via Internet and other means, any technical problem in overseas election cannot be a reasonable excuse to strip the right to vote from Korean nationals abroad.

(D) The Constitution does not intend that the people are allowed to exercise their fundamental rights in exchange for undertaking their duties such as paying taxes and doing military service. Also, considering (1) any Korean national abroad can perform their duty of military service if he wants, (2) there are Korean nationals abroad existing including women who have nothing to do with military service, (3) the fact that some of the complainant completed their military service duty, non-fulfillment of payment of taxes and military service duty cannot be a reason to deny the right to vote of Korean nationals abroad.

(E) Putting any restrictions on the right to vote can be justified only when there exists an inevitably particular, certain reason to do so. Reasons such as obscure and intangible risk, technical difficulty or obstacle which can be overcome through the efforts by the government, cannot be the justifying factors to put such restrictions on the right to vote. The statutory provisions at issue in this case provide that whether anyone is registered as a resident can be a determinative factor to decide s/he would be eligible for voting list, thereby flatly denying the right to vote of the Korean nationals abroad who are not eligible to register as residents under the Resident Registration Act. Such a denial of right is of no

just legislative purpose, therefore violates the right to vote, right to equality of Korean nationals abroad, and the principle of popular election.

(3) (A) Even if financial costs upon the candidates as well as the social cost upon the nation would be on the increase following the extension of election campaign, those burdens are not unbearable considering the economic power Korea has. Also, any concern for the future increase of campaign fund spending cannot be a factor limiting the exercise of voting rights. In this international era where more and more Korean nationals emigrate to foreign countries, the fact they have emigrated voluntarily cannot be a justifying reason to deny someone from exercising the right to vote which is one of the fundamental rights granted to every citizen.

(B) Therefore, restrictively allowing Korean nationals who live in Korea to be eligible for the voter registration list so they can vote using absentee ballot, thereby denying any possibility that Korean nationals abroad and Korean nationals staying overseas for short period of time are able to exercise their right to vote, is of no just legislative purpose, thus violates the right to vote and right to equality of Korean nationals abroad. Also it violates the principle of popular election.

B. Concerning Voting Rights and Eligibility for Local Election

(1) Korean nationals abroad residing in Korea is the people who cannot register as residents according to the Resident Registration Act. However, they are 'Korean nationals living in Korea' and in reality they are no different from 'Korean nationals registered in Korea' in terms of living in the same environments and sharing the same responsibility in their local district. Therefore there is no reasonable cause to justify any discrimination when it comes to granting the right to vote for local election. Furthermore, the Public Official Election and Prevention of Election Irregularities Act provides certain foreigners with the right to vote. Thus the reality amounts to the unjust result where the right to vote for local election reserved for Korean nationals abroad which is 'constitutional right' is being trumped by the right to vote for local election reserved for foreigners which is 'statutory right.' For the reasons stated above, stripping the right to vote for local election reserved for Korean nationals abroad living in Korea, just because they are not being registered as residents regardless the length of their stay, violates the right to equality as well as the right to vote for local election.

(2) Even if Korean nationals abroad are not allowed to register as residents in Korea, they can formulate a close tie with the community they live in as they live in the community for a long period of time. Also, considering that in general election anyone above age 25 can be elected as a member of Korean Assembly, the local election restriction where only registered residents are allowed to be elected is something of no persuasive power. Therefore, flatly denying the right to vote of Korean nationals abroad living in Korea for certain period of time who also have close ties with the community just because they cannot be registered as residents under the current law violates their right to hold public office.

C. Concerning Right to Vote in National Referendum

National Referendum is a process where citizens make decisions regarding the vital national-policy-making and the constitutional amendments as supreme rulers. Whether someone is registered as resident is a factor which cannot affect their status of citizens as supreme rulers. Therefore, denying the right to vote of the Korean nationals abroad depending upon whether they are eligible for registration as residents is in violation of the right to vote in national referendum with the same rationale as the above holding concerning the voting rights for national government.

2. summaries of the Minority Opinions

A. Concurring Opinion of Justice Lee Kong-hyun

In case someone residing outside Korea for a long period of time with the intention to stay on a permanent basis, compared with Korean nationals who simply live outside Korea on a temporary basis, their seriousness and attachment to the politics in Korea could be remote. For the reason, above the meaning of citizens as abstract and ideologically unifying body, the necessity that they should be acknowledged as actual and concrete elements in the nation is minimal. Therefore, putting some restriction on the voting rights for national government of Korean nationals abroad is not always found to be unconstitutional because it violates the principle of popular election. The same rationale applies to the right to vote in national referendum.

B. Concurring Opinion of Justice Cho Dae-hyen

The unconstitutionality of provisions at issue in this case lays upon the particular part where, in legislating the procedure for the exercise of right to vote, only registered residents are eligible to cast their votes, thereby automatically preventing Korean nationals abroad who registered at Korean consulates from voting. The part where the provisions at issue in this case allows the registered residents to vote is just and constitutional. Only the part where it does not include certain Korean nationals abroad is not in conformity to the Constitution. Therefore, the form of judgment should have been in accordance therewith.

Aftermath of the Case

This decision is a clear departure from the former constitutionality decision of the year 1999 for the provisions providing (1) green card holders living outside of Korea and (2) Koreans residing outside were not eligible to vote for election. After this decision was rendered, the Government party and the Opposite parties praised it as "right decision," "developed decision" and etc. (JoongAng Daily, July 29, 2007)

Related Decisions

The decisions of nonconformity to the Constitution were rendered for the two cases with

similar issues. Firstly, in regard to the case where resident registration was required as a prerequisite for exercising the right to vote in local referendum, the provision of Local Referendum Act stripping the right to vote in local referendum from Korean nationals abroad living in Korea but unable to register as residents was found to be not in conformity to the Constitution with the deadline for new legislation until December 31st, 2008 because there is no just cause to discriminate them from 'registered residents' (2004 Hun-Ma 643). Also, in regards to the provision of Public Official Election Act which does not provide any way to vote for the sailors who stay on the ship for a long time, the decision of nonconformity to the Constitution was rendered without specific deadline for new legislation. This decision was made with the order that the challenged provision would be applied until there is new legislation (2005 Hun-Ma 772).

Parties

Complainants

1. (2004 Hun-Ma 644)
Choi ○ Young and 9 others
The list of the counsels for the complainants are provided in the annex.
2. (2005 Hun-Ma 360)
Kim ○ Su and 4 others
Counsel for complainant : Hong Jun-pyo
Co-counsels : Hwang Woo-yeo and 2 others

Judgment

1. The part of Article 15 Section 2 Paragraph 1 of the Public Official Election Act (revised on August 4, 2005 through Act No. 7681) which states "one whose resident registrations are completed in the district under jurisdiction of the relevant local government", the part of Article 16 Section 3 of the same Act which states "one who has registered as a resident in the district under jurisdiction of the local government concerned", the part of Article 37 Section 1 of the same Act which states "voters who have registered as residents of their jurisdictional districts", the part of Article 38 Section 1 which states "domestic resident who is entitled to enter in the electoral register", as well as the part of Article 14 Section 1 of the National Referendum Act (revised on December 22, 1994 through Act No 4796), which states "eligible voters registered as residents in their jurisdictional districts" are not in conformity to the Constitution.

2. Each of the provisions of the Articles mentioned above shall continue to apply until the legislator revises by December 31, 2008.

