The Constitutional Court of Korea as a Protector of Constitutionalism

- Global Perspectives -

Constitutional Court of Korea
Constitutional Research Institute

PREFACE

The Constitutional Research Institute(CRI), a branch research institute of the Constitutional Court of Korea, has celebrated its 10th year in 2021. Organized separately from the Court's organization of rapporteur judges which directly supports the adjudication of cases, CRI conducts research and educational activities on the Constitution and constitutional adjudication.

CRI's field of research lies between pure scholarly interest and the resolution of actual cases; its role is to research and establish relevant facts and theories in advance that the Constitutional Court may make reference to in the near future for its adjudication. Such research is published in the form of reports under individual researchers' names.

In the field of education, CRI provides varied courses that supplement constitutional education at educational institutions including universities. These include programs for employees of the Constitutional Court, public defenders, military advocates, attorneys, law school and university students, secondary school students, primary and secondary school teachers, and public officials of state and local government.

CRI also issues a scholarly journal dedicated to constitutional justice, publishes reports on trends in constitutional adjudication around the world, holds a moot constitutional court competition, and hosts an international symposium. It also runs a training program that invites employees of other constitutional courts from overseas.

In the course of planning projects to celebrate the 10th anniversary of CRI, the project was prompted to issue a publication in English compiling the achievements of CRI's parent organization, the Constitutional Court of Korea. The Republic of Korea could not be called a constitutional state in a true sense in 1988 when the Constitutional Court of Korea was first established. The Court itself was born out of the 1987 amendment of the Constitution which was the result of the citizen resistance to the quasi-military regime. It was the fervent hope of the Korean people at the time that the Constitutional Court would take the lead in establishing a country respecting the rule of law where fundamental rights were actually guaranteed.

PREFACE

Commentators of modern Korean history are generally in agreement that the Republic of Korea represents a rare case of having achieved political democratization and economic growth at the same time, and even within a very short period. There are many factors that led to these achievements, but not many would object to the proposition that the Constitutional Court of Korea played a crucial role. Koreans originally learned ideas such as constitutionalism and constitutional adjudication from Europe and America. We take pride in the fact that the Korean people overcame a harsh history and successfully rooted these ideas where we live. And we hope that the results, developed in a way that is tailored to the Korean environment, are worthy of reference by other countries, and have reached a level where we can have positive influence to each other through mutual exchange.

This book contains valuable articles by distinguished constitutional scholars from 12 countries around the world. The articles are organized by theme into four chapters, that is "Constitutional Adjudication and Constitutional Court," "Constitutional Adjudication and Democracy," "Constitutional Adjudication and Fundamental Rights," and "Constitutional Courts in Comparison." Every article, however, addresses the achievements of the Constitutional Court of Korea as a common theme. Through these chapters, readers will not only be able to better understand the constitutional adjudication system and democracy in Korea, but also affirm values that are shared across countries.

We hope this slender volume will contribute to the development of constitutional adjudication around the world, the establishment of rule of law, and to the advancement of human freedom.

Jong-Bo PARK
President, Constitutional Research Institute

FOREWARD

I extend my hearty congratulations for the publication of *The Constitutional Court of Korea as a Protector of Constitutionalism: Global Perspectives,* a collection of scholarly articles celebrating the 10th anniversary of the Constitutional Research Institute which is the think tank of the Constitutional Court of Korea.

This book is an analysis by world-renowned scholars on the Constitutional Court of Korea's contributions for over 30 years since its establishment to the development of Korean democracy and rule of law, and to the growth of basic human rights. This will provide not only an opportunity to reflect objectively on the past and present of the Constitutional Court of Korea, but also will serve as an excellent reference for its further development.

It is true that each state has its own history and culture, and as a result, distinctive constitutional orders are in place along with diverse social and economic conditions. However, it is no longer an option but an imperative for states to share their hard-won experiences and ideas in the field of constitutional adjudication, which deals with universal human rights. It is our hope that this extraordinary collection of articles will help us share the experiences of the Constitutional Court of Korea around the world, and will contribute to the multifaceted global efforts for the development of constitutional democracy.

Lastly, I would like to express my heartfelt gratitude to the people who have provided enormous support to make the publication a reality: the scholars who contributed their in-depth insights, and to President Jong-Bo Park and all the members of the Constitutional Research Institute.

Namseok Yoo
President, Constitutional Court of Korea

CONTENTS

PART Ⅰ. Constitutional Adjudication and Constitutional Court

PART Ⅱ. Constitutional Adjudication and Democracy

CONTENTS

PART Ⅲ. Constitutional Adjudication and Fundamental Rights

PART Ⅳ. Constitutional Courts in Comparison

CONTRIBUTORS

Cheoljoon CHANG — REPUBLIC OF KOREA
Professor, Dankook University College of Law

Maartje DE VISSER — SINGAPORE
Professor of Law, Singapore Management University

Justine GUICHARD — FRANCE
Associate Professor of Korean Studies, University of Paris

Andrés Javier GUTIÉRREZ GIL — SPAIN
Secretary General, the Constitutional Court of Spain
Judge of the High Court of Justice of Madrid

Jau-Yuan HWANG — REPUBLIC OF CHINA(TAIWAN)
Professor of Law, College of Law National Taiwan University
Justice of the Taiwan Constitutional Court

Gertrude LÜBBE-WOLFF — FEDERAL REPUBLIC OF GERMANY
Professor, University of Bielefeld
Former Judge of the German Federal Constitutional Court

Kairat MAMI — REPUBLIC OF KAZAKHSTAN
Chairman, the Constitutional Council of the Republic of Kazakhstan

CONTRIBUTORS

Andy OMARA — INDONESIA

Professor of Constitutional Law, Gadjah Mada University School of Law

Alexander SMIRNOV — RUSSIAN FEDERATION

Doctor of Law, Professor, Lawyer Emeritus of the Russian Federation
Former Councilor of the Constitutional Court of the Russian Federation

Takao SUAMI — JAPAN

Professor of Law, Waseda Law School

Mark TUSHNET — UNITED STATES OF AMERICA

William Nelson Cromwell Professor of Law emeritus, Harvard Law School

Francois VENTER — REPUBLIC OF SOUTH AFRICA

Constitutional Law Professor, North-West University

I

Constitutional Adjudication and Constitutional Court

- Some Institutional Features of the Constitutional Court of Korea in a Comparative Perspective – With a View to the Court's Integrative Function
- The Korean Constitutional Court and the Promotion of Constitutional Literacy
- Global Constitutionalism and Human Rights: The Contribution of the Korean Constitutional Court to Global Society

Some Institutional Features of the Constitutional Court of Korea in a Comparative Perspective
– With a View to the Court´s Integrative Function

GERTRUDE LÜBBE-WOLFF*

Abstract

This chapter focuses on the integrative function of a constitutional court, and on some of the more important institutional frameworks which help a court perform this function in a satisfactory manner. Features that will activate the rationalising and moderating potential of collegial deliberation are particularly important for that purpose. No court in the world is set up ideally in this respect, and "best practices" depend to a large extent on context. The Constitutional Court of Korea and its workways seem in most of the investigated aspects designed in a way that is likely to promote integrative decision-making. Two particular features deserve special attention: The far-reaching supermajority requirement under which the Court operates implies a risk that does not appear to have materialised, so far. For a court in the civil law system, it is also atypical to interpret applicable majority requirements to the effect that none of them applies to the reasons of a decision. A majority requirement applicable to reasons tends to operate in favour of the development and maintenance of an integrative culture of deliberation. Not to make any use of this collegiality-promoting device may carry a risk, as well.

* Professor em., of Public Law, Univ. of Bielefeld (Germany), Associate Justice, German Federal Constitutional Court 2002-2014, email: gertrude.luebbe-wolff@uni-bielefeld.de. The author thanks Ahn Chang-Ho, Justice of the Constitutional Court of Korea 2012-2018, who kindly answered some questions concerning workways of the Court and the interpretation of provisions of the Constitutional Court Act and of other materials, including his concurring opinion in the 2017 impeachment case. The information I received contained no assessments or hints to possible assessments. Any misjudgment that may have slipped into the subsequent text is therefore entirely my own. Comments and criticism are welcome, all the more since in comparative research including legal systems foreign to the author, it is almost impossible not to get anything wrong.

I. The Integrative Function of Constitutions and Constitutional Courts

In a brochure on the Constitutional Court of Korea,[1] there is a page carrying only one short statement:

> The Constitutional Court of Korea
> embodies the national value
> of realizing justice and national integration

In a divided nation, of course, the term "national integration" evokes the idea of national unity, in the first place. But "to integrate" a nation is more than to reunite two geographical parts that haven fallen apart. It is building and preserving unity in the face of societal heterogeneity, conflict and cleavages.[2] Integration is indeed the primary function of a constitution.[3] It is appropriate for constitutional courts to consider this function in the way they interpret and apply the constitution. And it is important for their organisation and procedures to be tailored in a way that will help them to work as an integrating institution, not a polarising one. In this article, I will focus on some of the institutional features that can play a part in this respect.

II. Deliberation as the Centerpiece of Integrative Decision-Making

Fair judicial procedure is designed to give judges a chance to get the better of their prejudices. Deliberation in judicial conference can be and ought to be the centerpiece of that procedure. It exposes the judges not only to the arguments of the parties and to additional information which

1) Constitutional Court of Korea, 2020, p. 18 <http://english.ccourt.go.kr/cckhome/images/eng/main/ccourt_brochure_202009.pdf >, last accessed 31 Dec 2020.

2) See, e.g., on *social integration* in the context of a globalised economy with a potential not only to increase wealth, but also to produce losers and deepen social divides, "Reply by the Constitutional Court of Korea" to the Questionnaire for the 3rd Congress of the World Conference on Constitutional Justice 'Constitutional Justice and Social Integration', Seoul 2014 <https://www.venice.coe.int/WCCJ/Seoul/docs/Korea_CC_reply_questionnaire_3WCCJ-E.pdf>, last accessed 29 Nov 2020. On issues of polarisation in Korean society and social integration as a constitutional value, see the concurring opinion of Justice Ahn in the decision of Mar 10, 2017 on the Impeachment of the President (Park Geun-He), sub XIII.C. <http://english.ccourt.go.kr/cckhome/eng/decisions/majordecisions/majorDetail.do?searchClassCode=ENEXECLSS&searchClassSeq=576>, last accessed 31 Dec 2020.

3) Gertrude Lübbe-Wolff, Verfassung als Integrationsprogramm [The Constitution as an Integration Programme], 69 Aus Politik und Zeitgeschichte 43-48 (2019), also available at <https://www.bpb.de/apuz/289230/verfassung-als-integrationsprogramm>, last accessed 31 Dec 2020; id., Integration durch Verfassung [Integration by Constitution], 12 Zeitschrift des Deutschen Juristinnenbundes 174-180 (2009), also available at <https://www.nomos-elibrary.de/10.5771/1866-377X-2009-4-174/integration-durch-verfassung-jahrgang-12-2009-heft-4>, last accessed 31 Dec 2020.

they may have taken in before deliberation takes off, but also to challenges of their views on what to make of them. Ideally, it comes close to the "ideal speech situation" devised by the philosopher Jürgen Habermas, where only "the compelling force of the better argument" counts. Under such auspices, correct decisions, wise decisions, decisions that are sensitive to the concerns at stake, decisions that avoid extremes – in short: integrative decisions – are more much likely than in frameworks that do not provide for deliberation, or that are not set up to best activate its potentials.

1. Selection and Appointment of Justices

To work in an integrative way, it is obviously of the essence that a constitutional court and its individual justices be independent and impartial. If they are not, deliberation cannot work as it ought to. As a consequence, the court will lack credibility, and the legitimacy of its decisions will suffer. Both independence and impartiality depend on complex institutional arrangements. I will deal with just one aspect which is often misjudged.

In recent decades, the idea has gained traction that for a court to be fully independent, the selection of its members must be taken out of the hands of the political branches of government and transferred to a judicial appointment commission – preferably, according to one theory, to a commission with a majority of members of the judiciary.[4] The Supreme Court of India has even held that with respect to the selection of its justices anything but cooptation is an unconstitutional interference with the guarantee of judicial independence, which is part of the immutable "basic structure" of the Constitution of India.[5]

These views are mistaken, particularly so with respect to constitutional courts. "Political" appointment of justices provides democratic legitimacy and a reasonable degree of synchronisation of judicial worldviews with those of the society at large, and it does not in any way by itself put judicial independence in jeopardy. Many constitutional courts with a high reputation of independence have all their members or the greater part of them selected by the political branches of government. If "political" selection of justices poses a specific risk to the ability of a constitutional court to function in an integrative way, it is the risk for the court to turn out *partial*. A constitutional court may be perfectly independent and yet lack impartiality. The US Supreme Court is a case in point. Justices of that court are nominated by the president of the United States, and the president´s choice must be confirmed by one of the chambers of parliament, the Senate. This selection process, in combination with other relevant factors and a lack of appropriate

4) See, e.g., Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, par. 46 f. <https://wcd.coe.int/ViewDoc.jsp?id=1707137>, last accessed 31 Dec 2020; Jan van Zyl Smit, The appointment, Tenure and Removal of Judges under Commonwealth Principles. A Compendium and Analysis of Best Practice (The British Institute of International and Comparative Law), XVii f. (2015) <http://thecommonwealth.org/sites/default/files/press-release/documents/Compendium%20on%20Judicial%20Appt%20Tenure%20and%20Removal%20in%20the%20Commonwealth.pdf>, last accessed 31 Dec 2020.2021.

5) Supreme Court Advocates-on-Record-Association v. Union of India, Writ Petition (Civil) No. 13 of 2015 <https://main.sci.gov.in/jonew/judis/43070.pdf>, last accessed 31 Dec 2020. Cf. Art. 124 par 2 of the Constitution of India; for an overview and some background see Mahendra Prasad Singh, Supreme Court of India, par. 16 ff., 20 ff., in: Max Planck Encyclopedia of Comparative Constitutional Law (Dec 2018).

counter-measures, has indeed contributed to the court´s gross failure in its integrative function over recent decades. The reason for that failure, however, is by no means a lack of independence from the political authorities that have brought the justices into office. The real problem is the lack of impartiality that manifests itself in recurring voting blocks, divided along political nomination background lines.[6] Where that is a frequent pattern, or even the usual one in politically highly controversial matters, a constitutional court will not just mirror societal cleavages but reinforce them. It will make constitutional jurisdiction appear like a pointless sequel to the political power play. And the jurisdictional output will be one-sided and extreme rather than balanced and mitigated as it would be if serious deliberative efforts were made to overcome ideological divides and find common ground on the basis of rational argument and serious efforts to understand the respective concerns.

Such partisan divides, however, are by no means a typical concomitant of "political" systems for the selection of justices. A composition of the bench that makes it unlikely for the court to split into political "factions" can be avoided by various means.

Many countries, including Korea with its rather broad ban on party membership for public officials, rule out party membership of their justices in order to distance them from politics.[7] In some of them, ineligibility extends to persons who have been members or functionaries of a political party or held other political offices within a certain period of time, in some cases many years, previous to appointment or nomination. The constitution of Thailand, for instance, does not allow the appointment of justices who are *or have been* "a member or holder of other office in a political party in the ten-year period prior to election or selection."[8] It is questionable whether rules of this type will safely and significantly contribute to the impartiality of a constitutional court. They may have a symbolic value, but their operative value is, to say the least, very limited. In Hungary and Poland, prohibitions of party membership for Justices[9] have not prevented ruling majorities from capturing the respective constitutional courts by staffing them with their allies, and it would probably have made little difference if these prohibitions had been extended to periods before nomination or appointment. Parties have their ideas about who is close to them, regardless of whether career aspirations keep people from becoming members or not.

---

6) Gertrude Lübbe-Wolff, Das dysfunktionale Gericht (The Dysfunctional Court), Frankfurter Allgemeine Zeitung , 6 Oct 2020; a Chinese version is available at <http://www.calaw.cn/article/default.asp?id=13890>, last accessed 31 Dec 2020.

7) Beyond Korea, this is the case, e.g., in Bolivia, Indonesia, Italy, Japan, Malaysia, Peru, Spain, South Africa and Thailand, and in almost all eastern European countries (far beyond the EU). In some countries, e.g. France, Cambodia and Central Africa, only (leading) functions in a political party or other political organisation are ruled out. In Portugal, party membership must be adjourned. By contrast, in Switzerland, party membership is a factually indispensable prerequisite to become a Supreme Court Justice.

8) Sect. 202 (No. 5) ThaiConst, repeated in Sect. 10 (19) ThaiCCtAc**t**. In Indonesia, a provision excluding candidates that have been member of a political party in seven years before nomination was declared unconstitutional by the Constitutional Court. According to Simon Butt, THE CONSTITUTIONAL COURT AND DEMOCRACY IN INDONESIA, 37 (2015).

9) For Hungary, see Art. 24 (8) HungarConst, ruling out party membership of members of the Constitutional Court; in addition, Sect. 6 (4) HungCCtAct makes persons ineligible who have been a leading state official or a leading official in a political party in the four years prior to election. In Poland, a prohibition of party membership, and also a prohibition of membership in trade unions, is in place not only for members of the constitutional court, Art. 195 Abs. 3 PolConst, but also for all other judges, Art. 178 (3) PolConst.

What is important for Courts in order to be impartial is not to be devoid of members with political convictions and preferences. If that were the case, hardly anyone would be eligible. It is important to avoid staunch ideologists and a persistent dominance of any of the political forces, including those which happen to be prevalent as a result of democratic elections. The most widespread institutional arrangements that can be helpful for that purpose are: diversification of organs involved in the selection process, formal or informal political quota arrangements, short or moderate periods of office, staggered appointments (all of which makes diversity and balance of political views on the court more likely), qualification criteria aiming at the recruitment of persons with extensive professional experience (which exclude persons with *nothing but* political qualifications), and supermajority requirements for collegial bodies involved in the selection process (which counteract the temptation to appoint "party soldiers" or ideological extremists). None of these devices will safely produce a moderate, balanced court. Even the beneficial effect of a high supermajority requirement for the parliamentary election of justices as it exists in Germany and in many other countries[10] will vanish as soon as one party commands the requisite supermajority.

Given the fallibility of each of the above-mentioned devices, it is certainly recommendable to combine several of them. This has been done in Korea, where executive, parliamentary, and judicial powers each have their substantive share in a complex mixed appointment system albeit with a most unusual concentration of nomination power for the judicial branch in the hands of the president of the Supreme Court),[11] where eligibility depends on having served for at least fifteen years (in sum) in well-defined legal professions, and where the term of office is very short (six years)[12] – in great contrast to the appointment for life of US Supreme Court justices, and to appointments up to pension age in many other countries.[13]

10) In Germany, the two chambers of parliament each elect eight of the sixteen FCC judges (sitting in two so-called senates) by a two-thirds majority, § 6 (1), § 7 GermFCCtAct. A two-thirds supermajority is also required for the election, proposal or confirmation either of all the justices or of a part which is selected by parliament or by one of the chambers of parliament, or by other multimember bodies, e.g. in Angola, Argentina, Belgium, Bolivia, Chile, Costa Rica, Croatia, Hungary, Italy (here, the supermajority requirement is lowered to three fifths if two thirds are not attained in three ballots), Kosovo (here, the supermajority requirement applies only to seven of the nine justices), Mexico, Morocco, Peru, Portugal, Thailand, and, concerning the future Constitutional Court, Tunisia. A three-fifths supermajority requirement for all of the justices or part of them exists, e.g., in Albania, Armenia, Georgia and Spain. In Israel, seven votes in the nine-member Judicial Selection Committee are necessary for a justice to be appointed by the head of state.

11) Art. 6 KorCCtAct. The judiciary has a share in selecting the justices in many countries. Mostly, however, where this is the case, the Supreme Court as a whole (as for instance in Indonesia, Mongolia and Thailand) or the members of all the highest ordinary courts (as in Italy), or a General Council of the Judiciary (as in Spain and several other countries) or even the General Assembly of Judges (as in Armenia) holds that share, not just a single judge who is president of an apex court.

12) Art. 112 par. 1 korConst, Art. 7 par. 1 KorCCtAct. The six-year term is renewable. According to Chaihark Hahm, Constitutional Court of Korea: Guardian of the Constitution or Mouthpiece of the Government, in: Albert H.Y. Chen, Andrew Harding (eds.), CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE, 141, 144 fn. 7 (2018), reappointments have not occurred except in the early years of the court. This shows awareness of the problem of judicial independence that is at issue here. Internationally, reeligibility is recessive. It has been abolished, sometimes with delayed effect, or exempting the justices already in office, for instance in Germany (federal level, 1970), in Portugal (1997), in Taiwan and Slovakia (2001), for the European Court of Human Rights (2010), in Hungary (2011) and in Indonesia (2020). However, reeligibility persists for a great number of courts, including some renowned ones.

13) As in most common-law countries and, for instance, for the Supreme Courts or specialised Constitutional Courts,

Unlike in some of the countries with three-powers mixed appointment systems, providing for staggered appointments does not seem to have been a legislative concern, so far. I have not found any provision to that effect in the Constitutional Court Act, and indeed a temporal concentration of appointments catches the eye. According to the biographies on the court´s website (as of 20 December 2020), all of the incumbent Justices were appointed in the years 2017 to 2019, and more than half of them (five) even in one single year, 2019. Things could be worse, and in some countries they are. In Slovakia, for instance, nine out of thirteen justices of the Constitutional Court were replaced in 2019.[14] In the Czech Republic, there has been a more or less complete turnover of membership every ten years, so far.[15] In Myanmar, all seats on the Constitutional Tribunal were filled with new members in 2013, following resignation of all the previous members due to impending impeachment, and new appointments for the entire bench, this time including reappointment of three of the previous members, followed in 2016.[16] Flushing a constitutional court in this manner may not only be detrimental to political/ideological pluralism and balance on the bench, which is more easily achieved by temporally deconcentrated appointments as they take advantage of political changes in the nominating authorities over time. Large-scale crew changes also make it harder for a productive collegial culture of deliberation to develop – which always takes time – and persist.

2. Time to Deliberate

A. Caseload, Filtering and Simplifications of Procedure

Careful deliberation needs time. Constitutional courts, particularly those which citizens can access by way of individual complaint, therefore need mechanisms to separate the important, politically sensitive cases needing extensive deliberation from routine cases, and they need mechanisms that will enable the court to deal with the latter in a less time-consuming way. These mechanisms include permissions to decide in small formations and/or in simplified procedures (e.g. without an oral hearing, without giving reasons) or on the basis of standards that do not require a full legal assessment (e.g. on a discretionary basis, or on the basis of exacting admissibility requirements, or on the basis of admission criteria allowing non-acceptance of petty cases).

For the constitutional court of Korea, a system of prior review by panels of three judges has been adopted in order to limit the number of constitutional complaints that have to be processed by the

respectively, in Austria, Belgium, Denmark, Egypt, Finland, Japan, Myanmar, Norway, Russia and Sweden.

14) Max Steuer, On the Brink of Joining Poland and Hungary: The Night of Surprises in the Slovak Parliament, VerfBlog, 2018/10/25, par. 22 <https://verfassungsblog.de/on-the-brink-of-joining-poland-and-hungary-the-night-of-surprises-in-the-slovak-parliament/>, last accessed 31 Dec 2020.

15) Zdenek Kühn, The Constitutional Court of the Czech Republic, in: András Jakab, Arthur Dyevre and Giulio Itzcovich (eds.), COMPARATIVE CONSTITUTIONAL REASONING, 199, 209 (2017); David Kosař and Ladislav Vyhnánek, The Constitutional Court of Czechia, in: Armin v. Bogdandy, Christoph Grabenwarter, and Peter Huber (eds.), THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, VOL. III, CONSTITUTIONAL ADJUDICATION: INSTITUTIONS, 3rd ed. 119, 130 (2020).

16) Melissa Crouch, Dictators, democrats, and constitutional dialogue: Myanmar's constitutional tribunal, 16 International Journal of Constitutional Law 421, 434 ff., 443 (2018).

Full Bench.[17] Like in most countries where similar filtering systems are in place, including Germany, these panels can dismiss complaints only by unanimous decision.[18] The Korean filtering system is more complainant-friendly than most of its counterparts, including the German one, in that the possible reasons for dismissal by Panel are narrowly framed (i.e. they are limited to a small number of defects in the complaint that will usually be obvious), and in that the case will go to the Full Bench automatically where a Panel has not decided to dismiss it within thirty days from the date of filing.[19] This may be sufficient to make sure there is enough time for the full bench to discuss difficult and sensitive cases. Like in the majority of new democracies in Eastern Europe, decisions of other courts are not an object of (admissible) constitutional complaints in Korea. Such a restriction of the ambit of constitutional oversight has serious drawbacks in that it withholds from the constitutional court a source of authority and public support, and renunciates an important instrument to make sure that constitutional awareness will permeate the judicial system – and, indirectly, public administration – as a whole. On the other hand, this restriction keeps the greatest number of potential cases away from the Constitutional Court[20] and thereby allows for an otherwise rather generous filtering system.

In Germany, it has been discussed time and time again whether discretionary non-acceptance of cases as it exists for the US Supreme Court[21] would not be preferable to the current system, which allows to dispose of all but about 20-40 cases per year in panels of three, but on the basis of legal standards demanding acceptance of complaints which are important either because a substantial violation of a fundamental right of the complainant(s) is at stake or because an open constitutional question needs to be clarified. In my view, changing to a system of discretionary docket control would be most unwise. It would inevitably make the judges focus on the "big" cases, the intellectually interesting cases, the cases that will draw media attention. It would thereby eliminate the above-mentioned advantages of extensive competences, and damage the culture of general constitutional awareness that comes from a broad constitutional oversight covering "small" cases as well as big ones.

17) Art. 72 KorCCtAct.

18) Art. 72 (3) KorCCtAct. In Germany, the panels of three can also uphold constitutional complaints where there is sufficient guidance by the case-law of the large panels (*Senate*) or where the constitutional necessity is obvious. However, the power to declare legislation unconstitutional rests exclusively with the larger panels. As constitutional complaints can be raised not only against legislation or failure of courts to refer questions to the FCC, but against all kinds of acts of public authorities, including all ordinary courts, interfering with fundamental rights, this leaves ample room for the small panels to sustain constitutional complaints. For a detailed account, with statistics, see Gertrude Lübbe-Wolff, The German Federal Constitutional Court from the Point of View of Complainants in Search of their Constitutional Rights, in: P. Pasquino/B. Randazzo (eds.), LA GIUSTIZIA COSTITUZIONALE ED I SUOI UTENTI 61, 61-88 (2006).

19) Art. 72 (3) no.s 1.-4 and Art. 72 (4), sentence 2 KorCCtAct.

20) On the caseload of the Constitutional Court of Korea (1750/a in the years 2008-2017, almost 2000/a in recent years, see Constitutional Court of Korea, THIRTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA, 120 (2018). Cf. also statistics on the Court´s website, see below, fn. 69.

21) For details on the process of deciding whether to grant *certorari*, see Timothy R. Johnson and Maron W Sorenson, The U.S. Supreme Court's Strategic Decision-Making Process, in: Ralf Rogowski and Thomas Gawron, CONSTITUTIONAL COURTS IN COMPARISON. THE US SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT, 2nd ed., 111, 121 ff. (2016); Artemus Ward, Junior Varsity Judges? Law Clerks in the Decisional Process of the U.S. Supreme Court, ibid. 165, 167 ff.

The Constitutional Court of Korea also takes advantage of the time-saving permission to decide most cases by written procedure. Oral argument is mandatory only for decisions on impeachment, on the dissolution of a political party, and on competence disputes.[22] Proceedings in constitutional complaint cases and (other) cases concerning the constitutionality of legislation are mostly conducted just in writing.[23] Whereas supreme courts in the common law tradition of orality[24] typically hold an oral hearing in each case to be decided on the merits,[25] specialised constitutional courts and supreme courts with constitutional functions outside the common law world typically make rather scant use of oral hearings.[26] Oral hearings certainly *can* be important. They may be indispensable in cases hinging on a judicial assessment of the credibility of defendants and witnesses. They can also show a court "in action" to the public and thereby instill trust, or attract public attention to the importance and/or to the complexities of a matter. All of this can be relevant either with respect to a just outcome or with respect to the integrative function of constitutional jurisdiction, or both, but it does not make oral hearings indispensable in all types of cases or in every single instance of a given type of case. In cases that have passed the respective filtering systems, constitutional courts should therefore not be barred from holding an oral hearing wherever they find it appropriate. Doing so as a matter of routine reliance on orality, however, can only be considered as an atavism – a practice that was necessary in archaic times of illiteracy and may have had some advantages in more recent periods without easy copying facilities. In contemporary conditions, allocating little time for deliberations while devoting ample time to oral hearings is clearly misdirected. In systems where, due to a longstanding tradition of hearing oral argument routinely, there are corresponding social expectations, it will of course take time to gradually reallocate time investment without disintegrative effects on public trust.

B. Assistance Resources

Which array of competences is manageable for a court, how the justices get along with their tasks, and how much time they can afford to spend deliberating, depends, *inter alia*, on available assistance resources.

---

22) Art. 30 KorCCtAct.

23) Constitutional Court of Korea (fn. 20) 122-123.

24) On that tradition see Peter M.Tiersma, The Textualization of Precedent, Loyola Law School, Legal Studies Paper No. 2007-28, April 2007, passim; Michael D. Kirby, Judicial Dissent – Common Law and Civil Law Traditions, 123 Law Quarterly Review 379, 384 ff. (2007).

25) See, e.g., for the High Court of Australia, Susan Kiefel, An Australian Perspective on Collective Judging, in: Birke Häcker and Wolfgang Ernst (eds.), COLLECTIVE JUDGING IN COMPARATIVE PERSPECTIVE, 47 (2020); for the Supreme Court of Ghana Samuel Kofi Date-Bah, Decision-Making and Working Practices of the Supreme Court of Ghana, in: Charles M. Fombad (ed.), CONSTITUTIONAL ADJUDICATION IN AFRICA, 334, 339 (2017); for the UK Supreme Court Robert Reed (Lord Reed of Allermuir), Collective Judging in the UK Supreme Court, in: Birke Häcker and Wolfgang Ernst, ibid., 21, 26; for the US Supreme Court Howard Schweber and Jennifer Brookhart, The Supreme Court of the United States, in: Jakab et al. (eds.), 273, 279 (2017).

26) Just by way of example: The German FCC has held only 7 to 12 hearings annually in recent years. The Constitutional Court of Austria holds about 10 oral hearings per year, on average, Christoph Grabenwarter, The Austrian Constitutional Court, in: Bogdandy et al., eds. (fn. 15), 19, 42 (2020). The Constitutional Court of Slovenia, according to insider information, has heard oral argument less than once a year in recent years. The Constitutional Court of Georgia, by contrast, does not conform to the above typology (a hearing is mandatory for each admissible case unless the parties ask the court to proceed in writing, Art. 27 Abs. 2 GeorgCCtAct).

In this respect, the Constitutional Court of Korea is probably an object of envy in many places. I was told Justices have three so-called *rapporteur judges*, assigned to each of them individually,[27] except for the president, who does not get cases assigned to himself. According to published information, they work not only on the preliminary review of constitutional complaints, but also on cases allocated to the full bench.[28] In addition, there is an impressive reservoir of pooled rapporteur judges who also support judicial work.[29] The Court can also appoint academic advisors[30]. It has an impressive library. Testing its search form on the Court´s website, I found it a paradise for comparative constitutional research.[31] And there is the affiliated Constitutional Research Institute, which celebrates its tenth anniversary this year and supports the court´s endeavours, including its integrative function, by conducting research and providing education and training that will raise awareness of constitutional rights[32] and, along with this, awareness of the importance of the constitutional court that protects them.

In many other countries, justices have to put up with very little assistance. In the common law world, where judicial work does not start with a preparatory "report", justices were traditionally not expected to engage in any pre-hearing preparatory work, and as to post-hearing work, they were, and often are to this day, expected to do the judgment writing all on their own. Accordingly, little assistance was, and often still is, provided for them. The US Supreme Court, with four clerks for each of the justices, is rather an exception in this respect, in the common law sphere. In some constitutional courts outside the common law world, too, assistance for the justices is in short supply. The French *Conseil constitutionnel* is a notable example. The legal service (*service juridique*) there consists of only four expert officials, and these are neither generally nor on a case-by-case basis assigned to individual justices, but work under the authority of the secretary general. If the justice to whom the president has assigned a case does not agree with the draft decision produced by the legal service, he can write an alternative draft as the basis for deliberation in conference, but he cannot direct the legal service to do that work, or part of it, for him. Preparation of reports and/or draft decisions under the exclusive direction of a secretary general or court president creates an imbalance of power which is not helpful for the purposes of a deliberative process that should bring argument, not power, to prevail. For justices to be able to rely on assistants which are assigned to them individually and work according to *their* directions is important as a matter of equality not only concerning the relationship between court president(s) and associate justices, but also concerning the relationship between the justice to whom a case has

27) On rapporteur judges see (without reference to individual assignments) Art. 19 KorCCtAct; Constitutional Court of Korea (fn. 20) 115; on the employment of rapporteur judges with doctoral degrees as constitutional researchers ibid.

28) http://english.ccourt.go.kr/cckhome/engNew/introduction/organization/rapporteurJudges.do (accessed 22 Dec 2020). Due to ambiguity of the term *presiding justice* (see below, text with fn. 34), it is, however, difficult to find out what the role of a justice to whom a case has been assigned, as opposed to the president of the court, is in these cases.

29) One group of rapporteur judges is assigned to the justices, another is not, and separated into sub-groups working in specialised fields, Constitutional Court of Korea (fn. 1), 13 (2020).

30) Art. 19-3 KorCCtAct; according to Constitutional Court of Korea (fn. 20) 115, professors are appointed as academic advisors.

31) On the library see also Constitutional Court of Korea (fn. 20) 128 f., and information on the Court´s websites.

32) Constitutional Court of Korea (fn. 20) 116; information on the CRI and its activities is also available on the Court´s website.

been assigned for preparation (*reporting justice*; in the terminology used for the Constitutional Court of Korea: *presiding justice*[33]) and the other justices, because it makes sure that for each justice, support is available, if needed, not only in the cases assigned to him, but also in cases assigned to colleagues. Individual assignment of assisting staff, in other words, is an important element of securing equal fire power regardless of case assignment.

In Germany, each of the justices – including the president, who is not exempted from the role of "reporting judge" – has four individually assigned clerks ("Wissenschaftliche Mitarbeiter"), who, by the way, are also important transmitters of constitutional awareness into the judicial and other public service outside the constitutional court, to which they usually return after two or three years of service as FCC clerks. Four clerks per justice, that´s fine – more could hardly be employed responsibly –, and there is a good library, too, but not much else in terms of research facilities: just one legal assistant in the relations ("Protokoll") department charged with writing a newsletter on the case-law of international courts and foreign constitutional courts. At the FCC, the almost complete absence of pooled research personnel does not cause problems of insufficient specialisation in chambers, as far as domestic law and international law are concerned, because cases are assigned to the justices according to a schedule of responsibilities defined by subject matters, and each justices will pick assistants with expertise in the respective areas of law. However, when it comes to comparative research, which requires more language proficiencies and knowledge of different legal systems than the chambers of an individual justice can hold in stock, and in a system where cases are not assigned according to subject areas for which individual justices are responsible and can choose accordingly specialised clerks, the Korean support structure is clearly superior.

C. Bench Size

Bench size can engender scarcity of time for true deliberation. The greater the number of justices on the bench, the more time it will take to hear what each of them has to say – particularly so in courts where deliberation starts with an initial *seriatim* round, which is, however, not the case in Korea. All else equal, efforts to find common ground will also take more time with a greater number of participants. And bench size is relevant to the possible quality of deliberations beyond time restrictions.

With a full court bench of nine, the Constitutional Court of Korea is located between extremes such as three (Constitutional Court of Malta) and eighteen (Constitutional Court of Ukraine) or, until recently, nineteen (Constitutional Court of the Russian Federation; the new constitution of 2020 provides for a successive reduction, by non-replacement of justices leaving the court, to

33) The term *presiding justice* for the justice to whom a case has been assigned is apparently used in order to prevent misunderstanding arising from the fact that the term *rapporteur judge* is by law (Art. 19 KorCCtAct) reserved for members of the legal assistance staff. This choice of terminology, however is more puzzling and more prohibitive for an outsider´s understanding of the division (or accumulation) of tasks and powers within the court than the alternative of calling the justice to whom a case has been assigned *reporting justice*, because the term *presiding justice*, too, is by law (and, in addition, by common usage) dedicated to something other than the justice to whom a case has been assigned, see, e.g., Art. 22 (2) KorCCtAct ("The presiding judge of the Full Bench shall be the President of the Constitutional Court").

eleven). In constitutional adjudication, not only the proverbial insight that "four eyes see more than two", which can be extrapolated to greater numbers, but also a particular need to have a broad range of backgrounds, experiences and worldviews, including *different* political preferences "represented" (in a non-technical sense) on the bench militate against very small bench sizes. But the integrative function of a constitutional court can also suffer from bench oversize. There is an upper limit to the number of persons who can fruitfully engage in the type of collegial discussion that is required in a constitutional court. Much depends on context here. For instance, dissatisfaction with deliberations in the Grand Chamber at the European Court of Human Rights, where deliberation time is as a rule used up when each of the seventeen judges has spoken once, could probably be mitigated by changes in the discussion rules, or by organisational innovations that would make it easier to continue deliberations on another day.[34] The Supreme Court of India might, in the *Kesavananda* case, which was decided by a bench of thirteen – the largest bench ever set up in that court – have avoided the problem that some of the judges weren´t even able to read all of the opinions that had been produced,[35] if some time had been allotted to a deliberative effort to find more common ground and reduce the number of opinions. However, even with techniques that may enable even very large judicial formations to deliberate, they will never perform optimally. Oversize begins where it becomes hard to organise that individual contributions relate to each other rather than just being juxtaposed (i.e. that questions that have been asked will be answered, and suggestions discussed), where it becomes impossible to go into all the necessary detail, or where deliberations get so tedious due to the number of people having to or wanting to speak that fatigue rather than argument becomes the determining factor. The Korean choice of a (full) bench of nine justices – probably the most frequent choice, internationally[36] – is therefore definitely a wisely optimising one.

3. The Role of the President

Many countries have a tradition of powerful court presidents. Chief Justices in common law countries traditionally have the power to determine bench sizes and bench composition (including case assignment to the respective benches), and, if applicable, to assign the task of writing the "opinion of the court", "lead judgment" or "first judgment" (terminologies vary, but the task is always the same: to write a judgment that will, hopefully, get majority support).[37] These traditions

34) For instance, the initial seriatim round, which, as a rule, happens to be the final one as well, might be abandoned, or shorter comments called for in that round, or a follow-up session day reserved in advance. Apparently, deliberation discipline in the Grand Chamber suffers from the fact that the composition of that formation is different for each case. Lack of stable cooperation perspectives is always bad for the development of useful ethics of cooperation.

35) B. Muthu Kumar, Determining the Bench Size for Constitutional Adjudication, 5 Christ University Law Journal 1, 11 f. (2016).

36) Nine is apparently the most frequent (regular) number of justices in specialised constitutional courts. Examples include the Constitutional Courts of Albania, Armenia, Bosnia und Herzegowina, Cambodia, Colombia, Ecuador, Gabun, Georgia, Indonesia, Jordan (with actually nine justices; the constitution of Jordan only provides for a *minimum* number of nine), Korea, Kosovo, Lithuania, Luxemburg, Mali, Madagaskar, Mongolia, Myanmar, Romania, Slovenia, and Thailand. Examples of non-specialised constitutional courts are the Supreme Courts of Canada, Iceland, and the USA; of these, only the US Supreme Court regularly sits en banc, with all nine justices.

are, with some modifications and observable tendencies towards collegialisation, still alive in many Supreme Courts.

Among the specialised constitutional courts and Supreme Courts with constitutional court functions outside the common law world, or in mixed systems, there is a broad range of different scripts for the role of the president. In some of these courts, internal leadership is more or less entirely collegialised, with the president acting according to decisions of the collegium of justices or as their agent and with their presumed, but revocable consent in any relevant matter.[38] In others, presidents have more or less extensive autocratic powers. These may include disciplinary powers and other powers relevant to the status of justices, case assignment powers, exclusive command of assistance resources, exclusive powers to direct the process of deliberation and voting, and a casting vote in case of a tie.

Considering that judicial independence requires not only independence from powers outside the judiciary,[39] the question deserves to be discussed to what extent presidential powers beyond the reach of collegial decision-making are compatible with judicial independence.

The range of presidential powers and the relevant actual practices are often hard to tell from existing statutory rules and rules of court. Rules are often vague. It is open to debate, for instance, whether and, if so, to what extent the presidential task to "preside" or "chair" public and internal sessions of a court (or of its more important formations)[40] implies that the collegium cannot direct him in the exercise of that task. And quite often, internal practices develop in ways that are not predictable from the rules. For instance, under rules conferring power on the president to establish panels, assign cases to them and/or assign reporting and/or judgment writing to individual justices, or on the basis of traditions to the same effect, practices of random assignment or consensual decision-making may develop and may even turn into conventions. This is more likely to happen where the justices themselves have the power to elect their president[41] – a device which not only promotes collegiality but also protects a court from external influences that might be exercised via a powerful president. Highly collegial practices are, however, also possible in a court whose president is selected and appointed. The German Federal constitutional Court can serve as an example.

For these reasons, a correct appraisal of the presidential role in a constitutional court is hardly possible without access to insider reports, private or published, and a foreigner like myself, without command of the Korean language, is certainly an inept analyst of that role with respect to the Constitutional Court of Korea. The Constitutional Court Act is with few exceptions (e.g.

37) In the US Supreme Court, the Chief Justice assigns the lead judgment only if he is in the majority; otherwise, that power falls to the most senior justice in the majority.

38) In Europe, this is the case, for instance, for the constitutional courts in Germany and in Slovenia.

39) On this often overlooked aspect, see, with a view to court presidents and judicial councils, David Kosař, PERILS OF JUDICIAL SELF-GOVERNMEN IN TRANSITIONAL SOCIETIES, 130 and passim (2016).

40) As provided, e.g., in Art. 22 par. 2 korCtAt.

41) As for instance in Albania, Argentina, Belgium, Bosnia and Herzegowina, Brazil, Bulgaria, Cambodia, Chile, Colombia, Costa Rica, Croatia, Denmark, Ecuador, Georgia, Indonesia, Iceland, Italy, Kosovo, Latvia, Lebanon, Liechtenstein, Madagaskar, Mali, Mexiko, Mongolia, North Macedonia, Peru, Portugal, Romania, Sweden, Serbia, Slovenia, Spain, Thailand, Turkey, Tunesia, and Ukraine.

concerning the appointment of Rapporteur Judges, Junior Rapporteur Judges and the President of the Constitutional Research Institute)[42], all but telling with respect to the delineation of presidential and collegial powers in matters of internal decision-making. For constitutional courts in the civil law tradition, internal rules of court typically regulate internal procedures, such as panel formation, case assignment to panels and reporting justices, agenda-setting, calling of oral arguments and internal meetings, order of deliberations and voting, signatures, etc. With all of this, they typically specify the reach of presidential as well as collegial competences. To mention just some of the internal Rules of Procedure of the German FCC, by way of example: It is the president[43], according to these rules, who issues a direction on the details of how to anonymise the names of the parties before a decision is distributed[44]. It is the president in consultation with the reporting justice who decides on petitions to get access to the records[45], and the president upon suggestion by the reporting justice who serves applications to respondent parties and certain other addressees.[46] It is the president *in consultation* with the panel he presides who draws up the agenda for the panel meetings.[47] It is the president *in agreement* with the panel who can appoint a co-reporting justice in cases of particular importance.[48] And it is the panels (not the president) who make the rules for the allocation of cases[49] and decide whether to hold an oral hearing,[50] when to have meetings[51] and how to conduct deliberations.[52] As to voting, statutory legislation makes it clear that where opinions concerning the questions to be put to a vote, the order of voting on them, or the results of voting, differ, it is for the bench to decide.[53] The actual practices are even more collegial than what these rules might suggest. I have never seen a president pay no heed to the view of a majority of his colleagues in the way he conducts presidential business. No wonder – after all, his associates might change the rules if he did. It was a long process, though, to get there. Internal Rules of Procedure – the German term is: *Geschäftsordnung* (literally: order of doing business) – were adopted only in 1975. Presidents of the court had sought to prevent the adoption of such rules for more than twenty years because they disliked the prospect of control being taken out of their hands and the limits of their powers being clarified.[54]

42) Art. 19 par. 4, Art. 19-2 (2), Art. 19-4 (4) KorCCtAct.

43) I.e. the Justice who presides the respective panel (the president of the court in one of the panels and the vice-president in the other).

44) § 36 Rules of Court of the German FCC.

45) § 35 (1) Rules of Procedure, German FCC (the criteria for that decision are defined by statute, see § 35b GermCCtAct, according to the understanding that the rule of law requires the rights and duties of third persons to be defined by statutory legislation).

46) § 22 (2) Rules of Procedure of the German FCC. As to addressees, see § 23 par. 2 BVerfGG.

47) § 21 (2) Rules of Procedure of the German FCC.

48) § 20 (2) Rules of Procedure of the German FCC.

49) § 20 (1) Rules of Procedure of the German FCC. The president decides who the reporting justice for a case is according to these rules; in case of doubt, however, he will hear the members of the senate to whom the case might be assigned, and in case of controversy, the panel decides, § 20 (2) Rules of Procedure of the German FCC.

50) § 24 (1) Rules of Procedure of the German FCC.

51) § 21 (1) Rules of Procedure of the German FCC.

52) § 27 sentence 1 Rules of Procedure of the German FCC.

53) § 17 GermFCCtAct, with § 194 par. 2 Courts Constitution Act (Gerichtsverfassungsgesetz).

54) Willi Geiger, Erfahrungen aus 25 Jahren Verfassungsgerichtsbarkeit[Experiences from 25 years of constitutional

As to the Constitutional Court of Korea, Art. 10 (1) of the Constitutional Court Act would seem to confer upon the Council of Justices the power to make internal rules resembling the typical internal rules of constitutional courts in the civil law tradition.[55] The "Rules of Adjudication of the Constitutional Court" of Korea, the only internal rules that have, so far, been translated into English, however, rather follow the model of the typical "Rules of Court" in common law countries, specifying various requirements that petitions and other filings must meet, providing for pre-trial procedure, regulating oral argument, applications for the examination of witnesses and other aspects of evidence, and the like, including relevant obligations for counsel and third persons.

I have been informed that beyond these Rules of Adjudication, Rules of Operation of the Council of Justices (according to Art. 16 (5) of the Constitutional Court Act), and Rules of Composition and Operation of the Panels (according to Article 72(6) the Constitutional Court Act) have been adopted, and that there are also internal regulations regarding internal workways such as the Regulation for the Assignment of Cases and the Regulation for the Method of Court Decision Writing. All of this is not translated, so far.

From the information available in English, and with some of the relevant statutory rules apparently open to interpretation,[56] it is not clear to what extent decision-making with respect to internal procedure is collegialised in the Constitutional Court of Korea, and how much room remains for non-collegial presidential guidance in the procedures of this court. A reported controversy over the appointment of the president of the court in 2006 indicates that the office of the president is considered highly influential.[57] Suffice it to put on record that internal presidential powers to lead the court and define its workways without internal interference and independently of collegial support have never been missed in the German FCC or, to my knowledge, in other courts that have developed very collegial workways. In fact, if collegial deliberation is likely to produce more convincing, more balanced, more integrative decisions on substantive constitutional questions than brainracking by a single judge (or a mere counting of votes cast without discussion, or cast on the basis of bargaining and bartering between individual justices), it is hard to see why the same should not be true with respect to decision-making in matters of internal court procedure.

4. Structure of Deliberations

There are many different ways of conducting "deliberations". In the common law tradition and in hybrid legal systems that have adopted this tradition with respect to decision-making procedures, deliberations, if any, are usually rather short, and sometimes do not even deserve the name. The

adjudication], in: Recht und Politik im Verständnis des Bundesverfassungsgerichts, 3 Schriftenreihe der Juristischen Studiengesellschaft Hannover, 25, 26 (1980).

55) Art. 10 (1) KorCCtAct: "The Constitutional Court may make rules of adjudication procedure, internal discipline, and management of general affairs, to the extent that those are not inconsistent with this Act and other statutes."

56) Art. 10 par. 1 KorCCtAct seems to confer broad rulemaking powers upon the Court. A narrow reading (or a very broad reading of the presidential power to preside) would seem inappropriate, particularly in a court of the *per curiam* tradition, but that does not mean there is no room at all for divergent interpretations.

57) Hahm (fn. 12), 149.

judicial conferences in the US Supreme Court, for instance, usually consist of nothing but one *seriatim* round, with each justice speaking just once and voting right away, without even having heard what those next in line have to say. No wonder that this court is as far as a court can be from producing integrative decisions. Some other courts have equally undeliberative ways.

In many of the constitutional courts which take discussion among the justices more seriously, conferences often start with a *seriatim* round, too, but then proceeds to an open discussion. In courts which have adopted the civil law institution of a reporting justice who is in charge of preparing the case for deliberation and usually does so by drawing up a report and/or a draft decision, that justice is usually the first to speak. Otherwise, or following the presentation of the reporting justice, the other *seriatim* contributions will usually follow according to seniority or, much more frequently, reverse seniority, or according to seating order or alphabetical order, or just in a spontaneous order with the only restriction that each justice must have spoken once before anyone gets to speak a second time and an open discussion follows. Other courts, including the Constitutional Court of Korea, have an open discussion right from the start (following an opening presentation by the reporting justice, if any).[58)]

Each of these solutions have their costs and benefits. The Korean way – open discussion right from the start – is certainly the most time-saving one. It may also be advantageous in that it permits members with doubts about the right decision, regardless of their position in any possible speaking order, to defer their statement until they have heard what colleagues have to say. This may help to prevent premature taking of positions and associated difficulties of withdrawing from them later. On the other hand, a predetermined first-round order of speaking may foster collegiality in preventing justices who enjoy formal or informal status privileges or who just happen to be more assertive than others from taking the lead and sidelining others. An initial seriatim round may create an (additional) incentive for the justices to be well prepared (and, alas, to prove extensively that they are!). In courts with informal voting practices (see next section), it may also help to make sure that each justice has expressed his views at least once. It obviously depends on context – on voting practices, on whether cultural features such as overly agonal discussion behaviour or excessive deference to seniority need to be institutionally counteracted, and the like – which of the various possible practices will work best to set all the potential of collegial deliberation free. It is therefore impossible to recommend one way of ordering deliberations as superior under any circumstances. What is important is that the decision on how to proceed be, itself on the basis of deliberation, made by the members of the bench, not by one (presiding) justice alone, and that that decision be, from time to time, reconsidered on the basis of experience.

58) This is also the practice, e.g., in the Supreme Courts of Australia and India, in the Constitutional Councils of France and Lebanon, in the Constitutional Courts of Austria, Georgia, South Africa and Turkey, and in the First Senate of the German Federal Constitutional Court.

III. Voting

1. Majority Requirements

For most constitutional courts, a majority vote either of the justices participating in the judgment or of the regular number of justices on the bench is required to make a decision. Among the exceptions to be found in quite a number of the specialised constitutional courts, including the Korean and the German one, are unanimity requirements for the smaller panels established to decide or just filter out easy, petty and/or inadmissible cases. Supermajority requirements are also in place for some courts with respect to particular categories of cases, typically cases of rather infrequent incidence such as party bans and impeachments. In Germany, for instance, a two thirds majority is required for decisions to the disadvantage of the respondent in proceedings concerning forfeiture of fundamental rights, unconstitutionality of political parties, motions to impeach the Federal President, and motions to impeach federal and state (Länder) judges,[59] and for some particular procedural decisions.[60] Similar examples of highly selective two-thirds supermajority requirements (relating either to participating justices or to the regular composition of the bench) can be found, for instance, in Armenia, Bulgaria, Hungary, Croatia, Mongolia, Romania, Russia, Serbia, Thailand, Turkey, Ukraine, Slovenia, and, in the future, Taiwan and Tunisia.[61] In Brazil, according to Art. 103-A of the Constitution, a two-thirds majority is required for the production of a *sumula vinculante* that will bind not only the parties to the controversy at hand, but all judicial and administrative organs. Lower highly selective supermajority requirements also occur in some countries.[62]

---

59) § 15 (4) GermFCCtAct.

60) § 26 (2) GermFCCtAct (decision to refrain from requesting or using individual documents if their use would be contrary to national security interests), § 28 (2) GermFCCtAct (decision that a governmental refusal to grant permission to testify to a witness or expert in public service is unfounded and that the witness or expert therefore cannot plead his or her obligation to maintain secrecy), § 32 (6) GermFCCtAct (decision to extend a preliminary injunction beyond six months), § 105 (4) and (5) FCCtAct (decision to authorise the Federal President to retire a justice due to permanent incapacity for office or remove a justice as a consequence of certain criminal sentences or grave breaches of duty, and decision to temporally remove a justice under specified conditions).

61) The statutory provision according to which the Constitutional Court of the Russian Federation decides by a two-thirds majority when giving an interpretation of the constitution (Art. 72 RussCCtAct) does not mean that this requirement is applicable wherever the court specifies the meaning of the constitution; it only applies to a particular type of proceeding (abstract request for an interpretation of the constitution, Art. 3 (4) RussCCtAct. Besides, a two-thirds majority is required for the court to decide that the chairman or the deputy chairman does not, or not in an appropriate manner, comply with his duties; as a consequence, his powers may be terminated by the Federation Council upon a proposal of the president of the Russian Federation, Art. 23 RussCCtAct. The supermajority requirement for the Constitutional Court of Serbia is interesting because it applies only to a type of proceedings unknown in most constitutional courts: to proceedings for the review of constitutionality and legality instituted by the court *suo motu*, Art. 50 par. 2, Art. 58 par. 4 SerbCCtAct. On upcoming changes for the Constitutional Court of Taiwan see text above, next paragraph. In Tunesia, the organic law on the (future) Constitutional Court (abbreviated here: TunisCCtAct) requires a two-thirds majority for a statement of the court that for specified reasons (death, permanent incapacity, resignation, loss of one of the prerequisites for becoming a justice or serious violation of duties established in the organic law), a seat on the court has become vacant Art. 20 TunisCCtAct, for a decision to uphold a petitioner's recusal of a justice (Art. 28 TunisCCtAct), and for a decision on impeachment of the president of the republic (Art. 66 TunisCCtAct). The provisional institution entrusted with *a priori* review of (draft) legislative acts until the future constitutional court starts to operate decides by absolute majority of its members (Art. 21 of the organic law on the *Instance provisoire du contrôle de constitutionnalité des projets de loi*).

In Korea, by contrast, a severe supermajority requirement extends far beyond some exceptional types of constitutional cases. A vote of six or more Justices – i.e. two thirds of the regular full bench composition of nine – is required not only where the Constitutional Court decides to dissolve a political party, sustain impeachment or overrule its own precedent, but also for decisions ruling a statute unconstitutional or upholding a constitutional complaint.[63] As far as I can see, only very few constitutional courts operate under similar majority rules covering more than just exceptional cases.[64] In Poland and, for the future (2022), Taiwan, existing high-coverage supermajority requirements have been abandoned.[65]

At first sight, unidirectional supermajority requirements with respect to finding statutory legislation unconstitutional look like a promising proceduralisation of the idea that decisions finding constitutional fault in parliamentary legislation ought to be made only where the violation in question is rather obvious – in other words: they look like a means to prevent judicial

62) See, e.g. for the Constitutional Court of Benin, Art. 13 and Art. 49, Art. 78.2 BeninCCtAct concerning decisions requiring five of seven possible votes (a two-thirds majority is required where the court sits in conjunction with the Beureau of the Supreme Court in matters concerning the prosecution of a member of the Constitutional Court, Art. 81 BeninCCtAct).

63) Art. 23 par. 2 KorCCtAct.

64) Examples that I have come across: The Constitutional Court of the Czech Republic operates under a similarly far-reaching and almost as demanding supermajority requirement, Art. 13 CzechCCtAct in connection with Art. 87 par. 1 a), g) and h), and Art. 87 par. 2 of the Czech constitution (nine out of the regular number of fifteen votes required for decisions concerning the annulment of statutory legislation, an impeachment of the President of the Republic, a petition of the President of the Republic to revoke certain parliamentary resolutions concerning presidential office, and the review of international treaties, and for decisions overruling precedent. Except for the latter case – overruling – it is not quite clear from the text of the relevant provisions whether the supermajority requirement applies unidirectionally – i.e. only for decisions finding constitutional fault and/or changing the status quo –, or both ways. Examples that I have come across: The Constitutional Court has decided that the former is the case, see Kosař / Vyhnánek (fn. 15) 155 f. (2020). The Constitutional Council of Lebanon needs a majority of 7 out of possible 10 votes in reviews related to the verification of the laws' constitutionality and in disputes and challenges arising from parliamentary elections, Art. 12 LebCCAct. This requirement, I was informed by a Justice of that court, is non-unidirectional, i.e. it applies to the relevant decisions *whatever their content.* In Peru, where the In Peru, where the Constitutional Court has seven members, five votes are required for a decision declaring a piece of statutory legislation unconstitutional, Art. 5 par. 1 PeruvCCtAct. The most demanding supermajority requirement I have come across, so far, is effective for the Lebanese Constitutional Council: The Council needs seven out of ten possible votes in proceedings concerning review of statutory legislation and in disputes and challenges arising from parliamentary elections (Art. 12 LebCCAct), i.e. in both its areas of competence. From conversation with a justice, I understand that this requirement is non-unidirectional, thus preventing the Council from making any decision at all absent consensus of at least seven of the (regularly ten) members. As to the supermajority requirement applicable for the Constitutional Court of Taiwan, see text with fn. 66 and 75. There may be more examples, but the number of courts operating without similarly far-reaching supermajority requirements is, at any rate, much higher.

65) For the Constitutional Court of Taiwan, see Lin Tzu-Yi, Kuo Ming-Sun, and Chen Hui-Wen, Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape, 48 Hong Kong Law Journal, 995 (2018), quoted here from the version available at SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300722>, last accessed 31 Dec 2020, with page numbers 1-37 (p. 22 on the three-quarters supermajority requirement established in 1958 and lowered to a two-thirds requirement in 1993), and Hwang Jau-Yuan, Kuo Ming-Sun, and Chen Hui-Wen, Taiwan, in: Richard Albert, David Landau, Pietro Faraguna, and Simon Drugda (eds.), 2018 Global Review of Constitutional Law, I·CONnect – Clough Center 303, 305 (2019), for the removal of the supermajority requirement that will enter into force with the Constitutional Court Procedure Act (<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0030159>, accessed 31 Dec 2020) on January 4, 2022. With respect to the Constitutional Tribunal of Poland a (non-unidirectional) two-thirds supermajority requirement was introduced in 2015 and abandoned following protest from European institutions, while many other parts of the ruling party´s strategy to curb and subject judicial power, including that of the Constitutional Tribunal, have remained in force or have even been added subsequently, see Wojciech Sadurski, POLAND´S CONSTITUTIONAL BREAKDOWN (2019).

overactivism, which is certainly one of the risks associated with constitutional judicial review.[66] When applicable to party bans, or to the behaviour of persons subject to impeachment, and the like, they may be thought to serve as a shield against the risk that such means to protect the constitution might be abused to distort political contest. One should not overlook the flip side, though. Supermajority requirements imply a veto position for the corresponding minority, and that veto position is no less prone to misuse than the power of a simple majority. The risk of internal faction-building is even greater, because effective prevention of a foreseeable, lasting dominance of one group of politically like-minded justices becomes more unlikely where a minority is put in a position to dominate the court (if only unidirectionally).

The risks which this poses to the development and stability of an integrative culture of deliberation may not have materialised in the Constitutional Court of Korea, so far. At any rate, they have not materialised into anything even remotely resembling a systemic blockage of the court's functioning as a guardian of the constitution. The Court is highly renowned as a reliable guardian of democracy and the rule of law, which has exercised its functions with remarkable stability, and it enjoys trust and popularity.[67] Interestingly enough, the supermajority requirement rules under which this court operates, for instance, with respect to finding statutory legislation unconstitutional, has not resulted in a particularly low rate of such findings, compared with courts operating under less demanding majority requirements. Comparison is extremely difficult in this area, because types of proceedings, procedural details and other contexts are so very different, but, for instance, a rate of more than 37% of findings of constitutional fault in cases of constitutionality review of legislative acts upon referral by other courts, as it is reported for the Constitutional Court of Korea (long-term statistics, 1988-2020, on the Court´s website)[68], rather seems remarkably high.[69]

---

66) For the meaning of the term "unidirectional" in this context, see fn. 65.

67) Tom Ginsburg, I–CONnect Symposium: The 30th Anniversary of the Constitutional Court of Korea—Part II: The South Korean Constitutional Court in Comparative Perspective, Int'l J. Const. L. Blog, Mar 9, 2019 <http://www.iconnectblog.com/2019/02/i–connect-symposium:-the-30th-anniversary-of-the-constitutional-court-of-korea—part-ii:-the-south-korean-constitutional-court-in-comparative-perspective>, last accessed 31 Dec 2020. The supermajority requirement may even have contributed to the respect which the court enjoys by slowing down the pace of constitutionally induced change, and by preparing public opinion for such change, see Joon-Seok Hong, Signaling the Turn: The Supermajority Requirement and Judicial Power in the Constitutional Court of Korea, in: 67 American Journal of Comparative Law 177 (2019).

68) The data as of Nov. 30, 2020 show a total of 1005 cases of "Constitutionality of statutes" review (brought by ordinary courts since the Constitutional started to operate in 1988). In 294 of these cases (=29.3%), the norms submitted for review were found "Unconstitutional", in the terms of the statistical report, and in additional 80 cases there was a finding of "Nonconformity" – meaning that the reviewed norm is unconstitutional but remains in force until a date set by the court for the National Assembly to revise it, see <http://english.ccourt.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>, accessed 31 Dec 2020. In sum, this amounts to 37.2% of the "concrete review" cases (*konkrete Normenkontrolle*, as we call the FCC review of statutory legislation initiated by ordinary courts in Germany) resulting in a finding that the relevant norms violate the constitution (without the possibility of a curative interpretation). I have checked the "Unconstitutionality" figures for some earlier years (1990, 1005, 2000, 2005, 2010, 2015) and found the rates rising continuously in this row, from a very low base, up to 2015 (the *very small* negative difference between 2015 and 2020 may be due to the fact that the December data were not yet included in the 2020 statistics). Accordingly, the actual *annual* rate of concrete review decisions finding constitutional fault with should be far above the long-term rate of 37.2%.

69) There are no analogous statistics with specific reference to cases of "concrete review" published on the website of the German FCC, but the rate constitutional fault with legislation submitted for review to the FCC by other courts is definitely *much* lower. By far the greatest number of concrete review filings is not even considered on the merits. In

2. Object of Voting and Majority Requirements

In yet another important aspect, the workways of the Constitutional Court of Korea appear to differ from those of most specialised constitutional courts, and indeed from those of most apex courts in countries with civil law legal systems.

In common law systems, the object of judicial voting on a decision is the outcome, i.e. the dispositive part, and it is only with respect to the outcome that a majority of votes is necessary. This implies that so-called plurality decisions are possible, i.e. decisions which lack a reasoning that is supported by a majority of justices. Voting therefore typically does not extend to the reasons. By contrast, courts in the civil law tradition typically need a majority not only for the outcome, but also for the reasons upon which it is based. This holds regardless of whether or not the publication of separate opinions is possible (or even mandatory for those who have dissented internally). Accordingly, voting has to cover both outcome and reasons. This difference goes back to the archaic tradition of *seriatim* decision-making, on the one hand, and the tradition of *per curiam* decision-making, on the other.[70] The tradition requiring a majority for the reasons is favourable – more favourable than a tradition allowing each of the judges to write his own opinion – to the development of a deliberative culture because it cannot work unless the judges are ready to listen to each other carefully and approximate on some middle ground where necessary in order to frame reasons in a way that will find majority support.

To my surprise, I have been told that in the Constitutional Court of Korea, a majority (let alone a supermajority) is *not* required for the reasons of a decision, and that accordingly, decisions without reasons that are supported by a majority of justices are possible. With this, the court is, so to say, on the common law side with respect to the most fundamental difference between the workways of courts in the common law tradition and courts in the civil law tradition.[71]

How is this to be explained? For a few courts, as for the constitutional courts of Colombia and Kosovo, and the Supreme Coourt of Norway, similar a-typical patterns concerning the object of voting and of majority requirements, can be traced to a blending of traditions in hybrid systems or to a sporadic common law influence in an otherwise rather consistent civil law system.[72] In the

---

France, the Constitutional Council has dealt with 871 concrete review (*Question proiritaire de constitutionnalité,* QPC) proceedings from 2010, when the QPC was introduced, through 30 June 2020. Of these proceedings, 313 (= 35, 93%) resulted in findings of partial (69) or total (158) inconformity (meaning here; unconstitunality) of the relevant legal norms, or in rulings finding a violation of the constitution, with deferred effect (e.g. the analogon of a decision labeled "Nonconformity" in the statistics of the Constitutional Court of Korea) <https://www.conseil-constitutionnel.fr/bilan-statistique>, accessed 31 Dec 2020.

70) For details and for the historical background and consequences of this fundamental systemic difference with respect to the object of voting see Gertrude Lübbe-Wolff, Cultures of Deliberation in Constitutional Courts, in: Patricio Maraniello (ed.), JUSTICIA CONSTITUCIONAL, LA JUSTICIA CONSTITUCIONAL EN LOS DIFERENTES ÁMBITOS DEL DERECHO Y SUS NUEVAS TENDENCIAS, Vol. 1, 37, 42 ff. and passim (2016), also available online, <https://www.researchgate.net/publication/320918386_Cultures_of_deliberation_in_constitutional_courts#fullTextFileContent>; id., Why is the German Federal Constitutional Court a deliberative court, and why is that a good thing? A Comparative Assessment, in: Häcker and Ernst, eds. (fn. 25), 157, 161 ff. (2020).

71) The binding force of precedent is of much lesser practical importance, see Gertrude Lübbe-Wolff (fn. 6).

72) For the constitutional courts of Kosovo and Colombia, see Lübbe-Wolff, Why (fn. 71), 162 fn. 14 (2020). Some other countries in Latin America, where judicial systems often show a hybrid character, have also adopted the US tradition

case of Korea, the explanation probably lies in the far-reaching supermajority requirement (see previous section). Where a supermajority requirement applies, the question arises whether *that* requirement applies to reasons, as well. In case of a highly demanding supermajority requirement, the answer to this question is likely to be negative, because finding a majority for reasons is a more complex and more difficult task than finding one just for the outcome, and where a supermajority is required, applying it not only to the outcome, but also to the reasons may easily turn out obstructive. In case of a unidirectional supermajority requirement,[73] it would be particularly implausible to interpret it as extending to reasons, because this would invest the corresponding minority with the power to prevent a court from getting at any decision at all – a power which is clearly implied in a supermajority requirement applicable to all possible outcomes, but clearly not meant to be implied in a unidirectional supermajority requirement. No wonder, then, that the Constitutional Court of Korea does *not* consider the *super*majority requirement established in Art. 23 KorCCtAct applicable to the reasons of the relevant decisions. Another question is whether, instead, the basic *simple* majority requirement or no majority requirement at all should apply for the reasons. The former answer would seem more in line with the *per curiam* model on which most specialised constitutional courts, including the Korean one, are otherwise shaped. It would also be more prone to promote integrative decision-making. The Constitutional Court of Taiwan apparently interprets the relevant norms accordingly, which are not more explicit on the issue than the Korean ones. According to information by one of its members, this court operates on the assumption that where a decision requires a supermajority, this applies only to the outcome, but a simple majority is still necessary for the reasons.[74]

3. Formal and Informal Voting

As far as the respective majority requirements go (on that subject, see previous section), many constitutional courts, including the Constitutional Court of Korea, have a practice of formal voting. Formal voting is practically indispensable wherever the court is obliged to register or even to publish precise voting results, or where, as in Korea, all the Justices are required to express their opinion publicly, because in all these cases, there is a practical need to know the opinion of *every single* justice, even when it is already known that a sufficient majority is in favour of the proposed decision. Formal voting may also be explicitly prescribed by legislation or by rules of court, or may be understood to be prescribed by any sort of existing norms concerning voting procedures (such as

---

that a majority is required only for the outcome of judicial decisions. Norway, as opposed to other European Nordic countries, is one of the European countries that are strongly influenced by common law; that is why it also has a practice of requiring a majority only for the outcome of judicial decisions.

73) See above, fn. 65.

74) I owe this information to Justice Hwang Jau-Yuan. In the legal community, the question seems to be controversial: According to Lin Tzu-Yi, Kuo Ming-Sun, and Chen Hui-Wen, Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape, in: 48 Hong Kong Law Journal 48, 2018, S. 995-1027 (quoted here from the version that is available at SSRN, 1, 35 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300722>, accessed 31 Dec 2020, the supermajority requirement also applies to the underlying reasoning.

a requirement that decisions be adopted by open ballot).[75]

In some courts, by contrast, formal voting is rather unusual. This is the case, for instance, in the Supreme Court of Australia, in the German FCC, and in the Supreme Court of Japan.[76] Of course this does not mean that in these courts, it may remain unclear whether or not a decision has obtained the necessary majority. Where, however, as in the German FCC, a practice *not* to resort to formal voting is combined with license *not* to make the opinion of each justice public, this has a most beneficial effect on the court´s ability to develop a balanced, stable, integrative case-law, because it can make the most difficult of all judicial exercises – getting off a horse once mounted – a lot easier.[77]

IV. Separate Opinions

Historically, collegial decision-making "by the court" (*per curiam*) implied that internal differences of opinion would not be disclosed to the public. Some countries have retained this tradition, but for the majority of constitutional courts, it has been abandoned. The Venice Commission (Council of Europe, Commission on Democracy Through Law) correctly stated that "there is a growing trend among constitutional courts to allow separate opinions."[78] In the European Union, nowadays, only seven of the 27 member states do not allow their constitutional judges to publish separate opinions.[79]

In Asia, Korea is one of many countries that do not drive the secrecy of deliberations for their constitutional courts so far as to preclude separate opinions. With respect to the integrative function of constitutional adjudication, that is an advantage. This is not to deny that separate opinions may pose risks with respect to judicial independence – in particular when combined with reeligibility of the justices – , or with respect to the factual legitimacy of the court in certain cases of strong internal ideological divisions. The European Court of Justice provides an example. It would be unreasonable to allow separate opinions as long as the judges can be reappointed, and even if non-renewable terms were introduced, it is hard to foresee what the effect of making voting

75) Just by way of example, see §§ 34, 36 of the rules of the Constitutional Court of Austria (requiring that deliberation be followed by voting, making detailed provisions for the process of voting, § 34, and stipulating that voting results be recorded, § 36 par. 1); Art. 42 par. 7 of the rules of the Constitutional Court of Bosnia and Herzegowina (requiring that voting be done by a show of hands); Art. 35 of the rules of the Constitutional Court of Colombia (requiring that voting be effected by an unambiguous expression of consent or dissent concerning the proposition that is being voted upon); Art. 58 of the rules of the Constitutional Court of Serbia (requiring that every proposal be voted on electronically or, in the event that this is not possible, by a show of hands); Art. 70 of the law on the Constitutional Court of the Russian Federation (requiring that questions put to the vote and voting results be recorded).

76) For the Supreme Court of Australia see Kiefel (fn. 25), 51 (2020); for the Supreme Court of Japan Hiroshi Itoh, THE SUPREME COURT AND BENIGN ELITE DEMOCRACY IN JAPAN, 74 (2010).

77) For details on how this works, see Lübbe-Wolff, Why (fn. 71), 170-175 (2020).

78) European Commission for Democracy Through Law (Venice Commission), Report on Separate Opinions of Constitutional Courts, Opinion No. 932/2018, CDL-AD(2018)030, p. 4 par. 5 < https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e>, last accessed 30 Dec 2020.

79) These seven countries are Austria, Belgium, France, Italy, Ireland, Luxembourg and Malta.

behaviour transparent in terms of the integrative potential of ECJ Jurisprudence would be. If, for instance, transparency were to lay open considerable regional voting blocs within the court, the effect might well be a deepening rather than a smoothing out of north/south or east/west divides within the EU.

By contrast, in countries where regulatory frameworks and conventions make sure that permission to make internal controversy public, or even a duty to go public with internal dissent, will not put judicial independence in jeopardy or reinforce preexisting deep cleavages, permission to publish separate opinions is likely to contribute to preventing such cleavages.

As long as they do not come from a notoriously bloc-divided court, separate opinions are likely to have a beneficial educative effect. They express and illustrate that judicial decisions are not revelations of preexisting truths, but human products, devised to organise playing by the rules and provide clarification of ambiguous rules, and that they are indispensable for that purpose precisely because in matters of complex social organisation, only wisely designed institutions can guide us safely. People who know that will be more likely to value democracy and not fall prey to self-declared political saviours disdaining the institutions which are there to keep them from grabbing self-sustaining power.

With respect to internal decision-making, potential separate opinions have a rationalising and abuse-preventing effect in that they largely remove the possibility of embellishing decisions and the reasons given for them by suppressing or sidelining relevant information. This contributes to just decisions, directly as well as indirectly, by shaping judicial ethics accordingly. Another internal effect, very important in my experience, is that potential separate opinions induce efforts to avoid them. Where the members of a court might otherwise be inclined to vote minorities down when there is a clear majority, they are likely to invest more discussion and try to settle upon intermediate solutions, such as more narrowly tailored reasons, more flexible standards, explicit recognition of the importance of concerns that do not prevail, etc. – all of which will contribute to avoid extremes and the ensuing polarisation.

V. Conclusion

Chances for a constitutional court to work in an integrative way hinge on a culture of deliberation that will activate the rationalizing and moderating potential of collegial discussion. The development and stabilisation of such a culture depend on many factors. In a highly polarised environment – to which an apex court may itself have contributed, as is the case, for instance, in the United States –, the task becomes of course more difficult. General cultural factors, such as the degree of individualism or community spirit, the greater or lesser importance of seniority or other elements of hierarchy, and all kinds of other prevalent values also shape communication in a court and bear on its outcome. This article has looked at a particular subset of relevant factors: at some of the organisational and procedural frameworks, including informal rules, which also play an important part. More of such frameworks could have been given a look, and the analysed ones

could have been dealt with in greater depth, but a selection of important institutional features – concerning the appointment of justices, filtering mechanisms, assistance resources, bench size, presidential powers, order of deliberations, majority requirements, voting rules, and separate opinions – should at least have made it plausible that frameworks matter, and that they are not only products but also sources of culture, for better or for worse. The Constitutional Court of Korea is in most of these respects perfectly equipped to accomplish the integrative mission of a constitutional court. As to possible limitations of a collegial culture of decisionmaking by presidential powers, there is not enough information available to a foreigner without command of the country´s language to make a valid assessment. In two respects, the Constitutional Court of Korea works in a strikingly atypical way: It operates under a demanding and atypically far-reaching supermajority requirement. And, unlike most constitutional courts in civil law countries, it does *not* apply majority requirements to the *reasons* of its judgments. Both these characteristics carry a risk, but do not necessarily impede a stable culture of deliberation that is likely to foster integrative decisionmaking.

The Korean Constitutional Court and the Promotion of Constitutional Literacy

MAARTJE DE VISSER*

Abstract

Sensitizing the general public to the constitution and the court's mandate as its ultimate guardian not only benefits the latter's social legitimacy, but is critical to the endurance of constitutional democracy. This Article explores how the Korean Constitutional Court has sought to acculturate the general public to the meaning and value of the Korean constitution. It does so from a comparative perspective, juxtaposing its approach to that adopted by a range of other courts that are similarly well-known for commitment to constitutional guardianship. It suggests that improving constitutional awareness should be accepted as an essential aspect of the judicial mandate, which requires that sufficient resources are made available so that this responsibility can be successfully discharged. It furthermore suggests that it is beneficial when courts embrace new technologies and other modern communication techniques for the dissemination of information about the content of the constitution and its animating values. A multi-pronged literacy strategy allows courts to reach a wider range of audiences, as its messaging can be tailored to the needs and preferences of different groups of citizens.

* Professor of Law, Singapore Management University.

I. Introduction

According to its mission statement, one of the principal aims of the Constitutional Research Institute (CRI) at the Korean Constitutional Court is to 'deepen people's understanding of the Constitution'.[1] This aspect of the CRI's work appears to have largely escaped academic notice. At one level, this benign neglect is not surprising: after all, the Korean constitutional court has rendered many significant decisions advancing the triumvirate of fundamental values – rights, democracy and the Rule of Law – that clearly warrant examination for their contribution to the furtherance of constitutional democracy.[2] Outside the context of adjudication, the Korean constitutional court has carved out a place for itself as a leading actor within the transnational judicial arena. It was the driving force behind the establishment of the Association of Asian Constitutional Court[3] and Equivalent Institutions, actively participates in other modes of transjudicial dialogues[4] and deeply committed to the transfer of judicial skills and knowledge to build strong and efficient courts within the region and beyond.[5] These are remarkable feats, and should be celebrated as such.

Yet the real-life significance of the Korean Constitutional Court's commitment to cultivate a greater awareness of, and appreciation for, the constitution among the general public in Korea should not be underestimated. Individuals can only vindicate perceived violations of rights that they know are theirs to enjoy and enforce. Knowledge of the constitutional framework is further a prerequisite for members in society to perform their role as constitutional guardians by holding State institutions and officials to account, be it at the ballot box, by initiating judicial action against legislative or executive measures considered to fall foul of constitutional rules or by effectively using freedom of information laws.[6] And, crucially, familiarity with the content of a constitution can make it possible for this text and its underlying values to serve as a glue that binds (diverse) societies together.[7]

---

1) *About CRI: Greetings*, http://ri.ccourt.go.kr/eng/.

2) See Jongcheol Kim, *Upgrading Constitutionalism: The Ups and Downs of Constitutional Development in South Korea Since 2000*, *in* Constitutionalism in Asia in the Early Twenty-First Century (Albert Chen ed., 2014) 79-94; Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean Politics*, *in* New Courts in Asia (Andrew Harding & Penelope Nicholson eds., 2011); Kang Kook Lee, *The Past and Future of Constitutional Adjudication in Korea*, Jibong Lim, *Judicial Intervention in Policy-Making by the Constitutional Court in Korea*, and Dai-Kwon Choi, *The State of Fundamental Rights Protection in Korea*, *in* Current Issues in Korean Law (Laurent Mayali & John Yoo eds., 2014); Chaihark Hahm, *Beyond "law vs. politics" in constitutional adjudication: Lessons from South Korea*, 10 Int'l J. Const. L. 6 (2012).

3) http://aacc-asia.org. For discussion: Maartje De Visser, *We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism*, 3 Asian J. L. Soc. 105 (2016). See also its initiative to consider the prospects for and design of an Asian court of human rights: SNU Asia-Pacific Law Institute (ed), Global Constitutionalism and Multi-layered Protection of Human Rights – Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia (2016).

4) See David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. Penn. L. Rev. 927, 962-75 (2015).

5) See Maartje De Visser, *Patterns and Cultures of Intra-Asian Judicial Cooperation*, *in* The Oxford Handbook of Constitutional Law in Asia (David S. Law, Holning Lau & Alex Schwartz eds., 2021).

6) Cf. Tom Gerard Daly, *Designing The Democracy-Defending Citizen*, 6 Const. St. 189, 205 (2020); Tom Ginsburg and Aziz Z. Huq, How to Save a Constitutional Democracy (2018).

7) This is linked to the idea of the constitution as an expression of the identity of the polity, on which Michel Rosenfeld,

This Article accordingly explores how the Korean Constitutional Court has sought to acculturate the general public to the meaning and value of the Korean constitution. It does so from a comparative perspective, juxtaposing its approach to that adopted by a range of other courts that are similarly well-known for commitment to take seriously their role as ultimate guardians of the constitution. It suggests that improving constitutional awareness should be accepted as an essential aspect of the judicial mandate, which requires that sufficient resources are made available so that this responsibility can be successfully discharged. It furthermore suggests that it is beneficial when courts embrace new technologies and other modern communication techniques for the dissemination of information about the content of the constitution and its animating values. A multi-pronged literacy strategy allows courts to reach a wider range of audiences, as its messaging can be tailored to the needs and preferences of different groups of citizens.

This Article is divided into four parts. Part II examines the notion of constitutional literacy and provides a brief overview of its value in contemporary democracies generally and for constitutional courts in particular. Part II considers how the promotion of constitutional literacy can be seen as both inherent in and a logical extension of the classic judicial function of adjudicating cases. Part III explores how courts have sought to educate the general public on the provisions and values of the constitution other than through court proceedings and judgment-writing. The focus will be on the various initiatives devised by the Korean Constitutional Court, which will be compared to the approaches employed by courts in Asia and beyond. Part IV offers some reflections on emerging judiciary-led good practices concerning constitutional literacy.

II. The Idea of Constitutional literacy

This Article will use Dreisbach's definition of constitutional literacy as 'knowledge of the Constitution sufficient to invoke it properly'.[8] This understanding focuses attention on two interrelated elements: information about the structure, contents and principles that motivate the constitution on the one hand, and the capacity for individuals to do something as a result of, and with reference to, that information on the other hand. The 'invocation' of the constitution or its underlying principles can be explicit – such as by holding up a placard in a demonstration or during a coffeeshop conversation – or implicit, for instance by participating in an election.

Constitutional literacy should be thought of as a spectrum, or a series of spectrums, within which each citizen occupies her own, fluid position. While some individuals may be entirely ignorant as to the existence of a constitution and, by implication, its content, it is more common to observe

The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (2010); Chaihark Hahm, *Constitutional Identity and Nation-Building*, *in* The Oxford Handbook of Constitutional Law in Asia (David S. Law, Holning Lau & Alex Schwartz eds., 2021).

8) Dreisbach, Constitutional Literacy: A Twenty-First Century Imperative (2016), at 11. Contrast the earlier definition by Massaro, according to which literacy denotes the ability to study the constitution as an end in itself: Toni Massaro, Constitutional Literacy: A Core Curriculum for a Multicultural Nation (1993).

what we could call partial constitutional literacy. The extent of knowledge is not only often incomplete, but also unequal: some portions of the constitution are better known than others and which ones these are may differ from one individual to the next. A person's precise place on the literacy spectrum is determined by a complex interplay of factors. These include an individual's place within society, their level of political engagement and their professional responsibilities: one would neither assume nor require the same degree of literacy of parliamentarians, civil servants working on immigration matters, staff in an NGO dedicated to women's rights, vulnerable indigenous communities or high school students. For our purposes, emphasis will be placed on efforts directed at the general public, or segments thereof. They cannot avail themselves of the type of dedicated resources that are available to political elites or legal professionals (such as other courts, lawyers or academics with an interest in constitutional issues) to achieve higher literacy. Moreover, the public's knowledge of their national constitution is most in need of attention.

There has yet to emerge a fixed tool or set of criteria to assess the level of constitutional literacy in a jurisdiction. A 2015 Magna Carta International Survey however provides comparative insight into societal awareness concerning the constitution's existence, which is a logical prerequisite for understanding its content, let alone acting upon that content.[9] It was found that about two in three South Koreans had heard of the country's 1948 constitution. This figure is similar to that for South Africa's 1996 post-Apartheid constitution,[10] below that for the United States (four in five Americans had heard of the U.S. Constitution, the Bill of Rights and the Declaration of Independence[11]), but higher than that for Canada (with one in two Canadians being familiar with the existence of the 1867 Constitution Act.

Multiple reasons may be suggested in support of the importance of constitutional literacy among the general public. It could be said that the democratic legitimacy of a government depends on the people's understanding of the constitution. When such an understanding is lacking, the State's claim that is empowered to exercise authority over individuals would fall apart under social contract theories and the related idea of popular sovereignty.[12] As Beck explains, if citizens however 'knew exactly what the Constitution stood for, their so-called tacit consent [to submit themselves to the rules and principles set out therein] would look much more like informed

9) Ipsos MORI, *Magna Carta International Public Opinion*, January 2015, https://magnacarta800th.com/projects/international-poll/.

10) *See also* Tim Hodgson, *Bridging the Gap between the People and the Law: Transformative Constitutionalism and the Right to Constitutional Literacy*, Acta Juridica 189, at 191 (2015), which found that 'a mere 10 per cent of [South African] people have read the Constitution or have had it read to them'.

11) The general view in the academic literature is that despite high awareness of constitutional documents, there is poor constitutional literacy in the United States (in the sense of knowing what these documents are about), usually attributed to the low priority given to civics education in schools. *See*, e.g., Dreisbach, *supra* note 9; Maryam Ahranjani, Caleb Medearis & Jeffrey Shook, *Evaluating High School Students' Constitutional and Civic Literacy: Case Study of the Washington, D.C. Chapter of the Marshall-Brennan Constitutional Literacy Project*, 90 Denv. U.L. Rev. 917 (2013); Jonathan Gould et al, *Guardian of Democracy: The Civic Mission of Schools*, Report for the Campaign for the Civic Mission of Schools. Philadelphia, PA: University of Pennsylvania Leonore Annenberg Institute for Civics (2011).

12) For an illuminating discussion of the fictional character of the original 'we the people' and their relationship to the people governed under the constitution, *see* Chaihark Hahm & Sung Ho Kim, Making We The People – Democratic Constitutional Founding in Postwar Japan and South Korea (2015).

consent.'[13] In a related vein, literacy can influence trust in the State. A 2017 OECD Report found that people's confidence in their national government had fallen in many countries, which was identified as a contributor to populist sentiments.[14] To regain public trust, the OECD recommended investment in efforts to ensure that citizens understand how policies are made and implemented. This will include basic knowledge about the constitutional design of State structures and the relationship between the different branches of government.