Reasoning

1. Introduction of the Case and Subject Matter of Review

A. Introduction of the Case

(1) 2004 Hun-Ma 644

(A) The complainants are all permanent residents of Japan with Korean citizenship who currently reside in Japan (complainants 1 through 6) or are Korean nationals residing in Korea (complainants 7 through 10) who are under the age of 19. They contend that Article 15 Section 2, Article 16 Section 3, and Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act'(before being amended by Act No. 7681, August 4th, 2005) require resident registration as a prerequisite to exercising one's right to vote and thereby render the complainants, who cannot register as residents, unable to exercise their right to vote in Presidential-National Assembly elections, and their right to vote or be elected to public office in local elections, thereby infringing their constitutional basic rights. They filed this constitutional complaint on August 14th, 2004.

(B) On October 11th, 2005, the complainants amended the remedies—sought—for part of the complaint, stating that Article 14 Section 1 of the National Referendum Act prevents the complainant, who cannot register as residents, from exercising their right to vote in national referendum by requiring resident registration as a prerequisite to exercising one's right to vote in national referendum on important policies of the nation and proposed amendments to the Constitution, thereby infringing their basic rights and added a filing for the constitutional complaint on said article of the National Referendum Act.

(2) 2005 Hun-Ma 360

The complainants are Korean citizens of over 19 years of age who are permanent residents of the U.S.A. or Canada. They contend that Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act'(before being amended by Act No. 7681, August 4th, 2005), which enables only those registered as residents domestically to be entered in the electoral register and exercise their right to vote, prevents those residing abroad whose resident registration does not exist or has been expunged from exercising their right to vote. They add that Article 38 Section 1 of the same Act only enables the domestic residents who are eligible for entry in the electoral register to file absentee reports, makes it impossible for Korean nationals residing abroad, who have no resident registration, to vote as absentees. They assert that the aforementioned articles infringe the complainants' constitutional rights and filed this Constitutional Complaint on April 6th, 2005.

B. Subject Matter of Review

Though the complainants filed this Constitutional Complaint on the Articles of the old 'Public Official Election and Prevention of Election Irregularities Act' (before being amended

by Act No. 7681, August 4th, 2005), the name of said Act was changed to the "Public Official Election Act" by Act No. 7681 on August 4th, 2005, and the contents were also amended. However, in the case of Article 15 Section 2 prior to amendment, only the position of the article was changed to Article 15 Section 2 Paragraph 1, and though some contents were added to Article 37 Section 1, there was no change regarding the portions relevant to the complainants. Also, though an Article 38 Section 1 was amended so as to eliminate the limits placed on the scope of domestic residents who were allowed to vote as absentees, no amendment was made to change the fact that nationals residing overseas can not vote as absentees. Then, it is reasonable to view the relevant Articles of the current Public Official Election Act (as amended by Act No. 7681, August 4th, 2005, hereinafter referred to as 'the Act').

In conclusion, the subject of this decision is whether the part of Article 15 Section 2 Paragraph 1 of the Act which states "one whose resident registrations are completed in the district under jurisdiction of the relevant local government", the part of Article 16 Section 3 of the same Act which states "one who has registered as a resident in the district under jurisdiction of the local government concerned", the part of Article 37 Section 1 of the same Act which states "voters who have registered as residents of his jurisdictional district", the part of Article 38 Section 1 which states "domestic resident who is entitled to enter in the electoral register", as well as the part of Article 14 Section 1 of the National Referendum Act (as amended by Act No. 4796 on December 22, 1994), which states "eligible voters registered as residents in their jurisdictional districts" (hereinafter referred to as 'the Article of the National Referendum Act in Question) infringe the basic rights of the complainants. (All of the articles subject to review in this case will hereinafter be referred to as 'the Articles in Question').

The contents of the Articles in question and the related provisions are as follows.

Public Official Election Act (as amended by Act No. 7681 on August 4, 2005)

Article 15 (Eligibility to Vote)

(1) A national of nineteen years of age or above shall be eligible to vote in the election of the President and the members of the National Assembly.

(2) Persons who fall under any of the following paragraphs shall be entitled to vote in the elections held to elect the local council members and the head of the local government in the district:

1. Korean nationals who are aged 19 or above and whose resident registrations are completed in the district under jurisdiction of the relevant local government as of the date on which the electoral register provided for in the provisions of Article 37 Section 1 is compiled; and

2. Foreigners who are aged 19 or above and for whom 3 years lapse from the date on which they obtain their permanent stay statuses pursuant to the provisions of Article 10 of the Immigration Control Act and who are entered in the foreigner registration records of the relevant local government pursuant to the provisions of Article 34 of the Immigration Control Act as of the date on which the electoral register provided for in the provisions of Article 37 Section 1 is compiled.

Article 16 (Electoral Eligibility)

(1) A national who is forty years of age or above and who has resided in the country for five years or longer as of the election day shall be eligible for election to the Presidency. In this case, if he has been sent to a foreign country in public service or stayed in a foreign country while having a domicile in the Korean territory for a certain period, he shall be deemed to have stayed in the Korean territory for that period.

(2) A national of twenty–five years of age or above shall be eligible for election as a member of the National Assembly.

(3) A national who is aged 25 years or above and who has registered as a resident in the district under jurisdiction of the local government concerned for sixty consecutive days or longer (from the record date of the electoral register up to the election day consecutively, in case of any person who had been sent to a foreign country in public services and has returned to the Republic of Korea after sixty days before the election day) as of the election day shall be eligible for election for the relevant local council member and the head of the local government. In this case, a period of sixty days shall not be interrupted by establishment, abolition, division, or merger of the local government, or change in the boundary of a district (including a case as provided in Article 28).

(4) (omitted)

Article 37 (Preparation of Electoral Register)

(1) Whenever an election is held, the head of Gu (including the head of autonomous Gu, and it is limited to the Dong area, in the case of Si in the urban and rural complex form), the head of Si (referring to the head of Si in which no Gus are established, and it is limited to the Dong area, in the case of Si in the urban and rural complex form), the head of Eup/Myeon (hereinafter referred to as the "head of Gu/Si/Eup/Myeon") shall survey the electors (including foreigners provided for in the provisions of Article 15 Section 2 Paragraph 2 in the case of the election of any local government council members and the head of any local government) who have registered as residents of his jurisdictional district 28 days before the election day, in the case of the presidential election; 19 days before the election day, in the case of the election for the National Assembly member, the local council member and the head of a local government (hereinafter referred to as the "record date of the electoral register"), and prepare the electoral register within 5 days from the record date of the electoral register (hereinafter referred to as the "electoral register preparation period").

Article 38 (Absentee Report)

(1) Where a domestic resident (excluding any foreigner provided for in the provisions of Article 15 Section 2 Paragraph 2 who is entitled to enter in the electoral register is unable to go to the polling station to cast a vote on the election day, he may make an absentee report in writing to the head of Gu/Si/Eup/Myeon during the electoral register preparation period. In this case, every absentee report by means of mail shall be made by means of registered mail and expenses incurred by the registered mail shall be borne by the State or the relevant local government.

National Referendum Act (as amended by Act No. 4796 on December 22, 1994)

Article 14 (Preparation of Pollbook)

(1) Each time a national referendum is held, the head of a Gu (including the head of an autonomous Gu, and in the case of a Si which is of the urban and rural complex type, it is limited to the Dong area), the Mayor (refers to a Si where no Gu is established, and in the case of a Si which is of the urban and rural complex type, it is limited to the Dong area), the head of an Eup/Myeon (hereinafter referred to as "head of the Si/Gu/Eup/Myeon"), shall investigate the eligible voters registered as residents in his jurisdictional area as of the day on which the date of the national referendum is announced publicly by voting districts, and prepare a pollbook within five days after the date of the national referendum is announced publicly.

National Referendum Act (as amended by Act No. 8449 on May 17, 2007)

Article 7 (Voting Rights)

All citizens who are over 19 years of age have the right to vote

Local Government Autonomy Act (as wholly amended by Act No. 8423 on May 11, 2007)

Article 12 (Qualifications of Residents)

Persons who have domicile within the jurisdiction of a local government shall be residents of such local government.

Article 13 (Rights of Residents)

(2) Residents who are nationals of the nation shall have the right to participate in elections of the members of local councils and the heads of local governments to be held by such local governments (hereinafter referred to as the "local elections") under the conditions as prescribed by the Acts and subordinate statutes.

2. Opinions of the complainants and Summary of Opinions of the Relative Agencies (Omitted)

3. Review on Justiciability Requirements

A. Claim Regarding the Articles of the Public Official Election Act

(1) Though this Constitutional Complaint was filed regarding Articles of the old 'Public Official Election and Prevention of Election Irregularities Act' as before being amended on August 4th, 2005, we have made the relative Articles of the amended Public Official Election Act, which show no actual difference in content, as the subject of our decision, as mentioned above. However, the elections for the 17th National Assembly were held on April 15th, 2004, and the complaints in question were filed on August 4th, 2004 and April 6th, 2005, both dates over 90 days after the elections, and thus when using the Articles of the old 'Public Official Election and Prevention of Election Irregularities Act' as our standard, we should inspect whether the complaints were filed within the mandated period.

(2) In the case of regularly repeating events such as elections, new candidates run each time and a new range of voters vote each time. What is more, the effects of an election are limited until the effects of the following elections come into force. Therefore, each election

is a new one. Also, the objective of the complainants filing this constitutional complaint is to question the issue of the potential infringement of basic rights in future elections, rather than the basic right infringements that have already occurred in elections of the past.

(3) In conclusion, considering such characteristics of elections along with the objectives of the complainants, this complaint can be viewed as the complainants contesting, in advance, the basic rights infringements that the complainant will suffer by not being able to participate in various future elections, that is to say, infringements of basic rights that are certain to occur in the future. In this case, the issue of timely filing of complaints, which applies to cases regarding events that have already taken place, does not apply here (11–2 KCCR 770, 98 Hun–Ma 363, Dec. 23, 1999; 13–1 KCCR 386, 2000 Hun–Ma 25, Feb. 22, 2001).

B. Claim Regarding the Article of the National Referendum Act in Question

The National Referendum Act was amended through Act No. 4796 on December 22, 1994, but there has since been no national referendum on important policies per Article 72 of the Constitution, nor on proposed amendments of the Constitution per Article 130 of the Constitution, and thus there has been no case of basic rights infringement through Article 14 of the National Referendum Act. However, national referendums are, by definition, held at unpredictable times and if we only allow for the filing of Constitutional Complaints around the times when national referendums are actually held, it will be difficult to effectively protect our basic rights. So, the claim regarding this section should be regarded as contesting, in advance, the infringements on basic rights that are sure to occur when national referendums are held in the future. Therefore, as in the case of the Articles of the Public Official Election Act above, the issue of timely filing does not apply.

C. Sub-conclusion

As there exists no other flaw of statutory requirements either, this filing for constitutional complaint is legitimate.

4. Review on the Merits

A. The Right to Vote in Presidential • National Assembly Elections

(1) The Legal Significance of the Right to Vote and the Limits to Restraining the Right to Vote

The Constitution elucidates the principle of popular sovereignty by stipulating that “the Republic of Korea shall be a democratic republic” and that “the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people” in Article 1. The significance this holds is that the state authority shall be formed according to the consensus of the people(1 KCCR 199, 205, 88 Hun–Ka 6, Sept. 8, 1989). For this to happen, 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 (13-2 KCCR 77, 93, 2000 Hun-Ma 91, July 19, 2001).

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 according to the relevant laws. Also, Article 11 prescribes the right to equality in the domain of political life, and Article 41 Section 1 and Article 67 Section 1 ensures the principles of popular-equal-direct-secret voting in presidential and national assemble elections. The reason why the Constitution clearly guarantees the right to vote and the principles of voting is because under the system of popular sovereignty and democracy through representation, the people 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 (11-1 KCCR 675, 697, 98 Hun-Ma 214, May 27, 1999).

This exercising of the people's right to vote is, on the one hand, 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, including their right to vote in presidential and national assembly elections (hereinafter referred to as 'State Elections') is regarded as the most basic and necessary right for realizing the principle of popular sovereignty, and to be superior to other basic rights (1 KCCR 199, 207, 88 Hun-Ka 6, Sept. 8, 1989).

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', this does not signify a reservation to comprehensive legislation that acknowledges the right to vote 'only under the terms of the law'. This means that the basic rights of the people should be materialized through the law and to specifically actualize the right to vote through the law.

Such statutory reservation is to realize and ensure the right to vote and not to restrict it. Therefore, even when stipulating the contents and process regarding the right to vote, such stipulation must conform with Article 1 of the Constitution that declares popular sovereignty, Article 11 that speaks of equality, and Articles 41 and 67 which guarantee popular-equal-direct-secret elections for presidential and national assemble elections. Also, pertaining to the importance the right to vote holds 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 popular 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 restrict the right to vote in violation of the principle of popular election (11-1 KCCR 54, 60, 97 Hun-Ma 253 et al., Jan. 28, 1999).

(2) The Constitutionality of Article 37 Section 1 of the Act

(A) The Significance of Article 37 Section 1 of the Act

Article 37 Section 1 of the Act gives the person in charge of drafting the electoral register the obligation to survey the registered residents in his/her jurisdiction and draft an electoral register within a certain period of time from record date of the electoral register each time an election is held. Since those who 'are not registered domestically as residents' cannot exercise the right to vote in state elections as ensured by Article 15 Section 1, this Article actually has the legal effect of making it impossible for those without resident registration to exercise their right to vote in state elections, though it simply looks like a provision regulating electoral procedure.

Of the complainants in this case, the Korean nationals residing abroad who are permanent resident of foreign countries and do not reside in Korea have no resident registration in Korea and thus, cannot exercise their right to vote in state elections according to Article 37 Section 1 of the Act. In the case of those complainants who are nationals residing abroad but currently living within the country Article 6 Section 3 of the Resident Registration Act prohibits them from registering as residents unless they give up emigration, and thus, they too are unable to exercise their right to vote in state elections. All in all, Article 37 Section 1 of the Act precludes all Korean nationals residing abroad, save those who reside in Korea and express their will to give up emigration (thus enabling resident registration), entirely and in uniformity, from exercising their right to vote in state elections.

Moreover, with regards to the long term overseas sojourners with intention to emigrate and the long and short term overseas sojourners (such as students studying abroad, resident office employees, diplomats etc.) with no intention of emigration who have had their resident registration expunged (Articles 17-2 and 10 of the Resident Registration Act), Article 37 Section 1 of the Act prohibits them from voting in state elections regardless of whether they are staying within the country.

(B) The Constitutionality of Article 37 Section 1 of the Act (Reevaluation of the previous Constitutional Court decision)

Many arguments have been stated as the basis of the constitutionality of Article 37 Section 1 of the Act. Based on such arguments, the Constitutional Court in its 97 Hun-Ma 253 decision of January 28, 1999, declared that Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act' (as amended by Act No. 4796, December 22, 1994 and before being amended by Act No. 6663, March 7, 2002), which was the same in context, as constitutional. However, considering the development of information technology, the increase in Korean nationals residing abroad due to economic growth and globalization, the growth of our people's awareness towards the fairness and freedom of

public official elections, and changes in legal perspective which have taken place since then, reevaluation is required.

First, the danger of North Korean residents or nationals residing in Japan affecting the elections is not a basis for denying the Korean nationals residing overseas their right to vote.