At the same time, greater literacy can bring about more, and more meaningful, civic engagement. Asian states have progressively given their citizens more rights and duties, which may encompass opportunities to directly participate in governing.[15] Exercising those rights and duties requires that citizens are taught why, when and how to do so. They must also have the belief that it is perfectly legitimate to initiate official processes to vindicate constitutional rights. Socio-economic, religious and other minorities as well as weaker segments in society need to feel reassured that they are truly equal citizens in society and in the eyes of the law. This is especially pressing for pluralistic societies,[16] and here it bears noting that Korean society too has become more diverse over the years.[17]

Furthermore, when people truly understand their country's identity and ideology as articulated in the constitution, this could give rise to the kind of constitutional patriotism originally popularized by Jürgen Habermas in the 1990s[18] and more recently revitalized by Jan-Werner Müller.[19] This denotes citizens' allegiance towards a set of norms that embody political morality rather than a sense of civic loyalty that is based on blood or faith.[20] While widespread social knowledge of constitutional values and principles may always be a good thing, it matters particularly in countries that cannot boast a long tradition of democratic constitutionalism and those in which the constitution is viewed as an instrument that guides society towards a better future.[21] In relation to

13) Peter Beck, *We (The People) Need an Annotated Pocket Constitution*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3402518, at 9.

14) OECD, *Trust and Public Policy － How Better Governance Can Help Rebuild Public Trust* (2017), https://dx.doi.org/10.1787/9789264268920-en.

15) *See* e.g. Ward Berenschot, Henk Schulte Nordholt & Laurens Bakker (eds), Citizenship and Democratization in Southeast Asia (2016); Paul Bijl & Gerry van Klinken, Citizenship in Asian History, 23 Citizenship Studies 189 (2019). On the link between awareness about participation rights and their actual usage, see Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40 Cornell Int'l L. J. 445 (2007).

16) For a discussion of how different South-East Asian constitutions have responded pluralism, *see* Jaclyn L. Neo and Bui Ngoc Son (eds), Pluralist Constitutions in Asia (2019).

17) Partly due to migration and partly due to internal dynamics, including a growing recognition of multiculturalism. *See* e.g. Kwang Suk Yoo, *Expansion of Religious Pluralism in Korean Civil Society: A Case Study of Conscientious Objection in South Korea*, 9 Religions 326 (2018); In-Jin Yoon, *Plurality and Solidarity: Multicultural Minority Groups and Multicultural Coexistence in Korean Society*, https://ricas.ioc.u-tokyo.ac.jp/aasplatform/achivements/pdf/2010_as_injin.pdf (2010).

18) *See* Jürgen Habermas, Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy 491-515 (1996); Jürgen Habermas, The Inclusion of the Other 105-154 (1998).

19) See Jan-Werner Müller, Constitutional Patriotism (2008), and the contributions to the *Symposium Constitutional Patriotism*, 6 Int. J. Const. L. 67.

20) More critical about the importance and effects of constitutions in delivering a more engaged citizenry or more democratic outcomes: Brian Christopher Jones, Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness (2020); Sanford Levinson, Constitutional Faith (1988).

21) On the challenge posed by multiculturalism in this regard, see Sungmoon Kim & Hsin-wee Lee, eds. Reimagining Nation and Nationalism in Multicultural East Asia (2017).

Korea, it has been suggested that the successful consolidation of democracy since 1987 does not obviate the need to continuously strive to 'upgrad[e] constitutionalism'.[22] The direction that this constitutional evolution should take, and how the balance should be struck between competing interests, are matters for debate (as elsewhere), in which a Korean society that is well-versed in the ideals of the national constitution can play a constructive role.

Courts are increasingly accepting that they have a part to play in disseminating constitutional literacy for the benefit of the general public. This warrants reflection on whether promotion of knowledge of the constitution should be classified as a legitimate exercise of judicial review. That is accordingly the subject of the next section.

III. Literacy as a Legitimate Judicial Function

It is generally accepted that the quintessential role of a judge is to decide cases.[23] The underlying logic is that the State has an existential need to maintain social order and stability, which is understood to require a mode of conflict settlement that is (perceived) as neutral, rational and peaceful.[24] Constitutional provisions that speak to the judicial power accordingly emphasize dispute settlement, often alongside the need to safeguard the courts' independence and impartiality as twin markers of the trust that the official adjudicatory process is entitled to. Other roles typically associated with the judicial branch include reviewing the validity of measures taken by the executive and legislature in recognition of the importance of checks and balances.[25] Notably judges in apex courts are also involved in legal development, sometimes through the exercise of a formal power to render advice to the government,[26] but more commonly in the course of litigation.[27]

At the same time, there is a growing recognition that judges do more than decide cases. Examples of non-judicial functions that have been identified encompass sitting on government commissions dealing with anything from law reform to electoral issues to inquiries into high-profile events, delivering lectures or otherwise participating in public debates, supporting charitable causes

22) Kim, *supra note* 2, at 100.

23) *See* e.g. Marcus Mietzner, *Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court*, 10 J. East Asian St. 397 (2010); Helmut Goerlich, *The Role of Constitutional Courts in Resolution of Constitutional Disputes − A Critical Outline Guided by the German Example*, 44 J. Ind. L. Inst. 3; Tom Ginsburg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, *in* Institutions and Public Law: Comparative Approaches 226-7 (Peter Lang ed., 2004).

24) Austin Sarat and Joel B. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 Am. Pol. Sci. Rev. 1200 (1975).

25) Those who subscribe to the theory of limited government would argue that this function also protects citizens from legislative or executive overreach.

26) This can be done, inter alia, through the power to provide binding interpretations of constitutional provisions (e.g. Constitution of Bulgaria, Art. 149(1) or the right to submit proposal for the initiation of new legislation (e.g. Constitution of Finland, section 100). For a discussion of the uses and challenge related to advisory jurisdiction in the US, see Mel A. Topf, A Doubtful and Perilous Experiment: Advisory Opinions, State Constitutions, and Judicial Supremacy (2011).

27) *See* e.g. Monika Florczak-Wator (ed.), Judicial Law-Making in European Constitutional Courts (2020).

or even serving as ambassadors.[28] This non-exhaustive inventory invites us to reflect on the demarcation between what is considered to belong to the judicial function and that which is not. It matters on which side of the line a particular activity. From a normative perspective, allowing judges to take on a vast range of nonjudicial tasks may change society's beliefs and expectations of the judiciary, for better or worse. Garoupa and Ginsburg point out that undertaking such tasks could implicate the doctrine of the separation of powers; might compromise the reputation of a judge, her court or the judiciary writ large as independent and impartial; and requires reflection on whether to extend legal benefits such as judicial immunity beyond the courtroom.[29] From a practical perspective, judges or courts engaging in nonjudicial functions gives rise to questions concerning the extent to which they are equipped with the necessary resources (such as human capital, equipment, funds) to execute such functions properly.

While the need for demarcation is accordingly clear, actually drawing the boundary is far from straightforward. Garoupa and Ginsburg favour a spatial criterion: they classify activities as judicial if these are performed 'by a judge inside the courtroom'.[30] Using the location as the linchpin means that it is relatively straightforward to decide how to pigeon-hole a judge's behaviour, but carries with it the risk of being underinclusive. As Goldbach has observed, the work that takes place inside the courtroom may be influenced by activities performed by judges in other venues or settings.[31] He accordingly proposes to focus on the nature of the activity, looking at whether the subject-matter is related to the functioning of the court and whether or not the activity has a bearing on deciding cases.[32] Goldbach studies international judicial training, but his suggestion that activities directly and positively related to the court *qua* institution are a legitimate part of the judicial function is of keen interest for present purposes. When judges engage in activity to explain the meaning of the constitution, and, most importantly, their role as constitutional guardians, this too has a facilitative impact on their adjudicatory work. Those eligible to turn to the court to litigate constitutional matters, and their lawyers, will be able to present the best case possible:[33] a higher degree of constitutional knowledge means a better gauge on which aspects of the matter are suitable for legal resolution, the type of arguments that can validly be raised, or the remedies that judges may be asked for. More generally, involvement in literacy-boosting efforts could benefit the overall standing of the court or even the judicial branch as a whole, which is vital for courts' ability to discharge their mandated functions.[34] As noted by current Korean Constitutional Court President

28) *See* e.g. Hon. Robert S. French, *Executive Toys: Judges and Non-Judicial Functions*, 19 J. Jud. Administration 5 (2009); Robert B McKay, *The Judiciary and Nonjudicial Activities*, 35 Law & Contemp. Prob. 9 (1970); Patrick Monahan & Byron Shaw, *The Impact of Extra-Judicial Service on the Canadian Judiciary*, in Judiciaries in Comparative Perspective 512 (H.P. Lee ed., 2011).

29) Nuno Garoupa & Tom Ginsburg, *Judicial Roles in Nonjudicial Functions*, 12 Wash. U. Global St. L. Rev. 755, 757 (2013).

30) Ibid., at 758.

31) Toby S. Goldbach, *From the Court to the Classroom: Judges' Work in International Judicial Education*, 49 Cornell Int'l L. J. 617 (2016).

32) Ibid., at 633.

33) Cf. Dreisbach, *supra* note 8, at 92.

34) Cf. Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 Colum. J. Transnat'l L. 451 (2009); Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts:*

Yoo, 'For the Court to righteously fulfil, for the people, its authority of constitutional adjudication bestowed by the people, we look forward to [their] continued support and cooperation.'[35] The salience of such a pact between the court and society should not be underestimated, especially for constitutional courts, that is to say, courts that possess the power to review to laws in light of the constitution.[36] These courts are dependent on the cooperation of the other branches for the enforcement of decisions that may invalidate or otherwise criticize the work done by the latter. Political science literature suggests that when the general public approves of how the court does its job, the incentive for the political branches to comply with judicial decisions increases: ignoring or moving against the court could jeopardize their own reputation and result in punishment at the ballot box.[37] It has been argued that for this to happen, constitutional knowledge is key, as 'those who know more about law and courts are more likely to support the judiciary and believe in its legitimacy.'[38]

IV. Judicial Strategies to Improve Constitutional Literacy

Having explained why there are good reasons to consider the engagement in literacy promotion part of the judicial function, this section explores how the Korean constitutional court and several of its peer institutions have gone about this. It should be clear that the activity of disseminating information about the constitution straddles the adjudicative – non-adjudicative divide within judicial function category introduced earlier. Private individuals may participate in constitutional litigation, and listening to the questions asked by judges during the hearing or being in the courtroom when the decision is handed down may enlarge their degree of constitutional literacy. This can concern the interpretation or effect of a given constitutional provision, but also lead to a better understanding of the position of the courts within the constellation of power. Ordinary citizens can be involved in proceedings in a variety of ways. In decentralized systems, of which the United States is the prototype, they are typically involved as claimant and/or defendant in the

Party and Judicial Politics, 28 Ariz. J. of Int'l & Comp. L. 539 (2012).

35) President of the Constitutional Court of Korea, *A Message from the President*, *in* Constitutional Court of Korea (2020) at 8.

36) In relation to Asia, *see, e.g.* Association of Asian Constitutional Courts and Equivalent Institutions (AACC) Secretariat for Research and Development, Constitutional Review at AACC Members (2019); Albert Chen and Andrew Harding (eds), Constitutional Courts in Asia – A Comparative Perspective (2018); Tom Ginsburg, Judicial Review in New Democracies – Constitutional Courts in Asian Cases (2009).

37) *See* George Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 Am. J. Pol. Sci. 346 (2001), Clifford Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. of Pol. 55 (2009); Jay Krehbiel, *Do Voters Punish Noncompliance with High Courts? A Cross-National Analysis*, online first, Politics (2020) https://doi.org/10.1177%2F0263395720935368.

38) Aylin Aydın Çakır & Eser Şekercioğlu, *Public Confidence in the Judiciary: The Interaction Between Political Awareness and Level of Democracy*, 23 Democratization 634, 650 (2016). See also Editorial, *Arresting the Decline of Public Confidence in the Court*, 97 Judicature 165, 166; Annenberg Public Policy Center, *Civics Knowledge Predicts Willingness to Protect Supreme Court*, September 13, 2018, https://www.annenbergpublicpolicycenter.org/civics-knowledge-survey-willingness-protect-supreme-court/; Jutta Limbach, *The Role of the Federal Constitutional Court*, 53 S.M.U. L. Rev. 429, 429 (2000).

controversy in which the constitutional issue has cropped up. The analogy in the Kelsenian model, to which Korea subscribes, is the procedure for concrete review.[39] In centralized systems, individuals may further be able to hear constitutional information from the horse's mouth when a constitutional complaint procedure is in place, like in Korea,[40] or when abstract review can be initiated through an actio popularis.

Even when they are not a party to the proceedings, members of the public may enjoy the constitutional literacy on display in the courtroom by attending hearings. Seats tend to be limited, however. This scarcity problem can be addressed by televising proceedings, which some courts have begun to do,[41] with calls for others to follow suit. As an editorial in *Judicature* put it:

> There is reason to admire just how smart and dedicated our nine Supreme Court justices are, even if we do not agree with all of their rulings. … A probable result of broadcasting proceedings of the United States Supreme Court [is that it] may lead to greater public understanding of the complexity of issues considered by the Court.[42]

There is accordingly considerable scope to improve the public's literacy in the course of constitutional adjudication. More recently, courts have begun to experiment with novel ways to do so that are not always connected to cases or controversies. The approach taken by the Korean Constitutional Court, with the support of its dedicated Constitutional Research Institute, will be examined first, followed by a discussion of how several other prominent courts have sought to deepen the general public's awareness about the national constitution.

1. Korean Constitutional Court

The Korean Constitutional Court has developed a range of initiatives to familiarize citizens with the constitution and the practice of constitutional adjudication. In so doing, it appears to be inspired by the belief that being 'wide open to the public' is essential for two interrelated reasons: it allows the court to duly discharge its role as 'the last bulwark that protects basic rights' and allows ordinary Koreans to make more sense of the constitutional dimension of the 'increasingly complicated social conflicts and confrontations' that arise in modern society.[43] At its most foundational, the court's website provides a chronological account of the establishment of constitutional justice in Korea and explains what powers the court possesses and how these can be exercised.[44] Those eager to know more than avail themselves of special educational publications[45] and an introductory video that

39) Constitution of the Republic of Korea, Art. 107. The exposure will however be less direct, as the parties to the proceedings are usually not involved in the part of the procedure that takes place before the constitutional court in which the latter must determine the validity of the statutory provision that the regular court intends to rely on to resolve the dispute.

40) Constitution of the Republic of Korea, Art. 111(5) and Korean Constitutional Court Act, Art. 68-1 and Art. 68-2.

41) The Covid pandemic has sped up the willingness of courts to live-stream proceedings.

42) Editorial, *Arresting the Decline of Public Confidence in the Court*, *supra* note 38, 166.

43) Constitutional Court of Korea 2020 Brochure, at 50, (KCC, Educational Brochure, http://english.ccourt.go.kr/cckhome/images/eng/main/ccourt_brochure_202009.pdf.

44) These descriptions are further supplemented by a detailed Q&A section.

shares further details about the court's history and institutional design.[46] Online engagement is complemented by the possibility to physically immerse oneself in the court's work environment and imbibe constitutional principles, with the Korean constitutional court offering opportunities to tour its premises. Visitors can listen to lectures in which rapporteur judges discuss the constitution and the system of constitutional adjudication as well as take a stroll through exhibitions that tell the narrative of the constitution's creation and provide insight into landmark decisions by the court. All citizens are furthermore granted access to the court's well-stocked library.

The Korean constitutional court has also expended effort to familiarize the general public with its major decisions. It has recognized that simply making the text thereof available, electronically or in hard copy, may not translate into significant improvements in constitutional literacy. The complex or sensitive nature of the issues referred to it often make for lengthy rulings, especially when there are concurring or dissenting opinions, which can discourage readership. Moreover, judgments tend to be replete with legal-technical jargon, compromising accessibility for citizens who have not been inducted into the law. To accommodate these constraints, the Korean constitutional court has condensed 180 of its more significant rulings into one-page summaries[47] and has even converted 26 of these – dealing with everyday issues like freedom of expression and gender equality to mega-political questions regarding presidential impeachment or party-banning – into cartoons.[48]

Special mention must be made of the Constitutional Research Institute, established in 2011. Its Instruction Team provides courses for a host of legal professionals, from lawyers to public defenders to law school students, as well as non-legally trained individuals. These comprises staff working in government agencies and local government, undergraduates in disciplines other than law (since 2016) and social studies teachers in middle and high schools. The focus of efforts targeted at the latter group is on instilling 'a constitutional spirit' that these teachers are in turn expected to relay to their students, with the additional help of textbooks and related materials about the Korean constitution prepared by the Instruction Team.

45) The KCC has also prepared an annotated version of the Constitutional Court Act and publishes a Journal of Constitutional Justice that available to all members of the public free of charge.

46) Youths can also look at The Constitutional Court of Korea – Cartoon Brochure, https://library.ccourt.go.kr/site/conlaw/download/publications/The_Constitutional_Court_of_Korea(Cartoon)_2019.pdf.

47) http://english.ccourt.go.kr/cckhome/engNew/decisions/historicalBrief/historicalBriefList.do.

48) http://english.ccourt.go.kr/cckhome/engNew/decisions/landmarkcases/landmarkList.do.

Table 1. Constitutional Training Courses for Non-Legally Trained Individuals[49)]

Constitutional Training Courses for Non-Legally Trained Individuals	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*	*2018*	*2019 (until Sept.)*
Civil servants in central/local government agencies	2 classes 162 pax	3 classes 138 pax	5 classes 219 pax	5 classes 151 pax	5 classes 152 pax	5 classes 194 pax	5 classes 143 pax	6 classes 250 pax
Undergraduate students					4 classes 200 pax	4 classes 228 pax	4 classes 215 pax	2 classes 118 pax
Social studies teachers		1 class 33 pax	4 classes 151 pax	2 classes 41 pax	4 classes 138 pax	4 classes 152 pax	3 classes 103 pax	3 classes 96 pax

To conclude this discussion of the Korean constitutional court's literacy-enhancing efforts, it should be emphasized that these have seen a remarkable growth in intensity and diversity in the last decade. Several possible reasons might account for this development. Let us begin with an increase in the demand for constitutional education, which has been identified as one of the drivers that led to the establishment of the Constitutional Research Institute.[50)] This increase might, in part, be attributed to Koreans having become more alert to the court's existence due to its earlier decisions affecting the country's political landscape and democracy,[51)] triggering a desire to find out more about this judicial institution. Data concerning the number of constitutional complaints suggests such a growing awareness: before the millennium, an average of 400 cases were registered each year; by now, more than 2,000 Koreans file constitutional complaints on an annual basis.

Also, during its third decade, the court considerably expanded the fundamental rights protection available to ordinary Koreans. It held, amongst others, that adultery and abortion could not be criminalized,[52)] that conscientious objectors could not be denied alternatives in fulfilling their military service obligations,[53)] and that assemblies in the vicinity of the National Assembly were permitted.[54)] The court may have wanted to highlight these achievements to the intended beneficiaries to avoid its human-rights-friendly judgments being parchment victories only and to ensure that such judgments are appreciated by the general public as the court upholding its end of the bargain, viz. delivering rights protection, thus entitling it to strong popular support. Such support is important given the comparatively low levels of trust in government institutions in Kore a,[55)] and the constitutional court having had to wade into the political thicket, notably when it had

49) CRI, The Cradle of the Constitutional Spirit Affecting the Lives of Koreans (2019) at 12-4.

50) CRI website, 'Background & History'.

51) Cf. Kim, *supra* note 2, at 79-81.

52) 27-1(A) KCCR 20, 2009Hun-Ba17 and 16 other cases (consolidated), February 26, 2015; 31-1 KCCR 404 2017Hun-Ba127, April 11, 2019.

53) 30-1(B) KCCR 370, 2011Hun-Ba379 and 27 other cases (consolidated), June 28, 2018.

54) 30-1(B) KCCR 88, Hun-Ba 322 and 7 other cases (consolidated), May 31, 2018.

55) OECD, Understanding the Drivers of Trust in Government Institutions in Korea (2018), https://doi.org/10.1787/9789264308992-en. The National Assembly was ranked as the least trusted institution, with the courts enjoying higher levels of popular trust.

to decide on the impeachment of President Park in 2017.[56] While adjudicating megapolitical cases of this sort can be treacherous, the Korean constitutional court earned plaudits for the quality and clarity of its decision,[57] with one commentator also remarking on how it had cleverly turned the televised delivery thereof into 'an astonishing national civics level at the highest level, an education in constitutionalism and rule of law for an entire nation.'[58] Having seen the constitution and its ultimate guardian come to life in this manner, it would not be surprising to see a further growth in popular demand for information about the national text and the court. Against this backdrop, the Article now turns to consider a selection of courts elsewhere have sought to improve literacy with a view to possibly identifying new initiatives that can be added to the Korean judicial toolbox. The discussion features prominent courts in Asia as well as other regions that have been influential in advancing constitutionalism and (re)shaping their country's democratic orders through their rulings.

2. Asia: Indonesian Constitutional Court and Taiwanese Constitutional Court

The Indonesian and Taiwanese Constitutional Courts use their website as the first port of call to disseminate information to the general public about their jurisdiction, their competences and the appointment of justices.[59] Those interested to learn more about constitutional case law can further find the full text of many past decisions, alongside publications discussing landmark cases. The Indonesian website further allows visitors to take a pretty detailed e-tour of the court building,[60] while those paying a physical visit to the premises can avail themselves of the materials in the court library. Other online resources include introductory videos, crafted with a view to enable 'more people [to] understand the system of judicial review of constitutionality' (Taiwan), and live-streams of video conferences and public lectures about the performance and outcome of constitutional review (Indonesia).

In addition, the Indonesian Constitutional Court makes extensive use of social media to raise public awareness about its role, its rulings and other relevant activities that it engages in. It has a Twitter account with 54,500 followers as of November 2020; an Instagram account with 104,000 followers, with some of its more than 1,500 posts having garnered more than 1,000 likes as well as a Facebook page. The court further hosts its own YouTube channel with 40,300 subscribers.

56) 29-1 KCCR 1, 2016 Hun-Na 1, Mar. 10, 2017.

57) See e.g. Huyn-Soo Lim, *A Closer Look at the Korean Constitutional Court's Ruling on Park Geun-hye's Impeachment*, Yale J. Int'l L. (Online Supplement), 18 May 2017. For an endorsement of its earlier impeachment decision: Wen-Chen Chang, *Strategic Judicial Responses in Politically Charged Cases: East Asian Experiences*, 8 Int'l J. Const. L. 885 (2010).

58) Robert E. Kelly, *South Korea's Finest Hour: Lessons From the Impeachment*, The Interpreter (11 April 2017).

59) https://mkri.id/ and https://cons.judicial.gov.tw/jcc/zh-tw respectively.

60) https://mkri.id/index.php?page=web.Puskon.

3. Europe: German Federal Constitutional Court, Italian Constitutional Court and European Court of Human Rights

In Europe, the German and Italian Constitutional Courts and the European Court of Human Rights have similarly created websites that are replete with information about their mandate, their internal functioning, relationship to other institutions and decided cases, packaged in an accessible and user-friendly way.[61] Descriptions on the general webpages are complemented by brochures and videos that explain, in a surprisingly thorough manner, how constitutional adjudication works and why it matters. In this regard, the brochure prepared by Italian constitutional court deserves to be highlighted for its candid acknowledgement of the importance as well as the challenges for judicial-led efforts to deepen constitutional literacy:

[There is an] original need to reach all citizens, and especially the younger generations, with material that is comprehensible and easy-to-read, but that at the same time can provide a faithful and exhaustive image of the Constitutional Court and its multiple activities. The experience gained over these years shows that narrating the work of the Constitutional Court also furthers knowledge of the Constitution itself and of the values it lays at the foundation of civil co-habitation. The meaning of the Constitution is spread, and awareness of it is revived.[62]

The collection of videos about the European Court of Human Rights (ECtHR) and the European Convention of Human Rights (ECHR) is particularly wide, and includes videos of an instructional nature. Individuals who believe that a public authority in one of the signatory states has violated a right protected by the ECHR can file a petition with the Court in Strasbourg, once they have exhausted remedies at the national level.[63] This mirrors constitutional complaint procedure in place in Korea and in many other countries that subscribe to the centralized review model. Akin to that procedure, the individual petition route to Strasbourg is exceedingly popular, with thousands of new petitions being filed every year, and, also similar to what happens at the national level, the vast majority of these petitions are rejected during the initial screening stages.[64] In response, the ECtHR has recorded short video tutorials to explain to the general public how the application form must be completed and what the admissibility conditions are.[65] Such targeted, and seemingly technical, literacy-boosting initiatives may have several advantages. They validate constitutional guardianship by individuals and convey a sense of keen judicial receptivity to applications. In addressing how to avoid the fate an ill-designed application, public expectations about the success of 'going to Strasbourg' are managed, which in turn can help sustain the Court's popular legitimacy when a complainant's application is indeed rejected. For the ECtHR, there is the prospect of

61) https://www.echr.coe.int/Pages/home.aspx?p=home, https://www.bundesverfassungsgericht.de, https://www.cortecostituzionale.it.

62) https://www.cortecostituzionale.it/documenti/download/pdf/lacorte_depliant_EN.pdf.

63) ECHR, Art. 35.

64) For a critical discussion, see Nikos Vogiatzis, *The Admissibility Criterion Under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?*, 65 Int'l & Comp. L. Q. 185 (2016); Janneke Gerards and Lize Glas, *Access to Justice in the European Convention on Human Rights System*, 35 Netherlands Q. Human Rights 11 (2017).

65) These can be viewed via YouTube.

receiving more applications eligible for a review on their merits, which would enable it to better discharge its role in weeding out unlawful State actions. Separate arrangements are in place to enable the ECtHR to educate civil society about the role that it and the Convention can play in furthering the welfare of marginalized groups.[66]

The German court and the ECtHR also use social media to boost literacy. Both have Twitter accounts (with 41,600 respectively 35,500 followers as of November 2020), with the latter further hosting its own channel on YouTube.

All three courts open their doors to visitors. Interestingly, the German and Italian Constitutional Courts have also gone on tour themselves, thus literally bringing their institution closer to citizens. To mark the national day of unity in 2020, the German court participated in a multimedia exhibition alongside other State institutions in Potsdam (close to the German capital and some 500 kilometers from the seat of the court in Karlsruhe), where visitors were enticed to take 'a souvenir photo with their favourite basic right'.[67] In recent years, the Italian court has gone on a 'voyage through Italy .. to know and to let itself be known directly by citizens.'[68] During these voyages, the focus is on raising awareness about constitutional principles and their judicial protection among particular sub-strata of Italian society: the incarcerated and school students. The 'voyages through Italy' have been captured in docufilms that were broadcast on the country's most-watched television channel.

4. South America: Chilian Constitutional Court and Columbian Constitutional Court

Like their Asian and European counterparts, the Chilian Constitutional Court and the Columbian Constitutional Court have expended considerable effort to curate an informative online experience for citizens.[69]The general public can acquire a plethora of factual knowledge about the historic origins, jurisdiction and composition of these institutions by visiting the website. The information is similarly presented in an array of modalities: from general descriptions to FAQ pages to introductory videos. Columbians can further take a free guided tour of their constitutional court.

The pair of South American courts have further turned to social media to enlighten people about the constitution and its enforcement. As of this writing, the Chilian Constitutional Court has 16,500 followers on Twitter, a LinkedIn account with 5,600 followers and a YouTube channel. The Columbian Constitutional Court is a particularly savvy user of new technologies, and with considerable success it seems. Its Facebook page has attracted almost 135,000 followers, its Twitter account boasts 497,500 followers, and the 60,700 followers of its Instagram account have been

66) This is done mainly through a video series explaining relevant case law concerning the different Convention rights and through events targeted at civil society representatives, such as 'A "Living Instrument" for Everyone: The Role of the European Convention on Human Rights in Advancing Equality for LGBTI persons' (Strasbourg, 7 October 2020).

67) Das Bundesverfassungsgericht in Postdam, https://tag-der-deutschen-einheit.de/bundesverfassungsgericht/.

68) President of the Constitutional Court, *Preface to the 9th Edition*, *in* The Italian Constitutional Court (2020), https://www.cortecostituzionale.it/documenti/download/pdf/lacorte_depliant_EN.pdf.

69) http://www.tribunalconstitucional.cl/ and http://www.corteconstitucional.gov.co/.

treated to more than 750 posts. The Columbian court was also at the vanguard in launching a YouTube channel, having done so in 2012, where one can today find a playlist comprising dozens of videos that is added to on an almost weekly basis.

5. North America: US Supreme Court and Canadian Supreme Court

The strategies employed by the United States Supreme Court and the Canadian Supreme Court to improve popular understanding of the constitution and their place within the constellation of powers are in many respects similar to those that we have just canvassed.[70] Their websites are a rich trove of materials, with citizens being nudged to familiarize themselves with recent judgments and how these come about through webcasts of hearings (Canada) or recordings and transcripts of oral arguments (US). As of 2018, the communications team at the Canadian court has been tasked with translating the legalistic reasoning of important judgments into brief summaries couched in 'reader-friendly language, so that anyone interested can learn about the decisions that affect their lives'.[71]

Both courts have made arrangements to welcome visitors. The Canadian Supreme Court offers guided tours,[72] while the U.S. Supreme Court allows members of the public to explore portions of its building on their own. When doing so, they can partake in courtroom lectures by trained volunteer docents, watch a video featuring interviews with the justices and explore a rotating display of exhibitions.

Like many of their counterparts elsewhere, the two North American courts have embraced social media, though there are differences in the choice of channel and popular take-up rates. The YouTube channel of the US Supreme Court had 10,000 subscribers in November 2020; in contrast, the Canadian court is active on Twitter (33,200 followers), LinkedIn (2,000 followers) and Facebook (8,000 followers).

Particular mention should be made of educational resources to support the acquisition of constitutional literacy among students and teachers. American teachers can download course packs that are designed to enable students to learn more about the US Bill of Rights and related case law in an interactive fashion. Students participate in mock trials or debates that revolve around contemporary scenarios designed to resonate with teenagers: for instance, whether organizing a walkout in objection to a dress code prohibiting messages of any kind on clothing worn during school hours would be covered by the constitutional right to free speech[73] or whether the ban against unreasonable searches and seizures prevents schools from looking through the possessions of underaged students for illegal substances.[74] Distance learning activities are available to induct

70) https://www.supremecourt.gov/ and https://www.scc-csc.ca/.

71) https://www.scc-csc.ca/case-dossier/cb/index-eng.aspx.

72) Due to Covid19, on-site tours have been converted into 30-minute remote tours by guide-interpreters.

73) This scenario is a modern adaptation of the US Supreme Court's ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

74) This scenario is a modern adaptation of the US Supreme Court's ruling in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

students and teachers into what are described as 'the pillars of literacy', viz. the rule of law, the separation of power and judicial independence.[75] Alongside videos and discussion-starter questions, opportunities are created for live conversations with judges about the real-life significance of these pillars.[76] The Canadian Supreme Court offers special guided tours for students, while elementary and secondary pupils who are unable to make the trip to Ottawa can enhance their constitutional literacy through educational kits comprising an age-appropriate annual report, poster, mock trial and a beguiling youth activity book.[77]

Mirroring the Italian idea of voyaging through the country, the Canadian Supreme Court embarked on a one-week visit to Winnipeg in the fall of 2019. During this visit, the Court showcased its adjudicatory work by holding its first ever hearings outside its own premises,[78] attracting hundreds of Canadians, and its justices participated in about a dozen events with diverse groups in the local community. The visit has been praised as 'going a long way to enhance the public's appreciation of Canada's law and democratic institutions',[79] and the Chief Justice has expressed his hope that such tours can become a regular feature of the court's work.[80]

6. Africa: South African Constitutional Court

Looking finally at how the South African Constitutional Court approaches constitutional literacy, we encounter several by now familiar tools and techniques, but with the occasional twist. There is a functional website that explains to online visitors how the court functions, its place within the constitutional system and contains a case law repository that is easy to navigate.[81] A major sub-section of the Court's website is devoted to the history and content of the South African Constitution. Here, readers can also learn what a constitution is and does, and the meaning of related core ideas like constitutional supremacy and the separation of powers. As for the actual text of the Constitution, emphasis is placed on ensuring that South Africans know the Bill of Rights, so that they feel confident and comfortable to take action when rights violations occur. In this regard, it is worth noting that there are specific clarifications of the rights guaranteed to children,[82] women, workers and LGBT persons in recognition of their greater vulnerability.

---

75) https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/distance-learning-civics-civic-engagement-federal-courts#ruleoflaw.

76) In line with the US decentralized model of review, the judges that can be (and usually are) involved extend beyond those sitting on the US Supreme Court.

77) https://www.scc-csc.ca/vis/education/kit-trousse/index-eng.aspx.

78) One of the hearings related to a case originating in Manitoba, of which Winnipeg is the capital: *K.G.K. v The Queen* [2020] SCJ No 7 (QL). The other hearing concerned *Conseil scolaire francophone de la Columbie-Brittanique v British Columbia*, 2020 SCC 13 (CanLII).

79) As per Canadian Bar Association President Vivene Salmon, quoted in Canadian Supreme Court Press Release, 22 September 2019.

80) Quoted in Canadian Supreme Court Press Release, 27 September 2019.

81) https://www.concourt.org.za/index.php.

82) Youth can also make use of the Street Law programme, which aims to boost legal as well as constitutional literacy through practical case studies and discussion/reflection questions: see https://www.concourt.org.za/index.php/constitution/your-rights/know-your-rights.

Particular efforts have been expended to induct members of the public who visit the South African Constitutional Court into the aspirations of democratic constitutionalism. They can tour its iconic building, the architecture of which serves as a reminder of the country's dark past and is replete with commitments to the new constitution.[83] In addition, the Court has acquired hundreds of artefacts that visualize and advocate for justice. These are on public display and the subject of guided tours. This deliberate use of art for literacy purposes appears to be well-received, as the following observation from one of the visitors suggests:

If one were going only to see the art, it would be worth the trip. If one were going only to see the Court, it would be worth the trip. But seeing both, and learning how meticulously the two have been melded together to reflect the values embedded in the South African Constitution was, quite simply, extraordinary and moving.[84]

Spurred on by the social distancing restrictions due to Covid19, the South African Constitutional Court has further begun to make available recordings of its hearings via its YouTube channel.

V. Reflections

Sensitizing the general public to the constitution and the court's mandate as its ultimate guardian not only benefits the latter's social legitimacy, but is also critical to the endurance of constitutional democracy. This idea is not lost on courts, many of which today accept that cultivating constitutional literacy is an integral part of their mandate that they take increasingly seriously. As we have seen, this is clearly true for the Korean Constitutional Court and more particularly its Constitutional Research Institute. By way of conclusion, this Article will reflect on what insights can be drawn for the Korean Constitutional Court from our brief tour d'horizon of several of its peer institutions in other jurisdictions. In doing so, it is helpful to break up judicial approaches to constitutional literacy by considering the areas covered (*what*); the target audiences (*who*); and the modes of induction that have been adopted (*how*).

Returning to the idea of constitutional literacy as covering a spectrum of knowledge, it is possible to distinguish between different types of information that can be covered as part of literacy-enhancing initiatives. These include information about the court as an institution, covering aspects such as its jurisdiction, procedures, and the relationship with the other branches of government; information about the outcome of constitutional review proceedings; and information about constitutional rules and values. To be clear, these shade into one another, but the above discussion has shown that most courts, the Korean Constitutional Court included, tend to prioritize improving the general public's understanding of their role and functioning. This is readily understandable: of all the State institutions, the courts are arguably most familiar with this type of

83) For instance, the beams supporting the roof contain engravings of handwritten samples of the words 'human dignity, equality and freedom' by the judges who sat on the bench when the building was being constructed.

84) As recounted on the dedicated the Constitutional Court Art Collection website.

constitutional information and have the strongest incentive to educate citizens about the fundamentals of constitutional adjudication. It could also be said that literacy initiatives focused on judicial constitutional guardianship are easiest to justify as a legitimate judicial activity since these are most closely aligned to the classic adjudicatory functions performed by courts.

Turning to the intended beneficiaries of constitutional literacy, it is interesting to see that the Korean Constitutional Court is amongst those courts that differentiates between segments of the general public and adjust information to their needs, capabilities and interests. Separate efforts are made to engage youngers and, by implication, their school teachers, probably based on the psychological belief that ingraining the right values and principles is best done before we reach adulthood. On a related note, and regardless of youth-specific materials, we see a scaffolding of legal complexity in the resources made available. Members of the public with a stronger desire for constitutional literacy – like prospective litigants or those involved in civil society – can make use of brochures that offer a deeper examination of constitutional rights or procedures, whereas other citizens will find the basic explanations provided on the general pages of the court's website sufficient for their knowledge purposes. This leads us to consider the means to distribute constitutional literacy.

The brief comparative exposé in this Article has demonstrated that there is a marked degree of variety in the design of constitutional literacy-promoting activities. Three aspects will be highlighted here, beyond the online availability of summaries of constitutional judgments, on a complementary basis. First, many courts open their doors to members of the public, creating conditions for the latter to get a better sense of the manner and environment in which judicial guardianship of the constitution takes place. In this regard, it is interesting to see an incipient practice whereby courts also travel the country to bring their work closer to citizens. The Korean Constitutional Court is among the few that amplify the immerse character of a court visit through special exhibitions explaining the foundation and fundamentals of the constitutional order. Secondly, several courts have begun to make use of different types of social media. When executed well, social media can reduce the barriers to the physical experience of seeing the court in action. While the social distancing restrictions on account of Covid19 may readily come to mind, we should remember that a trip to the seat of the court may not be viable for citizens living far away even when there are no legal obstacles to doing so. The threshold to engage is moreover lower than with court visits, both financially as well as psychologically, with notably younger generations of citizens being comfortable with obtaining information via Twitter, Facebook and the like. There are, undoubtedly, limits to the amount of information that can be effectively communicated through social media channels. Even so, such channels may be a useful addition to the court's literacy arsenal to improve foundational literacy about the content and value of the constitution among a large portion of the citizenry. Whether this materializes will, in part, depend on a court's resources and in-house expertise. This brings us to the third aspect, viz. institutionalization. Within the Korean Constitutional Court, the Constitutional Research Institute is entrusted, amongst others, with literacy advancement. Assigning this task to a specific unit signals to the court's stakeholders – political and social – that constitutional literacy is considered important and may help ensure

that sufficient resources are earmarked for the discharge of this non-adjudicatory responsibility.

Taking everything together, the Korean Constitutional Court's current literacy strategy deserves praise for its inclusive character and its strong institutional commitment in the form of the CRI. Other courts in Asia and beyond that are similarly committed to making themselves and their national constitution come alive for the public at large could accordingly do far worse than studying this strategy for inspiration. For the Korean Constitutional Court itself, its existing initiatives could be usefully complemented by a curated social media policy. Doing so seems a logical next step in pursuit of its basic aim to 'justly instill, in the people's everyday lives, the universal constitutional values of human dignity, freedom, and equality enshrined in the Constitution.'[85)]

85) President of the Constitutional Court of Korea, *A Message from the President*, *in* Constitutional Court of Korea (2020) at 8.

Global Constitutionalism and Human Rights : The Contribution of the Korean Constitutional Court to Global Society

TAKAO SUAMI*

Abstract

The protection of fundamental human rights is an inevitable part of global constitutionalism. The idea of human rights was born in Western Europe. For that reason, not a few East Asians feel some sense of difference or distance with respect to human rights. This is quite a natural response to foreign-born ideas. Whenever any social system born in a particular region is transplanted into another region, it usually has to undergo a certain change in order to take root in a different social environment. However, the idea of human rights is grounded upon the commonality of all humankind. It is not easy to reconcile these two opposite elements, namely the universality of human rights and the particularity of local contexts, but the 'Asian value claim' is not the correct response to this issue. After briefly explaining global constitutionalism, this article first tries to clarify the relationship between local (national or regional) discussion on human rights issues and the development of global constitutionalism. Then, it will try to examine contribution of the Korean Constitutional Court to global constitutionalism in terms of both its judicial and extra-judicial activities.

* Professor of Law, Waseda Law School.

I. Introduction

After the outbreak of pandemic in 2020 everyone was forced to be more aware of national borders than before. However, it should be recalled that the world-wide expansion of cases of COVID-19 has been caused and accelerated by the globalization itself. The progress of globalization has brought a great deal of change to many aspects of every legal order, and thus it has become difficult to describe the current state of international affairs using the traditional theory of international law. Therefore, in the wake of the globalization of the 1990s, several academic ideas have emerged in order to comprehend the structure of global society as such. 'Global constitutionalism' is one of them. In a similar manner to national constitutionalism, the protection of fundamental human rights is an inevitable part of global constitutionalism. Human rights are controversial in many places of the world. Especially, as the idea of human rights was born in Europe, some of East Asians tend to feel some sense of discomfort or unease with human rights.[1] This is a quite natural response to foreign-born ideas. Whenever any social system or institution born in a particular region is transplanted into a country of another region, it will necessarily suffer a certain change in order to take root in different social environment. However, the idea of human rights is grounded upon the commonality of all humankind. On occasion, it is not easy to reconcile these two opposite elements, namely the universality of human rights and the peculiarity of local contexts, but the 'Asian value claim' which regards an Asian value as an exception is not a right answer to this question. The answer must be to further develop the idea and substance of human rights through instilling non-Western elements into it.

After briefly outlining global constitutionalism and justifying its idea, this article first tries to clarify the relationship between local (national or regional) discussion on human rights issues and the development of global constitutionalism. It will then try to elucidate the active contribution of the Constitutional Court of Korea (the KCC) to global constitutionalism through its judicial dialogue with other constitutional courts. It should be noted that the role of the KCC is valuable for not only Korean people but more broadly for people all around the world.

II. Global Constitutionalism: Rise or Decline?

1. What is 'Global Constitutionalism'?

It appears that the notion of global constitutionalism has already become popular in Korea.[2]

1) For example, the Liberal Democratic Party's draft constitution in 2012 emphasized that new human rights provisions in the Constitution must be compatible with the history, tradition and culture of Japan.

2) The KCC' president himself refers to 'the recent trend of emerging global constitutionalism' (Han-Chul Park, *Preface*, in Global Constitutionalism and Multi-layered Protection of Human Rights – Exploring the Possibility of Establishing a Regional Human Rights Mechanism in Asia –, 4 (SNU Asia-Pacific Law Institute, Constitutional Court of Korea, 2016).

Constitutionalism is usually discussed in national contexts. But at the moment many scholars in the world discuss constitutionalism for the space beyond nation states. There is lack of consensus on the exact meaning of 'constitutionalism' at the national level. Likewise, the conceptualizations of constitutionalism beyond the state is more varied than those for national constitutionalism. Therefore, initially, it is necessary to explain how this article understands 'global constitutionalism'.

A. Background of Global Constitutionalism

First of all, global constitutionalism is an argument based upon a recognition that the progress of globalization has considerably transformed the state of international society. Against the backdrop of the deepening of economic inter-dependency as well as the emergence of a world-wide market through economic integration, an array of previously domestic issues (e.g., human rights), have become the concern of international society as a whole. In addition, most of serious problems (e.g., climate change, financial crisis, terrorism, tax havens, and natural disasters), none of which can be solved without international cooperation, have arisen, promoting the construction of international institutional frameworks to respond to them. These alterations have had the general effect of decreasing the powers of states to rule. The decrease is proved by the fact that non-state entities have actually influenced international decision-making. Taken all together, this has meant that every legal order, whether international or domestic, has suffered structural changes in the last decades, and a traditional state-centered paradigm has become unsuitable to fully explain the present state of affairs.[3] Based on this perception, global constitutionalism aims at providing a better explanation for global society.

B. Main Concerns of Global Constitutionalism

Global constitutionalism focuses on two types of legal phenomena, namely (1) the constitutionalization of international law and (2) the internationalization of national constitutions.[4] The former is inspired by the evolution of international organizations, in particular the UN (e.g., the Security Council), the WTO, the International Criminal Court (ICC), the EU and regional human rights conventions, as well as the growth of a hierarchical structure of international law (e.g. higher international legal norms such as *jus cogens* and basic human rights).[5] In the case that domestic constitutionalism does not work as a bulwark against tyrannical action, the move towards the constitutionalization of international law is unavoidable to escape the ravage of tyranny.[6] The

3) Inger-Johanne Sand, *Varieties of Authority in International Law, State Consent, International Organisations, Courts, Experts and Citizens,* in Legal Authority beyond the State 161, 161 (Patrick Capps and Henrik Palmer Olsen eds, Cambridge, 2018).

4) Anne Peters, *Constitutionalization*, in Concepts for International Law, Contributions to Disciplinary Thought 141, 141-144 (Jean D'Aspremont and Sahib Singh eds., Edward Elgar, 2019); Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, Indiana Journal of Global Legal Studies, Vol.16, 621-645 (2009); Gábor Halmai, Perspectives on Global Constitutionalism, The Use of Foreign and International Law 5-7and 218-219 (Eleven International Publishing, 2014).

5) Jan Klabbers, *Setting the Scene*, in Jan Klabbers, Anne Peters and Geir Ulfstein, The Constitutionalization of International Law 1-44 (Oxford, 2009).

6) Aoife O'Donoghue, *Tyranny and Constitutionalism beyond the State*, in Globalisation and Governance, International Problems, European Solutions 63, 64, and 88-89 (Robert Schütze ed., Cambridge, 2018).

latter is revealed by the transnational reality of national constitution-making. National constitutions are usually viewed as a product of constituent power which 'We the People' hold, but the reality is that in many cases, 'the drafting of a constitutions is a transnational process, and that transnational influences on the development of national constitutional texts are visible.[7] For example, both German Constitution and Japanese Constitution are considered as an imposed constitution,[8] because they were drafted under powerful international influence. These two aspects of global constitutionalism reinforce and complement each other.

C. Outline of Global Constitutionalism

What is global constitutionalism? To put it briefly, on the recognition that national and international society is constitutionally controlled to some extent, 'global constitutionalism' is an idea that global society should be governed by constitutional principles such as the rule of law, human rights and democracy, which are distilled from domestic constitutionalism, and which are superior to international and domestic law. Those constitutional principles underlie a comprehensive framework covering all national, regional and international laws. In an international law setting, they appear in the form of *jus cogens*, general principles of law and international human rights treaties. On the other hand, in a domestic law setting, they appear in the form of national constitutions. In conjunction with constitutional principles, global constitutionalism never proclaims that an international constitution as such exists, one that is found in any single document called a 'constitution'. Instead, it find institutions, processes and principles within the international legal order which fulfill typical constitutional functions.[9] In brief, global constitutionalism focuses on 'the administration of international constitutional functions' of a global governance system.[10]

Several points will be further mentioned to clarify this definition. First of all, global constitutionalism finds its origin in the political movement of 'constitutionalism', and is closely linked to domestic constitutionalism. Accordingly, it includes normative claims aiming at preventing the abuse of powers through law. Constitutional governance on the basis of constitutional principles is addressed to all powers in global society, such as (1) the ruling power of international organizations, (2) the sovereignty of states, and (3) the actual power of private actors (e.g., NGO and multinational corporations).[11] Global constitutionalism, in a similar manner to

7) Tom Ginsburg, Terence C. Halliday and Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering*, in Constitution-Making and Transnational Legal Order, 1, 2-3, 9 and 11 (Gregory Shaffer, Tom Ginsburg and Terence C. Halliday eds., Cambridge, 2019).

8) Richard Albert, Xenophon Contiades and Alkmene Fotiadou, *Introduction, Imposition in making and changing constitutions*, in The Law and Legitimacy of Imposed Constitutions 1, 3-4 (Routledge, 2019); Mattias Kumm, *On the History and Theory of Global Constitutionalism,* in Global Constitutionalism from European and East Asian Perspectives, 168, 184-185 (Takao Suami, Anne Peters, Dimitri Vanoverveke and Mattias Kumm eds., Cambridge, 2018).

9) Anne Peters, Takao Suami, Dimitri Vanoverveke and Mattias Kumm, *Global Constitutionalism from European and East Asian Perspectives, An Introduction*, in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 1, 7-8.

10) Marc Weller, *The Real Utopia. International Constitutionalism and the Use of Force,* in Globalisation and Governance, International Problems, European Solutions 131, 138 (Robert Schütze ed., Cambridge, 2018).

11) Anne Peters, *supra* note 4, at 141-153.

domestic constitutionalism, can continue to present targets for global society to attain through developing those principles.[12] In other words, since it has a normative dimension, global constitutionalism is distinguished from mere constitutionalization.[13]

Secondly, at its outset, global constitutionalism turned its eyes towards international law and international organizations.[14] However, international law is interrelated with domestic law in many respects, and they have a mutual influence upon one another. The global legal order is actually composed of both international and domestic laws. Thus global constitutionalism presently keeps both of them in mind. Although Dieter Grimm does not agree with the viability of constitutionalism beyond the state, he acknowledges that one cannot 'obtain a complete picture of the legal conditions for political rule in a country' unless we see national constitutional law and international law together.[15] The idea of 'Transnational Legal Orders (TLO) presents a similar view of 'transnational nature of the normative ordering' in which a single domestic constitution 'can comprise norms that are part of multiple TLO'[16] According to this view, 'constitutions should be considered global-transnational documents as much as national ones'.[17] This recognition is shared by global constitutionalism too.

Thirdly, global constitutionalism is based upon legal pluralism. Although constitutional principles play a leading role, there is no hierarchy among legal orders, namely between international, regional and domestic laws. Given the fact that constitutionalism in the EU is constitutional pluralism, global constitutionalism must also be 'constitutional pluralism'.[18] Pluralism is essentially inherent in and compatible with the idea of constitutionalism.[19]

Fourthly, the transformation of classical sovereignty is suited to global constitutionalism. The reconceptualization of sovereignty is likely to create favorable conditions for global constitutionalism.[20] Almost all constitutional lawyers have firmly believed that the establishment of a national constitution derives from the exercise of the people's constituent power.[21] However, nowadays transnational influence on national constitutions is undeniable and some state constitutions were established in a transnational manner.[22] In those cases, their normative ground

12) N.W.Barber, The Principles of Constitutionalism, 6-9 (Oxford, 2018).

13) Anne Peters and others, *supra* note 9, at 5-6.

14) Anne Peters, *Membership in the Global Constitutional Community*, in The Constitutionalization of International Law, *supra* note 5, at 153-262; Anne Peters, *supra* note 4, at 141.

15) Dieter Grimm, Constitutionalism, Past, Present and Future 370 (Oxford, 2016).

16) Tom Ginsburg and others, *supra* note7, at 2 and 7.

17) Colin J. Beck, John W. Meyer, Ralph I. Hosoki, and Gili S. Drori, *Constitutions in World Society: A New Measure of Human Rights*, in Constitution-Making and Transnational Legal Order, *supra* note 7, at 85, 104; Thornhill is also aware of 'a process in which national constitutional law was integrated into global constitutional law' (Chris Thornhill, Constitutionalism and populism: national political integration and global legal integration, International Theory, Vol.22, 1, 22 (2020).

18) Takao Suami, *Global Constitutionalism and European Legal Experiences, Can European Constitutionalism Be Applied to the Rest of the World?*, in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, 123, 165-166.

19) Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, in Constitutional Pluralism in the European Union and Beyond 67, 78-84 (Matej Avbelj and Jan Komárek eds., Hart, 2012); Alec Stone Sweet, *supra* note 4, at 632-639.

20) Takao Suami, *supra* note 18, at 150.

21) Alexander Somek and Michael A. Wilkinson, *Unpopular Sovereignty?*, Modern Law Review, Vol.83, 955-978 (2020).

22) Tom Ginsburg and others, *supra* note 7, at 1-9; Colin J. Beck and others, *supra* note 17, at 85.

has to be discovered outside the states concerned. On the other hand, international lawyers deny the absoluteness of state sovereignty. They claim that state sovereignty can no longer enjoy unbridled freedom, but has to be subject to restrictions without having consented to them.[23] As an extension of this claim, some recognize the constraint of constituent power as well as the existence of legal authority which is not based upon the will of states.[24]

All things considered, political ruling powers are enforced at both national and international levels. On this account, domestic constitutionalism alone is not enough to control the exercise of political power. The justification of global constitutionalism is very simple. So long as such powers are exercised by non-state actors, it is unsuitable for constitutionalism to remain only within individual states. In order to embody itself, constitutionalism has to expand to transnational space beyond the state. Once shiftting from the domestic space, constitutionalism will start its own development as global constitutionalism. Then as a result of interaction between two types of constitutionalism, domestic constitutionalism will also be affected by global constitutionalism. Constitutionalism as a whole is likely to grow through such mutual permeation.

2. The Rise or Decline of Global Constitutionalism

A. Backlash Against Global Constitutionalism

The idea of global constitutionalism has been exposed to constant attack for the last decade, in particular after the international financial crisis in 2008.[25] Global constitutionalism in the early days had often referred to the progress of the EU, the legalization of the international trade order by the WTO, and the establishment of the ICC as evidencing the constitutionalization of international law. In the 2010s, however, the opposite trend was obvious for each of them. The problems were the UK's withdrawal from the EU ('Brexit'), the emergence of illiberal democracy in Central and Eastern Europe, the abeyance of the Appellate Body of the WTO, and the withdrawal of some African members from the ICC. In each field, it is easy to find out some incidents which raise doubts about global constitutionalism. The intensification of nationalistic sentiments has also provided more ammunition to anti-global constitutionalist. It makes sense that some feel pessimistic about the future of constitutional principles therefore.[26]

B. Infiltration of Global Constitutionalism into Global Society

It is difficult to foresee the future of domestic and global constitutionalism, but the backlash is one aspect of the matter. Constitutional principles which underlie global constitutionalism have already

23) Mattias Kumm, *supra* note 8, at 175 and 177.

24) Patrick Capps and Henrik Palmer Olsen, *Introduction,* in Legal Authority beyond the State, *supra* note 3, at 1-9; Chris Thornhill, *Rights and constituent power in the global constitution,* International Journal of Law in Context, Vol.10, 357-396 (2014).

25) Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, in Constitution-Making and Transnational Legal Order, *supra* note 7, at 156, 182-183.

26) Kim Lane Scheppele, *Autocracy under Cover of the Transnational Legal Order,* in Constitution-Making and Transnational Legal Order, *supra* note 7, at 189.

taken deep root in the whole of international society as well as an array of states. Although it is easy to come across violations or infringements of those principles, there is a large number of evidences to show the consensus on constitutional principles in international society. The fact that the emergence of illiberal democracy is often called 'backsliding' paradoxically evinces the existence of a consensus on constitutionalism. If there weren't such a consensus, 'we would not see so many leaders with questionable motives attempting to justify themselves in the name of constitutional democracy'.[27] In addition, both the geographical expansion of regional human rights protection,[28] and the combination of both trade agreements and political agreements advocating constitutional principles can be considered as such evidences.[29]

Last but not least, the UN's involvement in state-building has to be added as an indicator of this trend. UN peacekeeping operations focused on monitoring ceasefires in the past. In the post-cold war era, however, they have expanded into other fields to a significant degree,[30] and on occasions, have become actively engaged in the reconstruction of nation states including constitution-making in conflict and post-conflict countries in which governmental systems broke down and stopped functioning.[31]

As aforesaid, it is believed that domestic constitution-making must be based upon the people's will in order to obtain legitimacy. However, any process of constitution-making cannot be completely free from transnational influences. Tom Ginsburg and his colleagues point out that '[I]n every phase of the constitutional process, constitution-making involves interaction between transnational actors and local parties'.[32] This is in particular true for constitution-making under the auspices of the UN.[33] However, state-building is always a difficult task for an international administration, and not a few of the operations were evaluated as failure rather than success.[34] Direct governance by an international administration may tend to bring about 'a popular backlash

27) *Id.*, at 202.

28) The interaction between the Inter-American Court of Human Rights and national courts in Latin America is an indication of consensus on human rights protection in a broader context (Armin von Bogdandy and René Urueña, *International Transformative Constitutionalism in Latin America,* The American Journal of International Law, Vol.114, 403-442 (2020)). The adoption of the ASEAN Human Rights Declaration is another sign in the South East Asia (Dimitri Vanoverbeke, *Are We Talking the Same Language?, The Sociohistorical Context of Global Constitutionalism in East Asia as Seen from Japan's Experiences,* in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 203, 221-222).

29) Takao Suami, *Global Constitutionalism for East Asia: Its Potential to Promote Constitutional Principles,* in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 533, 566-569.

30) Department of Political and Peacebuilding Affairs, Repertoire of the Practice of the Security Council 22nd Supplement, Part X Subsidiary organs of the Security Council: peacekeeping operations and special political missions (2019).

31) Manon Bonnet, *The Legitimacy of internationally imposed constitution-making in the context of state building,* in The Law and Legitimacy of Imposed Constitutions, 208, 208-210 (Richard Albert, Xenophon Contiades and Alkmene Fotiadou eds., Routledge, 2019); Tom Ginsburg, *Constitutional Advice and Transnational Legal Order,* in Constitution-Making and Transnational Legal Order, *supra* note 7, at, 26, 42.

32) Tom Ginsburg and others, *supra* note 7, at 6.

33) The process of drafting the constitution for South Sudan involved not only the UN but also a myriad of outside actors (*Id.*, at 2).

34) The UN intervention in Kosovo was known as failure, because it did not succeed in creating a multi-ethnic state and rather increased division among different ethnic groups (Nicolas Lemay-Hébert, *State-Building From the Outside-In: UNMIK and Its Paradox,* Journal of Public and International Affairs 65, 65-66 and 73-74 (January 2009); Oisín Tansey, The Concept and Practice of Democratic Regime-Building, International Peacekeeping, Vol.14, No.5, 633, 638-643 (November 2007)).

against foreign rule' which undermines its legitimacy.[35] Thus, while constitutionalism appears as an adequate tool to guide state-building, some may express a pessimistic or prudent view about the role of international intervention for state-building.[36]

To be sure, processes which involve both state-building and constitution-making are very complex and time-consuming, and are affected by all sorts of local and international elements. Among these elements, the will of the people is considered as decisive, and the ultimate success of efforts towards state-building rests with the will of local people.[37] Therefore, the legitimacy, effectiveness, and appropriateness of UN interventions are still the subject of fierce debates, but such a discussion lies outside the scope of the present article. Instead, the author will focus here on the normative aspect of UN interventions. From a normative perspective, the most important question about UN operations for state-building is what kind of state the UN attempts to create. UN operations have been based upon UN Security Council resolutions. By examining them, one will be able to see that these resolutions explicitly or implicitly assume state-building grounded upon constitutional principles such as the rule of law, the protection of human rights, the separation of powers and democratic governance. For example, the resolution on Libya in 2011 looks forward to the establishment of a transitional government, emphasizing 'a commitment to democracy, good governance, rule of law and respect for human rights'.[38] For that purpose, this resolution endorses the promotion of the rule of law, the setting up of an electoral process, and the promotion and protection of human rights within the mandate of the UN support mission.[39] These principles were reconfirmed by recent resolutions, which also extended the mandate of the mission.[40] These resolutions for Libya are not exceptions. The task of the UN mission is not always the same, because it has to be tailored to meet local conditions. Nevertheless, almost all resolutions include state-building on the basis of the rule of law, democracy through free and fair elections, and the protection of human rights.[41] Those constitutional principles are affirmed as the universal core values of the UN by the Guidance Notes of the UN Secretary-General.[42] It follows from the above that the UN has been powerfully advancing

35) Nicolas Lemay-Hébert, *supra* note 34, at 65-66.

36) Oisín Tansey, *supra* note 34, at 643-644; David E. Landau, *Democratic Erosion and Constitution-Making Moments: The Role of Transnational Legal Norms*, in Constitution-Making and Transnational Legal Order, *supra* note 7, 234, 247-260.

37) Tom Ginsburg, *supra* note 31, at 44-46.

38) UN Security Council, Resolution 2009 (2011), 16 September 2011.

39) *Id.*

40) UN Security Council, Resolution 2486 (2019), 12 September 2019; UN Security Council, Resolution 2542 (2020), 15 September 2020; Libyan Political Agreement, 17 December 2015.

41) The resolution for Guinea-Bissau requests the UN mission to focus on strengthening democratic governance, support to legislative and presidential elections as some of the priorities, and affirms that it should assist national authorities in the promotion and protection of human rights (UN Security Council, Resolution 2458 (2019), 28 February 2019). Likewise, the resolution for Mali decides that the mandate of the UN mission shall include support for the rebuilding of the rule of law, the full restoration of constitutional order and democratic governance, the organization of inclusive, free, fair and transparent elections, and the promotion and protection of human rights (UN Security Council, Resolution 2100 (2013), 25 April 2013). A number of the UN Security Council's resolutions are similar to the above two resolutions (Resolution 2476 (2019) (Haiti), 25 June 2019; Resolution 2149 (2014) (Central African Republic), 10 April 2014; Resolution 2102 (2013) (Somalia), 2 May 2013; Resolution 1996 (2011) (South Sudan), 8 July 2011).

42) Guidance Note of the Secretary-General, UN Approach to Rule of Law Assistance (April 2008); Guidance Note of the Secretary-General, United Nations Assistance to Constitution-making Processes (April 2009).

constitutional values in the context of state-building.[43] The value-based involvement of the UN in constitution-making is also consistent with the UN Charter promoting adherence to fundamental human rights and international law.

It is especially important that the repeatedly adopted resolutions show the fact that no permanent member of the UN Security Council has exercised the right of veto at the time of their adoption. Even permanent members which do not domestically observe constitutional principles cannot help accepting them as normative international standards.[44] This fact means that irrespective of the degree of their materialization in each state, there exists a consensus on constitutional principles in international society.

UN interventions with the goal of national constitution-making tend to raise a question of its legitimacy. For that reason, the Guidance Notes on the Constitution-making Processes, as well as some UN resolutions, stress national ownership of constitution-making, in recognition of the concern that UN assistance could lead to a foreign imposed constitution.[45] However, these resolutions also make clear that local ownership of constitution-making must stay within limits set out by international society, and that state-building must be based upon constitutionalism.[46]

Therefore, it can be concluded that constitutional principles deriving from Western liberal democracy are shared by international society as a whole, although the degree of commitment to them is not uniform everywhere. The history of international intervention for state-building goes back to the end of World War II. The post-war Constitution of Japan can be understood as the product of international intervention.[47] The case of Japan is usually classified as one of the successes of international intervention, because the Constitution has contributed much to the stability and prosperity of Japan for more than seven decades. In other words, the Japanese Constitution was ahead of its time in terms of global constitutionalism.

Sharing constitutional principles in international society, however, is not the end of the story. Besides claims of exceptionalism, like the Asian value claim, issues often arise due to vagueness of constitutional principles, which causes problems as to how they should be interpreted when being applied.[48]

43) Tom Ginsburg, *supra* note 31, at 43.

44) Kim Lane Scheppele, *supra* note 26, at 203-205.

45) Guidance Note (2009), *supra* note 42; Resolution 2102 (2013), *supra* note 41; Resolution 1996(2011), *supra* note 41.

46) Kim Lane Scheppele, *supra* note 26, at 194-195; Oisín Tansey, *supra* note 34, at 634-636.

47) Although it is debatable in Japan whether or not the Constitution is an imposed constitution, it is undisputed that the Japanese government drafted and adopted it under strong influence from the Allied Forces (Tom Ginsburg, *supra* note 31, at 33; Zachary Elkins, Tom Ginsburg and James Melton, Baghdad, Tokyo, Kabul…..Constitution Making in Occupied States, William and Mary Law Review, Vol.49, 1139, 1159-1164 (2008)).

48) Takao Suami,*supra* note 18, at 160.

III. Individuals as a Nexus Between National and Global Constitutionalism

- Why does constitutional discourse have to repeatedly emerge? -

In order to explore the outlook of global constitutionalism, this section will examine the dynamism which continues to reproduce orientation pushing towards constitutionalization. The progress of constitutionalization is not a linear process, but operates in shifts back and forth. As long as there still exists sufficient dynamism to drive forward this progress, however, the process of pushing forward towards constitutionalization will restart again and again. From this perspective, the key to these changes is the individualization of international law through the approval of individuals as international law subjects.[49)]

The legal status of individuals in the international legal order has undergone a considerable degree of change in the second half of the 20th century. This change started in the Nuremberg and Tokyo trials to prosecute war crimes against humanity during the World War II. States are still primary subjects of international law, but since then, international law has gradually recognized partial subjectivity of individuals in many contexts.[50)] As a result of the increase of international law targeting their rights and obligations, individuals have now become deeply incorporated into international law.[51)]

Why does the expansion of individuals' legal status have a bearing on global constitutionalism? To begin with, if states were sole players in international society and if international law were based only on consent by states under the rule of *pucta sunt servanda,* there would be little room to discuss constitutionalism beyond the state, although not no room at all. This is because, since constitutionalism is intrinsically a legal concept which attempts to ensure individual freedom by constraining public power, such traditional state-centered international law does not have much interface with individuals. However, the incorporation of individuals into international law has enabled constitutionalism to connect with transnational space.

More important is that the expansion of individuals as international law subjects has led to the embedding within the entire legal system of the mechanism for promoting the repeated occurrence of constitutional claims.[52)] In the case of human rights, the process of interplay is revealed by the following assumption. To begin with, as the result of the legal status of the individuals in international law, the rights and obligations of individuals would be subject to both domestic and international law at the same time. As a consequence, whenever there is a gap between the two in terms of human rights protection, double-standards cannot be maintained from the viewpoint of

49) Inger-Johanne Sand, *Varieties of Authority in International Law, State Consent, International Organisations, Courts, Experts and Citizens*, in Legal Authority beyond the State, *supra* note 3, at 161, 175.

50) Jan Wouters, Cedric Ryngaert, Tom Ruys and Geert De Baere, International Law, A European Perspective 387-420 (Hart, 2019).

51) Anne Peters, Beyond Human Rights, The Legal Status of the Individual in International Law 1-10 (Cambridge, 2016).

52) Yoon Jin Shin, *Cosmopolitanising Rights Practice, The Case of South Korea*, in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 245, 269-271.

individuals. It is natural that individuals attempt to rely upon higher standards, whether international, regional or domestic, which are the most favorable to themselves. It is notable that the interplay between the two legal orders is not one way, but interactive. If international law undermines human rights under a domestic constitution, the latter will work as a bulwark against the violation of human rights. As this assumption suggests, international law and domestic law have been linked up through individuals like a knot. Anne Peters argues that the ultimate international legal subjects are not states but individuals, and that the ultimate normative source of international law is also humanity, not sovereignty.[53] Even if one does not agree with her, one cannot deny that unless international law is reconstituted as law only between states, an individual's claim seeking higher protection will continuously provide energy for the development of human rights protection. This dynamism is demonstrated by the experience of direct effect of EU law.[54] Thus an individual is always a starting point for, and central to, the development of democracy and human rights.[55]

A fundamental inconsistency seems to exist between the classical state-based international law and the legal status of individuals in international law. Accordingly, the incorporation of individuals into international law should be considered as a turning point for the whole of international law. Due to this, the structure of international law is undergoing considerable transformation. Unless it is feasible to exclude individuals from the domain of international law, international law will simply have to accept this transformation.

IV. Global Constitutionalism and Human Rights

1. Human Rights as a Core of Global Constitutionalism

This article will focus on human rights in the context of global constitutionalism. Among constitutional principles, the protection of human rights is more directly addressed to the position of individuals than others. In addition, under the recent emergence of illiberal democracy in several states, the role of international human rights law (IHRL) has become more important than before, because it can play a role of providing for governmental legitimacy.[56]

IHRL is part of international law which has rapidly developed during the last decades. Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, a number of human rights treaties, whether applicable to all people or specific types of people, have been concluded under the auspices of the UN. Regional human rights treaties were also concluded for most regions except East Asia. Thanks to the accumulation of these world-wide and regional treaties, the development of human rights norms has been astonishing.[57] Such IHRL has affected domestic

53) Anne Peters, *supra* note 51, at 155.

54) Takao Suami, *supra* note 18, at 154.

55) Yoichi Higuchi, Riberaru-demokurashi no gennzai – Neo-riberaru to iriberaru no aidade [The current state of liberal democracy – in between Neo-liberal and illiberal], 153 (Iwanami, 2019).

56) Chris Thornhill, *supra* note 17, at 20-23.

57) Colin J. Beck and others, *supra* note 17, at 86-90; Hae Bong Shin, Kokusai Jinken Ho [International Human Rights

constitutions, and irrespective of geographic location or economic prosperity, constitutions in most countries include human rights provisions.[58] While influencing each other, both IHRL and domestic constitutions are now working together in order to ensure the protection of human right. This phenomenon underlies an idea of global constitutionalism, because human rights have come to constitute a coherent global legal order.[59]

As a result of contributions by the UN Human Rights Council, human rights treaty bodies, and regional human rights courts, substantial normative consensus on the substance of each human right has already been shaped at the international level, but as the contents of this consensus are still abstract or indefinite, its application to concrete examples necessarily brings about difficult confrontations between various stakeholders.[60] This is a sensitive problem. In order to approach this, this section will start with an empirical study on the EU and Japan.

2. Different Understanding of Human Rights between the EU and Japan

It is often underlined that the EU and Japan have the same values and constitutional principles.[61] The sharing of common values and principles was legally confirmed by the conclusion of the EU-Japan Strategic Partnership Agreement (SPA) in 2018.[62] The discourse on the sharing of common values sharing is popular in Japan. Most Japanese simply believe that Japan shares the same values of human rights with the EU, because these values were incorporated into the Constitution of Japan just after World War II and have been more or less respected up to now. However, there is a considerable gap on the understanding of human rights between Europe and Japan.[63] First, the Japanese discourse on human rights is more diffused than the European one. As a result, the borderline between human rights and legal rights is not entirely clear in Japan. Secondly, there is a difference between them in terms of constitutional duties to protect human rights against infringements by private parties. Unlike Europe, Japan understands that the role of human rights is to protect individuals against state action and thus it is reluctant to accept such duties. Thirdly, in Japan, human rights are considered as a domestic issue, but in Europe, as the European Convention of Human rights (the ECHR) demonstrates, the protection of human rights is an international issue.

Law] 3-54 (Shinzan-sha, 2013).

58) Colin J. Beck and others, *supra* note 17, at 90-104.

59) *Id.*, at 86 and 88-89.

60) Kim Lane Scheppele, *supra* note 26, at 219; Takao Suami, *supra* note 18, at 159-165.

61) The EU-Japan Summit meeting always loudly proclaims 'common values and shared principles' (Takao Suami, *supra* note 29, at 568).

62) The preamble of the EU-Japan SPA refers to both parties' commitment to the common values and principles, in particular democracy, the rule of law, human rights and fundamental freedoms. Article 1, para.1 (d) also mentions about shared values and principles.

63) Takao Suami, *Rule of Law and human rights in the context of the EU-Japan relationship: are both the EU and Japan really sharing the same values?*, in The Changing Role of Law in Japan, Empirical Studies in Culture, Society and Policy Making 247, 255-263 (Dimitri Vanoverbeke, Jeroen Maesschalck, David Nelken and Stephan Parmentier eds., Edward Elgar, 2014).

As regards international law, Anthea Roberts suggests a cognitive paradigm of 'comparative international law'.[64] The term, 'comparative international law' seems to be self-contradictory, because international law is supposed to be globally applied. Everybody assumes that domestic laws differ country to country, but they tend to believe that international law is universal. But this belief does not necessarily correspond to the reality. In fact, there are national differences in terms of an approach to international law.[65] It is easy to find an analogy between international law and human rights. How should we understand the above-mentioned gap between the discourse and the reality in respect of human rights? This question will be examined in the next section.

3. Paradox inherent in the idea of Human Rights

A. Universality as a Fundamental Element of Human Rights

Human rights are generally defined as rights which 'all human beings should be able to claim as a matter of rights' in their societies.[66] While the UDHR is the first comprehensive and widely-accepted document of human rights, its preamble recognizes that human rights are ensured for all mankind. Other human rights treaties also accept such universal nature of human rights.[67] Not only those treaties, but also most national constitutions are predicated on the same or similar understanding of human rights.[68] Thus the universality is a distinguished feature of human rights.[69] The legitimacy of human rights is formally supplied by their universal nature based upon the commonality of all people.

The universality of human rights is also justified by their function. The main purpose of human rights is to restraint the abuse of public powers. If they have to be subordinate to a state, they will be logically unable to control state authority. Their universality connotes that all actors including the state must respect human rights. In other words, they can impose restrictions on state authority by reason that they rise above the state.[70] The discourse on their universality is very influential for all international actors, in particular individuals. Any individual is encouraged to claim that the rights guaranteed in other states should be protected in his or her country too, because these rights are human rights. To sum up, the universality justifies going beyond 'the boundaries of the national legal systems' and has the effect of promoting not a race to the bottom, but a race to the top

64) Anthea Roberts, Is International Law International? 1-17 (Oxford, 2017).

65) *Id.*, at xvii.

66) Black's Law Dictionary 758 (Bryan A. Garner ed., Eighth ed., 2004).

67) The preamble of the International Covenant on Civil and Political Rights (the ICCPR) emphasizes the universality of the rights recognized in this Covenant, and does not mention anything about regional specificity of those rights. The Human Rights Committee for the ICCPR takes account of regional human rights treaties, human rights documents adopted by regional organizations and case law of regional human rights courts for drafting its general comments, but its comments do not refer to regional specificity of its interpretation (for example, General comment No.37 (2020) on the right of peaceful assembly (article 21), CCPR/C/GC/37, 17 September 2020).

68) The Japanese Legal System, Introductory Cases and Materials 721 (Hideo Tanaka ed., Malcolm D.H. Smith assis., University of Tokyo Press, 1976).

69) Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 European Constitutional Law Review 5, 20 (2009).

70) Shuichi Kato, Zattushu Bunka – Nihon no Chisana Kibou [Mixed-breed Culture, Small Hope of Japan], 91-93 (Kodansha, 1974).

concerning human rights standards.

B. Local Elements in Human Rights

The universal nature is one side of human rights, however. When human rights are implemented by domestic laws, they must necessarily contain local elements (e.g. culture, history, tradition and religion) that are made up within national or regional environments. With regard to human rights, Europe is the most legalized and institutionalized region in the world. Europe has its own regional courts dealing with human rights issues, namely the European Court of Human Rights (the ECtHR), the Court of Justice of the EU (the CJEU) and the EFTA Court. These courts play a major role of determining how human rights should be protected by interpreting regional human rights instruments.[71] European interpretation of human rights has officially and legitimately converged through the accumulation of their case law, and that as a consequence, such interpretation has naturally acquired regional universality.

However, it is surprising that even Europe shares an ambivalent understanding of human rights. In 2009, Marta Cartabia, who was later appointed as a judge of the Italian constitutional court, emphasized that '[E]mbedded in the historical, religious, moral, linguistic and political peculiarities of each people, such rights are fed by particularity and pluralism'.[72] It is not clear whether or not her stress on locality is widely shared in Europe, but her view indicates that even in Europe, the interpretation of human rights is still diverse in spite of the successful and long-lasting operations by the ECHR and the EU. She referred only to Europe, but the same logic can be more easily applied to the world as a whole, which is more diverse than Europe.

4. Response to Paradox - How Should we Approach Divergence Among Different Areas?

A. Overview

In many respects, human rights standards adopted by the ECtHR or the CJEU are not the same as national standards in Europe or East Asia. How can or should we reconcile a universal dimension of human rights with their local dimension? This question has not been fully answered yet.

International society has already made much efforts to find a compromise between these two elements.[73] The Bangkok Declaration in 1993, the Vienna Declaration in 1993 and the World Summit Outcome in 2005 are valuable in respect of this question. These documents take due account of national and regional peculiarities, while maintaining the universal nature of human rights,[74] and demonstrate that IHRL can be legitimately localized by national or regional

71) They are the European Convention on Human Rights (the ECHR) and the Charter of Fundamental Rights of the EU (the EU Charter).

72) Marta Cartabia, *supra* note 69, at 20.

73) Takao Suami, *supra* note 29, at 540; Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration), UN Doc.A/CONF.157/PC/59 (7 April 1993); Vienna Declaration and Programme of Action, UN Doc.A/CONF.157/23 (25 June 1993); 2005 World Summit Outcome, GA Res. 60/1, UN Doc.A/RES/60/1 (24 October 2005), paras.121-122.

environments. The theory of 'a margin of appreciation' developed by the ECtHR is compatible with these declarations and can be approved as one of the instruments to adapt the universal nature of human rights to local conditions. In sum, there is a consensus on the due attention to be paid to regional or national elements when interpreting each human right in local contexts. It is unclear, however, how or to what extent such local elements should have an influence on the idea of human rights. In order to further clarify this issue, the author will present the following two approaches as an ideal type. To anticipate the answer to this question, a solution will be found somewhere in-between these two ideal types.

B. Convergent Approach

The first approach assumes that various national or regional interpretation of human rights will be gradually harmonized, and should be finally brought together into one single or uniform standards applicable throughout the world. This approach is inspired by and faithful to the universal nature of human rights. As long as the protection of human rights derives from the assumption that every individual must be respected and dignified as such, it is difficult to justify a position that human rights should differ from country to country or from region to region in the world, because when we focus on each individual, irrespective of his or her nationality, religion, culture, tradition, customs and race, the degree of divergence among those individuals is generally not major but rather minor. Empathy with such convergence tends to lead to the acceptance of a position that one authority can determine globally applicable standards. It is sure that in Europe, the regional courts have fixed regional standards.[75] This approach understands that at the global level, international human rights bodies under human rights treaties fulfill a similar task to develop global standards.

C. Divergent Approach

In contrast to the convergent approach, the divergent approach does not expect that current divergence concerning human rights will finally converge into uniform standards, though it never rejects the gradual process of harmonization. Conversely, anticipating that such divergence will last in a foreseeable future, the divergent approach positively perceives divergence among different interpretations to be fruitful to the development of human rights. In this approach, commitment to human rights does not require the homogenization of the existing diversities, but requires that the diversities should be taken seriously.[76] While human rights have a universal nature, under the conditions that national authorities are responsible for their implementation, they cannot be totally free from difference deriving from local peculiarities.

This approach may appear to be contradictory to the universal nature of human rights, but it is aware of the risk of 'judicial colonialism' which is inherent in the convergent approach. 'Judicial colonialism' means that hegemons compel non-hegemons to accept their interpretation and standards. The legitimacy of the European courts as authority to determine human rights standards

74) Takao Suami, *supra* note 29, at 540.
75) Marta Cartabia, *supra* note 69, at 8-17.
76) *Id.*, at 23.

has been generally approved by European peoples. Even in Europe, however, Cartabia expressed her fear that the EU Charter would undermine 'the pluralistic nature of Europe' through centralizing the responsibility of human rights protection from the national level to the European level.[77] What she wants to argue is that under the assumption that each country decides its own construction, the ECtHR's case law is considered to be highly suggestive, but is not absolute if it impairs national constitutional identity.

D. Examination of These Approaches

Each of the two approaches has advantages and disadvantages. Regarding disadvantages, the convergent approach has the risk of 'judicial colonialism' as aforesaid, and the divergent approach has the risk of justifying violations of human rights by oppressive or authoritarian regimes.

As a matter of course, both approaches take different courses of action, but it is notable that they actually share something common. What they share is to ensure the full participation of all states with their own practices in constitutional construction at the transnational levels. The convergent approach presupposes that all different understanding of human rights has to be taken into consideration in order to advance convergence. This is because without equal input from all national practices, converged standards cannot gain full authority and legitimacy to persuade all peoples.[78] The divergent approach has also to be accompanied by full participation. Why does it need such participation? First, national constitutional identity and tradition is usually made up and confirmed through the deliberative process of distinguishing itself from others. Thus each state cannot help participating in transnational discussion in order to preserve its identity and tradition. Secondly, although each state is legally free to adopt its own specific interpretation, in fact, only a hegemon can realize such a possibility as she wishes. This is because if a non-hegemon carries out unorthodox constitutional practice, she will have to be prepared to suffer harsh criticism from international society. Nevertheless, if such a non-hegemon should maintain its constitutional practice, she shall be required to explain to international society why dominant interpretation has to be transformed so that her practice can be legitimatized. In conclusion, the remedy for national tradition is not isolation through hiding behind the shield of sovereignty, but participation in dialogue with international society.

It follows from these considerations that these two approaches are not completely inconsistent. They show that the following two conditions have to be met at the same time for the purpose of progressing the contents of human rights. The first is to build up common perception on human rights through encounter with various actors having their own ideas, and the second is to evolve national or regional diversity in a manner compatible with human rights. Global constitutionalism will have to continue to pursue the satisfaction of both conditions.

77) *Id.*, at 17-21.
78) *Id.*, at 23 and 28.

E. Globalization and Local Institutions

Globalization from the 1990s has led to the impression that all is to be leveled in international society, but the relationship between the universality of human rights and the locality of their implementation is as complex and diverse as multiple forms of democracy – the latter also being a core constitutional principle.[79] As regards the world economy, many scholars believed in 1990s that as far as the market economy was concerned, market arrangements and economic institutions would finally converge everywhere, and that the world economy would be governed by uniform, transnational institutional arrangements. However, the 'new institutional economics' represented by Masahiko Aoki demonstrates that despite huge impacts of the globalizing market, 'institutional diversity in the overall global arrangement will remain despite the closer linkage of national markets and the development of ICT' (information and communications technology).[80] Assuming that human rights are somewhat more sensitive to locality than economic institutions, it makes sense that the same logic can be applied to the legal domain of global society.

Taking account of the difficulty of establishing one single mechanism to extract uniform standards from local human rights practice, it is preferable that instead of a deductive approach, one has to take an inductive approach based upon the perennial process of mutual communication among all stakeholders for the promotion of human rights. It is not easy to foresee what the final goal of this approach is. But it is likely that the substance of human rights will be polished by means of this process so that they can garner more support from peoples in the world. For example, global constitutionalism initially tended to focus on civil and political rights. This tendency might have connection with the fact that global constitutionalism was mainly discussed by scholars in the West in which social rights were relatively well protected. On the basis of dialogue between the West and the East, today's global constitutionalism pays more attention to social rights, though there is still a distance between the West and the East.[81] In order to further develop both international and domestic legal orders in the direction of promoting human right, constitutional principles themselves have to be further developed and reformulated. The process of communication has the potential to cause such changes. The next question is how we should organize continuous mutual communication for the move to global constitutionalism.

---

79) According to the International IDEA, '[T]here is no single and universally applicable model of democracy' (International Institute for Democratic Electoral Assistance (IDEA), International IDEA Strategy 2018-2022 (2018)); Kim Lane Scheppele, *supra* note 26, at 195.

80) Masahiko Aoki, Toward a Comparative Institutional Analysis 377 and 387-388 (The MIT Press, 2001); Aoki argues that institutions will adapt themselves to impacts of globalizing markets and transnational firms. But this will not imply that all the differences across national domains will disappear and the world economy will be governed by uniform, transnational institutional arrangements' (*Id.*, at 388-389).

81) Anne Peters, *Global Constitutionalism, The Social Dimension,* in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 277-350; Hyuck-Soo Yoo, *Development Issues in the Discourse of Global Constitutionalism*, in Global Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 351-376; Xigen Wang, A New Idea for Constructing the Global Legal Mechanism of the Right to Development, in Gobal Constitutionalism from European and East Asian Perspectives, *supra* note 8, at 377-391.

V. Judicial Dialogue for Global Constitutionalism

1. Emergence and Function of Judicial Dialogue

A. Global Constitutionalism and the Role of Domestic Courts

In order to develop pluralistic constitutionalism beyond the state, the enhancement of mutual communication among a wide number of stakeholders is inevitable. Such communication is always useful to avoid any misunderstanding and for participants to evolve their own interpretation of human rights. For the sake of communication, all stakeholders need to have their own common argumentative spaces to exchange their views.[82] Those spaces have already been organized and are functioning in global society.

With respect to human rights, a great deal of communication among international actors has been continuing at several official forums such as the UN human rights bodies, and international or regional courts.[83] Their achievements must be highly appreciated, but it should be noted that all stakeholders cannot be fairly represented within them. Due to the essential nature of institution-building, any inclusion of some stakeholders must accompany the exclusion of others than the included.[84] As a consequence, the inter-subjective understanding by these forums cannot be complete, but has to be always incomplete. In order to improve the level of inclusiveness, mutual communication among stakeholders should be organized and conducted from as many different angles as possible in order to compensate for this inevitable incompleteness.

From this point of view, transnational communication between varied courts (termed 'judicial dialogue') is considered to be one of the arrangements which can complement and intensify communication by the official forums. Today, national and international courts often work together while communicating, learning and influencing one another. Collaboration between national and international courts in a consistent manner with constitutional principles may play an important role in constructing a global constitutional order, because if their collaboration is successful, they will be able to integrate legal orders at the different levels into a global legal order. Judicial review in the light of the constitution is an essential element of constitutionalism. Therefore, a constitutional court is an indispensable institution for domestic constitutionalism.[85] Likewise, both national and international courts remain decisive actors for global constitutionalism.[86] It should also be noted

82) Paul Schiff Berman, Global Legal Pluralism, A Jurisprudence of Law Beyond Borders 141-151 (Cambridge, 2012); Chantal Mouffe, The Democratic Paradox 12-13(Verso, 2005).

83) For example, experts committees under both the UN and regional human rights treaties are operating as international forums for many stakeholders and have contributed much to the development of human rights by issuing non-binding opinions (Hae Bong Shin, Kokusai-Jinken-Ho [International Human Rights Law – Dynamism of International Standards and Coordination with Domestic Law] 512-541 (Shinzan-sha, 2013)). International or regional courts usually consists of judges of different nationalities. Thus these courts can be considered as a forum for dialogue, too.

84) Hans Lindahl, Fault Lines of Globalization, Legal Order and the Politics of A-Legality 8, 115 and 261-267 (Oxford, 2013).

85) Dieter Grimm, *supra* note 15, at 199-204.

86) Anne Peters, *supra* note 14, at 162-163; Chris Thornhill, *Rights and constituent power in the global constitution,* International Journal of Law in Context, Vol.10, 357, 366-367 (2014).

that courts, whether national or international, are the sole institutions to which individuals can obtain direct access in order to bring their human rights claims. Thus it makes sense that global constitutionalism has become bound up with the idea of judicial dialogue.