That is because even if we were to allow our nationals living abroad to enjoy the right to vote, in our special situation of continuing confrontation with the North, it would seem that certain restrictions on the right to vote of North Korean residents or the Koreans residing in Japan aligned with the General Association of Korean Residents in Japan (*Chae Ilbon Chosŏnin Ch'ongryŏnhaphoe* or *Joch'ongryŏni*: hereinafter, "*pro-Joch'ongryŏn* Koreans residing in Japan") will be acceptable. There is also concern about North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan exercising the right to vote under false identities, but it is not impossible to utilize the registration policy under the current 'Registration of Korean Nationals Residing Abroad Act' as well as the domestic domicile report system under the 'Act on the Immigration and Legal Status of Overseas Koreans' to prevent such an event. Also, as the Korean nationals residing abroad who are not North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan possess passports, unlike the North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan, it is possible to differentiate the two. Therefore, the vague and abstract danger of North Korean residents or *pro-Joch'ongryŏn* Koreans residing in Japan affecting the elections cannot justify depriving Korean nationals residing abroad of their right to vote completely.

Second, some contend that if we were to allow all Korean nationals residing abroad the right to vote, the Korean nationals residing abroad would have the casting vote in cases when the elections are decided by small margins and that is why we should restrict their right to vote. However, this assertion goes against the principle of popular elections.

The principle of popular election disregards all actual factors such as competence, wealth, or social status of the voter and demands that anyone of age is given the right to vote. Therefore that any citizen who is of 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 popular elections. So, assertions that the right to vote should be restricted as it may affect the outcome of the elections is an unacceptable assertion that violates the principle of popular elections.

Third, some suggest that allowing all Korean nationals residing abroad, including the permanent residents of foreign nations, to vote in state elections makes it difficult to ensure the fairness of an election. They say, the election process in the countries those nationals reside in can be conducted unfairly in terms of the loss and replacement of ballots, unlawful campaign finances, the possibility of voting twice or by proxy, the contortion of the will of the voter, and bribery etc. Depriving Korean nationals residing abroad of their right to vote on the basis of this such view also cannot be justified.

Ensuring the fairness of elections is primarily the job of the state, and it is not just to hold the voters responsible for said task. Also, we cannot deny certain citizens the right to vote, the right that enables democracy to function, simply because there is concern over the fairness of the elections. It can be expected that managing elections in foreign countries will be more difficult than doing so domestically, but it is such an impossible task as to have to completely deny the voters the right to vote. The expected possibilities of unlawful

elections can be prevented beforehand through adequate restrictions on the campaigning methods of elections that take place abroad, implementing methods to confirm the identity of the voter, and management of campaign finances prior to and after the elections. Post facto control through the trials of the courts is also feasible. What is more, the election practices of our people have become mature enough so that there may be some reduction in heteronomous regulation in terms of the fairness and openness of elections.

Fourth, various technical difficulties regarding the elections such as promoting the holding of elections and the candidates to all Korean nationals residing abroad within the allotted campaigning period, campaigning, and sending ballots and collecting the marked ballots is also not a good enough reason to justify depriving any of our citizens completely of their right to vote.

Such difficulties can be mitigated by extending the allotted campaigning period. In terms of promoting candidates, it is not extremely difficult to adequately provide Korean nationals residing abroad with information on the candidates in this world of advanced information and communication technology and the Korean nationals residing abroad can also easily access information on the candidates via the internet. Also, in modern times votes tend to be cast according to party rather than the individual. The electoral campaigns not being held abroad as extensively as within the country is something the Korean nationals residing abroad must understand. There are measures such as printing ballots locally which can be implemented to solve the difficulties regarding sending and collecting ballots. The collection and counting of ballots can be done even after significant time has passed since the elections. All these factors demonstrate that technical difficulties regarding the elections cannot be a basis for completely depriving the Korean nationals residing abroad of their right to vote.

Fifth, there may be concern that if we are to acknowledge that Korean nationals residing abroad should exercise their right to vote, there may ensue another issue of equality between the Korean nationals residing abroad that live in nations with advanced postal systems and those who do not if we are to allow only the former nationals to vote.

However, even if certain Korean nationals residing abroad who live in countries with inadequate postal systems are temporarily unable to exercise their right to vote, this is only a factual result and not a result of intended discrimination. We cannot deprive all Korean nationals residing abroad of their right to vote because of this. The principle of equality in the Constitution does not prevent the state from choosing when, where, or which class to begin improving the system with. The state can, in accordance with reasonable standards, implement step by step modifications of policies to promote the realization and improvement of legal values to the best of its ability (3 KCCR 11, 25, 90 Hun-Ka 27, Feb. 11, 1991), and therefore, there will be no violation of the principle of equality even if Korean nationals residing abroad are granted the right to vote starting in the regions where this is possible.

Sixth, the assertion that the right to vote is connected with the obligations to pay taxes or serve in the military, and the Korean nationals residing abroad who do not fulfill this obligation should not be allowed to vote also needs to be reevaluated.

Article 1 Section 2 of the Constitution only stipulates that "the sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people" and does not acknowledge the status of the people based on their obligations. Putting aside whether historically the duties of tax paying and military service were conditions of being granted the right to vote, the current provisions of the Constitution also

do not define the exercise of people's basic rights to be a trade-off for the fulfillment of obligations such as tax payment or military service.

Especially in this case, the Korean nationals residing abroad are simply exempt from the duty to pay tax according to 'the agreement on the prevention of double taxation' and are not in violation of their duties. The same may be said regarding military service considering there are ways for Korean nationals residing abroad to fulfill their duty of military service, some of the complainants of this very case have already fulfilled their military service obligations, in today's world national defense (in a broad sense) relies significantly on the patriotism and cooperation of Korean nationals residing abroad, and the fact that the duty to military service is currently only imposed upon men. Therefore, a certain relationship between the right to vote and the duty to military service cannot be established.

Finally, as Korean nationals residing abroad are undeniably citizens of the Republic of Korea who have the Constitutional right to participate in the formation of government agencies, and as national unification in the increasingly global and international world demands that the will of Korean nationals residing abroad also be included in the will of the people of Korea, there is no Constitutional justification that can be found for Article 37 Section 1 of the Act to deprive Korean nationals residing abroad of their right to vote.

(C) Conclusion

That all citizens, as sovereigns, should enjoy an equal right to vote no matter where they reside, and the state has an obligation to do all that is in its power to realize such an equal right to vote is a Constitutional demand stemming from the principles of popular sovereignty and democracy. The legislative branch, when restricting the people's right to vote, must respect the significance that right holds as best it can, and when examining whether a law restricting the right to vote is in accordance with the prohibition of excessive restriction stipulated in Article 37 Section 2 of the Constitution, the examination must follow a strict standard.

Therefore, the restriction of the right to vote may only be justified when individual and specific causes clearly exist that make the restriction unavoidable. Ambiguous and abstract dangers or technical difficulties or obstacles that can be overcome through efforts on the part of the state cannot justify any restriction on the right to vote.

However, Article 37 Section 1 of the Act determines eligibility of being enlisted in the electoral register based solely on whether a person is registered as a resident and this decides whether a person will be able to exercise their right to vote. This results in completely denying Korean nationals residing abroad, who cannot register as residents under the Resident Registration Act, their right to vote even though they are undeniably citizens of the Republic of Korea. As stated above, there is no objective that justifies such a complete denial of the right to vote.

Therefore, Article 37 Section 1 of the Act infringes the right to vote and right to equality of Korean nationals residing abroad in violation of Article 27 Section 2 of the Constitution, and is also in violation of the principle of popular election stipulated by Article 41 Section 1 and Article 67 Section 1 of the Constitution.