B. What is Judicial Dialogue?

To be precise, 'judicial dialogue' means mutual communication between national and international courts or between national courts. Judicial dialogue has evolved most actively in Europe,[87] while many courts in other regions have also participated in the process of dialogue. Its gradual emergence is now a world-wide phenomenon. Currently all kinds of courts are active in dialogue, which can be classified into three different types in terms of participants, namely dialogue between (1) 'national judges', (2) 'national and international judges', and (3) 'international judges'.[88] Judicial dialogue usually includes communication with international human rights bodies (e.g., the Human Rights Committee for the ICCPR and the VENICE Commission). This is because although their interpretations are not legally binding, they are allowed to display their authoritative interpretations of human rights.[89]

The form of dialogue is classified into two types, namely 'institutionalized or formal dialogue' and 'non-institutionalized or informal dialogue'. In Europe, the formal systems (namely preliminary ruling procedures in the EU, the EEA and the ECHR respectively) function well as instruments for communication between international and domestic courts.[90] Preliminary ruling procedures represent a formal dimension of the European judicial dialogue, but another informal dimension exists in Europe, - namely that those procedures are actually bolstered by an informal network of national, regional and international judges. While mutual trust and confidence among judges is a prerequisite for the proper function of trans-judicial communication, in Europe, there are plenty of opportunities for judges to know each another and to talk about legal issues together. Through making use of these opportunities, many of them can build up personal trust each other,[91] and as a result a community of constitutional and international justices has in fact been formed in Europe. Although it is difficult to evaluate the importance of informal communities, it is true that

87) Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, University of Richmond Law Review, Vol.29, 99-138 (1994).

88) Yoichi Ito, *Kokusai Jinken Hosho wo meguru Saibankan no Taiwa [Judicial Dialogue on International Human Rights Protection]*, Kokusai Jinken [International Human Rights] No.25, 34 (2014).

89) Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, Yale Law Journal, Vol.107, 273, 358 (1997-1998).

90) In the preliminary ruling procedure, the interpretations of EU law by the CJEU are binding upon national courts (TFEU Article 267). The EEA Agreement set up a similar but non-binding preliminary ruling procedure for the EFTA Court, and the ECHR has recently introduced a procedure for an advisory opinion by its Protocol No.16. The binding nature of judicial decisions is not decisive for judicial dialogue. On the one hand, even if they are binding, their implementation must rest upon discretion of other courts, and on the other hand, even if they are not binding, they are likely to have certain impact upon other courts (Armin von Bogdandy and René Urueña, *supra* note 28, at 425-430; Elvira Méndez-Pinedo, EC and EEA Law, A Comparative Study of Effectiveness of European Law 150 and 171 (European Law Publishing, 2009)). The idea of judicial dialogue turns attention to normative and actual impact rather than bindingness (Anne-Marie Slaughter, *supra* note 87, at 124-125).

91) For example, the EFTA Court published an edited volume to celebrate its 20th anniversary in 2014. A number of European judges from the ECtHR, the CJEU and national supreme courts contributed to this volume (The EEA and the EFTA Court, Decentred Integration (The EFTA Court ed., Hart Publishing, 2014)).

the formal procedures would not work well without such communities. In other words, provided that mutual trust exists between participants, judicial dialogue may become successful without any formal institutional arrangements.[92] The institutionalization is not a mandatory requirement for the success of dialogue, although it is useful.

To qualify as judicial dialogue, communication must be mutual. Reciprocal exchange of ideas between courts has cross-fertilized their adjudications.[93] Courts, in particular constitutional courts joining a conversation with foreign or international courts often find inspiration for their judgments from other courts' precedents.[94] One-way reference to foreign or international judgments was not new, but should be regarded as a first step for subsequent dialogue. It is unfortunate at the moment that reference to foreign judgments is not symmetrical between the West and the non-West. Although courts in the West often refer to each other's judgment, it is rare that Western courts refer to judgments of non-Western courts.[95] In order to improve the effectiveness of judicial dialogue, this asymmetry must be overcome. As a matter of course, national courts cannot be directly bound by foreign judgements or by international judgements which their states are not subject to. Those foreign or international judgments constitute persuasive authority only. Nevertheless, they give any court a valuable opportunity to reconsider their case law from a new perspective.[96] It is likely, for certain issues at least, that judicial dialogue will promote informal coherence between different legal orders.

As the European experience shows, dialogue about human rights can be very active. However, to become active, judicial dialogue requires a minimum level of commonality embedded in legal orders of participating courts in terms of legal concepts, legal norms, and methods of legal interpretation and reasoning.[97] As the fact that most states have ratified or signed the ICCPR suggests, the advancement of both IHRL and domestic constitutions have constituted common foundation of human rights-based thought for the whole world,[98] and fully meets this minimum requirement for dialogue.

To sum up, judicial dialogue is a legal phenomenon through which, when facing similar legal issues in the context of ongoing globalization, varied courts, whether national, supranational or

92) Juliane Kokott and Daniel Dittert, *European Courts in Dialogue*, in The EEA and the EFTA Court, *supra* note 91, at 43-52.

93) Anne-Marie Slaughter, *A Global Community of Courts*, Harvard International Law Journal, Vol.44, 191, 192-193 (2003).

94) Tania Groppi and Marie-Claire Ponthoreau, *Introduction, The Methodology of the Research: How to Assess the Reality of Transjudicial Communication?*, in The Use of Foreign Precedents by Constitutional Judges 1-2 and 5 (Tania Groppi and Marie-Claire Ponthoreau eds., Hart, 2014).

95) Tania Groppi and Marie-Claire Ponthoreau, *Conclusion, The Use of Foreign Precedents by Constitutional Juges:A LimitedPractice, An Uncertain Future*, in The Use of Foreign Precedents by Constitutional Judges, *supra* note 94, at 411, 429; Stefan Martini, *Lifting the Constitutional Curtin? The Use of Foreign Precedents by the German Federal Constitutional Court,* in The Use of Foreign Precedents by Constitutional Judges, *supra* note 94, at 231, 248-249.

96) Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism,* in Ruling the World?, Constitutionalism, International Law, and Global Governance 356, 377 (Jeffery L. Dunoff and Joel P. Trachtman eds., Cambridge, 2009).

97) Anne-Marie Slaughter, *supra* note 87, at 125-126.

98) Tania Groppi and Marie-Claire Ponthoreau, *supra* note 94, at 416-417; Koji Teraya, *Kokusai Ho ni okeru Jinken Kiteiteki Shiko no Haikei to Tenkai [Background against and Evolution of Human Rights Based Thinking in International Law]*, Kokusai Jinken [International Human Rights] No.27, 19-28 (2016).

international, build up their own standpoints through mutually paying attention to and taking account of precedents of other courts irrespective of their jurisdictions.[99] As a result of such trans-judicial communication, national courts no longer confine themselves to their own jurisdiction. The dialogue beyond the state reveals that a more open and dynamic legal system than the state-centered model has been transnationally emerging in the world. The participation in such communication is likely to have changed local mindset of participating judges, so that they can hold an identity as a member of 'a global judicial community'.[100] Explicit reference to foreign judgments is an evidence of dialogue, but there being no reference does not necessarily exclude the possibility of implicit influences in constitutional interpretation.[101] No court has treated foreign precedents as having more than persuasive authority, but as a result of reciprocal influence, it can be presumed that most courts will reach different conclusions from the original idea that they had before entering into dialogue. Even if they do not change their ideas, dialogue will be useful in avoiding their misunderstanding.

C. Increasing Awareness of Judicial Dialogue

In 1994, Anne-Marie Slaughter presented the theoretical framework for as well as the actual patterns of judicial dialogue by conducting empirical study on national, supra-national and international courts.[102] Being inspired by her idea, other scholar also argues that instead of the traditional state-centered legal order, international courts, interacting with national courts, constitute patchwork patterns of judicial law making for the whole society.[103] Today the conception of judicial dialogue has become widely accepted by the academic community and still attracts a great deal of attention of many scholars. 'Global legal pluralism' is an idea of 'developing procedural mechanism, institutions, and practices', in order to 'create or preserve spaces for productive interaction among multiple, overlapping legal system'.[104] While global legal pluralism does not require overall principles to keep a certain unity in the global legal order, it shares a pluralistic comprehension with global constitutionalism, and turns its attention to dialectical interactions among different international, regional and national courts.[105] A major theory of EU law also recognizes an important role of judicial dialogue. In the EU there has been a long-lasting unresolvable tension about the primacy of EU law over domestic constitutions between the CJEU and national courts. The theory of 'constitutional pluralism' explicates that institutionalized judicial dialogue by the preliminary ruling procedure can give a practical solution to this problem.[106]

---

99) Takao Suami, *'Saibankan-taiwa' towa nanika – Gainen no gaikatsuteki kento [What is Judicial Dialogue?, Overall examination of the concept of judicial dialogue]*, Horitsu-Jiho, Vol.89, No.2, 57-62 (2017).

100) Anne-Marie Slaughter, *supra* note 93, at 196.

101) Tania Groppi and Marie-Claire Ponthoreau, *supra* note 94*, at* 6-7.

102) Anne-Marie Slaughter, *supra* note 87, at 99-138; Anne-Marie Slaughter, A New World Order 65-103 (Princeton University Press, 2004).

103) Chris Thornhill, *supra* note 86, at 369.

104) Paul Schiff Berman, *supra* note 82, at 10.

105) *Id.*, at 153-158 and 266; Chris Thornhill also argues that courts are in fact rapidly evolving as hinge elements in the emergence of a comprehensive transnational constitution (Chris Thornhill, *supra* note 86, at 367-369).

106) Miguel Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in Sovereignty in

Global constitutionalism, which is the main theme of this article, is another example. After Kadi judgment of the CJEU in 2008, constitutional pluralism has been merged with global constitutionalism.[107] Global constitutionalism expects the development of a global legal order that is compatible with constitutional principles. But how can such development be expected? International organizations lack centralized powers to coercively enforce such principles. Thus under the decentralized world, their embodiment must rely upon cooperation among international actors. With respect to these actors, as national and international courts have the final authority to interpret constitutional texts, global constitutionalism is obliged to pay close attention to the role to be performed by courts.[108] In particular, national courts are especially highly valued for the protection of human rights and the rule of law. This is because, unlike international courts, they are empowered to actually enforce their judgments and decisions within their jurisdictions. If constitutional justices can reach a consensus on certain issues, dialogue among them will be an instrument for the establishment of a global system respecting human rights.[109] However, global constitutionalism anticipates that despite their dialogue, constitutional justices will not always come to an accord regarding their opinions on human rights issues.[110] What is more important than the attainment of an agreement is that constitutional justices always maintain and reinforce their commitment to constitutional principles in the course of constant interaction between them.[111] As long as they take part in dialogue with shared commitment to human rights, the existence of different interpretation is generally permissible. Notwithstanding exiting difference, the constant process of mutual learning by constitutional justices will lead to not only the repeated reconsideration of their own interpretation or standards of human rights, but also the constant renewal of the human rights concept itself. The remaining issue to be examined in this article is how such dialogue is being carried out in Asia.

2. Judicial Dialogue in Asia - Leadership of Constitutional Court of Korea -

A. Overall Situation

Judicial dialogue assumes an open-minded and dynamic legal environment in which instead of

Transition 501, 531-534 (Neil Walker ed., Hart, 2003); In order to avoid a head-on clash, both courts are often involved in dialogue through this procedure. This procedure actually works as a valid tool in bringing national traditions and experiences into the CJEU. Accordingly, it is evaluated that 'the preliminary ruling is a great chance for national judges to take part in the building up of the European constitution'(Marta Cartabia, *supra* note 69, at 25).

107) Takao Suami, *supra* note 18, at 133-138.

108) Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism,* in the Ruling the World?, Constitutionalism, International Law, and Global Governance, 356, 371-379 (Jeffrey L. Dinhoff and Joel P. Trachtman eds., Cambridge, 2009).

109) Gábor Halmai, *Constitutional Transplants,* in The Cambridge Companion to Comparative Constitutional Law, 580, 587 (Roger Masterman and Robert Schütze eds., Cambridge, 2019); Gábor Halmai, *supra* note 4, at 177.

110) Armin von Bogdandy and René Urueña, *International Transformative Constitutionalism in Latin America,* The American Journal of International Law, Vol.114, 403, 414-419 (2020).

111) Akiko Ejima, *Grobaru shakai to 'Kokusai-Jinken' – Grobaru Jinkenho ni mukete [Globalized Society and 'International Human Rights'- Towards Global Human Rights Law]*, Horitsu Jiho, Vol.87, No.3, 348-353 (2015).

confining themselves to their jurisdictions, constitutional justices, whether national or international, work together to govern all political powers in a manner consistent with constitutional principles. Such a dialogue functions well in Europe, where, as previously mentioned, the formal mechanisms of dialogue between international and national courts have become institutionalized, and are supported by an informal community of national and international judges. Although they belong to different courts, they know and talk to each another, and mutually exchange their ideas in order to find solutions to the same or similar issues.

In order to expand judicial dialogue to global society, the Venice Commission of the Council of Europe has been organizing the triennial World Conference on Constitutional Justice since 2009.[112] As its statute states clearly, the Conference is expected to closely cooperate with regional and linguistic groups of constitutional justices. Even as of 2009, such groups already covered most regions in the world.[113] It is unfortunate that Asia was much behind other regions in terms of regional organization. This laggardly progress was demonstrated by the small participants from Asia to the World Conferences.[114] Under such unfavorable conditions for judicial dialogue, the Korean Constitutional Court (the KCC) has consistently played a leading role in this region, and has greatly contributed to the reinforcement of dialogue.

It is notable that the KCC's positive attitude towards judicial dialogue is institutionally supported by abundant research staff on foreign and international laws. In order to make communication with courts in other jurisdictions fruitful, any court has to be furnished with sufficient knowledge of foreign legislation and precedents. This is because if each court tries to understand the development of foreign laws without taking account of their local contexts, dialogue will be likely to lead to mutual misunderstanding. The KCC is very much aware of this risk. Therefore, the KCC receives a high-grade of research assistance from Constitutional Research Officers, Constitutional Researchers, Academic Advisers and the Constitutional Research Institute (CRI), all of whom have excellent expertise on foreign laws.[115] On the basis of extensive comparative legal expertise provided by these experts, the KCC is able to approach dialogue with self-confidence. Among these four types of experts, the foundation of the CRI in 2011 as an in-house think tank for the KCC is unique, noteworthy and beneficial to the KCC. Comparative research work by courts is usually made to find a solution on pending cases, while the task of the CRI, however, is comparative research with a long-term and strategic perspective.[116] By being free from dealing with pending cases, the CRI

112) Articles 1 and 3 of Revised Statute of the World Conference on Constitutional Justice, as amended by the 2nd General Assembly, Vilinus, 12 September 2017 (28 September 2017).

113) As of 2009, these groups included Conference of European Constitutional Courts (informally from 1972 and officially founded in 1999), Ibero-American Conference on Constitutional Justice (founded in 1995), Association of Constitutional Courts using the French language (founded in 1997), Conference of Constitutional Control Organs of Countries of Young Democracy (founded in 1997), Union of Arab Constitutional Courts and Councils (founded in 1997), and Southern African Judges Commission (founded in 2003).

114) The participation of Asian courts was relatively few. Among 117 constitutional courts and supreme courts that participated in the 4th Congress in 2017, only 10 courts were Asian courts.

115) David S. Law, *Judicial Comparativism and Judicial Diplomacy*, University of Pennsylvania Law Review, Vol. 163, No.4, 927, 967-973 (2015).

116) Seokmn Lee and Fabian Duessel, *Researching Korean Constitutional Law and The Constitutional Court of Korea*, Journal of Korean Law, Vol.16, 265, 282 (2016).

can focus on fundamental study of wide-ranging constitutional issues including human rights.[117] Its research output is aimed at making a long-term impact upon the direction of future KCC's case law.

With a rich knowledge of foreign laws, the KCC has exhibited its proclivity for the promotion of regional judicial dialogue in the two respects. The first is the KCC's efforts to build up an institutional network of constitutional and supreme courts in Asia, and the second concerns how the KCC's judgments on human rights issues can function as a persuasive authority for other courts. Each of them will be successively examined hereafter.

B. Communication Outside Court Rooms

In East Asia, there is no regional court of human rights and no legal framework for institutionalized dialogue between courts of different nationality. As a result, its general situation surrounding judicial dialogue is quite different from Europe. Nevertheless, judicial dialogue is possible in the form of informal dialogue. As mentioned previously, even in Europe, institutionalized dialogue is complemented by informal contact among judges outside their courtrooms. The Asian problem in the past was that there had been few occasions for national judges to have direct communication each other.

In order for judges to discuss together, they need suitable opportunities to do so. These opportunities take a variety of forms from visits to other courts to participation in international conferences, symposiums and seminars on specific legal issues. The KCC has been very active in developing such transnational forums during the last decade in order to encourage dialogue for Asian courts, and has firmly established its status as the center of judicial dialogue in Asia.[118]

First of all, the Korean participation in the Venice Commission in the Council of Europe is important to establish an Asian presence at the international forum.[119] One constitutional justice of the KCC has always been an individual member of the Venice Commission. Since many of the other members also send their constitutional justice to the Commission, the KCC can share constitutional practice with other justices throughout the world and it can also influence them. Secondly, the KCC not only participates in international conferences, but also hosts major international conferences in Seoul.[120] While the organizational management of a large-scaled international conference is always a complex, time-consuming and painstaking job, which requires special know-how, Korean constitutional justices have the advantage of being assisted by a powerful administrative department, namely the International Affairs Division, which is

117) *Id.*; Yoon Jin Shin, *supra* note 52, at 258.

118) Takao Suami, *Azia ni okeru saibankan-taiwa – Kankoku Kenpo-Saibansho no Katsudo wo chushin ni [Judicial Dialogue in Asia – Focusing on the Activities of the Korean Constitutional Court],* Horitsu Jiho, Vol.90, No.12, 71-77 (2018).

119) Yoon Jin Shin, *supra* note 52, at 260; Although the Commission is part of the CE, its membership (62 Members, 1 Associate Member and 4 Observers) has expanded to the outside of Europe, and has partly covered North and South America, Africa and Asia.

120) The KCC hosted the Third World Conference on Constitutional Justice (WCCJ) in 2014 and the World Congress of the International Association of Constitutional Law (Yoon Jin Shin, *supra* note 52, at 260; David S. Law, *supra* note 115, at 976).

responsible for organizing international conferences as well as receiving foreign delegations to the KCC.[121] Thirdly, the KCC is eager to institutionalize bilateral cooperation with many constitutional courts. To this end, the KCC has already concluded memorandums of understanding on bilateral cooperation with constitutional courts of 13 states.[122]

Last but not least is that the KCC, in cooperation with the Venice Commission, succeeded in establishing the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) in 2010. The AACC is a regional network of constitutional courts covering 19 Asian member states (as of 2020) and is entrusted with the task of promoting trans-judicial communication in Asia by sharing experiences, exchanging information and discussing issues of common concern over constitutional practice and jurisprudence.[123] The objectives stipulated in the AACC's statute show its commitment to human rights, democracy, and the rule of law (Article 3), and reveals that the AACC complies with the idea of global constitutionalism.[124] The fact that the inaugural congress of the AACC was held in Seoul in 2012 clearly demonstrates the KCC's leading role in its foundation.[125] Besides a biennial Congress, the AACC now regularly organizes many meetings, symposiums, training programs and workshops,[126] and through organizing them and disseminating its member court decisions, the AACC provides valuable opportunities at different levels for its members' courts to have mutual dialogue. It is noteworthy that the AACC's members agreed to establish a Secretariat for Research and Development (SRD) in Seoul in 2016.[127] As the fact that the SRD is managed by the KCC indicates,[128] the KCC's leading role has continued after the establishment of the AACC.

In conclusion, the KCC's great contribution to the progress of judicial dialogue has to be highly appreciated from the viewpoint of global constitutionalism.

3. Bottom-up global constitutionalism by the Constitutional Court of Korea

A. Viewpoints of Examination on the KCC's Judgments

In addition to communication outside the courtrooms, the substance of the KCC's judgments is also

121) David S. Law, *supra* note 115, at 974.

122) They include Russia, Dominica, Guatemala, Bolivia, Georgia, Spain, Argentina, Tajikistan, Indonesia, Mongolia, Thailand, Turkey and Bulgaria.

123) Preamble and Articles 3 and 4 of the Statute of AACC.

124) For example, 'Nur-Sultan Declaration' adopted by the Fourth Congress in 2020 repeatedly emphasizes the member courts' commitment to constitutional values, namely the rule of law, human rights and democracy.

125) Yoon Jin Shin, *supra* note 52, at 260-261; Kookhee Lim, Constitutional Court of Korea and its Contribution to Asian Network of Constitutional Justice, Nagoya University Asian Law Bulletin, Vol.1, 48, 51-53 (2016); David S. Law, *supra* note 115, at 975.

126) Article 21 of the AACC's Statute; The Permanent Secretariat of Association of Asian Constitutional Courts and Equivalent Institutions for Planning and Coordination, 2019 Annual Report, 4-12 (April 2020).

127) After starting its operation in 2017, in order to promote mutual understanding among the AACC's member courts, the SRD has conducted annual book project focusing on relevant topics (e.g., constitutional review systems, the rights jurisprudence) and organized international symposiums and research conferences for the AACC members (AACC SRD, Research Concept Paper, Freedom of expression: Experience of AACC members, 2-6 (2020)).

128) The Permanent Secretariat, *supra* note 126, at 2.

important for judicial dialogue in two respects, namely (1) reference to foreign and international law including precedents and (2) how its judgments include universal content which is influential to other jurisdictions.

As regards the first respect, referring to foreign and international law means that a particular court has taken account of some other laws besides the legally applicable laws when deciding cases concerned. This is evidence showing the initiation of judicial dialogue. If a court actually takes non-applicable laws into consideration, explicit reference to them will make its judgment more transparent. The increase of transparency constitutes a requirement to further facilitate trans-judicial communication.

As regards the second respect, in order to accelerate judicial dialogue, any court has to give its decisions and reasons in universal language. If a court gives them only in its own dialect, other courts of a different nationality will have difficulty in understanding what it wants to say. Needless to say, a court always decides an issue to be solved in a local context, but it has to consider its judgment's impact upon other jurisdictions, namely whether or not its reasoning is universally acceptable. Only universal reasoning is useful for judicial dialogue.

In the next part, the substance of some of the KCC's judgment will be examined from these two respects.

B. Reference to Precedents of Other Courts

Reference to other courts' precedents is a typical form of judicial dialogue. When citing these precedents, one should make a distinction between foreign law and international human rights law (IHRL). This is because unlike foreign law, international human rights treaties signed and ratified by Korea constitute the source of Korean law.[129)]

As regards IHRL, departing from conventional theory, the KCC has positively accepted the higher status of IHRL in its domestic legal order. In other words, the KCC, distinguishing IHRL from the rest of international law, has made use of it as a standard for constitutional review on national law.[130)] In several cases, IHRL has actually played a valuable role for constitutional adjudications,[131)] and dissenting opinions more frequently cited IHRL including the opinions of UN treaties bodies.[132)] However, it is debatable whether or not IHRL has played a decisive role for reaching conclusions.[133)]

As regards foreign law, the KCC has adopted a different approach. To put it accurately, the KCC

129) Article 6, para. 1 of the Constitution of the Republic of Korea.

130) Yoon Jin Shin, *supra* note 52, at 246-255.

131) *Id.*, at 250-251.

132) For example, a dissenting opinion in a case on punishment of insult as a criminal offense referred to article 19 of the ICCPR and General Comment No.34 adopted by the Human Rights Committee under the ICCPR (2012Hun-Ba37, 27 June 2013). A concurring opinion in a case on the punishment of commercial sex acts also mentioned article 6 of the UN Convention on the Elimination of All Forms of Discrimination against Women and the opinion of the UN Committee on the Elimination of Discrimination against Women in 2011 (2013Hun-Ka2, 31 March 2016).

133) According to Yoomin Won, 'IHR instruments don't seem to have had a great influence over the outcome of revoking the Korean law' (Yoomin Won, *The role of international human rights law in South Korean constitutional court practice: An empirical study of decisions from 1988 to 2015*, International Journal of Constitutional Law, Vol.16, No.2, 596, 608-609 (2018)).

is not reluctant to cite foreign legislation,[134] although it seems rather rare that the KCC's judgments explicitly cite foreign precedents. However, this does not mean that the KCC is indifferent to foreign precedents. The reality is the contrary. With the assistance from support staff within the KCC and the CRI, the KCC conducts extensive comparative research for most cases.[135] No doubt this research covers foreign precedents as well as foreign legislation in a variety of states, but whether or not the result of research into foreign precedents is explicitly mentioned in the reasons for a judgment is a different question. It is understandable that the KCC is more careful with respect to citing foreign precedents than foreign legislation. This is because since foreign judgments were rendered in different situations from Korea, the KCC is forced to take account of such difference to fully understand them. This work is not easy in general. Therefore, the KCC tends to be conservative about citing foreign precedents in order to escape from criticism by reason of misunderstanding. According to the author's examination of the English translation of the KCC's judgments, however, it seems that the KCC has recently become more positive with respect to making reference to foreign precedents than before, as some of its judgements in the 2010s referred to foreign and international judgments as well as foreign legislations. For example, a judgment on restricting the right to vote of prisoners and those on probation with suspended sentence referred to not only foreign legislations, but also judgments or decisions of the Canadian Supreme Court, the Supreme Court of South Africa, the ECtHR, the Australian Supreme Court and the French Constitutional Council.[136] Interestingly, since 2008, the Supreme Court of Japan has turned around its attitude towards foreign law and precedents too, and became a bit more positive to making reference to international and foreign law.[137] In particular, a dissenting opinion of Justice Yamaura deserves attention. After explaining the similarity of a legal system between Korea and Japan, he explicitly cited the KCC's judgment of 1997 that declared the law in question unconstitutional, and mentioned the subsequent amendments of Korean law.[138] It is reasonably presumed from his citation that the KCC judgment was lively discussed in the deliberations among the SCJ's justices. It may take some time for both courts to start mutual dialogue, but if both refer

134) Yoon Jin Shin, *supra* note 52, at 258; For example, a judgment in a case on prohibition of using the name of a political party whose registration has been cancelled referred to legislation of the US, Germany and Japan (2012Hun-Ma431, 2012Hun-Ka19 (consolidated), 28 January 2014)). A judgment in a case on Constitutional Review of Article 312(1) of the Criminal Procedure Act also referred to Japanese, German and the US's criminal procedure laws (2003Hun-Ga7, 26 May 2005).

135) David S. Law, *supra* note 115, at 962.

136) 2012Hun-Ma409·510, 2013Hun-Ma167 (consolidated), 28 January 2014; A judgment on the crimes of abortion also cited a famous 'Roe v. Wade' judgment by the US Supreme Court (2017Hun-Ba127, 11 April 2019). In this judgment, both the majority and the concurring minority opinion referred to this US judgment. On the other hand, the minority dissenting opinion referred to a judgement by the German Constitutional Court. It is reasonably presumed from them that constitutional justices had a lot of discussion about foreign precedents in their deliberations.

137) The SCJ's judgment of 2008 referred to 'foreign laws' or 'laws of foreign countries', although it did not mention specific countries It also referred to the ICCPR and the Convention on the Rights of the Child (2006 (Gyo-Tsu)135, 4 June 2008)(Akiko Ejima, *Use of Foreign and Comparative Law by the Supreme Court of Japan*, in Judicial Cosmopolitanism, The Use of Foreign Law in Contemporary Constitutional Systems 800, 808-810 (Giuseppe Franco Ferrari ed., Brill Nijhoff, 2020)). In the 2010s, some of the SCJ's judgments on discrimination on gender, birth and sexual orientation cited foreign legislations, IHRL, and opinions of the UN human rights treaty bodies (2012(Ku)984, 4 September 2013; 2013(O)1079, 16 December 2015; 2018(Ku)269, 23 January 2019).

138) 2013(O)1079, 16 December 2015.

to the same precedent (e.g., the ECtHR's precedent), they will be considered to become involved in an indirect dialogue through common citations.

Explicit reference to foreign precedents is likely to inspire the interest of the referred court and to have the effect of encouraging mutual reference. The lack of a reference does not necessarily mean, however, that the KCC did not take account of foreign precedents. For the examination of judicial dialogue, the fact that a judgment explicitly referred to foreign precedents is not a decisive factor. This is because there is no guarantee that all foreign precedents having influence over a particular court were explicitly mentioned in its reasons. For example, the SCJ had not explicitly cited foreign precedents until 2008 except its early days, but, irrespective of no explicit reference, an empirical research clarifies that several of the SCJ judgments during that period were heavily influenced by foreign precedents.[139] As the KCC's reference to the world-wide trend indicates,[140] as far as human rights issues are concerned, it is almost impossible for any court to develop its case law without considering international and foreign precedents.

Since courts do not always cite relevant precedents, it is difficult to quantitatively analyze to what extent foreign precedents have impacted upon the development of the KCC's case law. Therefore, the author has to qualitatively complement his analysis by examining the substance of judgments from the viewpoint of the universality of their reasoning.

C. Human Rights and Local Tradition and Culture

For the purpose of qualitatively evaluating the KCC's judgments, the relationship between the universality of human rights and the locality of tradition, culture, religion and history is an appropriate subject to explore. Conflicts between these two may occur everywhere, but the degree of its seriousness seems to depend upon the specific region in the world. The idea of human rights was born in Europe. Accordingly, the gap between human rights and local elements is generally small in Europe, although this does not mean that serious conflict with respect to human rights never occurs. In contrast, individual-based human rights were an unfamiliar idea in the non-Western world including East Asia, although traditional ideas in every region overlap with human rights. For this reason, non-Western courts tend to confront an important but difficult issue concerning how local elements can reconcile with human rights. Therefore, this section will examine how the KCC has tackled this problem.

Korea is a country of Confucian tradition and culture. There were some cases in which the KCC was forced to determine the relation between tradition and constitutional principles, namely how the Korean Confucian tradition should be treated in the constitutional framework.[141] Among these cases, the KCC's judgment of 2011 for Prohibition of Filing a Complaint against Lineal Ascendants is noteworthy.[142] The issue of this case was the constitutionality of Article 224 of the Criminal

139) Akiko Ejima, *supra* note 137, at 802-808.

140) For example, a judgment in a case on Capital Punishment examined a world-wide trend on capital punishment (2008Hun-Ka23, 25 February 2010).

141) Yoon Jin Shin, *supra* note 52, at 263-267.

142) 2008Hun-Ba56, 24 February 2011.

Procedure Act which prohibited a criminal complaint (e.g., by a crime victim) from being lodged against a lineal ascendant of the principal himself/herself or his/her spouse. It is evident that this prohibition was based upon the Confucian tradition of the filial duty imposed on children to take care of their parents or grandparents. This tradition took deep root as morality in the Korean society and its start dates back to the Josun Dynasty. In this case, the unconstitutionality of this provision was claimed by reason of the violation of equality guaranteed by Article 11 of the Constitution. The existence of inequality seemed to be obvious. Accordingly, the issue was whether or not such inequality was constitutionally allowed or justified. According to the Constitution, in order to decide a piece of legislation as unconstitutional, more than six justices among nine justices have to agree to its unconstitutionality (Article 113).

Nine justices were divided into four and five. Four justices expressed their opposition to the unconstitutionality of the provision in question. Therefore, the KCC had to conclude that that provision did not violate the Constitution. The reasons of their opinions in this judgment were profoundly interesting. A minority of four justices, taking note of the fact that the application of the instant provision was quite limited by other legislations, reached a finding that the provision did not appear to severely restrict the victim's right to be heard, and it adopted the principle of arbitrariness as a review standard. Then when examining the reasonableness of this provision, they emphasized the role of traditional morality and ethics, and the sharing of a common ground by law and morality. They finally declared that:

'[a]t the bottom of our legal mindset, individualism affected by modern western ideals and Confusian tradition centered on community and blood relationship coexist'.

This is an important passage for global constitutionalism. And furthermore, after recognizing that 'parts of the Confusian tradition, (…..), still remain as an innate part of our morality, despite adoption of modern Western ideals', they concluded that the prohibition against a complaint filed by descendants 'appears to be reasonable in its differential treatment'.

On the other hand, the other five justices presented their opinion of unconstitutionality. Having recognized the seriousness of the infringement of fundamental rights caused by this provision, they applied not only the test of reasonableness, but also the principle of proportionality, and then they reached a different conclusion from the previous minority opinion by reason of the lack of a reasonable balance. It is interesting to see that the majority opinion also accepted the legitimacy of the purpose of this provision. On the basis of this acceptance, they examined the balance between the protection of culture or morality on the one hand, and the protection of equality on the other hand. In other words, the point of divergence among nine justices was not the purpose of that provision, but the balance between local tradition and human rights. Therefore, it seems that the KCC's case law provides an institutional venue in which Confucian tradition and liberal rights can be balanced.[143)]

143) Sungmoon Kim, *Civil Confucianism in South Korea, Liberal Rights, Confucian Reasoning, and Gender Equality,* in Confucianism, Law, and Democracy in Contemporary Korea, 105, 106 (Sungmoon Kim ed., Roman & Littlefield, 2015).

D. Suggestion from the KCC's Judgment for Global Constitutionalism

This judgment of 2011 includes several insightful suggestions to develop the meaningful relation between tradition and constitutional principles.

First of all, it should be noted that the minority opinion presented an overall paradigm which ensured the coexistence of both Korean tradition and Western imported idea. Unless long-lasting tradition can be eliminated within a short period of time, it is not in fact feasible that one side of the two, namely human rights, is absolutely superior to the other side, namely local tradition. However, as some elements of Confucianism are hard to reconcile with 'the modern principles of personal freedom and equality before the law',[144] they have the risk of undermining the core of freedom and equality. This indicates that not a few societies have to confront a dilemma between universalism in human rights and relativism in culture and tradition,[145] and on occasions, such a dilemma causes an unbridgeable confrontation. How should this dilemma be solved? The precedence of constitutional principles must be endorsed, as the KCC's judgment of 2005 for the House Head System suggests.[146] However, as long as a one-size-fits-all style solution is not applicable to this problem, these two elements must live in harmony in all societies. From this perspective, the minority opinion emphasizing the coexistence should be evaluated as setting up a starting point for further discussion.

Secondly, even if we assume the coexistence of the two, there are several options about how to design a framework containing them. The KCC's precedents, including the judgment of 2011, exhibit two options to all other jurisdictions. According to the judgment of 2011, the KCC applies two types of test, depending upon the degree of violation, to ascertain violation of equality. Namely, (1) the KCC generally applies the principle against arbitrariness for the purpose of ascertaining the violation of equality. This test only examines the existence of any reasonable ground that would legitimize discrimination. (2) In cases where discriminative treatment places a significant burden on the related fundamental rights, the KCC applies, besides the principle against arbitrariness, the principle of proportionality. This two-steps test is stricter than the former one-step test.

The first option is presented by the minority opinion in the 2011 judgment. It gives almost the same weight to both Confucian tradition and equality before the law. As a result, the justification of discrimination depends upon whether or not the discrimination is based upon reasonable grounds. This test is not so hard to pass. This is proved by the four justices' conclusion of constitutionality. The second option is presented by the majority opinion in the same judgment. Since this option gives more weight to equality than tradition, it is harder to justify discrimination than with the first option. The criteria for this test are both the reasonableness and the proportionality. The second option seems to be globally predominant. The ECtHR's judgment of 2000 adopted a similar test on

144) Sungmoon Kim, *Introduction,* in Confucianism, Law, and Democracy in Contemporary Korea, *supra* note 143, at 1, 11-12.

145) Hee-Kang Kim, *Locating Feminism beyond Gender and Culture, A Case of the Family-Head System in South Korea,* in Confucianism, Law, and Democracy in Contemporary Korea, *supra* note 143, at 81, 83.

146) The judgment stated that 'if a certain family system, coming from the past, is contrary to the individual dignity and sexual equality required by Article 36(1) of the Constitution, it cannot be justified on the basis of Article 9'(2001Hun-Ga9, 10, 11, 12, 13,14, 15 and 2004Hun-Ga5 (consolidated), 3 February 2005).

Article 14 (prohibition of discrimination) of the ECHR for discrimination against an adulterine child under French law as regards inheritance rights. In order to reach a conclusion, the Court first examined the legitimate aim of differential treatment, and then the proportionality between the means employed and the aim sough to be realized.[147] This ruling is consistent with the five justices' opinion in the 2011 judgement. Finally, the SCJ's judgment of 1973 on an aggravating penalty for killing an ascendant also adopted a two- steps test of the reasonableness and the proportionality.[148]

Thirdly, the relation between tradition and human rights is always a difficult and complex issue to solve. Not only the KCC but also many international and national courts have wrestled with this question. Both opinions in the 2011 judgment are predicated upon the binary opposition between Confucian tradition and gender equality. This binary structuring of the issue is understandable as the starting point of examination by non-Western courts. However, these two matters should not be understood as permanently fixed and unchanging. First of all, while all traditions and cultures including the Confucian one are the product of a long-lasting historical process, no tradition and culture is unchanging, and they can be modified so as to come to terms with liberal constitutional principles.[149] The same explanation is applicable to constitutional principles including human rights. The essentials of constitutional principles were established in the West. After that, they have been normatively received by the whole world. Under such a development, the formation of a theory for cross-cultural constitutionalism has now become an issue in urgent need of examination.[150] To this end, the idea of human rights must become compatible with respect for cultural diversity, though such diversity cannot be used as an excuse for authoritative rule.[151] In Japan, there are several arguments about how to meet this condition, namely (1) the preponderance of Western liberal values based upon the individual,[152] (2) the modification and/or supplementation of a human rights idea from a trans-civilizational perspective,[153] and (3) a human rights perspective which is based upon inclusive globalism which can embrace plural paradigms.[154] Likewise, in Korea, an argument of Confucian constitutionalism seeks to develop a normative framework which is neither traditionally Confucian nor purely liberal.[155] This article is not the place to discuss these arguments in depth, but it is noteworthy that all of them expect that the current conception of human rights will be further evolved and deepened. Even argument (1), being the closest to the

147) Case of Mazurek v. France, Application no. 34406/97, 1 February 2000, paras.48-55.

148) The SCJ's approach looks like this balancing approach by the five justices' opinion (1970(A)1310, 4 April 1973).

149) Sungmoon Kim, *supra* note 143, at 120.

150) Hajime Yamamoto, Bunka, Jinken, Rikkensyugi – Gurobaru-ka jidai ni okeru rittukensyugi-koso no tameni [Culture, Human Rights and Constitutionalism – For the idea of Constitutionalism in the Age of Globalization, in Kato Syuichi wo 21-seiki ni hikitsugu tameni [For the Succession in the 21st Century of Syuichi Kato] 155-176 (Nobutaka Miura and Tsutomu Washizu eds., Suisei-sha, 2020).

151) *Id.*, 155-157.

152) Syuichi Kato, *supra* note 70, at 91-94; Syuichi Kato and Yoichi Higuchi, Jidai wo Yomu, 'Minzoku', 'Jinken' saiko [Reading the Times, Reconsidering 'Ethnos' and 'Human Rights'] 22-23, 95, 143-145, 182-185 and 206 (Iwanami, 2014).

153) Yasuaki Onuma, A Transcivilizational Perspective on International Law 440-462 (Martinus Nijhoff, 2010).

154) Hajime Yamamoto, *supra* note 150, at 170.

155) Sungmoon Kim, *supra* note 143, at 106.

original Western idea, presupposes that the universality of human rights born of the West has to become more complete, inclusive and globalized.[156] This means that constitutional principles are also not unchanging. In reality, both local tradition and human rights are gradually changing within the dialectic process of mutual influence.[157] It should be kept in mind that local tradition will also be affected by the establishment of a Constitution embodying constitutional principles.

How should national courts join the process of trans-judicial communication, which evolves and deepens the notion and understanding of human rights? This question concerns what model of behavior judicial dialogue requires. In order to find an answer, the view of Miguel Poiares Maduro is suggestive.[158] First, for the purpose of responding to dialogue, national courts should be sensitive to foreign or international precedents, because courts may not only receive their influence but also have an impact upon them unless they are totally isolated from the rest of the world. Secondly, as a matter of course, national courts cannot be bound by foreign legal orders, but they have to understand that if their decisions are consistent with each other, they will acquire more persuasive power. To put it differently, the attainment of a consensus on human rights between national courts will contribute much to the enhancement of IHRL. Thirdly, it is likely that in many cases, national courts will not reach the same conclusion on human rights issues. If this is the case, they will be required to explain their reasoning in order to justify their conclusions. To persuade other courts, they need to hold both local and global perspectives. This is because their justification from a local perspective may not be enough to persuade other courts outside their jurisdictions. Fourthly, in any case, their reasons for judgments must be transparent as much as possible. Namely, the reasons must explain how judges reached a particular conclusion as well as what elements they considered. If deliberation among judges extends to foreign legal sources, the reasoning should explicitly mention them as much as possible.

To conclude, if national courts satisfy these conditions, their behavior will be very much consistent with the idea of global constitutionalism. From this point of view, it seems probable that there is still room to discuss the improvement of the KCC judgments, in particular its reasons.

VI. Conclusion

Poiares Maduro also points out that '[T]o a certain extent, looking at the jurisprudence of another court promotes some form of informal coherence between those legal orders where they judicially interact'.[159] The process of globalization has accelerated mutual communication on every aspect of people's lives between different places in the world. The growth of horizontal communication between constitutional systems is part of the overall change. Although the use of foreign legal sources by constitutional justices often causes some negative response,[160] it seems unlikely that

156) Syuichi Kato and Yoichi Higuchi, *supra* note 152, at 206-210; Hajime Yamamoto, *supra* note 150, at 172.
157) Sungmoon Kim, *supra* note 143, at 120.
158) Miguel Poiares Maduro, *supra* note 108, at 373.
159) *Id.*, at 377.

they will close their eyes to what is going on outside. By reason of the lack of democratic legitimacy, foreign legal sources always remain as persuasive authority. As far as human rights are concerned, however, the lack of democratic legitimacy is not decisive for the use of foreign legal sources. This is because as the essential tension between human rights and national democracy indicates, the legitimacy of human rights does not completely rely upon democratic decision-making processes. Constitutionalism itself is based upon an idea that even the outcome of democratic decision-making processes cannot undermine the space of individuals guaranteed by fundamental freedoms.

It is difficult to exactly measure the degree of influence of judicial dialogue, though it is too extreme to say that judicial dialogue has not had any impact upon courts. On the one hand, it is argued in respect of IHRL that its role as persuasive authority in the KCC's decisions is limited in the sense that it was not a conclusive reason.[161] The same evaluation can be applied to foreign legal sources too. On the other hand, even in a case where no reference to foreign sources is made, the existence of the hidden influences of the US case law on the SCJ's judgments was recognized.[162] It is likely that the same happened in the KCC.

To conclude, any courts are likely to be more or less affected by foreign or international legal sources during the process of judicial dialogue. However, it should be kept in mind that the degree of success in judicial dialogue depends upon the mindset of national courts joining the dialogue. In order to make judicial dialogue successful, they have to leave their previous inward-looking mindset, and to have a mindset more open to the outside. Namely, they not only draw out valuable suggestions from foreign or international sources for their constitutions, but also have to actively contribute to the construction of constitutional order beyond their jurisdictions. For example, when the relationship between local tradition and human rights is an issue, national courts should bring such tradition into the process of developing internationally recognized human rights, as long as they believe that such tradition has to be justified. In order to do so, they have to (1) carefully examine grounds and reasons supporting national constitutional practice, (2) extract universal elements from them, and (3) incorporate such universal elements into the idea or standards of human rights, once they have discovered those elements. In order to do so, national courts must be critical of both local practice and foreign or international practice. In other words, they need to adopt the position of an impartial observer, although they cannot be totally exempt from any local bias.

In the author's view, the KCC has already succeeded in attaining a global mindset. At the 3rd Congress of the World Congress on Constitutional Justice in 2014, the KCC president called for discussion to establish an Asian Human Rights Court.[163] This call is clear-cut evidence of such a mindset. It is true that not all courts are positive with respect to judicial dialogue. What elements

160) Gábor Halmai, *supra* note 4, at 184.

161) Yoomin Won, *supra* note133, at 607-608, 610 and 624.

162) Akiko Ejima, *A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents*, in The Use of Foreign Precedents by Constitutional Judges, *supra* note 94, at 290-297.

163) 3rd Congress of WCCJ, Seoul Communiqué (30 September 2014).

make a distinction of attitude towards dialogue? A number of legal, political and historical factors may affect the attitude of each court towards judicial dialogue, but it is probable that the cognizance of necessity is a turning point for a court to become positive to dialogue. If a court does not feel the necessity for dialogue, it will not be able to have a motive to join dialogue. In order to be involved in judicial dialogue, therefore, courts need an environment which preserves their motives for judicial dialogue. As regards human rights, the situation in which international society maintains interest in national human rights conditions constitutes part of such an environment. This is because if any national court tries to argue back against criticism from international society, it will be forced to submit its own counterargument in its reason for a judgment.

II

Constitutional Adjudication and Democracy

- The Constitutional Court of Korea as Interpreter of the Tenuous Notion of Democracy
- Supervising Elections In South Korea: Examining the Performance of Election Commissions as Institutions Protecting Constitutional Democracy
- South Korea's Multilayered "Basic Order": Uses and Meanings in Constitutional Rulings from 1989 to 2019

The Constitutional Court of Korea as Interpreter of the Tenuous Notion of Democracy

FRANCOIS VENTER*

Abstract

Democracy is a fragile constitutional notion, not only because it has no fixed meaning, but also because it presents itself in so many variants, mostly to justify the legitimacy of a particular constitutional order. The versions of democracy propounded in the constitutions of the ROK and the DPRK represent opposite conceptual poles. The Constitutional Court of Korea is a fervent advocate for classic liberal democracy, rooted in the vocabulary of the Constitution of 1987. When compared to other "new democracies", the Court's jurisprudence on democracy reflects the justices' consistent predilection for liberal constitutionalism in the image of North Atlantic constitutional orders. Liberalism is a worldview which serves as the foundation of a "civil religion" based on individual autonomy. This contribution raises, but does not venture to answer the question to what extent the liberal democratic worldview propounded by the Court is a true reflection of the life views of the citizenry of the ROK.

* Constitutional Law Professor, North-West University.

I. Introduction

In the 21st Century no state, government, political party or leader wishes to be accused of being undemocratic, because such a charge would imply a nasty attitude of autocracy, self-serving corruption and disregard for the interests of the people.

What it actually means to be democratic and how authorities can be held responsible to maintain democracy is however not at all clear. Obviously "democratic" and "democracy" do not mean the same in the *Democratic* People's Republic of Korea (hereinafter DPRK), *democracy* in the United Nation's aspirational 2030 Agenda for Sustainable Development,[1] or in the name of President Moon Jae-In's ruling *Democratic* Party.

As a universal constitutional and political good, democracy is irreplaceable, but what it entails is far from settled.[2] Various considerations involving the nature, quality and practices associated with democracy can be found, including conceptions of legitimate representation;[3] inherent paradoxes;[4] the growing impact of technology on society;[5] divergent electoral systems and electoral cultures;[6] and alternative means available for the expression of political attitudes acknowledged to be democratic.[7]

In the following section the difficulty of the lack of definition of democracy is discussed further to provide some background for a brief historical and textual exposition in section 3 of democracy in the Constitution of the Republic of Korea (hereinafter "ROK"). In section 4 the manner in which the Constitutional Court of Korea's (hereinafter "the Court") has recently dealt with democracy is described with reference to selected judgments. Section 5 presents a condensed review of the

---

1) UN General Assembly resolution A/RES/70/1 adopted on 25 September 2015. Paragraph 9 of its Declaration envisages a world '. . . in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development . . .'

2) Otfried Höffe, Democracy in an Age of Globalisation 69–78 (2007), e.g. distinguishes nine 'elements of conceptions of democracy', and refers to 'the now endless debate on the topic of democracy'.

3) See e.g. Martin Rosema, Bas Denters & Kees Aarts (eds), How Democracy Works: Political Representation and Policy Congruence in Modern Societies (2011). In raw numbers the estimated size of the world's population increased by a factor of at least 7 since 1800. The numerical size of the electorates has consequently exploded. Taking the USA as an example: the total American population when the first general elections were held in the late 1780's was less than 4 million, and by 2019 it was around 329 million. More than 155 million individual votes were cast in the 2020 presidential election. There may therefore now be around 80 times more American voters than at the time of the adoption of their constitution.

4) In Martin Loughlin & Neil Walker (eds), The Paradox of Constitutionalism – Constituent Power and Constitutional Form 1 (2007), the editors wrote:

> Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the 'consent of the people' and that, to be sustained and effective, such power must be divided, constrained, and exercised through distinctive institutional forms.

5) Braden R. Allenby, Information Technology and the Fall of the American Republic, 59,4 Jurimetrics 409, 412 (2019) e.g. suggests that –

> [T]he ideas, assumptions, and institutions behind today's democratic structures and practices may already be obsolete, if not simply failing. Indeed, many have already failed. If there is a way forward, it necessarily requires inventing new narratives, norms, and institutions, not hoping for old ones to return or stabilize.

See also Luís Roberto Barroso, Technological revolution, democratic recession, and climate change: The limits of law in a changing world, 18,2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 334 (2020).

6) See e.g. Andranik Tangian, Analytical Theory of Democracy History, Mathematics and Applications (2020).

7) See e.g. Henk Botha, Fundamental rights and democratic contestation: reflections on freedom of assembly in an unequal society, 21 LAW DEMOCRACY AND DEVELOPMENT 221 (2017).

manner in which democracy has been dealt with judicially in South Africa, Japan and Hungary as new democracies to provide a basis for some comparative remarks concerning the Court's approach to democracy. The expression "new democracies" is used here to refer to constitutional orders established since the end of World War II using constitutional language drawn from an idealized conception of "democracy" where it did not exist before. The concluding section poses the question (without endeavoring to propose an answer) whether the Court's aspirationally defined perspective on classic liberal democracy accurately reflects the values and culture of the South Korean people.

II. Democracy (un)defined

It is clear that what "democracy" actually means in the world of constitutional law, is uncertain. How it is dealt with in the region around Korea varies greatly, and mostly stands in stark contrast with the Court's understanding of this fundamental constitutional element. How "democracy" is understood and judicially applied in the rest of the world, is also, not even within the Western liberal, nor in the social-democratic, or post-colonial African contexts, consistent. Therefore, when a court, a constitutional or scholarly text refers to "democracy", it cannot be assumed that the intended meaning is self-evident.

Many contemporary constitutions refer to democracy without defining the word. To determine the assumed meaning, a study of the history and the legal and political context of the jurisdiction concerned is required. The Canadian Charter of Rights and Freedoms, 1982 for instance, provides that it " . . . guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This phrase has been replicated in various African constitutions, including those of Botswana, South Africa, Kenya and Zimbabwe, but its application in those jurisdictions can hardly be expected to be identical to that of its North American source. In terms of Article 1 of the Constitution of the People's Republic of China, 1982 "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants." In the preamble to The Constitution of the Islamic Republic of Pakistan, 1973, it is stated that Pakistan strives "to establish an order … [w]herein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed", and the Moroccan Constitution, 2011 proclaims that "Morocco is a constitutional, democratic, parliamentary and social Monarchy."

The ancient Athenians laid the foundations of the universal democratic idea, although it has proven impossible to replicate the Hellenes' direct democracy in larger and more advanced societies.[8] Jean-Jacques Rousseau famously wrote "A population of gods could have a democratic

8) For an analysis of the merits and shortcomings of Hellenic democracy, see TR Glover, Democracy in the Ancient World Chapter IV, 96 (1927), ending with the following remark:
Democracy is the form of government that asks the most of every citizen; the Greeks taught us that lesson in all their triumphs, and the same lesson is to read again, it is confirmed, in their failure to achieve and to maintain the ideals they saw.

government. A government as perfect as that is not for men."[9] Most influential in the development of modern notions of electoral democracy, is the history of the English Parliament between the late 13th and 19th Centuries.[10]

The theory and vocabulary of democracy are essentially products of Western European philosophers, among whom John Locke, Thomas Hobbes, and Montesquieu, and of its revolutionary implementation following the formation of the United States of America as promoted by the likes of Thomas Madison and extolled by Alexis de Tocqueville.[11] The current conception of democracy is therefore founded upon Western Liberalism, as it developed especially in the 19th Century in the states around the Northern Atlantic Ocean, and promoted globally by those states, especially in the second half of the 20th Century. Most commonly, democracy is presented as the foundation for the justification of the exercise of the coercive authority of the state on the assumption that the persons and institutions exercising the authority are mandated to do so by those subject to the authority, routinely referred to as "the sovereign people",[12] and often expressed in constitutional preambles designed to communicate the idea that the constitution is an elevated expression of the general popular will in the words "We, the people … "

Floral constitutional language can however not hide the reality that constitutions are not drafted by the citizenry, and that they are adopted at best by bodies purporting to represent the people and confirmed by referendum or plebiscite in which the voters can only indicate their unspecific support or otherwise for a complex and technically detailed text. It also does not require elaboration on the realities of politics, administration and governance to see that the influence of individual voters on the exercise of state authority is in practice insignificant.

A growing problem is therefore whether democratic mechanisms available to the "sovereign people" are effective.[13] Due to the triumph of liberalism and democracy in 19th Century Europe over monarchy, autocracy and feudalism, modern governmental authority is seldom inherited.[14] Therefore democratic political leadership is not thrust upon anyone, but has to be actively sought. The question why politicians seek the power to attain governmental authority may produce a variety of answers, but it stands to reason that altruism would rarely be the strongest motivation. It is also logical that the higher the potential for acquiring power, prestige and the achievement of control over the behavior of others, the stronger the motivation will be to attain political office.[15]

---

9) Concluding words in JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, (transl. Jonathan Bennett 2017) Book 3, chapter 4.

10) For a compact overview of that history, see FRANCOIS VENTER, CONSTITUTIONAL COMPARISON – JAPAN, GERMANY, CANADA & SOUTH AFRICA AS CONSTITUTIONAL STATES 196-200 (2000).

11) See e.g. Patrick Dunleavy & Brendan O'Leary, Theories of the State – The Politics of liberal Democracy 13-17 (1987).

12) See e.g. Höffe, *supra* note 2, at 21-33, and Giuseppe Duso, Die moderne politische Repräsentation: Entstehung und Krise des Begriffs (translated from the Italian original by Peter Paschke), 113-123 (2005).

13) Barroso, *supra* note 5, at 349 attributes the political causes of the rise of conservative populism to "… the crisis of representation of contemporary democracies, where the electoral process fails to give voice and relevance to citizenship. … This is partly because the political establishment has become increasingly detached from civil society, out of reach for normal citizens, and partly because of the feeling that globalized economic-financial power is truly calling the shots."

14) It persists mostly only in some modern-day dictatorships such as the DPRK.

15) See e.g. Rufus P. Browning and Herbert Jacob, Power Motivation and the Political Personality, 28,1 The Public

Recent scholarly literature on democracy raises mounting concerns about the observed direction of developments relating to democracy, mostly amounting to decay, expressed in monikers such as "an illiberal turn", "anti-constitutional populist backsliding", "decline of liberal constitutionalism", "de-democratization", "rule-of-law backsliding", "decomposition of constitutional norms", "erosion of democracy and constitutionalism", "regression of democracy", and "democratic deconsolidation".[16] András Jakab includes the following in a list of some of the causes behind this trend:

> The decline of constant and fervent support for democracy and the rule of law as a key factor in "the stability of liberal democracies". Reasons for this include poor economic growth, a rift occurring between the value systems of globalized elites and the rest of the population, and the passing on of the post-war generation that "valued the benefits of liberal democracy".
> Technological and scientific developments such as new technologies for political mobilization and communication technology which have changed political engagement and reading habits.
> The occurrence of terrorist attacks, bringing about responses that contribute to the justification of incursion on fundamental rights and the suspension of some democratic processes.[17]

How the democratic decline might be curbed in specific cases would, according to Jakab, depend on the existence of "a democratic, rule-of-law-oriented political morality" of the political community concerned.[18]
The substance of the "political morality" prevalent in a particular state can however not be described adequately by using imprecise terms such as "democracy" and "rule of law". In the end it will be determined by the prevailing understanding of the source of the authority exercised by the various organs of the state. Here "prevailing" can be understood to signify that which is effectively in use, which may, especially in new democracies, not necessarily coincide with the worldview held by most of the populace.

Various generalized explanations for the existence of authority can be found. The following categories are among them:

> A *sociological* explanation: humanity cannot function without leadership, and leadership depends on authority;[19]

Opinion Quarterly 75 (1964).

16) See the thorough survey by András Jakab, What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law, 6,1 Constitutional Studies 5, 6 (2020).

17) Jakab, *supra* note 16, at 9-12.

18) Jakab, *supra* note 16, at 23.

19) Max Weber famously distinguished the legitimation of three types of authority (traditional, charismatic and legal-rational) – see e.g. Paul M. Harrison, Weber's Categories of Authority and Voluntary Associations, 25,2 American Sociological Review 232-237 (1960) and Ronald M. Glassman, The Origins of Democracy in Tribes,

A *rationalistic* explanation: Immanuel Kant's categorical imperative, which is based on the principle that one should act only in such a way that one can also will that one's maxim should become a universal law, is a prominent example of this category;[20]
An *ontological* explanation, for instance that the source of power is of divine origin.[21]

The acceptance of these explanations depends on subjective worldviews, rendering them unconvincing to those having different understandings of the world, ironically leaving the world of constitutional law with terminology which is typically vague and imprecise, if not ontologically hegemonic.

All these conceptual variations lead to the conclusion that, without further investigation, no sound assumption can be made regarding the intended meaning of the concept "democracy" in a specific constitutional text, statute, scholarly work or the jurisprudence of a court. Unfortunately, the authors of such materials seldom assist their readers by providing the necessary context or definition.

III. The Constitution of the ROK

1. Historical Background

Indigenous Korean legal history has an historical depth with few equals in the world, going back to the third millennium BC, and reaching a phase of modernization by the end of the 19th Century, with the proclamation by King Gojong in 1894 of the 14 Articles of Legal norms. In 1910 Japan occupied the country and imposed its legal system upon Korea until the end of World War II in 1945. Two states were then created on the Korean Peninsula, the DPRK, ruled by the Soviet Union, and the ROK in the South, under the military rule of the United States. American rule ended in 1948, when the ROK was formally established with the adoption of a constitution. The 1948 Constitution has been amended nine times, with the latest revision of 1987 being the product of a movement towards democratization.[22]

Korean legal thinking had already been influenced by German ideas in the late 19th Century and was further mediated by the imposition of Japanese law (having also, and in the same period, adopted elements of German thinking) during the colonial period (1910-1945). These influences were further pursued after the end of the colonial period. American constitutionalism was not unknown in Korea before its liberation from Japan,[23] and understandably, the American influence

City-States and Nation-States Volume I ix-x (2017).

20) According to Stanley Rosen (ed), The Philosopher's Handbook 23 (2000), Kant chose to dislodge the "general will" from its political content and replaced it with the categorical imperative in order to "liberate ethics from its traditional subordination to the dictates of political prudence".

21) This is a view typically held by Christians and Muslims, with variations in the consistency with which this belief is held within those religious traditions.

22) See e.g. Kipyo Kim, *Overview*, *in* Introduction to Korean Law 1-6 (Korea Legislation Research Institute ed., 2013).

was intense after 1945. Many Korean lawyers were educated in the United States, especially after the war.

It is for present purposes sufficient to sketch the evolution of the Korean perception of democracy with reference to a few milestones, beginning with the Joseon Dynasty's reforms in the closing years of the 19th Century, which were intended to introduce a measure of democracy within an absolute monarchy.[24] Following US military rule between 1945 and 1948, general elections were held in 1948 to compose a National Assembly, which then adopted the *Constitution of the Democratic Republic of Korea* in the same year. The preamble began with the words "We, the people of Korea", and stated that they were "at this time engaged in reconstructing a democratic, independent country".

Due to the outbreak of the Korean war in 1950 and the declaration of martial law, governmental power came to be concentrated in the totalitarian presidency of Syngman Rhee,[25] which endured until 1960. The Second Republic was established in 1960 with a parliamentary cabinet system and a strengthened electoral system,[26] which did however not last long. The Third Republic was brought about in 1962 by a military coup, the dissolution of parliament and the introduction of a further period of authoritarianism, leading to constitutional amendment to establish the Fourth Republic in 1969. The leader of the military junta (Park Chung-hee) was assassinated in 1979.

The Fourth Republic was hardly less autocratic than the Third, but the Fifth Republic was established by amending the constitution in 1980, which, despite functioning under martial law with overwhelming power concentrated in the presidency, prepared the ground for democratization. In 1987 the popular desire for democratic change, expressed especially by means of widespread public demonstrations, led to the introduction of fundamental constitutional revisions. In 1987 the constitutional amendments were approved by referendum with a support of 93% of the popular vote, and the Constitution was promulgated in the same year.[27] The 1948 Constitution as amended until 1987 (now often referred to as "the 1987 Constitution") has continued in operation for 33 years.

2. Democracy in the Constitution

The constituted Korean position on democracy should, and does, form the basis for constitutional litigation and adjudication. The Preamble to the Constitution recalls the political history of Korea, beginning with the mention of its history and traditions from time immemorial and "upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our

23) See e.g. Kyong Whan Ahn, The Influence of American Constitutionalism on South Korea, 22,1 Southern Illinois University Law Journal 71 (1997).

24) The Constitutional Court, Thirty Years of the Constitutional Court of Korea, 67 (2018).

25) Gregg A. Brazinsky, Nation Building in South KOREA: Koreans, Americans, and the Making of a Democracy 4-17, 40 (2009); Thirty Years, *supra* note 24, at 68-69.

26) Thirty Years, *supra* note 24, at 74-75.

27) Thirty Years, *supra* note 24, at 87-88, and 93-94.

homeland". The preamble furthermore confesses to classical liberal ideals, including equal opportunity for all "by further strengthening the basic free and democratic order conducive to private initiative and public harmony". The understanding of a "democratic order" is thereby outlined as involving equality, freedom, private initiative and public harmony.

In an interesting footnote, Chaimark Hahm points out that the phrase "free and democratic order" is a translation of *chayu minjujōk kibonjilsō*, and that the phrase was intended to give expression to the German constitutional notion of *freiheitliche demokratische Grundordnung*.[28] This notion has been employed in German constitutional jurisprudence to ban extremist political organizations in the name of *streitbare Demokratie*, which might be translated as "combative democracy".[29]

In Article 1 the state is described as "a democratic republic", whose sovereignty and authority resides and emanates from "the people".[30]

For obvious reasons the division of Korea has since 1945 been a primary political and constitutional concern in the region. The ideal of national constitutional unification is severely obstructed by the radical differences in constitutional and ideological dispensations. Article 4 of the Constitution must be understood against this background: "The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy."[31]

In a significant irony, the North Koreans chose to use the word 'democratic' in the designation of their state, and that Article 1 of their constitution claims that the DPRK "is an independent socialist State representing the interests of all the Korean people", and that its Article 5 proclaims "the principle of democratic centralism" to be the foundation on which its organs are functioning, further enhanced in Article 12 by the mention of "the dictatorship of the people's democracy".

How the divergent Northern and Southern Korean conceptions of democracy are to be reconciled in the quest for unification is a question incapable of resolution by means of mere constitutional interpretation. Article 92 of the Constitution of the ROK allows for the establishment of an Advisory Council on Democratic and Peaceful Unification "to advise the President on the formulation of peaceful unification policy".

---

28) Chaihark Hahm, Law, Culture, and the Politics of Confucianism, 16,2 Columbia Journal of Asian Law 253, 269-270 (2002), footnote 60. Hahm also remarked (*Id.*), that, because the Korean word "chayu" is used to translate both "freedom" and "liberty" –

> Many Korean scholars . . . make the unwitting mistake of concluding that with the enshrinement of "free and democratic basic order" as a constitutional principle, Korea is also striving to be a "liberal democracy" as that term is used in American or European political and legal discourse. Moreover, according one commentator, this confusion has served to legitimate the repressive practices of military regimes in Korea.

29) See e.g. Benjamin Low, The Centre Cannot Hold: Reflections on Militant Democracy in Germany, 21 Trinity College Law Review 136-158 (2018).

30) Chaihark Hahm & Sung Ho Kim, To make "We the People": Constitutional founding in postwar Japan and South Korea, 8(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 800, 824 (2010) argued that the constitutional identity of the "constituent people" of the ROK (and of Japan) was forged "in reaction to the international vicissitudes of the dawning Cold War".

31) In the case on the dissolution of the Unified Progressive Party (**2013Hun-Da1**) at 3.A. the Court starkly stated:

> The state of ideological confrontation on the Korean Peninsula appears out of sync with the new historical trends in the 21st century. Nevertheless, the division, the ideological confrontation, and the threat to the regime caused thereby are stark realities facing us living on the Korean Peninsula today. South Korea and North Korea have failed to escape the Cold War framework.

Article 8 of the Constitution of the ROK requires political parties to be "democratic in their objectives, organization and activities" and demands the parties to "have the necessary organizational arrangements for the people to participate in the formation of the political will". If a party's purposes or activities are "contrary to the fundamental democratic order", the Government may apply to the Constitutional Court to have the party dissolved.[32] The most substantive indication of the meaning of democracy in the Constitution in these provisions is the requirement that political parties are required to facilitate popular participation to give expression to "the political will". How the facilitation should take place and what the role of the majority and minorities is or should be, are considerations not elaborate upon in the Constitution. Likewise, the precise nature of "the fundamental democratic order" is left open to interpretation.

In Article 32 a duty to work is imposed on every citizen, the extent and conditions of which are to be prescribed by legislation "in conformity with democratic principles". In 2007 a "wholly amended" *Labor Standards Act* was adopted, and it has since been amended twelve times.[33] The purpose of the prescribed standards for conditions of employment concern living standards and the national economy "in conformity with the Constitution".[34] The word "democracy" does not appear in the text of this Act, nor the phrase "duty to work", but Article 10 provides that "[a]n employer shall not reject a request from a worker to grant time necessary to exercise the franchise or other civil rights, or to perform official duties, during work hours."

The democratization of the economy "through harmony among the economic agents" is the purpose of Article 119 of the Constitution, which empowers the state to regulate and coordinate economic affairs. Four further purposes are provided for: to maintain the balanced growth and stability of the national economy; to ensure proper distribution of income; to prevent the domination of the market, and to prevent the abuse of economic power. The Constitutional Court described the historic aims of this provision as follows:

> This is a constitutional proclamation aiming to realize economic democratization by emerging from past vestiges of chaebol-centered economic policies and government collusion with businesses, while still guaranteeing the freedom and creativity of enterprises and individuals in economic affairs.[35]

Judging only on the constitutional text, especially Articles 32 and 119, it would appear that the meaning and purpose of democracy is closely associated with economic considerations in the Republic of Korea. This impression is strengthened by some dicta of the Court, such as:

> Article 119 Section 1 of our Constitution stipulates that the economic system of Korea is

32) See also Article 55 of the Constitutional Court Act.

33) Act No. 8372, Apr. 11, 2007, Act No. 11270, Feb. 1, 2012 being the latest amendment.

34) Article 1 of the Act states the purpose of the Act to be "to establish the standards for terms and conditions of employment in conformity with the Constitution, thereby securing and improving the fundamental living standards of workers and achieving a well-balanced development of the national economy."

35) Case on the Impeachment of the President (Park Geun-hye) **2016Hun-Na1,** March 10, 2017, concurring opinion at XIII.B.(3).

> based on respecting the freedom and creativity of individuals and enterprises, in effect declaring that our economic system is basically a free market economy the pillars of which our private property, the principle of private autonomy, and the principle of fault liability, and the Civil Code holds this principle of fault liability – derived from the free market economy system – to be the basic principle of general torts liability.[36)]

Given the vicissitudes of the politics and constitutional law of Korea since the late 19th Century, it seems fair to conclude that coherent institutional democracy has in 2020 entered only its fourth decade in the ROK, preceded by a much longer history of aspirational popular struggle to achieve the current situation. A persistent constitutional difficulty however remains prominent, namely the extent of the power vested in the presidency. In 2017 Justice Ahn Chang-Ho summarized this problem with reference to the historical agreement among the political parties in 1987. The agreement was based upon the wish to realize constitutional guarantees of human dignity and fundamental rights and to introduce a system of direct single-term election of the president, the termination of presidential power to dissolve the National Assembly and the establishment of the Constitutional Court:

> Nevertheless, through this impeachment adjudication we have learned that the harmful vestiges of the imperial presidency, such as government collusion with businesses, remain intact under the current Constitution. For what reason is the current Constitution, which sought to eradicate the authoritarian power structure, still impaired by such vestiges?[37)]

Despite the impeachment of President Park Geun-hye in 2017, the "imperial" nature of the presidency continues, and it would appear that the constitutional order is under constant pressure for further refinement. In this regard, the following comments in 2018 by the International Institute for Democracy and Electoral Assistance (IDEA) are apposite:

> There is growing public demand for revising 'the 1987 Constitution', which is in reality an amendment to the former constitution. Most of all, South Korea has yet to find the best balance for the executive power under a hierarchical political tradition. In 2016 and 2017, the political scandal that led to the removal of President Park's from office revived a long-simmering argument that constitutional reform is necessary to reduce the president's powers. Due to the extensive powers of the presidency, Korean politicians are obsessed with winning in the presidential election and becoming the 'ruling party'. Rather than engaging in dialogue and compromise with the opposing party, elected presidents rely on informal toolboxes, i.e., patronage politics, clientelist favoritism and regional loyalties, to ultimately win legislative support. Furthermore, the president can neutralize political opponents through his 'political weapons' namely, the Prosecutor General, the Chief of the

36) **2004Hun-Ka25** D.5.

37) **2016Hun-Na1** *supra* note 35, at XIII.A. At XIII.B. the judge described the shortcomings as follows: "While powers including the right to introduce legislative bills, to compile and submit budgets, and to extensive administrative legislation are concentrated in the President, there are no effective checks, or those that do exist do not work properly."

> Police Agency, the Chairman of the Board of Audit and Inspection (BAI), and the Commissioner of National Tax Service.[38] Thus, South Korean presidents exercise concentrated and personalized presidential power, undermining democratic political institutions. While also proposing the reduction of the powers of the president and the enhancement of the powers of parliament and the prime minister, there is also strong support for the removal of the prohibition on reelection. The permission of reelection is said to allow incumbents to deliver with a view of renewing their mandate and also address the challenge where single term presidents lose political steam in the last years of their term.[39]

The debate about the desire for and the nature of constitutional amendments after 33 years appears to be escalating.[40]

IV. Democracy in the Judgments of the Constitutional Court of Korea

In the absence of a constitutional or statutory definition of democracy, the jurisprudence of the Court provides the most authoritative account of the understanding of the concept in the country. From a perusal of various judgments, it is possible to glean the elements of the Court's construction of democracy in the ROK.

According to Jongcheol Kim "[i]t has always been taken for granted since at least 1948 that the Korean people shall have the sovereign authority and all the powers of the government branches and agencies established by the Constitution shall [be] emanate[d] from the people."[41] This may be construed as a core principle of Korean constitutional law, as it was formulated by the Court in 2007:

> 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

38) The need for "transparent and fair" appointment procedures of these offices was also emphasized in the judgment in the impeachment case, **2016Hun-Na1** *supra* note 34, at XIII.C.(2).

39) IDEA, *Constitutional History of Korea*, December 9, 2020 (last updated April 2018), http://constitutionnet.org/country/republic-korea.

40) In 2020 the matter of constitutional revision has more than once been the subject of political maneuvering in the National Assembly. See e.g. the news report Anonymous, *Opposition boycott scuttles motion to permit voters to propose constitutional revision, in* Yonhap News Agency May 8, 2020, December 9, 2020 https://en.yna.co.kr/view/AEN20200508010800315, reporting the successful blocking by the opposition parties of an amendment process aimed at allowing more than a single presidential term of office:
> A motion to permit a million voters to propose a constitutional revision was scuttled at the National Assembly on Friday as the main opposition party boycotted a parliamentary vote. In March, nearly 150 ruling and opposition lawmakers submitted to the parliament a motion to amend a constitutional clause in a bid to allow voters to propose a constitutional revision. Currently, the revision can be proposed only by a majority of lawmakers and the president.

41) Jongcheol Kim, Constitutional Law, in Korea Legislation Research Institute ed., Introduction to Korean Law 39 (2013).

> 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.[42]

In perhaps the most dramatic judgment to date, the 2017 impeachment case of President Park Geun-hye the Court stated, with reference to Article 7 of the Constitution ("All public officials shall be servants of the entire people and shall be responsible to the people"):

> In a representative democracy, a public official is entrusted by the people, the sovereigns, with the power to exercise national authority, and thus must work for the benefit of public interest from a neutral position.[43]

Here the Court reveals four of the most fundamental elements of its conception of democracy: representivity[44], popular sovereignty,[45] public interest and official neutrality. The Court has also not left any doubt in its judgments that the form of democracy that it subscribes to, is *liberal* democracy[46], and also linked it to the rule of law, finding that, by "abusing the authority delegated by the people" by pursuing personal interests in secret, Park Geun-hye had "undermined the principle of representative democracy and the rule of law".[47]

In a case about school teachers establishing or joining a political party, it was stated in the majority judgment that "[i]n a democratic state, all social activities of its citizens are related to 'politics' ", and that, despite the need to protect the political neutrality of state officials and education, a balance of interests needs to be struck to avoid an undue infringement upon teachers' freedom of political expression and freedom of association in order to promote public interests "such as openness of [the] democratic decision making process and subsequent development of democracy."[48] The list of democratic elements therefore also include the protection of the fundamental rights to freedom of expression and association, and openness of decision making.[49]

The Court has on several occasions expressed its view on "the image of a human posited by the

---

42) The Right to Vote of Nationals Residing Abroad Case **2004 Hun-Ma 644**, June 28, 2007 at 1.A.(1).

43) **2016Hun-Na1** supra note 35, at I.(1)①.

44) In its analysis of the requirements for impeachment, the Court *supra* note 34, at V.B. construed the "democratic legitimacy" of a president as being "delegated to the President by the national constituents through an election during his or her term in office," and therefore, " . . . from the standpoint that the President is a representative institution in which the public has directly vested democratic legitimacy, a valid ground for impeaching the President can only be found when the President, by violating the law, has betrayed the public's trust to the extent that such public trust vested in the President should be forfeited before the presidential term ends".

45) These two elements were again preferred in the recent judgment in the case concerning voting assistance rendered to a person with disabilities **2017Hun-Ma867,** May 27, 2020.

46) **2016Hun-Na1** *supra* note 35, at V.A.: "The considerable political chaos that may occur by removing a President elected by the public from office should be deemed an inevitable cost of democracy paid by the nation in order to protect the basic order of liberal democracy."

47) **2016Hun-Na1** *supra* note 35, at X.A.

48) **2018Hun-Ma551,** April 23, 2020 at 3.b.(2) of the English summary of the judgment.

49) In Justice Ahn Chang-Ho's concurring judgment in the Impeachment Case *supra* note 35, at XIII.B.(1), transparency was linked to democracy: "Not only must the President secure democratic legitimacy in the formation of power through an election, but he or she must also continuously secure democratic legitimacy in the execution of power, through transparent procedures and communication."

Constitution", being –

> … a citizen with the right to self-determination, as well as with creativity and maturity, and this citizen is a democratic citizen who, based on his or her own chosen view on life and society, responsibly determines and forms his or her life in society.

and –

> … the right to self-determination or the general freedom of action, deriving from the right to pursue happiness under Article 10 of the Constitution, respects the determination or choice made by a reasonable and responsible person regarding his or her own destiny but presupposes that this person assumes the responsibility for such determination or choice. We find that the essence of this constitutional right to self-determination lies in a person's self-evaluation and self-determination of the meaning and implications of his or her action.[50]

This characterization of the "democratic citizen" is in complete accordance with the precepts of classic liberalism.[51]

At the end of its opinion on the constitutionality of legislation concerning military service and conscientious objection, the Court stated its view on the position of minorities in a democratic dispensation:

> In a democratic decision-making system where majority decides, the legitimate means to realize the spirit of democracy that upholds tolerance and diversity is to accord conscientious attention to the 'Minorities,' people who think differently from the majority regarding particular issues.[52]

As indicated above, the concept "fundamental democratic order" referred to in Article 8 of the Constitution is not defined, other than the phrase in the third paragraph of the preamble to the Constitution, where the intention is stated to further strengthen "the basic free and democratic order conducive to private initiative and public harmony, and to help each person discharge those duties and responsibilities concomitant to freedoms and rights."

Article 55 of the Constitutional Court Act[53] provides: "If any objective or activity of a political party is contrary to the democratic basic order, the Government may request through a deliberation of the State Council adjudication on dissolution of the political party to the Constitutional Court."

In 2014 these provisions were the basis for the disbandment by the Court of the Unified

50) See **D.** 1.(a) 1) in the opinion of Justices Lee Seok-tae, Lee Eunae, and Kim Kiyoung in the case on the crimes of abortion **2017Hun-Ba127,** April 11, 2019 (citing previous judgments **96Hun-Ka5, May 28, 1998, 2004Hun-Ba80, February 23, 2006 and 2008Hun-Ba146, etc., October 29, 2009**).

51) See e.g. ALAN BRUDNER, CONSTITUTIONAL GOODS 60 (2004):
. . . to reach public ground from the premise of naturally dissociated and self-interested individuals, early liberalism had to create an opposition of its own. By a movement of abstraction, it distinguished between the subjective interests, inclinations, and ends of the particular individual, on the one hand, and the capacity, common to free agents, to act from principles all such agents could affirm, on the other.

52) **2011Hun-Ba379**, Jun 28, 2018 para 1. *in fine*.

53) Adopted in 1988, as amended by Act No. 10546, Apr. 5, 2011.

Progressive Party (which promoted socialism as a means to unify South Korea with North Korea), and the removal from its parliamentary representatives from their seats. The Court helpfully defined "basic democratic order" in the following passage:

> [T]he term 'basic democratic order,' referenced in Article 8 (4) of the Constitution, is founded on a pluralistic world view premised on trust in individuals' autonomous rationality and the relative veracity and rationality of diverse political views, and a political process that eschews all violent and arbitrary rules, and is formed and operated based on a democratic decision-making process that respects the majority but is considerate of the minority, and is based on the basic principles of liberty and equality; more specifically, we view the principles of sovereignty of the people, the respect for basic human rights, the separation of powers, the multi-party system, etc., as key elements of a basic democratic order under the current Constitution.[54)]

From this survey of key dicta in the judgments of the Court, it emerges that democracy in the perception of the Court is characterized by the following dogmatic elements: trust in individuals' autonomous rationality; trust in the relative veracity and rationality of diverse political views; popular sovereignty; promotion of the public interest; representivity; the neutrality of state officials; the rule of law, and upholding tolerance, diversity and the consideration for minority views.

The Court has also associated democracy with fundamental rights, specifically equality and liberty in the form of the freedom of association and political expression.

Regarding constitutional structure, the Court linked the separation of powers, a multi-party system and openness of decision-making to democracy.

From its decisions and the justification of the opinions of the justices dealing with democracy, the Court has left no doubt about its intention to promote the principles of classic liberalism.[55)] In this regard the question must be asked: does the theoretical and philosophical thrust of the jurisprudence of the Court (and the text of the Constitution) reflect the prevalent worldview of the constitutional "people" of Korea, or is the Court actively promoting rational liberalism on the basis of the subjective convictions of the justices, supported by the tenor of the constitutional text?

Answers to these questions are not readily available. The following remarks of Chaihark Hahm may however be of assistance:

> In place of Confucian values like filial piety or ritual propriety, Koreans nowadays prefer to speak in terms of individual rights and describe their country as a "liberal democracy." While the Korean Constitution makes no reference to Confucianism or Confucian values, it has plenty of provisions protecting individual rights and "free and democratic basic order." Similarly, the average Korean probably knows more about what Kant or Marx said than what Confucius or Mencius taught, while Christianity and Buddhism are by far the more visible religions of modern Korea.

54) **2013Hun-Da1, December 19, 2014**, at 2.B.(2)*ƒ* of the major decision.

55) See e.g. also the Court's description of democracy in **2013Hun-Da1** at 2.A.(1)(a).

> Yet, . . . , the persistence of the Confucian tradition is often noted as an important factor in describing or explaining contemporary Korean society. Confucianism apparently has an invisible grip on the people's everyday life and behavior. Even with no formal voice to defend it, Confucianism seems to inform the way people interact with one another, and the way they make sense of the world around them. Indeed, it may be that because Confucianism exists in a less visible and more diffuse state, it is exerting an unconscious and therefore more powerful influence on their lives.[56]

Worldviews are determined by profound, often culturally ingrained, beliefs, which usually take the form of religious convictions. Statistically, a majority of the population of the ROK do not subscribe to any religion, although substantial components of society identify themselves as Christians or Buddhists.[57] A uniformly shared worldview can hardly be expected to prevail in a modern, developed society, although atheism or personality cults such as Juche in the DPRK are typically enforced in communist states. The Western liberal notion of individual autonomy is the foundation of liberal democracy, which has achieved the status of a "civil religion". Jean-Jacques Rousseau laid the foundations for the dogma of this civil religion, the "sanctity of the social contract" being its core component,[58] and it has been fully embraced in the United States.[59]

It would appear that the Court consistently subscribes to liberal democracy as the civil religion of the ROK.

V. The Comparative Utility of Democracy in Constitutional Jurisprudence

In the interests of meaningful comparison (as opposed to mere juxtaposition) in a limited space, a *tertium comparationis* is required.[60] Although the "standard" (Euro-American) version of liberal democracy has been the presumptive constitutive confession in many constitutions adopted in new democracies over the past four decades, "democracy" is a word bearing too many meanings to serve as a comparator. The phenomenon of new democracies, of which there are plentiful examples, can here serve as useful comparator.

The wording of the Constitution and the establishment of the Court place the ROK squarely in

56) Chaihark Hahm, Law, Culture, and the Politics of Confucianism, 16,2 Columbia Journal of Asian Law 253, 269-270 (2002).

57) See e.g. December 9, 2020, http://www.korea.net/AboutKorea/Korean-Life/Religion.

58) Jean-Jacques Rousseau, The Social Contract or Principles of Political Rights (1762), (transl. by G D H Cole) 21 October 2020, https://constitution.org/2-Authors/jjr/socon.txt Book IV, 8.

59) In 1839 the former US President John Quincy Adams, quoted by HW House, A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion within the Secular State?, 13 Brigham Young University Journal of Public Law 203, 204 (1999) for instance exclaimed: "Fellow-citizens, the ark of your covenant is the Declaration of Independence. Your Mount Ebal, is the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States."

60) See FRANCOIS VENTER, GLOBAL FEATURES OF CONSTITUTIONAL LAW (2010) 51-55.

the category of "new" constitutional orders emulating North Atlantic liberal constitutionalism since 1987. Similarly, Japan (1947), Hungary (1989) and South Africa (1994) set out on such a course, and it is edifying to compare the differences between, and the similarities in, among other things, the manner in which their judiciaries have dealt with the notion of democracy, and the fortunes of liberal democracy in these states. Here it is unfortunately possible to do so only fleetingly.

Elements relevant for the present comparison (see Table 1 for a graphic exposition) are the nature of the historical starting points, the provisions of the constitutions relating to democracy, democracy in the jurisprudence, and current issues in the evolution of democracy. What follows here, is a concise selection of examples of the manner in which the courts of the three other jurisdictions approach and employ the notion of democracy.

1. South African Jurisprudence

In a recent judgment of the Constitutional Court concerning exhortations by a populist political leader of his followers to grab land unlawfully, the key consideration was the role of freedom of expression in a democracy. The judgment was introduced with the following statement by the Chief Justice:

> It is no exaggeration to characterize the right to freedom of expression as the lifeblood of a genuine constitutional democracy that keeps it fairly vibrant, stable and peaceful. When citizens are very angry or frustrated, it serves as the virtual exhaust pipe through which even the most venomous of toxicities within may be let out to help them calm down, heal, focus and move on. More importantly, free expression is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability.[61)]

Representivity has also increasingly emerged as an issue in South African politics. In a challenge to the South African proportional election system, an applicant was successful in 2020 in obtaining an order from the Constitutional Court on the unconstitutionality of the Electoral Act of 1998 "to the extent that it requires that adult citizens may be elected to the National Assembly and Provincial Legislatures only through their membership of political parties". The Court found that such a system does not do justice to the fundamental rights of every citizen to be free to make political choices, among other reasons because it excludes the participation by independent candidates (not representing a political party) from participating in elections. The declaration of unconstitutionality of the legislation was suspended for two years to allow Parliament the opportunity to remedy its defects. The Court reconfirmed the following dictum from a judgment in 1999:

> The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares

61) *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25 (27 November 2020) para 1.

> that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. … Legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[62]

The Court has not as yet provided its own definition of democracy other than with reference to provisions of the Constitution where the word appears. At the core lies section 36(1) which allows limitation of fundamental rights only when such limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom", taking into account a non-exclusive range of relevant factors.[63] Since section 36(1) was drafted following the example of section 1 of the *Canadian Charter of Rights and Freedoms*, the leading judgment of the Supreme Court of Canada on this point has been followed consistently in South Africa. The Canadian court stated in 1986 that a "free and democratic society" embodied, among others, "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[64]

2. Japanese Jurisprudence

Although Article 81 of the Constitution of Japan provides that the "Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act", the Court has a reputation of strong deference towards the executive and legislative branches of government.[65] The constitutional requirement of article 14 concerning the equal weight of votes, which has been the source of contestation for some time,[66] again cropped up in a case before the Supreme Court in 2020.[67]

In the election of members of the House of Representatives, every voter has two distinct votes, one for a single-member constituency, and the other for seats allocated on a proportional basis. Due to demographic variations following the periodic holding of a census, and the allocation of at least one seat per prefecture, disparities in the "weight" of constituency votes are inevitable, but should in terms of the demarcation legislation not exceed 2:1. The constitutionality of amendments to the legislation was challenged, but the Court found that the amendments "should be considered a reasonable exercise of the discretion vested in the Diet". In a separate opinion, Justice HAYASHI

62) *New Nation Movement v President of the Republic of South Africa* 2020 (6) SA 257 (CC) para 106.