(3) The Constitutionality of Article 38 Section 1 of the Act

(A) The Relationship to Article 37 Section 1 of the Act

Article 38 Section 1 of the Act allows only the domestic residents who are eligible for enlistment in the electoral register to file an absentee report. Therefore, even if the complainants become eligible for enlistment in the electoral register following Article 37 Section 1 of the Act being declared unconstitutional, those complainants who reside abroad will not be able to file absentee reports due to Article 38 Section 1 of the Act and, therefore, still will not be able to exercise their right to vote in state elections. So, whereas Article 37 Section 1 of the Act deprives Korean nationals living abroad who can not register as residents of the right to be enlisted in the electoral register, Article 38 Section 1 of the Act adds the requirement of residing domestically to the requirements for exercising the right to vote, and thereby makes it impossible for those residing overseas to vote. Therefore, Article 38 Section 1 of the Act is a provision that combines with Article 37 Section 1 of the Act to deny the Korean nationals living abroad their right to vote.

Meanwhile, of the citizens that are not Korean nationals living abroad and have resident registrations according to current law, short term overseas sojourners such as visitors to foreign countries, members of embassies and legations abroad, resident office employees, and students studying abroad whose resident registration has not been expunged must return to the country by the day of the elections in order to exercise their right to vote, due to Article 38 Section 1 of the Act.

(B) The Constitutionality of Article 38 Section 1 of the Act (Reevaluation of the previous Constitutional Court Decision)

In the 97 Hun-Ma 99 decision of March 25, 1999, the Constitutional Court decided that Article 38 Section 1 of the old 'Public Office Election and Prevention of Election Irregularities Act' (before being amended by Act No. 7189 on March 12, 2004), which was the same in context as Article 38 Section 1 of the Act, was not in violation of the Constitution. However, similar to the decision made regarding Article 37 Section 1 of the Act above, there is reason to reevaluate the contents of that decision.

First, concerns regarding technical difficulties and the fairness of elections are the same issues that are raised when allowing nationals residing abroad but currently living within the country, and that those arguments do not hold have already been demonstrated *supra*.

Second, the argument that the right to vote may be restricted due to concerns of increased election expenses of candidates and an increased burden upon the state that would result from extended election periods is also inadequate.

The 'Study on Implementation Methods of Overseas Absentee Voting' published by the National Election Management Commission proposes a measure that will not include overseas campaign expenses in the total campaign expense limit. Some campaign expenses may result from some campaign methods(broadcast advertisements, broadcast coverage of speeches and mailing of preliminary candidate PR materials) being allowed regarding overseas absentees, but such expenses will be accrued domestically and therefore it will be possible to manage the expenses. Also, even if there is a certain increase in election related expenses, it will not be so great as for our country to be financially incapable of handling it. Simple concern

over election expenses is not enough to restrict the right to vote, the most fundamental and important right of the people in a democracy.

What is more, looking over our history of legislations regarding elections, we find that we have already had experience allowing absentee voting of Korean nationals residing abroad in state elections in the 60's and early 70's. On top of this experience, if we were to refer to various examples of advanced nations that recognize the right to vote of their nationals residing abroad, it does not seem that implementing an absentee voting system for Korean nationals residing abroad would be an impossible task.

Third, there is an assertion that there is nothing unjust about denying the right to vote to someone who voluntarily leaves the country, but this does not hold true.

Requiring people who left the country voluntarily for academic or occupational reasons to return to the country in order to exercise their right to vote, and making it impossible for them to vote if they do not return is unjust in that it infringes the basic rights of the person residing abroad such as the freedom to reside-move abroad, freedom of occupation, right to hold public office, and the freedom of learning. What is more, in the current global society in which the possibility of moving and residing abroad grows ever greater, denying one the right to vote, a most basic right that should be enjoyed by all citizens, simply because the move abroad was voluntary, is unreasonable.

Fourth, the view that perceives Article 38 Section 1 of the Act to be one of convenience and not directly related to the restriction of the right to vote in the case of short term overseas sojourners with resident registrations in Korea such as members of embassies and legations abroad and resident office employees is a mistaken one.

Requiring one to spend large sums in travel expenses to return to the country, vote, and leave the country again is demanding something that is, in actuality, impossible and has the same effect as denying those persons their right to vote.

(C) Conclusion

As seen above, Article 38 Section 1 of the Act, which denies all overseas residents including Korean nationals residing abroad and short term overseas sojourners the opportunity to exercise their right to vote by only allowing absentee reports to domestic residents eligible for enlistment in the electoral register, has no justified legislative purpose. It thus infringes the right of overseas residents to vote and to equality in violation of Article 37 Section 2 of the Constitution, and is also in violation of the principle of popular election.

B. The Right to Participate in Local Elections (the Right to Vote and the Right to be Elected)

(1) Whether Restricting the Right to Participate in Local Elections is a Restriction on Constitutional Basic Rights

(A) The Constitution stipulates in Article 118 Section 1 that “a local government shall have a council” and states in Section 2 that “the organization and powers of local councils, and the election of members … shall be determined by statute” making it clear that the

right to vote for local council members is a Constitutional right. However, Article 118 Section 2 of the Constitution only stipulates that “election procedures for heads of local governments shall be determined by statute” thus raising the issue of whether a restriction on the right to vote for a head of local government is a restriction of Constitutional rights.

As the Constitution says 'election procedures' in the case of the heads of local government, thus differentiating from the term 'election' used in the case of local council members, it is difficult to say that the right to vote for heads of local governments is a Constitutional right. However, even if the right to vote for heads of local governments were perceived as simply a legal right and not a Constitutional one, examination of whether the right to equality was infringed will apply when there exists discrimination between comparable groups. Therefore, any restriction on the right to vote in local elections, whether it be for local council or heads of local governments, is a restriction of Constitutional basic rights.

(B) Meanwhile, Article 25 of the Constitution stipulates that ‘all citizens shall have the right to hold public office under the conditions as prescribed by statute', guaranteeing the people's right to hold public office. Since the right to be elected, which refers to be elected as the member or head of a government agency or local government through elections, is included in the right to hold public office, it is clear that any restriction on the right to be elected to local council or the office of the head of local government is a restriction on Constitutional basic rights.

(2) Whether Article 15 Section 2 Paragraph 1, Article 16 Section 3, and Article 37 Section 1 Infringe the complainants’ Right to Participate in Local Elections

Article 13 Section 2 of the Local Government Autonomy Act stipulates that “residents who are nationals of the nation shall have the right to participate in elections of the members of local councils and the heads of local governments to be held by such local governments (hereinafter referred to as the "local elections") under the conditions as prescribed by the Acts and subordinate statutes” thereby giving all 'residents who are nationals of the nation' the right to vote in local elections.

However, Article 15 Section 2 Paragraph 1 of the Act requires, as a prerequisite for attaining the right to vote in local elections, voters to be persons "whose resident registrations are completed in the district under jurisdiction" as of the date on which the electoral register provided for in the provisions of Article 37 Section 1. Then Article 16 Section 3 requires that only persons "whose resident registrations are completed in the district under jurisdiction" be given the right to be elected in local elections. Therefore, ‘nationals residing abroad but currently living within the country who are not registered as residents' are deprived of their right to vote or be elected in local elections. The issue is whether depriving nationals residing abroad but currently living within the country of their right to participate in local elections can be constitutionally justified.

(A) Decision on Restricting the Right to Vote

As the right to vote in local elections is given to 'residents who are nationals of the nation' per Article 13 Section 2 of the Local Government Autonomy Act, one's right to vote is acknowledged by principle if one fills both the requirements of being 'a national of the nation' and a 'resident'.