63) See e.g. *S v Manamela* 2000 (3) SA 1 (CC) para 33, to which the Court continues to refer as authority.

64) See *R v Oakes* [1986] 1 SCR 103 at 136g-h , cited in the 2020 judgment of the Constitutional Court *supra* note 61, at paras 36 and 39.

65) See e.g. David Kenny & Conor Casey, Shadow constitutional review: The dark side of pre-enactment political review in Ireland and Japan, 18,1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 51, 62 (2020).

66) See e.g. Hiroyuki Hata & Go Nakagawa, Constitutional Law of Japan 57-58, 79 and 159 (1997) and the trail of judgments of the Court since 1974 listed at the end of para 3(1) of the main opinion in 2018 (Gyo-Tsu) 153, decided on 19 December 2019.

67) Gyo-Tsu *supra* note 66.

Keiichi cited a parliamentary remark made by Winston Churchill in 1948 about the merits of a system of "one person one vote", and found that the achievement of equality in the value of votes to be "an important constitutional issue concerning the fundamental [nature?] of a representative democracy". In another separate opinion, Justice MIYAZAKI Yuko also emphasized the need for the election system of a representative democracy to realize fair and effective representation. In a dissenting opinion, Justice YAMAMOTO Tsuneyuki held that "unless every one of the people can exercise their right to vote equally, the principle of sovereignty of the people underpinned by a representative democracy, which is advocated in the Preamble of the Constitution, would turn out to be pie in the sky."

The ongoing issue of representativity was put into perspective in 2012 by the following summary by Yoshiaki Kobayashi:

> [T]he political process in postwar Japan cannot be characterized as a properly functioning democracy. It certainly falls short of the ideal. Citizens are not voting based on judgments they have formed of parties' and candidates' platforms, and members of parliament elected through their votes are not pursuing policies that reflect the popular will. There is a gulf, in fact, between the platforms that parties offer and what they actually spend money on. Citizens have responded to this dysfunction by no longer allowing election platforms to guide their voting behavior.[68)]

3. Hungarian Jurisprudence

After what has been described as a "constitutional coup" occurring since 2010[69)], Articles 1 (2)(e) and 24(4)[70)] of the Constitution as amended in 2011 empowered the National Assembly to elect, by a two-thirds majority, the president and members of the Constitutional Court. This facilitated the ability of the majority parliamentary party to "pack" the Court within a few years, thereby gaining political control over constitutional adjudication. The constitutional justices that were appointed before the coup resisted the targeted diminution of the Court's jurisdiction with some success until 2012, after which they were replaced by political appointees.[71)]

In 2012 the Constitutional Court delivered a judgment representing a last-ditch attempt to curb the onslaught on constitutionalism by the governing party, Fidesz. The Court declared key elements of legislation adopted in 2011 to amend the constitution indirectly, to be unconstitutional for being, among other reasons, contrary to the rule of law in a democratic state. The Court also partly relied on international law:

---

68) Yoshiaki Kobayashi, Malfunctioning Democracy in Japan, opening paragraph of Chapter 11 (2012).

69) See e.g. Kim Lane Scheppele, Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary), 23 Transnational Law & CONTEMPorary Problems 51 (2014).

70) In the 2019 version of the Constitution this provision is found in Article 24(8).

71) Scheppele, *supra* note 69, at 71-87.

> The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing.[72)]

By 2020 the Court had clearly been fully captured by Fidesz, as is demonstrated in its judgment of 25 June 2020 in which it found that a government decree aimed at curbing freedom of expression and exerting control over the media was not unconstitutional, being in the public interest as determined within the political responsibility of the government. The petitioners (a minority of one quarter of the members of parliament) failed, in the opinion of the Court, to prove "circumstance from which it would reasonably follow that the freedom and diversity of the press and the conditions of free information and orientation necessary for the formation of a democratic public opinion would not be ensured in Hungary in general."[73)]

4. Some Comparative Observations

From this selective survey of constitutional adjudication in the four new democracies chosen for the purpose, it emerges that the constitutional terminology with which the various courts operate, coincides closely. The four constitutions are for instance replete with the classic notions of liberal democracy. Japan is somewhat different in that the word "democracy" and the concept "rule of law" do not appear in the 1947 Constitution, but the notions are implicit in the text and in Japanese constitutional doctrine.[74)] The political, economic and judicial circumstances of each jurisdiction however varies greatly.[75)] The courts in the new democracies are frequently burdened with the task of serving as the final rampart against democratic decline or the resolution of political crises. The degree of their success varies, depending to a large extent on the strength of the political forces challenging the boundaries of the democratic doctrine reflected in the constitutions. The Korean and South African Constitutional Courts have provided significant impetus to the promotion of

72) Decision 45/2012. (XII. 29.) on the unconstitutionality and annulment of certain provisions of the Transitional Provisions of the Fundamental Law of Hungary (28 December 2012), at IV 7.

73) See the online announcement of the Court, 7 December 2020, https://hunconcourt.hu/kereses?keywords=Central+European+Press+and+Media+Foundation, and the news commentary by Nicholas Watson on 2 September 2020, in BalkanInsight 7 December 2020, https://balkaninsight.com/2020/09/02/press-freedom-groups-urge-eu-to-act-over-hungary-media-violations/ .

74) Thus, in e.g. Article 15 of the Japanese Constitution the key characteristics of democratic elections are entrenched. Japan has had a long history with the German idea of the *Rechtsstaat*, and the post war notion of the rule of law has a distinct American flavor: see e.g. Venter *supra* note 10, at 60-63, and Dimitri Vanoverbeke, Exporting the Rule of Law in East Asia: Japan's Experiences from the 1990's to Present, 46,2 REVUE BELGE DE DROIT INTERNATIONAL 364-381 (2013/2).

75) Japan shares the post-war experience of American occupation and constitution-writing with Korea, but has retained (albeit symbolically, but culturally significant) the imperial institution and Shinto and Buddhism as major religions; South Africa is economically probably the most unequal society in the world, accommodates many and widely divergent cultures, and its politics has been dominated since 1994 by a single "liberation movement" depending for support on racial demographics; Hungary, having a Catholic majority, emerged from the hegemony of the USSR and religious suppression to introduce constitutionalism, but has now for a decade been subject to conservative populist rule with little regard for constitutional supremacy.

their conceptions of constitutional democracy, the Hungarian Constitutional Court initially courageously resisted constitutional malfeasance before being largely neutralized through political manipulation, and the Japanese Supreme Court, exercising its usual self-restraint, has thus far performed only a limited role in this regard.[76]

When liberal democracy comes under pressure in new democracies, as it constantly does to varying degrees, the judiciary becomes a key player, and more often than not, the courts become embroiled in political controversy due to the need to curb executive overbearance (in many cases manifested in corrupt conduct[77]) by means of the enforcement of constitutionalized limitations. Quite understandably, the municipal circumstances in the various jurisdictions require and engender different responses, and a constant global theme in this regard is the "judicialization of politics" (or the "politicization of constitutional adjudication").[78] This gives rise to the question whether the standardized liberal democratic language received from abroad provides an appropriate base for persuasive judicial responses to political crises.[79] The materials referred to above suggest that the Court of the ROK has thus far, among the four new democracies, been the most consistent in the application of liberal democratic dogma.

One key element of democracy that stands out as problematic and unresolved in many constitutional orders, no less so in new democracies, is representivity. As shown above, in Japan the equal value of votes remains an issue that has consistently dogged constitutional jurisprudence, in South Africa the courts are frequently seized with cases concerning the accommodation of a wide variety of political and cultural beliefs[80] and independent politicians, in Hungary the Constitutional Court has over the past decade faced a "constitutional coup", and in the Constitutional Court of the ROK, a comprehensive proposal for reforming the constitutional power structure was recorded in 2017.[81]

Justice Ahn Chang-Ho introduced his proposal thus:

76) A former justice of the Japanese Court explained this self-restraint as follows: "A fundamental limitation on judicial power must be recognized in [the court's claim to] democratic legitimacy. It is also necessary to consider Japan's particular political, historical, social, and cultural circumstances," Koji Miyakawa, Inside the Supreme Court of Japan – From the Perspective of a Former Justice, 15,2 Asian-Pacific Law & Policy Journal 196, 205 (2014).

77) See e.g. Matthew M. Carlson, *Sontaku* and scandals in Japan, 23,1 Public Administration and Policy 33-45 (2020); Francois Venter, *State Capture, Corruption, and Constitutionalism in South Africa, in* Corruption and Constitutionalism in Africa 69-109 (Charles Fombad & Nico Steytler (eds), 2020); Samuel Rogers, Fidesz, the state-subsumption of domestic business and the emergence of prebendalism: capitalist development in an 'illiberal' setting, 32,5 Post-Communist Economies, 591-606 (2020).

78) See e.g. Chaihark Hahm, Beyond "law vs. politics" in constitutional adjudication: Lessons from South Korea, 10,1 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 6-34 (2012).

79) It is submitted that such would only be the case where, as Jakab, *supra* note 16, at 23 put it, the "political morality" of the society concerned is receptive to such language.

80) See e.g. Maledu v Itereleng Bakgatla Mineral Resources 2019 (2) SA 1 (CC), and Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch 2020 (1) SA 368 (CC).

81) Justice Ahn Chang-Ho's concurring judgment, *supra* note 35 in the Impeachment Case at XIII.C. As background to the proposals for reform, the opinion of more than 9000 words in the English translation addressed inter alia constitutional history and an analysis of the flaws in the power structure under the Constitution.

> An alternative to the imperial presidency could be the constitutional order of a modern decentralized nation. In such a nation, the principle of decentralization, which emphasizes local autonomy and responsibility, and the principle of direct democracy, which complements the limitations of representative democracy, play stronger roles, drawing from the principle of separation of powers, which guarantees the fundamental rights of the people by dispersing power and enabling checks and balances between authorities.

These remarks conform with the "standard" notions of liberal democracy, with emphasis on mechanisms such as decentralization and the merits of expanded checks and balances, while acknowledging that democracy has inherent shortcomings. The proposal went on to show that the constitutionally sanctioned concentration of power tended "to move toward centralization and away from the people, the sovereigns, while centralization gears toward absolutism, and absolute power is bound to corrupt the holder."[82] Justice Ahn Chang-Ho's opinion also mentioned the need for the expansion of the proportional representation system to better reflect the "divergent interests across society".[83] In 2019 the election laws were reformed to lower the voting age from 19 to 18, and adopting a system of "semi-interlocking proportional representation" providing some advantage to small political parties,[84] although the outcome of the 2020 general election seems to have had the effect of promoting a two-party system[85] against the background of popular dissatisfaction with the current president.[86]

VI. Conclusion

The Korean Constitutional Court's approach as authoritative interpreter of the tenuous notion of democracy must be understood in the context of the constitutional history of Korea since 1945, and of the formation of the Court as a German-style institution operating under an American-style Constitution.[87] A salient explanation of the political and cultural reaction to the traumas of

82) Over-centralization of authority has become typical also of new constitutions in Africa, including South Africa: see e.g. Francois Venter, *Parliamentary sovereignty or presidential imperialism? The difficulties of identifying the source of constitutional power from the interaction between legislatures and executives in Anglophone Africa*, *in* Separation of Powers in African Constitutionalism 95-115 (Charles Fombad ed., 2016).

83) At XIII.C.2. of the judgment.

84) Leo Mizushima, *South Korea, in* 2019 Global Review of Constitutional Law 319 (Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), 2020) December 11, 2020 http://www.iconnectblog.com/?s=global+review+of+constitutional+law.

85) WooJin Kang, What does Moon's election victory mean for South Korean democracy?, East Asia Forum 11 December 2020, https://www.eastasiaforum.org/2020/06/19/what-does-moons-election-victory-mean-for-south-korean-democracy/ (article dated 19 June 2020).

86) Hyung-A Kim, ANU, South Korean democracy in crisis, East Asia Forum 11 December 2020, https://www.eastasiaforum.org/2020/03/21/south-korean-democracy-in-crisis/ (article dated 21 March 2020).

87) Jibong Lim, Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions, 24 Loyola of Los Anageles International & Comparative Law Review 327, 329-332 (2002) e.g. explained that, in the run-up to the constitutional review of 1987, "a blend of the constitutional adjudication principles embodied in the institutions of Germany and the United States" characterized the Korean Constitutional Court.

Japanese occupation and the subsequent impact of the Korean war and the Cold War was provided in 2009 by Gregg Brazinsky:

> South Korea's success in turning the ideals of modernization and democracy into lived realities has not been replicated by many other postcolonial nations during or after the Cold War. South Koreans were able to embrace and ultimately realize these ideals because their near and distant pasts facilitated a distinctive pattern of sociocultural interaction with the United States. Americans were genuinely seen as liberators by many South Koreans both because of the U.S. role in ending Japanese colonialism and because of the sacrifices made by the United States to extricate the ROK from Communist occupation during the Korean War. In this sense South Korea differed from postcolonial societies that viewed American efforts to transplant their economic or political systems as a new form of colonialism. Moreover, after centuries of experience at adapting religions and philosophies imposed by outside forces, Koreans realized that U.S. hegemony need not destroy their own values and culture. … It was only through this synergy of American influence and Korean agency that the sociocultural transformation necessary for capitalist development and democracy occurred.[88)]

As an outsider, one might however wonder if the constitutional adjudication involving democracy in Korea reflects a complete replacement of the Koreans' (undefined) "own values and culture" referred to by Brazinsky, with a profound acceptance of the precepts of (aspirationally defined) classic liberal democracy. If so, the legitimacy of the ROK's liberal democratic constitutional foundations as expressed in its Constitution stands out among new democracies. If such is indeed the case, one might also ask if this is a reflection of a civil religion adopted by the majority (a-religious) population of the ROK, and how this civil religion, based upon individual autonomy and popular sovereignty, is accounted for within the Christian, Buddhist and Confucian minorities in Korean society?

The challenges to which constitutional jurisprudence is subjected in a new democracy are immense. The justices always have to strive for a balance between the ever-present danger of creative interpretational overreach inspired by the pressures of political arrogance amidst the conceptual vagueness of the constitutional vernacular on the one hand, and on the other the need to maintain the legitimacy of acknowledged, independent and principled objectivity. Perhaps the greatest challenge of a constitutional court is to give voice to a political morality persuasive enough to keep overbearing power at bay in a manner that allows for acceptance, or at least acquiescence, in a complex modern society composed of people of diverse worldviews.

Whether liberal democracy will in the ROK prove be the moral banner under which the desired balance can be maintained while democracy as such seems to be under strain globally, only time will tell. Currently this is the banner under which the Court distinguishes the ROK from the DPRK, whose "democracy" is thoroughly incompatible with the South's liberal democracy.[89)] This reality

88) Brazinsky, *supra* note 25, at 257.

represents an immense obstacle on the road to the realization of the constitutional ideal (Article 4) to seek unification through "peaceful unification based on the principles of freedom and democracy."[90]

89) In **2013Hun-Da1** at E.(1)(b) the Court summarized the nature of the DPRK regime as –
a people's democratic dictatorship, a one-party dictatorship by the Workers' Party of Korea, and a one-person dictatorship, with a monolithic guiding ideology, justifying hereditary dictatorship, and ruled by Kim Il-Sung's Juche ideology and Kim Jong-Il's Military-First ideology.

90) This difficulty is exacerbated by different conceptions of "peoplehood" in the ROK and the DPRK. See Justine Guichard, In the Name of the People: Disagreeing over Peoplehood in the North and South Korean Constitutions, 4 Asian Journal of Law and Society, 405-445 (2017).

TABLE 1

	ROK	SOUTH AFRICA
Historical starting point	See section 3.1	The Constitutions of 1993 and 1996 replaced the foregoing constitutional arrangements based on parliamentary sovereignty, executive prerogative, racial and ethnic differentiation, and the absence of constitutionalism, with the supremacy of the constitution, inclusive electoral participation, non-racialism and an entrenched fundamental rights regime.[i]
Constitutional provisions	See section 3.2	**1** The Republic of South Africa is one, sovereign, democratic state . . . **7** (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom . . . **36** (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . .[ii]
Jurisprudence	See section 4	See section 5.1
Current issues	"Imperial presidency", demands for constitutional revision and improved representivity.[iii]	Corruption and endangering of constitutionalism by mismanagement and political factionalism[iv] and representivity.

i E.g. section 1 of the 1996 Constitution provides:
> founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

ii The phrase "an open and democratic society based on human dignity, equality and freedom" also appears in the "interpretation clause" (section 39) and elsewhere in the Constitution, e.g. section 59(2). Parliamentary rules must be made "with due regard to representative and participatory democracy, accountability, transparency and public involvement" and "consistent with democracy" (e.g. sections 57, 70), Chapter 9 established "state institutions supporting constitutional democracy", and in terms of section 195(1) "[p]ublic administration must be governed by the democratic values and principles enshrined in the Constitution".

iii See comment of IDEA quoted *supra*, at note 39.

iv See e.g. Venter *supra,* note 77.

	JAPAN	HUNGARY
Historical starting point	The 1947 Constitution, drafted by the US military authorities, replaced the Meiji Constitution of 1889 by introducing three fundamental principles: *popular sovereignty* vested in the Japanese people, instead of the Emperor; *pacifism* and *respect for human rights*	The Hungarian Constitution of 1989-1990, a thorough revision of the 1949 constitution, which provided in 1956 for the Hungarian People's Republic "advancing towards socialism along the road of a people's democracy", was intended, according to its preamble "to promote a peaceful transition to a jural state having a multi/party system, parliamentary democracy and social market economy"[v] The constitution was thoroughly revised in 2011 by a populist regime, retaining most of the rhetoric of constitutionalism.
Constitutional provisions	**14**(1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin. **15** (1) The people[vi] have the inalienable right to choose their public officials and to dismiss them. (2) All public officials are servants of the whole community and not of any group thereof. (3) Universal adult suffrage is guaranteed with regard to the election of public officials. (4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.[vii]	The latest (2019) version of the founding *Article B)* provides that "(1) Hungary shall be an independent, democratic rule-of-law State. (2) The form of government of Hungary shall be a republic. (3) The source of public power shall be the people. (4) The power shall be exercised by the people through elected representatives or, in exceptional cases, directly."[viii]
Jurisprudence	See section 5.2	See section 5.3
Current issues	Representivity and a triangular dominance of policy choices by the bureaucracy, business and politicians.[ix]	Populist autocracy & a politically dominated Constitutional Court

v The preamble states: "We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order."

vi According to K Hingwan, *Identity, Otherness and Migrant Labour in Japan, in* Case Studies on Human Rights in Japan (R Goodman & I Neary eds., 1996) 51 "the people" (*kokumin*) here refers to Japanese nationals. Article 1 of the Constitution provides that the "Emperor shall be the symbol of the State and the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

vii Interestingly, the electorate can, in terms of Article 79(2) indirectly cause the dismissal of judges of the Supreme Court. Articles 95 and 96 provides for the holding of referenda.

viii See also *Article IX* dealing with freedom of expression and *Article 9* which makes the President "the guardian of the democratic functioning of the state organisation."

ix See e.g. Sigal Ben-Rafael Galanti, Nissim Otmazgin & Alon Levlpwotz (eds.), Japan's Multilayered Democracy 215 (2014).

Supervising Elections in South Korea: Examining the Performance of Election Commissions as Institutions Protecting Constitutional Democracy[1)]

MARK TUSHNET*

Abstract

Institutions protecting constitutional democracy (IPDs) have become an important feature in contemporary constitutional design. IPDs are needed because classical Madisonian mechanisms of ambition countering ambition and of size creating difficulties of coordination don't work well in a world where political parties organized on a national scale dominate politics. Election commissions are an example of IPDs. A study of the performance of the South Korean election commission illustrates how commissions interact with party politics and enforce a distinctive technocratic ideal of how politics should operate – as rational and deliberative. This ideal is somewhat unrealistic, and it remains open to question whether these IPDs protect democracy better than Madisonian mechanisms would.

* William Nelson Cromwell Professor of Law emeritus, Harvard Law School.

1) This Article is drawn from a chapter in a forthcoming book, THE NEW FOURTH BRANCH: INSTITUTIONS PROTECTING CONSTITUTIONAL DEMOCRACY (2021).

I. Introduction

The early years of the twentieth century produced an innovation in what we might call constitutional technology – the invention of the Kelsenian constitutional court. During the century's middle years the idea that constitutions should provide for judicial evaluation of legislation to determine its consistency with their structural and rights-based provisions spread through almost all well-functioning democracies. And, by the end of the century yet another innovation in technology built upon the earlier insights. This innovation was the proliferation of what the South African constitution calls "institutions for protecting constitutional democracy" (hereafter referred to as IPDs).[2)]

This Article begins by setting out the reasons that IPDs fit well within modern constitutions for conceptual and functional reasons. Conceptually: IPDs are needed in modern constitutional democracies because the prevalence of party-political governance means that separating powers can't ensure that constitutional democracy will in fact be preserved. Functionally: Although constitutional courts can do some of the necessary democracy-preserving work, they have their limitations, specifically a "legalistic" cast of mind and some difficulty in acquiring the kinds of expertise that IPDs can muster. The Article then examines one specific institution – the electoral commission – in light of those reasons. The examination takes the form of a case study of the South Korean election commission and its interaction with that nation's Constitutional Court, supplemented with some brief observations about election managements in India and the United States. That examination shows that IPDs too have their limitations, here a tendency to attempt to impose on an unruly politics a sometimes unrealistic ideal of politics as rationally deliberative.

II. Institutions for Protecting Constitutional Democracy: A Brief Account

Those who thought about designing constitutions for democracies in the eighteenth and nineteenth century focused on how the classical Montesquiean branches could protect a democracy once established.[3)] James Madison gave the now-standard account: Democracy would be preserved by a system of separated powers policing each other. As Madison put it, ambition would counter ambition: The legislature would guard against executive overreaching and the executive would guard against legislative excess. This would ensure that the structures of government would preserve democracy. Madison argued in addition that similar protections would arise in connection with individual rights when a nation's territory (and later, population) was large enough to make it unlikely that people bent on violating rights would be able to coordinate their oppressive efforts.

2) Constitution of South Africa, chapter 9.

3) This section summarizes arguments made, in substantially more detail and citing the relevant literature, in Chapters Two and Three of the work referred to in note 1 above.

The rise of party-political governance undermined the proposition that these Madisonian mechanisms would preserve constitutional democracy. Specifically, when an election gave a single party a legislative majority *and* the nation a chief executive from the same party, ambition would reinforce rather than counter ambition. And, of course, political parties were organized on a national scale, coordinating policies that could indeed be oppressive.

The Madisonian mechanisms continued to have some force, notably when government was divided and when parties themselves competed over rights-affecting policies. But, constitutional designers came to believe, the mechanisms needed supplementation. Hans Kelsen devised the constitutional court as a new institution specifically aimed at resolving conflicts between legislatures and executives over the boundaries between their domains. Such conflicts in themselves weakened the Madisonian mechanisms when an ambitious legislatures and chief executives contended that some topic was within their domains, thereby escalating rather than resolving threats to constitutional democracy. The conflicts also threatened to paralyze effective governance, discrediting democracy itself. Experience with constitutional courts led designers to conclude that they had similar advantages in policing legislation that threatened individual rights. The conceptual case for IPDs is thus that Madisonian mechanisms for protecting democracy don't work as effectively as they should in a party-political world.

In a sense, then, a constitutional court is the paradigmatic IPD: It protects democracy when, and because, Madisonian mechanisms of competition among the elected branches fail to work well in a world of democracies with reasonably well-organized political parties regularly contending for power. And for many years – and still today – in many nations the constitutional court is the sole (or primary) IPD. Anticorruption efforts, for example, are frequently lodged in the ordinary courts and, to some degree, in the constitutional court. In many nations, so is the management of elections, particularly the resolution of disputes over who can appear on the ballot and over election outcomes.

Courts, though, have some disadvantages as all-purpose IPDs. As Lon Fuller's work suggests, courts tend to treat all problems as resolvable with reference to general principles, which leads to some distortions or pathologies when they deal with what Fuller called polycentric problems – and some of the problems associated with threats to democracy are polycentric.[4] In addition, some problems can be addressed effectively only by deploying forms of expertise not readily available to courts or by using nontraditional remedies that courts can't easily devise. Effective investigation of corruption, for example, sometimes requires expertise in "forensic accounting" to trace how bribes are laundered into seemingly lawful bank accounts; effective protection of human rights sometimes requires systems of regular monitoring and reporting; and election management requires a degree of sensitivity to the real world of democratic politics. These are what I refer to as the functional reasons for creating IPDs in addition to constitutional courts.

It's not impossible for constitutional courts to overcome these difficulties. Rather than hoping that they will, though, constitutional designers in the late twentieth century came to believe that creating separate IPDs was the better course.[5]

4) For Fuller's argument, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978).

With this background, I turn to examining electoral commissions as IPDs.

III. Election Administration: The General Problem

Election administration in a party-political world is always political. Yonhyok Choe provides a useful description of the tasks associated with election administration.[6] Some issues arise before elections (drawing constituency boundaries and civic education), others during elections (voter registration, preparing election places, part and candidate registration, election campaigns, advance voting procedures, and polling on election day), and still others post-election (counting, announcing a decision, and resolving disputes).

We can fantasize about a world in which elections could be run without dealing with some or perhaps all of these issues. A nation could elect all its legislators with proportional representation from a single roster; no need to draw district lines here. A nation could allow anyone to run for any office; no need to determine qualifications for office or for the ballot here. And indeed a nation could allow every citizen to vote without even an age qualification. In such systems one might see a lot of frivolous parties (the "Party All the Time Party") and frivolous candidates. Precisely because they are frivolous they do little damage to a reasonably well-functioning democracy. And, indeed, the appearance of a frivolous party – Pirate Parties in Scandinavia or the "The Rent is Too Damn High Party" in New York State – can be a symptom of some failings of the overall political system.[7]

Even so, ballots must be counted to determine for whom they were cast and whether the people who cast them were citizens or foreigners. And of course there are good-governance reasons for electing legislators at least in part from geographically (or functionally or linguistically) defined districts and for requiring that parties and candidates satisfy some conditions for appearance on the ballot. As far as I am aware, every constitution does at least one of those things, and most do many of them. When constitutions have these sorts of arrangements – districting or party or candidate qualification rules – again some institution has to decide where to draw the lines and whether the qualifications have been met.

Constitution designers have chosen either to assign these tasks either to courts or to specialized election bodies (sometimes called commissions, sometimes "electoral courts").[8] Designers might

5) I note for completeness sake that constitutional courts are always in the background, available to supervise the work of other IPDs to ensure that *they* conform to constitutional limits as the constitutional court sees them.

6) YONHYOK CHOE, HOW TO MANAGE FREE AND FAIR ELECTIONS: A COMPARISON OF KOREA, SWEDEN AND THE UNITED KINGDOM (1997), ch. 3.

7) The Pirate Parties started out as mostly jokes by devotees of modern technology, with a program of eliminating all restrictions on "piracy" of intellectual property. In some places, though, they have become regular features of the political scene. On the "Rent is Too Damn High" party, see https://en.wikipedia.org/wiki/Rent_Is_Too_Damn_High_Party, archived at https://perma.cc/9QTZ-E3Q8.

8) Another term frequently used is "electoral management bodies." For a survey of East African institutions, see ELECTION MANAGEMENT BODIES IN EAST AFRICA: A COMPARATIVE STUDY OF THE CONTRIBUTION OF ELECTORAL COMMISSIONS TO THE STRENGTHENING OF DEMOCRACY (Alexander B. Makulilo et al, 2016). Nicholas Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. Chi. L. Rev. 769, 783 (2013), asserts, "The

choose courts either because they believe that the citizenry will be confident that the courts will decide the issues before them fairly or, more mundanely, because they believe that their nation does not have enough qualified (meaning at least in part, visibly fair) people to staff a separate election body.

Design cannot guarantee fairness, of course, especially but not exclusively in dominant party nations. For example, some national constitutions are committed to a theory of "militant democracy," a democracy that takes steps to preserve itself against internal subversion of the most serious sort.[9] One such step is the disqualification from the ballot of parties whose programs are anti-democratic or otherwise inconsistent with national self-preservation. It would not be surprising to find that members of a judiciary or of election-supervision bodies who are themselves deeply committed to the nation would have an unconscious bias that would lead them to find risks of subversion where others might not. And so experience suggests: Courts clearly devoted to protection of fundamental rights have on occasion made rather questionable decisions implementing militant democracy.[10]

Even more than the risk of bias is the risk of mindlessness. Consider an example from Australia. There members of Parliament cannot hold dual citizenship – a sensible restriction though not one that every democratic regime would impose. Consider then a problem that arose in 2017. In one of several related cases, the parents of a member of Parliament emigrated from Italy and had a child in Australia after arrival.[11] The parents became Australian citizens. But, under the Italian law of nationality, they remained citizens of Italy. Fine, they cannot serve in Parliament. Suppose, though, that the Italian law of nationality says that the *children* of Italian parents have Italan citizenship no matter where they are born or reside. Is the child a dual citizen disqualified from being a member of Parliament? Even worse, what if the child grows up knowing of her Italian heritage but completely unaware that under Italian law she is an Italian citizen? When the problem arose Australia's courts – well-known for their commitment to formalistic reasoning – concluded that the child was indeed a dual citizen and so disqualified from office, at least until she expressly disclaimed Italian citizenship (even if Italy itself would not give such a disclaimer legal effect).[12]

Like all IPDs, then, election commissions respond to obvious problems in a party-political world

---

nearly universal answer [to drawing district boundaries] is … [to] use independent redistricting commissions whose plans are subject to highly deferential judicial review."

9) For overviews of militant democracy, see MILITANT DEMOCRACY AND ITS CRITICS: POPULISM, PARTIES, EXTREMISM (Anthoula Malkopoulou & Alexander S. Kirshner eds. 2019); THE "MILITANT DEMOCRACY" PRINCIPLE IN MODERN DEMOCRACIES (Markus Thiel ed. 2009).

10) For reviews of the Israeli experience, see Raphael Cohen-Almagor, *Disqualification of Lists in Israel (1948-1984): Retrospect and Appraisal*, 13 L. & Phil. 43 (1994) (concluding that the key decision to the date of publication was "flawed"); MORDECHAI KREMNITZER, DISQUALIFICATION OF LISTS (2005) (concluding that the Supreme Court's decisions have "not demonstrated consistency or decisiveness"). The most recent decision in Germany discusses the problems associated with party disqualifications, National Democratic Party II, 2 BvB 1/13 (2017), available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html, archived at https://perma.cc/W5G6-AHHC. Notably, the Constitutional Court refused to disqualify a seemingly neo-Nazi party that had already achieved a significant degree of electoral success..

11) I simplify the facts for expository purposes, but do not believe that I have distorted any essential feature of the problem.

12) Re Canavan, [2017] HCA 45, (2017) 263 CLR 284.

and have characteristic advantages and disadvantages.[13] With election commissions the primary concern is this: In a party-political world partisans may be skeptical about the effectiveness of structural provisions designed to support nonpartisanship. And specifically as to the courts: Bending over backwards to demonstrate their position above party politics, they might formalistically apply the rules in ways that do nothing to advance and that might even impede good democratic functioning. In doing so they might also articulate a somewhat unrealistic vision of how partisan politics actually does – and perhaps should – operate.[14]

This articulation – whatever its content – brings out an important role that election commissions (and perhaps all IPDs) play.[15] What the election commission and the courts say about elections *constitutes* – gives social meaning to – the practice of elections. Some features of elections are rooted in simple law: who is eligible to vote and run for office, where polling places are located, and the like. Election commissions and courts flesh out those legal provisions, generating a "thicker" vision of what an election is: Commissions and courts interpret eligibility provisions in ways that explicitly or implicitly treat elections as occasions for popular deliberation about public policy or, in contrast, as occasions for eliciting voters' views, not always well formed or thought out, about public policy.

With these considerations in hand, this Article looks at how the South Korean election commission functioned in its political environment: how the nominally technical and nonpartisan commission has a politics associated with them, though not necessarily a politics that tracks conventional party lines, and how constitutional courts interact with election commissions in developing competing or mutually supportive images of politics.

IV. South Korea: The Election Commission, the Constitutional Court and the Image of Political Life

The Constitutional Court of South Korea has nine justices, three nominated by each of the Supreme Court, the parliament, and the president. Justices serve six years terms, which are technically renewable but in practice aren't; no justice since 1994 has served two terms. By convention the main minority party in the parliament nominates the candidate for one of the seats allocated to parliamentary choice.; the effect is that a president supported by a majority in the parliament can nominate five candidates, and a president whose party is in the minority can nominate four. Po Jen

13) Michael Pal, *Electoral Management Bodies as a Fourth Branch of Government*, 21 Rev. Const. Stud. 85, 97-106 (2016), provides a good albeit selective overview of the design choices made in creating election commissions.

14) If one defines one of the judicial proprieties with which Fuller was concerned as adopting the right mix of formalist and realist reasoning without regard to the surrounding political environment, excessive formalism to avoid the appearance of political bias would be a departure from the judicial proprieties.

15) I draw here upon important forthcoming work by Richard Stacey & Victoria Miyandazi, *The regulative and constitutive components of protecting a democracy: Kenya's electoral commission and the courts in the 2010s*, Asian J. Comp. L. (forthcoming 2022). Stacey and Miyandazi give the term "constitutive" a definition slightly different from, though related to, the definition I provide.

Yap and Chien-Chih Lin summarize the Court's relation to the political order: "political fragmentation … strengthens judicial independence as every major political party knows it has allies on the bench," and "judges are freed from ruling with an eye to reappointment."[16]

Created in 1963, the National Election Commission(NEC) has nine members, three chosen by each of the President, the National Assembly, and the Supreme Court. Members serve six-year terms. The Commission has a full-time staff, but most of the Commissioners serve only part-time, holding other positions are well. One Commissioner, though, works full-time as a Commissioner. The Commission chair is, by custom, a Supreme Court justice. The NEC is a typical election management agency charged with administering elections and enforcing the nation's election laws (including its system of campaign finance).

Following the end of the Japanese occupation in 1945, South Korea was first administered by the United States army. Accepting the post-1945 division of the peninsula, the Republic of Korea adopted its first constitution in 1948. From that time until 1987 South Korea had an authoritarian government, sometimes civilian, sometimes military.[17] Widespread protests in the 1980s ultimately led to the creation of a new democratic government. Since then Korean politics has been dominated by what one scholar calls a "two plus two" system: "two major parties (the conservative and the center-left) and two minor parties (another conservative and the progressive)," with the conservative party holding a majority in the National Assembly for most of the time since 1987.[18] The major parties, though, regularly split and recombine into new ones, primarily when factional leaders find themselves frustrated at developments within the parties with which they have temporarily affiliated themselves. Parallel to electoral politics, and important to the story that follows, there have been recurrent upsurges in politics "in the streets," organized by social movements without formal affiliations to the existing parties.

With this institutional and political background in hand, I turn to analyzing the relation between the Constitutional Court and the NEC. A scholarly contribution by M. Mohsin Alam Bhat dealing with the parallel relation in India between the Indian Election Commission and the Indian Supreme Court provides a useful framework. Alam Bhat begins by describing the Court's commitment to an ideal of what he calls "discursive democracy."[19] According to the Court, that ideal requires that voters have available a wide range of information about candidates' life histories, including their criminal records, educational qualifications, and wealth. Politics should be pure, not polluted, as Alam Bhat puts the ideal. And, Alam Bhat argues, the Supreme Court recruited the Election Commission as an ally – or, perhaps more accurately, the Court and the Election Commission collaborated in developing the image of the politics of discursive democracy. So, for example, the

16) PO JEN YAP & CHIEN-CHIH LIN, CONSTITUTIONAL CONVERGENCE IN EAST ASIA, ms. p. 35 (forthcoming 2021).

17) A brief period between April 1960 and May 1961 was an exception.

18) Yoonkyung Lee, "Political Parties," in ROUTLEDGE HANDBOOK OF KOREAN POLITICS AND PUBLIC ADMINISTRATION (Chung-In Moon & M. Jae Moon eds., 2020), at p. 83.

19) M Mohsin Alam Bhat, "Between Trust and Democracy: The Election Commission of India and the Question of Constitutional Accountability" (manuscript in author's possession). *See also* Manoj Mate, *High Courts and Election Law Reform in the United States and India*, 32 BU L. Rev. 267 (2014).

Court used the Election Commission as the vehicle for elaborating and then enforcing disclosure requirements. And, as we will discuss later, the Election Commission itself expanded its authority in pursuit of its vision of a deliberative politics.

Alam Bhat locates this collaboration in part in the Court's doctrine of deferential review of Election Commission decisions. One feature of IPD design is the relation between an IPD and the constitutional court. Probably as a matter of constitutional theory, in which the constitution must be supreme law regulating all institutions, and certainly as a matter of constitutional practice, constitutional courts will supervise the work of IPDs. The central question then is, what standard of review will the constitutional court use when conducting that supervision?

The distinctive forms of expertise associated with IPDs counsel in favor of deferential review. Alam Bhat's argument suggests another basis for such review: The constitutional court and an IPD might converge upon a single vision of the political system within which they both operate. The convergence need not be complete; occasionally, for example, the court will find that an election commission acted arbitrarily or that it did not take relevant considerations adequately into account. All that's required is that the court and the IPD find themselves in roughly the same location in the ideological space defining democracy. Adapting a term from Jürgen Habermas, we might say that election commissions and courts "co-constitute" elections.

The relation between the Korean Constitutional Court and the NEC illustrates the phenomenon of convergence and deferential review that Alam Bhat finds in India, complicated a bit by the Constitutional Court's use of a proportionality test in cases where it rejects the NEC's position.[20)]

Several Constitutional Court decisions reflect the view that politics should be relatively orderly. The Court required the legislature to modify legislation requiring presidential candidates to deposit relatively large sums before qualifying for the ballot, with candidates who receive less than ten per cent of the vote forfeiting the entire amount and candidates receiving more than fifteen per cent getting a full refund. The Court acknowledged the legislature's "policy discretion" to design a system that would "prevent many insincere and indecent candidates" from running, and accepted the view that some monetary deposit before being allowed on the ballot was acceptable. A dissenting judge made the same point in these terms: "in presidential elections, there is a desperate need to prevent too many candidates from running for office."[21)] The problem, in the Court's eyes, was that the amount required to be deposited was too large. Its decision took the form of a "modified decision" that gave the legislature the opportunity "to consider diverse circumstances" and adjust the statute, perhaps by lowering the amount required to be deposited.

In discussing a statute limiting people from publishing advertisements supporting or opposing political candidates – basically, spending on campaigns independent of the parties – three justices observed that independent expenditures could result in "personal attacks or slandering the opposing candidates by spreading false information," particularly when done anonymously on-line. This would, they said, disturb "the tranquility and fairness of the election."[22)] The Court later

20) I have benefited from comments on the South Korean cases by Jonghyun Park of the College of Law, Kookmin University.

21) Deposit Money in Presidential Elections Case, 20-2(b) KCCR 477, 2007Hun-Ma1024, Nov. 27, 2008.

rendered a decision of "conditional unconstitutionality", another form of a modified decision, holding the statute would be unconstitutional were it interpreted to prohibit political expression and election campaigning on the internet.[23] The Court reasoned that the possibility that defamation and false information might be disseminated could not justify a complete ban of online campaigning even during a limited period. The prior case was overruled to that extent.

The Constitutional Court has decided only a handful cases challenging the NEC's regulatory decisions, but two of them are quite dramatic.[24] Both involved President Roh Moo-Hyun. Roh, the candidate of the liberal Millennium Democratic Party (MDP), won the presidency in December 2002.[25] Though reasonably popular himself, Roh faced large political problems. The conservative Grand National Party (GNP) had a majority in the National Assembly, and the MDP itself was internally divided with Roh representing a younger insurgency within the party. Roh's supporters left the party in September 2003 to form the Uri Party, and the old guard formed an informal anti-Roh coalition with the GNP. On the policy level, Roh faced a weak economy and suspicion from the United States that he was likely to be an unreliable ally.

Elections for the National Assembly were scheduled for April 2004, and Roh hoped that its outcome would strengthen his political position by installing a substantial number of his supporters from the new Uri Party in the Assembly. Following up on an earlier speech urging people to support his party, in February 2004 Roh gave a speech in which he urged voters to support the Uri Party, saying that he "would like to do anything that is legal if it may lead to votes for the Uri Party." Four days later the GNP filed a complaint with the NEC alleging that Roh's speech violated a statute requiring that the President be impartial in elections. Within a week the NEC sent a letter to Roh "requesting" that he remain neutral. A week after that Roh held a press conference in which he refused to apologize for making the speech and said that he disagreed with the NEC's substantive conclusion about his duties as President: "I would like to make it clear that the decision of the National Election Commission at this time is not convincing," and was a continuation of pre-1987 practices in which the government "mobilized … the state institutions" to produce election results it favored.

His opponents then impeached Roh, citing his defiance of the NEC as one of many grounds; the precise formulation was that in refusing to do what the NEC asked Roh had failed to protect the constitutional order. Roh sought review in the Constitutional Court, which had the power, express in the Constitution, to review impeachments. Roh was suspended from office while the case was

22) Prohibition of Distribution of UCC (User-Created Content) in Prior-Electioneering, 21-2(a) KCCR 311, 2007Hun-Ma718, July 30, 2009. Five justices out of nine would have held the prohibition unconstitutional, but the Korean Constitution requires a six-judge majority to invalidate the statute.

23) Prohibition of Internet Use for Political Expression and Election Campaign23-2(B) KCCR 739, 2007Hun-Ma1001, 2010Hun-Ba88, 2010Hun-Ma173·191(consolidated), December 29, 2011.

24) In addition to the cases discussed in detail, see also Case on Restoration of Returned Electoral Deposit and Campaign Expenses by Candidate Whose Election is Invalidated, 23-1(b) KCCR 62, 2010Hun-Ba232, April 28, 2001 (upholding the regulation described in the case's title; the relevant statute deals expressly only with return of deposits by unsuccessful candidates).

25) For full details, see Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-Hyun from a Comparative Constitutional Perspective*, 53 Am. J. Comp. L. 403 (2005).

pending, but the April elections went forward. The Uri Party won a massive victory, gaining 105 seats, far more than the 47 it had held in the prior Assembly, amounting to an absolute majority of 152 seats in a 199-member legislature; the MDP, Roh's former party, went from 63 to 9 seats.

The Constitutional Court held that Roh had indeed violated his constitutional obligations, but that the violations were not serious enough to warrant his removal from office.[26] The opinion discussed all the grounds the National Assembly had cited in impeaching Roh, but here I focus only on the charge related to the NEC's letter. The Court's analysis began with a discussion of the duty of public officials to be neutral in elections, which, it said, followed from the "principle of free election … that the voters should be able to make their own judgment and decisions in a free and open process…." The President was a public official covered by this principle because he was "in a position to threaten" the free-election principle; in this he was different from legislators, "from whom political neutrality concerning elections cannot be requested" because they are "active figures at the electoral campaign." Note that this suggests that Roh's mistake was to express an opinion about who should win the upcoming election for the National Assembly (and note as well that no President would ever be in a position to 'influence" his or her own election campaign because Korean presidents serve a single nonrenewable six-year term).

The Court acknowledged the President was a member – indeed, the leading member – of a political party. And, the Court agreed, the President could continue to act within the party, for example by participating in a party's convention. But, though elected as a party member, once in office the President doesn't "implement[ ] the policies of the ruling party," but "is obligated to serve and realize the public interest," which presumably must be defined as distinct from the party platform on which the President ran. "The President is obligated to unify the social community by serving the entire population beyond that segment of the population supporting him or her." Turning to the "feverous competition" among parties in legislative campaigns, the Court held that a presidential statement "unilaterally supporting a particular political party" necessarily "distorts the process of the independent formation of the public's opinions based on a just evaluation of the political parties and the candidates." That competition "is significantly perverted by one-sided intervention of the President supporting a particular party."

The Court agreed with the National Assembly that Roh's response to the NEC request violated his duty to protect and defend the Constitution. Of course Roh could criticize the underlying law on which the NEC relied, and could seek its repeal or amendment. But "questioning the constitutionality of [the] statute itself in front of the national public constitutes a violation of the President's obligation to protect the Constitution." Such statements "might have significantly negative influence on the realization of a government by the rule of law, … by lowering the public's awareness to abide by the law." Note here that this is an extremely strong rejection of the view that each branch of government is entitled to decide for itself on a statute's constitutionality, subject only to an ultimate duty to comply with judicial holdings. And this anti-departmentalist stance implicitly assimilates the NEC to the judicial branch, because the NEC's request plainly

26) Impeachment of the President (Roh Moo-Hyun) Case, 16-1 KCCR 609, 2004Hun-Na1, May 14, 2004.

rested upon a contestable judgment about the constitutionality of the "political neutrality" statute's applicability to the presidency.

But, after all this, the Court allowed Roh to remain in office because his constitutional violations were not "grave" enough to justify removal. His statements were "unaggressive, passive, and incidental, during the course of expressing the president's political belief or policy design in the form of a response to the question posed by the reporters at a press conference." And, returning to a theme it had briefly addressed, the Court noted the "blurred" boundary between permissible presidential actions within his party-political role and impermissible statements violating the duty of political neutrality.

Returned to office, Roh was not done with conflicts with the NEC. Roughly six months before his term ended in 2008, he again got into trouble with it. This time a presidential election was in prospect (held in December 2007). Roh made a largely ceremonial speech to a public forum, in the course of which he said that "it will be a problem if foreign newspapers comment that the Korean leader is the daughter of a dictator [referring to Park Geun-hye, who narrowly lost the GNP primary election in several weeks later]." He also said that the GNP "is an irresponsible party." A few days later Roh received an honorary degree from a Korean university and delivered an address nominally on democracy. In the speech he criticized proposals put forth by the GNP's presidential candidate. Two days later he offered "congratulatory remarks" at a celebration of the anniversary of one of the 1987 protests that led to the establishment of a democratic government in Korea. Among his comments were criticisms of his opponents, "those who were in power in the past allied with conservative press." Within days of each speech the NEC met and reviewed Roh's statements, finding in each case that he had violated the duty of political neutrality. It sent him "notifications" of its conclusion that he had "defamed the opposition party and its potential presidential candidate," and "advised" him "to abstain from making any speech which may influence elections." Roh sought review in the Constitutional Court, arguing that the NEC's notices violated his right to free expression.

Again the Court found against Roh.[27] After disposing of the objection that, as mere "notices," the NEC's letters were not exercises of public power that could be unconstitutional, the Court turned to the merits. In a section headed, "President as a politician," the five-justice majority opinion devoted somewhat more space here than the Court had in 2004 to the real problem posed by the NEC's position. The discussion opened with the sensible observation, "Modern democracy has changed from representative democracy to party politics democracy." Parties "shape political ideas and influence state policies."[28] And, having been nominated by a party and winning as a party candidate, the President could continue to participate in party affairs. All this simply restated the analysis from 2004. But now the majority acknowledged openly that the President "is likely to be closely related to the policy and interests of a certain political group," which created the

27) Petition to Invalidate the Notice of Compliance Request for President's Duty of Impartiality toward Election, 20-2(a) KCCR 139, 2007Hun-Ma700, Jan. 17, 2008.

28) The official translation of the opinion into English is more stilted than others I have quoted, and I have freely adapted the language to make it more readable.

possibility of a conflict between the President's "freedom of political activity" and his duty of impartiality in elections. The President "not only executes his political party's policy but also owes the duty to promote public goods" and must "serve all the people." But, when a conflict arose, the duty of impartiality prevails.

The difficulty with this analysis of course is that, from the viewpoint of the President considered as party leader, the party's policies *are* the "public goods" that he or she must promote in his or her capacity as President. The opinion hints at a solution by suggesting that officials charged with the on-the-ground administration of elections might be influenced by, for example, Roh's statements criticizing the GNP: The statements might matter "because public officials tend to consider the political orientation of the President who supervises the personnel management although their employment is guaranteed under the law." Exactly what this means is obscure, although it might be hinting at the possibility that civil servants will exercise their discretion to tilt their services in favor of the President's position and against the opposition's. Yet, when we combine civil service protections with the fact that a president can serve only one term and the fact that presidential statements directed at elections have to be made in some temporal proximity to an election, this risk seems quite small.[29)]

Taken on its face, the Constitutional Court's image of politics blends the express idea that voters should choose their representatives based upon an unbiased evaluation of the candidates' position – phrases like "free and open process" and "truly free decisions" recur in the opinions – with an implicit but clearly present sense that voters will be "unduly" deferential to statements made by the President, who – again implicitly but clearly – they believe represents the nation as a whole. And the latter is true even though voters of course know that the President was elected in a competitive party-based election. The decisions discussed here seem to be seeking to impose a degree of orderliness on the messiness of politics in such a world.

Of course the two decisions on which I have focused dealt with a single political figure, who perhaps fell outside the boundaries of what the legal and electoral specialists on the two institutions believed to be permissible (roughly centrist) politics. Notably, the membership of the NEC when it acted against Roh consisted almost entirely of appointees of officials in place before Roh became president (appointees of the prior president and the chief justice). And Roh's governing style of appealing directly the people was in tension with the dominant elitist style of governance that seeks to make politics "orderly." It is not that the NEC membership was unfamiliar with politics, but rather that most of its members had a specific view of how politics should be conducted, a view that conflicted with Roh's governing style.[30)]

That said, neither the NEC nor the Constitutional Court seem to have a sensible account of a president's duties (or, more generally, of the idea of electoral fairness) in a party-political world.

29) The majority ended by finding that Roh's statements violated the duty of impartiality: They were made within six months of the scheduled presidential election, at a time when the potential candidates and "their general policies were already known to the public," they were made at relatively large public gatherings (rather than in small private settings), and they occurred during the ordinary hours of work.

30) Here too we see the constitutive role of the Election Commission and the Constitutional Court.

Recall the case for IPDs: They are needed because Madisonian mechanisms are inadequate to ensure the stability of democratic institutions in a party-political world, and they do so by deploying relatively less political forms of expertise. The institutions' difficulties in coming up with a plausible account of the President's duty of electoral fairness suggests that IPDs might not be an adequate supplement to Madisonian mechanisms.

V. Some Comparisons with India and the United States

For about two decades – and perhaps for several years to come – the Indian Electoral Commission has endorsed a view of politics quite similar to that offered in South Korea. The Indian Constitution created an independent Election Commission with a single head who was guaranteed tenure like that of Supreme Court judges. Parliament could add additional commissioners, as it has; those commissioners can be removed only if the Chief Election Commissioner approves. Indian politics from independence through 1977 was dominated by the Congress Party. From that year until the early 2000s governments were coalitions, often but not always including the Congress Party.

Initially the Election Commission's primary task was election administration narrowly defined: maintaining election rolls and ensuring accurate vote tabulations. Doing so in a nation as large as India posed substantial challenges, and the Commission's performance of these largely technical duties gained it popular support and respect. As the party system shifted from one-party dominance to coalition governments, the Election Commission was able to expand its remit. A key moment was the arrival of a new Chief Election Commissioner T.N. Seshan in 1990. Sesahn was a career civil servant, a dynamic figure who ushered in "a period of activism … engag[ing] with a fluid party system and new aspects of political mobilization," strengthening his position by "alternatively appeasing and colluding with" the two major parties.[31)]

Seshan built upon a "Code of Conduct" for conducting election campaigns that had initially been adopted in the state of Kerala in 1960, where vigorous party competition existed.[32)] Invoking the idea that politics should be conducted differently once votes are being cast – for example, a candidate should not be able to adjust her campaign platform after some voters had cast their votes in light of the platforms they had been presented with – , Seshan used the Commission's power to determine the dates of elections as a method of getting parties to comply with campaign regulations he favored.[33)] As the period between the opening of a campaign and the first days of voting

31) Christophe Jaffrelot, "T.N. Seshan and the Election Commission," in THE GREAT MARCH OF DEMOCRACY: SEVEN DECADES OF INDIA'S ELECTIONS (S.Y. Qurashi ed. 2019), at p. 107; David Gilmartin, *One Day's Sultan: T.N. Seshan and Indian Democracy*, 43 CONTRIBUTIONS TO INDIAN SOCIOLOGY 247, 265 (2009); Alistair McMillan, "The Election Commission," THE OXFORD COMPANION TO POLITICS IN INDIA (Niraja Gopal Jayal & Pratap Bhanu Mehta eds., 2010), at pp. 99, 112.

32) For the Code's origins, see McMillan, "Election Commission," note 31, above, at p. 109.

33) Seshan apparently rooted this distinctive morality in an expansive notion of voter coercion. *See* David Gilmartin, *One Day's Sultan: T.N. Seshan and Indian Democracy*, 43 CONTRIBUTIONS TO INDIAN SOCIOLOGY 247, 253 (2009) (quoting a speech by Seshan).

contracted and the length of the voting period grew – according to McMillan, from two days in 1980 to about a month after 1996 – the Commission's ability to control campaign behavior increased as well.[34]

Seshan suspended elections scheduled to fill vacant seats because in one case the local Chief Minister used a government helicopter to campaign and in another the governing party promised "to include Dalit converts to Christianity in the list of Scheduled Castes" – that is, had made a campaign "appeal to caste."[35] He challenged "the announcement or undertaking of any government policies during election campaigns that might be construed as government attempts to use its power to unduly influence the voters." A government promise to expand the list of Scheduled Castes, announcements of new development plans, even visits by government ministers to areas with by-elections – all came under Seshan's critical eye. He attempted to block the government from adopting a new cotton export program during a campaign. Seshan vigorously "enforced" – via publicity – Code policies aimed at reducing purely emotional appeals to voters, through loudspeakers, banners, and posters. According to Jaffrelot, the 1996 elections "were no longer marked by innumerable rallies, a plethora of posters, and the use of blaring mobile loudspeakers or video vans…."[36]

Read against a background political tradition in which politics has "a carnival-like atmosphere,"[37] Seshan's project might be understood as an effort to reconstitute campaigns to make them somewhat more deliberative. Even on this understanding the project was probably unrealistic as well, unless we count quite small changes as indications of the project's success. Seshan's vision of political campaigns is regularly characterized as bureaucratic and middle-class; a recent discussion refers to "a kind of technocratic efficiency by the ECI that appeals to the Indian middle class."[38]

U.S. constitutional law offers a dramatic contrast to what's found in South Korea and India. Essentially all of the regulations found permissible in South Korea and India would be clearly unconstitutional in the United States, largely because the U.S. Supreme Court has a dramatically different vision of what election campaigns can be: raucous, non-deliberative, something like a free-for-all.

The United States lacks a national election body (other than the Supreme Court when constitutional disputes over election rules come to it). Election management in the United States is highly decentralized. At the subnational level most states leave election management to officials typically known as Secretaries of State, most of whom are elected in party-based elections. The

34) McMillan, *Regulation and Administration*, note 31, at p. 194.

35) REHNA ALI, THE WORKING OF THE ELECTION COMMISSION OF INDIA (2001), at p. 51. The Supreme Court twice overrode Seshan's refusals to set election dates, finding his concerns about election security and voter identification misplaced. McMillan, "Election Commission," note 31, above, at p. 105.

36) Jaffrelot, note 31, above, at p. 109; Gilmartin, note 31, above, at pp. 257, 261, 267.

37) Gilmartin, note 31, above, at p. 277 (quoting Swapan Dasgupta).

38) Sridharan & Vaishnav, E. Sridharan & Milan Vaisnaw, "Election Commission of India," in RETHINKING PUBLIC INSTITUTIONS IN INDIA (Devesh Kapur, Pratap Bhanu Mehta & Milan Vaishnav eds. 2017), p. 442. Gilmartin, note 31. above, at p. 281, also connects Seshan's approach to "long-standing assumptions among literate Indian elites that they had a special duty … to tame the unruliness of India's everyday life" through advancing "transcendent principles of law."

substantive rules governing elections are set by varying state laws, supplemented by important national legislation dealing with campaign finance and protection of the rights of demographic minorities. For present purposes, though, the U.S. Constitution's guarantee of freedom of expression is the main source of rules about how candidates can campaign.

Several states have statutes prohibiting false statements in election campaigns.[39] The U.S. Supreme Court hasn't considered the constitutionality of these statutes. It has held unconstitutional a statute making it a criminal offense to lie about the fact that one has received a military honor. Among the reasons offered by the Court's plurality was that the nation's "constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." The government could punish false statements only when they are used to gain "material advantage."[40]

We might think that making a false statement to enhance a candidate's chance of election would count as material advantage. The leading commentator and the most important lower court decisions contend otherwise, though. Dealing with one such statute, a court wrote, "we do not want the Government … deciding what is political truth – for fear that the Government might persecute those who criticize it. Instead, in a democracy, the voters should decide."[41] Another observed, "We … leave room for the rough and tumble of political discourse…."[42] These phrases pick up on one of the most widely cited phrases in U.S. free expression jurisprudence: The First Amendment requires that states allow "debate upon public issues … [to be] uninhibited, robust, and wide-open."[43]

Applied to political campaigns, these rules and the impulse underlying them constitute U.S. political campaigns as raucous events, focused on what some might think trivialities, full of overstatements and heightened rhetoric – the opposite of the image of politics offered by the South Korean and Indian courts and election commissions. Perhaps the different images emerge from different political histories: much more turbulent overall in South Korea and India than in the United States until recently. If so, recent developments in the United States might induce some rethinking in the United States. One such development is rising concern, centered in the Democratic Party, about the prevalence of "fake news" promulgated by non-U.S. sources and intended to undermine confidence in U.S. elections. Another is a concern, centered in the Republican Party, that election administration has not prevented widespread fraud in the actual process of voting. The first concern might generate novel legislation aimed at policing political discourse to ensure something like "accuracy" in political assertions. The second concern might generate legislation restoring a much older system in which all ballots were to be cast on a single day of civic participation. Were the U.S. Supreme Court to uphold these or similar laws it might in turn generate an image of desirable politics more like that conveyed in South Korean and Indian law.

39) For a review of the cases, see Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 Montana L. Rev. 53 (2013).

40) United States v. Alvarez, 567 U.S. 709, 723 (2012) (opinion of Kennedy, J.).

41) Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (2014).

42) 281 Care Committee v. Arneson, 766 F.3d. 774, 795 (8th Cir. 2014).

43) New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

VI. Conclusion

Election commissions are supposed to reduce the risk that elections will be conducted unfairly when political parties alone control how elections are run and votes counted. Even on these terms the record of fourth-branch election commissions is mixed at best. They have proven to be subject to the same kinds of partisan manipulation that can affect statutory commissions, for example. Antonio Ugues's study of four Central American countries suggests the difficulties. In all four expertise is expressly taken into account in appointing members. Only in Guatemala does the election commission operate without strong partisan bias.[44] In El Salvador the presence of members chosen on the basis of party seems to have infected the body's operation. In Nicaragua members of the Supreme Election Council are nominated by the executive and legislature after consulting civil society members, and confirmed only after receiving a 60% vote in the legislature; according to Ugues, "the Council … has become highly politicized through various formal and informal measures…."[45] Using the example of the addition of two commissioners to India's NEC as his example, Michael Pal points out that drafting "gaps" can provide opportunities for partisan manipulation.[46]

Yet, even complete "success" in reducing, even eliminating, the role that party politics plays in election administration doesn't mean eliminating politics. A different sort of politics replaces party politics: Election administration under party politics constitutes elections in one way; election administration without party politics constitutes elections differently.

We can use the descriptions offered of South Korean and Indian politics to develop an idea of the non-party politics of election administration. Elections in India were raucous, festive, loud, engaging ordinary people in ways they are comfortable with – messy and undisciplined. Similarly with Roh's form of politics. The politics that election commissions produce is a restrained, deliberative, calm one. As we have seen, some observers call that sort of politics "middle class"; I have described it as technocratic and orderly. Seen in its best light, that sort of politics engages ordinary people in ways that might incline them to become "better" democratic citizens – more informed about the issues, more deliberative, more attentive to "the merits" of parties' policy proposals. Seen in a less glowing light, this politics might suppress citizen engagement – and, as the "middle class" description suggests, perhaps in ways that have differential effects on the policies politics generates.

As IPDs, then, electoral commissions do protect constitutional democracy – but a specific form

44) The Supreme Electoral Commission there is nominated by "a special nominating commission and confirmed by the national legislature with a two-thirds vote." Antonio Ugues, "Electoral Management Bodies in Central America," in Advancing Electoral Integrity (Pippa Norris, Richard W. Frank, & Ferran Martinez i Coma eds. 2104), at 129.

45) *Id*. at 128. Michael Pal identifies one subtle problem: Often the election commission's charge is parasitic upon legislation. It might be charged with compiling an accurate electoral roll of eligible voters, but the legislature can sometimes define eligibility criteria. Or it might be charged with making sure that the person casting a ballot is in fact a registered voter, but the legislature might have the power to define documents needed to ascertain the person's identity. Pal, note 31, above, at 106-07.

46) Pal, note31, above, at 107-08. Pal provides additional examples from Kenya and South Africa showing how dominant political parties can exploit design gaps.

of constitutional democracy. Whether that form is preferable to the messy contestations of party politics, with their attendant risk of biased election administration, will of course depend upon how effective Madisonian mechanisms are in the context of specific party configurations.

South Korea's Multilayered "Basic Order": Uses and Meanings in Constitutional Rulings from 1989 to 2019

JUSTINE GUICHARD*

Abstract

The notion of "basic order" is central to the work that the Constitutional Court of Korea has performed since it started to operate in 1988, the institution having endorsed the mission to protect not only the basic rights of individuals but also the "basic order" of the Republic of Korea. To further our understanding of what lies behind this term, the present study offers an overview of the 199 rulings in which the "basic order" has appeared between 1989 and 2019, never alone but as part of diverse phrases such as "free democratic basic order," "economic basic order" or "constitutional basic order." Quantitatively analyzing all of these cases and qualitatively focusing on some, the research interrogates whether a consistent "basic order" doctrine can be discerned through the uses made of and meanings given to the various expressions incorporating this notion.

* Associate Professor of Korean Studies, University of Paris.

I. Introduction

In the weeks after the Constitutional Court of Korea opened its doors in September 1988, it received nine cases, all of which were constitutional complaints—a system enabling anyone whose constitutionally guaranteed rights (i.e., basic or fundamental rights) have been infringed by governmental power to refer the matter to the new institution and guardian of the Constitution. Over the years, this mechanism has contributed to the vast quantity and variety of issues that the Court's nine justices have been asked to settle. By September 2020, no less than 40,872 cases had been filed, most of which were constitutional complaints—39,753 to be exact. The rest consisted of 1,002 requests by ordinary courts for reviewing the constitutionality of the statutes they have to apply, 113 competence disputes between state and local governments or agencies, two presidential impeachment proceedings, and two motions to dissolve a political party.[1] Together, these different forms of adjudication make up the Court's five functions.[2]

The present chapter examines a selection of rulings that cuts across these functions and sheds light on the role that the Constitutional Court has played in South Korean democracy since 1988. Far from having to safeguard basic rights only, the Court indeed acts and defines itself as the protector of a larger "basic order" (*kibon chilsŏ*). To further our understanding of what this "basic order" is, the study here conducted offers an overview of the rulings in which the term appears, never alone but as part of diverse phrases. Between 1989 and 2019, a total of 199 decisions were identified as mentioning at least once a "basic order" expression. The most prevalent one is "free democratic basic order" (*chayu minjujŏk kibon chilsŏ* or *chayu minjujuŭi kibon chilsŏ*), which features in 106 rulings and has attracted significant scholarly attention already.[3] Other formulas comprise "democratic basic order" (*minjujŏk kibon chilsŏ*, found in 39 rulings), "constitutional basic order" (*hŏnpŏpŭi kibon chilsŏ*, employed in 18 rulings), and "constitutional democratic basic order" (*hŏnpŏpŭi minjujŏk kibon chilsŏ*, present in 15 rulings). Yet, this plurality of terms does not stop there. Alongside those cited exist derivatives such as "representative democratic basic order" (*taeŭi minjujŏk kibon chilsŏ*), "constitutional political basic order" (*hŏnpŏpŭi chŏngch'ijŏk kibon chilsŏ*), and "national basic order" (*kukka kibon chilsŏ*), each identified in a couple of judgments, as well as the recurring phrase "economic basic order" (*kyŏngjejŏk kibon chilsŏ* or *kyŏngjeŭi kibon chilsŏ*, appearing in 17 decisions).

Quantitatively analyzing all of these cases and qualitatively focusing on some, among which several of the Constitutional Court's most high-profile verdicts summarized or translated into English, this chapter explores the uses made of and meanings given to South Korea's "basic order." Through the various expressions incorporating this notion, the research more specifically

1) Constitutional Court of Korea (CCK), statistics available on the institution's official English website at: http://english.ccourt.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do (last consulted on December 29, 2020).

2) Constitution of the Republic of Korea, Article 111.

3) For a justification of this translation and an analysis of scholarly discourses, see Hannes B. Mosler, "Decoding the 'Free Democratic Basic Order' for the Unification of Korea," *Korea Journal*, Vol. 57, No. 2, 2017, 5-34.

interrogates whether a consistent "basic order" doctrine can be discerned in the Court's rulings, like a "basic structure" doctrine has been developed in certain countries such as India, most notably.[4] Finding overlapping definitions of "basic order" terms but no full articulation of them, this study argues that South Korea's "basic order" is best understood as multilayered. Initially borrowed from Germany, the expression does not simply embody a phenomenon of constitutional diffusion from abroad but also, and perhaps more importantly, one of constitutional diffusion within as it has morphed and proliferated in South Korea since its introduction in the 1960s. The first part of this chapter retraces when and how diverse "basic order" formulas have surfaced in constitutional law and case law, reconstituting their temporal and thematic distribution in the Court's decisions. The second part concentrates on the "free democratic basic order" and shows that it is itself far from being a fixed notion despite its apparently straightforward definition, its use having been subjected to variations, evolutions, and contestations in both translated and original versions.

II. Rise and Decline of "Basic Order" Expressions over Time

1. From Constitutional to Jurisprudential Diffusion

The plurality of terms found in constitutional jurisprudence partly comes from the Constitution itself, reflecting the different historical strata that compose its text. No mention of the "basic order" was made in the founding Constitution that the Republic of Korea adopted in 1948—a document which has not been replaced but instead revised nine times through the decades. The expression "constitutional democratic basic order" (*hŏnpŏpŭi minjujŏk kibon chilsŏ*) was introduced in 1960 on the occasion of the Constitution's third revision after the fall of South Korea's first president, Rhee Syngman (1948-1960), ousted by the so-called April 19 Students' Revolution. The newly written Article 13 then stipulated that political parties can be dissolved by the Constitutional Court, an institution which did not exist before, when their aims and activities are against the "constitutional democratic basic order"—a requirement actually meant to provide them a form of protection against the state.[5] All of these elements amounted to transplants from the 1949 German Basic Law, whose Article 21 already deemed unconstitutional political parties that "seek to undermine or abolish the free democratic basic order" (*freiheitliche demokratische Grundordnung*) and entrusted the Federal Constitutional Court with the task of determining whether or not they did.[6] In 1962, Article 13 of the South Korean Constitution became Article 7 with minor variations, the

4) See, for instance, Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, New Delhi: Oxford University Press, 2010.

5) Hannes B. Mosler, "Translating Constitutional Norms and Ideas: Genesis and Change of the German 'Free Democratic Basic Order'," *Verfassung und Recht in Übersee/World Comparative Law*, Vol. 52, No. 2, 2019, 198.

6) Basic Law for the Federal Republic of Germany, Article 21, translation by Christian Tomuschat et al. in cooperation with the Language Service of the German Bundestag available at: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last consulted on December 29, 2020).

briefly existing Constitutional Court in charge of dissolving political parties being replaced by the Supreme Court and the "constitutional democratic basic order" by the "democratic basic order" (*minjujŏk kibon chilsŏ*), another slight alteration of the original German expression.

An actual reference to the "free democratic basic order" (*chayu minjujŏk kibon chilsŏ*) was only added to the Constitution a decade later, in 1972. Its insertion took place in the context of its seventh amendment under the always and increasingly authoritarian rule of Park Chung-hee (1961-1979), at a time when evolving international relations forced the two Koreas "to prepare a possible transition to a post-Cold War era independently from their patrons, which ultimately led to each strengthening their system vis-à-vis the other."[7] As a result, two new interconnected objectives were mentioned in the preamble of the so-called Yushin Constitution: on the one hand, pursuing the "peaceful unification of the homeland"; on the other hand, strengthening the "free democratic basic order," implying that the system of the South should ultimately prevail over that of the North in the event of the two Koreas' integration. In parallel to this momentous change, a Constitutional Committee was designated as the institution now in charge of dissolving political parties posing a threat to the "democratic basic order," making two similar yet not identical "basic order" expressions coexist in the South Korean Constitution.

This juxtaposition continues in the current version of the text, which was last revised in 1987 in the course of the country's transition to institutional democracy. In addition to remaining in the preamble, the expression "free democratic basic order" was then inserted in Article 4, a novel provision asserting that "The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the free democratic basic order."[8] As part of the 1987 amendment process, Article 7 on political parties also became Article 8 and the power to dissolve those endangering the "democratic basic order" reverted to the resurrected Constitutional Court. Overall, one can thus find in today's Constitution two different "basic order" references in three different places, the "free democratic basic order" being mentioned in the preamble and Article 4 while the "democratic basic order" is invoked in Article 8. As a result, it can be said that South Korea's "basic order" does not simply represent a case of diffusion from abroad, namely Germany. It has also involved a phenomenon of diffusion within, which has not been limited to the Constitution but has spread to and through constitutional jurisprudence.

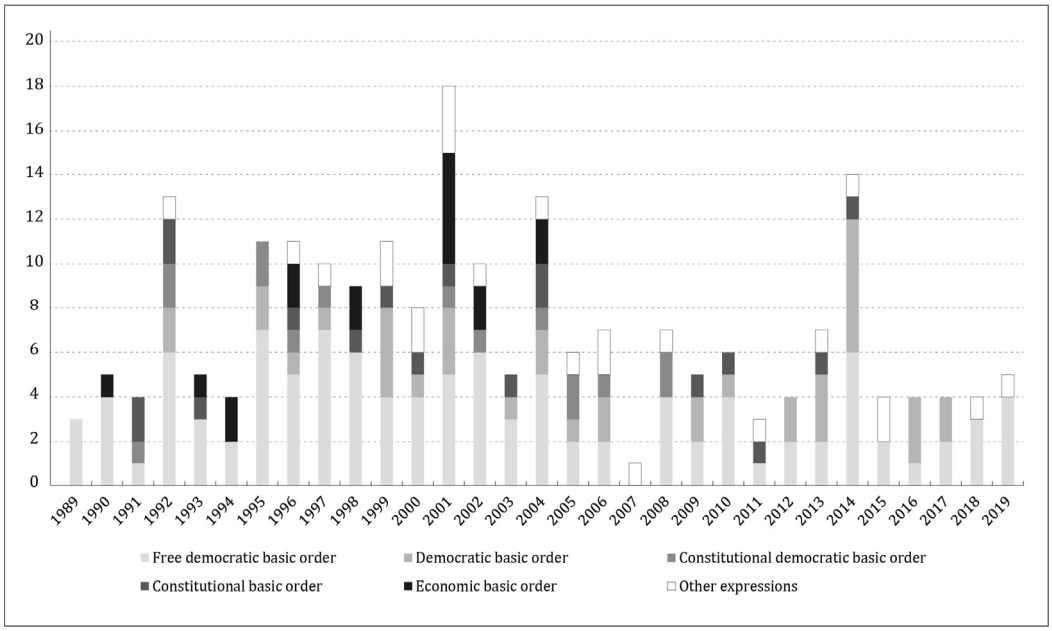
Graphs 1 and 2 illustrate the distribution of various "basic order" phrases in the Constitutional Court's rulings between 1989 and 2019. As previously indicated, the term "free democratic basic order" appears predominant, having been consistently in use during this period—that is to say, referred to in at least one decision every year for three decades, except in 2007. It was also the first "basic order" expression employed in constitutional decisions and the only one identified in 1989. Since then, a double pattern seems to have prevailed: on the one hand, the early diversification of the "basic order" formulas relied on by the Court; on the other hand, the institution's recent

7) Mosler 2016, 11.

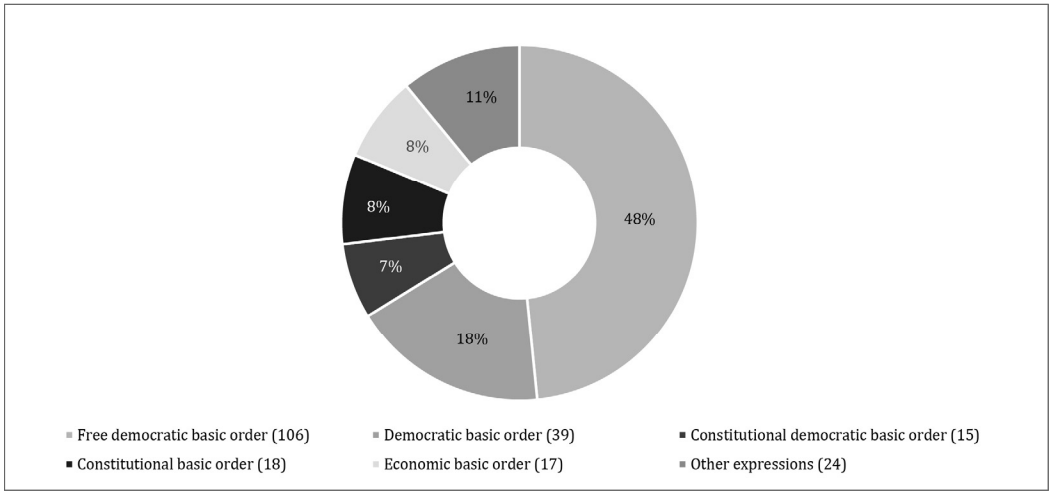
8) Constitution of the Republic of Korea, Article 4, based on the translation of the Korea Law Translation Center (KLT) available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG%20 (last con sulted on December 29, 2020). In its translation, the KLT renders the "free democratic basic order" as the "basic free and democratic order."

tendency to mobilize less rather than more terms in its judgments.

Graph 1: Rulings with at least one mention of a "basic order" expression between 1989 and 2019 (distribution per year)



Graph 2: Rulings with at least one mention of a "basic order" expression between 1989 and 2019 (distribution per expression)



Note: The total number of rulings amounts to 199 rather than 219 because some expressions appear in the same decisions.

2. Early Diversification of "Basic Order" Expressions

In 1989, the expression "free democratic basic order" was the only one resorted to by the Constitutional Court. Its justices invoked it in three landmark rulings. These were the so-called Preventive Detention Case (which found criminal convicts' preventive confinement unconstitutional when mandatory as opposed to discretionary), the Forests Survey Inspection Request Case (which recognized the existence of a right to know), and the National Assembly Candidacy Deposit Case (which ruled the requirement that candidates deposit large sums of money to run for legislative elections non-conforming to the Constitution).[9] Interestingly, each of these decisions evoked the "free democratic basic order" without offering a definition. While the phrase figured all but once as part of a dissenting opinion in the Preventive Detention Case, it featured more prominently in the Forests Survey Inspection Request Case (with two references) and, even more so, in the National Assembly Candidacy Deposit Case (with a total of nine mentions).

In this ruling, the Constitutional Court pronounced itself against Articles 33 and 34 of the Election of National Assembly Members Act requiring a deposit of twenty million won for independent candidates and ten million won for party nominees (approximately twenty and ten thousand dollars respectively). Reasoning back in 1989 that "the average amount of savings of the economically active in this country is 6.93 million won," the Court went on declaring that "the deposit requirement of ten or twenty million is prohibitive to people of ordinary income or in their twenties' or thirties', and therefore permits only the wealthy to the candidacy. Therefore, it is excessive. They [the two deposits] violate the basic principles of people's sovereignty and of free democracy in relation to right of equality (Article 11), right to vote (Article 24) and right to hold public office (Article 25) of the Constitution."[10] In the original text, the Court further advanced the argument that the "free democratic basic order" is endangered when the electoral system is dissociated from democratic politics or, as the justices alternatively put it, when representative institutions are disconnected from the popular will.[11] Despite these significant affirmations, no definition of the "free democratic basic order" was articulated in this decision.

The next year, in 1990, the phrase "economic basic order" found its way in constitutional language, appearing in the so-called Prohibition of Third-Party Intervention in Labor Disputes Case.[12] The Court then "upheld the Labor Dispute Adjustment Act that prohibits third party intervention in a labor-management dispute," a position for which it was criticized by those contending that "workers need advice and assistance from third parties such as experts on labor issues, scholars, legal professionals, etc. in order to exercise their three basic labor rights guaranteed by the Constitution."[13] These are "the right to independent association, collective

9) 88Hun-Ka5, July 14, 1989; 88Hun-Ma22, September 4, 1989; 88Hun-Ka6, September 8, 1989.

10) Constitutional Court of Korea, *The First Ten Years of the Korean Constitutional Court*, Seoul: Constitutional Court, 2001, 173.

11) 88Hun-Ka6, 213 and 244.

12) 89Hun-Ka103, January 15, 1990.

13) CCK 2001, 248.

bargaining and collective action."[14] Their protection was considered to be part of the "economic basic order" that the Court referred to in this decision and defined as resting on the principle of market economy, itself based on the respect for the freedom and creative initiative of individuals and enterprises.[15] These two values can be found in the Constitution, which stipulates that their respect is at the heart of South Korea's "economic order" (Article 119, Section 1) while "The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents" (Article 119, Section 2).[16] The phrase "economic basic order," however, is nowhere present in the text of the Constitution and appears as a jurisprudential innovation.

The following year, in 1991, the formulas "constitutional basic order" and "constitutional democratic basic order," which are not mentioned in the Constitution either, were incorporated in three rulings. The former was more specifically mentioned in two decisions, the first of which was the so-called Prescriptive Acquisition of Miscellaneous State Property Case.[17] Featuring three times in this judgment, the "constitutional basic order" was explicitly associated with the principle of free democracy, but not only. Rather, it was presented as resting on two pillars: free democracy and the rule of law.[18] The second ruling in which the expression appeared concerned the Movie Act, which should come as no surprise given that the phrase "constitutional basic order" was part of the law itself.[19] It was introduced in the Movie Act in 1966, four years after this piece of legislation came into being, to permit the Ministry of Information to censor the films contradicting the "constitutional basic order" among other things. As for the "constitutional democratic basic order" also identified in jurisprudence for the first time in 1991, it was mentioned in a ruling reviewing the Election of Local Council Members Act and deemed to be at risk of being violated by restrictions imposed on the right of political participation. The restrictions in question were nonetheless found legitimate in the case at hand.[20]

In 1992, it was the turn of the phrase "democratic basic order," mentioned in the Constitution's Article 8, to emerge in two decisions where it was used alongside other expressions (namely "free democratic basic order" and "constitutional basic order"). These verdicts are part of the 18 out of 199 rulings in which several "basic order" formulas can be seen coexisting. In the rest of the selection, no more than one kind of "basic order" expression is used per decision. On the occasion of its jurisprudential introduction in the two 1992 judgments, one of which was related to the National Security Act and the other to the Election of National Assembly Members Act, the "democratic basic order" was used in the former as a strict equivalent of the "free democratic basic order" but only within the frame of a dissenting opinion while it was cited by the majority in the

14) Constitution of the Republic of Korea, Article 33, KLT translation.
15) 89Hun-Ka103, 13.
16) Constitution of the Republic of Korea, KLT translation.
17) 89Hun-Ka97, May 13, 1991.
18) Ibid., 213.
19) 90Hun-Ma56, June 3, 1991.
20) 90Hun-Ma28, March 11, 1991.

latter but only in reference to the Constitution's Article 8 on political parties.[21] None of these decisions articulated a definition. But the year 1992 is significant for another reason: by then, the five main "basic order" terms analyzed in this chapter had been introduced in the Constitutional Court's language.

In 1996, the Court made its first mention of an entirely new expression, that of "national basic order."[22] It was invoked in a case on the National Security Act not as part of the text itself but of the annex. The phrase has since recurred in three landmark rulings respectively known as the Ban on Civil Servants' Labor Movement Case (as part of a dissenting opinion), the Case on Presidential Emergency Decrees No. 1, 2 and 9 (as part of Emergency Decree No. 1), and the Case on the Annulment of the Supreme Court Judgment That Refused to Recognize the Liability of the State to Pay Compensation for Damages Regarding the Issuance of Emergency Measures (as part of a dissenting opinion again).[23] Together, these decisions belong to a group of 24 rulings in which additional variations on the notion of "basic order" have been provided. The variations in question can be categorized in three categories: firstly, expressions lexically different but semantically equivalent to those already examined (such as "constitutional basic ideology and basic order," "constitutional values and basic order," "our country's basic order based on the principle of free democracy"); secondly, phrases based on but adding new elements to the terminology in use (such as "representative democratic basic order" and "constitutional political basic order"); and thirdly, formulas unrelated to existing ones (such as, apart from "national basic order," "legal system's basic order, "social ethics' basic order," and "family system's basic order").

At the time when the "national basic order" was first referred to in 1996, it is interesting to note that the five main "basic order" expressions were all deployed in different decisions. Each also appeared in 2001 and 2004 rulings. The diversity of terms that can be found in constitutional jurisprudence up to that year, however, has since undergone a decline or reduction that continues to date.

3. Recent Reduction of "Basic Order" Expressions

This decline began with the expression "economic basic order," whose last mention can be traced to 2004. That year, it featured in two cases rendered the same day. One was related to the constitutionality of the National Health Insurance Act's Article 27, in which the "economic basic order" was described as based on the principle of market economy itself associated with the respect of the freedom and creative initiative of individuals and enterprises like in the above-cited 1991 ruling.[24] The other concerned the constitutionality of the Korea High Speed Rail Construction Authority Act's Article 24 and displayed the same exact phrasing.[25] No mention of the "economic

21) 89Hun-Ka8, January 28, 1992; 92Hun-Ma37, March 13, 1992.
22) 95Hun-Ka2, October 4, 1996.
23) 2003Hun-Ba50, October 27, 2005; 2010Hun-Ba132, March 21, 2013; 2015Hun-Ma861, August 30, 2018.
24) 2003Hun-Ba58, August 26, 2004.
25) 2003Hun-Ba28, August 26, 2004.

basic order" can be found after while 31 rulings have referred to the "freedom and creative initiative of individuals and enterprises." Many more have simply invoked the "economic order" (*kyŏngje chilsŏ*) a phrase that has appeared in 111 rulings before 2004 and 147 since. It is also an expression that features in the Constitution, which may explain the Constitutional Court's preference for it and the correlative elimination of the "economic basic order" from its rulings. The same trend can be observed for other terms as well.

The last reference to the "constitutional democratic basic order" dates back to 2008. The formula was employed that year in two rulings both related to the media. The first concerned the constitutionality of the Promotion of the Motion Pictures Industry Act, whose Article 22 listed the "constitutional democratic basic order" at the top of the elements to be taken into consideration when rating a film.[26] Abolished in 2006, the Promotion of the Motion Pictures Industry Act has been replaced by the Promotion of the Motion Pictures and Video Products Act which contains no reference to the "basic order." The second case was related to the Sound Records, Video Products, and Video Games Products Act, whose Article 15 defined the respect of the "constitutional democratic basic order" as one of the conditions for importing materials from abroad.[27] This law having also been abolished in 2006, the disappearance of the term from constitutional jurisprudence can be said to stem from the elimination of a number of restrictive legal statutes and provisions where it was mentioned.

As for the "constitutional basic order," it was last used in a 2014 decision about the National Security Act, itself referencing an earlier judgment known as the Military Secret Leakage Case.[28] Similar to the simplification of the "economic basic order" into the "economic order," the eclipse of the "constitutional basic order" appears related to the Court's greater reliance on the expression "constitutional order" (*hŏnpŏp chilsŏ*). Out of the 597 rulings mentioning the latter, 73 were delivered between 1988 and 1998, 212 between 1999 and 2009, and 312 since 2010. The adjective "basic" has therefore been dropped from a number of phrases in which it featured since the 1990s. From 2014 onwards, the only "basic order" formulas in use can be identified as the "free democratic basic order" and the "democratic basic order." This reduction from five to two main expressions signals a return to the sole ones inscribed in the Constitution and a potential reaction against a long period of terminological proliferation.

4. Overview of "Basic Order" Expressions' Thematic Distribution

A tentative thematic breakdown of the 199 rulings rendered between 1989 and 2019 in which the notion of "basic order" appears reveals that 23 of them (over 11%) deal with the National Security Act, with around the same number and proportion of cases concerning other matters of criminal justice. In addition, more than 10% of the decisions are related to past issues (21 rulings), 10% to electoral laws (20 rulings), 8% to the media (16 rulings), and 7% to politics, a realm comprising

26) 2007Hun-Ka9, July 31, 2008.
27) 2004Hun-Ka18, October 30, 2008.
28) 2011Hun-Ba358, September 25, 2014.

judgments on both parties and presidents (15 rulings). Besides, 19 rulings are connected to the economy and 11 to taxes, accounting together for 15% of the Constitutional Court's "basic order" jurisprudence. The use of the diverse expressions incorporating this notion interestingly varies across these different areas of decision-making.