In the case of Korean nationals who reside abroad, they obviously do not have the right to vote as they do not satisfy the requirement of being a 'resident'. However, in the case of nationals residing abroad but currently living within the country, there may be many cases in which both of the aforementioned requirements are fulfilled. This is especially true in the case of Korean nationals living abroad who have domiciles in Korea for though they cannot technically register as residents according to the Resident Registration Act, they are, in actuality, the same as 'registered residents who are nationals' in that they are 'residents who are nationals'. That is to say that both these groups are eligible to enjoy the same rights and same duties in an equal environment within the same local government they belong to. The 'registered residents who are nationals' and 'residents who are Korean nationals residing abroad, incapable of registering as residents' are only different in whether they are registered as residents, and are the same in the aspect that they are residents of local governments who are nationals. Therefore, there is no basis for discriminating the two in terms of the right to vote in local elections.

Meanwhile, Article 15 Section 2 Paragraph 2 of the Public Official Election Act as amended by Act No. 7681 on August 4, 2005, give 'foreigners who are aged 19 or above and for whom 3 years lapse from the date on which they obtain their permanent stay statuses' the right to vote in local elections under certain conditions. However, a foreigner's right to vote in local elections is not a Constitutional right but simply a 'legal right' endowed by the Public Official Election Act. Therefore, according to current law, the right to vote, a Constitutional right, of the nationals residing abroad but currently living within the country fall short of a foreigner's right to vote, a legal right. It is obvious that such a result is unreasonable.

In conclusion, denying the nationals residing abroad but currently living within the country the right to vote in local elections – a right given even to foreigners permanently residing in Korea – completely and uniformly regardless of the length of their stay abroad is in violation of the principle of equality stated in the Constitution and is a restriction on basic rights which exceeds the limits of Article 37 Section 2 of the Constitution.

Therefore, Article 15 Section 2 Paragraph 1 and Article 37 Section 1 of the Act infringe the right of the nationals residing abroad but currently living within the country to equality and their right to vote in elections for local council members.

(B) Decision on Restricting the Right to be Elected

Article 16 Section 3 of the Act limits the scope of those eligible for election to 'nationals of 25 years of age or higher who have registered as residents in the district under jurisdiction of the local government concerned for sixty consecutive days or longer as of the election day', thereby depriving the nationals residing abroad but currently living within the country, who are incapable of registering as residents, of the right to be elected.

With legislations regarding local elections, it is necessary to consider the characteristics of the local government autonomy system, and the legislative branch is given a comparatively

wide range of legislative–formative powers when it comes to legislating the specifics of the local government autonomy system, including deciding the requirements for eligibility for election in local elections. However, as restricting the right to be elected in local elections is restricting the Constitutional right to hold public office, such restrictions are still subject to the limits of Article 37 Section 2 of the Constitution.

The purpose of Article 16 Section 3 of the Act requiring people to be 'registered as residents in the district under jurisdiction of the local government concerned for sixty consecutive days or longer' to be eligible for election in local elections is to limit the people capable of being elected as heads or councilmen of the local government to those who have lived as residents in the local government for at least a certain period of time and have formed significantly close relationships of interests with said local government. Accordingly, the period of 60 days was set as the minimum requirements as a resident and resident registration is demanded as the official record of such a period of residence in the municipality.

However, even those legally incapable of registering as residents, as in the case of 'Korean nationals residing abroad who are permanent resident of a foreign country' can reside as residents of a municipality for long periods of time and form close ties of interest with the affairs of the local government, and there are ways to officially confirm such periods of residence besides resident registration.

In spite of all this, Article 16 Section 3 only uses a certain period of 'resident registration' or longer to determine eligibility for election in local elections. Denying the nationals residing abroad who have resided for at least a certain period of time as residents and have made significant ties with the work of the local government the right to be elected in local elections completely simply because they have no resident registration cannot be reasonably justified.

What is more, considering the fact that Article 16 Section 2 of the Act gives the right to be elected to all nationals of 25 years of age or older, regardless of whether they are registered as residents, enabling Korean nationals residing abroad to be eligible for election to the national assembly regardless of whether they reside in Korea or not, denying one's right to be elected on the basis of resident registration only in local elections is not very convincing.

Therefore, Article 16 Section 3 of the Act which uses only the resident registration as a standard for determining eligibility for election, and thereby denies the right to be elected to Korean nationals residing abroad who cannot register as residents, infringes on the right to hold public office in violation of Article 37 Section 2 of the Constitution of the nationals residing abroad but currently living within the country.

C. The Right to Vote in National Referendum

(1) The Significance and Forms of Right to Vote in National Referendum

The right to vote in national referendum refers to the right of the people to directly make decisions regarding certain national matters in the form of national referendums. It is a basic Constitutional right which, along with the right to vote and be elected in various selections, constitutes the political rights of the people. The Constitution acknowledges the right to vote

in national referendum when deciding important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny (Article 72) and when confirming proposed amendments to the Constitution (Article 130 Section 2).

The national referendum on important policies stipulated in Article 72 of the Constitution is the process of the sovereign people authorizing matters relating to the national destiny proposed by the president. The referendum on proposed amendments to the Constitution is the process of the sovereign people ultimately deciding whether to authorize proposed amendments to the Constitution proposed by the National Assembly or the President and affirmed through a resolution of the National Assembly.

(2) The Constitutionality of the Article of the National Referendum Act in Question

The National Referendum Act is established as the law concretizing the right to vote in national referendum, and Article 7 of the National Referendum Act gives the right to vote in national referendum, by principle, to nationals of a certain age or older. However, the Article of the National Assembly Act in question requires the person in charge of compiling the register only the voters that are registered within the jurisdiction in question as of the date the national referendum is announced publicly, thereby rendering the Korean nationals residing abroad, such as the complainants, unable to exercise their right to vote in national referendum.

As seen supra, the national referendum is the process of the people, as the sovereign, decide whether to authorize important national policies or proposed amendments to the Constitution. As such, the Article of the National Referendum Act in question, that uses resident registration, which cannot affect the people's position as the sovereign in any way, as the sole standard and depriving the Korean nationals residing abroad of any chance of exercising their right to vote in national referendum infringes the right of the complainants to national referendum for the same reasons discussed in the decision regarding restricting the right to vote in state elections.

5. Decision of Nonconformity to the Constitution with the Order of Continuing Application

A. The Articles in question in this case infringe the basic rights of Korean nationals residing abroad, who cannot register as residents, by preventing them from exercising their right to vote in presidential and national assemble elections as well as their right to vote in national referendum simply because they are not registered as residents, even though they are still citizens of the Republic of Korea. The also deny the Korean nationals living abroad the right to vote or be elected in local elections simply because they are not registered as residents, despite the fact that they are residents who are nationals. However, as explained below, it does not seem appropriate to render a decision stating that the Articles in question are simply unconstitutional.

B. When laws violate the Constitution, it is procedure to declare them unconstitutional in order to ensure the validity of the Constitution. However, when removing unconstitutional Articles of law from the system through a decision of unconstitutionality may cause

confusion and leave a legal void, a declaration of non-conformity can be made with an order to continue enforcing the articles in question temporarily. If it is determined that the unconstitutional state of temporarily enforcing the unconstitutional articles of law is constitutionally more desirable than the constitutional state of no legal regulation arising from the declaration of unconstitutionality, the Constitutional Court may decide maintain the unconstitutional regulations for a certain period of time and enforce them temporarily until the legislative branch amends the articles to conform with the Constitution in order to prevent an unbearable legal void and the ensuing confusion (17-1 KCCR 796, 810, 2005 Hun-Ka 1, June 30, 2005).

If the articles in question are declared unconstitutional and are immediately rendered ineffective, it is clear that a state of confusion in which it will be impossible to properly hold the upcoming 17th presidential elections and 18th national assembly elections. Also, though it is a Constitutional requirement that all Korean nationals residing abroad be granted the right to vote as a matter of principal, there still remain many issues that must be solved in terms of ensuring fair elections and technicalities involved therein. For example, if we were to allow Korean nationals residing abroad including overseas sojourners the right to vote in state elections and the right to vote in national referendum, we would require time to conduct a sufficient review of and prepare for matters such as installing voting booths and an agency to manage the elections, establish a process for checking the ID of Korean Nationals residing abroad, the method of voting, method of campaigning, and other specific methods on conducting fair elections. In the case of giving the nationals residing abroad but currently living within the country the right to vote in local elections, we must review issues such as whether to impose residential requirements, and if so how long the term of residing should be. These such issues should ultimately be decided by the legislative branch through extensive discussion and social consensus.

(3) Therefore the Articles in question are hereby declared not to be in conformity with the Constitution, but they are to be temporarily enforced until the legislature amends them. The legislative branch must make the proper amendments at the latest by December 31, 2008, and if no such amendments are made by then, the Articles in question will become null and void starting on January 1, 2009.

6. Conclusion

Therefore, the articles in question do not conform to the Constitution but are to be enforced temporarily until the legislature makes the proper amendments, which are to be made at the latest by December 31, 2008.

Also, the Constitutional Court decision 96 Hun-Ma 200 of June 26, 1996, which decided, unlike this decision, that Article 16 Section 3 of the old 'Public Office Election and Prevention of Election Irregularities Act' (before being amended by Act No. 5537 on April 30, 1998) did not violate the Constitution, is altered inasmuch as it conflicts with this decision, as are the decision 97 Hun-Ma 253 of January 28, 1999, which decided that Article 37 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act' (as amended by Act No. 4796 on December 22, 1994, and before being amended by Act No. 6663 on March 7, 2002) did not violate the Constitution, and the

decision 97 Hun–Ma 99 of March 25, 1999, which decided that Article 38 Section 1 of the old 'Public Official Election and Prevention of Election Irregularities Act' (before being amended by Act No. 7189 on March 12, 2004) was not in violation of the Constitution.

All of the justices concurred this decision, save the justices Lee Kong–hyun who expressed a separate opinion as stated below under item 7. and Cho Dae–hyen who expressed a separate opinion as stated below under item 8.

7. Concurring Opinion of Justice Lee Kong–hyun

A. I agree with the majority opinion in that Article 37 Section 1 and Article 38 Section 1 of the Act infringes the rights of Korean nationals residing abroad with regards to state elections, specifically the right to vote, the right to equality, and the principle of popular elections. I also agree that Article 14 Section 1 of the National Referendum Act infringes the right to vote in national referendum of Korean nationals residing abroad. Thus, said articles do not conform with the Constitution, but I do not believe that the same articles generally infringe, the right of the nationals residing abroad who are permanent residents of a foreign country.

B. Though the right to vote must be realized to the fullest extent possible according to the constitutional principles of popular sovereignty and democracy, the demand for equality regarding participation in elections does not prohibit all kinds of restrictions on the right to vote. Exceptions to the principle of popular election may be constitutionally acceptable when there is reason for justification (9–1 KCCR 674, 685–686, 96 Hun–Ma 89, June 26, 1997).

Permanent residents of foreign nations have built a lives for themselves over considerable periods of time in countries with different cultural · social · economic conditions from Korea and have the right and will to reside their permanently. In many cases these people differ greatly from normal the nationals residing abroad in terms of the intimacy and sincerity of attitude they show regarding participation in the elections and politics of Korea. Therefore, they do not necessarily have the right to form representative organizations as specific constituents of the nation, even though they may be a part of our people in an ideological and abstract sense.

Even in the case of other nations, the will to reside permanently and the term of residence abroad are important factors considered when deciding whether or not to recognize the right to vote. In the case of England the right to vote is granted to nationals residing abroad who have only resided abroad for a certain amount of time or less, and Canada and Australia only grant the right to vote when the term of residence abroad is within a certain period and said residents intend to return to the nation and reside their permanently.

In conclusion, not granting the right to vote to certain nationals residing abroad, such as permanent residents of foreign countries, is not always constitutionally unacceptable and in violation of the principle of popular elections, and this is the same with the right to vote in national referendum as well.

C. However, the aforementioned Articles do not consider the intimacy or sincerity of the demand for political participation according to the intention of permanent residence or the term of residence abroad. They simply determine eligibility for entry in the voter or

electoral register according to whether a person is registered as a resident, and only allow absentee reports to be filed by those domestic residents eligible for entry in the electoral register. Therefore, even when we consider the divided state of our nation, technical concerns or the fairness of elections, and the issues of election expenses, such restrictions cannot be justified and said articles are not in conformity with the Constitution, as stated by the majority opinion.

D. For these reasons, I hereby express a separate opinion to the majority opinion.

8. Concurring Opinion of Justice Cho Dae-hyen

A. Subject Matter of Decision

What the complainants are demanding is a decision on whether the Articles concerned in this case violate the Constitution in that they do not allow nationals residing abroad to exercise their right to vote, and so this issue must be the subject matter of decision, and the conclusion must be expressed in the holding.¹⁾

B. Article 15 Section 2 and Article 16 Section 3 of the Act (partially unconstitutional with regards to pseudo legislative omission)

Article 15 Section 1 of the Act stipulates that "a national of nineteen years of age or above shall have a voting franchise for the election of the President and the members of the National Assembly", therefore there is no discrimination against Korean nationals residing abroad regarding the right to vote in presidential or national assembly elections.²⁾

However, Article 15 Section 2 of the Act, with regards to elections for local council members and heads of local governments, grant nationals of 19 years of age or older who are registered in the jurisdiction of the local government as of the date of compilation of the electoral register the right to vote. It also grants the right to vote to foreigners who are aged 19 or above and for whom 3 years lapse from the date on which they obtain their permanent stay statuses and who are entered in the foreigner registration records of the relevant local government as of the date on which the electoral register is compiled. On the other hand, it does not give the right to vote to nationals of 19 years of age or older who have a registered domestic domicile within the jurisdiction of the relevant local government. Pursuant to the principle of resident autonomy, it is not against the Constitution to deny nationals who do not reside within the jurisdiction of the relevant local government the right to vote. However, if the nationals residing abroad of age 19 or higher have registered a domestic domicile and are residing in said domicile, the principle of resident autonomy demands they be given the right to vote as well, and as long as they have registered domestic domiciles, there should be no problem in terms of election management either.

1) the fact that the articles in question grant nationals with resident registrations the right to vote is not the subject matter of review, nor is it unconstitutional, so we must not include it as a subject of the holding.

2) There remains the issue of whether nationals residing abroad should be given the right to vote not just in proportional representative National Assembly elections but also in local constituency elections. However this is not the subject of this review and should be decided by policy.

Therefore, Article 15 Section 2 of the Act failing to stipulate that the nationals residing abroad of age 19 or older who reside in registered domestic domiciles within the jurisdiction of the relevant local government have right to vote is in violation of Article 11 Section 1 of the Constitution, and discriminates against the aforementioned group unreasonably.

For the same reasons, Article 16 Section 3 of the Act allowing only residents who have resided in the jurisdiction of the relevant local government for 60 days or more with resident registration, and not including the nationals residing abroad who reside in registered domestic domiciles is in violation of Article 11 Section 1 of the Constitution.