One can first notice an almost complete and exclusive reliance on the expression "free democratic basic order" in the many rulings reviewing the National Security Act's constitutionality. This issue is one of the most enduring and recurring question that the Court has had to arbitrate since its creation, testifying to the controversiality of a law perceived by its detractors as a legacy of South Korea's successive authoritarian regimes. While the first request to examine this piece of legislation was submitted in 1989 and decided in 1990, the last to date was submitted in 2019 and decided the same year, with an additional 21 cases having been filed in between. The position of the Court has been to reaffirm the National Security Act's constitutionality since its initial finding that the law was conditionally conform to the Constitution—that is to say, provided that it was interpreted and applied in a narrow way.[29] While this ruling has contributed to limit the extensive uses that could be made of the statute, the Court has also recognized its function as an instrument meant to preserve not only national security but also the "free democratic basic order." The contours and contents of the latter were delineated on that occasion as explored in the second part of this chapter. The 1990 decision is not only groundbreaking in terms of definition but also of diffusion within, the "free democratic basic order" invoked by the Court in its argumentation having been borrowed from the Constitution and subsequently inserted in the law following its 1991 revision. The expression is now part of the National Security Act and therefore mentioned each time justices review it, the record of 56 references in one ruling having been reached in 2015.[30]

The language of the "free democratic basic order" also predominates in rulings related to South Korea's authoritarian past. The issues considered by the Constitutional Court comprise the justiciability of the crimes perpetrated in the course of the 1979 coup d'état and of the ensuing repression of the 1980 Gwangju uprising as well as the correlative question of victims' recognition and compensation. These matters started to reach the Court in the mid-1990s, before and after the passage of the Special Act on the May 18 Democratization Movement. Other events and movements than Gwangju's have been legislated and ruled upon since, including in relation to the 1948-1949 Jeju uprising and Park Chung-hee's 1970s emergency decrees. Except for cases connected to the colonial era, the phrase "free democratic basic order" has been prevalent in corresponding jurisprudence. In addition to being mentioned in pieces of legislation such as the Act on the Honor Restoration of and Compensation to Persons Related to Democratization Movements passed in 2000, the expression has been referred to by and disputed before the Court. The historical rather than theoretical definition and contestation of the "free democratic basic order" that emerge from these rulings will be examined in the second part of the analysis.

In contrast to decisions about the National Security Act and the authoritarian past, the phrase

29) 89Hun-Ka113, April 2, 1990.
30) 2013Hun-Ka26, April 30, 2015.

"free democratic basic order" is rarely encountered in rulings reviewing laws on movies, newspapers, videos, music, or broadcasting. Out of the 16 media-related judgments in which a "basic order" formula appears, only three resorted to the "free democratic basic order." The rest relied on the expressions "constitutional democratic basic order" (found in seven rulings) and "constitutional basic order" (employed in six). This should come as no surprise given that such terms, largely left undefined, featured in the laws themselves until they were abolished and replaced starting from the mid-2000s. Another realm where there is no mention of the "free democratic basic order" is in rulings related to the Assembly and Demonstration Act, which has been reviewed on multiple occasions including four all referring to the "democratic basic order." Here again, no specification of its meaning was supplied in them. It is necessary to turn to cases on politics to find one articulated.

Decisions about politics can be conveniently classified into two categories: those concerning presidents and those dealing with parties. The expression "free democratic basic order" figures in six of them, most prominently in the two impeachment rulings rendered by the Constitutional Court in 2004 and 2017.[31] It can also be identified in a series of landmark rulings such as the Case on Prohibition of Public Employees' Collective Opposition or Obstruction against Government Policies, the Case on Prohibition of Using the Name of a Political Party whose Registration has been Cancelled, and the Case on the Prohibition of Collective Action of Public Officials and Political Activities of Teachers' Union.[32] But the phrase "democratic basic order" has been as frequently employed and can be found in high-profile decisions such as the Case on Mutates Mutandis Application of the Statutes and Regulations relating to the Civil Procedure in the Process of Dissolving a Political Party, the Case on the Provision Forbidding Public Officials from Joining a Political Party and Regulating Political Activities, and the two dissolution cases concerning the Unified Progressive Party respectively rendered in 2014 and 2016.[33] The first one is momentous as it contains a definition of the "democratic basic order," which will be analyzed in the second part of this chapter. Cases on politics also present twists on the notion with the expression "representative democratic basic order" featuring in two rulings including the Case on the Registration Requirement of Political Parties.[34]

Similar plural uses of "basic order" expressions can be encountered when it comes to decisions about elections. Half of them exclusively refer to the "free democratic basic order" as do the National Assembly Candidacy Deposit Case and the Unlawful Distribution or Posting of Documents and Printed Materials Case.[35] A close yet unique phrase appears in the Case on Teachers' Resignation Requirement for Candidacy for Public Official Election and Education Superintendent Election Prohibition from Engaging in Election Campaign, a recent ruling from

31) 2004Hun-Na1, May 14, 2004; 2016Hun-Na1, March 10, 2017.

32) 2009Hun-Ma705, May 31, 2012; 2012Hun-Ka19, January 28, 2014; 2011Hun-Ka18, August 28, 2014.

33) 2014Hun-Ma7, February 27, 2014; 2011Hun-Ba42, March 27, 2014; 2013Hun-Da1, December 19, 2014; 2015Hun-A20, May 26, 2016.

34) 2004Hun-Ma246, March 30, 2006.

35) 88Hun-Ka6, September 8, 1989; 2011Hun-Ba17, April 24, 2014.

2019 which is the first and only one to acknowledge the "free and democratic basic order" (*chayuropko minjujuŭi kibon chilsŏ*) as a foreign concept.[36] More specifically, the political activity of civil servants was described in it by dissenting justices as being allowed in the United States and Germany as long as it does not transgress the "free and democratic basic order."[37] By contrast, rulings showing a preference for the "democratic basic order" include the so-called Organizational Campaign Ban Case, Population Disparity in Electoral Redistricting Case, as well as Age Restriction for Voting, Electoral Eligibility, Election Campaigning and Political Party Activities Case.[38]

Finally, the "free democratic basic order" imposes itself as a prevalent yet far from hegemonic expression in the realm of criminal justice. While appearing in landmark rulings such as the Preventive Detention Case and the Law-Abidance Oath Case, other formulas can be found that sometimes correspond to complete innovations.[39] They comprise two references to the "basic order preserving and sustaining society" (for instance, in the Manslaughter of a Lineal Ascendant of the Offender or His Spouse Resulting from Bodily Injury Case), one to the "basic order of the family system" (in the Prohibition of Filing a Complaint against Lineal Ascendants Case), and one to the "basic order of social ethics" (as part of the dissenting opinion in the Adultery Case).[40] These phrases add to the variety of uses that have been made of the "basic order" without quite defining what lies behind it. Few rulings have actually endeavored to clarify its contours and contents. Even those who did do not fully lift the uncertainties surrounding the Constitutional Court's "basic order" terminology, which appears particularly problematic in English.

The second part of this paper focuses on the widely commented notion of "free democratic basic order," which has almost never been translated by the Constitutional Court as such. Like other "basic order" expressions, its translation is more often than not omitted in the Court's English publications and, when present, hardly consistent. Even in original language, however, the notion of "free democratic basic order" is less fixed than it appears, its use having been subjected to evolutions and contestations.

III. The Non-Fixity of the "Free Democratic Basic Order" in Translated and Original Versions

1. Infrequent and Inconsistent Translations

Out of the 199 decisions in which a "basic order" expression can be found, 64 have been partly and sometimes even fully rendered into English. By and large, the "basic order" phrases contained in

36) 2018Hun-Ma222, November 28, 2019.
37) Ibid., 1398.
38) 98Hun-Ma141, November 25, 1999; 2000Hun-Ma92, October 25, 2001.
39) 88Hun-Ka5, July 14, 1989; 98Hun-Ma425, April 25, 2002.
40) 2000Hun-Ba53, March 28, 2003; 2008Hun-Ba56, February 24, 2011; 2011Hun-Ka31, February 26, 2015.

these rulings have not been translated. Moreover, the few that have been do not follow a consistent terminology in the Constitutional Court's English publications, among which are the two important compilations of cases respectively entitled *The First Ten Years of the Constitutional Court* and *Twenty Years of the Constitutional Court of Korea*.[41] As it turns out, the term "basic order" is only employed 13 times in the former, in connection to two judgments, and 17 times in the latter, in connection to the same verdicts plus two others. This paucity calls for a detailed examination of the translations present in both volumes.

Overall, between 1988 and 1998, the Court delivered 66 rulings in which a "basic order" formula appears. 15 of them are considered as landmark decisions and partly summarized in *The First Ten Years* compilation, but with hardly any mention being made of the Court's original "basic order" language. As a matter of fact, the notion has only been translated in connection to two cases: the so-called Praising and Encouraging under the National Security Act Case, ruled upon in 1990, and the May 18 Incident Non-Institution of Prosecution Decision Case, decided in 1995.[42] Both English summaries refer to the "basic order of free democracy," a term used seven times in the first ruling and once in the second in place of the "free democratic basic order" preferred in this chapter.[43] The Praising and Encouraging under the National Security Act Case further provides a general definition of this notion, listing the constitutive elements of the "basic order of free democracy" as "respect for basic rights, separation of power, representative democracy, multi-party system, elections, the economic order based on private property and market economy, and independence of the judiciary."[44]

Other mentions of "basic order" phrases can also be identified in *The First Ten Years* as part of the Constitutional Court's presentation of its powers, such as: "The institution of dissolving political parties functions as a means to defend or struggle for the basic order of free democracy."[45] In a note placed at the end of the term "struggle," the Court was careful to specify that "The choice of the word is intentional and is related to the concept of defensive democracy or militant democracy" conceptualized by Karl Loewenstein, namely "the idea that even democracy can persecute ideas or people if they pose threats to its integrity and security, or that it can protect itself from such ideas or people."[46] The Court then cited Article 8, Section 4 of the Constitution precisely enabling South Korean democracy to defend itself against certain actors: "If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action for its dissolution in the Constitutional Court, and the political party shall be dissolved in accordance to the decision of the Constitutional Court."[47] The publication further

41) CCK 2001; Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court, 2008.

42) 89Hun-Ka113, April 2, 1990; 95Hun-Ma221, December 14, 1995.

43) In addition, the term appears twice not as part of the Praising and Encouraging under the National Security Act Case's summary but commentary.

44) CCK 2001, 136.

45) Ibid., 21.

46) Ibid.; Karl Loewenstein, "Militant Democracy and Fundamental Rights I," *American Political Science Review*, Vol. 31, No. 3, 1937, 417-432, and "Militant Democracy and Fundamental Rights II," *American Political Science Review*, Vol. 31, No. 4, 1937, 638-658.

included a translation of the corresponding provision in the Constitutional Court Act, however using yet another expression: "If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may request to the Constitutional Court, upon a deliberation of the State Council, an adjudication on dissolution of the political party."[48] These three interconnected references to the "basic order of free democracy," the "fundamental democratic order," and the "basic order of democracy" suggest an interchangeable use of the terms "free democratic basic order" and "democratic basic order" preferred in this chapter while revealing two divergent translations of the latter.

In addition, one can find in *The First Ten Years* the expression "basic order of national community" to capture the Constitutional Court's work. The phrase features in a quotation from the inauguration speech delivered by the Court's President Kim Yong-joon in 1994: "Six years ago, when the Court first opened, many expressed concerns about this Court's function and role. Now, the Court has firmly established its status as an institution of constitutional adjudication that protects people's basic rights and defends the constitutional order. We can now take the accomplishments of the First Term as our stepping stone in making our best efforts to prevent infringement of people's basic rights, and thereby be the forerunner in realization of the rule of law and social justice. At the same time, it is the duty of the Constitutional Court in this era to, through constitutional adjudication, establish the Constitution as a norm of daily living in people's consciousness, and thereby build a basic order of national community that we and our future generation will protect and nurture forever."[49]

No more than a few extra "basic order" formulas appear in *Twenty Years*, the English compilation of two decades of constitutional decisions. On top of the above 13 occurrences, four were added: three mentions of the "free and democratic basic order" in connection to the so-called Dong-Eui University Case and one of the "basic order" in connection to the Manslaughter of a Lineal Ascendant of the Offender or His Spouse Resulting from Bodily Injury Case.[50] Here again, these two rulings do not reflect the many uses made of "basic order" phrases in original language. Between 1999 and 2008, 65 cases were identified as comprising at least one such phrase. While 21 of them were partly summarized into English, only two had their "basic order" expressions offered in translation. Perhaps surprisingly, these two decisions do not include the Court's first presidential impeachment judgment. The sole "basic order" term mentioned in *Twenty Years* in connection to this case was "democracy constitutional order," a curious formulation employed not as part of the summarized verdict but its commentary: "In the constitutional history of Korea, resolutions for impeachment have been proposed nine times, four of which were voted on at the plenary session of the National Assembly, and five of which were discarded. Of these, this was the only case in which the impeachment resolution was actually passed by the National Assembly, and a final decision rendered by an adjudicatory agency. After the Court decided this case, many probed into the

47) CCK 2001, 22.
48) Ibid., 371.
49) Ibid., 31-32.
50) 2002Hun-Ma425, October 27, 2005; 2000Hun-Ba53, March 28, 2002.

socio-political causes and motives behind the impeachment crisis, as well as its historical and political significance in the overall context of democracy constitutional order."[51]

In the English compilations since published on an annual basis, the translation of "basic order" expressions remains the exception. References have been identified in eight cases between 2009 and 2019 while, in the meantime, 58 used a "basic order" phrase in original language. The eight in question include the Case on Prohibition of Using the Name of a Political Party whose Registration has been Cancelled, in which the Court used the phrase "free democratic basic order" in connection to the Constitution's Article 8 on political parties, as well as the Case on Mutates Mutandis Application of the Statutes and Regulations relating to the Civil Procedure in the Process of Dissolving a Political Party, in which the Court resorted to the formula "basic democratic order" in relation to the same Article 8.[52] This last expression represents an alternative translation of the "democratic basic order" preferred in this chapter and successively rendered by the Court as "fundamental democratic order," "basic order of democracy," and "basic democratic order." The two decisions referring to the Constitution's Article 8 also demonstrate the interchangeable use in translation of the "free democratic basic order" and "democratic basic order," whose definitions are similar yet not identical in jurisprudence. In the Dissolution of Unified Progressive Party Case, the Court not only invoked the "basic democratic order" but also provided a definition of it largely convergent with, but partly divergent from that of the above-cited "basic order of free democracy."[53] In place of "respect for basic rights, separation of power, representative democracy, multi-party system, elections, the economic order based on private property and market economy, and independence of the judiciary," all associated in 1990 with the "free democratic basic order," the constitutive elements of the "democratic basic order" were listed as "popular sovereignty, respect for basic human rights, separation of powers, and plural party system."[54]

The "free democratic basic order" has therefore been translated by the Constitutional Court only once as such. Until 2014, it has appeared in the institution's English publications as the "basic order of free democracy" or the "free and democratic basic order" while it has since been rendered through two new phrases. The notion thus became the "democratic fundamental order" in the summaries of the Case on "Pro-Enemy" Clauses of the National Security Act and the Case on the Suspension of Qualification Provision of the National Security Act, before turning into the "basic order of liberal democracy" in the second presidential impeachment ruling.[55] Although these decisions contribute to increase the number of cases for which an English equivalent of "basic order" expressions is provided, their translation remains not only highly infrequent but also widely inconsistent, making it difficult to discern any "basic order" doctrine based on the Court's publications destined to an Anglophone readership.

51) CCK 2008, 290.
52) 2012Hun-Ka19, January 28, 2014; 2014Hun-Ma7, February 27, 2014.
53) 2013Hun-Da1, December 19, 2014.
54) Constitutional Court of Korea, *Constitutional Court Decisions:2014*, Seoul: Constitutional Court, 2015, 303.
55) 2013Hun-Ka26, April 30, 2015; 2016Hun-Ba361, March 29, 2018; 2016Hun-Na1, March 10, 2017.

2. Overlapping Definitions without Articulation

Even in Korean language, the existence of a full-fledged "basic order" doctrine is uncertain. Among the various "basic order" expressions used in constitutional jurisprudence, only a couple have had their meanings clarified thoroughly. They are the "free democratic basic order," defined early on (in 1990), and the "democratic basic order," defined much later (in 2014). As previously mentioned, the definition of these two notions appears similar yet not identical. Both decisions consequently seem to provide a "basic order" doctrine, but do not quite amount to it as they do not account for the variations of terminology present in constitutional norms and rulings. In other words, they provide general descriptions of the "free democratic basic order" and the "democratic basic order" but no articulation of them. Each term is defined separately, in the particular context of a given case: on the one hand, the Court's review of the constitutionality of the National Security Act, which has been both controlled and consolidated by justices; on the other hand, their adjudication of the Unified Progressive Party's dissolution trial, which has led the institution to justify disbanding it. Both cases can therefore be said to have involved policing the boundaries of South Korean democracy in the name of protecting two slightly different versions of what its "basic order" is.[56)]

In its landmark decision on the limited constitutionality of the National Security Act's Article 7, the Court has set restrictions on the interpretation and application that could be made of this provision, holding that it can only serve to punish the activities that pose a clear danger to the existence and security of the state or to the "free democratic basic order" (translated as the "basic order of free democracy" in the corresponding English summary). In so doing, however, the Court has also contributed to recognize the National Security Act as an instrument meant to protect not only the former but also the latter. The clarification of what endangers each features at the decision's center: "The activities jeopardizing the integrity and the security of the nation denote those communist activities, coming from outside, threatening the independence and infringing on the sovereignty of the Republic of Korea and its territories, thereby destroying constitutional institutions and rendering the Constitution and the laws inoperative. The activities impairing the basic order of free democracy denote those activities undermining the rule of law pursuant to the principles of equality and liberty and that of people's self-government by a majority will in exclusion of rule of violence or arbitrary rule: in other words, one-person or one-party dictatorship by an anti-state organization," a designation encompassing North Korea in the National Security Act. As explained by the Court, the "activities impairing the basic order of free democracy" more specifically include "the efforts to subvert and confuse our internal orders such as respect for basic rights, separation of power, representative democracy, multi-party system, elections, the economic order based on private property and market economy, and independence of the judiciary."[57)]

The many similarities and few divergences between this definition and that of the *freiheitliche*

56) Justine Guichard, *Regime Transition and the Judicial Politics of Enmity: Democratic Inclusion and Exclusion in South Korean Constitutional Justice*, New York: Palgrave Macmillan, 2016.

57) CCK 2001, 136.

demokratische Grundordnung articulated by the Federal Constitutional Court of Germany have already been commented upon. As analyzed by Hannes Mosler, "While the Korean definition is an almost literal translation of that of the German Constitutional Court, there are some small but noteworthy differences. Almost everything else being equal, the Korean version does not spell out the 'right of a person to life and free development' as well as the 'responsibility of government' as fundamental principles of the FDBO [free democratic basic order]. In addition, the Korean version features a core principle that is not part of the German version: 'an economic order whose framework is constituted by private property and market economy'."[58] Interestingly, this element is not explicitly mentioned as part of the definition of the "democratic basic order" formulated in the Unified Progressive Party's dissolution ruling.

According to this decision, "the term 'basic democratic order,' referenced in Article 8 (4) of the Constitution, is founded on a pluralistic world view premised on trust in individuals' autonomous rationality and the relative veracity and rationality of diverse political views, and a political process that eschews all violent and arbitrary rules, and is formed and operated based on a democratic decision-making process that respects the majority but is considerate of the minority, and is based on the basic principles of liberty and equality; more specifically, we view the principles of sovereignty of the people, the respect for basic human rights, the separation of powers, the multi-party system, etc., as key elements of a basic democratic order under the current Constitution."[59] Yet, as further elaborated upon by the Court, "the basic democratic order should not be equated to mean the specific form of democracy adopted by the current Constitution. As long as a political party accepts the basic democratic order discussed above, i.e., the indispensable elements of a democratic decision-making process, and the minimum elements required for the operation and protection thereof, it should be allowed to freely express different views about the details of this basic democratic order prescribed by the current Constitution. Likewise, a political party may freely pursue a diverse spectrum of ideology that it believes to be right, as long as it does not deny the basic democratic order. The ideological orientations of today's political parties span widely, ranging from liberal democracy to communism. Therefore, even if a political party advocates a certain ideology, it should not be held unconstitutional merely because of its advocacy as long as its objectives or activities do not violate the substance of the basic democratic order discussed above."[60]

The four pillars of the "basic democratic order" (popular sovereignty, respect for basic human rights, separation of powers, and multiparty system) were further said to match the foundations of "modern constitutional democracy," which "is formed and operated under two main principles: the principles of democracy that pursue political decision-making based on an autonomous citizenry; and the principles of the rule of law that protects the rights of individuals, i.e., individual freedom from state power or the political will of the majority."[61] According to the terms preferred in this

58) Mosler 2017, 17.

59) Constitutional Court of Korea, *Constitutional Court Decision: Dissolution of the Unified Progressive Party*, Seoul: Constitutional Court, 2016, 16.

60) Ibid., 16-17.

chapter, the components of the "democratic basic order" therefore subsume most of those of the "free democratic basic order" ("respect for basic rights, separation of power, representative democracy, multi-party system, elections, the economic order based on private property and market economy, and independence of the judiciary"), with elections and representative democracy arguably coinciding with popular sovereignty while independence of the judiciary falls under separation of powers. The main difference between the two notions thus lies in "private property and market economy" not being listed as part of the "democratic basic order." Before and after this ruling, the Court has been careful to associate these two with the "free democratic basic order" only, the sole decision in which market economy is identified as an essential part of the "democratic basic order" being one in which this contention was advanced by the complainant rather than the members of the institution.[62)]

At the same time, market economy has been defined as a core but not exclusive principle of the "economic basic order." In the first decision in which the expression appeared, the so-called Prohibition of Third-Party Intervention in Labor Disputes Case, the "economic basic order" was related to market economy in a passage also referring to the task of building a social welfare state.[63)] The same can be seen in the so-called Automobile Driver's No-Fault Liability Case, in which the Court highlighted that the principles of market economy and social state coexist in the Constitution.[64)] This affirmation has been repeated in other cases as well, such as the Act on the Registration of Real Estate under Actual Titleholder's Name Case and the Ban on the Shuttle Bus Operation Case.[65)]

Yet, the issues of whether private property and market economy make the "free democratic basic order" distinctive vis-à-vis the "democratic basic order" and of whether the "free democratic basic order" is exclusive of certain principles recognized as part of the "economic basic order" remain unanswered. Without an explicit articulation of the various "basic order" notions that the Constitutional Court mobilizes, it is hard to see that a full-fledged "basic order" doctrine exists in its rulings.

3. Evolution of Uses in Impeachment Cases

Despite its seminal 1990 definition, the "free democratic basic order" also appears far from being fixed when taking into account the evolution of its uses, as illustrated by the Constitutional Court's two presidential impeachment rulings. The first case was brought in 2004 against then President Roh Moo-hyun and decided that same year in his favor. The mention of the "democracy constitutional order" in the decision's English commentary masks the language deployed in the original text. One can find in it 11 mentions of the "free democratic basic order" although this expression does not figure in the Constitution's Article 65 stating that the president and other

61) Ibid., 7-8.
62) 92Hun-Ma157, April 20, 1995
63) 89Hun-Ka103, January 15, 1990.
64) 96Hun-Ka4, May 28, 1998.
65) 99Hun-Ka18, May 31, 2001; 2001Hun-Ma132, June 28, 2001.

public officials can be impeached when they "have violated the Constitution or other Acts in the performance of official duties."[66] This condition has been refined and narrowed by the Court in the case at hand through the introduction of a further constraint, namely that the said violations be serious enough to endanger the "free democratic basic order." Not all illegal acts necessarily pose such a danger and those committed by Roh Moo-hyun against his obligation to remain politically neutral in electoral times were precisely not found to threaten the "free democratic basic order."[67]

To put it differently, impeachment was clearly defined in this decision as a way to defend the "basic order" in question. As affirmed by the Constitutional Court, what is at stake through an impeachment trial is nothing less than the protection of the constitutional order, which was explicitly equated with that of the "free democratic basic order." Its essential elements were thereupon described as resting on two principles: democracy (including the parliamentary system, multiparty system, as well as electoral system) and the rule of law (comprising the respect for basic rights, separation of powers, as well as independence of the judiciary).[68] The Court thus offered to reorganize into two categories the components listed in its landmark 1990 ruling, without however mentioning private property and market economy. It reaffirmed on several occasions that the existence of a threat to the "free democratic basic order" was necessary to impeach a president in office, not finding the statements made by Roh Moo-hyun in support of a given political party tantamount to an active offense against the parliamentary electoral system constitutive of the "free democratic basic order."[69] No additional "basic order" expression was invoked by the Court in this decision, the phrase "constitutional basic order" having been employed but by one of the parties rather than the justices. While the rhetoric of the protection of the "constitutional order" was openly associated with that of the "free democratic basic order" in this first impeachment ruling, the same language does not exactly feature in the second impeachment case.

The latter was delivered in 2017 against then President Park Geun-hye.[70] While impeachment was still presented on that occasion as a mechanism to defend the constitutional order, the notion of "free democratic basic order" (rendered in English as the "basic order of liberal democracy") was, to a large extent, relegated to the background. In the full translation of this judgment, one can find four mentions of the "constitutional order" and one of the "basic order of liberal democracy" as part of the majority decision, to which must be added two mentions of the "basic order of liberal democracy" in the concurring opinion of one justice. Interestingly, the majority defined impeachment as an instrument to protect the constitutional order but not the "free democratic basic order" as explicitly as the concurring opinion and the first impeachment ruling did. In the Court's words, "Adjudication on impeachment is a constitutional procedure that protects the constitutional order by depriving high-ranking public officials of their authority when they abuse that authority to violate the Constitution or law."[71]

66) Constitution of the Republic of Korea, Article 65, KLT translation.
67) 2004Hun-Na1, May 14, 2004.
68) Ibid., 656.
69) Ibid., 657.
70) 2016Hun-Na1, March 10, 2017.

The institution then proceeded to distinguish and balance democracy, which impeachment imposes a cost on, and the "free democratic basic order," which impeachment enables to preserve. According to the majority's reasoning, "The considerable political chaos that may occur by removing a President elected by the public from office should be deemed an inevitable cost of democracy paid by the nation in order to protect the basic order of liberal democracy."[72] This passage is the only one in which the expression appeared in the majority decision, both in its English translation and original version. It associates impeachment with the protection of the "free democratic basic order" but more indirectly than in the concurring opinion of one justice and in the first impeachment verdict. Justice Ahn Chang-ho openly argued as part of the former that "This decision was made to safeguard the constitutional order founded on the basic order of liberal democracy."[73] The same had already been said by the Court in the previous case but was not repeated here in the majority's text. Furthermore, while democracy was defined as one of the principles on which the "free democratic basic order" rested in 2004, the two were momentously distinguished in 2017.

Another difference lies in the reference to the "market economy order" (*sijang kyŏngjejŏk chilsŏ*) found in the second impeachment ruling as opposed to the first. Ultimately, then President Park Geun-hye was found to have violated this component of the constitutional order by infringing upon the freedom and property rights of enterprises, leading the Court to recognize *chaebŏl* as her victims rather than accomplices. For this reason and a few others including Park's abuse of power, the "free democratic basic order" was considered as needing protection against the president, thus justifying her impeachment. This brings us to finally examine cases in which who defends the "free democratic basic order" and who harms it has been hotly disputed, as can be seen in rulings related to South Korea's authoritarian past.

4. Historical Definition and Contestation

Cases related to past issues are significant for several reasons. First of all, one can encounter in them a historical rather than general definition of the "free democratic basic order," positioned on the side of the forces that have fought for the advent and realization of South Korean democracy. This pairing gradually came into being. It began in the Constitutional Court's jurisprudence with the recognition that certain acts committed during the authoritarian era had disrupted the "free democratic basic order." The Court so affirmed in its ruling on the Special Act on the May 18 Democratization Movement rendered in 1996.[74] The reviewed law had been adopted the previous year to enable the prosecution of the crimes of mutiny and treason perpetrated by Chun Doo-hwan and Roh Tae-woo during and between two founding events of the Fifth Republic (1980-1987): the December 12, 1979 coup d'état led by the two future presidents and the May 18, 1980 suppression

71) Constitutional Court of Korea, *Constitutional Court Decisions:2017*, Seoul: Constitutional Court, 2018, 11-12.
72) Ibid., 20.
73) Ibid., 97.
74) 96Hun-Ka2, February 16, 1996.

of the Gwangju uprising that erupted in reaction. In 1996, the Court considered that the crimes in question had contributed to destroying the "free democratic basic order" of the country.

Interestingly, this was not the position that the Constitutional Court had embraced in its two earlier rulings on the crimes committed on December 12, 1979 and May 18, 1980. No recognition that they had injured the "free democratic basic order" can be found in the so-called December 12 Incident Non-Institution of Prosecution Case, where, on the contrary, the Court argued that prosecutors' decision not to indict the perpetrators of the coup d'état for the crimes of treason and mutiny was not arbitrary.[75] While identifying a number of facts in support of prosecution, the Court ultimately reasoned that "it cannot be denied that the suspects have led the country in pivotal roles … Whether to a small or large extent, whether to our liking or not, the order established during that time became an integral part of our history and formed the foundation of the present political, economical, and social order."[76] Although no "basic order" expression was employed on that occasion and the constitutional order was not included in the above list, it almost sounds as if the Court could have acknowledged Chun Doo-hwan and Roh Tae-woo's contribution to its making. A year later, however, some justices proved clearly against this possibility. As three of them ruled in the May 18 Incident Non-Institution of Prosecution Decision Case, Chun and Roh's crimes had damaged the constitutional order based on both popular sovereignty and the "free democratic basic order."[77]

Since then, the latter has been fully defined on the side of prodemocratic forces with the 2000 adoption of the Act on the Honor Restoration of and Compensation to Persons Related to Democratization Movements. Its Article 2 then held that "the term 'democratization movement' means activities performed on or after August 7, 1969, which contributed to the establishment of the democratic constitutional order and restored and expanded freedom and rights of people by resisting authoritarian rule that had disrupted the free democratic basic order and infringed on the basic rights of people guaranteed by the Constitution."[78] The law in question has been reviewed several times while its Article 2 has undergone both temporal and lexical extensions. The term "democratization movement" now includes the activities performed on or after March 24, 1964 and having contributed, on top of the rest, to the "realization of the ideals and values put forth by the Constitution." In parallel, authoritarian rule remains importantly defined as "having disrupted the free democratic basic order and infringed on the basic rights of people."

The Constitutional Court has therefore been proactive in disconnecting the notion of "free democratic basic order" from the powers that introduced it, in particular the Park Chung-hee regime in the 1970s. As justices have ruled in the so-called Case on Presidential Emergency Decrees No. 1, 2 and 9, the "free democratic basic order" represents the fundamental principle of the Constitution's

75) 94Hun-Ma246, January 20, 1995.

76) CCK 2001, 163.

77) 95Hun-Ma221, December 15, 1995.

78) Act on the Honor Restoration of and Compensation to Persons Related to Democratization Movements, Article 2, based on the KLT available at: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=34955&lang=ENG (last consulted December 29, 2020).

successive versions since 1948 (although the term did not exist then) and it authorizes lawful criticism and protest against the Constitution itself.[79] On this basis, the Court has declared that the "free democratic basic order" was damaged not only by the emergency decrees banning the above activities, but also by the 1972 Yushin Constitution that paradoxically inserted the expression in the preamble of the text where it remains to date.[80]

The value of the cases related to past issues does not stop there. In addition to shedding light on the historical definition of the "free democratic basic order," they also reveal how contested this definition has been. Disputes about who fought for or against the preservation of the "free democratic basic order" have been many before the Constitutional Court. Arbitrating them has included determining whether the Special Act on Discovering the Truth of the Jeju April 3 Incident and the Restoration of Honor of Victims covered those who meant to injure the "free democratic basic order."[81] The Court has answered this question in the negative. It has consequently excluded from the category of victims the military groups that targeted individuals such as the 1948 Constituent Assembly election personnel and the policemen working for the United States Army Military Government in Korea (USAMGIK), holding that these groups supported North Korean communism while negating the "free democratic basic order" which is the "basic principle of our constitution and South Korea's identity."[82] The Court importantly reasserted in this ruling that the "free democratic basic order" and its defense are the highest value and priority of the Constitution, reaffirming this order's anticommunist ideological dimension and insisting in this perspective on private property and market economy as two of its essential components. As declared in the decision, groups or parties espousing communism are in contradiction with the Constitution's ideology since the "free democratic basic order" is associated with the principle of market economy, a position in conflict with the more recent ruling on the dissolution of the Unified Progressive Party in which communism was considered as an ideology not incompatible with the "democratic basic order."[83]

This case is not the only dispute related to the 1948-1949 Jeju uprising. In 2009, a complaint reached the Constitutional Court claiming that the activities and restoration of honor of more than 1,000 individuals represented a double violation of the "free democratic basic order."[84] More specifically, the complaint alleged that out of 13,564 persons recognized as victims, 1,540 were militants active in armed guerilla units. The request was rejected for lack of justiciability but belongs to cases in which who threatens and who upholds the "free democratic basic order" has been debated. So does the so-called Dong-Eui University Case where the dispute concerned 40-some students retrospectively designated as members of the democratization movement but previously convicted for having caused the death of policemen during a 1989 protest.[85]

79) 2010Hun-Ba132, March 21, 2013.
80) Ibid., 194.
81) 2000Hun-Ma238, September 27, 2001.
82) Ibid., 383-384.
83) Ibid., 402.
84) 2009Hun-Ma147, November 25, 2010.
85) 2002Hun-Ma425, October 27, 2005.

Descendants of the latter thereupon filed a constitutional complaint on the basis that restoring the honor of the former students violated several of their basic rights.

While three dissenting justices argued that "the very fact of restoring the honor of those involved in the Dong-Eui University incident and compensating them as 'members of the democracy movement' necessarily has a negative effect on the social esteem of the fallen policemen and on the efforts to commemorate them," the majority found, to the contrary, that such a "decision itself does not (and is not intended to) cast any negative judgment on the policemen who died in the line of duty. They are not represented as having acted on behalf of the 'authoritarian rule that despoiled the free and democratic basic order and violated the citizens' constitutional rights.' Their social esteem has not been tarnished by the decision. They are still honored by the society as meritorious citizens, and they deserve to be so honored for the sacrifice they made in the performance of their duty as law enforcement officers."[86)]

The accusation of disrupting the "free democratic basic order" here appears to be confined to the acts of the authoritarian leadership perhaps in an effort to quell disputes about who has fought for or against protecting it. Most recently, however, cases related to the "free democratic basic order" have extended to challenging its very constitutionality. A 2011 complaint thus claimed that the "free democratic basic order" is against the Constitution's Article 1 according to which the Republic of Korea is a democratic republic.[87)] Although the request for review was rejected, again for lack of justiciability, its submission is nonetheless symptomatic of the debates that the "free democratic basic order" continues to raise.

IV. Conclusion

Central to South Korean constitutional law and case law, the notion of "basic order" never appears alone in them but as part of diverse expressions analyzed both quantitatively and qualitatively in this research. Combining these two approaches has enabled our study to provide an overview of the 199 rulings in which the Constitutional Court has invoked the "basic order" at least once between 1989 and 2019. As argued in the first part of this chapter, two periods and trends can be distinguished. Until 2004, "basic order" formulas can be said to have proliferated in the Court's decisions, continuing a phenomenon of diffusion within that started in the Constitution and later spread to jurisprudence where no less than five main "basic order" phrases and a variety of derivatives were in use during the institution's first 16 years of operation. Since 2004, however, the tendency has been toward a reduction and recentering of the Court's "basic order" terminology on the two expressions featuring in the Constitution: on the one hand, the "free democratic basic order" mentioned in the preamble and Article 4 in connection to South Korea's "policy of peaceful unification"; on the other hand, "the democratic basic order" referred to in Article 8, Section 4

86) *Twenty Years*, p. 304-305.
87) 2011Hun-Ma826, January 1, 2012.

stipulating the conditions for dissolving political parties. Although both notions have been clarified in two groundbreaking rulings, their definitions do not quite amount to a full-fledged "basic order" doctrine as contended in the second part of this chapter. Its analysis particularly focuses on the "free democratic basic order" and how this notion is less fixed than it appears. This is the case not only in translation, where it has been rendered infrequently and inconsistently, but also in original language. In addition to the articulation between the "free democratic basic order" and other formulas remaining uncertain, its uses in jurisprudence have been subjected to evolutions and contestations that illustrate the conflictual rather than consensual nature of South Korea's multilayered "basic order."

III

Constitutional Adjudication and Fundamental Rights

- Following or Leading the Society?
  Comparing the Decisions on the Adultery Cases by the Taiwan Constitutional Court and the Constitutional Court of Korea
- The Case Law from the Constitutional Court of Korea on the Conscientious Objection to Military Service
- The Place Restrictions on Freedom of Speech in South Korea
- Comparing the Approaches of the Constitutional Court of Korea and the Constitutional Court of Indonesia in Deciding Constitutional Cases Associated with Economic and Social Rights

Following or Leading the Society?
- Comparing the Decisions on the Adultery Cases by the Taiwan Constitutional Court and the Constitutional Court of Korea

JAU-YUAN HWANG*

Abstract

Adultery remained a crime in Korea until 2015 and in Taiwan until 2020. In 2015, the Constitutional Court of Korea (CCK) issued a decision overturning its previous decision of 2008 and declaring the adultery provision unconstitutional. In 2020, Taiwan Constitutional Court (TCC) also rendered a decision overturning its previous decision of 2002 and declaring unconstitutional the adultery as a crime. Being new democracies, Korea and Taiwan share many cultural and social backgrounds in common. Both the CCK and the TCC went through a similar path and presented a similar framework of legal reasoning. The central questions asked by this essay are twofold: (1) how did the CCK and the TCC organize their reasoning to reach their respective decisions? and (2) how did both Courts justify their changed position on the constitutionality of adultery as a crime? For the first question, this essay, in part II and III, analyzes the framework and important elements of the reasoning presented by the CCK's 2015 decision and the TCC's 2020 decision, focusing on the basis of rights, standard of review, analysis of the proportionality principle, and decision outcome. For the second question, this essay, in part IV, explores the possible causes to justify either Court's change in position. This essay finds both Courts were fully aware of the public opposition against decriminalization of adultery as a crime in time of their respective decision. Nevertheless both the CCK and the TCC managed to overcome this counter-majoritarian difficulty either by employing sophisticated persuasion skills or by direct confrontation against such opposition, in order to lead the society and initiate social reforms. In conclusion, this essay praises both decisions as milestone judgments to be celebrated in both Korea and Taiwan.

* Professor of Law, College of Law National Taiwan University.
Justice, the Taiwan Constitutional Court.

I. Introduction

Since the 1990s, the Taiwan Constitutional Court (TCC) and the Constitutional Court of Korea (CCK) have been the two leading constitutional courts in East Asia. Being the oldest constitutional court in Asia, the TCC has managed to transform itself from a judicial institution originally founded in China in 1948 to a full-fledged constitutional court in Taiwan,[1] along with Taiwan's democratization beginning from the late 1980s. The CCK was established in 1988 under the 1987 Constitution of the Republic of Korea. Over the past thirty years, the CCK has certainly developed into an active and leading constitutional court with international reputation.[2]

Besides their geographical proximity, the TCC and the CCK have also decided cases of similar constitutional issues against similar historical backgrounds and social pressure. Among them, the decisions on the constitutionality of the criminal punishment of adultery stand out as representative cases that warrant further examination.

While many countries chose to decriminalize adultery in the 20th century, adultery remained a crime in South Korea until 2015 and in Taiwan until 2020. It is noteworthy that, the adultery crimes in both South Korea and Taiwan were abolished by their respective constitutional courts, instead of by their parliaments. More coincidentally, both the CCK and TCC first upheld the constitutionality of adultery as a crime around 2000, and then overturned their respective precedents many years later.

This essay intends to compare the decisions on the adultery rendered by the TCC and the CCK, focusing on the reasoning, basis of rights, and the standard of review, among others. Then this essay will evaluate and comment on the similarity and differences of each court's responses to their own social pressure. In conclusion, the essay will briefly reflect on the counter-majoritarian difficulty facing both Courts in new democracies.

II. The CCK Decisions on the Adultery Case

1. The Four Decisions from 1990 to 2008 Confirming the Constitutionality of Adultery as a Crime

Adultery had remained a crime since the *Kojoson* era (2333-108 BC) in Korea. After the Second

1) For a general introduction of the history and development of the TCC, *see* Jau-Yuan Hwang, Introduction, in: Judicial Yuan ed., *Leading Cases of the Taiwan Constitutional Court vol. 1*, Taipei: Judicial Yuan, pp.1-7 (2018). Only two Interpretations (the official designation for its decisions) of the TCC were rendered in China in January 1949. Thereafter, the Council of Grand Justices (the official designation for TCC until 1993) once ceased to function for about three years, due to the Chinese civil war and the war between China and Taiwan. Around the end of 1951, there were only two sitting justices residing in Taiwan. After the President appointed, with legislative confirmation, seven new justices in March 1952, the TCC resumed its operation and then issued Interpretation No. 3 in May 1952. As of the end of January 2021, the TCC has rendered a total of 800 Interpretations.

2) *See* Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge, U.K.: Cambridge University Press, pp.206-246 (2003).

World War, the newly independent Korea's National Assembly passed the Korean Criminal Code of 1953. Section 241 of Korean Criminal Code provided either married male or female adulterers, as well as his or her partner, shall be sentenced to imprisonment for no more than two years.[3] Despite several attempts to abolish or revise the offence of adultery, Section 241 remained on the book until 2015, when the CCK declared it unconstitutional.

In fact, the CCK had rendered four other decisions upholding the constitutionality of adultery as a crime before the said 2015 decision. In 1990, 1993 and 2001, the CCK declared the anti-adultery provision constitutional three times.[4] In 2008, the CCK, in an opinion of 4 to 5, fell short of the six-vote threshold required for declaring unconstitutional a statute,[5] and had no choice but to confirm the constitutionality of Section 241 of Criminal Code (Korea) for the fourth time.[6]

2. The CCK's 2015 Decision Declaring Adultery as a Crime Unconstitutional

The failed change intended by the majority of the CCK in the said 2008 decision finally came true in 2015. On February 26, 2015, the CCK issued its fifth decision on the adultery case and declared Section 241 of Criminal Code (Korea) unconstitutional.[7]

A. Eight Petitions Consolidated

This 2015 decision was rendered on a total of eight consolidated petitions, including six petitions filed by individual defendants and two petitions filed by district courts. Seven out of nine Justices of the CCK found the adultery provision unconstitutional, while two Justices upheld its conformity to the constitution. The judgment (majority opinion) of the Court was signed by five Justices, and two other Justices delivered another two opinions of each own, respectively. The two dissenting Justices also issued a dissenting opinion together.

3) For a brief account of the history and development of adultery as a crime in Korea, *see generally* Joon Seok Hong, Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea, *American Journal of Comparative Law*, 67: 177-217 (2019).

4) *See* 20-2(A) KCCR 696, 2007Hun-Ka17 (2008), at 282, 290-292 (English translation), *available at* http://search.ccourt.go.kr/xmlFile/0/010400/2008/pdf/e2007k17_1.pdf (Last visited Jan. 25, 2021); *published* in a bound volume: The Constitutional Court of Korea, *Decisions of the Constitutional Court of Korea (2008)*, pp. 282-316 (2011), *available at* https://library.ccourt.go.kr/site/conlaw/download/case_publications/2008+(decision_2008).pdf (Last visited Jan. 25, 2021).

5) Section 23, Paragraph 2 of the Constitutional Court Act (Korea) (Amended 2011).

6) For a brief account of the CCK's case law jurisprudence from 1990 to 2008, s*ee* Hong, *supra* note 3. at 282-283, 290-296.

7) For the English translation of the full text of the 2015 decision including the majority, concurring and dissenting opinions, *see* 27-1(A) KCCR 20, 2009Hun-Ba17 (2015), *available at* http://search.ccourt.go.kr/xmlFile/0/010400/2015/pdf/e2009b17_1.pdf (Last visited Jan. 19, 2021); published in a bound volume, The Constitutional Court of Korea, *Decisions of the Constitutional Court of Korea (2015)*, pp. 1-35 (2016), *available at* https://library.ccourt.go.kr/site/conlaw/download/case_publications/decision(2015).pdf (Last visited Jan. 25, 2021).

B. What Constitutional Rights Are Infringed?

The majority opinion invoked two constitutional rights as the grounds to invalidate the adultery provision: the right to sexual self-determination as covered by the right to personality and right to pursue happiness under Article 10, and the right to privacy protected under Article 17 of the Korean Constitution.[8] A careful analysis of the majority opinion suggests that the CCK relied mostly on the right to sexual self-determination as the primary basis to review the constitutionality of the adultery provision. It appears that mainly in the last-part analysis of the proportionality principle, *i.e.*, balancing of interests, did the CCK refer to the right to privacy as another interest invaded by the adultery provision.

C. Standard of Review

The 3-Justice's dissenting opinion of the CCK's 2008 decision proposed to apply a strict review of the proportionality principle, in order to strike down the adultery provision.[9] On the contrary, the court opinion, signed by five Justices, of the CCK's 2015 decision did not expressly discuss or indicate which standard of review was applied to the analysis of the proportionality principle. Without choosing its standard of review, the CCK straightforwardly applied the proportionality principle to review the purpose and means of the adultery provision.

D. Scrutiny of Purpose

On the scrutiny of the legislative purposes, the CCK first confirmed, without much elaboration, the adultery provision has legitimate purposes, *i.e*., the protection of good sexual culture and practice, and the promotion of marital fidelity between spouses.[10] As compared to the three-tiered standards of review as applied by the Supreme Court of the United States, the CCK's seemed to apply a rather lenient test of rationality (or rational basis) review for confirmation of the said *legitimate* purposes as constitutional, instead of searching for *important* or *compelling* interests as constitutional purposes.

E. Scrutiny of Means

Then the CCK turned to the review of means. The majority opinion cited the "change in public's legal awareness" to question the existence of public consensus that supported the adultery provision.[11] However, the majority opinion did not introduce material empirical evidences to sustain their observation. Against this assertion, Justice Lee Jung-Mi and Justice Ahn Chang-Ho, in their dissenting opinion, counter-argued that "there is no empirical evidence to prove the change of the legal perception of the general public" regarding the criminal punishment of adultery in Korea. They cited three opinion polls surveyed in 2005, 2009 and 2014, respectively, to show the adultery

8) For an in-depth analysis of the CCK's 2015 decision, *see* Seokmin Lee, Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery', *Journal of Korean Law* 15: 325-353 (2016).

9) *See* 2007Hun-Ka17 (2008), *supra* note 4, at 300 (Justice Kim Jong-Dae, Justice Lee Dong-Heub and Justice Mok Young-Joon, dissenting).

10) *See* 2009Hun-Ba17 (2015), *supra* note 7, at 6.

11) *See Id.*

as a crime had been consistently supported by more than 60% of the people polled.[12]

With the finding (or allegation) of no longer available public consensus in favor of retaining the adultery as a crime, the majority opinion went on to examine whether the adultery provision was an appropriate and effective means to achieve the said purposes. In the court opinion, the CCK held the modern criminal law should not punish an act belonging to personal privacy that was not socially harmful. Thus the adultery provision failed the test of appropriateness. Further, the majority opinion also questioned the effectiveness of criminal punishment of adultery. Since the adultery was indictable only upon complaint by the innocent spouse, the beginning of the criminal procedures on adultery usually means the end of marriage (or the beginning of the judicial divorce process).[13] In the real world, an already-broken marriage would not be saved by resorting to the criminal punishment of adultery. The majority opinion also found the rate of punishing adultery has been dramatically decreased. Statistics suggested that only less than 10% of adulterers were prosecuted. The majority opinion maintained that the adultery provision has lost its general and specific deterrence effect. On the other hand, the majority opinion emphasized the civil liabilities, including damage compensation, and awarding of the custody and visitation rights of the children after divorce, among others, may provide the victimized spouse with real and more thorough legal protections. Though the majority opinion acknowledged that the adultery provision served to protect the socially or economically underprivileged women (wives) in the past, it found that such functions have been diminished as gender equality, either *de jure* or *de facto*, has been improved significantly in Korea. The above reasoning led the majority opinion to hold that the adultery provision will mainly facilitate, and not save, a broken marriage, and therefore was not an effective means to protect either a specific marriage or the marriage institution. Accordingly, the majority opinion held that the adultery provision failed the test of "appropriateness of means and least restrictiveness."[14]

In the last part of analysis under the proportionality principle, the majority opinion exercised its balancing of interests and found that the adultery provision constituted excessive restrictions on the right to sexual autonomy and the right to privacy, without much effectiveness to achieve the legislative purposes of protecting the marriage and fulfilling the obligation of fidelity in marriage.[15]

F. Outcome

In conclusion, the CCK's 2015 decision held that the adultery provision's restrictions on both the right to sexual self-determination and the right to privacy failed the proportionality principle, and therefore unconstitutional.

Pursuant to Section 47, Paragraph 2 of the Constitutional Court Act of Korea (1988),[16] any

12) *See Id.*, at 28-29 (Justice Lee Jung-Mi and Justice Ahn Chang-Ho, dissenting).

13) *See* Lee, *supra* note 8, at 330-331 (citing the case law of the Supreme Court of Korea and claiming the request for divorce is regarded as a precondition for lodging a complaint against the adulterous spouse and his or her partner).

14) *See* 2009Hun-Ba17 (2015), *supra* note 7, at 7-11.

15) *See Id.*, at 11.

16) Section 47, Paragraph 2 of the Constitutional Court Act of Korea provides "Any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made." (Last amended May 20, 2014). The

CCK decision declaring a statute or provision unconstitutional would not trigger a retroactive effect in general. While in the case of declaring a criminal law unconstitutional, such decision of the CCK would nevertheless trigger a retroactive effect under paragraph 3 of the said Section. Before 2014, such retroactive effect shall have caused any criminal law declared unconstitutional to lose its validity from the date when this criminal law was adopted and took effect. In 2014, Section 47, Paragraph 3 of the said Act was amended to limit the overstretching retroactive effect to a shorter period of time: "… any statute or provision thereof relating to criminal punishments shall lose its effect retroactively: Provided, That where a decision of constitutionality has previously been made in a case to which any such statute or provision thereof applies, such statute or provision thereof shall lose its effect from the day following the date on which the decision was made."[17] In accordance with this lastly amended provision, the CCK's 2015 decision on the adultery case shall have a retroactive effect limited to those decisions of criminal courts made on and after October 31, 2008, as the last decision of the CCK on the adultery provision was made on October 30, 2008.[18]

III. The TCC Decisions on the Adultery Case

1. The History of Criminal Punishment of Adultery in Taiwan

Section 239 of Criminal Code of Taiwan provided that "A married person who commits adultery with another shall be sentenced to imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment."[19] This section, together with the other sections of Criminal Code, were enacted in 1935, originally in China. After the Republic of China (ROC) government took administration of Taiwan from the defeated Japan in 1945, the ROC government soon extended the application of much of its laws and regulations, including the Criminal Code, to Taiwan. Section 239, on the face, was a gender neutral law, punishing both the adulterous husbands and wives.[20] However, there have been far more women than men punished for committing the adultery offence in practice, partly due to Section 239 of Criminal Procedure Code, which provided that the withdrawal of a complaint against an adulterous spouse shall not be considered a withdrawal of a complaint against his or her partner (the third party). Thus the adulterer's innocent spouse may choose to punish the third party only and relieved his or her spouse from criminal responsibility. In the past, it was an evident and prevailing phenomenon that a substantial portion of

full text of its English translation is *available at* https://elaw.klri.re.kr/eng_service/lawView.do?hseq=47509&lang=ENG (Last visited Jan. 31, 2021).

17) Section 47, Paragraph 3 of the Constitutional Court Act of Korea, id.

18) See Lee, supra note 8, at 351.

19) For the full text of the English translation of the Criminal Code of Taiwan, see https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0000001 (Last visited Jan. 31, 2021).

20) When Taiwan was governed by the Ching Dynasty of China from 1683 to 1895 and by the Japanese colonial government from 1895 to 1945, only the married wives were punished for committing adultery, while the husbands were exempt.

wives chose, or were coerced, to forgive their adulterous husbands, while more husbands chose to lodge their complaint against both their adulterous wives and the third parties.

2. Interpretation No. 554 (2002): Constitutional

In spite of its long history, the criminal punishment of adultery was not welcomed by a majority of criminal law scholars and a substantial share of the judges and even the public prosecutors in Taiwan. Such disapproval of adultery as a crime has become increasingly prevalent among the legal professionals along the path of Taiwan towards a more open, free and democratic society since the 1990s. However, the vast majority of the people in Taiwan has remained overwhelmingly and consistently opposed to decriminalization of adultery. In November 2000, a young judge of district court took the initiative by petitioning to the TCC, challenging the constitutionality of adultery as provide for in Section 239 of Taiwan's Criminal Code. The TCC handed down its ruling in Interpretation No. 554[21] of 2002, holding constitutional the criminal punishment of adultery. In spite of its conservative conclusion, Interpretation No. 554, for the first time in the Interpretations of the TCC, recognized the "freedom of sexual behaviors" as an unwritten right protected by the Constitution. However, this Interpretation applied a deferential standard of review similar to the rational basis test as employed by the Supreme Court of the United States, to review the constitutionality of the criminal punishment of adultery. The TCC acknowledged that the criminal punishment of adultery did restrict the married person's liberty to engage in sexual behaviors, but ruled it was rationally related to the legitimate purpose of safeguarding the moral values of marriage and family institutions. In conclusion, Interpretation No. 554 held that it was within the scope of legislative discretion to punish the adulterers by criminal law, and therefore did not violate the proportionality principle.

3. Interpretation No. 791 (2020): Unconstitutional

A. Twenty-Two Petitions Consolidated

Though holding the adultery as a crime constitutional, Interpretation No. 554 did not settle this constitutional issue for good. It was welcomed by the vast majority of Taiwanese people, particularly among the conservative camp. In this regard, the TCC did follow, instead of lead, the society. However, this Interpretation was not so popular among constitutional and criminal law scholars, as well as the younger generation of judges and prosecutors in Taiwan. In July 2015, a district court judge filed a petition with the TCC, urging the TCC to overturn its Interpretation No. 554 and rule the adultery as a crime unconstitutional. In May 2017, a three-judge panel from another district court filed a similar petition on the same issue. In October 2018, a convicted male adulterer also challenged the said Section 239 of Criminal Code (Taiwan) and questioned the wisdom of Interpretation No. 554.

21) The English translation of Interpretation No. 554 could be retrieved from the official website of the Judicial Yuan, available at https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=554 (Last visited Jan, 10, 2021).

The TCC finally granted review of these three petitions, consolidated, in January 2020 and decided to hold an oral argument on March 31, 2020. After the announcement of oral argument on February 21, the TCC received nineteen more petitions (fourteen from several judges and five from individuals), all of which were consolidated with the said three petitions. The TCC rendered Interpretation No. 791[22] on May 29, 2020, which overturned Interpretation No. 544 and ruled the adultery as a crime unconstitutional for violating the right to sexual autonomy and the right to privacy.

B. What Constitutional Rights Are Infringed?

In Interpretation No. 791, the TCC held two provisions regarding adultery unconstitutional: Section 239 of Criminal Code (the offence of adultery) and the Proviso of Section 239 of the Criminal Procedure Code (the effect of withdrawing a complaint). Section 239 of the Criminal Code (Taiwan) punished both the adulterous spouse and the third party by imprisonment for not more than one year, though instituted only upon complaint by the innocent spouse pursuant to Section 245 of the Criminal Code (Taiwan). The Proviso of Section 239 of the Criminal Procedure Code provided that a withdrawal of complaint against the adulterous spouse shall not be considered a withdrawal of complaint against the other adulterer (the third party). Thus the adulterer' innocent spouse may choose to punish the third party only and relieved his or her spouse from criminal responsibility.

Interpretation No. 791 invoked the right to sexual autonomy as the major constitutional basis to strike down Section 239 of Criminal Code (Taiwan).[23] Though this was not a right expressly recognized by the Constitution of Taiwan, the TCC relied upon Article 22 of Constitution, which has been a constitutional basis for recognition of unwritten constitutional rights and employed by the TCC since the mid-1980s.[24] In fact, Interpretation No. 554 already referred to the "freedom of sexual behaviors" as the constitutional right against the criminal punishment of adultery, though the TCC eventually declared the adultery provision constitutional in this decision. Along this line, Interpretation No. 791 merely renamed the said "freedom of sexual behaviors" to the "right to sexual autonomy" in order to emphasize the core interests of decision-making capacity *vis-à-vis* physical behaviors.

In reviewing whether the adultery provision constituted excessive restrictions on the rights of the defendants concerned, the TCC did also mention that the right to spatial and informational privacy was also invaded as the inevitable consequences of the investigation, prosecution and trial processes. However, the TCC seemed to employ this right to privacy only as a supplementary basis to invalidate the adultery provision.[25]

On the review of Section 239 of Criminal Procedure Code (Taiwan), the TCC resorted to the right

22) For the full text (in Mandarin) of the TCC Interpretation No. 791, see https://cons.judicial.gov.tw/jcc/zh-tw/jep03/show?expno=791 (Last visited Jan. 19, 2021). As of January 31, 2021, its English translation is still not available.

23) See id., Para. 26 (Reasoning).

24) Interpretation No. 204 (1986) was the first TCC interpretation that referred to Article 22 of Constitution as the constitutional basis for recognition of unwritten rights.

25) See TCC, Interpretation No. 791 (2020), Para. 32 (Reasoning).

to equality under Article 7 of Taiwan Constitution to strike down this unique provision. Since it takes two to commit an adultery, both parties to the adultery shall receive the same punishment. Under the said Section 239 of Criminal code, the innocent spouse may choose to continue his or her complaint against the third party only, without implicating his or her adulterous spouse. Standing alone before trial, the third party apparently suffered an inferior different treatment to the adulterous spouse.[26] Based upon this analysis, the TCC found Section 239 of Criminal Procedure Code (Taiwan) unconstitutional for violation of the right to equality.

As a result of the operation of the said Section 239 of Criminal Code, the application of Section 239 of Criminal Code in practice has incurred a significant disparity between the number of male and of female defendants prosecuted and convicted for committing adultery. Statistics showed that the female defendants had consistently outnumbered the male by a range up to 20% during the past twenty years. Thus the TCC further raised a concern about the said gender inequality in practice, resulted from the coupled application of Section 239 of both Criminal Code and Criminal Procedure Code. However, the TCC stopped short of declaring the said two Sections unconstitutional.

The CCK decisions only dealt with the counterpart of Section 239 of Criminal Code (Taiwan), without involving any similar provision to Section 239 of Criminal Procedure Code of Taiwan. The comparison and comments below will focus on the part of Section 239 of Criminal Code (Taiwan) in the reasoning of Interpretation No. 791.

C. Standard of Review

In striking down Section 239 of Criminal Code (Taiwan), the TCC adopted an intermediate scrutiny test on its analysis of the proportionality principle. Influenced by the jurisprudence of the Supreme Court of the United States, the TCC, in Interpretation No. 791, required the challenged adultery provision further an important interest by means that are substantially related to the achievement of purpose, in order to meet the requirements under the said test.

D. Scrutiny of Purpose

Similar to the CCK decision, the TCC recognized the promotion of fidelity in marriage, together with the maintenance of the marriage institution in general and respective marriage in particular, as constitutional purposes furthering important public interests.

E. Scrutiny of Means

The TCC also applied the proportionality principle, borrowed from German courts' jurisprudence, to review the constitutionality of both purposes and means. On the review of means, analysis of the proportionality principle were divided into three parts: appropriateness, necessity, and balancing of interests.

On the appropriateness test, the TCC cast doubt on the effectiveness of criminal punishment as a

26) See Id., at Para. 39 (Reasoning).

means to maintain the marriage institution in general and the respective marriage in particular. Nevertheless, the TCC still agreed that such criminal punishment did help deter the occurrence of adultery to a certain degree, and therefore was not a completely useless means for realization of the said purposes.

On the necessity test, the TCC found the adultery concerned far more private than public interests. Criminal punishment shall be imposed upon the conducts of anti-social nature that did harm public interests, rather than on those merely interfering with personal morality or private interests. Though violation of fidelity in marriage does hurt the feelings and trust of the innocent spouse, it does not necessarily damage the public interests to a significant degree. In this sense, imposition of criminal punishment on adulterers can hardly be considered a necessary means.

On the balancing of interests test, Interpretation No. 791 held the criminal punishment of adultery infringed the right to sexual autonomy. Besides, the TCC emphasized it also intruded on the spatial and information privacy. Such intrusion was the inevitable and collateral consequences of criminal investigation, prosecution and trial processes. Such material harms to the rights of adulterers obviously outweighed the contingent effects on the maintenance of marriage. Criminal punishment of adultery shall fail the balancing test.

F. Outcome

In conclusion, the TCC declared Section 239 of the Criminal Code (Taiwan) unconstitutional for violating the proportionality principle and infringing the right to sexual autonomy. Under Taiwan's Constitutional Court Procedure Act, the TCC decisions have a general effect binding on all levels of government and agencies. However the TCC may only declare unconstitutional the laws or regulations as applied by a final judgment of court and not the court judgment itself. Thus, for those already convicted individual defendant-petitioners, any of them will have to file a petition for retrial of his or her own case with the court of final judgment, in order to overturn his or her final judgment. For those judge-petitioners, they shall resume the court procedure of the respective cases, and acquit the defendants on trial. For those already in prison serving their sentences, they shall be released right after the announcement of Interpretation No. 791.

It was reported that a total of five convicts (three males and two females) then in prison were released on the evening of the same day when the TCC announced this Interpretation on May 29, 2020. Another 28 convicts had their sentences commuted, but continued to serve the sentence of other convicted offences.[27] Besides, it was reported that a total of 162 adultery cases were then pending before the district courts and high courts (appellant courts) across Taiwan. The judges presiding over these cases shall dismiss these charges by judgments of "exempt from prosecution" in accordance with Section 302, Clause 4 of Criminal Procedure Code (Taiwan).[28]

---

27) *See* Apply Daily, "Adultery Decriminalized: 33 benefited, two females and three males released immediately," (May 29, 2020) (in Mandarin), *available at* https://tw.appledaily.com/local/20200529/W6RQ4CTQDBQAHGJ4AW2PSR66UQ/ (Last visited Jan. 28, 2021); CTS News, "Adultery unconstitutional! Five released from prison, 28 commuted" (May 30, 2020) (in Mandarin), *available at* https://news.cts.com.tw/cts/general/202005/202005302002213.html (Last visited Jan. 28, 2021).

28) *See* George Liao, "Five released, 162 cases to be dropped following Taiwan's decriminalization of adultery," *Taiwan*

IV. Comparative Analysis and Comments

1. Comparison of Holdings and Legal Reasoning

Both the CCK and the TCC issued more than one decision on the adultery case, and only declared the adultery as a crime unconstitutional in their last decision, respectively. In the following, I will focus on and compare the last decision of both Courts, *i.e.*, the CCK's 2015 decision and the TCC's 2020 decision, unless otherwise stated.

Overall speaking, there are several noticeable similarities and differences between the said two decisions of the CCK and the TCC on the adultery case. The jurisprudential development and the holdings of these two decisions were similar. The analytic framework and tools as employed in reasoning also shared many characteristics in common, despite some nuanced but important differences.

A. Basis of Right

It is easy to notice that both Courts relied upon the "right to sexual autonomy" (by the TCC) or "right to sexual self-determination" (by the CCK), as the primary basis of right to review the constitutionality of adultery as a crime. It seems that both terms refer to the same legal connotation and effects, conceptually and operationally. The only difference was the CCK inferred the right to sexual self-determination from the right to personality and the right to pursue happiness under Article 10 of Korean Constitution, while the TCC recognized the right to sexual autonomy as an unwritten right as protected under Article 22 of Taiwanese Constitution. This is only a rhetoric and symbolic difference as a constitutional ground to start the analysis. Moreover, both Courts referred to the "right to privacy" as the secondary basis of right to evaluate the actual consequences of the investigation, prosecution and trial processes. Both Courts found the invasion of the adulterers' spatial and informational privacy were so disturbing that would outweigh the interests pursued by the legislative purposes of the adultery provision.

However, there was also a noticeable variance between these two decisions: right to equality (or equal protection). Both adultery provisions in both countries punished both husbands and wives committing adultery, as well as their partners. Both provisions were gender-neutral on the face and not motivated by a discriminatory purpose or intent based on or related to gender. The majority and concurring opinions of the CCK's 2015 decision did not discuss the issue of gender equality at all.[29] In Taiwan, the TCC's 2020 decision also invalidated, on the ground of equality right, the unique Section 239 of Criminal Procedure Code (Taiwan), which allowed the innocent spouse betrayed to withdraw the criminal complaint against his or her adulterous spouse only and continued the criminal procedures against the third party. Though this procedural provision was also gender

News (Jun. 1, 2020), *available at* https://www.taiwannews.com.tw/en/news/3942916 (Last visited Jan. 28, 2021).

29) The dissenting opinion of the CCK's 2015 decision did mention gender equality but considered it as one of the legitimate purpose to be protected by the adultery provision. *See* 2009Hun-Ba17 (2015), *supra* note 7, at 25-26 (Justice Lee Jung-Mi and Justice Ahn Chang-Ho, dissenting).

neutral on the face, but it did produce a disproportionate impact against the female offenders (either as the adulterous spouse or the third party), whose prosecution and conviction had outnumbered their male counterpart in practice. Mindful of such disparate impact, the TCC's 2020 decision did express concerns with this "phenomenon of gender imbalance" as the obvious consequence of the combined application of both Section 239 of the Criminal Code and Criminal Procedure Code of Taiwan. However, the TCC's 2020 decision stopped short of expressly declaring, in its holdings, the adultery provision in the Criminal Code unconstitutional for violation of gender equality under the Constitution. The TCC fell short of a two-thirds supermajority (ten votes) out of the fifteen Justices, as required by the Constitutional Court Procedure Act of Taiwan to produce a holding on a constitutional issue. The simple majority of the TCC can only expressed their concerns in the reasoning.[30)]

B. Analysis of the Proportionality Principle

Another striking similarity was that both Courts applied the proportionality principle to analyze whether and how the adultery provision violated the said right to sexual autonomy (or self-determination) and the right to privacy. I believe this is a clear example of both Courts' being influenced by the jurisprudence of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG).

On the review of the means, both Courts applied the three requirements of the proportionality principle: appropriateness, necessity and balancing of interests. Both Courts held the adultery provision failed the last test of balancing of interests, taking into special consideration of the invasion into the adulterers' right to privacy. However, both Courts presented, in the rhetoric sense, a slightly different application of the first (appropriateness) and second (necessity) tests. The difference lied in the application of the first test of appropriateness. The CCK seemed to combine the first and second tests together and then ruled the adultery provision failed to achieve the "appropriateness of means and least restrictiveness." In so doing, the majority opinion of the CCK made a lengthy comparison of the civil liabilities and the criminal punishment of the adultery, before reaching its conclusion.[31)] On the other hand, the TCC separated the test of appropriateness from the test of necessity, and applied one after another. Though the TCC also held that the adultery provision failed the test of necessity, it nevertheless only cast doubt on the appropriateness of means. A careful reading of the reasoning of the TCC regarding the analysis of the appropriateness test, it seemed that the TCC did confirm that the criminal punishment of adultery still had a rational, though not strong enough, relation to its legislative purposes.[32)]

A further analysis of both decisions will reveal the following two other differences. Firstly, the CCK seemed to apply the traditional three-part proportionality principle to review the

30) Under the Constitutional Court Procedure Act of Taiwan, it requires a vote by more than a two-thirds majority of the total number of the Justices (*i.e.,* at least ten out of fifteen) to produce a holding of court decision, but it needs only a simple majority (*i.e.*, eight out of fifteen) to approve the reasoning.

31) *See supra* note 7, at 6-11 (Majority opinion).

32) *See* Interpretation No. 791 (2020), para. 30-31 (Reasoning).

constitutionality of means, while separating the scrutiny of purpose from the review of means. The TCC appeared to read the proportionality principle as a set of four-part tests to review both the purpose and means of the law in dispute. In terms of the doctrinal contents and the application of the proportionality principle, the said difference in the decisions of both Courts sounded rhetoric and did not produce any real difference in the outcomes of both decisions. But a more careful reading will reveal a more subtle and significant difference between these two decisions.

The difference laid in the standard of review adopted by each Court. In its 2015 decision, the majority opinion of the CCK did not discuss or mention the standard of review for its analysis of the proportionality principle for the purpose of determining whether the right to sexual self-determination and the right to privacy were violated by the adultery provision. On the other hand, the TCC's 2020 decision specifically chose the intermediate scrutiny test for its analysis of the proportionality principle, including the review of both purposes and means.[33] Accordingly, the TCC confirmed the legislative purposes as important interests but found the means unconstitutional under heightened scrutiny.

Application of the proportionality principle is undoubtedly an example of constitutional borrowing from Germany by both Korea and Taiwan. However, the TCC's invocation and choice of the intermediate scrutiny test in the analysis of the proportionality principle owed its origin to the Supreme Court of the United States. Beginning roughly from the start of the 21st century, the TCC has increasingly discussed, in its decisions, which standard of review ought to be adopted in a specific case, particularly on those cases involving equal protection, free speech and property rights, among others. This has been a conscious borrowing from the jurisprudence of the Supreme Court of the United States. As a result, the TCC has gradually developed a set of three-tier tests, *i.e.*, rational basis review, intermediate scrutiny and strict scrutiny, and skillfully incorporated these US-styled tests into its analysis of the proportionality principle originated from Germany. Such discussion, choice and application of the standards of review framework seemed to be largely absent in the 2015 decision and many other important decisions of the CCK.

Without making any evaluation on the application or non-application of the various tests, I would further argue that this seemingly rhetoric difference may be attributed to an institutional factor regarding the composition and backgrounds of Justices in both Courts. In Korea, any one eligible for the post of Justices of the CCK must hold a position as judge, public prosecutor or attorney-at-law for at least 15 years, among other qualifications.[34] Thus even a law professor with similar or more years of seniority will not be eligible for appointment to be a Justice of the CCK, if he or she does not have the said public official position or professional license. While in Taiwan, a legal scholar without the said public position or professional license is still eligible for the post of the TCC Justices.[35] Taiwan's Organization Act of the Judicial Yuan further requires the number of

33) *See id.*, at para. 27 (Reasoning).

34) Constitutional Court Act of Korea, Section 5(1): "Justices shall be appointed from among those who have held any of the following positions for 15 years or more and who are 40 or older: Provided, That the periods of service of the person who has held two or more following positions shall be aggregated: 1. A judge, prosecutor, or attorney; …" (1988, last amended 2011).

35) Organization Act of the Judicial Yuan, Section 4, Paragraph 1: "A candidate for Justice shall have one of the following

Justices appointed under the same category of qualification shall not exceed one-third of the total number of Justices, *i.e.*, five.[36] Roughly since 1994, the number of legal scholars appointed to be the TCC Justice has been around one half of the total number of the TCC Justices, while the other half has consisted of career judges, prosecutors and/or lawyers.[37] Over years, legal scholars of no previous judicial experience have played an important role no less than those Justices with judicial experiences, in the TCC.

One positive contribution made by those Justices of scholarly background has been the introduction and promotion of comparative constitutional studies into the jurisprudence of the TCC. The proportionality principle itself was introduced, in the mid-1990s, by those Justices having been educated and earned doctoral degrees in law from various German universities. With the appointment of U.S.-educated legal scholars to be Justices, the TCC became aware of the issue of the standards of review and began to discuss its choice and application also around the mid-1990s. In the beginning, the proportionality principle borrowed from Germany and the standards of review model influenced by the U.S. seemed to compete with each other. The former approach has enjoyed an upper-hand advantage in practice, partly due to the fact that Germany-educated legal scholars obviously outnumbered their counterparts from the U.S., either in the universities of Taiwan or within the TCC.[38] Then the TCC managed to combine and develop these two approaches into a unique approach that applied the three-tier tests under the framework of the proportionality principle. After reference to the proportionality principle in a decision, the TCC would usually go on to discuss and eventually choose a specific standard of review from among the said three-tier tests. If the TCC picks the most lenient test of rational basis review, it would only require there shall be a *legitimate* purpose and then apply the appropriateness test to the review of means in a disputed law. In the case of the intermediate scrutiny test, as in Interpretation No. 791, the TCC will elevate its requirement for the purpose from merely legitimate to *important*, and often resorts to the last part of the proportionality principle, *i.e.*, balancing of interests, for the review of the means. If the TCC chooses the most rigid test of strict scrutiny, then it always demands the purpose must be *compelling* and the means be the least restrictive (or there shall be no less restrictive means available). Such a mixed approach has been a product of exchanges between the Justices with judicial experiences and with scholarly background, as well as between those Germany-educated and U.S.-educated Justices. It remains to be watched and examined whether the TCC will further

qualifications: (1) Having served as tenured judge for at least fifteen years with outstanding performance; (2) Having served as tenured public prosecutor for at least fifteen years with outstanding performance; (3) Having practiced as lawyer for at least twenty-five years with an outstanding reputation; (4) Having served as professor in a university or an independent college that is accredited by the Ministry of Education for at least twelve years, having lectured on the primary subjects as provided for in Article 5, Paragraph 4 of the Judges Act for at least eight years, and having published professional writing; (5) Having served as Judge in an international court, or having worked as researcher of public law or comparative law in an academic institution and having authoritative professional writing. (6) Having researched in law and having political experiences with an outstanding reputation." (1947, last amended 2015).

36) *See Id.*, Section 4, Paragraph 2.

37) The qualification of lawyers eligible for the Justiceship of the TCC was added in 2015. Since then, there have been three lawyers (two males and one female) appointed.

38) After appointment of four new Justices in October 2019, the TCC currently has five Germany-educated scholars and only one U.S.-educated (the author of this essay) scholar serving Justices. Another Justice of scholarly background once studied in Japan. One of the three Justices with lawyer experience also studied in Germany.

develop a more sophisticated framework of the standards of review and make an innovative contribution to the theory and practice of comparative judicial review.

C. Outcome

On the face, both of the latest decisions by the CCK and the TCC declared unconstitutional the adultery provision, based upon similar grounds as analyzed above. There was a significant difference in regard to the reach of the binding force of the respective decision. Under Section 47(3) of the Constitutional Court Act of Korea, any criminal statute or provision declared unconstitutional by the CCK shall lose its effect retroactively, provided that, where there was a previous decision upholding its constitutionality, this criminal statute or provision shall lose its effect only after the date of the previous decision made.[39] Since the last previously decision upholding the constitutionality of the adultery provision was made on October 30, 2008, thus only those court decisions, finding guilty of the adultery offence, made between October 31, 2008 and until February 26, 2015 shall lose their effect retroactively.

In Taiwan, a TCC decision declaring a law (either civil, criminal or administrative) unconstitutional will be binding on the future cases only, without any retroactive effect in general. Beginning from Interpretation No. 177 of 1982, the TCC has accorded a limited retroactive effect to the petitioned cases in dispute, as well as those cases on the same issue that are already petitioned with but yet decided by the TCC. This limited retroactive effect has been the judge-made laws by the TCC itself, without any express statutory authorization. As compared to the CCK's 2015 decision, the TCC's 2020 decision obviously had a much less impact on the final decisions of criminal courts and the society.

It is worth noting that the TCC will soon be confronted with the similar challenges posted by the said retroactive effect. The current Constitutional Court Procedure Act of Taiwan, consisting of 35 Sections, was completely amended in December 2018. The brand new Act, consisting of 95 Sections, will formally take effect on January 4, 2022. Under Section 53(2) of this new Act, any of the future TCC decisions declaring a criminal law unconstitutional and invalid immediately[40] will also have a retroactive effect on all final decisions of criminal courts that applied the same criminal law declared unconstitutional. This new rule on the retroactive effect of the future TCC decisions has raised some concerns among some of the sitting Justices, including myself. Take Interpretation No. 791 as example, the disputed Section 239 of the Criminal Code of Taiwan took effect in 1935. The TCC once upheld its constitutionality in Interpretation No. 554 on December 27, 2002. It would be extremely complicated and difficult to give a decision like Interpretation No. 791 the unlimited retroactive effect, as provided for in the said Section 53(2). It remains to be watched how the TCC will respond to this new rule after the new Act takes effect in January 2022.

39) *See Supra* note 16.

40) This new provision intentionally excludes those decisions declaring a law unconstitutional but still valid until the expiration of a certain period of time following the date of decision, from having a retroactive effect. Section 47(2) of the Constitutional Court Act of Korea also excludes the CCK's decisions on civil and administrative laws from having the retroactive effect.

2. Following or Leading the Society?

As stated above, both the CCK and the TCC first upheld the constitutionality of adultery as a crime and then overturned their respective previous decisions around twenty years later. It took 25 years for the CCK to rule adultery as a crime unconstitutional. The CCK's first decision was issued in 1990. Its latest decision changing the prior position came out in 2015, about 25 years later. On the part of Taiwan, it took eighteen years for the TCC to change its position on the constitutionality of adultery as a crime. The TCC's first decision (Interpretation No. 554) was made in 2002. Eighteen years later, the TCC reversed its 2002 decision by Interpretation No. 791 in May 2020.

All of the five decisions of the CCK and the two of the TCC were made after democratization began in Korea and Taiwan, respectively, in the late 1980s. It should be safe to suggest that those previous decisions upholding the adultery provision may not be a by-product of the authoritarian rule in both countries before 1990. In my opinion, those previous conservative decisions may be regarded as both Courts' tacit acquiescence to the then-overwhelming will and expectation of the vast majority of the people in both countries, rather than their silent submission to the political influence. Despite progressive developments in the political arena, a new democracy could remain conservative on some or many social policies, particularly on the issues regarding the family, marriage and sexual morality.

The next curious question to be asked is: why did the CCK and the TCC change their previous position on adultery finally, in 2015 in Korea and in 2020 in Taiwan? Have the society of Korean and Taiwan already evolved to support or demand the decriminalization of adultery? The answer seemed to be in the negative. Several recent opinion polls in Korea and Taiwan, respectively, showed a clear majority of the people polled in each country still supported the punishment of adultery by criminal law, not much different from twenty years ago.

In the dissenting opinion of the CCK's 2015 decision, Justice Lee Jung-Mi and Justice Ahn Chang-Ho cited three opinion polls surveyed in 2005, 2009 and 2014, respectively, all of which showed the criminal punishment of adultery had been consistently supported by more than 60% of the people polled in Korea.[41] The ratio of people polled in Taiwan in favor of retaining the adultery as a crime was even higher than that in Korea. During the oral argument of Interpretation No. 791, the representatives from the Ministry of Justice strongly suggested that many opinion polls conducted in the first two decades of the 21st century consistently showed over 70% of the Taiwanese people polled were against the decriminalization of adultery. That was exactly the main rationale why the government, both the executive and legislative branches, had been extremely reluctant to remove the adultery from the Criminal Code of Taiwan. Even after the announcement of Interpretation No. 791, an opinion poll showed 60.2% of people polled still against this decision and only 32.9% supporting it. This poll also indicated a gender difference: 67.9% of the female and 52.2% of the male polled opposing this TCC decision.[42]

41) *See supra* note 12.

42) United Daily, "60% of people polled cannot accept decriminalization of adultery by the Constitutional Court," (Jun. 22, 2020) (in Mandarin), *available at* https://udn.com/news/story/7321/4651796 (last visited Jan. 28, 2021).

Many should wonder why the CCK and TCC changed their respective position against such strong oppositions from both societies. And how did both Courts reach their decisions, by what legal arguments and justifications?

In the CCK's 2015 decision, the majority opinion suggested there has been a "change in public's legal awareness" and there no longer existed a clear public consensus in favor of the criminal punishment of adultery.[43] However, the dissenting opinion cited then-most recent polls to rebuke this finding. It seemed that the poll data cited by the dissenting opinion should be a more accurate indication of the real public attitude of the majority people of Korea in regard to the adultery issue. Nevertheless, the majority opinion's hint at the possible "change in public's legal awareness" in Korea was a clever justification. The majority opinion of the CCK first suggested, without solid evidences, that the public in Korea was already divided on this issue. Then it pretended to follow this alleged new trend emerging from the society, by questioning the continuance of public support for the adultery as a crime in Korea. On the surface, this argument sounded like a rhetoric justification used by the majority opinion to defend its decision. In fact, its genuine intention was to avoid the direct confrontation against the "real" public opinions. Without making a flat denial of the public support for adultery as a crime, the majority opinion of the CCK, in a subtle and indirect way, presented its own legal rationales to strike down the adultery provision.

As compared to the CCK, the TCC actually faced a stronger opposition against the decriminalization of adultery in early 2020. The TCC was fully aware of this opposition and did not dodge the ball. Unlike the CCK, the TCC took a head-on stand against the enormous social pressure, in an attempt to get the monkey off its back, once and for all. In Interpretation No. 791, the majority opinion first suggested that the traditional social functions of marriage have gradually given way to individual autonomy over the conclusion and termination of marriage, as well as to one's sexual autonomy within a marriage. Based upon this reformulation of the normative connotation of marriage, the TCC went on to assert the necessity for review and redefinition of marriage in light of the idea of the living constitution. The TCC also referred to other constitutional rights that it had already recognized as unwritten rights, such as the right to privacy, *etc*. Citing the abovementioned social changes in the functions of marriage and the normative changes in the family and marriage laws under the Constitution, the TCC took on the challenge and directly confronted against the ostensibly overwhelming public opposition against decriminalization of adultery in Taiwan.[44]

There was another explanation about why the TCC chose to sail against the wind in a more direct and bolder manner. In May 2017, the TCC rendered Interpretation No. 748, which recognized the same-sex marriage under the Taiwanese Constitution. This decision and its implementation statute enacted two years later made Taiwan the first country in Asia and the 27th in the world to recognize the same-sex marriage. Despite strong opposition by about one half of the people in Taiwan, Interpretation No. 748 has been enthusiastically praised by the liberals and the younger generations

43) *See supra* note 10.
44) *See* TCC, Interpretation No. 791 (2020), Para. 23-24 (Reasoning).

of Taiwanese, as well as by numerous international media. It marked a significant milestone of the judicial activism of the TCC. Not surprisingly, the majority of the TCC Justices thereafter gained much more confidence in tackling a thorny social issue like adultery.

As compared to Interpretation No. 748 on the same-sex marriage case, Interpretation No. 791 on the adultery case may be considered a slightly easier decision. While the overall legal community of Taiwan was divided on the same-sex marriage issue, a much higher percentage of the legal professionals were against the criminal punishment of adultery. Before and after the issuance of Interpretation No. 748, social mobilization against the legalization of the same-sex marriage was high on the political agenda, leading to several referenda balloting in November 2018 aimed at halting the implementation of same-sex marriage in Taiwan. On the contrary, decriminalization of adultery has never become a top-priority issue for any political party or camp in Taiwan, even though a much higher percentage of Taiwanese people are indeed against it than those against the same-sex marriage.

Facing strong and discernable opposition from the society, both the CCK and the TCC chose to confront the challenge and eventually made the seemingly unpopular decisions to decriminalize adultery. In spite of minute differences in their justifications and persuasion skills, both Courts did manage to lead the society, instead of following the will of the majority of people. Fortunately, both Courts have also enjoyed the success of their respective decision thus far.

V. Conclusion

As most countries in modern days have decriminalized adultery, the existence of the adultery as a crime in Korea until 2015 and in Taiwan until 2020 presented two unusual cases worthy of comparative studies. Against similar social backgrounds and public opposition, both Korea and Taiwan went through a similar path to decriminalize adultery by way of reversing the respective judicial decisions of the Constitutional Court, and not by legislation. Each decision of the CCK and the TCC thus provides a rare window to observe and analyze how an active Constitutional Court responds to the resistant opposition among the majority of the people in a society. From this perspective, both decisions on the adultery case rendered by the CCK and the TCC should be regarded as striking examples of a court's managing to overcome the counter-majoritarian difficulty[45] facing it.

Over the past three decades, either the CCK or the TCC has taken pains to establish itself as active but trustworthy Constitutional Court as the guardian of the Constitution in its own country. Though the adultery case is considered a more social than political issue, it could nevertheless produce enormous political pressure on the court. In a democracy, the political branches generally dare not resist such genuine will of the majority of the people. Either constitutional courts or

45) *See* Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd Ed., New Haven, CT: Yale University Press (1962).

supreme courts will be in an equally, or even more, vulnerable position to directly confront against the people. From this perspective, both decisions discussed in this essay should stand as the milestone cases to illustrate both the CCK and the TCC's careful answers to the thorny social issues in a new democracy.

The Case Law from the Constitutional Court of Korea on the Conscientious Objection to Military Service

ANDRÉS JAVIER GUTIÉRREZ GIL*

Abstract

This articles examines the evolution of the case law from the Constitutional Court of Korea as regards the conscientious objection to military service. The evolution ultimately led to the judgment of 28 June 2018, which declared the unconstitutionality of the legislator's omission concerning the regulation of an alternative civil service, and set a deadline for its implementation, which took place on 31 December 2019 with Act 16851. The special geopolitical circumstances of the Korean peninsula explain a controversy that divides the Korean society and the Constitutional Court itself. However, this controversy has been resolved in a way that gives the Constitutional Court a clear political and legal leadership. Finally, the article analyzes the judgment in the international legal context, with particular reference to the way in which some of the issues raised have been addressed by the Constitutional Court of Spain.

* Secretary General, the Constitutional Court of Spain.
Judge of the High Court of Justice of Madrid.

I. Introduction

1. On 3 May 2018, the Constitutional Courts of Korea and Spain signed a collaboration agreement that gradually bears fruits. In this cooperation framework, I am very honored to have the chance to participate in the collective work that evaluates the role of the Constitutional Court of Korea over the past 30 years and which will be published in the year that marks the 10th anniversary of the Constitutional Research Institute.

Unfortunately, studies on Korean constitutionalism and the Constitutional Court of Korea are almost non-existent in Spanish[1]. It is necessary to check the English, French or German literature about Korea to overcome the barrier of the Korean language and get an approach to the constitutional model of the Republic of South Korea.

However, there are many reasons why the Korean constitutional jurisdiction should be of interest to Spain. Despite the great distance between both countries in terms of geography, language and culture, Korea and Spain share many relevant factors as regards constitutional justice. Both follow Kelsen's model, and their competences are strongly influenced by the Constitutional Court of Germany[2].

2. This is the reason why many aspects of the Korean constitutional jurisdiction are worth studying. Besides, the Korean and Spanish Courts are facing many common issues due to the increasing globalization of human rights. Conscientious objection is always a topical issue. The greater the society's religious and ideological pluralism, the stronger its relevance. It has rightly been pointed out that conscientious objection has gone through a legal 'big-bang', because a small

---

1) The Constitution of Korea has been translated from an English version into Spanish by Mariano Daranas Peláez. This translation was published in: 'Revista de las Cortes Generales', no. 94-95-96 (2015), pp. 367-413.
Also, Korea's Constitutional Court website offers an interesting brochure in Spanish on its history, status, organization, functions, proceedings, services and activities.
https://library.ccourt.go.kr/site/conlaw/download/publications/2014_Constitutional_Court_of_Korea(spanish).pdf
Regarding doctrine, several studies written by Colombian Professor Rodrigo González Quintero should be mentioned. To name a few: the article titled *Pactos sociales y justicia constitucional: una visión comparada entre Corea y Colombia*, published in 'Civilizar-Ciencias Sociales' (2011), no. 21, pp. 33-48; or a later article titled *Derechos humanos y seguridad nacional en la jurisprudencia de la Corte Constitucional surcoreana*, published in Revista Chilena de Derecho, vol. 40, no. 1, Santiago, (2013). The Korean system is addressed in other articles in Spanish, such as *Procesos constituyentes y cortes constitucionales: una perspectiva comparada,* Díkaion, Revista de actualidad jurídica, no. 18, Colombia, (2009), pp. 135-161.
In Spanish, the work *La justicia constitucional en Asia*, written by Luca Fanotto and translated by Diana María Castaño Varga, is also available.

2) Thierry Rambaud, *Regards croisés sur la Cour constitutionnelle de Corée et le Conseil constitutionnel français,* 3 REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] 755-772 (2010). This work explains that Professor Kwangyoun Lee highlighted the historical influence of German Administrative Law on the Korean Administrative order, as well as the strong ties that Korean professors developed with the German legal science after studying at German universities.
González Quintero (*Procesos constituyentes y cortes constitucionales: una perspectiva comparada)* points out that Kelsen came into contact with the Korean legal reality from the 1930's onwards. He was the professor of Japanese jurist Otaka Tomoo in Europe. Otaka Tomoo was a jurist and scholar in Korea during the Japanese Occupation. Later on, Kelsen had several Korean students at Harvard and Berkeley.
Professor Chongko Choi states that Kelsen wanted to write an ideal Constitution for a reunited Korea (Law and Justice in Korea, Seoul, Seoul National University Press), 2005, 25-26.

area such as conscientious objection to military service has triggered a chain reaction that has multiplied the types of conscientious objection[3].

In the current democratic societies, new types of conscientious objection have indeed added to the classic ones, like conscientious objection to military service or abortion. Examples include the rejection to participate in eugenic practices, to collaborate in the execution of death sentences or to receive certain medical treatments; the objection to compulsory religious education; the promotion of home schooling against compulsory schooling; conflicts about clothing or about Sunday rest in the working sector; the objection to the compulsory participation as a member of the jury in a criminal trial or the objection of public officers to perform same-sex marriages, among other cases.

Even in traditional cases -objection to military service and to abortion-, the phenomenon has also expanded: the refusal to perform the military service has evolved, first, into the rejection of the alternative service, and then, into an attempt to deduct the share corresponding to public defense expenditure from taxes. In the case of abortion, doctors were the first to state their objection; then, it scaled up to auxiliary health workers and pharmacists, and finally to Italian judges, who refused to consent to the will of minors that wanted to abort without their parent's permission. Also, several heads of State have refused to participate in the approval of laws that decriminalize abortion or euthanasia, like the heads of Belgium, Luxembourg or Liechtenstein.

At the same time, the existence of new generations of immigrants, who share cultural and religious values that sometimes deeply differ from those of the societies in which they try to integrate, causes the arousal of new examples of conscientious objection, such as the following: the refusal to use a motorbike's protecting helmet because it cannot be used while wearing a turban (Sikhs); the opposition of Orthodox Jews to remove the men's yarmulke cap; the refusal to honor the national flag because it is considered an act of idolatry (Jehovah's Witnesses), or the denial to add one's own photo to identity documents (Amish). It is clear that all these expressions of conscientious objection cannot be valued in the same way. As the Constitutional Court of Korea has pointed out, conscientious objection can only be considered genuine if it is 'deep, firm and true' (judgment of 28 June 2018, case 2011Hun-Ba379 and other 27 consolidated cases). In the words of the European Court of Human Rights, the beliefs from which conscientious objection arises must be based on 'solid and convincing grounds' (judgment of 7 July 2011, *case of Bayatyan v. Armenia*, § 125).

3. Unfortunately, it is impossible to address all the issues that can arise in this article. That is why I will exclusively focus on conscientious objection to military service. Not only because it is the oldest type of conscientious objection, but also because the constitutional treatment that this issue has received has been different in South Korea and Spain.

In fact, after the fall of the Soviet Union and the adherence of some of the countries of the Warsaw Pact to NATO, most European countries professionalized their Armed Forces or regulated

3) Navarro-Valls, Rafael y Martínez Torrón, Javier, *Conflictos entre conciencia y ley. Las objeciones de conciencia*, IUSTEL (2011).

the issue of conscientious objection. Therefore, conflicts deriving from the fulfillment of military duties have gradually disappeared, but migratory movements have given rise to an increase in other kinds of conscientious objection. On the other hand, the possibility of an armed conflict between the two Koreas still exists. That is why national defense is extraordinarily relevant. However, the extent of the immigration phenomenon is lower than that in Europe and the cultural homogeneity is greater. Thus, there are not many cases of conscientious objection related to immigration. Besides, the legal order in South Korea respects religious freedom, which contributes to the lower number of conscientious objection cases amongst immigrants.

From a legal and constitutional perspective, the starting point of conscientious objection also differs. In Spain, conscientious objection to military service is expressly recognized in Article 30(2) of the Constitution. After stating that Spanish citizens have the right and the duty to defend Spain, it adds: 'The law shall determine the military obligations of Spaniards and shall regulate, with the proper safeguards, conscientious objection as well as other grounds for exemption from compulsory military service; it may also, when appropriate, impose a form of social service in lieu thereof'.

This constitutional precept was developed in Law 48/1984, of 26 December, which was replaced by Law 22/1998, of 6 July. The principles that inspired these laws were: a) The regulation of conscientious objection with the following requirements: it should include the maximum number of types of objection and the minimum degree of formality in its proceedings; b) The conferral of the jurisdiction to solve the requests for conscientious objection to the civil Administration; c) The removal of all kinds of discrimination between those that fulfil the military service and conscientious objectors; d) The provision of sufficient guarantees to ensure that conscientious objection is not used as a way to elude the performance of constitutional duties, and e) The fulfillment of the alternative service system so that it benefits both objectors and the society in general.

Over the years, however, the will to professionalize the Armed Forces and the significant increase in the number of requests to be exempted from an armed military service made legislators suspend its compulsory fulfillment from 31 December 2001 on[4)].

South Korea has taken a different approach. In Professor Dae-Kyu Yoon's words[5)], in order to generally understand Korean Law, it is necessary to understand the particular aspects of Korean society in the first place. Korea belongs to the oriental culture, in which agriculture -i.e. life attached to the soil- was the basic way of life, and polytheist and pantheistic religions such as Buddhism and Confucianism were dominant. A deep respect for ethics prevails in the Korean society, which observes a high level of morality in comparison with other societies that share the same moral principles but follow them in a less rigid way.

Also, the particular geopolitical situation of the Korean peninsula cannot be ignored: First, it is a strategic place fought over by China, Japan and Russia; second, it is also a conflict scenario

4) By virtue of Law 17/1999, of 18 May, on the Armed Forces Personnel Regime, and of Royal Decree 247/2001, of 9 March.

5) Dae-Kyu Yoon, *La tradición jurídica coreana y su influencia en el derecho contemporáneo*, 7 - 14, REVISTA DE RELACIONES INTERNACIONALES, vol. 7. nº 14 (1998).

between the two superpowers arisen after WWII, and finally, after the end of the Cold War, it turned into a place of continuous confrontation between the two political systems that North and South Korea represent.

The Constitution of Korea provides in Article 39:

1. All citizens shall have the duty of national defense under the conditions prescribed by this Act.
2. No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.

To develop this constitutional mandate, the Korean legislation regulated the different categories of the male compulsory military service and imposed a criminal punishment on those that evaded military service in order to enforce its fulfillment. The criminal provision only imposes a punishment on those that fail to enroll 'without a justifiable cause' or who are absent after receiving a notification of enlistment or recruitment. However, as the refusal to perform the duty of military service on the ground of conscientious objection does not fall within the meaning of 'justifiable cause' (Supreme Court decision 2004Do2965, of 15 July 2004), conscientious objectors are criminally punished like those evading military service in general.

Like in many other countries, the impact of conscientious objection in Korea acquired social relevance after the sentences to objectors were confirmed. The convicts had a conflict of conscience between their beliefs and the armed military service, especially in the case of Jehovah's Witnesses. This controversy took on an international dimension when several conscientious objectors brought their cases before the United Nations Committee of Human Rights. On 3 November 2006, the Committee examined the cases filed by two conscientious objectors (Communications Nos. 1321/2004, Yeo-Bum Yoon against the Republic of Korea, and 1322/2004, Myung-Jin Choi against the Republic of Korea). Under Article 18 of the International Covenant on Civil and Political Rights (ICCPR), it determined that the sentence imposed to the claimants after their refusal to enroll in the army for reasons of conscience violated this article. On 23 March 2010, the Human Rights Committee adopted the Views of Communications Nos. 1593 to 1603/2007, where it recalled that the conviction and sentence imposed amounted to a restriction on their ability to manifest their religion or belief and that, in those cases, the State party had not demonstrated that the restriction in question was necessary, within the meaning of article 18, paragraph 3. On 1 February 2013, the Committee of Human Rights adopted another View (Communication No. 1786/2008 Jong-nam Kim et al against the Republic of Korea) in which it reiterates the arguments of previous Views, and recently, on the View of 29 June 2020 (Communication No. 2846/2016, Jong-bum Bae et al), it adopted the same position.

In Korea, several courts served this question to the Constitutional Court, which issued a decision on how conscientious objection to military service fits in constitutional terms in four occasions: the first three times, the Court analyzed the constitutionality of the criminal provisions applicable to citizens who do not fulfil their military duties on grounds of conscientious objection. The Court

considered that these provisions were constitutional- judgments of 26 August 2004 (case 2002Hun-Ka1) and of 30 August 2011 (cases 2007 Hun-Ka12 and 2008Hun-Ka22).

The fourth decision was issued in 2018 (judgment of 28 June 2018, case 2011Hun-Ba379 and other 27 consolidated cases). The Constitutional Court re-examined the question and modified its previous opinion in a decision with international impact. Despite it confirmed the constitutionality of the criminal provision, it nonetheless determined that the lack of alternative civil service options for conscientious objectors was nonconforming to the Constitution and set a deadline for legislators -until 31 December 2019- to provide conscientious objectors with an alternative civil service.

Shortly after, on 1 November 2018, the Supreme Court of the Republic of Korea adopted a decision to decriminalize conscientious objection. The Court considered that religious and moral beliefs were valid grounds to oppose to military service and ordered the release of 58 conscientious objectors.

Finally, in compliance with the decision of the Constitutional Court, Act No. 16851 on the Assignment and Performance of the Alternative Service was enacted on 31 December 2019 and came into force on 1 January 2020.

After this brief analysis on the evolution of conscientious objection and its treatment in Korea, the following pages will serve to deeply examine the Constitutional Court decisions about this issue.

II. Evolution of the Case Law from the Constitutional Court of South Korea

1. Judgment of 26 August 2004 (Case 2002Hun-Ka1).

This case arises from a criminal procedure of a person accused of violating the Military Service Act. The citizen refused to enroll despite having received the notification of enlistment for active duty service from the Commissioner of the Military Manpower Administration. Failure to enlist in the military service is punished with a sentence of imprisonment of up to six months or a fine. The appellant petitioned the court to request constitutional review, claiming that the Military Service Act infringed the freedom of conscience of those who objected to military service on the ground of their religious conscience. The criminal court accepted the petition and filed a request for constitutional review with the Constitutional Court.

The Constitutional Court, in a 7:2 opinion, held that article 88(1) of the Military Service Act[6)]

6) Article 88 of the Military Service Act (Evasion of Enlistment), Section 1: Persons who have received a notice of enlistment in the active service or a notice of call (including a notice of enlistment through recruitment), and fail to enlist in the army or to comply with the call, even after the expiration of the following report period from the date of enlistment or call, without any justifiable reason, shall be punished by imprisonment for not more than three years: Provided, that persons who have received a notice of check-up to provide the wartime labor call under Article 53(2), are absent from the check-up at the designated date and time, without justifiable reason, they shall be punished by imprisonment for not more than six months, or by a fine not exceeding two million won, or with penal detention.

(as amended by Act No. 5757, of 5 February 1999) was not unconstitutional. The Court examined the constitutionality of the criminal provision by comparing its content with several precepts from the Korean Constitution.

A. Whether the provision at issue violates the freedom of religion (Article 20 of the Constitution of Korea). The Court rules out the examination of the case from the perspective of religious freedom. Even if it admits the presence of a religious motivation on the appellants, it considers that since freedom of conscience is a comprehensive fundamental right in which both religious and non-religious conscience are included, it believes that the case has to be resolved by focusing on the freedom of conscience. Conscientious objection may also have ethical, philosophical or similar grounds.

B. Whether the provision at issue violates the freedom of conscience (Article 19 of the Constitution of Korea). The Court distinguishes between two areas regarding freedom of conscience: a) The 'freedom to form the conscience', which is the freedom internal and inherent to one's heart and consists in the freedom to form one's conscience and to make a decision under the conscience within the realm internal to one's heart, without unjust interference or coercion from outside, and b) the 'freedom to exercise the conscience', which is to express and realize the conscientious decisions, and to express the conscience thus formed towards the outside world and to establish life pursuant to the conscience. This includes, more specifically, the freedom to express the conscience or to not be forced to express the conscience (the freedom to express the conscience), the freedom to not be forced to act against the conscience (the freedom to exercise the conscience by inaction), and the freedom to act pursuant to the conscience (the freedom to exercise the conscience by action).

The 'freedom to form the conscience' is an absolute right which is fully protected as long as it stays in one's own heart. The 'freedom to exercise the conscience' is a relative freedom that may be restricted by law if it violates the legal order or the rights of others.

When analyzing the case, the Constitutional Court of Korea considers that there is a conflict of interest between the freedom of conscience (Article 19 of the Constitution) and the safeguard of national defense and safety (Article 5, section 2 of the Constitution). Also, Article 39(1) of the Constitution sets out the duty of national defense. Lastly, Article 37(2) of the Constitution establishes that the freedoms and rights of citizens may be restricted by law only when necessary to ensure national security. The 'guarantee of national security' is an indispensable prerequisite for the existence of the nation, the preservation of the national territory, the protection of the life and safety of all citizens, and also as a basic prerequisite so that citizens may exercise their freedom.

In judging whether or not to adopt an alternative service system, the legislators should comprehensively take into account the overall state of security of the nation, the country's combat capability, the demand for military resources, the quantity and quality of the human resources subject to conscription, the expected change in the combat capability once an alternative service system is adopted, the meaning and relevance of the fulfilment of military service given the

national security situation of Korea, the national and social demand for an equal allocation of military service duties, the actual conditions of the military service, and so on.

The reasons that support the implementation of an alternative service system are the following: a) The proportion of conscientious objectors with respect to the overall number of individuals under conscription is irrelevant. b) The importance of human military resources has diminished in comparison with the past, as the current national defense power does not depend solely upon the combat capability, and modern warfare takes on aspects such as the information and scientific warfare. c) The adoption of an alternative service system to solve the problems of the protection of conscience and equality, as has already been implemented in many nations for a long time. d) If an alternative service system is operated in a way the burden of the alternative service is equivalent to that of the military service on active duty, the problem of the evasion of military service will also be resolved. e) As the experience in many other nations that have adopted the alternative service system confirms, it is possible to select true conscientious objectors through a strict preliminary screening process and a post-management process, in order to find out whether or not the objection to military service is based upon a conscientious decision.

The reasons against the implementation of an alternative service system are the following: a) Our nation is the only divided nation in the world that is under a state of truce, and hostilities continue between the South and the North. Under this unique security situation, the duty of military service and the principle of equality in the military service burden have an important meaning that cannot be compared to that of other nations. b) Although it is true that there has been a change in the concept of national defense and modern warfare, the proportion of the human military resources in the national defense power may still not be neglected. On the other hand, the natural decrease in the number of military resources due to the current drop in the birth rate should also be taken into account. c) Considering the tough conditions of the active duty in our nation, it is not easy to ensure the equality between the burdens of an alternative service and those of the military service. Besides, there is a danger that the attempt to achieve the equality of those burdens might render the alternative service into a measure punishing the realization of one's conscience. d) In addition, although the proportion of the conscientious objectors to the overall number of individuals subject to conscription is not great at the current stage, we should not rule out the possibility that the preventive effect of deterring the evasion of military service through criminal sanctions might abruptly be dissipated with the adoption of the alternative service system. e) In the Korean society, where there is an absolute social demand to achieve equality as regards the burden of military service, if allowing exceptions to the fulfillment of the military service becomes a social issue, the adoption of the alternative service system might cause a serious harm to the capacity of the nation as a whole, as it may damage the social unification and further destabilize the backbone of the entire military service system: the mandatory conscription of all citizens.

After exposing the reasons in favor and against the implementation of an alternative service system, the Court states that if the constitutionality of a provision restricting a basic right depends upon the legal effect that will materialize in the future, the question lies in analyzing to what extent the Constitutional Court may review the criterion followed by the legislators.

Legislators have a wide scope of freedom to determine if the protection of conscience derived from the freedom of conscience should be compulsory and the best way to enforce it. Therefore, from this perspective, the judgment of whether the failure to adopt an alternative service system by the state is in violation of the freedom of conscience, as the public interest of national security may still be effectively achieved notwithstanding the adoption of the alternative service system should be limited to the test of 'whether the legislative judgment is conspicuously wrong'.

As a matter of principle, the implementation of relevant policies concerning national security is the task of legislators. The criterion of the legislators on the security situation of the nation should be respected, as they have a wide scope of discretion to specify the constitutionally imposed duty of national defense in the form of a provision based upon such judgment of reality.

Considering the security situation of Korea, the social demand for equality in conscription, and the various restrictive elements that may accompany the adoption of the alternative service system, the current situation does not guarantee that the adoption of the alternative service system will not harm the important constitutional legal interest of national security. In order to implement the alternative service system, a peaceful coexistence between South Korea and North Korea should be reached, the incentives for evading military service should be eliminated through the improvement of the military conditions, and finally, a consensus should be formed among the members of the social community to ensure that enabling the alternative service will not harm the realization of equality in the military service burden nor the social unity, through the widespread understanding and tolerance of the conscientious objectors. The Court decided that such prerequisites were yet to be satisfied, and therefore, the legislative criterion to not implement the alternative service system may not be deemed to be clearly unreasonable or plainly wrong.

In essence, 'freedom of conscience, as set out in Article 19 of the Constitution, does not give citizens the right to refuse to undertake military service'. 'Freedom of conscience' means simply the right to request the State to consider and protect the conscience of a person if possible, and therefore, it does not include the right to refuse to undertake military service on grounds of conscientious objection, nor to demand an alternative service to the compliance of a legal obligation. […]'.

C. Whether the provision at issue violates the principle of equality (Article 11 of the Constitution of Korea). The Constitutional Court also rejected the claim that the analyzed provision violates the right to equality, as it uniformly regulates on this issue regardless of whether the objection to the military service is or not based on religious grounds. Therefore, it cannot be said that the provision falls on any kind of discrimination.

On the other hand, the Court also rejects the comparison of conscientious objectors with people exempt from undertaking military service because of their physical, mental or psychological disabilities or diseases, or with those that serve as special talents in the areas of arts and sports. The Court finally declares that there is a huge difference between these cases and conscientious objectors, which is the reason why a different treatment based on this corresponding difference is not in violation of the principle of equality.

2. Judgment of 30 August 2011 (Cases 2007Hun-Ka12 and 2009Hun-Ka103, consolidated) and Judgment of 30 August 2011 (Cases 2008Hun-Ka22, 2009Hun-Ka24, 2010Hun-Ka16, 2009Hun-Ka7, 2010Hun-Ka37, 2008Hun-Ba103 and 2009Hun-Ba3).

Several years after its first decision, the Constitutional Court of South Korea issued two judgments on 30 August 2011. In the first case, several Jehovah's Witnesses were accused of violating the Act for the Establishment of Homeland Reserve Forces when they were called up for a reserve force training but failed to attend. While the case was pending, the court filed a request with the Constitutional Court for a constitutional review of the act, claiming that Article 15 Section 8 of the former Act No. 9945 of 25 January 2010, setting out the Establishment of Homeland Reserve Forces[7], was unconstitutional.

In the second case, several Jehovah's Witnesses were accused of violating the Military Service Act when they received a notice of enlistment but failed to report. While the case was pending, the court filed a request with the Constitutional Court for a constitutional review of the act, claiming that Article 88, Section 1 of the former Military Service Act (before its amendment set out in Act No. 9754, of 9 June 2009)[8] was unconstitutional.

The Constitutional Court used the Same Reasons in Both Judgments:

(1) The Court considered that imposing criminal penalties to those who did not take the training of service duty or did not enroll in military service because they claimed their right to an alternative service system, did not violate the defendants' freedom of conscience for the following reasons: the unique security situation of our South Korea; the loss of military forces which could be caused by adopting an alternative service system; the difficulties in determining whether a refusal to participate in the reserve service training is based on genuine conscience; the concern that the introduction of an alternative service system against public opinion would likely hinder social integration, thus seriously undermining the overall national capacity; and the fact that certain prerequisites required by the Court's case law still had not been met.

---

7) Article 15 Section 8 of the former Act No. 9945 of 25 January 2010.
A person who fails to receive [military] training under 6(1) without any justifiable ground shall be punished with imprisonment and with prison labor for not more than one year, with a fine not exceeding two million won, with detention, or with a non-criminal fine.

8) Article 88, Section 1 of the former Military Service Act (before its amendment set out in Act No. 9754, of 9 June 2009.
1) Any person who has received a notice of enlistment for active duty service or a notice of call (including a notice of enlistment through recruitment) but fails to enlist in the military or to comply with the call, even after the expiration of the following report period from the date of enlistment or call without justifiable grounds, shall be punished by imprisonment for not more than three years: [...] Provided, That persons who have received a notice of check-up to provide the wartime labor call under Article 53(2), are absent from the check-up at the designated date and time, without justifiable reason, they shall be punished by imprisonment for not more than six months, or by a fine not exceeding two million won, or with penal detention.

(2) Also, the Court rejected the claim that laws discriminated people based on their conscience or religion, or that they violated the principle of equality, as these laws uniformly regulate the evasion from military service, regardless of whether that evasion is based on conscience or whether that conscience is religious.

(3) Finally, the Court rejected the contention that the provisions violated Article 6, Section 1, of the Korean Constitution, which declares the principle of respect for generally recognized international law, due to the following reasons: It cannot be considered that the right to conscientious objection is automatically recognized under the International Covenant on Civil and Political Rights, which Korea signed on 10 April 1990, or that the Covenant created a legally binding obligation as to conscientious objection; there are no international treaties on human rights which expressly recognize the right to conscientious objection; and this right cannot be considered as a generally recognized rule of international law because there is no customary international law guaranteeing that right.

The judgments include two concurring opinions and the dissenting opinion of two judges. The latter consider that in these kinds of cases, where freedom of conscience and national defense are in conflict, an interpretation balancing both interests becomes necessary. However, these judges believe that both the Constitutional Court and the Supreme Court have interpreted in their case law that the refusal to undertake military service or participate in the reserve service training cannot serve to justify an exemption from military service. That is why serious criminal punishments have been imposed on the defendants. For the reasons stated, they find that both provisions severely infringe on the human dignity and value of the defendants. Also, they believe that it is such an excessive measure that it overly violates the basic grounds for imposing criminal penalties, i.e. the rule of proportionality between criminal conduct and responsibility.

3. Judgment of 28 June 2018 (Case 2011Hun-Ba379 and 27 Consolidated Cases).

Once again, the criminal proceedings started after several Jehovah's Witnesses were accused of violating the Military Service Act when they received a notice of enlistment but failed to report.

The judgment analyzes the constitutionality of two provisions: The provision establishing five categories of military service (which does not set out the implementation of an alternative civil service)[9] and the criminal provision that punishes those that do not undertake the compulsory military service without a cause[10].

9) Article 1, Section 1 of the Military Service Act, prior to its amendment by Act 9754, of 9 June 2009.

10) Article 88 of the Military Service Act.

1) Any person who has received a notice of enlistment for active duty service or a notice of call (including a notice of enlistment through recruitment) and fails to enlist in the military or to comply with the call, even after the expiration of the following report period from the date of enlistment or call without justifiable grounds, shall be punished by imprisonment with labor for not more than three years: Provided, That where a person who has received a notice of check-up to provide a

A) First, regarding the provision on the categories of military service, the Court adopted the following decision: Nonconforming to the Constitution (with an order granting temporary application or prohibiting application). Six judges voted in favor of this decision and there are several reasons why the Constitutional Court adopted the decision of nonconformity, among which the following should be mentioned:

(1) The Constitution of Korea protects the freedom of conscience (Article 19). As it had stated in previous judgments, the Constitutional Court recalls that there are two different areas: a) The 'freedom to form the conscience', which is the freedom internal and inherent to one's heart and consists in the freedom to form one's conscience and to make a decision under the conscience within the realm internal to one's heart, based on one's own conscience, without unjust interference or coercion from outside. b) The 'freedom to exercise the conscience,' which is to express and realize conscientious decisions, and to express the conscience thus formed towards the outside world and to establish life pursuant to the conscience. This includes, more specifically, the freedom to express the conscience or to not be forced to express the conscience (the freedom to express the conscience), the freedom to not be forced to act against the conscience (the freedom to exercise the conscience by inaction), and the freedom to act pursuant to the conscience (the freedom to exercise the conscience by action).

The 'freedom to form the conscience' is an absolute right which is fully protected as long as it stays in one's own heart. But the 'freedom to exercise the conscience' is a relative freedom that may be restricted by law if it violates the legal order or the rights of others.

(2) Article 6.1 of the Constitution recognizes the conscientious objection to military service by virtue of the international rules on human rights, especially Article 18 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the freedom of thought, conscience and religion. In its General Comment No. 22 (1993), the Human Rights Committee believes that the right to conscientious objection can be derived from Article 18 of the ICCPR, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. The Covenant entered into force in Korea in 1990, without any reservations regarding Article 18. Both the United Nations Commission on Human Rights and the Human Rights Council that replaced it as of 2006 have expressed the same view in several resolutions.

(3) The respect of the principles of proportionality and ultima ratio. The duty of national defense

call for wartime labor under Article 53(2) is absent from the check-up at the designated date and time without justifiable grounds, he shall be punished by imprisonment with labor for not more than six months or by a fine not exceeding five million won, or by misdemeanor imprisonment: Amended by Act No. 11849, Jun. 4, 2013; Act No. 12560, May 9, 2014; Act No. 14183, May 29, 2016

1. Three days for enlistment for active duty service;
2. Three days for a call-up to social work personnel service;
3. Three days for a call for military education;
4. Two days for a call for military force mobilization and a call for wartime labor.

(Article 39 of the Constitution), which includes constitutional values that are key for the existence and safety of the State, conflicts with the freedom of conscience, which is the base of one's own nature and dignity. With this in mind, the legislator must find certain harmony that enables the coexistence of these two and, if not possible, at least their proportionate application. The principle of proportionality set out in Article 37, Section 2 of the Constitution is not a mere general principle used to limit fundamental rights. It restricts the State's action, which will only be able to use its power to the extent necessary to achieve the legitimate purpose pursued.

(4) The low impact of the implementation of an alternative service on Korea's national power of defense. It is not possible to affirm that the implementation of an alternative service for conscientious objectors will significantly impact the country's capacity of national defense since, according to official data, the proportion of conscientious objectors with respect to the overall number of individuals under conscription is irrelevant. Besides, even if objectors are punished, they will be imprisoned in a correctional facility and will not serve as military resources. A strict examination that enables the identification of the real conscientious objectors will prevent a bad impact on the country's capacity of national defense. Even if the decrease in the number of military resources is likely due to a drop in the birth rate, it should be taken into account that the current national defense does not only depend on human military resources, as modern warfare has turned into a sort of scientific and information warfare. Therefore, the number of military resources is not really important.

(5) The possibility to reach equality between the tasks of the military service and those of the alternative service. If we remove the factors by which active service is avoided and ensure equality between the active and the alternative service in terms of difficulty and length of service, this, together with a greater complexity of the selection system, will enable this problem to be solved effectively.

(6) The unique security situation on the Korean peninsula is no obstacle to regulating an alternative civil service, as experience from foreign countries shows that, regardless of the seriousness of the war threat, it is possible to implement it.

(7) The serious consequences suffered by conscientious objectors due to the lack of an alternative service. In particular, they are imprisoned for at least a year and a half and are unable to hold public office for a certain period of time, even after their sentence has been served. Moreover, as they are considered as evaders, objectors who already work as civil servants or are part of a company are dismissed. They also lose all patent rights, permits and licenses they have obtained. Finally, the Military Manpower Administration has the power to publish on its website the personal data of objectors, the declaration that they have not fulfilled their military obligations and their subsequent consideration as evaders. In addition to all these penalties and punishments from a legal point of view, objectors also suffer consequences in their social life after serving their sentence.

(8) Alternative service is more useful than punishment for national security. National defense obligations are not only limited to military service, but also to services of a non-military nature that are increasingly important. There are many social obligations in society that must be done for the common good, but are often avoided because they involve difficult or dangerous tasks.

(9) The Constitutional Court had already recommended reviewing the possibility of establishing an alternative service in 2004 (2002Hun-Ka1). However, 14 years passed and the situation did not change.

The conclusion reached by the Constitutional Court of South Korea is that the provision on the categories of military service, which does not regulate an alternative service for conscientious objectors, violates the prohibition of excessive restrictions and the freedom of conscience of objectors.

B) The second provision under consideration by the Korean Constitutional Court is the criminal provision imposing a sentence of up to three years' imprisonment for a person who does not or fails to perform military service 'without just cause' within the period determined for that purpose after receiving the enlistment or conscription letter. The criminal provision imposes penalties only on those who do not enroll 'without just cause', but since refusal to perform military service on grounds of conscience was not among the types of justification, conscientious objectors were criminally punished under this provision in the same way as ordinary evaders[11].

In principle, legislators have the power to decide which actions may be defined as criminal actions and their corresponding punishment. In other words, they must analyze whether legislative objectives can be achieved through other means than punishment and seek ways to minimize restrictions on the fundamental rights of the people.

In the present case, the purpose of the criminal provision is, first, to guarantee military resources and the equal sharing of military service tasks and, second, to achieve the legal interests recognized in the Constitution through the defense and security of the country. In view of this, the Constitutional Court considers that the application of the criminal provision to those who unduly evade the military service is an appropriate means of achieving such legislative objectives. The Court considers that the criminal provision does not impose excessive restrictions nor limits the freedom of conscience of objectors, as the public interests that are intended to be protected (national security and equal sharing of the military service tasks) are essential.

In the event that an objector is subject to criminal proceedings, he must be acquitted if the truthfulness of the objection is recognized, as in such a case, the judicial body must consider the objection as a ground for justification, even if the alternative service has not yet been initiated. On the contrary, if there is no real and sincere cause of conscientious objection, criminal conviction is

11) Supreme Court judgments 2004Do2965, of 15 July 2004; 2007Do4522, of 23 August 2007; 2007Do7941, of 27 December 2007; and 2009Do7981, of 15 October 2009).

lawful.

Four judges differ from the opinion of constitutionality[12]. They consider that since the provision on the categories of military service is the basis for the application of the criminal provision, the unconstitutionality of the former is inevitably linked to that of the criminal provision. Therefore, they argue that it is logical to consider that the criminal provision is unconstitutional in the part applicable to conscientious objectors, since the provision on the categories of military service is also unconstitutional.

III. Remarks on Judgment of 28 June 2018 (Case 2011hun-ba379 and 27 Consolidated Cases)

1. Procedural Issues

The judgment of the Korean Constitutional Court of 28 June 2018 examines the constitutionality of two provisions: Article 5(1) (administrative provision on the categories of military service) and Article 88(1) (criminal provision). The channels through which this specific case was brought before the Constitutional Court were two: The question of unconstitutionality regulated in Article 41(1) of the Constitutional Court Act (type of proceedings: 'Hun-Ka') and the appeal for constitutional protection *(amparo)* regulated in Article 68(2) (type of proceedings: 'Hun-Ba').

In Korea, when the constitutionality of an act is at issue in a trial, the court must request a decision of the Constitutional Court, *ex officio* or at the request of the parties involved in the case (Article 107(1) of the Korean Constitution). Indeed, the ordinary courts cannot judge the constitutionality of laws for themselves, but if the court suspects about the unconstitutionality of the law that it seeks to interpret and apply to the case under its jurisdiction, the court must suspend the proceedings, request the Constitutional Court for a decision on the constitutionality of the law in question and subsequently try in accordance with that decision. Finally, the petition must be brought through the Supreme Court. When an ordinary court other than the Supreme Court makes a request, it shall do so through the Supreme Court. This requirement is procedural in nature and the Supreme Court neither reviews the request nor determines whether to bring the request to the Constitutional Court.

However, the case may also be brought through article 68(2) of the Constitutional Court Act, which states that if a party involved in a case requests from the ordinary court a judgment on the constitutionality of a certain law that is relevant to the trial of the same case and this request is dismissed by the same court, that party may file an application for constitutional protection *(amparo)* with the Constitutional Court.

In both cases it is necessary that the provision applies to the case brought before the ordinary court, but if the provision is indirectly applicable, that will also suffice. In this case, even if the

12) Judges Lee Jin-sung, Kim Yi-su, Lee Seon-ae and Yoo Namseok.

administrative provision on the categories of military service was not directly applicable, the application of criminal laws actually depended on the constitutionality of the administrative provision tried. If the latter was found to be unconstitutional, the appellants could receive a different punishment or be acquitted, so the constitutionality of the both provisions was a matter to be resolved prior to the judicial procedure.

In Korea, a judgment on the constitutionality of an act falls within the jurisdiction of the full bench of the Constitutional Court, and requires the favorable vote of six or more judges in order to declare the unconstitutionality of the legal provision (Article 23 of the Constitutional Court Act).

With regard to the provision on the categories of military service, the Court made the following decision: Nonconforming to the Constitution (with an order granting temporary application or prohibiting application). Six judges (Lee Jin-sung, Kim Yi-su, Lee Seon-ae, Yoo Namseok, Kang Ilwon and Seo Kiseog) supported this decision and three judges opposed by defending refusal (Ahn Changho, Cho Yongho and Kim Changjong).

On the contrary, in relation to the criminal provision, the vote of six judges in favor of its unconstitutionality was not reached, since four voted for the dismissal of unconstitutionality (Judges Kang Ilwon, Seo Kiseog, Ahn Changho and Cho Yongho), one for its refusal (Judge Kim Changjong) and four for the opinion of partial unconstitutionality (Judges Lee Jin-sung, Kim Yi-su, Lee Seon-ae and Yoo Namseok).

As regards the structure of the judgment, three models are generally followed. That of the United Kingdom, where judicial decisions consist of the opinions of each judge (seriatim opinions). In the United States, since the beginning of the nineteenth century, the former model was replaced by the expression of a single opinion stating the court's unanimous decision (unanimous opinion), a decision of the majority (majority opinion) or a plural opinion (plurality opinion) in the event that there is no majority decision, in which case the position with the most votes becomes the official decision. Each of the judges may write or adhere to a concurrent or dissenting opinion. In continental Europe, however, the judgment reflects the majority criterion and in some countries, such as Spain, it is possible to add a concurrent or dissenting opinion.

The judgment of the Constitutional Court of Korea expresses the majority position in the trial of each of the provisions under consideration. Both the judges who made up the majority opinion and the dissenting judges were able to express their particular opinion. These are extensive reasonings in which the various judges expose the procedural considerations and the decisions on the merits they deem appropriate, through a language that seeks to be accessible and convincing to all people interested in the issue under consideration.

2. The Difference with Previous Decisions

We have seen that the Constitutional Court of Korea has ruled four times on the constitutional fit of conscientious objection to military service: the first three times, the Court analyzed the constitutionality of the criminal provisions applicable to citizens who do not perform their military duties on grounds of conscientious objection. The Court considered that these provisions were

constitutional -judgments of 26 August 2004 (case 2002Hun-Ka1) and of 30 August 2011 (cases 2007Hun-Ka12 and 2008Hun-Ka22). On the contrary, the Court issued its fourth pronouncement on this topic in 2018 (judgment of 28 June 2018, case 2011Hun-Ba379 and others). This time, the Constitutional Court re-examined the matter and, even if it confirmed the constitutionality of the criminal provision, it nonetheless determined that the fact of not offering alternative forms of civil service to conscientious objectors was nonconforming to the Constitution.

Technically, the last judgment and the three previous ones are compatible, since the Constitutional Court did not examine the constitutionality of the provision regulating the administrative categories of military service until 2018. Consequently, the judgment issued in 2018 does not deprive the previous three of their effectiveness.

There is no doubt, however, that the judgment of 2018 represents a different position on conscientious objection. Until then, the Constitutional Court had considered that it was the Parliament's mission to weigh whether the acceptance of an alternative civil service could seriously undermine national defense and, if so, to what extent. On the contrary, the Court assessed the issue for itself in the new judgment and concluded that the absence of regulation of an alternative service for conscientious objectors violated the prohibition of excessive restrictions and the objectors' freedom of conscience.

This change of position is less surprising than it might initially seem; first, because the Court had already anticipated or pointed it out in its previous judgments, and second, because its evolution has been similar all over the world. As we have had the chance to see, the United Nations Human Rights Committee corrected its initial position when it considered that the right to conscientious objection could be inferred from Article 18 of the ICCPR. Similarly, the European Court of Human Rights has kept a restrictive criterion for 40 years, which was amended after the judgment of 7 July 2011 in the case of *Bayatyan v. Armenia*[13].

The European Court of Human Rights has pointed out that the requirements of legal certainty and the protection of the legitimate expectations of litigants do not give rise to an acquired right to an established case law, however constant it would have been (judgment of 18 December 2008, case Unédic v. France, § 74). Case law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (judgment of 14 January 2010, case Atanasovski v. the former Yugoslav Republic of Macedonia, § 38).

In the judgment of the case *Bayatyan v. Armenia,* the European Court expressly and openly acknowledged a change in its position (paragraphs 98 to 111, under the heading 'Whether there is a need for a change of the case law') and justified it by applying the 'living instrument' theory. The doctrine of the living instrument is strongly consolidated in the case law of the European Court of Human Rights, which has pointed out that the European Convention on Human Rights is a living

13) Unlike the Common Law system, in which the precedent acts as a rule and the overruling or change of precedent renovates the legal system, in Continental Law the courts are not bound by the rule of 'prospective overruling', and follow, on the contrary, the principle of 'retrospective overruling'. Even in a country like the United States, where the stare decisis rule has great relevance, the Supreme Court is free to separate itself from its own constitutional precedents.

instrument that must be interpreted in the light of the current living conditions and conceptions that prevail in democratic States nowadays. As the Convention is, above all, a mechanism for the protection of human rights, the Court must take into account the evolving situation in the Contracting States. The Court can and must therefore take into account other elements of international law other than the European Convention. The consensus emerging from specialized international instruments may be a relevant factor when the Court interprets the provisions of the European Convention.

The expression that the Constitution is a 'living tree' was coined by the Supreme Court of Canada in the *Privy Council* judgment, *Edwards v. Attorney General for Canada* of 1930. The so-called evolutionary interpretation consists in adapting the meaning of constitutional precepts to the new social realities. But with a clear limit: the evolutionary interpretation cannot serve to make the Constitution say the opposite of what it says; in that case, the Constitution is not interpreted, but changed, thus avoiding the specific reform procedure envisaged for this purpose.

The judgment issued by the Constitutional Court of Korea refers to this internal and external evolution. The internal evolution of Korean society might not have been significant, as evidenced by the division of opinions of the judges who have issued the judgments, both in the Constitutional Court and in the Supreme Court. But there is no doubt about the evolution of this question at the international level. It is true that the Human Rights Committee's interpretation of Article 18 of the International Covenant on Civil and Political Rights is not legally binding and that the position of the European Union and the European Court of Human Rights cannot be regarded as generally recognized international law or customary international law binding on Korea (Supreme Court Judgment 2007Do7941, of 27 December 2007; judgment of the Constitutional Court 2011Hun-Ma306 et al, of 26 July 2018). However, the judgment issued by the Constitutional Court bears in mind the developments in the area of conscientious objection at the international level, as shown below.

3. The Principle of Respect for Generally Recognized Rules of International Law

Article 6(1) of the Korean Constitution states that 'Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.'

Similarly, Article 96 of the Spanish Constitution provides that validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. It is obvious that international treaties bind the States that sign them; in fact, international rules on fundamental rights have a hermeneutic function in the Spanish legal system that is expressly recognized by the Constitution in its Article 10(2).

However, it does not fall under the jurisdiction of the Spanish Constitutional Court to guarantee the compliance with international treaties. Therefore, a national law can never be declared unconstitutional for violating the provisions of an international treaty, since the Court's prosecution

parameters are only based on the Constitution and the so-called 'constitutionality block'. In the event of a conflict between an internal law and an international treaty, the ordinary courts will decide on the resolution of the conflict.

Consequently, the violation of a right guaranteed in an international treaty can only be invoked before the Constitutional Court if that right corresponds to one of the rights recognized in the Constitution. Rights covered by international rules which are not protected by the appeal for constitutional protection *(recurso de amparo)* may only be invoked before ordinary courts.

However, the use of international treaties on human rights ratified by Spain as a criterion for the interpretation of State norms is based on the mandate set out in article 10(2) of the Constitution ('The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain'). This duty has been rigorously observed in Spanish constitutional case law, with many decisions in which the Court expressly uses international rules and case law to establish the meaning of the constitutional precepts on fundamental rights.

In the case of South Korea, it should be mentioned that on 10 April 1990, this country signed the International Covenant on Civil and Political Rights, which does not expressly refer to the right to conscientious objection. However, Article 18 of the ICCPR guarantees the freedom of thought, conscience and religion. Attention should be drawn once again to the evolution in the Human Rights Committee. In its general comment No. 22 (1993), the Committee corrected its initial position by considering that a right to conscientious objection could be deduced from the aforementioned Article 18 of the ICCPR, as the obligation to use force at the price of human lives could give rise to a serious conflict with a person's freedom of conscience and their right to manifest their religion or belief.

The United Nations Human Rights Committee has adopted a number of Views on the occasion of several communications filed by conscientious objectors against the Republic of Korea. The Committee considers the violation of Article 18 of the ICCPR due to the sentence imposed on the defendants, who had refused to serve in the army on grounds of conscience. The Committee noted that the punishment imposed on the perpetrators amounted to a restriction of their ability to manifest their religion and belief. These are the Views of 3 November 2006 (Communications No. 1321/2004 by Yeo-Bum Yoon v. the Republic of Korea and No. 1322/2004 of Myung-Jin Choi), 23 March 2010 (Communications Nos. 1593 to 1603/2007), 1 February 2013 (Communication No. 1786/2008 of Jong-nam Kim et al) or 29 June 2020 (Communication No. 2846/2016 of Jong-bum Bae et al).

A different position was adopted by the Inter-American Commission on Human Rights, which resolved on 10 March 2005 the first individual appeal relating to the right to conscientious objection. This Commission concluded that conscientious objection was only protected by the American Convention in countries where this right was recognized (Case Cristián Daniel Sahli Vera and others v. Chile, of 10 March 2005, and shortly after in the case Alfredo Díaz Bustos v. Bolivia of 27 October 2005).

In the case of Europe, at the end of the 80s and in the 90s, there was a clear movement in the European countries of the Council of Europe to recognize the right to conscientious objection. In 1987, the Committee of Ministers adopted Recommendation No. R(87)8, urging Member States to recognize the right to conscientious objection and inviting Governments that had not yet recognized this right to adapt their legislation in accordance with the following basic principle: 'Anyone liable to conscription for military service who, for compelling reasons of conscience, refuses to be involved in the use of arms, shall have the right to be released from the obligation to perform such service, (...). Such persons may be liable to perform alternative service'. In 2010, the Committee of Ministers adopted Recommendation CM/rec (2010)4, based on the evolution of case law from the UN Human Rights Committee and on the provisions of the Charter of Fundamental Rights of the European Union. The Committee of Ministers also confirmed this interpretation of the notion of freedom of conscience and religion enshrined in Article 9 of the Convention, and recommended that Member States ensure the right to benefit from the status of conscientious objector.

The Parliamentary Assembly of the Council of Europe, in its Resolution No. 1928 (2013) of 24 April 2013, also called on Member States to 'ensure the right to well-defined conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education' (point 9.10).

Meanwhile, the Charter of Fundamental Rights of the European Union, which entered into force on 1 December 2009, sets out in Article 10(2): 'The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right'.

Above all, however, the evolution in the case law of the European Court of Human Rights should be highlighted. A restrictive approach was maintained for forty years, which began with the judgment of 12 December 1966 *(Case Grandrath v. the Federal Republic of Germany).* The change of criterion of the European Court of Human Rights took place in a judgment issued by the Grand Chamber on 7 July 2011 in the *Case Bayatyan v. Armenia* (paragraphs 98-111, under the heading 'Whether there is a need for a change of the case law'). In this judgment the ECHR, by applying the theory of 'living instrument', decides to anchor conscientious objection in Article 9 of the European Convention, which recognizes the freedom of thought, conscience and religion. This doctrine has been reiterated in subsequent decisions (judgments *Eçerp v. Turkey,* of 22 November 2011; *Feti Dermitas v. Turkey* of 17 January 2012; *Savda v. Turkey* of 12 June 2012; or *Tarhan v. Turkey*, of 12 June 2012). On the contrary, in the decision *Çağatay Baydar v. Turkey* of 19 June 2018, the Court dismissed the appeal on the grounds that, in this case, the Court considered that the plaintiff had not proved that his opposition to compulsory military service constituted a conviction or belief of sufficient consistency and seriousness.

The Constitutional Court of Korea, both in its judgment of 26 August 2004 and in its two judgments of 30 August 2011, found that the criminal punishment of conscientious objectors did not violate article 6(1) of the Constitution, which declares the principle of respect for generally recognized rules of international law. The Court did not consider that the right to conscientious objection was automatically recognized in the International Covenant on Civil and Political Rights or that the Covenant created a legally binding obligation with respect to conscientious objection;

nor was there a customary international law guaranteeing conscientious objection, even if certain countries protected it. Based on the fact that the International Covenant on Civil and Political Rights itself does not clearly establish the right to conscientious objection as a human right, the Supreme Court and the Constitutional Court have maintained the position that the interpretation of international human rights organizations such as the HRC is valid as a recommendation but not legally binding in each country (e.g. Supreme Court decision 2007Do8187, of 29 November 2007; Supreme Court decision 2007Do7941, of 27 December 2007; and the decision from the full bench of the Constitutional Court 2008Hun-Ka22, of 30 August 2011).

This reasoning would not have been possible in Spain since the courts are bound by article 10(2) of the Constitution to give to international human rights standards the meaning that such standards receive from the corresponding supranational bodies entrusted with that function. Therefore, if the United Nations Human Rights Committee has adopted a number of Views appreciating that Article 18 of the ICCPR covers the right to conscientious objection, the Spanish courts must endorse this interpretation.

Anyway, this disagreement between the Committee and the Korean Constitutional Court was resolved after the judgment of 28 June 2018 acknowledged that Article 18 of the ICCPR covers conscientious objection.

4. The Legal Nature of the Right to Conscientious Objection

The question of the legal nature of conscientious objection tends to focus on determining whether or not it is a fundamental right. Major consequences can derive from the answer to this question. If it is a mere right of legal rank, the legislator only needs to decide the cases in which he or she deems it convenient to set out legal clauses on conscientious objection. But if, on the contrary, it is a fundamental right that arises from the Constitution itself, the legislator cannot ignore its essential content and judges will be able to accept conscientious objection in cases that have not been expressly recognized by the legislator, through a weighing of the conflicting interests.

The first time that the Spanish Constitutional Court ruled on conscientious objection was in judgment 15/1982 of 23 April, which does not qualify it legally as a fundamental right but as ‘a right explicitly and implicitly recognized in the Spanish constitutional order’. In 1985, the Court ruled once again on conscientious objection in judgment 53/1985 of 11 April, when it decided about an appeal against a law decriminalizing certain cases of abortion. On this occasion, the Court stated that although it is not generally recognized in the Constitution, ‘conscientious objection is part of the content of the fundamental right to ideological and religious freedom’. Later on, the case law of the Court departed from this position, in judgments 160/1987 of 27 October, 161/1987 of 27 October and 321/1994 of 28 November, which state that ‘the right to be exempted from military service does not directly derive from the exercise of ideological freedom, even if both are linked. This right arises only from the fact that the Constitution expressly recognizes the right to conscientious objection in Article 30(2), but only referred to military service’.

However, this issue was overturned due to the regulatory and case-law evolution that has taken

place at the European level, especially when the European Court of Human Rights, in the judgment issued by the Grand Chamber on 7 July 2011 in the *Bayatyan v. Armenia* case (§ 98 to 111), decided to link conscientious objection to Article 9 of the European Convention on Human Rights. This article recognizes the freedom of thought, conscience and religion, something that the Court had rejected until then. For this reason, the subsequent judgment from the Spanish Constitutional Court 145/2015, of 25 June, granted constitutional protection *(amparo)* to a pharmacist who refused to sell the so-called 'day after pill', recognizing his right to conscientious objection in connection to the right to ideological freedom (Article 16(1)).

In the case of Korea, the Constitutional Court's judgment of 28 June 2018 linked conscientious objection to the freedom of conscience protected under Article 19 of the Constitution. However, several fundamental rights were raised before the Court:

a) Freedom of conscience. We have already seen how freedom of conscience offers two areas for the Korean Constitutional Court: a) The 'freedom to form the conscience', which is the freedom internal and inherent to one's heart and consists in the freedom to form one's conscience and to make a decision under the conscience within the realm internal to one's heart, based on one's own conscience, without unjust interference or coercion from outside. b) The 'freedom to exercise the conscience', which is to express and realize conscientious decisions, and to express the conscience thus formed towards the outside world and to establish life pursuant to the conscience. This includes, more specifically, the freedom to express the conscience or to not be forced to express the conscience (the freedom to express the conscience), the freedom to not be forced to act against the conscience (the freedom to exercise the conscience by inaction), and the freedom to act pursuant to the conscience (the freedom to exercise the conscience by action).

In a case concerning the filing of information on patients' medical expenses carried out by a health institution to obtain an income tax deduction [20-2(A) KCCR 1115, 2006Hun-Ma1401·1409 (consolidated), of 30 October 2008] the Constitutional Court stated that 'Conscience, as protected under Article 19 of the Constitution, is a moral and value judgment of the mind that distinguishes right from wrong. Among the protected consciences are not only one's views on the world, life, ideology, and belief, but also one's moral judgment due to the innate nature of one's personality'. 'In addition, 'decision according to conscience' includes all serious moral decisions involving standards of good and bad; in real situations, this is taken as cases in which an individual perceives such decisions as something that restricts his or her freedom but must obey, and against which the individual cannot act without experiencing serious moral conflicts'.

Conscience that is protected by the Constitution is an acute and concrete conscience that is the powerful and earnest voice of one's heart; failure to do so would destroy one's existential value as a person. That is, the 'decisions from the conscience' mean all earnest decisions concerning ethics pursuant to one's own standards of right and wrong, acting against which is not possible without a serious conflict with one's own conscience, as the individual takes such decisions as something that binds him or her and that should be obeyed unconditionally.

b) Freedom of religion (Article 20(1) of the Constitution). A common feature of all matters settled in the case law from the Korean Constitutional Court is the status of Jehovah's Witnesses for most conscientious objectors. In Europe, however, a pacifist ideology is usually at the origin of the cases raised.

In the case leading to the 2004 judgment, both the Seoul Southern District Court and the appellant party, as well as the opinion of two judges, considered that the case affected both religious freedom and freedom of conscience. But the majority position of the Constitutional Court, while admitting the presence of a religious motivation in the actions of the appellants, considered that freedom of conscience is a comprehensive fundamental right in which both religious and non-religious conscience are included and therefore, it believed that the case should be resolved by focusing on the freedom of conscience.

On the other hand, the 2018 judgment of the Constitutional Court acknowledged that, as Article 20, Section 1 of the Constitution protects the freedom of religion and most appellants were either Catholics or Jehovah's Witnesses, if the conscientious objection to military service is based upon religious beliefs, the provision at issue in this case hence restricted the freedom of religion of the conscientious objectors. However, as the freedom of conscience is a comprehensive fundamental right that includes religious and non-religious conscience, the objection of conscience may also be based on ethical, philosophical or other kinds of grounds.

c) The values of Article 10 of the Korean Constitution. The appellants claimed that the provisions in question violated human dignity, human values and the right to seek happiness as provided for in Article 10 of the Korean Constitution. However, the Constitutional Court considered that since freedom of conscience is a fundamental right necessarily linked to human dignity and values, and the right to happiness is a fundamental right of subsidiary application (as already indicated in the judgment of 29 August 2002, 2000Hun-Ka5), it is not possible to judge separately whether the right to human dignity and values or the pursuit of happiness has been violated unless it is determined that freedom of conscience has been violated as well.

d) The right to equality (Article 11 of the Constitution). In its judgment of 26 August 2004 (case 2002Hun-Ka1), the Constitutional Court dealt with the right to equality and ruled out that the criminal provision violated it, since the fact that the objection was based or not on religious grounds made no difference. On the other hand, the Court also rejected the comparison of conscientious objectors with people exempt from undertaking military service due to their physical, mental or psychological disabilities or diseases, or with those that serve as special talents in the areas of arts and sports.

In the 2018 judgment, the respect for equality focused on a different aspect: equality between the military service tasks and those of the alternative service, whose complexity must be the same. To this end, the Court considered it reasonable that the length of the alternative service should be extended in order to last longer than the active service, or to increase the degree of difficulty of the alternative service with respect to the active service, or that they were at least equal. However, the

Court warned that if the length or the difficulty of the alternative service was excessive, it could lead to another possible violation of fundamental rights.

5. The Admission of Conscientious Objection Cases not Regulated by the Legislator

The question often arises as to whether conscientious objection can only be invoked in cases expressly admitted by the legislator, or whether, on the contrary, judges may recognize other cases in the event of a conflict between a fundamental right and a legal obligation. It is a question of distinguishing whether conscientious objection arises directly from the fundamental right to freedom of ideological or religious conscience, without the need for a rule by the legislator recognizing that right.

While it is clear that the legislator may establish such conscientious clauses as they deem appropriate to allow certain citizens to be exempted from a duty or from the legal consequences of their non-compliance, there is not a unique answer in the various legal systems to the following question: whether the absence of express recognition necessarily means the non-existence of the right to conscientious objection.

There is undoubtedly no general right to conscientious objection that allows any person and under all circumstances to cease performing a legal duty on the basis of their freedom of conscience. This would not be compatible with the functioning of the Rule of Law, since it would mean that the effectiveness of legal rules depends on the concurrence of each individual.

But this does not mean that conscientious objection cannot be recognized in cases not provided for by law, as long as they can be inferred from the Constitution. Although its case law has been uncertain in this area, the Spanish Constitutional Court has recognized the right to conscientious objection in exceptional cases in which, despite the fact that the legislator had not provided for them, there was a clear and serious conflict between the legal duty and the freedom of conscience of the person that had to comply with the rule. It did so in judgment 53/1985 of 11 April, which recognizes the right of medical personnel to conscientious objection to the practice of abortion[14)], stating that conscientious objection is part of the content of the fundamental right to ideological and religious freedom recognized in the Constitution, which is directly applicable in matters on fundamental rights. The Court did so again for pharmacists in judgment 145/2015 of 25 June, regarding the sale of the so-called 'day after pill'.

In European continental law, courts are frequently reluctant to recognize conscientious objection if it has not been previously recognized in the legislation, while in Anglo-Saxon countries judges act more freely in this area.

In *Germany*, the decision of the Constitutional Court of 15 March 2007 concerning the introduction of the subject of ethics into the state of Berlin, with no possible waiver, is of interest. The Constitutional Court justified the denial of conscientious objection by arguing that 'openness

14) Later the legislator regulated it in Organic Law 2/2010, of 3 March, on sexual and reproductive health and voluntary termination of pregnancy, for health professionals directly involved in the voluntary termination of pregnancy.

to the multiple opinions and ideologies that exist is a constitutive condition of a public school in a freely and democratically established community. [...] Integration does not only mean that the religious or ideological majority does not exclude minorities who think otherwise; integration also requires that the latter do not isolate themselves, and that they do not exclude dialogue with people from other ideologies and other faiths'.

In *France*, freedom of conscience prevails only over the principle of obedience to the law in cases provided for by law, such as conscientious objection to military service in Law No. 63-1255 of 21 December 1963, or the conscientious clause in the Public Health Code that protects health personnel when performing abortions.

In *Italy*, although the Constitution does not mention conscientious objection (but there is a Law on Abortion and a Law on Assisted Reproduction), the Constitutional Court stated in judgment 164/1985 that conscientious objection to military service is a fundamental right derived from the Constitution and that the alternative service is another way of serving the State.

In the *United Kingdom,* given that this country does not have a written Constitution, the power to recognize the right to conscientious objection has traditionally been vested in the courts, which have weighed their convenience in each case. We may find an example in Sepet and Another v. Secretary of State for the Home Department, in which the House of Lords ruled on conscientious objection to military service. Sometimes the legislator has regulated conscientious objection after prior judicial recognition, such as in the case of the exemption to join a jury. In the area of education, the 1998 School Standards and Framework Act contains a conscientious clause allowing parents to apply for an exemption in order for their children to not receive religious education or to participate in any kind of religious worship at school. There are also conscientious clauses in favor of health personnel regarding abortion and the manipulation of human embryos.

In the *United States,* judicial recognition of the right to conscientious objection has coexisted over time with the conscientious clauses established by the legislator. Thus, following the Supreme Court's decision in Roe v. Wade, which liberalized abortion in the first six months of pregnancy, most states of the Union adopted rules that included conscientious clauses for health workers, as well as for pharmacists to provide the so-called 'day after pill' or medicines related to euthanasia.

American case law distinguishes two clauses: the Establishment clause or neutrality clause of the State in religious matters and the Free Exercise Clause or clause of free exercise of religion. If the truthfulness of the individual's beliefs is demonstrated, the State bears the burden of proving the existence of a State interest that justifies the limitation of freedom and which cannot be achieved through less restrictive means of individual freedom.

South Korea is part of the group of countries where the Constitutional Court can recognize the right to conscientious objection in cases not regulated by the legislator. Until Act No. 16851 of 31 December 2019, there had been no conscientious clause established by the legislator; however the Constitutional Court found in the judgment of 28 June 2018 that its absence from military service legislation was nonconforming to the Constitution, and compelled the legislator to regulate its exercise. It can be said that the Korean Constitutional Court has taken its decision against the will of Parliament. Already in 2004, the Court urged the Parliament to consider every alternative that

could guarantee the public interest of national security, as well as the freedom of conscience of objectors. During that time, several governmental organizations, such as the National Human Rights Commission of Korea, the Ministry of National Defense, the National Assembly, etc. reviewed or recommended the introduction of the alternative service program. Also, an increasing number of ordinary lower court judgments acquitted conscientious objectors. However, the Parliament had not modified its position for the past 14 years.

In short, it can be noted that in most legal systems there are legislative clauses on the recognition of conscientious objection in the most serious conflicts of conscience (abortion and military service), together with the power of the courts to weigh and assess special cases arising directly from the fundamental right to freedom of conscience, whose recognition should be reserved for the relevant Constitutional Court.

6. Recommendations and Mandates of the Constitutional Court to the Legislator: the Deferred Unconstitutionality

(1) The judgments of the Korean and Spanish Constitutional Courts sometimes include express recommendations and mandates to the legislator. However, they have a different nature: only the latter are binding, while the recommendations simply tend to guide the legislator in a certain sense. Both in the judgment of 26 August 2004 and in the subsequent two judgments of 30 August 2011, the Korean Constitutional Court did not declare the unconstitutionality of the provisions under consideration. Nevertheless, the first judgment included several recommendations for the legislator to regulate on conscientious objection. On the contrary, we will see that in judgment of 28 June 2018, the recommendation becomes a binding mandate for the legislator.

Usually, recommendations to the legislator are not the result of a declaration of unconstitutionality, but rather of the Court's view that the legislation under consideration is likely to be enhanced even if it is not unconstitutional. This is the case in the judgment of 26 August 2004. Even if the Korean Constitutional Court considered that the provision was constitutional, it made some recommendations to the legislators so that they could analyze ways of resolving the conflict between freedom of conscience and the public interest of national safety. In particular, the Court stated: 'We are in the opinion that now is the time to seek a national solution of our own through a serious social discussion with respect to how to take the conscientious objectors into account, instead of neglecting and leaving as untouched the situation of suffering and conflict of the conscientious objectors.' ... 'The legislators are obligated to mitigate the conscientious conflict by presenting the alternatives that do not go against the public interest or the legal order, i.e. different possibilities that may replace the legal obligation, or serve as an individual exemption of the legal obligation. If such possibility may not be provided, the legislators then should at least try and protect the freedom of conscience by permitting the reduction or exemption of the punishment or sanction imposed for the violation of the obligation. Therefore, the legislators should earnestly assess whether there is a solution for eliminating the conflict relationship between the legal interests of the freedom of conscience and the national security and for enabling the coexistence of

these two legal interests, whether there is an alternative to protect the conscience of the conscientious objectors while securing the realization of the public interest of national security, and whether our society is now mature enough to understand and tolerate the conscientious objectors. Even if the legislators decide not to adopt an alternative service system, the legislators should seriously consider whether to supplement the legislation in the direction that the institutions implementing the law may take measures protecting the conscience through the conscience-favoring application of the law'.

But is the Constitutional Court entitled to tell legislators what they should do? Can the Court in any way assign itself a legislative initiative that the Court lacks?

(2) A different situation arises when the Constitutional Court considers that unconstitutionality has its origin in a legislative omission, i.e. when the Constitution imposes on the legislator the need to issue constitutional development rules and the legislator has not done so. With different nuances and methods, constitutional courts have used various solutions to give effect to decisions in which the unconstitutionality of a rule does not derive from its content, but from the omission by the legislator.

In Spain, judgments 15/1982 of 23 April and 35/1985 of 7 March solved the appeals for *amparo* filed by people who declared themselves to be conscientious objectors at a time when the legislator had not yet adopted a law regulating the right to conscientious objection, despite the fact that this right was expressly recognized in article 30(2) of the Constitution. This lack of regulation led the military authorities to reject requests from objectors. The Constitutional Court considered that this omission by the legislator could not prevent the recognition of this right, but at the same time the Court could not replace legislators in their work of regulating it, so it decided to provisionally suspend the appellants' military service until the procedure allowing objectors to exercise their right to military service was regulated.

In the case of the judgment of the Korean Constitutional Court of 28 June 2018, the Court found that legislators had ample discretion to decide on the application procedure, the method of examination, the process for appealing the results of the examination, as well as the scope and period of the alternative civil service. Therefore, instead of merely declaring the unconstitutionality of the provision, the Court allowed the act to continue to be applicable until an alternative provision was enacted. However, legislators were obliged to implement the legislative reform establishing the alternative service for conscientious objectors as soon as possible. The deadline was 31 December 2019, as the provision on the categories of military service would no longer be in force on 1 January 2020.

Thus, the judgment contains a deferred ruling of unconstitutionality, since while it appreciates the unconstitutionality of the provision on the categories of military service, it nevertheless postpones the full effectiveness of the declaration of unconstitutionality. The use of this technique is common in the case law of the Court of Justice of the European Union, pursuant to Article 264 of the Treaty on the Functioning of the Union. The Spanish Constitutional Court, despite not having legal authority to do so, also uses it sometimes, but it justifies the constitutional value or interest

intended to be preserved and indicates the specific period of deferral. Not every value or interest serves to postpone the effectiveness of the nullity of the legal precept declared unconstitutional. The aim is to preserve interests or values that the Court considers to be constitutionally relevant and that justify the disassociation between unconstitutionality and nullity, even for a certain period of time. In the judgment of the Korean Constitutional Court of 28 June 2018, the importance of the values preserved by the postponement of the unconstitutionality effects is evident: national defense and security.

In the event that the Parliament had not fulfilled the mandate of the Constitutional Court within the prescribed time limit, the provision on the categories of military service would have ceased to be in force on 1 January 2020 and that would have allowed the ordinary courts to directly apply the Constitution in the sense established by the constitutional judgment, i.e., by appreciating that a properly justified conscientious objection can be a cause to be exempt from criminal liability, and thus acquit the persons in such situation.

7. Judgment Enforcement

Generally, once the Constitutional Court of Korea decides that a certain act is unconstitutional, the act will lose its effect under article 47 of the Constitutional Court Act and the ordinary courts will be bound by the same decision, i.e. they will not be able to apply the act declared unconstitutional to any case. The decision of the Constitutional Court binds ordinary courts, State bodies and local governments.

In the judgment of 28 June 2018, there are two direct recipients of the Constitutional Court's decision:

(1) The judicial bodies, both the one that raised the consultation under article 41(1) of the Constitutional Court Act, and all the judicial bodies of the Republic. They are bound by the decision after having official knowledge of the judgment. For this reason, shortly thereafter, on 1 November 2018, the Supreme Court of the Republic of Korea adopted a decision that led to the decriminalization of conscientious objection. This decision considered that moral and religious beliefs were valid grounds for opposing to military service and ordered the release of 58 conscientious objectors.

The Supreme Court, following judgment 2016Do10912, of 1 November 2018, established that even before the regulation of the new alternative civil service was passed, an objector who was tried on charges of violating article 88(1) of the Military Service Act should not be punished if his objection was recognized as justified. On the other hand, those who had already been convicted may file an appeal for review.

(2) The legislator is also a direct recipient of the judgment. As the declared unconstitutionality was the result of a legislative omission, the restoration of the constitutional order required

legislative action, in particular an act that regulated the alternative civil service. Accordingly, in its judgment of 28 June 2018, the Korean Constitutional Court set a deadline – 31 December 2019 – for the amendment of the Military Service Act by introducing an alternative service system for those who refused to undertake military service on grounds of conscience or religion. This is a deferred nullity, which makes it possible to postpone the moment when a favorable ruling of the Constitutional Court displays its effects, making it easier to adapt it to the circumstances of a specific case and thus protect certain constitutional assets.

The Korean legislator has properly complied with the mandate of the Constitutional Court, as the new Act on Allocation and Performance of the Alternative Service (Law No. 16851 of 31 December 2019) entered into force on 1 January 2020. This Act regulates the assignment and performance of the alternative service for those who do not undertake the active service duty, the reserve service or the supplementary service (Art. 1) for reasons of freedom of conscience. Provision is also made for the alternative service of those who object to training as a member of the reserve forces (Art. 26).

The period of the alternative service is 36 months (Art. 18). The request to undertake the alternative service must be submitted to the Alternative Service Review Commission, and recruitment will be deferred until a decision is taken (Art. 3). The Commission shall be integrated into the Military Manpower Administration, but it will independently perform its functions under its own authority (Art. 4). If the applicant does not agree with the decision taken, he may file an administrative or litigation appeal (Art. 13).

Any person providing alternative service shall do so in a facility established by Presidential Decree, such as a penitentiary facility. In any case, the activities entrusted shall not involve the use, handling or control of weapons or lethal weapons, nor the death of persons or the destruction of infrastructures or the like (Art. 16). Provision is made for the payment of remuneration and travel expenses incurred in carrying out the functions of the alternative service (Art. 21). The cancellation of the assignment to the alternative service is regulated for different reasons. In that case, the period spent in the alternative service may be computed to reduce the period still to be performed in another category (Art. 25).

IV. Future Issues

As it has been seen, the judgment of the Korean Constitutional Court of 28 June 2018 resulted in two direct consequences: The new position of the Supreme Court expressed in the ruling of 1 November 2018 and the actions of the legislators, who passed the new Act No. 16851 on 31 December 2019. But it is clear that this does not put an end to the problem of conscientious objection, as new issues will arise in the coming years.

1. In the future, complaints may arise concerning the content of the new Act No. 16851, as the groups that have promoted the recognition of conscientious objection have begun to be critical of

some aspects of this Act. The first concerns the duration of 36 months of the alternative civil service. It is argued that it would become a means of indirect discrimination, which occurs when a seemingly neutral provision, criterion or practice may cause a particular disadvantage to people with a certain religion or belief, with regard to other persons, unless it can be objectively justified for a legitimate purpose and unless the means for achieving that purpose are adequate and necessary. Another criticism is that applications to participate in the alternative service program are evaluated by a committee under the Military Manpower Administration, which is part of the Ministry of National Defense.

2. Logically, once the Act regulating the alternative civil service is in force, complaints will disappear, but a new type of case may be brought before the courts by those who, on the basis of a pacifist ideology, refuse to perform the alternative civil service. In Spain, the Constitutional Court rejected the appeals filed in this regard (judgment 321/1994 of 28 November) because the difference was clear: the rebel had satisfied his right to objection but opted for civil disobedience by refusing to perform the alternative civil service.

3. In other cases, what arose was the possible disproportion of penalties that punished the behavior of those objectors who refused to perform the alternative civil service. In Spain, such sentences could be up to six years' imprisonment and include other accessory sentences. The Spanish Constitutional Court confirmed their constitutionality, as the behavior which is not a lawful expression of ideological freedom or protected by the legal or constitutionally established conscientious objection may be subject to criminal punishment. Otherwise, it would mean a dilution of the effectiveness of rules and the undermining of the legal and social order (judgment 55/1996 of 28 March).

4. Another type of situation is that relating to conscientious objection in persons that claim pacifist convictions after entering the military service with weapons. In Spain, the Constitutional Court denied its viability in judgment 161/1987 of 27 October, as its recognition 'during the period of stay in the army is disturbing as regards the security of the internal structure of the Armed Forces, which must be able to fulfil their military duties at all times'.

5. The Spanish Constitutional Court has also had the opportunity to rule on the so-called conscientious objection in tax matters. The most frequent case is that in which the taxpayer intends to not pay the tax percentage allocated by the State to military expenditure, or requests that it be used for other purposes. The Court has ruled on this matter only once, in the Constitutional Court Order 71/1993 of 1 March. It clearly stated that conscientious objection and ideological freedom cannot be invoked to claim an exception to the general duty to contribute to the maintenance of public expenditure.

6. Finally, we should have a look at conscientious objection claims in bioethics. On 11 April

2019, the Constitutional Court of Korea (case 2017Hun-Ba127) ruled that the criminalization of abortion is unconformable. The Court considered that women's self-determination would be given priority during the first 22 weeks of pregnancy. According to Articles 269 and 270 of Chapter XXVII, 'Abortion Offences' of the Criminal Act, a woman who causes her own miscarriage or any healthcare provider such as an obstetrician or midwife who performs an abortion on a woman shall be punished by a fine or imprisonment. The Constitutional Court ruled that these two articles represented a constitutional discrepancy and gave the National Assembly until 31 December 2020 to review the act.

Cases of conscientious objection related to the origin of life, the provision of contraceptives and birth control drugs, the sterilization of incapable persons and assisted human reproduction techniques have been raised in many countries. And in relation to the end of life, there may be conflicts of conscience among health workers to terminal sedation, the use of opioids, the removal of artificial nutrition or the donation of organs. In Spain, judgment 53/1985 of 11 April recognized the right to conscientious objection of medical and health personnel in relation to abortion, calling it a fundamental right before the legislator had admitted it.

Conscientious objection to medical treatment should also be mentioned. These types of conflict are mainly raised by Jehovah's Witnesses, as well as by the members of the so-called Christian Science, who believe that any disease can heal through prayer alone and consider it unlawful to resort to medical treatment in a generalized manner. The judgments of the Spanish Constitutional Court 154/2002 of 18 July and 37/2011 of 28 March stated that the patient's right to decide on their own treatment must be respected 'even if it could lead to a fatal outcome'. The patient thus possesses the 'power of self-determination' that legitimizes them to choose between the different possibilities offered, 'thus consenting their practice or rejecting them'.

These issues are of high legal interest. The Constitutional Court of Korea will probably have to address them in the future, in a complex context given the special geopolitical circumstances of the Korean peninsula, which explain a controversy that divides Korean society and the Constitutional Court judges themselves, but which has been resolved in a way that gives the Court clear political and legal leadership.

V. Conclusion

1. There is no general right to conscientious objection that allows any person to cease performing a legal duty on the basis of their freedom of conscience. This would not be compatible with the functioning of the Rule of Law, since it would mean that the effectiveness of legal rules depends on the concurrence of each individual.

However, in democratic societies, the legal relevance of freedom of conscience increases as ideological, religious and cultural pluralism grows. The globalization of knowledge, the mobility that characterizes the man of the twentieth and twenty-first centuries and the existence of new generations with cultural and religious values that are sometimes very different from those of the

societies in which they are integrated, lead to an increase in the cases of conscientious objection.

2. In most legal systems, legislative clauses on the recognition of conscientious objection for the most serious conflicts of conscience (abortion and military service) co-exist with the power of high courts to weigh and consider special cases arising directly from the fundamental right to freedom of conscience. In any case, conscientious objection shall be worthy of consideration if it is 'deep, firm and true'.

The influence that modern pacifism has exerted since the mid-twentieth century has led to the admission of conscientious objection to military duties by most legal systems, which offer alternative forms of civil service. Similarly, the bodies entrusted with the interpretation of the most important international human rights treaties (such as the United Nations Human Rights Committee or the European Court of Human Rights) have corrected their initially restrictive position by considering conscientious objection as part of freedom of conscience.

3. The Constitutional Court of South Korea has ruled four times on the constitutional fit of conscientious objection to military service: the first three times, the Court analyzed the constitutionality of the criminal provisions applicable to citizens who do not fulfil their military duties on grounds of conscientious objection. The Court considered that these provisions were constitutional -judgments of 26 August 2004 (case 2002Hun-Ka1) and of 30 August 2011 (cases 2007Hun-Ka12 and 2008Hun-Ka22).

The fourth decision was issued in 2018 (judgment of 28 June 2018, case 2011Hun-Ba379 and other 27 consolidated cases). The Constitutional Court re-examined the question and modified its previous opinion in a decision that had international impact. Despite it confirmed the constitutionality of the criminal provision, it nonetheless determined that the lack of alternative civil service options for conscientious objectors was nonconforming to the Constitution and set a deadline for legislators -until 31 December 2019- to provide conscientious objectors with an alternative civil service.

4. The conclusion reached by the Korean Constitutional Court is that the provision on the categories of military service, which does not regulate an alternative service for conscientious objectors, violates the freedom of conscience of objectors and the prohibition of excessive restrictions.

The Constitutional Court of Korea acted with great prudence. On the one hand, the Court was aware that the guarantee of national defense (Arts. 5(2) and 39(1) of the Constitution) is an indispensable prerequisite for the existence of the nation, the preservation of the national territory, the protection of the life and safety of all citizens, and also as a basic prerequisite so that citizens may exercise their freedom. On the other hand, the Court was also aware that military technology gradually diminishes the importance of the human factor in the field of defense and that the official Korean position on the content of Article 18 of the ICCPR was not shared by the international community.

From its judgment of 26 August 2004 on, the Constitutional Court has recommended the legislator to seek a solution that may harmonize conflicting interests. But the years have passed and the Parliament has not made any changes, an event that has finally led the Constitutional Court to consider that the legislator's omission is nonconforming to the Constitution.

5. Korean institutions have been exemplary in complying with the Constitutional Court's judgment: On the one hand, the Supreme Court adopted a decision on 1 November 2018 which led to the decriminalization of conscientious objection, considering that moral and religious beliefs were valid grounds for opposing military service. On the other hand, on 31 December 2019 the Parliament adopted the new Act No. 16851 on the Assignment and Performance of the Alternative Service, which entered into force on 1 January 2020.

The Place Restrictions on Freedom of Speech in South Korea

CHEOLJOON CHANG*

Abstract

In 2018, the Constitutional Court in Korea made important rulings regarding the place restrictions on the exercise of the freedom of assembly. In this article, cases dealing with three different categories of statutory regulations on the freedom of assembly are discussed: regulations on assemblies in areas surrounding the National Assembly, the official residence of the Prime Minister, and all levels of courts. All of them resulted in the enhanced free assembly rights. Given the relatively reluctant stance taken by the Court in the past to protect assembly rights in the place considered a nonpublic forum, the change is quite remarkable. Since there has been no amendment to the Constitution or change in the Court's jurisprudence on the constitutional rights and their limits, the reason for such change in the holdings can be attributed to the transformation of the general public's perspectives on the freedom of assembly, which is a result of the hugely successful democratic movement witnessed recently in Korea. Now, people can hold an assembly in the places that were once prohibited by the Assembly and Demonstration Act. More citizens share an optimistic view on the future of developmental coexistence between freedom of assembly and democracy in Korea.

* Professor, Dankook University College of Law.

I. Introduction

The world witnessed the U.S. Capitol riots in January 2021 in horror. The mob's aggressiveness and the government's security failure were not the main causes of the horror. It was the fact that such serious blow to the democracy was struck by its own citizens in the capital of the country that guarantees the fullest extent of the freedom of speech. The armed protesters who stormed into the Capitol after the gathering might lose sight of the fact that First Amendment of the U.S. Constitution is not a legal shield for an insurrection to overthrow a legitimate government. With this failed practice of freedom of assembly, stricter regulations against political demonstrations can be created at least for the time being in the public places.[1] At the same time, because freedom of speech is a constitutional foundation for democratic prosperity, this incident may ask American people to re-examine the essence and reality of American democracy.[2]

In Korea, by contrast, peaceful protests by the citizens successfully stopped governmental abuses and eventually expelled the president who violated the constitutional orders. From Oct. 2016 to Mar. 2017, an accumulated total of 16.5 million protesters had gathered throughout the country. Gwanghwamun Square, located about 3 kilometers away from Cheongwadae, the Presidential Office, was the main place of the demonstrations. No intentional violence during all the large-scale rallies was reported and the police did not have to suppress them. The participants carried candles instead of stones. Voices from Gwanghwamun instigated the National Assembly to approve the presidential impeachment motion. These peaceful and democratic movements based on freedom of assembly ended up with the Constitutional Court's decision to oust the impeached president Park Geun-Hye from the office after a cautious constitutional review.

After the so-called "the candlelight revolution" of 2017, Koreans ascertained the truth that the citizens' power can advance democracy, and that the guarantee of freedom of assembly is the constitutional basis of mature democracy. The present government, contrary to the Park Geun-Hye government, coming after the presidential impeachment changed the governmental stance of protection toward the people's right to assembly from the outset. President Moon Jae-In ordered that all the administrative agencies shall satisfy the human rights standard that the National Human Rights Commission of Korea delivers. The National Police Agency issued a blueprint for protection of the free assembly that makes great strides from the brutal suppression in the past.[3]

---

1) The 59th presidential inauguration was held amid highly restricted access to the Washington D.C. The core areas of the National Mall were closed for public use including the First Amendment activities. See CNN, Washington to would-be inauguration visitors: Stay home, 16th Jan. 2021. <https://edition.cnn.com/travel/article/washington-inauguration-travel/index.html>.

2) In the legal academia, dangers of possible extremism in the American polity have been reported; for example, Bruce Ackerman prophetically warned the hazard of political triumphalism backgrounded by the Constitution. See Bruce Ackerman, The Decline and Fall of the American Republic, Harvard University Press, 2010.

3) One of the worst examples of the police's crackdown on freedom of assembly was a protester's death case on the street of Seoul in Nov. 2015. The police fired water cannon towards the participants of demonstration against the government, which was not supposed to be aimed directly at people under police regulations. In the incident, the victim was hurt to death by a directly aimed shoot of a water cannon. Afterwards, the Constitutional Court found the police's practice of firing a water cannon that uses a mixtures of tear gas and water to disperse demonstrators unconstitutional. See 2015 Hun-Ma 476, May 31, 2018. In this case, the Constitutional Court reviewed the constitutionality of the Operation

In the same vein, the Constitutional Court issued decisions that took a major step forward in terms of the extension of the free speech protection in 2018. Specifically, the Court's broad interpretations of Article 21 of the Constitution expanded the choice of public forum where citizens are permitted to assemble.[4] The vicinity of the National Assembly, the official residence of the Prime Minister, and the courts became a public forum allowing for peaceful demonstration as a result of the Court's decisions. This is meaningful because these places had been symbols of the governmental authority where nobody could trespass in exercising freedom of speech. Therefore, we can understand the Constitutional Court's conversion as a movement for breakdown of long-lasting authoritarianism based on constitutional democracy.

II. The National Assembly as a Place of Demonstration

1. Change of Constitutional Interpretation

Traditionally, the National Assembly, a hall of representative democracy, has not been a place for protest in Korea. This is not because the Korean citizens paid homage to the legislature for their constitutional role, but because they simply did not pay much attention to the legislature as a major target of democratization compared to the executive branch during the authoritarian regimes.[5] The National Assembly that was seized by the collaborators of the military government could only play

---

Manual on Water Cannons that describes the following provision:
Chapter 2 (Use of Water Cannons)
3. Use of Water Cannons at Assemblies and Demonstrations
B. Methods of using a water cannon
4) Using tear gas in a water cannon
a) Instructions: Mix lachrymator agents such as tear gas in the water cannon truck's water tank, to the appropriate concentration necessary for suppressing persons committing crimes, and ensure that harm to nearby third parties is minimized.
b) Conditions of use: Use upon approval by the commissioner of the district police agency when people do not disperse, upon high-angle or direct spraying.
The Constitutional Court held those provision unconstitutional for the following reasons: "The Conduct of using a water cannon containing tear gas to disperse or block assemblies and demonstrations not only restricts the freedom of assembly, but also directly breaches the right not to be harmed, which is derived from the right to physical freedom. Therefore, the legislature must regulate, by law, matters related to the essence of such restriction/breach." In other words, the contents the Manual includes should have been stipulated in a statute according to the gravity of possible infringement of fundamental rights. The Manual, as an administrative order, is not a justified legal framework to contain such a serious abridgment of constitutional rights without specific delegation of authority by statutes.

4) Article 21 of the Korean Constitution:
(1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized.
(3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Act.
(4) Neither speech nor the press shall violate the honor or rights of other persons not undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.

5) At the risk of overgeneralizing, I categorize President Park Chung-hee's term(1961-1979) and President Chun Doo-Hwan's term(1980-1988) as authoritarian regimes because their government was created by the military coups. The same can be said for President Roh Tae-Woo's term(1988-1992), because he was a member of the coup that was led by General Chun Doo-Hwan.

a nominal role despite the constitutional framework of separation of powers. Also, protesters for democratic movement used to protest mostly in university campuses and several public squares in metropolitan cities where many people could easily assemble. The National Assembly was not people's choice of place for protest.

Furthermore, the law governing assembly prohibited a public rally near the National Assembly. The Assembly and Demonstration Act stipulated that no person shall hold any outdoor assembly or stage any demonstration anywhere within a 200-meter radius from the boundary of the National Assembly building when it was established in 1962. The law also stated that any person who violated the rule should be punished by imprisonment or a fine. In the 1989 revision, the size of radius of the provision was modified from 200-meter to 100-meter, and the punishments became stricter.

Two constitutional petitions against this regulatory framework mark conspicuous juxtaposition: 2006 Hun-Ba 20, Dec. 29, 2009 and 2013 Hun-Ba 322, May 31, 2018. In 2009, the Constitutional Court found the law at issue constitutional, but in 2018 it reversed its original stance. Ten years could have been a short time for the Constitutional Court to take a completely opposite interpretive stance. But the presidential impeachment of 2017 had a decisive impact on viewing the National Assembly as an object of protest and the Court found no legitimate reason to prohibit demonstration in its vicinity.[6] This conceptual change of understanding what the National Assembly may also be intertwined with the jurisprudential conversion of the Court.

2. 2006 Hun-Ba 20·59 (consolidated), Dec. 29, 2009

A. Opinion of the Court

The petitioners of these cases were labor activists who were prosecuted on charges of holding assemblies within the 100-meter radius from the boundary of the National Assembly building. They argued that the provisions of the Assembly and Demonstration Act violated freedom of assembly of the Constitution.[7]

---

6) When people became aware of the practical mechanism of President Park's governmental power abuse, they found it necessary to remonstrate with the National Assembly members who supported the President. To the protesters, legal exemption from political demonstrations in the National Assembly was unreasonable. Besides, the National Assembly area is spacious enough to control demonstrations.

7) The challenged provision in this case was Article 11 and Article 23 of the Assembly and Demonstration Act:
Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)
No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences: 1. The National Assembly building, all levels of courts, and the Constitutional Court; 2. The Presidential residence and the official residences of the Speaker of the National Assembly, the Chief Justices of the Supreme Court, and the Chief Justice of the Constitutional Court ; 3. The official residence of the Prime Minister: *Provided*, That the same shall not apply in cases of a parade or procession; and 4. Diplomatic offices or residences of heads of diplomatic missions in Korea; *Provided*, That the same shall not apply if it is presumed that an assembly or demonstration, which falls under any of the following items, may not interfere with the functions or security of diplomatic offices or residences of heads of diplomatic missions:
(a) Where the assembly or demonstration is not directed at the diplomatic offices or residences of heads of diplomatic missions; (b) Where the assembly or demonstration would not escalate into a large-scale assembly or demonstration; and (c) Where the assembly or demonstration takes place on a holiday when diplomatic offices are off duty.

The Constitutional Court ruled that the provision of the law at issue is constitutional. While the absolute ban on demonstration near the National Assembly building may not seem balanced in terms of interests concerned, the Court found that protecting the constitutional role of the National Assembly through this law was more important for democracy in Korea.

First, the Constitutional Court accepted the precedent view that freedom of assembly promulgated in Article 21 contains freedom to choose where to protest,[8] and that the right to choose the place of assembly constitutes a core value of freedom of assembly because a goal of an assembly may depend on the place that the message is proclaimed.[9]

The Constitutional Court conceded that the provision of this law did not consider a possible harm of absolute prohibition on gathering within the 100-meter radius from the boundary of the National Assembly building without exception. However, the Court indicated, "an outdoor assembly or demonstration near the National Assembly may directly renounce the legislators, impose psychological pressure through threats, or cause difficulty in the access to the National Assembly." Absolute ban of this law ensures free access to the National Assembly building and the safety of its facilities. Therefore, the law is considered as an adequate means to serve the legitimate legislative purpose.