C. On Article 37 Section 1 of the Act (partially unconstitutional with regards to pseudo legislative omission)

Regardless of whether the election is a presidential-national assembly or local election, one cannot vote if they are not registered in the electoral register, (Article 156 Section 1 of the Act), and nobody can be entered in more than one electoral register (Article 37 Section 3). In case of filing an absentee report, one must record such a report in the electoral register and be entered in a separate absentee report register (Article 38 Section 4), and can only cast absentee ballots (Article 156 Section 3).

The purpose of the electoral register system is to confirm the identity of those who have the right to vote, enter them in the register, and manage so that they only exercise their right to vote once. It is a necessary and appropriate system for ensuring fair elections.

However, since one cannot exercise their right to vote without being entered in the electoral register, restricting eligibility for entry in the electoral register is, in fact, restricting the right to vote. Therefore, in order not to enlist someone with the right to vote in the electoral register, the conditions of restricting basic rights, as stipulated by Article 37 Section 2 of the Constitution, must be followed.

Article 37 Section 1 of the Act stipulates that the electoral register must be compiled by surveying voters registered as residents in the relevant jurisdiction as of the date of compilation. Therefore, in the case of Korean nationals residing abroad, though they have the right to vote in state elections, cannot be entered in the electoral register because they have no resident registration, even when they file domestic domicile registrations or register as nationals residing abroad with embassies, and therefore cannot vote. As explained above, the nationals residing abroad with registered domestic domiciles should have the right to vote in local elections, and yet, even if Article 15 Section 2 of the Act is amended to grant them that right, they would be ineligible for entry in the electoral register on the basis that they have no resident registration, and therefore will not be able to exercise their right to vote.

However, in terms of confirming the identity of voters and managing elections so that they only vote once, nationals residing abroad registering domestic domiciles or registering at embassies is no different from the resident registration system.

Therefore, Article 37 Section 1 failing to allow nationals residing abroad who have registered domestic domiciles or have registered at the embassies to be entered in the electoral register for state elections³⁾ is restricting their right to vote without reasonable

3) Nationals residing abroad must be entered in the electoral registers of embassies even if they are only given the right to vote in proportional representative National Assembly elections and not local constituency ones. It

cause, and is in violation of the Constitution. The same is true in the case of local elections with respect to the nationals residing abroad with registered domestic domiciles who reside in the jurisdiction of the relevant local government. Though there is concern about the difficulty of managing elections when nationals residing abroad are allowed to vote, this is not reason enough to justify restricting the people's right to exercise their sovereignty.

D. On Article 38 Section 1 (Partial unconstitutionality)

When exercising the right to vote, the general principle is to be present at voting booths with compiled electoral registers, but when absentee reports are filed, votes may be cast at one's current location in the form of absentee ballots. When registered as an absentee, votes may only be cast in the form of absentee ballots. Those unable to file absentee reports cannot utilize the absentee voting system.

Article 38 Section 1 of the Act only stipulates that "domestic residents" eligible for entry in the electoral register may file absentee reports. the nationals residing abroad with registered domestic domiciles may be recognized as domestic residents and file absentee reports if they acquire eligibility for entry in the electoral register⁴). However, nationals who reside in foreign nations cannot utilize the absentee voting system be they nationals with resident registration in Korea, nationals registered as nationals residing abroad at embassies, nationals residing abroad temporarily, or nationals with the intention to reside abroad permanently.

Though there will be many problems regarding election management if we were to allow nationals residing abroad to vote as absentees, the remarkable advances in communications technologies have made it easier to overcome such difficulties. Also, as exercising the right to vote is in fact exercising the people's sovereignty, restricting the method of exercising the right to vote is not constitutionally acceptable. The part of Article 38 Section 1 of the Act which allows only domestic residents to file absentee reports restricts the right to vote of nationals residing abroad with regards to the method of exercising said right and cannot be considered reasonable. The legitimacy of the legislative purpose cannot be recognized, and it also violates the rule of balancing interests.

The "residing domestically" part of Article 38 Section 1 of the Act is in violation of the Constitution.

E. On Article 14 Section 1 of the National Referendum Act (partially unconstitutional with regards to pseudo legislative omission)

As Article 7 of the National Referendum Act grants the right to vote in national referendum to nationals of age 19 or older, nationals residing abroad also possess the right to vote in national referendum. However, Article 14 Section 1 of the National Referendum Act stipulates voters registered as residents be entered in the voter register, and Article 58 Section 1 states that those not entered in the voter register cannot vote in national referendums. Therefore, nationals residing abroad do not have resident registration, and thus,

is just that the elections must be managed so that they only exercise the right to vote that they are granted.

4) The issue of eligibility of nationals residing abroad with registered domestic domiciles to be entered in electoral registers is related to Article 37 Section 1.

cannot exercise their right to vote in national referendum.

In the case of nationals residing abroad who have registered domestic domiciles or are registered with at embassies, election management is possible in terms of confirming the voters' identity and allowing them to vote only once. Therefore there is no reason to restrict their right to vote in national referendum. Therefore, Article 14 Section 1 of the National Referendum Act failing to allow nationals residing abroad who have registered domestic domiciles or are registered with embassies to be entered in the voter register is an unreasonable restriction of the right to vote in national referendum, as stated in section C. supra.

F. On the Expression of the Judgment

The unconstitutionality of the articles in this case lie in the fact that they regulate the matter of exercising the right to vote for registered residents but not for nationals residing abroad who have registered domestic domiciles or are registered with their relevant embassies. The part of the articles in question which regulate the rights of registered residents is just and constitutional, and only the pseudo legislative omission of not including certain nationals residing abroad is unconstitutional.⁵⁾

When certain articles of law are unconstitutional because they fail to include certain contents, as is the case with the articles involved in this case, such pseudo legislative omission must be declared in violation of the Constitution or to be nonconforming to the Constitution. The relevant articles should not be declared unconstitutional or nonconforming to the Constitution in their entirety. This is because we cannot declare the constitutionally valid sections of said articles as nonconforming to the Constitution, nor can they cease to be enforced.

Declaring pseudo legislative omission unconstitutional or nonconforming to the Constitution is simply urging additional legislation and not declaring any existing law unconstitutional. Therefore, the existing articles of law do not cease to be enforced and no decision need be made on the matter of their temporary enforcement. No decision can be made on the temporary enforcement of the constitutionally valid section of the laws in question, and even when the period of temporary enforcement is over, the constitutionally valid section cannot be rendered null.

Justices Lee Kang-kook(Presiding Justice), Lee Kong-hyun, Cho Dae-hyen, Kim Hee-ok(Unable to sign and seal due to overseas business trip), Kim Jong-dae (Assigned Justice), Min Hyeong-ki, Lee Dong-heub, Mok Young-joon, Song Doo-hwan

[Annex] List of Counsels for complainants(2004 Hun-Ma 644)

5) If the majority opinion believes that the articles in question "limiting to registered residents" does not conform to the Constitution, they must clearly state that in the holding and not simply state that the "resident registration" part does not conform to the Constitution. Also, if the opinion that limiting to registered residents" does not conform to the Constitution means that not including nationals residing abroad in addition to registered residents does not conform to the Constitution, the "registered resident" part should continue to be enforced, and since determining whether the "limiting part" should be temporarily applied is meaningless, there is no need to make a decision on this matter.

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Law Firm Duksu, attorney in charge Lee Seok-tae

Law Firm Sanha, attorney in charge Gil Gi-kwan

Law Firm Saegil, attorney in charge Park Jong-wook

Law Firm Jahayeon, attorney in charge Lee Jae-gyun and 1 other

Law Firm Changio, attorney in charge Kim Hak-woong

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