In addition, the Constitutional Court considered that the National Assembly deserves special treatment under the Constitution. Given its unique importance, the constitutional jurisdiction exercised by the National Assembly requires special and sufficient protection. As for the sufficiency of constitutional protection, however, the general regulations prescribed by the Assembly and Demonstration Act or supportive regulations under the Criminal Act could not serve as an effective means to protect the competence of the National Assembly if it were not for the provision at issue. The state may protect the National Assembly from demonstration by punishing protesters on the basis of the Penal Code that includes trespass, obstruction of business, assault, and mayhem. Nevertheless, the ex-ante protection may not be fulfilled with this regulatory scheme.

When it comes to the petitioner's detriment from enforcement of the law at issue, the

---

Article 23(Penal Provisions)

Any person who violates the main text of Article 10 or Article 11; or who violates the ban provided for in Article 12, shall be punished according to the following classification of offenders: 1. The organizer shall be punished by imprisonment for not more than one year, or by a fine not exceeding one million won; 2. The moderator shall be punished by imprisonment for not more than six months, a fine not exceeding 500,000 won, penal detention, or a minor fine; and 3. A person who participates in an assembly or demonstration with knowledge of the fact shall be punished by a fine not exceeding 500,000 won, penal detention, or a minor fine.

Article 24 was a reference to the provisions above:

Article 24 (Penal Provisions)

Any person who falls under any of the following subparagraphs shall be punished by imprisonment for not more than six months, a fine not exceeding 500,000 won, penal detention or minor fine: 1. A person who participates in an assembly or demonstration without regard to the fact that she/she was, under Article 4, excluded by the organizer or the moderator from participation; 2. A person who holds an assembly or stages a demonstration by making a report under Article 6 (1) in a false manner; 3. A person who, notwithstanding a warning of a police officer, crosses a police line set up under Article 13 for a significant time without any justifiable reason, or damages, conceals, moves, or eliminates a police line, or does harm to the usefulness of a police line by any other means; 4. A person who violates an order given under Article 14 (2) or who refuses or obstructs necessary measures thereunder; and 5. A person who violates Article 16 (5), 17 (2), 18 (2) or 20 (2).

8) 2000 Hun-Ba 67, Oct. 30, 2003.

9) 2004 Hun-Ga 17, Nov. 24, 2005.

Constitutional Court said, "it is hardly the case that there is a less restrictive means other than the challenged provision, and having no exception is not considered to violate the rule of the least restrictive means, given the function and role of the National Assembly." In addition, compared with the 200-meter radius regulation of the previous law, the current place regulation does not abridge the petitioner's interests excessively.

The Constitutional Court further found that the harm to the petitioner (i.e., the decline in the effectiveness of assemblies and restriction on freedom) was not unreasonably significant compared to the concerned interests. The private interest abridged by the challenged provision is only a spatial restriction in a limited scope—restriction of holding assemblies near the National Assembly—whereas protecting the competence of the National Assembly is unquestionably important for representative democracy.

B. Dissenting Opinion

Four out of nine Justices presented dissenting opinion in this case. This divergence of opinions foreshadowed a possible change of the Constitutional Court's stance in a case challenged later. The Constitutional Court can find a statute unconstitutional only when more than six out of nine Justices join in the opinion.[10] The dissenting Justices did agree with the majority's opinion that the provision at issue does not violate Article 21 of the Constitution regarding licensing or censorship of speech, but opined that it violates the principle of proportionality.

First, the dissenting opinion placed a greater value in protecting the place of assembly compared to the majority opinion. There was no constitutional justification to prohibit the influence of political and collective expression on members of the National Assembly. The challenged provision established a no-assembly zone without considering the specific danger of assemblies or demonstrations near the National Assembly and the possibility of violence. Lack of consideration of possible exceptions made the law unreasonably exclusive, and that could be an inadequate means to fulfill the legislative purpose.

Second, the member of the National Assembly is an independent representative who was elected by the people. Because the member should be bound only by his or her conscience, and not by a particular person's or a group's pressure, we need to protect the representatives from undue pressure. However, such protection should be exclusively against the direct physical threat or the possible harm. People's mere political expression is not a constitutional target to prevent for the legislators.

Third, the protest near the National Assembly by itself hardly causes any practical and specific harm or physical threat. A violent assembly that may set up blockade on the National Assembly,

10) The Constitutional Court Act
Article 23 (Quorum for Adjudication)
(1) The Full Bench shall review a case by and with the attendance of seven or more Justices
(2) The Full Bench shall make a decision on a case by the majority vote of Justices participating in the final review: *Provided*, That a vote of six or more Justices is required in any of the following cases: 1. Where it decides to rule a statute unconstitutional, sustain impeachment, dissolve a political party, or uphold a constitutional complaint; and 2. Where it overrules the Constitutional Court's precedent on interpretation and application of the Constitution or statutes.

threaten a lawmaker's personal safety, or destroy the National Assembly facilities, is already considered a speech not protected by the Constitution. We cannot presume that a general rally will become a violent assembly. Mere abstract possibility of harm cannot justify eliminating every chance of peaceful assemblies guaranteed by the Constitution.

Fourth, the National Assembly building still secures distance from the entire space boundary. If a protest takes place outside the boundary, the protestors cannot harm the building or the legislators inside the building with physical threat or forcible obstruction of business.

In terms of the minimum harm test, designation of such a prohibited area is an excessive regulation of fundamental rights and violates the rule of the least restrictive means. There can be a less restrictive alternative. Without absolutely forbidding public speeches in the area, the possible harm from assembly can be regulated with the general penal codes. Compared to the statutes governing protests near the Congress in other countries, such absolute ban is unusual. The United Kingdom and Japan do not have statutory provisions that forbid an assembly near the Parliament in advance. Germany and the United States have statutory provisions of ex-ante regulation that specify exceptionally permitted assemblies.

Finally, in balancing the public interests secured through the law against the private interests lost through the prohibition, the challenged provision is problematic in the sense that it provides no exception to ease the restriction on basic rights even when there exists a small possibility of violation of law. It is undoubted that the protection of the function of the National Assembly as a constitutional control body represents public interest of supreme importance, but the contested provision, by imposing full-fledged restriction even on the peaceful and justifiable assemblies, shows no effort in balancing the conflicting legal interests by considering specific circumstances. Therefore, the balance of interests is hardly achieved. In consequence, the instant provision breaks the rule against excessive restriction by overly regulating the freedom of assembly and is in violation of the Constitution.

3. 2013 Hun-Ba 322, 2016 Hun-Ba 354, 2017 Hun-Ba 360·398·471, 2018 Hun-Ka 3·4·9 (consolidated), May 31, 2018

In this case, the Constitutional Court unanimously reversed the prior ruling which found the provisions of the Assembly and Demonstration Act that prohibited assemblies within the 100-meter radius from the boundary of the National Assembly building, constitutional. Criticisms on the constitutionality of the Assembly and Demonstration Act had been raised for a long time at all levels of society.[11] In the National Assembly, even the opposition lawmakers proposed a revision

11) Constitutional law scholars pointed out that place regulation of the Assembly and Demonstration Act is too strict to protect freedom of speech. In addition, they argued that, representing the citizen under the Constitution, the National Assembly should open its door to listen to what the citizens say. See Tae-Soo Kang, Freedom of Speech and the Problem of the revised Assembly and Demonstration Act, Korean Journal of Constitutional Law, vol.10(1), 2004, p.441.
In 2006, People's Solidarity for Participation, a representative non-governmental organization for civil rights movement in Korea, issued a status report of Article 11 of the Assembly and Demonstration Act application. In that report, from 2011 to 2015, the police had given thirty cases of notice of prohibition against the application of protests

bill to permit assemblies near the National Assembly.

Eight petitions of constitutional review were consolidated into this case. The petitioners had been charged at the courts in Seoul for participating in an assembly held near the National Assembly. The participants wanted to express their political opinion to the legislators to enact or revise a law related to their interests. The Constitutional Court sided with the petitioner in this case.

A. Whether the freedom of assembly has been infringed upon

The Court's changed stance does not mean that it denies the significance of the legislature in a constitutional democracy and the necessity of protecting it from external threats. The National Assembly, as an authority controlling national affairs, plays an important role in determining national policies as a body representing the people and exercises strong oversight over the executive. Thus, the function and role of the National Assembly, given their unique nature and significance, require special and sufficient protection.

The legislative purpose of the challenged provisions of the Assembly and Demonstration Act is legitimate. They aim to ensure that the National Assembly members and staffs employed at the National Assembly and members of the general public and public officials attending the National Assembly can perform their duties by entering the National Assembly building free from pressure or threat. The provisions also intend to guarantee the safety of National Assembly facilities including the National Assembly building. In terms of the appropriateness of means test, the complete prohibition of outdoor assemblies within a 100-meter radius from the boundary of the National Assembly building helps protect the National Assembly's function. Therefore, the means that the challenged provisions take to satisfy the purpose of the Assembly and Demonstration Act is not inappropriate.

However, securing the National Assembly's constitutional mission has nothing to do with assemblies being held near the National Assembly building; in fact, they may help the National Assembly stay devoted to its constitutional role. The National Assembly members must perform their duties conscientiously by putting national interests first, given the National Assembly's role of "gathering public consensus." Thus, the necessity to protect the National Assembly from unreasonable pressure exercised by specific persons or certain forces should, as a rule, be limited in scope to the protection from potential physical duress or harm against National Assembly members and from the risk of threats against entry into, or the safety of, the National Assembly facilities including the building.

Considering the legislative purpose of the provisions at issue, the National Assembly building can be interpreted to include the entire National Assembly site where the National Assembly functions take place, including the Members' Office Building and the National Assembly Library. However, such an interpretation would lead to over-inclusion of areas unrelated to entry into the National Assembly building, and areas separated from the National Assembly site byroads as well as nearby parks and green area. Further, a fence is installed on the boundary of the National

based on the place.

Assembly site and significant space lies between the fence and the National Assembly facilities, which guarantee the constitutional function of the National Assembly.

The challenged provisions presume that assemblies held nearby the National Assembly building pose a direct threat to the legal interests protected by the provisions. If this presumption could be refuted by specific situations, the legislature must prescribe exceptions in the rules to allow outdoor assemblies. For instance, in cases where the constitutional function of the National Assembly is unlikely to be infringed upon by outdoor assemblies, such as small-scale assemblies or assemblies held on public holidays, the legislature should make legal exceptions to mitigate the possibility of excessive restriction on the freedom of assembly.

In addition, even though the constitutional function of the National Assembly may be harmed if violent, illegal, and large-scale assemblies take place nearby the National Assembly building, we can prevent the harm effectively with the existing laws. The Assembly and Demonstration Act prescribes diverse regulatory measures to deal with such situations, and any acts of violence or obstruction of work that occur during the assemblies are punishable under criminal law.

The challenged provisions go beyond the minimum scope necessary for achieving their legislative purpose, by uniformly and completely prohibiting assemblies that do not require such regulations or can be permitted as an exception. Therefore, they violate the rule of minimum restriction.

B. Decision of nonconformity to the Constitution (temporary application)

The prohibition of outdoor assemblies nearby the National Assembly building, imposed by the provisions at issue, contains both unconstitutional and constitutional elements. The Court thus issued a decision of nonconformity to the Constitution and ordered that the provisions remain applicable until amended by the legislature by December 31, 2019.

Decision of nonconformity to the Constitution is one of the modified versions of unconstitutionality decision. When the Constitutional Court finds a law or a provision of a law unconstitutional, it loses its legal effect at the moment the decision is made. In other words, with the Constitutional Court's decision of unconstitutionality, a law or a provision of law at issue disappears.[12] To all citizens including the petitioners, it is an unexpected situation of legal vacancy. The Constitutional Court has created several modifications to respect the authority of the legislature and to minimize the disorder from the absence of law. Decision of nonconformity is one of the modifications that makes the Court's decision declaratory only for the time being until the date the Court points out. Therefore, the law decided as nonconformity sustains its formality except the element found unconstitutional by the Court until the legislative revision.[13]

12) The Constitutional Court Act
Article 47 (Effect of Decision of Unconstitutionality) (1) Any decision that a statute is unconstitutional shall bind ordinary courts, other State agencies, and local governments. (2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made.

13) There are two more modified version of unconstitutionality decision: decision of conditional constitutionality and decision of conditional unconstitutionality. These all modifications have been made through case laws by the Constitutional Court.

III. Assembly near Official Residence of the Prime Minister

The Prime Minister serves as an Acting President during a presidential vacancy, an aid to the President, and the second highest ranking official in the Executive in Korea.[14] While categorized as a state with a presidential system like the United States, Korea, for historic reasons, also appoints the Prime Minister, the position usually considered as the head of the government in a state with a parliamentary system. Politically, the Prime Minister cannot hold greater authority and political power than the President, but when the President loses his or her political popularity or influence, the Prime Minister acts to gather political confidence from the people.

The official residence of the Prime Minister is a public property that is both a living place as well as working place of the Prime Minister which contains an executive room, a reception room, and conference rooms. The Assembly and Demonstration Act had the place regulations on the residence of the Prime Minister in the same framework to those on the National Assembly to protect his/her safety and stability.

1. 2015 Hun-Ka 28, 2016 Hun-Ka 5 (consolidated), June 28, 2018

The Constitutional Court held that the provision of the Assembly and Demonstration Act unconstitutional, which provided that any person holding any outdoor assembly or staging any demonstration anywhere within a 100-meter radius from the boundary of the official residence of the Prime Minister, except for a parade, shall be subject to criminal punishment. In addition, the provision of the same Act requiring to punish any person who disobeys a dispersion order against such outdoor assembly or demonstration violating the above provision is unconstitutional as well.

The petitioner of this case was prosecuted for organizing a protest at a place 60 meters from the boundary of the official residence of the Prime Minister, where any outdoor assembly or demonstration is banned, and for disobeying the police's dispersion order. He filed a motion to request a constitutional review on the part of the challenged provision concerning 'any person who

14) The Constitution of the Republic of Korea
Article 71 If the office of the presidency is vacant or the President is unable to perform his/her duties for any reason, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for him/her.
Article 86 (1) The Prime Minister shall be appointed by the President with the consent of the National Assembly. (2) The Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President. (3) No member of the military shall be appointed Prime Minister unless he/she is retired from active duty.
Article 88 (1) The State Council shall deliberate on important policies that fall within the power of the Executive. (2) The State Council shall be composed of the President, the Prime Minister, and other members whose number shall be no more than thirty and no less than fifteen. (3) The President shall be the Chairperson of the State Council, and the Prime Minister shall be the Vice-Chairperson.
Article 94 Heads of Executive Ministries shall be appointed by the President from among members of the State Council on the recommendation of the Prime Minister.
Article 95 The Prime Minister or the head of each Executive Ministry may, under the powers delegated by Act or Presidential decree, or *ex officio*, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

disobeys a dispersion order against any assembly or demonstration that violates Article 20 Section 1 Item 1 and Article 11 Item 3 of Article 20 Section 2 specified in Article 24 Item 5 of the Assembly and Demonstration Act. The provision provides a legal basis to impose criminal punishment for disobeying the dispersion order against any outdoor assembly or demonstration waged near the official residence of the Prime Minister. The trial court accepted the petition before requesting a constitutional review on the provision in 2016 Hun-Ka 5 case. The same court also requested *sua sponte*, a constitutional review on Article 11 Item 3 indicated in Article 23 Item 1 of the Act, according to which any person organizing an outdoor assembly or demonstration near the official residence of the Prime Minister shall be punished in 2015 Hun-Ka 28 case. The Constitutional Court reviewed these two petitions consolidated.

A. Decision on the Prohibited Places Provisions

Given the position of the Prime Minister prescribed in the Constitution, the legislative purpose of the challenged provisions to protect the function and peace of the official residence of the Prime Minister as both living space and office is a legitimate goal. The means of prohibiting any outdoor assembly or demonstration except for a parade near the official residence of the Prime Minister is not an entirely unreasonable measure to serve the legislative purpose.

However, in terms of the principle of minimum restriction, banning an assembly should be considered the last resort after all the other less restrictive means are exhausted. Therefore, the Court held that an outdoor assembly should be permitted as an exception if the general presumption that such activities near the Prime Minister's official residence pose direct threats to its function and peace can possibly be rebutted by specific circumstances. The challenged provisions prevent all outdoor assemblies without exception, including 'small ones' and 'those not organized against the Prime Minister,' which would very unlikely undermine the function and peace of the official residence. Therefore, it is an extreme restriction that exceeds the scope necessary to serve the legislative purpose.

The challenged provisions allowed a 'parade' near the official residence. However, the concept of the 'parade' under the Act is ambiguous, and thus it was difficult to expect the loosening effect on the restriction of the fundamental rights. Because the Act does not describe what 'parade' means,[15] the interpretations from the prior rulings were not coherent. The legislative reason for allowing a parade in this provision was its little risk of harm: the participants of a parade do not stay at the specific place for long. The legislators wanted to protect freedom of parade. Considering these legislative purpose and intention, the Constitutional Court had previously narrowed down the permissible parade into the moving assembly that has little influence or harm to the public safety,

15) The Assembly and Demonstration Act only defines outdoor assembly and demonstration.
Article 2 (Definitions) For the purposes of this Act, the definitions of terms shall be as follows: 1. The term "outdoor assembly" means an assembly in a place that has no roof or covering or is in an open space with none of its four sides closed; 2. The term "demonstration" means an act of a group of persons associated under common objectives parading along, or displaying their will or vigorous determination in public places available for the free movement of the general public, such as roads, plazas, parks, etc., with the aim of exerting influence on the opinions of a large number of unspecified persons or overwhelming them.

or the function and security of the official residence of the Prime Minister.
The Act, however, already provided for various restrictions depending on the nature and circumstances of the assembly. Accordingly, when an outdoor assembly and/or demonstration near the official residence are exceptionally permitted, the function and peace of the official residence can still be sufficiently maintained. The provisions at issue impose an indiscriminate and total ban on assemblies including those that do not need restriction or can be given as exceptional permission beyond the minimum extent necessary to fulfill its legislative purpose. Therefore, it violates the principle of minimum restriction.

When comparing the interest of ensuring the function and peace of the official residence of the Prime Minister against the challenged provisions and the level of restriction they impose on freedom of assembly, it cannot be claimed that the public interest to be achieved by the provisions outweighs the restricted freedom of assembly. Thus, the challenged provisions also violate the balance of interests.

Consequently, the provisions at issue infringe upon freedom of assembly by violating the principle against excessive restriction.

B. Decision on the Provision on Disobeying Dispersion Order

According to the challenged provision on a dispersion order of the Act, disobeying a dispersion order against any outdoor assembly near the official residence of the Prime Minister is punishable as a crime. Since the provisions at issue infringe upon the freedom of assembly by violating the principle against excessive restriction as mentioned above, the provision on a dispersion order also infringes upon freedom of assembly. Thus, the provision violates the Constitution.

C. Decision of nonconformity to the Constitution

Unconstitutionality of the Provisions at Issue lies in the fact that they prohibit assemblies near the Prime Minister's official residence indiscriminately and totally, which exceeds the scope necessary to protect the function and peace of the official residence. In other words, banning outdoor assemblies near the official residence of the Prime Minister has both constitutional and unconstitutional aspects simultaneously. Therefore, it is left within the discretion of the legislators to amend the provision and decide which of such activities should be permitted as an exception.

Therefore, the Court delivered a decision of nonconformity to the Constitution, and ordered the provisions at issue to remain applicable until the legislature amended them by December 31, 2019. If amendment was not made by such date, the Provisions at Issue would become invalid as of January 1, 2020.

2. Meaning of the Decision

As long as the Prime Minister is a public officer in the Executive, his/her official residence provided by the government is no longer a private property. Even though the Prime Minister should entertain privacy and safety inside the residence, citizens should be able to access outside the

residence with legitimate purposes. Geographically, the official residence of the Prime Minister is in the way to Cheongwadae from downtown Seoul. The protesters sometimes march from Gwanghwamun to the permitted place of Cheongwadae passing through the official residence of the Prime Minister. The Constitutional Court may have considered these factors in this case.

IV. All Levels of Courts as a Place for Protest

During the last decade, citizens held demonstrations more frequently near the prosecutor's offices, criticizing their biased investigation and prosecution. In addition, the courts have been the target of protests. Especially during the time of presidential impeachment, the streets near the Constitutional Court have been crowded with the people against impeachment. With the increased awareness about the rule of law, citizens have been more interested in prosecutions and legal decisions. This case reflects the Constitutional Court's changed perspective toward the role of Judiciary, that the Court should no longer be alienated from the citizens.

1. 2018 Hun-Ba 137, July 26, 2018

In this case, the Court found that the phrase "all levels of courts" in Article 11 Item 1 of the Assembly and Demonstration Act stating that any person holding any outdoor assembly or demonstration anywhere within a 100-meter radius from the boundary of all levels of court shall be subject to criminal punishment, was unconstitutional. In addition, "all levels of courts" in Article 11 Item 1 under Article 23 Item 1 of the same Act violates the rule against excessive restriction, thereby infringes upon freedom of assembly.

The Complainant was prosecuted for holding an assembly at the front gate of the Supreme Prosecutor's Office located within a 100-meter radius from the boundary of the Supreme Court and found guilty at the trial court. The Complainant appealed and filed a motion to request a constitutional review; and upon rejection, filed a constitutional complaint.[16)]

16) This constitutional complaint was made according to Article 68 Section 2 of the Constitutional Court Act
Article 68 (Ground for Request) (1) Any person whose fundamental rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the governmental power, excluding judgment of the courts, may request adjudication on a constitutional complaint with the Constitutional Court: *Provided*, That if any remedial process is provided by other statutes, no one may request adjudication on a constitutional complaint without having exhausted all such processes. (2) If the motion made under Article 41(1) for adjudication on the constitutionality of statutes is denied, the party may request adjudication on a constitutional complaint with the Constitutional Court. In this case, the party shall be precluded from filing a motion again to request adjudication on the constitutionality of statutes for the same ground in the proceedings of the original case.
Article 41 (Request for Adjudication on Constitutionality of Statutes) (1) If the constitutionality of a statute is precondition of the judgment of a case, the ordinary court which takes charge of the case(including the military court) shall request adjudication on the constitutionality of the statute to the Constitutional Court, *ex officio*, or by its decision upon a motion of a party.

A. Whether the Freedom of Assembly was Infringed Upon

The key to a fair trial includes independence of judges from any influence or pressure of society as well as from intervention of other Government branches or the Judiciary itself. The legislative purpose of the provisions at issue was to prevent the attempt to influence the independence of the courts by holding an assembly in front of courts. Such purpose seemed legitimate based on the demand of the Constitution to ensure independence of judges and a fair trial. Establishing places to ban assemblies and demonstrations in the proximity of all levels of courts also seemed an appropriate means of serving the legislative purpose.

If a general presumption that outdoor assemblies or demonstrations held near the courts may affect their ongoing trials can be rebutted in specific circumstances, the legislature is required to amend the related provisions so that outdoor assemblies or demonstrations can be permitted under exceptional conditions even in the vicinity of the courts.

Some assemblies, even when they are held near the courts, are unlikely to threaten the independence of judges or affect the trials. For example, assemblies held near the courts to protest against other entities like prosecutors' offices, corporations, or individuals had little to do with influencing the independence of the courts. Even if they are held with the courts in mind, they may merely intend to make their voices heard about judicial administration that is irrelevant to the independence of judges or trials on specific cases.

The provisions at issue aim to protect the courts from various pressures and to deter all potential influences on cases under trial. However, the Assembly and Demonstration Act already contains other restrictions besides the provisions at issue that protect the courts based on the nature and circumstances of the assemblies and demonstrations. The legislative purpose of the provisions at issue will be served by these provisions when outdoor assemblies and demonstrations are exceptionally permitted in the vicinity of all levels of courts.

As the provisions at issue uniformly and totally ban outdoor assemblies and demonstrations including those which do not need to be restricted or which may be given exceptional permission, they go beyond the minimum scope needed to serve the legislative purpose and violate the principle of minimum restriction.

In addition, not only by restricting assemblies and demonstrations that are likely to affect the independence of judges or cases under trial, but also by totally banning all outdoor assemblies in the proximity of all levels of courts, the provisions at issue violate the balance of interests. Therefore, the provisions at issue infringe upon freedom of assembly by violating the principle against excessive restriction.

B. Decision of Nonconformity to the Constitution

The provisions at issue banning outdoor assemblies and demonstrations in the vicinity of all levels of court had both constitutional and unconstitutional elements. It is thus left within the discretion of the lawmakers to take into account circumstances that will not affect the independence of judges or cases under trial, and determine which outdoor assemblies and demonstrations are exceptionally permissible.

Therefore, as the provisions at issue did have some constitutional aspects, the Court delivered a decision of nonconformity to the Constitution and ordered a continued application of the provisions at issue until the legislature amended it by December 31, 2019. If the amendment were not made by such date, the provision at issue would lose effect as of January 1, 2020.

2. Meaning of the Decision

The courts and the prosecutor's offices constitute an extraordinary architectural complex in Korea. The buildings of each level of prosecutor's offices are located in the places adjacent to the counterpart court buildings: the local trial courts neighboring the local prosecutor's office, the appellate courts neighboring the high prosecutor's office, and the Supreme Court neighboring the Supreme Prosecutor's Office. If an assembly to protest the prosecution is held near the prosecutor's office, it would violate the Assembly and Demonstration Act that forbids a protest anywhere within a 100-meter radius from the boundary of any level of court, because they share common spaces.

V. Jurisprudence of Freedom of Assembly

1. Comparative Approach

Freedom of Assembly, through which the people can collectively communicate their idea and information to promote formation of public opinion freely and safely, works for social solidarity. In addition, another purpose of freedom of assembly is political stability in the long run by encouraging protesters to have an opportunity to express their disagreements. Particularly during the term between elections, the people can be connected with the representatives based on freedom of assembly. If the representation system under the Constitution does not function well, the freedom of assembly, as an alternative, works for direct democracy. In terms of minority protection, freedom of assembly helps the people who have limited or excluded chance to express their political opinion.[17)]

Freedom of assembly promotes the members of an assembly to choose the time, place, manner, and purpose on their own. Specifically, they should be free to decide how to prepare, organize, control, and participate in an assembly, let alone the place and time of the assembly.[18)] The place of assembly is closely related to the purpose or the contents of speech. An assembly grasps its significance as it is held at the place where the target of the protest is located, at the place of incidents, or where the motives exist. The choice of place is often a decisive factor of the success of an assembly.[19)]

17) 2008 Hun-Ka 25, Sep. 24, 2009.
18) 2014 Hun-Ka 3, Sep. 9, 2016.
19) 2004 Hun-Ka 17, Nov. 24, 2005.

The Constitution stipulates the general provision of when and how the government can abridge the fundamental rights.[20] This is a general principle of constitutional mechanism about all governmental restrictions on the individual rights. Therefore, all constitutional rights including freedom of speech/assembly, promulgated or unpromulgated, can be limited according to this principle.

The Constitutional Court developed the general principle into a more specific one: the principle of proportionality. The principle of proportionality is composed of four elements to review: legitimacy of purpose, appropriateness of means to the purpose, minimum harm, and a balance between conflicting legal interests. All the cases discussed above were decided based on these four elements of the principle.

This mechanism is comparable with the nonpublic forum jurisprudence that the U.S. Supreme Court established. Nonpublic forums are governmental properties that the government has an arbitrary power to open or shut down for speech. In many cases regarding nonpublic forum, the Court established a principle: with reasonable and viewpoint neutral regulation, the government can forbid speech including assembly in nonpublic forum. In *Adderly v. Florida*, the Supreme Court was on the government's side to prohibit speech outside prisons.[21] In *Edwards v. South Carolina*, peaceful assembly on the sidewalks of the capitol grounds was protected by the First Amendment.[22] In *Cox v. Lousiana II*, the Court approved of a ban on picketing near a courthouse with intent to obstruct justice and impede access.[23]

The U.S. Supreme Court, in its attempt to find a balance between managing governmental functions and protecting the free speech right, has created the nonpublic forum theory.[24] Assemblies at the major nonpublic fora, such as the Presidential Office, the National Assembly, and Courts, can be constitutionally limited to enable a government functioning, although broad place restrictions on the free assembly are unconstitutional.[25]

Because the Constitutional Court of Korea does not adopt a categorical approach, it is difficult to make a simple parallel comparison between the decisions regarding place restrictions made by the Korean Constitutional Court and those made by the U.S. Supreme Court. However, the purpose of the public forum theory and the nonpublic forum theory was considered during the Constitutional Court's decision-making process based on Article 37(2) in a different form called the principle of proportionality. As a result, the protection of the free assembly right in the nonpublic forum has been significantly strengthened in Korea, to the extent comparable with the First Amendment protections in the U.S.

---

20) The Constitution of Republic of Korea
Article 37 (2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even such restriction is imposed, no essential aspect of the freedom or right shall be violated.

21) 385 U.S.39 (1966).

22) 372 U.S. 229 (1963).

23) 379 U.S. 559 (1965).

24) For further understanding and criticism on the public forum theory, see Robert Post, Between Governance and Management: The History and Theory of the Public Forum, 34 *UCLA L. Rev.* 1713 (1986-1987).

25) Orsolya Salát, The Right to Freedom of Assembly: A Comparative Study, Hart Publishing, 2015, pp.269-270.

2. The Assembly and Demonstration Act after the Decisions

After the Constitutional Court's three decisions regarding the place restrictions of the Assembly and Demonstration Act in 2018, the legislature revised the challenged provisions in June 2020. The requirements for an assembly were inserted at each item of Article 11 in revision. First, in the areas surrounding the National Assembly, the assemblies are permitted on the condition that the assembly has no possibility to obstruct the National Assembly's activities and that the assembly would not turn into a massive rally. Second, the assemblies are allowed around the official residence of the Prime Minister, if the protest is not held directly against the Prime Minister and if the assembly would not turn into a massive rally. Third, in the areas surrounding all levels of courts, the assemblies are permitted on the condition that the rally would not harm the independence of a judge or an adjudication of a specific case, and that the assembly would not turn into a massive rally.

At first glance, the revised statutory provisions seem to reflect the Constitutional Court's intent and holdings on the freedom of assembly. However, there are systematic loopholes if one takes a closer look. The requirements added by the revised statutory provisions in fact make assemblies at those places harder to be held. To meet the requirements, the protest must not harm the function of the places and also must not turn into a massive rally. In addition, the police hold the sole authority to decide whether all the requirements are met, which would give the police more arbitrary power in its enforcement of the law. Consequently, the Constitutional Court's intent to allow a greater freedom of speech and assembly could not be fully realized with the legislative follow-up.

VI. Conclusion

In 2018, the Constitutional Court in Korea made significant rulings regarding the place restrictions on the exercise of the freedom of speech. Three cases discussed above share the belief in the enhanced free assembly rights. Given the conservative stance taken in the past to protect the public property considered as a nonpublic forum, the change is quite remarkable. Since there has been no amendment to the Constitution or no change in the Constitutional Court's jurisprudence of the constitutional rights and their limits, the reason for such change can be attributed to the transformation of the general public's perspectives on the freedom of assembly as a result of the hugely successful democratic movement witnessed recently. Now the people can hold an assembly in the places that were once prohibited by the Assembly and Demonstration Act. More citizens share an optimistic view on the future of developmental coexistence between freedom of assembly and democracy in Korea.

Comparing the Approaches of the Constitutional Court of Korea and the Constitutional Court of Indonesia in Deciding Constitutional Cases Associated with Economic and Social Rights

ANDY OMARA*

Abstract

This paper aims to comparatively study the approaches of the South Korea Constitutional Court and the Indonesian Constitutional Court in deciding constitutional cases related to economic and social (ES) rights. By analyzing five Korean constitutional cases and seven Indonesian judicial review cases, the paper found that while the types of the Courts decisions in these two jurisdictions have been limitedly defined by the law and the Constitution, in practice these two Courts have developed several approaches beyond what have been mentioned by the law and the constitution. The paper further investigates the Courts' rationales in issuing such decisions and observes the consequences of rendering such modified decisions. While the use of modified approaches aims to: prevent legal vacuum, confusion, respecting the law-making body i.e. the legislature and other factors, modified decisions are not absent from criticisms. The paper maintains that nonconforming decisions should be carefully utilized.

* Professor of Constitutional Law, Gadjah Mada University School of Law.

I. Introduction

There are different ways on how countries enforce economic and social rights. For some, enforcing economic and social rights is the duty of the government. For others, the Court is possible to participate in the protection of economic and social rights through judicial review. Indonesia and South Korea are example of countries where judiciary is authorized to conduct constitutional review. The South Korea Constitution grants the Constitutional Court an authority to review laws against the Constitution.[1] Similarly, the updated Constitution of Indonesia introduced a new, special and separate Court namely the Constitutional Court which has the power to test the constitutionality of laws against the constitution.[2] The current Constitutions of Indonesia and that of South Korea have incorporated significant provisions on economic and social rights. With the Courts' power to check the validity of laws against the constitution and the incorporation of plethora economic and social rights in the constitution, this allows the Courts to determine whether or not the existing laws violate economic and social rights that are constitutionally guaranteed.

The Constitution and the Law on the Constitutional Court in both countries have determined the types of constitutional court decisions i.e. constitutional, unconstitutional, and inadmissible. In practice, however, the Courts have developed several techniques beyond the approaches that have been stipulated in the law and the Constitutions.[3] The paper aims to understand the Constitutional Courts' modified approaches. In addition, it also aims to comprehend the Courts' rationales in applying the innovative approaches. And finally, the paper intends to know the logical consequences of rendering these alternative judicial techniques. The paper is structured as follows: Part I overviews models of judicial enforcement and judicial approaches on economic and social rights. Part II investigates the justiciability of Economic and Social Rights in Indonesia and South Korea. Part III examines types of rulings of the Korean Constitutional Court and Indonesian Constitutional Court. Part IV analyzes the expansion of the Korean and the Indonesian constitutional courts' approaches in deciding constitutional cases on economic and social rights. Finally, the paper ends with conclusion.

II. Models of Enforcement and Judicial Approaches on Economic and Social Rights

1. Models of Enforcement on Economic and Social Rights

There are differing views regarding which institutions should enforce economic and social rights.

1) Article 111 of the South Korea Constitution.
2) Article 24 C of the Indonesian Constitution.
3) Simon Butt, *Indonesia's Constitutional Court: Conservative Activist or Strategic Operator?* in Bjorn Dressel (ed) *The Judicialization of Politics in Asia* 98−116 (2012).

Should it be in the hand of the legislative (legislative supremacy) or should it be the domain of the judiciary (judicial supremacy). Jeremy Waldron, in *The Core of the Case Against Judicial Review*, questions whether rights are better protected by judicial review than they would be by a democratic legislature.[4] He believes that judicial review is democratically illegitimate. Other scholar Cass Sunstein argues that incorporating economic and social rights in a constitution was a large mistake. He suggested that social rights are unenforceable by court because they lack bureaucratic and policy means.[5] Other scholars such as Jeff King argues that the judiciary plays pivotal roles in improving the quality of democracy by reviewing the government policies.[6] This is because the judiciary can ensure that the public policies made by the majorities do not violate the rights of the minorities. While there are differing views regarding whether economic and social rights should be included in the constitution, most constitutions include economic and social rights. Some countries expressly include economic and social rights as justiciable rights in their constitutions. This mean economic and social rights are judicially enforceable. Other countries recognize economic and social rights as nonjusticiable rights. In this case, judiciary is not authorized to enforce economic and social rights. The fulfillment of these rights is in the hand of the legislature or the executive.

Stephen Gardbaum offers a third way that he called "new commonwealth constitutionalism" which aim to balance between the judicial supremacy and legislative supremacy. A new commonwealth constitutionalism tries to "create institutional balance, joint responsibility and deliberative dialogue between courts and legislatures in the protection and enforcement of fundamental rights."[7] It allows review of legislation by the judiciary but grants the final word to the legislature. There is a similar theory to a new commonwealth constitutionalism namely a constitutional dialogue (coined by Rosalind Dixon).[8] This theory provides a dialogue between courts and legislature in the enforcement of economic and social rights.

In *Economic and Social Rights in National Constitution,* Courtney Jung, Ran Hirschl and Evan Rosevear[9] make four arguments with regard to how national Constitutions determine Economic and Social rights,[10] two of which are: first, not all economic and social rights are equally

4) Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L J, 1346-1406 (2006).

5) Cass R. Sunstein, *Against Positive Rights, in Western Rights? Post-Communist Application*, in Andrass Sajo, ed (1996), See also Vicki C Jackson and Mark V. Tushnet, *Comparative constitutional law* 1483. (Foundation Press, 1999).

6) Jeff King, *Judging Social Rights* 248 (University College London 2012)

7) Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 The American Journal of Comparative Law 707-760 (2001).

8) Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 International Journal of Constitutional Law 393 (2007).

9) Courtney Jung, Ran Hirschl, and Evan Rosevear. "Economic and social rights in national constitutions." *The American Journal of Comparative Law* 62.4 (2014): 1043-1094.

10) First, although economic and social rights (ESRs) have grown increasingly common in national constitutions, not all ESRs are equally widespread. Whereas a right to education is so common as to be practically universal, a right to food and water is still very rare. Second, constitutions accord ESRs different statuses, or strengths. More than some one-third of countries identify all economic and social rights as justiciable, another third identifies some ESRs as aspirational and some as justiciable, and the last third identify ESRs as aspirational or entrench fewer than two. Third, legal tradition— whether a country has a tradition of civil, common, Islamic, or customary law— is a strong predictor of whether a constitution will have economic and social rights and whether those rights will be justiciable. Fourth, whereas regional differences partly confound the explanatory power of legal traditions, region and legal tradition retain an independent effect on constitutional entrenchment of ESR. Courtney Jung, Ran Hirschl, and Evan

widespread. Right to education is so common while a right to food and water is very rare. Second, Constitutions place the statuses and the strengths of Economic and Social rights in various ways. Some countries constitutions identify all economic and social rights as justiciable, but there are constitutions which stipulate economic and social rights as aspirational or some as justiciable. The Constitution of Hungary expressly mentions economic and social rights as justiciable rights.[11] The Irish Constitution[12] and the Indian Constitution[13], however, determine economic and social rights as nonjusticiable rights. The South African Constitution does not explicitly state one way or the other whether economic and social rights are justiciable.[14] In this regard, what would be the position of the Indonesia Constitution as well as the South Korea Constitution? Do ES rights consider as justiciable, nonjusticiable or somewhat justiciable rights? These two questions will be addressed in Part II.

2. Judicial Approaches in Deciding Cases Related to Economic and Social Rights

Typically, there are two types of the constitutional court rulings in judicial review cases: granting a petition or rejecting a petition. When a petition is granted by a court, it means that the court declare the law is inconsistent to the constitution. As a result, the court will invalidate the provision of the concerned law. A petition is rejected when the petitioners cannot convince the court that there is inconsistency between the provision of the law and the constitution. As a result, the law remains constitutional. The Court decision will have legal effect in time of the publication of the court decision.

In the real world, however, this is not always the case. Different constitutions may provide different rules on the Court approach in deciding cases. For example, the South Africa Constitution grants the constitutional court a power to decide a constitutional matter within its power[15] a court: (a) must declare that any law that is inconsistent with the constitution is invalid (b) may make an order limiting the retrospective effect of the declaration of invalidity (c) may make an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Rosevear. "Economic and social rights in national constitutions." *The American Journal of Comparative Law* 62.4 (2014): 1043-1094.

11) Article 70 K of the Hungary Constitution stipulates, “claims arising from infringement on fundamental rights and objections to the decisions of public authorities regarding the fulfilment of duties may be brought before a court of law.”

12) Article 45 of the Irish Constitution (1937) explicitly mentions a Directive Principles of Social Policy. This article stipulates that:The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas (the parliament). The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any court under any of the provisions of this constitution.

13) Article 37 of the Indian Constitution explicitly stipulates that “the Directive Principles contained in Part IV shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

14) South Africa Constitution Art 26, 27 and 29.

15) the Constitution of the South Africa of 1996 Article 172.

Unlike the South Africa Constitution, the Indian Constitution does not expressly grant the courts the power to review the decisions of the executive and the legislature. However, Part III of the Constitution prohibits the state from making any law in contravention of fundamental rights.[16] Part III becomes the basis of the Supreme Court to determine the constitutionality of laws specifically with regard to fundamental rights.

In the Austrian Constitution, the Court decision on judicial review typically has effects since the date of its publication. But it is possible that the Court establishes another date to avoid legislative vacuum, giving time to the lawmaker to enact a new law to substitute the invalided one. Further, the Court can postpone the effects of its rulings for a term of up to eighteen months.[17] In this case, the invalidated statute remains in force until the eighteen months period lapses or the lawmakers enact a new law to replace the annulled law.

In Greece, the Constitution stipulates that the Supreme Special Court invalidates the provisions of a law as the date of publication of the court rulings, or as of the date specified in the decision.[18] That means the Court can issue a ruling where the date for the beginning of the effects of the invalidation of the unconstitutional statute is different from the publication of the court decision. This is similar to other countries such as Belgium[19], France[20] and Germany[21] where the Constitutional court or equivalent institutions has the power to invalidate the law in time of its publication. But the Court can also temporarily maintain the effect of the invalidated law.

Unlike the aforementioned countries' experience, the Italy Constitution[22] stipulates that when the Constitutional Court declares unconstitutional a provision of a law, it terminates the effect of the concerned law the day after its publication. This means the Court cannot postpone the invalidation effect or extend the application of the invalidated provisions. Allan R Brewer-Caris provides comprehensive comparative analyses regarding the Constitutional Courts approaches in deciding judicial review cases.[23] His study shows the Court approaches can be in the various forms, these include the following:

1. Constitutional court interferences with the legislator on existing legislation
   a. constitutional courts interpretation of statutes in harmony with the constitution
   b. constitutional courts complementing the legislature by adding new rules (and new meaning) to the existing legislative provision

16) Article 13 (2) stipulates, "The State not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

17) Article 140.5 of the Austrian Constitution.

18) Article 100.4 para. 2 of the Greece Constitution.

19) Law on Belgium Constitutional Court Article 8.2 the Constitutional Court has the power to conditionally maintain the effect of annulled provision of the law.

20) The France Constitution in the case of statutory provision declare unconstitutional according to article 61-1 Constitutional Council is authorized to fix another ulterior date except for unconstitutionality.

21) Article 35 of the Federal Constitutional Court of Germany stipulates the execution of the court decision that the Court can determine how such execution will take place.

22) Article 136 of the Italy Constitution.

23) Allan Brewer-Carias, Allan. "Constitutional Courts as Positive Legislators in Comparative Law." *General Report on XVIII International Congress of Comparative Law. Washington*. 2010.

c. Constitutional courts complementing legislative functions by interfering with the temporal effect of legislation
d. the deformation of the interpretative principles: constitutional courts' reforming of statutes and interpreting them without interpreting the constitution

2. Constitutional court's interference with the legislator regarding legislative omissions
   a. constitutional court filling the gap of absolute legislative omissions
   b. Constitutional courts' filling the gap of relative legislative omissions
   c. constitutional court as provisional legislators

III. Justiciability of Economic and Social Rights in the Indonesia and the South Korea Constitutions

Historically, the first Indonesian Constitution of 1945 did not contain the words of "human rights". This was due to two competing ideological differences –the liberal democracy and integral state –among the framers of the constitution when they drafted the first constitution. The liberal democracy represented by Hatta and Yamin believed that it is important to include human rights in the constitution because it is a way to limit the state powers and also protect the rights of the people.[24] Integral state represented by Soekarno and Soepomo considered that it is not necessary to insert human rights provisions in the first constitution because the state and the people are one institution so that what the state always reflects the will of the people.[25] In addition, human rights also reflect individualism which is not in line with the communitarian value in Indonesia society.[26] However, the 1945 Constitution mentioned certain rights which can be associated with both civil and political rights and economic social and cultural rights. Concerning economic, social, and cultural rights, the Constitution recognized the right to work (art.27), the right to a reasonable standard of living (art. 27), the right to education (art. 31), and guarantee for the poor (art. 34). While all these rights are protected by the Constitution, further formulation of these provisions was in the form of statutes.

The two subsequent Constitutions of 1949 and 1950 contained significant economic and social rights. The establishment of Universal Declaration of Human Rights in 1948 highly influenced the inclusion of human rights provisions in these two constitutions. The human rights provisions in these constitutions resemble the provision of UDHR 1948. As mentioned by Lubis, "almost all human rights provisions of the UDHR were adopted, making the 1949 Constitution eligible to be regarded as part of human rights success represented by UDHR."[27] There were approximately

24) Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* 262-63 (PT Gramedia Pustaka Utama, 1993).

25) Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945 "*The Preparation of the 1945 Constitution" at 109-121 . M AB Kusuma, *Lahirnya Undang-Undang Dasar 1945* (Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, 2004) at 255.

26) Id.

27) Lubis, *In Search of Human Rights* at 564.

twenty-six articles concerning basic rights and freedom of man, eight provisions regarding basic principles of human rights, and some articles concerning social economic and cultural rights.[28] In 1959, the old 1945 Constitution was reinstated through Presidential Decree July 5, 1959.[29] Since then the Constitutional provisions regarding human rights were back to what contained in the old 1945 Constitution.

From 1999 up to 2002 the Old 1945 Constitution was finally amended. The updated Indonesia Constitution elaborate provisions on human rights both civil political rights and economic and social rights. This can be seen in Chapter XA which include many different rights:

> Right to life; right to establish family and procreation; right to self-betterment, right to justice, freedom of religion, speech, education, employment, citizenship, place of residence, association and expression; freedom of information; personal security; right of well-being including social security and health provision; right to personal property; right to seek political asylum; freedom from torture and degrading treatment; protection and non-discrimination, including freedom of conscience, traditional cultural identity, recognition under the law and unacceptability of retrospective criminal legislation; the primary responsibility of the government to protect, advance and uphold human rights; the obligation to uphold human rights of others and to be bound by the law for this purpose; and the restriction of the application of human rights provisions on justified grounds of moral and religious values or of security and public order.[30]

---

28) Indonesia "1949 Const" Art 7-33, 34-41.

29) Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitutional di Indonesia: Studi Sosio- Legal Atas Konstituante 1956-1959* "The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956-1959" (Pustaka Sinar Harapan, 1992). at 401 See also Adrian Vickers, *A History of Modern Indonesia* at 144 (Cambridge University Press, 2013).

30) Indrayana, *Indonesian Constitutional Reform 1999-2002* at 217-218. Chapter XA on Human rights consists of ten provisions (Articles 28 A to 28 J):
Article 28A Every person shall have the right to live and to defend his/her life and existence.
Article 28B (1) Every person shall have the right to establish a family and to procreate based upon lawful marriage. (2) Every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination.
Article 28C (1) Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture, for the purpose of improving the quality of his/her life and for the welfare of the human race. (2) Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state. Article 28D (1) Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law. 2) Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment. (3) Every citizen shall have the right to obtain equal opportunities in government. (4) Every person shall have the right to citizenship status.
Article 28E (1) Every person shall be free to choose and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, and to choose one's place of residence within the state territory, to leave it and to subsequently return to it. (2) Every person shall have the right to the freedom to believe his/her faith, and to express his/her views and thoughts, in accordance with his/her conscience. (3) Every person shall have the right to the freedom to associate, to assemble and to express opinions. Article 28F Every person shall have the right to communicate and to obtain information for the purpose of the development of his/her self and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels.
Article 28G (1) Every person shall have the right to protection of his/herself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right. (2) Every person shall have the right to be free from torture or inhumane and degrading

In addition to Chapter XA, there are six articles which also explain about human rights. These include Article 27[31] on equality, Article 28[32] on freedom to associate, to assemble and to express opinions. Article 31[33] on the right to education, Article 32[34] on a right to culture, Article 33[35] on national economic and natural resources and Article 34[36] on right to social security and health. It can be said that the new Constitution contains a swathe of economic and social rights constitutional provisions. While there are no explicit articles which determine the justiciability of economic and social rights, the government under article 28 I (4) has the duty to

---

treatment, and shall have the right to obtain political asylum from another country.

Article 28H (1) Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment, and shall have the right to obtain medical care. (2) Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness. (3) Every person shall have the right to social security in order to develop oneself fully as a dignified human being. (4) Every person shall have the right to own personal property, and such property may not be unjustly held possession of by any party.

Article 28I (1) The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances. (2) Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment. (3) The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilizations. (4) The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government. (5) For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations.

Article 28J (1) Every person shall have the duty to respect the human rights of others in the orderly life of the community, nation and state. (2) In exercising his/her rights and freedoms, every person shall have the duty to accept the restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

31) Article 27 (1) All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions. (2) Every citizen shall have the right to work and to earn a humane livelihood. (3) Each citizen shall have the right and duty to participate in the effort of defending the state.

32) Article 28 The freedom to associate and to assemble, to express written and oral opinions, etc., shall be regulated by law.

33) Article 31 (1) Every citizen has the right to receive education. (2) Every citizen has the obligation to undertake basic education, and the government has the obligation to fund this. (3) The government shall manage and organize one system of national education, which shall increase the level of spiritual belief, devoutness and moral character in the context of developing the life of the nation and shall be regulated by law. jdih.bapeten.go.id (4) The state shall prioritize the budget for education to a minimum of 20% of the State Budget and of the Regional Budgets to fulfil the needs of implementation of national education. (5) The government shall advance science and technology with the highest respect for religious values and national unity for the advancement of civilization and prosperity of humankind.

34) Article 32 (1) The state shall advance the national culture of Indonesia among the civilizations of the world by assuring the freedom of society to preserve and to develop cultural values. (2) The state shall respect and preserve local languages as national cultural treasures.

35) Article 33 (1) The economy shall be organized as a common endeavor based upon the principles of the family system. (2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State. (3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people. (4) The organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy. (5) Further provisions relating to the implementation of this article shall be regulated by law.

36) Article 34 (1) Impoverished persons and abandoned children shall be taken care of by the State. (2) The state shall develop a system of social security for all of the people and shall empower the inadequate and underprivileged in society in accordance with human dignity. (3) The state shall have the obligation to provide sufficient medical and public service facilities. (4) Further provisions in relation to the implementation of this Article shall be regulated by law.

respect, to protect and to fulfill human rights. If the government fails to do so, there is a judicial mechanism through both constitutional court and ordinary court to impose the government to fulfil its constitutional obligations. That said the economic and social rights are justiciable in the updated Indonesia Constitution.

With regard to South Korea, there has been significant development regarding the Economic and Social rights in the South Korea Constitutions.[37] The first Constitution of 1948 already contained such rights. Article 16 guaranteed the right to equal opportunity for education and the right to free of charge primary education. Article 17 assured the right work and protection of women and children. Finally, Article 19 stipulated that citizens who are incapable of making a living on account of old age, infirmity or such other reasons as may cause incapacity to work, shall be protected by the state in accordance with the provisions of law.

The 1962 Amended Constitution expanded the catalogue of social rights.[38] These include provisions regarding dignity and worth of human being and the right of a humane livelihood. There were also provisions concerning social security and protection of citizens who are incapable of making a living. The subsequent Constitution of 1980[39] determined social welfare to be a state objective. It also introduced the right to pursue happiness and the right to environment. While the current 1987 Constitution stipulates the free-market economy as foundation, it also allows the government to interfere to achieve substantial freedom and equality of all citizens. This reflects the adoption of a social state principle.

The current South Korea Constitution contains significant protection of economic and social rights. These include articles 31, 32, 34, 35, and 36. Article 31[40] provides the right to education to all citizens. Article 32[41] contains the right to work for all citizens. The right to have life worthy of

37) Wonil Cha, The Judicial Enforcement of Socio-Economic Rights in South Korea, Law and Development Review 2019;12(3): 822-823.

38) The 1962 Amended Korean Constitution. Wonil Cha, The Judicial Enforcement of Socio-Economic Rights in South Korea, Law and Development Review 2019;12(3): 822-823.

39) The 1980 Amended Korean Constitution. Wonil Cha, The Judicial Enforcement of Socio-Economic Rights in South Korea, Law and Development Review 2019;12(3): 822-823.

40) Article 31
(1) All citizens shall have an equal right to receive an education corresponding to their abilities.
(2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by law.
(3) Compulsory education shall be free of charge.
(4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by law.
(5) The State shall promote lifelong education.
(6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by law.

41) Article 32
(1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by law.
(2) All citizens shall have the duty to work. The State shall prescribe by law the extent and conditions of the duty to work in conformity with democratic principles.
(3) Standards of working conditions shall be determined by law in such a way as to guarantee human dignity.
(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.
(5) Special protection shall be accorded to working children.

human beings is stipulated in Article 34[42]. Article 35[43] explains the right to have healthy and pleasant environment. Article 36[44] stipulates the right to have human dignity and equality in a family. Are these rights justiciable? If we read the above articles alone we may find difficulty in determining the justiciability of such rights since there is no express provisions determine the justiciability of ES rights. But if we connect the above articles with provisions regarding the duties of constitutional court it certainly shows that ES rights are justiciable. This is because Article 111 of the Constitution stipulates that the Constitutional Court shall adjudicate five matters[45] two of which are (1) the unconstitutionality of a law upon the request of the courts (2) petitions relating to the Constitution as prescribed by law. These two matters, namely determining the constitutionality of law and deciding petitions relating to the Constitution provide a legal avenue for individuals to bring constitutional cases related to ES rights to the Constitutional Court. The Constitutional Court will finally determine the constitutionality of the existing laws and declare whether such laws sufficiently respect and protect constitutional rights including economic and social rights. It demonstrates economic and social rights are justiciable in the South Korea Constitution.

(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by law, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

42) Article 34
(1) All citizens shall be entitled to a life worthy of human beings.
(2) The State shall have the duty to endeavor to promote social security and welfare.
(3) The State shall endeavor to promote the welfare and rights of women.
(4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.
(5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by law.
(6) The State shall endeavor to prevent disasters and to protect citizens from harm therefrom.

43) Article 35
(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.
(2) The substance of the environmental right shall be determined by law.
(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

44) Article 36
(1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.
(2) The State shall endeavor to protect mothers.
(3) The health of all citizens shall be protected by the State.

45) Article 111 of the South Korean Constitution stipulates the jurisdiction of the Constitutional Court as follow:
1. Questions of the constitutionality of laws upon request of the courts
2. impeachment of high officials including the President
3. dissolution of political parties on account of their unconstitutional purposes or activities,
4. competence disputes between state organs and'
5. constitutional petitions

IV. Types of Rulings of the Indonesian Constitutional Court and the Korean Constitutional Court

1. Types of Indonesian Constitutional Court Rulings

The Indonesian Constitutional Court Law of 24/2003 stipulates three types of court rulings i.e. inadmissible, granted or rejected.[46] If the Constitutional Court is of the opinion that the petitioners or the petitions do not fulfill the requirements, the Court will decide that the petition is inadmissible. If the disputed act does not contravene the Constitution, the decision will state that application is rejected. (3) and finally, when the Constitutional Court believes that the petition is legally reasonable, the decision will state that application is granted.

The Constitutional Court Regulation (the PMK 06/PMK/2005) further stipulates that if the Court grants a petition, the court verdict states "the article or part of the law does not have legal binding force.[47]" In addition, "The Court rulings are final and effective since the verdict is announced by the Court in a plenary session opened to the public.[48]" Further, Article 38 states; "A law which is reviewed by the Court is valid until there is a court verdict that declares that this law is inconsistent with the 1945 Constitution." The above-mentioned Articles confirm that the Court is not only capable in declaring a law is inconsistent with the constitution, but also can invalidate the provisions of laws. These court rulings are final and unreviewable. In practice the Court developed its approaches. These include conditional decisions, the invalidation of a statute in its entirety, and declaration of incompatibility.

2. Types of the Korean Constitutional Court Decisions

Article 45 of the Law on Korean Constitutional Court stipulates, "when the Constitutional Court decides on the constitutionality of a statute, the decisions shall be made only for the statutes for which a review is requested: Provided, that if the Court finds that a decision of unconstitutionality on a provision would render the entire statute unenforceable, it may decide the statute unconstitutional as a whole." Article 47 (1) of Korean Constitutional Court Act further stipulates, "Any decision that an Act is unconstitutional shall be binding upon courts, and other state agencies and local government." That means, in conducting its constitutional mandates, the Court may declare a statute or an article of a statute requested for review unconstitutional or inconsistent with the Constitution and such decision binds other state institutions. The forms of decisions of the Korean Constitutional Court consist of decisions of constitutionality and unconstitutionality and in practice, the Court can also declare legislation unconstitutional in part and unconstitutional according to specific interpretation.[49] These types of decisions are often called as modified form

46) Article 56 Law 24/2003 stipulates three types of court decisions.
47) Article 36 of the PMK 06/PMK/2005
48) Article 39 of the PMK 06/PMK/2005
49) Kun Yang, The Constitutional Court in the Context of Democratization: The Case of South Korea, Verfassung und

of decisions. Modified decision is believed necessary to respect the legislative and prevent disorder by giving a decision of unconstitutionality despite recognizing the unconstitutionality of the law.[50] There are three types of modified decisions, they are: decisions of conditional constitutionality, decisions of conditional unconstitutionality and decision of nonconformity to the Constitution. Limited constitutionality means a court decision declaring a law is considered constitutional only if it is interpreted in line with the Court decision. Limited unconstitutionality is a court decision that declare a law can be considered as unconstitutional if such law interpreted differently from the Court. Limited unconstitutionality depends on the interpretation. The decision of nonconformity is a court decision that declares a law unconstitutional but such a law remains valid for a certain period.

How the Courts in these two countries developed their approaches when they settle constitutional cases on economic and social rights? The following Part will analyze how in practice the Courts in the two jurisdictions modified their rulings beyond what have been stipulated in the law and constitution. The analysis will primarily focus on the Court's reasons of issuing modified decisions and its consequences.

V. An Analysis on the Expansion of the Constitutional Courts' Approaches in Deciding Constitutional Cases on Economic and Social Rights: The Case of the Korean Constitutional Court and the Indonesian Constitutional Court

1. The Korean Constitutional Court's Approaches in Adjudicating Judicial Review Cases Related to Economic and Social Rights

This Part will analyze five important constitutional cases decided by the Korean Constitutional Court. They are: Case on the Priority of Employees' Retirement Allowances[51], Case on the Livelihood Protection Standard,[52] Case on Accidents that Occur While Commuting to or from Work[53], Case on Fixed-Term Employment of University Faculty Members[54], and Case on the Prohibition of Labor Disputes by Public Employees in Labor Service.[55] These five court rulings

Recht in Übersee/Law and Politics in Africa, Asia and Latin America, 2 Quartal 1998, Vol. 31 No. 2 (2. Quartal 1998) p. 163.

50) Leo Mizushima, development in South Korean Constitutional Law: The Year 2016 in Review, http://www.iconnectblog.com/2017/12/developments-in-south-korean-constitutional-law-the-year-2016-in-review-2/#_ftnref6 accessed 14 December 2020.

51) [9-2 KCCR 243, 94Hun-Ba19 et al., August 21, 1997].

52) [9-1 KCCR 543, 94Hun-Ma33, May 29, 1997]

53) [2014Hun-Ba254, September 29, 2016]

54) [15-1 KCCR 176, 2000Hun-Ba26, February 27, 2003]

55) [5-1 KCCR 59, 88Hun-Ma5, March 11, 1993]

are selected because: first, they are all related to the right to humane livelihood and the right to occupation which are part of economic and social rights stipulated in the Constitution. Second, the Court's approaches in these five cases are varied and most of them go beyond what have been said by the law and the Constitution. In the first four cases the Court delivered nonconformity rulings which is not recognized by the Law and the Constitution while in the final case the Court directly ruled the law constitutional and dismissed the complaint. What is the Court's consideration to issue modified decisions instead of declaring a provision of a law unconstitutional (which means granting the petition) or constitutional (which means essentially rejecting the petitions)? The Part below will find out the court rationales.

A. Case on the Priority of Employees' Retirement Allowances[56)]

A bank filed a lawsuit against the debtor's retiring employees. It objected to the distribution of assets at the Suwon District Court. This is because, according to the Labor Standards Act,[57)] debt incurred in labor relations such as wages and retirement allowances has priority over taxes, public charges, or other claims except mortgages or pledges. The disputes emerged over the part of the provision concerning "retirement allowances." The bank filed a constitutional complaint to the Constitutional Court. The Court declared the "retirement allowance" stipulated in Article 30-2 of the former Labor Standards Act and Article 37 Section 2 of the Labor Standards Act nonconforming to the Constitution. The Court further ordered the application of the provision be suspended. It is important to understand that in this case the Court issues a nonconformity decision instead of nullifying the provisions of these two Laws. As reflected in summary of the decision, the Court did so because of the following: first, The Retirement Allowance Provisions are likely to infringe the rights arising out of mortgages and pledges. This is because such provision prioritizes the payment for retirement allowance over mortgagees and pledgees. As a result, mortgagees and pledgees lose their right to priority in fulfilment of debt. Therefore, it is possible that the claims of mortgagees and pledgees may go unsettled.[58)] Second, the retirement allowance provision discourages potential creditors. This may lead to a company short on cash flow and going bankrupt event if the company has enough collaterals. If this happens it certainly weaken the employees' livelihoods and welfare.[59)] It is therefore "unjust to disturb the legal foundation of secured transactions in a blind focus on the legislative goal of security of workers' livelihood. It is also unjust to go as far as to shut down corporate finance just to obtain priority in debt satisfaction for retirement allowances.[60)]" The Court concluded the Retirement Allowance Provision violates the rule against excessive restriction.[61)] The Court, however, did not declare such provision

56) [9-2 KCCR 243, 94Hun-Ba19 et al., August 21, 1997]
57) Article 30-2 section 1 of the Labor Standards Act (amended by Act No. 4099 on March, 1989 and repealed by Act No. 5305 on March 13, 1997).
58) Summary Case on the Priority of Employees' Retirement Allowances [9-2 KCCR 243, 94Hun-Ba19 et al., August 21, 1997]
59) Id.
60) Id.
61) Id.

unconstitutional. The Court instead provided guidance by allowing the priority of a reasonable portion of retirement allowances. This is important to assure workers' minimum living standards and attain social justice over other claims. It is also in line with the character of retirement allowances as deferred wages or as welfare payments. The Court was of the opinion that it is the domain of the legislature to determine the appropriate portion of retirement allowances -not the Court.[62] In this case, the Court also suspended the application of these provisions until December 31, 1997 to give sufficient time for the legislature to revise such provisions. Justice Cho Seung-Hyung, in his dissenting opinion, stated that the portion of retirement allowances that arose during the three years preceding the date of retirement since the enactment of such provisions on March 29, 1989, did not violate the Constitution. In other words, these provisions remain constitutional for certain period.

The nonconforming decision above-mentioned shows the Court's reluctance to declare a law unconstitutional. The Court declared the provisions of the law in contradiction to the Constitution but it did not state the law unconstitutional. The Court did so to avoid legal vacuum because declaring a law unconstitutional will invalidate the existing law. The Court ruling also provides a guidance to the legislature what to be done when the legislature updates the law to keep the law constitutional. The Court finally gives an opportunity to the legislature to revise the existing law and sets deadline when such revision has to be completed. This is done by the Court to ensure that the legislature appropriately revise the law within the timeline set by the Court. One important characteristic in this ruling is that the Court chose to delay the application of the concerned articles –and not to keep them applicable to the public.

This Court decision above-mentioned reflects the constitutional dialogue[63] between the judiciary and the legislature. The judiciary, on the one hand, determines the validity of the law without declaring the law unconstitutional. The legislature, on the other hand, is deemed the most appropriate institution to revise the laws that have been reviewed by the Court. Therefore, the Court ordered the legislature to fix the law with deadline. In Katharine S. Young's words, this ruling can be characterized as conversational review[64] or an engaged Court[65] since there is a "conversation" between the two bodies and these two institutions "engaged" in effectuating economic and social rights. This Court approach aims to uphold the separation of powers principles. It prevents the Court from encroaching the legislative power to make law. The question then why did the Court chose to suspend the application of the concerned provisions rather than maintaining the application of the provisions?

B. Case on the Livelihood Protection Standard[66]

62) Id.

63) Rosalind Dixon and Tim Ginsburg eds, *Comparative Constitutional Law in Asia* 103 (Edward Elgar Publishing, 2014).

64) Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 Int'l J. Const. L. 385 (2010); Katharine G. Young, Constituting Economic and Social Rights (Oxford U. Press 2012). 142-43

65) Id. at 203-04.

66) [9-1 KCCR 543, 94Hun-Ma33, May 29, 1997]

Husband and wife filed a constitutional complaint against the 1994 Livelihood Protection Standard in the 1994 Guidelines for Livelihood Protection Programs. They argued the amount of payment under this 1994 Livelihood Protection Standard was far below the minimum living cost. They further argued that this Standard infringed the right to the pursuit of happiness and a humane livelihood as guaranteed by the Constitution. The Court found that the 1994 Livelihood Protection Standard does not violate the fundamental rights of the couples. It is true that the present Constitution guarantees the right to humane livelihood[67] and imposes on the state duty to protect people's living standards.[68] The Court held that the 1994 Livelihood Protection Standard does not violate the fundamental rights of the complainants. The Court acknowledges the constitutional duty of the state to protect social security and welfare. This constitutional responsibility had been carried out by the state (in this case the legislature) by enacting law regarding livelihood protection. The validity of the livelihood protection standards cannot be determined solely based on the livelihood benefit payments under the Protection Standards. It should be the sum of all benefits including those livelihood protection payment or exemptions provided by other laws. This Court decision played important roles because it sets the direction of the policy decision with regard to the fulfillment of the right to human livelihood. In 2004 a similar case occurred.

This case shows how the Court expressly determines what to be included to satisfy the right to humane livelihood specifically to people incapable of earning a livelihood. It should be counted as the sum of all benefits received by people—not individual case by case. The Court issued a decision which confirmed that the 1994 Livelihood Protection Standard does not violate the fundamental rights of the complainants. The Court did not issue a nonconforming decision which allow the legislature to revise the provisions of the law. This is because this ruling did not change the validity of the 1994 Livelihood Protection Standard. In other words, this ruling confirmed that the 1994 Standard did not violate the fundamental rights as guaranteed by the Constitution.

C. Case on Accidents that Occur While Commuting to or from Work[69]

The petitioner is an electrician. On November 11, 2011 he was bicycling home from work. He felt off and injured. He applied to the Korea Workers' Compensation and Welfare Service for the medical care benefits stipulated by the Industrial Accident Compensation Insurance Act. His application to medical care was declined by the Compensation and Welfare Service on the ground that such injury did not constitute an occupational accident. The petitioner filed a motion requesting a constitutional review of Article 37 Section 1 Item 1 Sub-Item (c) of the Industrial Accident Compensation Insurance Act and Article 29 of the Enforcement Decree of the Industrial Accident Insurance Act alleging that these two provisions were not in line with the equality principles as guaranteed by the Constitution.

67) Article 34 Section 1
68) Article 34 Section 5 the state duty to protect those who are incapable of earning a livelihood due to old age or other reasons.
69) [2014Hun-Ba254, September 29, 2016]

Article 37 of the Industrial Accident Compensation Insurance Act stipulates:
(1) If a worker suffers any injure, disease or disability or dies due to any of the following causes, it shall be deemed an occupational accident. Provided, that this shall not apply where there is no proximate causal relationship between his or her duties and the accident.
1. Accident on duty
(c) Any accident that occurs while he or she commutes to or from work using a transportation means provided by the employer concerned or other similar means under the control and management of his or her employer.

Article 29 of the Industrial Accident Compensation Insurance Act stipulates:
If an accident that happens while a worker is commuting of or from work meets each of the following conditions, it shall be deemed an accident on duty under Section 1 Item 1 Sub-Item (c) of the Act.
1. The accident should happen while the worker is using the means of transportation which is provided by the employer for the worker's commute to and from work or can be regarded as being provided by the employer;
2. The worker should not have the entire and exclusive responsibility to manage or use the means of transportation used for his or her commute to and from work.

The Court held Article 29 of the Enforcement Decree of the Industrial Accident Compensation Insurance Act is not justiciable because Article 29 concerns a presidential decree which under the Korea Constitutional Court Act, cannot become the subject of a constitutional complaint.[70] In addition, the Court found that Article 37 which excludes workers with their own transportation from obtaining medical care benefits violates the principles of equality.[71] This is because Article 37 treats differently between workers with transportation benefits and workers without transportation benefits. Due to the fact that not all companies are able to provide sufficient transportation for their workers, some workers use their own transportation. Therefore, it is not just if the workers with their own transportation is excluded from getting medical care unlike the workers who use the company transportation. The Court was of the opinion that Article 37 of the Industrial Accident Compensation Insurance Act violates the principles of equality as guaranteed by the Constitution.[72] While the Court concluded that Article 37 violates the Constitution, it does not declare Article 37 unconstitutional.[73] The Court declared Article 37 does not conform to the Constitution.[74] The nonconformity decision in this case means that Article 37 remains valid until it is amended by the legislature. The Court provided deadline for the legislature to amend the

70) Id.
71) Id.
72) Id.
73) Id.
74) Id.

concerned Law by December 31, 2017. The issuance of nonconformity decision aims to avoid legal vacuum and disorder.

Three Justices dissented for the following reasons: It is reasonable to exclude accidents that occur on a conventional commute because they are not under the control and management of the business owner.[75] It is possible to include accidents that occur on a conventional commute in the scope of occupational accidents. However, that would be the domain of the legislature –not the Court to include it in a law.[76] In doing so, the legislature should consider several factors including financial conditions of the industrial accidents' insurances, social consensus between business owners and workers, and the overall level of social security.[77]

The nonconforming decision in this case allows Article 37 remains valid until the legislature revises the Article within the timeline set by the Court. If the legislature does not revise the Article within the timeline, Article 37 will be unconstitutional. The consequence of nonconforming decision in this present case is different from the consequences of Court ruling in Case on Retirement Allowance. In this present case, the provision of the law remains valid while in case on Retirement Allowance, the Court suspended the application of the law. The question then why the Court treated these two cases differently? It is likely that the Court attitude in these two cases closely related to the financial consequences that may occur because of the Court decision. In Case on Retirement Allowances, the Court preference to delay the application of the provisions seems to be welcomed by the business and financial sectors but it was highly criticized by the workers.[78] This is because the Court ruling gives a possibility to the business and financial sectors to obtain financial benefit. Similarly, in Case on Accidents that Occur While Commuting to or from Work, the Court ruling to maintain the applicability of the law will likely to give financial advantages to the business because there is no obligation for the business to cover the medical expenses if a worker got Accidents that Occur While Commuting to or from Work when they do not use a transportation means provided by the employer. There is another similarity where the Court considers in both cases to prevent legal vacuum, disorder and confusion.

D. Case on Fixed-Term Employment of University Faculty Members[79]

The complainant, a faculty member of Ajou University, filed a constitutional review to Supreme Court. The complainant also submitted a constitutional complaint to the Constitutional Court arguing that his dismissal from the Ajou University on the ground of fixed-term employment provision as mentioned in Article 53-2 of the Private School Act[80] violate his fundamental rights

75) Id.
76) Id.
77) Id.
78) Id.
79) [15-1 KCCR 176, 2000Hun-Ba26, February 27, 2003]
80) Article 53-2 of the Private School Act (amended by Act No. 6004 on August 31, 1999) (Appointment and Dismissal of Teachers Other Than Heads of Schools):
(1)-(2) [omitted]
(3) Faculty members of college educational institutions may be employed by fixing contract terms such as term of office, salary, conditions of service, works and merit agreement on such terms and conditions as the bylaws of the

i.e. rights to employment as mentioned in Article 31 (6) of the Constitution. Article 31 (6) stipulates fundamental matters pertaining to educational system including in-school and lifelong education, administration, finance, and the status of teachers be determined by statute. Article 31, however, does not expressly determine the status of teachers. It is the statute that will determine the status of teachers. In other words, Article 31 (6) does not provide for any of such matters that are fundamental to the status of teachers. This Article is different from Article 11, 22, 27 (1) and 32 (3), which guarantee the right to equality, the academic freedom, the right to trial and judicial process and the principles of statutory work conditions.

With regards to constitutional review by the Supreme Court, the complainant argued that his dismissal violated Articles 11, 22(1), 31 (6) and 32 (3) of the Constitution.[81] The Supreme Court found that Article 53-2 aims to allow an individual to decide whether or not to renew a contract of a faculty member upon reviewing the individual's qualification as a faculty member.[82] This reflects the autonomy of the faculty individual decisionmaker. Article 52-3 is in line with the original intention of the legislature and within the power of the legislature. Therefore, the Supreme Court ruled that Article 52-3 did not violate Article 22 (1) or 31 (6) of the Constitution. The status of a teacher at a private university is different from the status of a teacher in public university. Therefore, it did not violate the right to equality as stipulated in Article 11 of the Constitution. It also does not violate the principle of working condition as mentioned in Article 32 (3) of the Constitution since the labor relation between teacher and the university is different from the general rules of labor relations.

In the case of constitutional compliant, the Court was of the opinion that Article 52-3 of the Employment Law was unconstitutional because it lies in "completely blocking a way for a faculty member whose employment is not renewed to seek any relief.[83]" The existing regulations fail to provide regulations as the basis for a decision to not renew or relief procedure to contest an unfair denial to renew. Instead of declaring the Law unconstitutional, the Court issued a decision of nonconformity. The nonconformity decision in this case means that there is an obligation for the legislature to revoke the unconstitutional provisions by the earliest possible moment. In addition, the legislature also should insert in the updated law provisions which elaborates the procedures

---

respective educational foundations concerned may determine. In this case, with respect to the term of office, the provisions concerning the term of office applying to faculty members of national and public college educational institutions shall apply mutatis mutandis.

(4) Where the term of office for faculty members employed pursuant to paragraph (3) expires, the person who has the power to appoint and dismiss shall determine whether to reappoint such faculty members after deliberation by the faculty personnel committee.

Addenda (1) (Enforcement Date)

This Act shall enter into force on the date of its promulgation: Provided, That the amendments to Articles 21 (2) and (4) and 53-4 shall take effect on January 1, 2002.

Addenda (2) (transitional Measures on Contractual Appointment)

Faculty members appointed for a specified period pursuant to the former provisions shall, notwithstanding the amendment to Article 53-2(3), be governed by the former provisions until their terms of appointment expire.

81) Case on Fixed-Term Employment of University Faculty Members [15-1 KCCR 176, 2000Hun-Ba26, February 27, 2003]

82) Id.

83) Case on Fixed-Term Employment of University Faculty Members [15-1 KCCR 176, 2000Hun-Ba26, February 27, 2003]

prior to and subsequent to a decision to not renew the employment of a faculty member at the end of the initial fixed term employment and a relief procedure to challenge such decision to not renew.

Two Justices, Han Dae-Hyun and Ha Kyung-Chull, dissented. They are of the opinion that Article 31 (6) of the Constitution may concern not only the right and interest of teachers against unjust interference by governmental powers, but also to guarantee the citizens' basic right to education. In addition, Article 31 (4) of the Constitution aims at guaranteeing the independence of education and the autonomy of the collegiate educational institutions which closely linked to Article 22(1) of the Constitution which protects the academic freedom. The dissenters acknowledge that it is important to have the prior and subsequent procedures to protect the status of teachers at private university. However, the absence of such procedures does not create the provision of the concerned law in contradiction to the Constitution. Rather, it leads to concern that delegating such policies might harm the independence of the private collegiate education or the autonomy of the private collegiate institutions.

In this case, The Court issued a modified decision i.e. a decision of nonconformity. The Court ruled that Article 52-3 of the concerned Act was not in line with the Constitution. However, The Court did not declare the concerned provision unconstitutional. The Court was of the opinion that revising or making law is the domain of the legislature –not the Court. the Court ruling therefore, ordered the legislature to revise the concerned law and set the timeline when such revision should complete. The Court rationales to issue nonconforming decisions and not declaring the law unconstitutional is because announcing a simple unconstitutionality of the provision of the law would mean holding the provision of the concerned law unconstitutional.[84] This is not the intention of the Court because there is no way for the Court to create an obligation to the legislature to revise the law and remove the unconstitutional status of the provisions of the law.[85]

E. Case on the Prohibition of Labor Disputes by Public Employees in Labor Service[86]

A government employee filed a constitutional complaint to the Constitutional Court arguing that Article 12 Section 2 of the Labor Dispute Adjustment Act, which stipulate that workers in state agencies, local governments or defense industries designated by the Act on special measures for the Defense Industry cannot engage in labor dispute, infringed the right to collective action of the complainant.[87] The Court ruled Article 12 Section 2 of the Labor Dispute Adjustment Act violates the Constitution. This is because Article 33 Section 2[88] of the Constitution does not entirely restrict the right to collective action. Therefore Article 12 Section 2 violates the rule against

84) Ibid.

85) Ibid.

86) [5-1 KCCR 59, 88Hun-Ma5, March 11, 1993]

87) Case on the Prohibition of Labor Disputes by Public Employees in Labor Service [5-1 KCCR 59, 88Hun-Ma5, March 11, 1993]

88) Article 33 Section 2 of the Korean Constitution stipulates: (1) To enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action. (2) Only those public officials who are designed by law shall have the right to association, collective bargaining and collective action. (3) The right to collective action of workers employed by important defense industries may be either restricted or denied as prescribed by law.

excessive restriction. The Court, however, did not declare the Law unconstitutional. Rather, it issued a nonconforming decision. The decision of nonconformity in this case means that while the existing provision of the law is inconsistent to the Constitution, it will remain valid until the law is revised by the legislature. The Court ruling also called the legislature to revise the law and eliminate such nonconformity within certain period of time. Justice Byun Jeong-Soo dissented, asserting that Article 12 section 2 violates the fundamental right of labor therefore it should be declared unconstitutional.[89] There is no solid ground for the Court to reserve immediate invalidation.

F. An Analysis of the Nonconforming Decisions of the Korean Constitutional Court

In the four cases (Case on the Priority of Employees' Retirement Allowances; Case on Accidents that Occur While Commuting to or from Work; Case on Fixed-Term Employment of University Faculty Members; and Case on the Prohibition of Labor Disputes by Public Employees in Labor Service) above-mentioned, the Court has developed a Court decision beyond what have been determined by the existing law i.e. modified decisions or decisions of nonconformity. The Court declared the law is inconsistent to the Constitution but maintained the validity of the law for certain period of time. This can be seen when the Court used specific sentences in its rulings. These include the Court declared, "Therefore, we hereby issue a decision of nonconformity…instead of a decision of simple unconstitutionality."[90] "Therefore, we declare the….Provision to be nonconforming to the Constitution."[91] "The Court rules that the …Provision does not conform to the Constitution…"[92] or "despite a finding of unconstitutionality, the Court avoids striking down the statute in its entirety and yet proclaims that the statute is deficient from the constitution's point of view."[93] The aforementioned sentences mean the Court acknowledges that the law is inconsistent to the Constitution but it declines to declare such a law unconstitutional.

In the four cases mentioned above, the Court further stated the reasons why the Court issued nonconforming decisions. "The Court employs such decisions either out of respect the legislature's formative powers or in order to avoid confusion that may arise from the gap in the legal system which will be created if the whole statute is struck down."[94] The Court further explain another reason why it delivers the nonconformity decisions:

"…given the complex social reality which law seeks to regulate, an either/or approach of unconstitutionality or constitutionality will not allow the Court to be flexible and adaptive enough in its interpretations of the law. Such a rigid approach may even create a vacuum in the legal system, cause confusion, and undermine legal stability. Further, the Court pointed out, it may

89) Case on the Prohibition of Labor Disputes by Public Employees in Labor Service [5-1 KCCR 59, 88Hun-Ma5, March 11, 1993]

90) Fixed-Term Employment of University Faulty Members (15-1 KCCR 176, 2000Hun-Ba26, February 27,2003)

91) Case on the Priority of Employees' Retirement Allowances [9-2 KCCR 243, 94Hun-Ba 19 et al., August 21, 1997]

92) Case on Accidents that Occur While Commuting to or from Work [2014Hun-Ba254, September 29, 2016]

93) Thirty Years of the Constitutional Court of Korea, Government Publication Registration Number Thirty Years of the Constitutional Court of Korea 33-9750000-000130-01 August 16 ,2018 pp 151-152.

94) Thirty Years of the Constitutional Court of Korea, pp 151-152.

unduly restrict the powers of the legislature."[95]

With similar reasons, the Court ruled that the Employment Retirement Provisions and the provisions in other three cases mentioned above did not conform to the Constitution. The Court nonconformity decision did not automatically rule that the Provisions were unconstitutional. The Provisions remained valid for certain period of time as set by the Court.

From the above analyses, it can be concluded that the Court is likely to issue nonconformity decisions when three conditions are fulfilled: (1) when the beneficial provision has problem of equal protection (2) when a decision of unconstitutionality will make legal vacuum and confusion. (3) when it is difficult to separate the constitutional and unconstitutional part of the provision and there are various possibilities to cope with unconstitutional situation, for the reason of respecting legislature. In a more comprehensive perspectives, the characteristics of nonconformity decision can be in the following forms: (1) a decision of unconstitutionality which declare that provisions of a statute do not conform to the Constitution but the Court maintains its constitutionality for a certain period of time. (2) While the provisions of a statute do not conform to the constitution, such provisions are formally maintained. The legislature has the duty to revise the law. (3) The government agencies should not implement the unconstitutional laws until such laws are revised. In the end, the government will implement the updated laws. (4) It is basically a decision of unconstitutionality, but it defers the effect of the decision which removes the provisions. This is not a form of partial unconstitutionality decision. The distinct feature of such decision is time delaying.

The modified court rulings abovementioned do not seem to be in line with Article 47 Section 1 and 2 (effect of decisions of unconstitutionality) of the Constitutional Court Act where (1) any decision that a statute is unconstitutional shall bind ordinary courts, other state agencies and local governments and (2) any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made. In other words, the Court has the obligation to remove the unconstitutional statute since the date on which the decision is made. There must be a good reason for the delay.

2. The Indonesian Constitutional Court Approaches in Deciding Economic and Social Rights Cases

This Part will analyze the Indonesian Constitutional Court approaches in deciding cases related to economic and social rights specifically on the right to education. It will study six judicial review cases concerning budget for education and one case on Education Legal Entity case (the BHP case). These cases are selected not only because they reflect economic and social rights cases but also because the types of decisions in these cases are largely similar to the constitutional cases ruled by the Korean Constitutional Court mentioned above.

95) Thirty Years of the Constitutional Court of Korea, p 152.

A. Budget for Education Cases

Article 31 (4) of the Updated Constitution stipulates, "The State shall prioritize the budget for education to a minimum of 20 percent of the State budget and of the Regional Budgets to fulfill the needs of implementation of national education." This new constitutional provision set the minimum percentage of budget allocation that should be prioritized by the government to be allocated to educational sector. The insertion of this new provision is significant considering that similar provision never existed in the previous constitutions. For the government, such constitutional mandate put significant burden as the national and regional budgets should be reallocated and the portion for educational sector should be significantly increased. Unfortunately, it is not easy to do so because increasing budget for education means decreasing budget for other sectors.

Since the introduction of Article 31 (4) in the updated Constitution, there are many petitions submitted to the Constitutional Court. For the purpose of these paper, five cases concerning budget for education will be analyzed. These include the Decision of the Constitutional Court No. 011/PUU-III/2005 (*Budget for education I*), the Decision of the Constitutional Court 012/PUU-III/2005 (*Budget for education II*), the Decision of the Constitutional Court 026/PUU-III/2005 (*Budget for education III*), the Decision of the Constitutional Court 026/PUU-IV/2006 (*Budget for education IV*), the Decision of the Constitutional Court 24/PUU-V/2007 (*Budget for education V*), and the Decision of the Constitutional Court No. 13/PUU-VI/2008 (*Budget for education VI*). The above cases show how the Court approaches, to a certain degree, may consider the government's response in following up the Court rulings.

In *Budget for education I*, the petitioners[96] challenged the constitutionality of the Elucidation of Article 49 (1) of the National Education Law arguing that the Elucidation which allow gradual increase of education budget was in contradiction to Article 31 (4) of the Constitution. The Court declared that the fulfillment of 20 percent budget for education should be conducted at once –not gradual increase. Therefore, the Court declared that the Elucidation of Article 49 (1) was inconsistent with Article 31 (4) of the Constitution. The Court thus invalidated the Elucidation of Article 49 (1).

In *Budget for education II*, the petitioners challenged the constitutionality of Law 36/2004 on National Budget arguing that this Law only allocated 6% on budget for education. In split decisions, the Court declared that the Law was inconsistent with Article 31(4) of the 1945 Constitution. However, the Court did not invalidate the Law considering that (1) there would be no legal basis for national budget if the Court invalidate the Law, (2) the government and the parliament should reallocate the current national budget to fulfill 20% budget for education. Reallocating budget is something that is not easy for the government to do because it would negatively impact budget allocation for other sectors and (3) if the current law was invalidated, the government must apply last year national budget which is smaller in percentage compared to the current budget allocation.[97] In this case, the Court ruled the Law inconsistent with the Constitution but it did not

96) the petitioners are teachers in elementary and middle schools and education activists.
97) The Decisions of Constitutional Court No. 12/PUU-III/2005 at 37, 40 and 61.

invalidate the concerned law.

In *Budget for education III*, the petitioners[98] filed a petition to the Court arguing that the 2006 Annual Budget Law which allocated 9.1% to education sector was in contrary to Article 31 (4) of the Constitution. In a split decision, the Court ruled for petitioners declaring that allocating 9.1% for education was not in line with Article 31 (4) of the Constitution. The Court, therefore, invalidated this provision. The three cases above show the Court's strong commitment to the fulfillment of 20% budget for education as mandated by the Constitution. This can be seen from the Court requiring not only a minimum 20% budget for education but also the 20% budget for education must be conducted once –not a gradual increase. Failure to fulfill these two requirements may result in the invalidation of the law. In doing so, however, the Court also considered the possible consequence. When invalidating the concerned law would lead to constitutional damage, financial chaos or administrative disturbance, the Court would strategically refuse to invalidate the concerned law.

In *Budget for education IV,* the Indonesian Teacher Association (PGRI) and two housewives and an entrepreneur submitted a petition to the Court. They claimed that the 2007 National Budget Law which allocated 11.8 percent for education violated their constitutional rights. Considering the two previous decisions, the Court declared, "the 20 percent budget for education …should be prioritized and seriously implemented, otherwise the Court would declare the Law …was unconstitutional in its entirety."[99] The Court stated that some provisions in the 2007 Law on National Budget were not in line with the Constitution and declared these provisions unconstitutional. The Court however did not invalidate the Law in its entirety but only few provisions concerning budget for education.

In *Budget for education V*, a teacher and a lecturer filed a petition to the Court and challenged the validity of Article 49 (1) of Law 20/2003 on National Education System. They argued that Article 49 (1) which exclude educators' salary in calculating the 20% budget for education violated their constitutional right to obtain a good and prosperous living. This is because the existence of Article 49(1) will not give significant benefits to educators. The Court in split decision stated that Article 49(1) of Law 20/2003 violated the Constitution because it was not in line with Article 1 (3), (6) of the same statutes which recognized the important roles of the educators. The Court decided that in calculating budget for education, the salary of educators should be included. Including salary of educators will show the importance of the educators' salary as a part of the national education system. The Court further stated, "by inserting the salary of educators in the calculation of budget for education, it would be easier for the government and the DPR to carry out its obligation reaching 20 percent budget for education in the National Budget Law."[100] In this case the Court predicted that there would be a continuous violation if the Court consistently exclude the educators' salary in determining budget for education. The Court therefore inserted the salary of educators as an important element that should be included in the calculation of education budget. In the end, the

98) teachers and individuals activists (most of them were the petitioners in the first budget for education case).
99) The Decisions of the Constitutional Court 026/PUU-IV/2006 at 95.
100) Id. at 84.

Court stated that "there is no reason for the government to delay its constitutional responsibility to reach 20 percent budget for education. Justice delayed, justice denied."[101)]

In *Budget for education VI*, the Indonesian Teacher Association (PGRI) in 2008 once again submitted a petition to the Court on the basis that the 2008 National Budget which allocated 15.6% for education violated Article 31(4) of the Constitution. The Court emphasized that it had decided four similar cases since 2005. However, the lawmaker kept ignoring the court decisions. The Court had given sufficient time for the lawmakers to enact a law which comply with Article 31 (4) of the Constitution. The Court ordered that the 2009 Annual Budget should meet the full constitutionally required component for education. The Court, however, did not nullify the 2008 National Budget. The Court stated "Even though the 2008 Law on National Annual Budget is in contradiction to the Constitution, to avoid chaos in administering state finance, the 2008 Law would remain valid until the enactment of the 2009 Law on National Annual Budget."[102)] In the event where the 2009 National Budget failed to satisfy 20 percent budget for education, the Court would dismiss the Law in its entirety.

The six judicial review cases mentioned above show the Court dynamic attitude in deciding cases related to the right to education which linked to budget allocation for education. Cases on *Budget for education I, and III* reflect the Court's consistency in upholding the Constitutional requirement to prioritize 20 percent budget for education as stipulated in Article 31 (4). This can be seen when the Court declared the provisions of the laws unconstitutional when the laws did not reach 20 percent budget for education. In *Budget for Education II*, however, the Court acted strategically by declaring the Law inconsistent with the Constitution but did not invalidate the concerned Law. The Court did so because invalidating the Law would cause administrative difficulty and constitutional damage. In *Budget for education IV,* the Court acknowledge that strictly enforcing 20 percent budget for education would lead to continuous violation of the Constitution. The Court therefore tried to narrow the gap between the actual national budget for education and the constitutional mandates which required 20 percent budget for education. The Court did so by inserting the salary of educators in calculating budget for education. This certainly would increase the percentage for education sector and narrowing the gap between the actual national budget and the constitutional mandates. The Court acknowledged the National Budget Law did not reach 20 percent for education sector. However, the Court did not invalidate the Law. This is because doing so would create difficulty in financial administration. The Court, however, warned the lawmakers that the fulfillment of 20 percent budget for education should be implemented in the 2009 Annual Budget or the Law would be invalidated in its entirety. This type of decision is similar to the nonconforming decisions by the Korean Constitutional Court.

B. Incorporating Educational Institutions (the BHP-Badan Hukum Pendidikan) Case[103)]

The petitioners (private universities, individuals) challenged the constitutionality of Law 9/2009 on

101) Id.
102) Id at 101
103) The Decision of the Indonesian Constitutional Court Number 11-14-21-126 and 136/PUU-VII/2009

the BHP which granted the state universities autonomy to regulate themselves and to finance their activities, including allowing them to obtain financial support from private enterprises. The petitioners argued that doing so would make the state universities susceptible to the interests of corporations which might lead to the privatization of state universities. Besides, the change of legal status of education institution to the BHP would result in the State avoiding its constitutional obligation to fund education; causing higher tuition fee that make higher education unaffordable for many people. This would create inequality, and violate the right of the people to receive an education.

In its ruling, the Court referred its previous decision 021/PUU-IV/2006 which declared that Article 53 (4) of the Law on National Educational System was consistent with the Constitution. The Court, in its 2006 decision, also provided guidance for the lawmakers when they establish Law on the BHP. That guidance included: (1) the government's primary function on education; (2) the Law aims to elaborate the responsibility of the state on education not to reduce the government responsibility on education; and (3) the formulation of the law should accommodate everyone's aspirations.

The Court declared that Law on BHP was inconsistent with Article 28D, Article 31, and the Preamble of the 1945 Constitution. It created legal uncertainty and jeopardized the efforts to achieve the national educational goals. While the Court declared that the law unconstitutional, some of the BHP principles, the Court stated, could be adopted.

When rendering the decision, The Court also adopted another approach. It declared Article 53 (1) "was constitutional insofar as it was interpreted as a function of education and not as a legal entity." This means that the Court ruled this Article was constitutional only if it was interpreted in a way following the court interpretation. This type of decision is also known as conditionally constitutional.

In this case, the Court considered the Constitution and its previous decisions. In addition, the Court also issued a different type of decision. It did not automatically grant or reject the petition and declared whether the law was constitutional. Rather, it outlines conditions so that would enable the law to be constitutional. The conditional decision could be interpreted in two different ways. It could be seen as reflecting a weak form of judicial review because the Court did not automatically invalidate the law. Whether the Court would invalidate the Law would depend on whether or not the lawmakers follow the Court's guidance. On the other hand, it could be interpreted as the adoption of a strong form of judicial review because the Court played a significant role in the realization of the decision by providing guidance for the legislature. This decision raised a question whether it is the proper function of the Court to provide guidance or this was the function of the legislature as the lawmaker.

The seven cases mentioned above show how the Indonesian Constitutional Court in certain cases utilized approaches that were not mentioned in the Constitutional Court Law. As can be seen in the cases of budget for education, the Court moved back and forth in deciding budget for education. In some cases, the Court declared the Law unconstitutional because it did not fulfill the 20 percent budget for education as mandated by the Constitution. In other cases, the Court declared the law

inconsistent to the Constitution but it did not invalidate the concerned law. This is because doing so would create administrative chaos. To ensure the lawmakers follow up the Court ruling, the Court decision put deadline to the lawmakers to revise the law. In the BHP case, the Court issued a conditional decision which essentially maintain the constitutionality of the law if the law is interpreted in line with the Court interpretation.

VI. Conclusion

This paper has comparatively analyzed the approaches of the Indonesian and the Korean Constitutional Courts in deciding constitutional review cases on economic and social rights. It has examined five constitutional review cases of the Korean Constitutional Court and seven judicial review cases of the Indonesian Constitutional Court. The analysis indicates the Korean Constitutional Court and the Indonesian Constitutional Court utilize several approaches in deciding cases related to economic and social rights ranging from constitutional, unconstitutional to nonconformity and conditional decisions. The constitutional courts in these two countries, in certain cases, expand its types of decisions beyond the types of decisions stipulated by the Laws on Constitutional Court. The modified decisions of the Korean Constitutional Court and the conditional decisions of the Indonesian Constitutional Court are example of the Court rulings that go beyond what is stated in the relevant Law. There are some characteristics of the modified decisions which to a certain extent are applicable to the Korean Constitutional Court and the Indonesia Constitutional Court. They are, inter alia,[104] (a) decisions of unconstitutionality which declare that provisions of a statute do not conform to the Constitution but the Court maintains its constitutionality for a certain period of time. (b) While the provisions of a statute do not conform to the constitution, such provisions are formally maintained. The legislature has the duty to amend the law. (c) In this respect, the executive agencies should not implement the unconstitutional laws until such laws are amended. In the end, the government will implement the updated laws. (d) It is basically a decision of unconstitutionality, but it defers the effect of the decision which removes the provisions.[105] This is not a form of partial unconstitutionality decision. The distinct feature of such decision is time delaying.

There are several reasons why the Courts in both countries employ modified decisions. For both the Korean Constitutional Court and the Indonesian Constitutional Court, issuing nonconformity rulings aim to prevent legal vacuum, avoid confusion and at the same time respecting the power of the legislature as law-making body. It is preventing legal vacuum because the existing provisions are deemed to be valid until the improved provisions are enacted or until the deadline comes.
It means there is no legal vacuum at all since the provisions of the existing law will only be

104) Jong-ik Chon, The Nonconformity Decision of the Korean Constitutional Court, 8/27 Asian Pacific constitutional adjudication forum
105) Id.

considered invalid if the updated provisions have already enacted. In addition, it also avoids confusion because factually after the Court rendered the decision, there is no change at all in the provisions of the law until the improved provisions are enacted. Things will be different if the Court declares the provisions of the law as unconstitutional on the date the Court decided the case. In such situation, the existing law does not contain that particular provisions anymore. For society, it may create confusion especially when they want to apply that particular provisions to resolve their case. They cannot apply that provisions anymore because there are no updated provisions replacing these provisions yet. Adopting nonconformity decisions also respect the power of the legislature to make laws. The Court restrained itself from going too far when deciding case. The Courts are not the lawmakers. It is not the duty of the court to make or to change the law. It is the duty of the legislature. The duty of the Court is to ensure whether or not the existing laws are in line with the Constitution. With similar arguments, the Indonesian constitutional court also utilized modified decisions i.e. conditional decisions to prevent legal vacuum, confusion and upholding the separation of powers principle.

Indonesian Constitutional Court, in some instances, has the final say to declare whether or not a law was constitutional. However, it is also possible that the Court maintained the constitutionality of the law even though this law was inconsistent with the Constitution. In other cases, the court ruled decisions of conditional constitutionality which mean the law would remain constitutional only if the lawmakers satisfied the court guiding principles. The court did not automatically invalidate the law, but instead it gave the opportunity to lawmakers to revise the law. Decisions of conditional constitutionality, however, can also be interpreted that, by providing guidance in its decisions, the court dictated the lawmakers on what should be included in the law. Last important note is to understand whether it is within the discretion of the Court to choose the form of nonconformity decision while the law limits the types of the court decisions.

IV

Constitutional Courts in Comparison

- Unity of Opposites: Similarities and Difference of Approaches in the Practice of the Constitutional Courts of South Korea and Russia
- A Comparative Analysis of Models and Activities of Constitutional Adjudicatory Bodies of the Republic of Kazakhstan and the Republic of Korea

Unity of Opposites: Similarities and Difference of Approaches in the Practice of the Constitutional Courts of South Korea and Russia

Alexander Smirnov*

Abstract

Establishment of the first in the world constitutional courts in Czechoslovakia and Austria celebrates its centenary in 2020. Meanwhile, constitutional courts in the Republic of Korea and in the Russian Federation have been functioning for about a third of a century. Since then, the history of constitutional justice has developed rapidly and dramatically in different countries, however, very few empirical studies have been devoted to a comparative comparison of the methodology used in decision-making of constitutional courts. The purpose of this article is to study the similarities and differences in the methods of interpretation of legal regulations applied in the constitutional justice of South Korea and Russia. Furthermore, the decisions of the constitutional courts of these two countries were compared in terms of methods and techniques of legal interpretation applied, in which striking similarities in the subjects of study were found. A result of studying of these court decisions demonstrates, on the one hand, the differences in general approaches mainly caused by historical specificities and peculiarities of litigation in particular cases - depending on the differences in initial legislative and other conditions and on the other hand, the convergence of views on a number of legal positions, along with overall objectives of the activity of the constitutional courts of South Korea and Russia.

* Doctor of Law, Professor, Lawyer Emeritus of the Russian Federation.
Former Councilor of the Constitutional Court of the Russian Federation.

I. Introduction

It is being said that every nation discovers a certain secret of human history. Isn't the phenomenon of justice such a mystery, with its determination to be done, even "if the world collapses"? For centuries, at the cost of bitter defeats and brutal victories, the steel characters of the judicial systems have been forged. However, in the modern world, the engine of social progress is the basic inalienable human rights. On their basis, through the ideas of constitutionalism and international law, there is a steady convergence of legal ideas and ideas of civilized peoples and states, the main measure of which is man.

Constitutional justice and constitutional courts, which after World War II began their victorious march around the world, were the apotheosis and at the same time an instrument of this tectonic civilizational convergence of the legal systems of the **U**nited **N**ations.

Like Russia, the foundations of the organization of the judicial power of the Republic of Korea are enshrined in its Constitution, however, unlike the Russian Federation, in Chapter 5 "Courts" and Chapter 6 "Constitutional Court" the differentiation of general and constitutional justice is laid down. This is also indicated by the provision of Article 101.2 of the Constitution of the Republic of Korea, according to which the judicial system consists of the Supreme Court, which is the highest court of the state, and courts of various levels. According to the Law "On the Organization of Courts" of 26 September 1949, the judicial system consists of three levels of courts: municipal, district (including specialized) and higher. Thus, the Constitutional Court occupies a separate and special place in the system of state bodies of the Republic of Korea.

In Russia, the Constitutional Court is included in the judicial system of the state; however, just like in the Republic of Korea, it does not participate in the judicial hierarchy, since it is not a higher instance for other courts, while all other judicial bodies are organized in accordance with the principle of unity of the judicial system. The characteristics of the judicial system of the Russian Federation, contained in its Constitution, the Federal Constitutional Law "On the judicial system of the Russian Federation", allows us to conclude that there are three main branches of the judicial system of Russia: the Constitutional Court of the Russian Federation, as well as courts of general jurisdiction headed by the Supreme Court of Russia and commercial (economic) courts.

It seems that such an exceptional independent position of constitutional justice in both countries is due to its special role in the political and legal system.

Constitutional courts are often reproached for *de facto* involvement in politics and lawmaking. But is it? The answer is yes and no. Of course, it would be pointless to argue that constitutional justice has nothing to do with politics. But what is meant by politics? If there is a struggle for power, then the constitutional courts are alien to such politics.

However, without taking part in the distribution of power, they are an important, and in some historical moments a key element of the political system of their countries. Why? Because they are the countries' ultimate regulator, an arbiter between the state and civil society, as well as between political majority and minority. In this sense, it can be argued that constitutional courts are even

higher than the legislator. After all, only they can declare laws invalid or correct their meaning.

Of course, one may ask: what then about the principle of separation of powers and the will of the legislator? However, it should be remembered that in the dispute between constitutional justice and the legislator, the Constitution itself stands on the side of the first, and in Russia and the Republic of Korea it is popularly adopted in a referendum, and, therefore, the direct will of the overwhelming majority of the country supports constitutional courts more than any parliament can. This can be confirmed, in particular, by the fact that the legislation of the Republic of Korea provides for the right of citizens to appeal to the Constitutional Court with a question about the violation of their rights and freedoms caused by the legislator's inaction (failure to exercise proper legislative powers). The constitutional courts are also placed above politics by the fact that they can not only pacify the majority, sometimes carried away by their power, but also neutralize dangerous fluctuations generated by the minority, which is also not always right.

In other words, constitutional justice implements not only a normative, but also a communicative way of social action, meaning that it stands guard over consensus and political stability. This is what makes the constitution a "living" law, and the interpretation of laws by constitutional courts functional, i.e., taking into account the changing social realities in which constitutional norms operate and are understood.

It is no coincidence that, in the practice of the Constitutional Court of the Republic of Korea, on the same issues in different times, different or even diverging decisions can be made.[1] After all, society is changing, customs, foundations, philosophy of law are changing, and therefore to a certain extent it is fair that different decisions can be made on certain problems in different eras.

The Constitutional Court of the Russian Federation also developed a concept for a dynamic adjustment of the legal positions of the Court. As the President of the Constitutional Court Mr Valery Zorkin noted, "the provisions of the Constitution of the Russian Federation manifest their regulatory impact both directly and through laws that concretize them in a certain system of legal regulation, moreover, in a developing socio-historical context. Therefore, the legal positions formulated by the Constitutional Court in relation to the reviewed normative act in the system of previous legal regulation and the constitutional practice that took place at that time can be clarified or changed in order to adequately identify the meaning of certain constitutional norms, their letter and spirit, taking into account specific social and legal conditions for their implementation. In the absence of the possibility of a dynamic adjustment of legal positions, the Constitutional Court could not play the role of some kind of "shock absorber", which is especially important in the context of cardinal transformations. It must ensure the protection of the principle of separation of powers from violations and degeneration (to be a "constant in the separation of powers"), on the

1) For example, in 2009, the Constitutional Court of the Republic of Korea ruled that a law criminalizing a man who seduced a woman by promising to marry her was not in conformity with the country's constitution (2009 Hun-Ba17 judgment). 6 out of 9 judges of the Constitutional Court voted for the recognition of the law as inconsistent with the Constitution, which decided that in this case the legislation violates the rights of both men and women. However, the Constitutional Court had previously considered this issue (decisions in case 89Hun-Ma82 of September 10, 1990; in case 90Hun-Ka70 of March 11, 1993; in case 2000 Hun-Ba60 of October 25, 2001) and then this norm was recognized as corresponding to the Constitution. Constitutional Court of Korea. Available at: http://english.ccourt.go.kr/cckhome/engNew/decisions/casesearch/caseSearch.do [accessed: 27 December 2020].

one hand, and the flexibility of constitutional norms in the context of the new socio-economic and organizational reality, on the other. Despite the fact that the Constitutional Court decides exclusively on issues of law, it is doomed to find a balance of constitutionally protected values, so that the imperative framework of the legal principle does not block the possibility for the legislator and the executor to find a solution to problems on the basis of legitimate discretion and optimal political expediency. This function of the Court can be designated as the formation (or, more precisely, objectification) of constitutionally justified expediency".[2)]

Taking into account a real understanding of the conditions for the application of constitutional provisions, one should also evaluate practice of the constitutional courts of the two countries, which, even following generally similar and legally justified methods of interpreting legal norms, can sometimes quite naturally come to both similar and opposite results. Let's try to illustrate this statement with several examples in which the constitutional courts of the Republic of Korea and Russia dealt with similar incidents.

At the same time, the objects for comparison were not chosen arbitrarily. Situations that were important for the legal system of each of the countries, a certain public resonance, and also - what is most important - having *mutatis mutandis* similar legal problematic at their core, were considered.

II. Problem of Legitimacy of Death Penalty

The question of the legality of retaining the death penalty was and remains one of the most controversial. According to Amnesty International, by the end of 2019, the death penalty for all types of crimes was abolished in 106 countries (most of the countries of the world), 142 countries (more than two thirds countries of the world) abolished the death penalty both by law and practice. However, at least 26,604 people around the world were awaiting execution of their death sentences.[3)] 58 countries keep the death penalty within the law. In many countries, death sentences are imposed but not enforced, including since 1997 in the Republic of Korea.[4)]

Article 6 of the International Covenant on Civil and Political Rights of 16 December 1966 allows for the use of the death penalty in limited cases, but it also provides that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant" (article 6, paragraph 6). On 15 November 2007, the UN passed a resolution calling on nations to impose a moratorium on the death penalty. The proposal to introduce a moratorium was supported by 99 states, 52 states voted against, 33 abstained. Thus, opinions in the world are divided, and only slightly more than half of the states are unequivocally in favor of the

2) Valery Zorkin. The Principle of Separation of Powers in the Activities of the Constitutional Court of the Russian Federation (Public lecture, in Russian), URL: http://www.ksrf.ru/ru/news/speech/Pages/ViewItem.aspx?ParamId=2 [accessed: 27 December 2020].

3) Amnesty International. Death sentences and executions 2019. 21 April 2020, Index number: ACT 50/1847/2020, URL: https://www.amnesty.org/en/documents/act50/1847/2020/en/ [accessed: 27 December 2020].

4) Infoplease. The Death Penalty Worldwide. February 11, 2017 Infoplease Staff, URL: https://www.infoplease.com/current-events/1999/death-penalty-worldwide [accessed: 27 December 2020].

abolition of this punishment. On October 4, 2017, the UN Human Rights Council called on states that have not yet abolished the death penalty to ensure that it is not used as a punishment for specific behaviors such as apostasy, blasphemy, adultery and consensual sexual relations between same-sex partners 27 out of 47 members of the Council voted for the adoption of this resolution; 13 states, including the USA, India and Japan, opposed; seven countries, including Cuba and the Republic of Korea, abstained from voting.[5)]

The border with respect to the death penalty also passes through the decisions of the constitutional courts of the Republic of Korea and the Russian Federation, which, having largely different starting positions in their laws and legal obligations, naturally came to exactly opposite results regarding the prospects for the death penalty.

Thus, in its Judgment of 25 February 2010 on the case "On Punishment by the Death Penalty",[6)] the Constitutional Court of the Republic of Korea recognized the possibility of imposing and executing the death penalty in accordance with the Constitution.

In this case the applicant was sentenced to death by a court of first instance for the murder of four people (including three women who were sexually abused by him). He appealed the relevant judgment to the Gwangju High Court, which granted the applicant's request and applied for a constitutional review of the provisions of the Criminal Code of 18 September 1953 no. 293, its Article 41.1, Article 41.2. and Article 42 in the part concerning "life imprisonment", Article 72.1 in the part concerning "life imprisonment", Article 250.1 (in the part that reads "shall be punished by the death penalty or life imprisonment") and Article 10.1 of the previously effective Law on punishment for crimes against sexual freedom and inviolability and on the protection of victims of such crimes - in the part that reads "shall be punished by the death execution or life imprisonment". In this Judgement the Constitutional Court of the Republic of Korea substantiated its legal position with the following main arguments:[7)]

1. The death penalty pursues the goal of general prevention, the implementation of justice through fair retribution to the person who has committed a serious crime, as well as the protection of society by completely eliminating the possibility of a relapse on the part of the offender. These goals are legitimate, the death penalty as the most severe punishment is an appropriate measure to achieve such goals.

2. The death penalty does not violate the principle of least restriction of rights arising from Article 37.2 of the Constitution of the Republic of Korea,[8)] although it interferes with the

5) UN Human Rights Council. URL: https://news.un.org/ru/story/2017/10/1312121 [accessed: 27 December 2020].

6) 22-1(A) KCCR 36, 2008Hun-Ka23, February 25, 2010.

7) To describe the positions of the Constitutional Court of the Republic of Korea, English-language materials on the judicial practice of the CC RK from the CODICES Information Base of the Venice Commission of the Council of Europe were used, URL: http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm [accessed: 27 December 2020].

8) "The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated". Korea Legislation Research Institute, URL: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG [accessed: 27 December 2020].

legitimate interests more than any other punishment (such as life imprisonment or life imprisonment without the right of conditional liberation). Therefore, the death penalty can be considered a punishment that has the most serious crime prevention effect, taking into account the survival instinct and fear of death.

3. When committing the most serious crimes, the imposition of punishment in the form of life imprisonment is disproportionate to the culprit's fault. From the point of view of the victim's family or society, life imprisonment would not be fair. Consequently, it is impossible to define a punishment other than the death penalty that would have the same effectiveness in achieving the goal of legislation.

4. Judicial error in the imposition of the death penalty cannot be considered a problem inherent in the death penalty as such, but is only one of the possible problems of the legal process. This problem can be resolved through a differentiated court system or appeal procedure. Accordingly, the possibility of a miscarriage of justice in imposing the death penalty should not constitute a basis for arguing that the death penalty cannot be applied in accordance with the Constitution.

5. Article 10 of the Constitution of the Republic of Korea, which establishes the right to respect for the dignity and value of a person, cannot automatically be considered as violated just because a criminal penalty provides for the deprivation of life. The Constitution implies the possibility of applying the death penalty, and the death penalty is not an excessive restriction of the right to life from the point of view of Article 37.2 of the Constitution. The death penalty is imposed on a person who has ignored a potential criminal warning and committed a serious violent crime. When assigning this punishment, the degree of social danger of the crime and the culprit's guilt are taken into account. Thus, the result of committing a cruel and serious crime depends on the decision of the offender.

6. The death penalty also cannot diminish the dignity of a judge or a member of the penitentiary system just because they may feel guilty when they appoint or execute this punishment (because they are only doing their public duty).

Three judges prepared a dissenting opinion, believing that the contested provisions do not fully comply with the Constitution. They noted that, taking into account the history of adoption and the wording used, Article 110.4 of the Constitution of the Republic of Korea[9] was originally aimed at eliminating the death penalty, in accordance with the regulations guaranteeing fundamental human rights. Therefore, this provision should not be interpreted in such a way as to constitutionally justify the death penalty, even if indirectly.

In addition, the dissenting opinion emphasized that the last part of Article 37.2 of the Constitution of the Republic of Korea provides for the possibility and redistribution of restrictions on basic rights. At the same time, its provisions consider any fundamental right as having a “being”

9) “Military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence”. Korea Legislation Research Institute, URL: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG [accessed: 27 December 2020].

and “outer layer”, and only the essence of law cannot be subject to restriction. However, this approach does not apply to the right to life, since it, by its nature, does not have such two components. It has a fundamental and absolute character and cannot be constitutionally limited, since neither in theory nor in practice can it be divided into “essential” and “less important” aspects. Since deprivation of life includes the taking of a person’s body, the death penalty diminishes the very essence of the right to life and physical integrity. Moreover, the death penalty violates Article 37.2 of the Constitution, which formulates the rule on the least restriction of rights, as well as Article 10 of the Constitution - by belittling the human dignity and self-esteem of persons who are involved in the appointment or execution of the death penalty and the detention of a person sentenced to death.

Thus, the legal position underlying the decision of the Constitutional Court of the Republic of Korea proceeds, in fact, from the *natural-legal and sociological* interpretation of legal norms, based on ideas about the justice of punishment for a crime; on the proportional nature of the restriction of the right to life and dignity of the individual, as well as the fundamental possibility of eliminating judicial errors. In a dissenting opinion, the three judges, on the contrary, resort to *historical and dogmatic* interpretation, indicating, respectively, the intentions of the legislator at the time of the adoption of the Constitution and its subsequent amendments, as well as the specifics of the fundamental (constitutional) rights and freedoms, the essence of which cannot be subject to any derogation by virtue of their inalienable character.

It is impossible not to note the very difficult legal situation in which the Constitutional Court of the Republic of Korea found itself when making this decision. The difficulty of the task before the Court, as it seems, consisted, firstly, in the fact that such a fundamental human right as the right to life is not directly enshrined in the Constitution of the Republic of Korea. However, certain indirect hints of respect for this right, if desired, can be found in the Preamble to the Constitution, where one of its goals is “to elevate the quality of life for all citizens...", which literally means, including the right to life, for it is quite clear that the improvement of the quality of life of each and every one cannot be realized through its violent alienation, even for some odious individuals. However, to a certain extent, this argument can be parried by means of an argument from the field of semantics, namely, an indication that the very concept of a goal, as opposed to the concept of a task, does not imply the obligation of its indispensable achievement in every context and in a particular case, but indicates only the direction of application of efforts. If we proceed from this logic, then according to the spirit of the Constitution of the Republic of Korea, everyone's right to life can only be considered a constitutional goal, which (along with, for example, such an undoubtedly forward-looking goal, also indicated in its Preamble as the elimination of “all social vices and unfair order”) should be achieved in the future, and the death penalty can be considered as a temporary and transitory measure, but not contrary to the Constitution.

On the other hand, in the Constitution of the Republic of Korea, the death penalty is still mentioned, however, only in one single case - in relation to crimes that are within the jurisdiction of military courts in the context of the possibility of appeal against their sentences (Article 110.4). Nevertheless, to deny, on the basis of this provision alone, the possibility of using the death penalty

in cases of other crimes is clearly illogical, for such a judgment would be deprived of sufficient grounds - after all, from the fact that the death penalty is mentioned in the Constitution in relation to military and similar crimes. It does not at all follow that it is prohibited in all other cases, especially since the Penal Code of the Republic of Korea fully recognizes this punishment (Article 41.1 and others), and without any reservations.

* * *

It is likely that the Constitutional Court of the Russian Federation met even greater difficulty in the issue of the legality of the death penalty. The fact is that in Article 20 of the Constitution of Russia, on the one hand, the right of everyone to life is recognized, and on the other hand, it is indicated that the death penalty, pending its abolition, can be established by federal law as an exceptional punishment for especially grave crimes against life when the accused is given the right to have the case examined with the participation of a jury.

The death penalty is defined in the Constitution of Russia only as a temporary and exclusive measure of punishment, which must be abolished when the appropriate conditions are ripe for this, and up to that moment the law can establish it only for especially grave crimes against life, and only subject to the provision of such a procedural guarantee to the accused as the consideration of his case by a court with the participation of a jury. That is, the death penalty is initially considered by the current Constitution only as an exceptional punishment, which is of a purely temporary nature. However, after the adoption of the 1993 Constitution, many important events took place in Russia.

On 28 February 1996, the Russian Federation signed the Convention for the Protection of Human Rights and Fundamental Freedoms, and on 5 May of the same year, the State Duma of the Federal Assembly of the Russian Federation (the country's highest legislative body) ratified it, and Russia, thus, entered the Council of Europe, and on 16 April 1997, it signed Protocol No. 6 to the said Convention concerning the abolition of the death penalty in peacetime. The intention of the Russian Federation to establish a moratorium on the execution of death sentences and to take other measures to abolish the death penalty was one of the essential grounds for its invitation to the Council of Europe on the basis of the conclusion of the Parliamentary Assembly of the Council of Europe of 25 January 1996 No. 193 on Russia's application for membership in the Council of Europe (subparagraph “ii” of paragraph 10) and the resolution of the Committee of Ministers of the Council of Europe (96)2. Russia accepted this invitation, legislatively formalizing its accession to the Council of Europe by federal laws of 23 February 1996 “On the accession of the Russian Federation to the Charter of the Council of Europe” and of 23 February 1996 “On the accession of the Russian Federation to the General Agreement on the Privileges and Immunities of the Council of Europe and the Protocols thereto.” By acceding to the statutory documents of the Council of Europe, the Russian Federation thereby reaffirmed its assurances and obligations, the fulfilment of which was a condition for inviting it to the Council of Europe. The abolition of the death penalty was also called a “serious obligation” of Russia in the Address of the President of the Russian Federation to the Federal Assembly of 30 March 1999. That is, in fact, Russia at the international

level renounced the use of the death penalty and undertook the obligation to introduce a moratorium, and within three years after the signing of the Convention - and to prohibit the death penalty by ratifying Protocol No. 6. The draft federal law on the ratification of Protocol No. 6 was introduced by the President of the Russian Federation to the State Duma on 6 August 1999, simultaneously with the draft law providing for the abolition of the death penalty and making the appropriate changes to the criminal, criminal procedure and penal legislation of the Russian Federation. However, in February 2002, the State Duma adopted an appeal to the President of the Russian Federation on the premature ratification of this bill, obviously believing that since the population mainly support the death penalty, its final abolition politically could be extremely unpopular. At the same time, the presidential bill was not rejected by the State Duma and, therefore, from a legal point of view, it is still considered pending.

The international legal obligations of the Russian Federation are of great importance. In 1969 Russia ratified the Vienna Convention on the Law of Treaties. Article 18 of this document states that the state that has signed the treaty cannot, prior to its ratification, take steps and measures that would be directed against its object and purpose. The object of Protocol No. 6, as follows from the meaning of its first article, is the complete abolition of the death penalty in peacetime. The Russian Federation is bound by the requirement of Article 18 of the Vienna Convention on the Right of International Treaties not to take actions that would deprive the signed Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms of its object and purpose, until and if it does not officially express its intentions not to become a party. However, since Protocol No. 6 has not yet been ratified by the Russian parliament, it alone cannot serve as a basis for the abolition in the Russian Federation of laws providing for criminal punishment in the form of the death penalty, which by no means deprives the Federal Assembly of its prerogatives regarding the ratification of this Protocol.

Nevertheless, this document, for all its undoubted importance and significance, should be considered only as one of the elements of the legal regulation of the right to life that has developed in the Russian Federation, based on the provisions of Article 20 of the Constitution, the constitutional and legal nature of the obligations that follow from international legal treaties, as well as from domestic legal acts adopted by the Federal Assembly - the Parliament of the Russian Federation, the President of the Russian Federation, the Constitutional Court of the Russian Federation.

Thus, on 2 February 1999 the Constitutional Court of the Russian Federation, by its Judgement No. 3-П, adopted at the request of the Moscow City Court, as well as complaints from a number of citizens, prohibited the use of the death penalty in conditions when the jury was not available to those accused of committing crimes in at least one of the regions of Russia (at that time in the Chechen Republic), because the right of the accused to have his case tried by a jury is, according to the Russian Constitution, a special criminal procedural guarantee of judicial protection of everyone's right to life, and all citizens are equal before the law and the court.[10)]

10) See: *Собрание законодательства Российской Федерации* [Collection of Legislation of the Russian Federation]. 8

However, now courts with the participation of jurors are already operating throughout Russia (including in the Chechen Republic in accordance with Federal Law No. 241-ФЗ of 27 December 2006, from 1 January 2010). In this regard, the Supreme Court of the Russian Federation applied to the Constitutional Court for an official clarification of the provision of the Judgement of 2 February 1999 on the moratorium on the death penalty. A problem arose: whether from 1 January 2010 the purely procedural ban on the appointment and execution of capital punishment, formulated in the Judgement of the Constitutional Court of the Russian Federation remains.

On 19 November 2009 the Constitutional Court of the Russian Federation issued Decision No. 1344-O-P[11] on this request, which gave an answer to this difficult question. The Constitutional Court linked its decision, first of all, with a long complex moratorium (which was originally intended as a transition to the complete abolition of the death penalty), based on a system of legal sources: the current Constitution and Russia's international legal obligations. We can talk about the formation - both *de facto* and *de jure* - of a special constitutional and legal regime, including stable guarantees of the non-use of the death penalty in Russia.

Thus, the Constitutional Court of Russia used mainly the positivist interpretation of the international obligations of the Russian Federation, the explicitly declared constitutional goals of abolishing the death penalty, supplementing it with a dynamic (functional) historical approach that takes into account irreversible fundamental shifts in the socio-legal life of the country.

III. The Issue of Restrictions on the Right to Vote for Prisoners and Persons Sentenced to Deprivation of Liberty

The Constitutional Court of the Republic of Korea ruled on 28 January 2014 in the “Restriction on Right to Vote of Prisoners and Probationers with Suspended Sentence” case[12] that the provisions of paragraph 2 of part 1 of Article 18 of the Law on the Election of Public Officials and Part 2 of Article 43 of the Criminal Code (in respect of “persons sentenced to suspended imprisonment” and “prisoners”) violate the applicants' active suffrage, since in violation of the principles of universal suffrage, enshrined in Part 1 of Article 41 and Part 1 of Article 67 of the Constitution, these provisions equally restrict the rights of prisoners and persons sentenced to conditionally imprisonment, while the position of the majority of judges was as follows:

1. Restrictions on the right to vote for prisoners or persons on probation violate the principle of universal suffrage. The contested provisions established a complete prohibition on voting for

February 1999 г. № 6. Ст. 867.

11) Russian Gazette. № 226(5050), 27 November 2009 [in Russian], URL: https://rg.ru/2009/11/27/postanovlenie-ks-dok.html [accessed: 27 December 2020].

12) 26-1(A) KCCR 136, 2012Hun-Ma409.510, 2013Hun-Ma167 (consolidated), January 28, 2014.

prisoners or persons on conditional sentences. Taking into account the objectives of the impugned provisions, there are no reasonable grounds for complete prohibition to vote, regardless of the gravity of the crime, the specific circumstances of its commission and the form of guilt of the offender.

In particular, if the execution of the punishment has not been terminated (the punishment has not been canceled), the persons who have been assigned a suspended sentence are not held in correctional institutions and, in fact, live the lives of ordinary citizens. On this basis, there is no need to restrict the right of these persons to vote. Consequently, the contested provisions violate the applicants' right to vote in violation of part 2 of Article 37 of the Constitution, violate the principle of equality, equally restricting the rights of persons who have been sentenced to a suspended sentence and those imprisoned in violation of the principle of universal suffrage, enshrined in part 1 of Article 41 and part 1 of Article 67 of the Constitution.

2. The contradiction with the Constitution of the part of the contested provisions relating to persons who have been sentenced to a conditional sentence may be eliminated by declaring the corresponding norms unconstitutional. As for the part of the contested provisions relating to prisoners, its inconsistency with the Constitution is due to the complete restriction of the right to vote. In this sense, the dissenting opinion of one of the judges, expressed in this case, seems especially interesting. In the opinion it was stated that "... since the legitimacy of the law and the obligation to obey it directly follow from the exercise of electoral rights by citizens, restriction of the right to vote for prisoners and persons who have been sentenced to a conditional sentence does not seem to reinforce the law abiding and does not meet the requirement of the reasonableness of the measures applied".

3. Elimination of this contradiction with the Constitution falls within the competence of the legislator, who may provide conditions for granting certain categories of prisoners the right to vote. The contested provisions in this part are recognized as temporarily valid until the legislator makes necessary changes.

In pursuance of this Judgement, paragraph 2 of part 1 of Article 18 of the Law on the Election of Public Officials was amended by Law No. 13497 of 13 August 2015. It is stipulated that a person sentenced to imprisonment with corrective labor for a term of one year or more, whose punishment has not been canceled or terminated, is deprived of the right to vote in elections. This provision came into force on 1 January 2016.

Later, the Constitutional Court of the Republic of Korea issued the Judgement of 25 May 2017 in the case regarding the Restriction of Voting Rights of Sentenced Persons.[13] Position of the majority of the judges in this case was as follows.

The purpose of the contested provisions is to apply social and criminal legal restrictions to sentenced persons who have not fulfilled their basic duties as members of the society, as well as to

13) 29-1 KCCR 209, 2016Hun-Ma292 · 568 (consolidated), May 25, 2017.

maintain the law-abidingness of these persons and society as a whole. According to judicial practice, if a person is sentenced to imprisonment for a period of at least one year, this means that during the proceedings it has been proven that he has caused significant harm to society. Therefore, it is necessary to subject such a person to social and criminal law restrictions in order to ensure that he or she observes the laws. The restriction of electoral rights in accordance with the contested provision remains in effect until the punishment ends (if it is not canceled). Therefore, the severity of criminal liability is proportional to the period for which electoral rights are limited. A contested provision cannot be considered as imposing a restriction on voting rights unnecessarily, regardless of the severity of the crime, whether it is willful or reckless, legal interests affected, or the application of parole, a discretionary administrative measure applied during the execution of a sentence. The public interest in the application of criminal and social restrictions and the maintenance of law-abidingness by restricting the electoral rights of persons sentenced to imprisonment for a term of one year or more with corrective labor cannot be considered less significant than the personal inconvenience of the sentenced person who cannot exercise the right to vote during execution of punishment. Consequently, the contested provision does not violate the electoral rights of the applicants or the principle of least restriction of rights.

* * *

Moving to the practice of the Constitutional Court of the Russian Federation, it should be noted that a similar case was encountered by the Court, and the interpretation given in the case turned out to be similar to that given by the Constitutional Court of the Republic of Korea. However, this case was complicated by a serious obstacle in the form of a decision of the European Court of Human Rights in combination with a challenge to the legality of the provisions of the Russian Constitution itself, in Article 32 (Section 3) which establishes that no citizen has the right to elect and be elected who is recognized by the court as incapable, as well as held in places of imprisonment by a court sentence. In its judgment of 4 July 2013 in the case of *Anchugov and Gladkov v. Russia*, the European Court of Human Rights concluded that the restriction of the electoral rights of citizens held in places of deprivation of liberty by a court sentence established by this Article of the Constitution of the Russian Federation violates the guarantees of article 3 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, i.e. the subjective right to participate in elections.

The Russian Ministry of Justice applied to the Constitutional Court about the possibility of executing this decision. In its Judgement No. 12-П of 19 April 2016, the Constitutional Court, by way of a compromise, partially recognized the execution of this decision of the European Court in view of the fact that, taking into account the provisions of the Russian criminal law, persons convicted for minor offenses, as a general rule, are not sent by the court in places of deprivation of liberty, which means that they are not deprived of their electoral rights, which ensures the necessary degree of selectivity of this measure and its differentiation, including in terms of those criteria that were previously recognized by the European Court itself in other cases [in particular, *Scoppola v. Italy* (No. 3) dated 22 May 2012, etc.].

In motivating its decision in this case, the Constitutional Court of Russia resorted to a *sociological interpretation* that is not often found in judicial practice, citing mathematical calculations and indicating the following: the number of those not deprived of voting rights, almost 10 times more than the number of those sentenced to imprisonment for committing crimes of little gravity and almost 1.5 times - the overall number of those sentenced for crimes to imprisonment and, accordingly, all those suspended from participation in elections due to the direction to serve a sentence in places of deprivation of liberty. In the same year [2015] 176,665 people were convicted for crimes of medium gravity, of whom 53,363 were sentenced to imprisonment (30.21%); for grave crimes - 172,782 people, of whom 81,906 (47.4%) were sentenced to imprisonment; for especially grave crimes - 41,903 people, of whom 39,634 (94.5%) were sentenced to imprisonment. The cited official data - taking into account the obligation of the courts when imposing a sentence to take into account the fact that convicts sent to places of deprivation of liberty are limited in their electoral rights - refutes the arguments about the absence in the Russian legal and judicial system of effective differentiation, proportionality, and to approach the solution of the issue of limiting the electoral rights of citizens held in places of deprivation of liberty by a court verdict, in the spirit of favoring the basic principle of universality of electoral right".[14)]

It should also be added that persons sentenced by a court to conditional deprivation of liberty are not limited in voting rights in the Russian Federation.

Such a decision and the subsequent steps of the Russian Federation in the field of criminal legislation have led to the complete elimination of this contradiction.

Hence, on 23-25 September 2019, the 1355th meeting of the Committee of Ministers of the Council of Europe was held, which was dedicated to the execution of judgments of the European Court of Human Rights, at which the issue of execution of 29 judgments (groups of judgments) in respect of 17 states was considered, including 4 judgements - on complaints against the Russian Federation. At the meeting, a resolution was adopted on the recognition of the decisions as executed.

In particular, analyzing the measures taken by the Russian authorities in the preparatory materials for the meeting, the Secretariat of the Committee assessed the version of execution of the *Anchugov and Gladkov* judgment proposed by the Constitutional Court of the Russian Federation as harmonizing the provisions of the Constitution and the Convention (as interpreted by the European Court of Human Rights).

In the notes of the Secretariat, attention was drawn to the fact that the corresponding recommendation of the Constitutional Court was implemented, and from 1 January 2017, the Criminal Code of the Russian Federation provides for a new type of punishment - forced labor, which is used as an alternative to imprisonment for committing a crime of small and medium gravity or for committing a serious crime for the first time. According to the Secretariat of the Committee of Ministers, this measure represents an actual deprivation of liberty (according to

14) Russian Gazette no. 95(6963), 5 May 2016. URL: https://rg.ru/2016/05/05/sud-dok.html [accessed: 27 December 2020].

Article 60.1 of the Criminal Executive Code of the Russian Federation, those sentenced to forced labor are serving their sentences in special institutions - correctional centers, according to Article 60.4 of the same code they are under supervision and can leave the territory of the Center only in specially stipulated cases by decision of the administration), however, it is not a "deprivation of freedom" in accordance with Russian law and, therefore, is not associated with deprivation of the electoral right of convicts. It was noted that in 2017-2018, a new type of punishment was applied in about 3,000 cases (including as a partial replacement of imprisonment). It is noted that at the same time the authorities are taking measures to ensure a balanced approach to the imposition of sentences in the form of imprisonment, as a result of which there is a systematic decrease in the number of persons serving sentences in the form of imprisonment (and, accordingly, deprived of active suffrage for this period).

IV. On the Significance of Improper Conditions of Detention

The Constitutional Court of the Republic of Korea, in its Judgement of 29 December 2016 “On Overcrowding in Detention Centers”,[15] ruled that the imprisonment of a convicted person in a place of detention that does not comply with minimum space requirements violates human dignity and therefore violates the Constitution.

The applicant in the case was sentenced to pay a fine of 700,000 won for an economic crime. In connection with the refusal to pay the imposed fine, the convict was placed in a detention center. As a result, he was kept in cell in the Seoul Detention Center building (floor space - 8.96 m2, number of 6 persons) from approximately 4:00 pm on 8 December 2012 until 1:00 pm on 18 December 2012, after which the applicant was released after the expiry of the term of his punishment.

On 7 March 2013 the applicant lodged a constitutional complaint on the ground that the behavior of the defendant, the Seoul Detention Center, in relation to the applicant's detention from 4:00 pm on 8 December 2012 to 1:00 pm on 18 December 2012, under these conditions violated the applicant's fundamental rights, including his human dignity.

The position of the majority of the judges in this case was as follows.

The Constitutional Court noted that the applicant had already been released from prison by the time the case was considered, therefore, his rights could not have been directly restored, even if the Court had accepted his complaint for consideration. However, the Court remains concerned that overcrowding in such centers is a problem that may be of a continuing nature. Since this case concerned an important issue of the treatment of convicts, and, therefore, required a constitutional resolution, the Constitutional Court recognized that this case, as an exception, was of judicial interest.

15) 28-2(B) KCCR 652, 2013Hun-Ma142, December 29, 2016.

With regard to the exercise of the state's powers to bring to criminal responsibility, the right to human dignity, enshrined in article 10 of the Constitution, prohibits treating people only as objects of state policy, imposing on them inhuman and cruel punishment, as well as in the case of implementation of criminal punishment, prohibits the maintenance of convicts in correctional institutions in which the basic conditions of human existence are not observed.

When assessing whether the dignity of a convict was affected by his detention in a correctional institution, in addition to the criterion of the space allocated for one person, other circumstances must also be assessed: the general functioning of the institution, the number of prisoners, the number of guards, the term of imprisonment, as well as issues of national allocation of funds for these purposes.

However, in the event that the space allocated to one prisoner is extremely small to meet the basic human needs, such circumstances themselves lead to an excess of the limits of the exercise of state power to prosecute and diminish the dignity of the prisoner.

In this case, the space reserved for one adult male was 1.06 ㎡ for two days and 1.27 ㎡ for six days and five hours. This space is not enough for an adult man of ordinary size even to fully stretch out, and is also so small that he has to sleep only on his side.

Thus, even taking into account general circumstances, such as the period during which the applicant was in the cell in question and the time he spent outside that cell (during visits of relatives and sports exercises), it is highly probable that the applicant experienced serious suffering in this room in the form of deterioration in physical or mental health, as well as a result of non-compliance with the requirements necessary for the basic types of human life. Therefore, the confinement which took place in such a crowded room that the applicant could not maintain his minimum human dignity, infringed on his rights and personal value.

The judgment was accompanied by the concurrent opinion of four judges, who noted that, in the light of the provisions of Article 10 of the Constitution of the Republic of Korea, which establishes the principle of respect for human dignity, the Law on the Execution of Sentences and Treatment of Prisoners in Correctional Institutions, the Basic Rules for Correctional Institutions, and the Guidelines the principles on solitary confinement, transport, recording, etc., aimed at guaranteeing a minimum standard for the treatment of prisoners, as well as the relevant provisions of international law and foreign judicial precedents, show that the state must ensure at least , space of 2.58 ㎡ for each prisoner. However, given the practical difficulties associated with the expansion of such institutions, four judges called for an improvement in the system, taking into account the outlined criteria “for at least five to seven years”.

* * *

The issue of improper conditions of detention of those accused of committing crimes in custody and the significance of this circumstance was also the subject of consideration by the Constitutional Court of the Russian Federation. In its Decision from 14 January 2016 No. 14-O “On the complaint of citizen Vasily Konstantinovich Andreevsky on violation of his constitutional rights by subparagraph “b” of paragraph 2 of part 4 of Article 413 of the Criminal Procedure Code of the

Russian Federation"[16] - the Court focused on the study of this problem not solely from a humanitarian point of view, but from a perspective of establishing the legal consequences of such a violation and its impact on the need to review the conviction in the applicant's case.

V.K. Andreevsky was convicted on the verdict of the *Babushkinsky* District Court of the city of Moscow on 8 December 2004 for committing a crime under the first part of Article 105 of the Criminal Code of the Russian Federation. The European Court of Human Rights, having examined the complaint of V.K. Andreevsky, in a Judgement of 29 January 2009 admitted that during the investigation of the criminal case against him, there had been a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms in terms of the unsatisfactory conditions of his detention. However, the Supreme Court of the Russian Federation, where the convicted person, his representatives and the Ombudsman of the Russian Federation applied for a review of his criminal case, refused such a review, referring to the fact that the Judgement of the European Court of Human Rights concerns only the improper conditions of detention of V.K. Andreevsky in custody, and not the justification of his conviction or violations of the Convention for the Protection of Human Rights and Fundamental Freedoms when his criminal case is being considered by the court.

V.K. Andreevsky asked to declare subparagraph "b" of paragraph 2 of the fourth part of Article 413 of the Code of Criminal Procedure of the Russian Federation contrary to the Constitution of the Russian Federation, believing that this norm, due to its uncertainty, prevents the revision of the court decisions in view of the violations of the Convention established by the European Court of Human Rights, directly related to the conditions of detention of a person, and not to the very justification of the conviction, which limits his right to access to justice.

In its Decision, the Constitutional Court, first of all, noted that, when establishing the rules for the review by courts, in connection with the decisions of the European Court of Human Rights, of judicial acts that have entered into legal force, the federal legislator must take into account that institutional and the procedural conditions for the revision of erroneous judicial acts, in any case, must meet the requirements of procedural economy in the use of judicial remedies, transparency in the administration of justice, exclude the delay or unreasonable resumption of the trial and thereby ensure the fairness of the court decision and, at the same time, legal certainty, including the recognition of legal force of court decisions, their irrefutability (*res judicata*), without which the balance of public and private interests is unattainable.

At the same time, within the meaning of the Constitution of the Russian Federation, norms of international law, legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights, the obligation assumed by the state to comply with the final judgments of the European Court of Human Rights, including those finding violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, the institutional and procedural conditions for its revision - taking into account the constitutional and international legal

16) URL: https://www.legalacts.ru/doc/opredelenie-konstitutsionnogo-suda-rf-ot-14012016-n-14-o-po/ (in Russian) [accessed: 27 December 2020].

requirement for the stability of the acts of justice - should exclude the possibility of an unjustified reopening of the trial that does not follow from the conclusions contained in the relevant judgement of the European Court of Human Rights, which, although it recognized a violation of the Convention in respect of the applicant, was not related to the trial itself and did not affect the outcome of the case. Consequently, the procedure for the execution in criminal proceedings of such decisions of the European Court of Human Rights should make it possible to establish the presence or absence of a connection between the established violation of the Convention and the outcome of the trial, as well as determine the need to revise a court judgment that has entered into legal force as one of the means of restoring violated rights and freedoms of a citizen who applied to the European Court of Human Rights.

The Plenary Session of the Supreme Court of the Russian Federation, finding grounds on the Recommendation of the Committee of Ministers of the Council of Europe of 19 January 2000 R (2000) 2, in the Resolution of 27 June 2013 No. 21 "On the application by courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto" emphasizes, in accordance with the specified legal positions of the Constitutional Court of the Russian Federation and the European Court of Human Rights, that when considering the need to revise a judicial act, the causal relationship between the violation of the Convention established by the European Court of Human Rights or the Protocols thereto and the unfavorable consequences that the applicant continues to experience is taken into account (paragraph 17).

Thus, the President of the Supreme Court of the Russian Federation has the right to forward a submission to the Presidium of the Supreme Court of the Russian Federation to review the judgment in connection with the decision of the European Court of Human Rights in cases where a preliminary study of the received materials allows to conclude that there are all the necessary grounds for such a review, which does not indicate a decrease in the level of judicial protection of the rights of convicts.

At the same time, the Constitutional Court referred to the pilot judgment of the European Court of Human Rights of 10 January 2012 in the case "*Ananyev and Others v Russia"*, which was delivered with the aim of restoring the rights of the applicants violated by the unsatisfactory conditions of their detention. With regard to this situation, the following measures are possible: improving conditions of detention, including reducing of application the measure of detention and temporary measures to prevent and reduce overcrowding in places of detention; creation of effective remedies, namely preventive domestic remedies, including adequate judicial review, and compensatory domestic remedies (compensation).

As the Constitutional Court pointed out, the application of such measures is not related to the substance of the sentence passed in the criminal case and, accordingly, cannot stipulate the need for its revision. Mentioning by the European Court of Human Rights of the possibility of mitigating, under certain conditions, criminal punishment as a form of compensation to prisoners in custody in connection with violations of the Convention that took place during criminal proceedings, only directs the federal legislator to such an opportunity – who itself has the right to determine

legislative measures of a general nature, and therefore in the system of the current legal regulation, which does not provide for compensation for violations of the conditions of detention of a person by reducing the punishment imposed on him, also does not imply a revision of the sentence.

Moreover, the procedure for establishing the existence of grounds for referring the issue of revising the sentence to the Presidium of the Supreme Court of the Russian Federation in connection with the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms by the conditions of detention does not exclude determination of the question whether this violation had the nature of torture, which had a decisive meaning on the evidentiary base in a criminal case and, as a consequence, on the just nature of the sentence, given that the recognition of the fact of unsatisfactory conditions of detention in and of itself is not a circumstance precluding criminality and punishability of the act[17].

V. On Legality of Conducting Meetings, Assemblies and Demonstrations

In the decision of 28 January 2014 in the case "On the prior notice of outdoor assembly or demonstration"[18], The Constitutional Court of the Republic of Korea ruled that the criminal punishment provided for in Section 6 (1) and Section 22 (2) of the Assemblies and Demonstrations Law for organizers of assemblies and demonstrations who have not notified about the relevant assemblies does not contradict the Constitution. It was clarified that anyone who intends to organize an urgent assembly, which cannot be notified within the time limits established by the Law on Assemblies and Demonstrations, shall notify the competent authority if written notice is possible.

The court answered a number of questions:

1. Does the contested provision violate the principle of certainty in the light of the principle "*nulla poena sine lege"?*

As the Court noted, the term "assembly" is generally understood to mean the temporary presence of a group of people in a specific location for specific purposes, whereby "participation" may be

17) As indicated in the appeal of the Director of the Federal Penitentiary Service (FSIN) dated 27 June 2019, the number of pre-trial detention centers in Russia where the norms of the sanitary area are not observed has decreased. Since 2012 it has decreased by more than three times - from 69 to 19. Also, the number of institutions where conditions of detention did not comply with the legislation of the Russian Federation decreased by 1.7 times (from 96 to 58). The average sanitary area per person is 5.1 square meters at a rate of 4 sq. m. At the beginning of 2019, the number of isolation wards in which persons under investigation were kept in proper conditions was 73.4%. The work in this direction of the Federal Penitentiary Service of Russia will continue, - the document says. (E. Merkacheva Federal Penitentiary Service proposed a revolution in the pre-trial detention center: prisoners will no longer be imprisoned. Council under the President of the Russian Federation on the development of civil society and human rights, URL: http://president-sovet.ru/presscenter/news/read/5627/ (in Russian) [accessed: 27 December 2020].

18) 26-1(A) KCCR 34, 2011Hun-Ba174·282·285, 2012Hun-Ba39·64·240 (consolidated), January 28, 2014.

sufficient to constitute a common purpose. A reasonable person who has a general understanding of law gets from this explanation an idea of the meaning of the term "assembly", the definition of this term is not unclear. Thus, the contested provision does not violate the principle of certainty in the light of the principle "*nulla poena sine lege"*.

2. Does the contested provision violate the prohibition on the use of an acceptance procedure for holding public events arising from Part 1 of Article 21 of the Constitution?

The court found that the prior notification requirement of the Law means a requirement for cooperation in order to give the executive authorities (including the police) time to prepare the necessary steps to ensure the safe conduct of assemblies. The law, in principle, guarantees the possibility of holding assemblies and demonstrations, provided that they are properly notified. Consequently, the requirement for prior notification does not violate the prohibition on the application of the authorization procedure arising from Part 1 of Article 21 of the Constitution.

3. Does the contested provision violate freedom of assembly despite the principle of minimum restriction of rights?

The court emphasized that the information indicated in the notification in accordance with the contested provision is important and necessary to prevent the simultaneous holding of assemblies and demonstrations and to prepare the competent authorities for the timely adoption of the necessary measures to ensure public safety. Requirements for advance notice of an assembly must be made at least 48 hours prior to the assembly to allow adequate time for appropriate procedures such as submission of missing documents after the initial filing of notice, notification of prohibitions to applicants and appeal of the prohibition, etc., therefore, the contested provision is not an undue restriction.

Based on Part 1 of Article 21 of the Constitution, the contested provision can be interpreted as requiring notification of an "urgent meeting", about which it is impossible to notify in due time, but which is organized in advance. In such a case, notification must be given as soon as possible. Notification of an urgent assembly, filed as soon as possible, cannot be penalized as the impugned provision should not apply thereto. Thus, the contested provision does not violate the right to freedom of assembly and the principle of least restriction of rights.

4. Does the contested provision provide for an unduly severe penalty?

Holding an assembly without prior notice is likely to pose a threat to public safety. Such an assembly also violates the administrative purpose of the prior notification requirement. Thus, the contested provision, which provides for the punishment for holding such assemblies, does not violate freedom of assembly, and the punishment envisaged thereby cannot be considered excessive and beyond the discretion of the legislator.

At the same time, four judges dissented in this case, pointing out that:

1. The principle of the least restriction of rights by the provisions on “urgent meeting” has been violated.

The law does not provide for any measures for holding an urgent assembly, during which it is almost impossible to comply with the requirement of prior notification. There are no measures that would allow such an assembly to be held legally, such as postponing notice or notification of an on-site assembly. The wording of the impugned provision is vague, since it does not explicitly stipulate whether the organizers are prohibited from giving notice of an urgent assembly less than 48 hours in advance of its planned beginning, or (if the contested provision is supposed to provide for a notification obligation) when the notice should be given. This uncertainty creates difficulties for those who are obliged to comply with the requirements of the contested provision. Therefore, the general obligation envisaged in the impugned provision to send prior notification of any assembly without specifying exceptions for cases of holding an urgent assembly violates the applicants' right to a peaceful assembly, as well as the principle of least restriction of rights.

2. The contested provision provides for an excessively severe penalty.

The obligation to give advance notice of an assembly is nothing more than an obligation to cooperate in the administrative process; administrative sanctions (such as a fine) are sufficient to ensure that this obligation is properly fulfilled. However, the impugned provision establishes a criminal penalty, and thus can have a chilling effect on freedom of assembly guaranteed by the Constitution, which in fact makes the notification function a permissive one, contrary to the original purpose of the notification mechanism. The contested provision establishes the same penalty for organizers of an event who violate the prior notification requirement and for organizers of illegal assemblies and demonstrations prohibited by law. Such punishment should be considered excessively harsh and going beyond the limits of the state's discretion in establishing punishments provided by the rule of law, since it is the same for two completely different acts that pose different danger to legal interests.

As can be seen from this judgement, the priority was given to the public interests of ensuring public order over the interests of an individual, and the question of the real harm that could be caused by an illegal assembly did not rise at all. The conclusion about proportionality of the restriction of the right is based mainly on the conclusion that the requirement to submit a notice of an urgent meeting as soon as it became really possible is quite feasible.

* * *

Likewise, the Constitutional Court of Russia has repeatedly faced situations when the organizers of rallies and demonstrations were brought to administrative or criminal liability by the authorities, challenging the constitutionality of the relevant legislation.

The most resonant case of the review by the Constitutional Court of the Russian Federation of such an issue was the case on the constitutionality of Article 212.1 of the Criminal Code of the Russian Federation in connection with the complaint of I.I. Dadin. In the Judgement of 10 February 2017 No. 2-П[19], the Constitutional Court recognized it as not inconsistent with the Constitution of

the Russian Federation, since, in terms of its constitutional and legal meaning, in the system of current legal regulation, the provisions contained therein:

Allow to subject to criminal prosecution for violation of the established procedure for organizing or holding a meeting, demonstration, procession or picketing a person who was previously brought to administrative liability for committing administrative offenses provided for in Article 20.2 of the Code of Administrative Offences of the Russian Federation at least three times within one hundred and eighty days, if this person within the period during which he is considered to be subjected to administrative punishment for these administrative offenses, has again violated the established procedure for organizing or holding a meeting, demonstration, procession or picketing;

suppose that bringing a person to criminal liability for a crime under this article is possible only if his violation of the established procedure for organizing or holding a meeting, demonstration, procession or picketing entailed infliction or a real threat of harm to the health of citizens, property of individuals or legal entities, the environment, public order, public safety or other constitutionally protected values;

Exclude the possibility of criminal prosecution for violation of the established procedure for organizing or holding a meeting, demonstration, procession or picketing of a person in respect of whom, at the time of the commission of the act incriminated to him, there were no judicial acts that entered into legal force on bringing at least three times within one hundred and eighty days to administrative liability for committing administrative offenses provided for by Article 20.2 of the Code of Administrative Offences of the Russian Federation;

Allow a person to be prosecuted for violation of the established procedure for organizing or holding a meeting, demonstration, procession or picketing on the basis of this article only if the act he committed was intentional;

Mean that the factual circumstances established by judicial acts that have entered into legal force in cases of administrative offenses do not as such predetermine court's conclusions about the guilt of the person against whom they were issued, in the commission of a crime provided for by this Article, which must be established by the court in accordance with criminal law procedures based on the entire body of evidence, including those not investigated when considering cases of administrative offenses committed by this person;

Imply the possibility of imposing a sentence of imprisonment on a person only on the condition that his violation of the established procedure for organizing or holding a meeting, demonstration, procession or picketing entailed the loss of a peaceful nature of the public event (if the corresponding violation does not fall under the signs of a crime provided for in Article 212 “Riots” of the Criminal Code of the Russian Federation) causing or having a real threat of causing significant harm to the health of citizens, property of individuals or legal entities, the environment, public order, public safety or other constitutionally protected values, while without the appointment of this type of punishment it is impossible to ensure achieving the goals of criminal liability for the crime provided for in this article.

19) Russian Gazette. 28 February 2017, URL: https://rg.ru/2017/02/28/sud-dok.html [accessed: 27 December 2020].

From the legal positions disclosing the constitutional and legal meaning of Article 212.1 of the Criminal Code of the Russian Federation, revealed in the Judgement of the Constitutional Court of the Russian Federation No. 2-П, it clearly follows that one of the signs of the objective side of the crime is infliction or a real threat causing harm to the health of citizens, property of individuals or legal entities, the environment, public order, public safety, and other constitutionally protected values.

Accordingly, when prosecuted under Article 212.1 of the Criminal Code of the Russian Federation for violation of the established procedure for organizing or holding an assembly, rally, demonstration, march or picketing, the courts should bear in mind that the threat of such a violation must be valid and must be confirmed by specific actions of the person prosecuted. persons testifying about the real danger they create to the health of citizens, property of individuals or legal entities, the environment, public order, public safety, other constitutionally protected values (provocative calls for violation of current legislation, aggressive rejection of the legal requirements of authorized officials, the use of masks or other means specially designed to conceal a person or make it difficult to establish an identity, etc.).

Moreover, when qualifying a repetitive violation of the established procedure for organizing or holding an assembly, rally, demonstration, march or picketing as a criminal offense that entailed a real threat of harm to constitutionally protected values, the courts must take into account that the holding of any public event, as a rule, is associated with certain inconveniences for citizens who do not participate therein (restriction of pedestrian traffic, interference with transport, difficulty in accessing social infrastructure, etc.), which, being inevitable costs of freedom of peaceful assembly, cannot in themselves be regarded as giving rise to a real threat causing harm to the health of citizens, property of individuals or legal entities, the environment, public order, public safety, and other constitutionally protected values (Judgement of the Constitutional Court of the Russian Federation of 1 November 2019 No. 33-П on the case of the constitutionality of clauses 1 and 6 of article 5 of the Law of the Komi Republic "On certain Issues of Holding Public Events in the Komi Republic" in connection with the complaints of citizens M.S. Sedova and V.P. Tereshonkova; Decision of the Constitutional Court of the Russian Federation of 27 January 2020 No. 7-O "on the complaint of citizen K.A. Kotov on violation of his constitutional rights by Article 212.1 of the Criminal Code of the Russian Federation")[20)].

VI. Conclusion

Of course, this brief and selective comparative analysis undertaken by us cannot claim to be exhaustive conclusions. However, even based on such an incomplete comparison, it can be seen that the ideas about justice, including constitutional justice, in the Russian and Korean societies

20) Russian Gazette. 15 November 2019, URL: https://rg.ru/2019/11/15/ks-33-dok.html [accessed: 27 December 2020]; Russian Gazette. 4 February 2020, URL: https://rg.ru/2020/02/04/ks-rf-kotov-dok.html [accessed: 27 December 2020].

have their own peculiarities and differences. The literature notes that in both systems (as well as in comparison with other "Western" systems, including the American one), judicial practice is psychologically influenced by two models of administration of justice, which can be characterized as "material" and "procedural".[21] At the same time, they combine strict adherence to procedural rules with a special concern for the fairness of decisions.

The first can be correlated with the legal consciousness and legal culture of Korea, which are based on Confucian traditions, including: collectivism, paternalism, priority of ethical norms over legal norms, obligations over rights, preference for informal conciliatory procedures in court proceedings, etc. For centuries, the bulk of social relations were regulated there by moral and ethical norms, customs and traditions. Therefore, in the practice of Korean judges, strict adherence to all rules and legal procedures gives way to a greater value - achieving a fair result.

Russian legal system, like all systems based on Roman law, is based mainly on a "procedural" model with the postulate that "justice should not only be justice in essence, but also look like justice outwardly". This means that justice is done only when all the smallest legal procedures are followed. Such a legal mentality considers it necessary to establish clear rules by which legal proceedings are carried out, with which everyone agrees, and then rigorously enforce them.

Nevertheless, despite the noted historical differences, practice of constitutional courts also shows an undoubted trend towards convergence, which is based on the nature of constitutional justice noted at the beginning of this article as an important legal instrument for maintaining stability and peace in society. Hence, for example, it is obvious that in the above example of the case in connection with the complaint of I.I. Dadin and subsequent similar cases, the Russian Constitutional Court widely uses not only the "procedural", but also the "material" approaches, focusing instead of on non-compliance with the formal requirements of the law on the number of violations rather on the infliction or threat of infliction by the actions of the guilty person of specific significant harm to public and personal interests.

From this perspective, the task of interpreting a legal norm is equally understood by our Constitutional Courts, first of all, identifying the social goal of the law. In this regard, it is appropriate to conclude by citing the well-known judgment of the Constitutional Court of the Russian Federation that "justice, by its very essence, can be recognized as such only if it meets the requirements of justice and ensures effective restoration of rights."[22]

21) *Михалева И.В. Функционирование национальной судебной системы Республики Корея в контексте политических процессов середины XX – начала XXI века. Ойкумена. Регионоведческие исследования* [Mikhaleva I.V. The functioning of the national judicial system of the Republic of Korea in the context of political processes of the mid-20th - early 21st centuries. Ecumene. Regional Studies] 2010. 3 (14). pp. 112-113 (in Russian).

22) Judgement of the Constitutional Court of the Russian Federation of 30 January 2020 No. 6-П, URL: https://www.garant.ru/products/ipo/prime/doc/73385815/ [accessed: 27 December 2020].

A Comparative Analysis of Models and Activities of Constitutional Adjudicatory Bodies of the Republic of Kazakhstan and the Republic of Korea

KAIRAT MAMI*

Abstract

The constitutional adjudicatory bodies of the Republic of Kazakhstan and the Republic of Korea play an important role in promoting the rule of law and democratic values in their countries. The generally recognized provisions and principles of the world constitutional heritage were considered in the development of their legal framework and determination of their competence. Over the decades, our bodies have not only been formed, but have also taken their rightful place in the system of state bodies and have made a significant contribution to ensure the supremacy of the Constitution. Similar issues were raised, on which important legal positions were expressed. In this regard, this article comparatively analyzes the models of the constitutional adjudicatory bodies of the two countries, their legal status, powers, structure, formation and constitutional adjudications. Much attention is paid to the issues that were the subject of our bodies. Bilateral and multilateral cooperation in the field of constitutional and legal development is discussed separately. The Constitutional Research Institute, which marks the 10th anniversary constitutes an important area of research. It has much in common with the Scientific Advisory Council under the Constitutional Council of the Republic of Kazakhstan. The results and conclusions of the article will be useful to specialists in the field of constitutional law, constitutional review, students and applicants on this topic.

* Chairman, the Constitutional Council of the Republic of Kazakhstan.

I. Introduction

The rule of the law is one of the most unwavering and benchmarking values in the countries that have embarked upon the path of civilised and democratic development. Hence, being a principal source of securing legal ethos, the Constitution acts as a guardian and conductor of its integral elements. Therefore, a forefront task is to secure the provision of supreme legal force and direct application of constitutional norms, ensuring that they are respected and followed by all subjects of social relations. Having such a goal required the establishment of specialised state bodies with full power to implement constitutional adjudication over the compliance of the country's legislation and the activities of state bodies with the Constitution.

The principle of the adjudication first appeared in the United States in 1803. The U.S. Supreme Court issued that any other legislative and executive acts that contradict the Constitution of the country can be declared unconstitutional. Then following the American model, some European countries like Norway, Greece and Switzerland introduced constitutional adjudication before World War I.

In 1920, constitutional courts appeared in Austria, Czechoslovakia, later in Spain, Germany, and Ireland.

After World War II, to prevent further flagrant violations of the fundamental human rights and to guarantee the rule of law, several European countries also set up the institutions of constitutional justice.

Across the globe, there are three main models of constitutional adjudication, which are the American, the Continental, and the Mixed models.

The constitutional adjudication within the American model does not stand out from common justice.

The continental model, known in the literature as the European or Kelsen's, presumes the establishment of specialised bodies, which are separate organisations from the judicial system that consider exceptionally constitutional issues. This model falls into two main categories: a) the "Austrian" (Continental - Constitutional) model, when constitutional courts deal with constitutional matters (e.g., Italy, Spain, Germany, Bulgaria, Russia, Moldova, Turkey, and others), and b) the French (Continental) model, when French Constitutional Council is subject to review constitutional matters.

The Mixed (European-American) model diffuses and concentrates the elements of both models: so, not only the Constitutional or Supreme Court have the power of constitutional adjudication, but also all ordinary courts share similar authority (e.g., Portugal, Greece, Guatemala, Brazil, and others).

However, it is noteworthy that the current model of constitutional adjudication is unique in each country. Indeed, along with the accepted categories, national peculiarities, and the local history of the development of the legal system affect the connotation.

With gaining independence, both Kazakhstan and Korea started shaping their course in building

the rule of law. One of the most prominent indications of this process was the establishment of constitutional adjudicatory bodies.

This article further presents the information in sections for the convenience of presentation and accessibility by reflecting the experience of our countries.

II. Historical Overview

As compared to Kazakhstan, Korea started formalising the functions of constitutional adjudication earlier, in fact, right after the end of World War II. After gaining its independence in 1948, Korea proclaimed and set up the first Constitution of the Republic. Its Chapter 5 highlighted: "When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Committee and shall rule according to the decision thereof". It also stressed: "The Constitutional Committee shall be composed of five Supreme Court Judges and five members of the National Assembly, with the Vice President as the Chairperson of the Committee." At that time, the Committee had limited jurisdiction to adjudication on the constitutionality of statutes.

The Constitutional Committee had run for over ten years, but its activities were not significant. During its operation, it decided upon only six cases; wherein two cases, the laws were unconstitutional.

In 1960, the Constitution of the Second Republic included Article 8, devoted to the Constitutional Court. According to it, nine judges shall be appointed with terms of six years: three judges were appointed by the President, three by the Supreme Court, and three by the National Assembly. Unlike the earlier Constitutional Committee, the idea was to create the Constitutional Court as a permanent institution.

The Constitutional Court's jurisdiction included adjudication on the constitutionality of the National Assembly acts, final interpretations of the Constitution, adjudication on competence disputes, adjudication on the dissolution of a political party, and even impeachments. However, the Constitutional Court was never formed due to the coup d'état.

In 1962, the Constitution of the Third Republic introduced a decentralised model of the constitutional adjudication, and the courts of the first instance were empowered to adjudicate the constitutionality of laws. This Constitution had a separate Impeachment Committee, and the Supreme Court had the rights to decide on the constitutionality of statutes, on the dissolution of a political party, and others.

The adoption of the Constitution of the Fourth Republic in 1969 opened a new era in the development of constitutional justice in Korea. Soon thereafter, due to internal and external reasons, the country declared a state of emergency. Further, a new Constitution was drafted and approved by a referendum in 1972, mostly known as the Yusin Constitution. It set up the Constitutional Committee once again, empowered to adjudicate the constitutionality of the National Assembly acts based on the requests from courts, the dissolution of political parties, and the impeachment of the representatives of the supreme authorities. The Constitutional Committee received the

submission of the courts for adjudicating the constitutionality of laws through the Supreme Court and had to agree with their reasoning. Later, the model of the Constitutional Committee stayed the same in the Constitution of the Fifth Republic of 1980. Despite the existence of jurisdiction, the Constitutional Committee did not find its niche within the country's legal system. It survived only on paper and did not make a single decision.

The year 1987 became a milestone in the history of the development of the Korean constitutional adjudication system. In the revised Constitution, the ruling party and the opposition party agreed to consider the establishment of the Constitutional Court. So, in 1988, the Constitutional Court Act was proclaimed. It had the power to adjudicate the constitutionality of laws based on the requests from courts, to issue decisions on impeachment, to dissolve political parties, to resolve competence disputes between central government structures, central and local authorities, and to consider constitutional complaints.

The Constitutional Court of Korea belongs to the Austrian (Kelsen's) model of judicial constitutional adjudication. Kelsen's model uses the concept of an integral legal order, according to which, all the entire hierarchy of norms come from the sole primary legal source - the Constitution. Meanwhile, the integrity of the entire system and the activities of all mechanisms are determined and maintained by a specialised institution of constitutional adjudication of laws - the Constitutional Court, which, being independent, has the authority to abolish unconstitutional acts.

The basics of the judiciary of the Republic of Korea are found in its Constitution, covered in Chapter 5 "Courts", and Chapter 6, "Constitutional Court". So, the judicial system consists of the Supreme Court as the highest court in the country. Overall, the Constitutional Court takes a special place in the system of the state, as well as judicial bodies of the Republic of Korea, acting outside the system of subordination.

In Kazakhstan, the constitutional adjudication in its modern sense also did not appear at once. Previously being a part of the USSR, such institution did not exist in Kazakhstan and other countries of the socialist camp. Then at that period, the prevailing slogan was that the acts of the highest legislative body - the Supreme Council, the voice of people's will, must be consistent with the Constitution. Officially, the Supreme Council oversaw the protection of the principal law of the country.

So, throughout the Soviet period, we can see only individual elements and attempts to introduce this function. In the mid-1920s, the USSR Supreme Court had the authority to benchmark the legitimacy of the Union republics legal decisions with the Constitution.

In fact, from the 1960s to 1980s, the legal scholars repeatedly supported the idea of setting up an independent judicial body for constitutional supervision.

In 1989, the USSR set up the Constitutional Supervision Committee, and it was a remarkable event at that time, which, however, did not last long. The primary large-scale plan was the development of similar bodies of constitutional supervision across Union republics. Therefore, in 1989, Kazakh SSR (Soviet Socialist Republic) incorporated corresponding adjustments to its Constitution. Nevertheless, instead, the idea of the Constitutional Supervision Committee of the Kazakh SSR existed only on paper.

Later an independent Kazakhstan while developing the country's sovereignty accepted both categories of the continental model of constitutional adjudication. So, for example, the Constitution of the Republic of 1993 ran the Constitutional Court with the "Austrian" model. In contrast, the 1995 Constitution of the Republic relied on the Constitutional Council of French model.

With the acquisition of sovereignty and further independence, Kazakhstan stepped on a constant path of new nation-building. Hence, the Constitutional Law from December 16, 1991, "On the state independence of the Republic of Kazakhstan" played an essential role, where Article 10 stated: "The highest body of judicial protection of the Constitution shall be the Constitutional Court of the Republic of Kazakhstan". Principally, to secure the implementation of such changes of the Constitutional Law, the 1978 Constitution of the Kazakh SSR adopted several amendments. According to these amendments, the Constitutional Court of the Republic of Kazakhstan should be the supreme body of judicial authority protecting the Constitution of the Republic of Kazakhstan; should be sovereign and independent of Government and other bodies, officials, public associations; and should follow the Constitution of the Republic of Kazakhstan. Further, the laws of the Supreme Council of the Republic of Kazakhstan "On the Constitutional Court of the Republic of Kazakhstan" and "On constitutional adjudications [1]in the Republic of Kazakhstan" adopted on June 5, 1992, determined the members of the Constitutional Court, its competence, development procedures and activities.

So, by Article 5 of the Law "On the Constitutional Court of the Republic of Kazakhstan", the Constitutional Court of the Republic of Kazakhstan (hereinafter-the Constitutional Court of the RK) consisted of eleven judges: the Chairperson, deputy and nine judges. Based upon the ballot, the Parliament assigned all of them for ten years using the recommendations of the head of the Government. A candidate who won most votes from the total number of People's Deputies of the Supreme Council of Kazakhstan became the elected judge.

Only a citizen of the Republic of Kazakhstan not younger than 35 and not older than 60 years, living within the country, with higher legal education and work experience in the speciality for at least ten years, could become a judge of the Constitutional Court of the RK.

The Constitutional Court supervised the control over the compliance with the following normative-legal acts of the Constitution of the RK: the laws and other acts adopted by the Supreme Council; the decrees and other acts of the President of the country; the resolutions of the Cabinet of Ministers; the normative acts of ministries, state committees and departments; the normative acts of the Prosecutor General of the RK; the guideline clarifications of the Supreme Court and the Higher Arbitration Court of the RK; the international treaties that have not entered into force; and other obligations of the RK.

Also, another competence of the Constitutional Court of the RK was the verification of the cases on the constitutionality of law enforcement practices that affected the constitutional rights of citizens.

1) Kazakhstani legal documents use the term "constitutional proceedings". However, for the consistency across the article, this article uses the term "constitutional adjudications", applied by the colleagues from the Republic of Korea.

A distinguishing feature of the constitutional adjudicatory body of that period was the lack of authority to consider laws adopted by the Supreme Council before unless signed by the President, i.e., the absence of a preliminary constitutional adjudication. Nevertheless, the Constitutional Court of the RK had the authority to conduct both abstract and specific normative adjudications of other constitutional procedures.

Subsequently, the constitutional adjudication conducted by the Constitutional Court of the RK was mandatory; and, whenever any law was inconsistent with the Constitution, it had the power to annul and invalidate its legal force.

There were three groups of participants of the constitutional adjudications who had the right to request to the Constitutional Court of the RK:

The Presidium, committees, and a group of at least one-fifth of the total number of deputies of the Supreme Council; President, Prime Minister, Chairperson of the Supreme Court of the Republic, courts, the Prosecutor General, republican bodies of public associations, regional, Alma-Ata city representative bodies regarding the constitutionality of laws and resolutions adopted by the Supreme Council; the acts of the Head of State; the resolutions of the Cabinet of Ministers; and the normative acts of ministries, state committees and departments of the RK.

National Academy of Sciences on the compliance issues with the laws of the Constitution of the RK.

The citizens on the issues that directly affect their constitutional rights.

The internal political situation of that time also influenced the Law on constitutional adjudications. So, both the Head of State and the representative body could voice the objection to final decisions of the Constitutional Court of the RK. These objections, in turn, could be overridden by two-thirds votes of all judges of the Constitutional Court of the RK.

A new form of constitutional adjudication in Kazakhstan "the Constitutional Council of the RK" was developed based on the current Constitution of the RK, adopted at the republican referendum on August 30, 1995, and yet active to this day.

The newly set institution is present in Chapter 6 of the Constitution of the RK, which includes the rules and terms for assigning the members of the Council, as well as outlines the range of activities of the entire collegial body and the participants of the constitutional adjudications. According to Article 1 of the Constitutional Law of the RK "On the Constitutional Council of the Republic of Kazakhstan", the Council is a state body that secures the rule of the Constitution of the Republic of Kazakhstan across the territory of the republic.

It also certifies that the Council shall be independent and separate from state bodies, organisations, officials, and citizens; shall obey only the Constitution of the Republic; and shall not use political or any other motives when exercising its powers. The Council exercises its powers following the Constitution of Kazakhstan and current Constitutional Law, refraining from setting up and investigating other issues in all cases when it falls within the competence of courts or other state bodies.

In general, the entire process and the procedure for dispatching constitutional adjudications by the Council, ensuring the contentiousness principle of participants, attracting independent experts,

the nature and content of discussion and decision-making by the Council prove the presence of properties inherent to a collegial quasi-judicial body. So, formally, as its title shows, the Constitutional Council is not a judicial body. However, inclusively, its features cover the characteristics of both judiciary institutions and collegial authority of control.

Overall, it is necessary to highlight that the Republic of Kazakhstan and the Republic of Korea piloted various models at the normative and even practical levels while developing a modern constitutional adjudicatory body.

The critical factor is that its supporters managed to defend the progressiveness of this institution, particularly, its vital role in ensuring the rule of law in the country.

III. Composition, Guarantees and Structure

The models and legal status in the system of public authorities figure out the members of the constitutional adjudicatory bodies of our countries.

The Constitutional Council of Kazakhstan as a quasi-judicial body consists of seven members: the Chairman and two members of the Council, appointed by the President of the Republic, and two members, appointed by the Senate and the Mazhilis of the Parliament for six years. The ex-Presidents of the Republic are lifetime members of the Council.

The Constitutional Court of Korea, as a judicial body, consists of nine judges qualified to be court judges and appointed by the President. Among them, three judges are appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court. With the consent of the National Assembly, the President of the Republic appoints the President of the Constitutional Court out of the judges.

There are, in fact, similarities in the development of these institutions. The heads of the state and the countries' parliament join the appointment process. In the Republic of Korea, the judicial system is also part of this process by nominating three judges. As for Kazakhstan, it considers this aspect in practice. The Constitutional Council includes the representatives of the judiciary.

Both in Kazakhstan and Korea, the terms of service of the representatives of the constitutional adjudicatory body lasts six years and may be prolonged. The retirement age from the position in Korea is 70 years, and in our country, it does not have any age limit.

The eligibility requirements for the candidates are of great interest. Only a citizen of the Republic of Kazakhstan who is at least 30 years by the day of the appointment; lives in the territory of the Republic; has a higher legal education; and has worked in the legal profession for at least five years, might become a member of the Constitutional Council of the RK.

In the Republic of Korea, these requirements are more rigorous. The judges of the Constitutional Court are appointed from among persons who have reached the age of 40 and who have held any of the following positions for fifteen years or more (the scope of experience of holding two or more of the following positions are summed up):

- a judge, a public prosecutor, or a lawyer;

- a qualified lawyer who has engaged in legal affairs at a government agency, local government, national or public enterprise, government-invested institution, or other juristic people; or
- a qualified lawyer who has held a position equal to or higher than an assistant professor in jurisprudence at an authorised college or university.

So, to implement the entrusted mission properly, it is necessary to have guarantees that ensure comprehensive and objective consideration of the received requests. The analysis of the legislation of both countries shows that such instruments are accessible.

The members of the Constitutional Council of the RK have a special status and are state officials. They are independent and subordinate only to the Constitution.

The members of the Constitutional Council are irremovable during the term of office. It is probable to end or suspend their powers only following the cases considered by the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan". Also, the members of the Council are not subject to disciplinary liability.

The activities of the Chairman and the members of the Constitutional Council of the RK on the issues of constitutional adjudications are not accountable. Thus, their activities must be free of any interference. No one has the right to demand from them a report on the exercise of their powers. Also, no one has the right to request from the Council a free and independent consideration of a request that is pending, and the Chairman and the members of the Council do not have the rights to express an opinion or consult on the issues that are under the consideration of the Constitutional Council, until passing a final decision on them. Moreover, the members of the Council do not have any rights to express their opinion on an issue that may soon become the subject of consideration in the Constitutional Council.

Besides, the members of the Constitutional Council must not defend or represent anyone in the court or other law enforcement bodies, offer patronage to anyone to exercise rights and release from duties. Nevertheless, like all citizens, they can serve as legal representatives, for example, for their children, and others.

The Chairman and the members of the Constitutional Councils have equal rights when the Constitutional Council considers the issues and makes decisions on them. However, this universal rule has one exception; the Chairman's vote becomes final in case of equal votes.

The Law secures the immunity of the Chairman and members of the Council. During the term of office, the Chairman and the members of the Council are free from any arrest, custodial detention, house arrest, compulsory attendance, prosecution without the consent of the Parliament of the Republic of Kazakhstan about stripping of their immunity, excluding the cases, when arrested at the crime scene or when committing more serious crimes and most severe crimes.

In such cases, to obtain the consent to the criminal prosecution, arrest, detention in custody, house arrest, compulsory attendance of the Chairman or the member of the Constitutional Council of the Republic of Kazakhstan, the Prosecutor General of the Republic of Kazakhstan submits to the Parliament of the Republic of Kazakhstan. The submission must be before the decision about

the offence qualifications of the suspected by applying motion to the court for sanctioning restrictive measures like custodial detention, house arrest, arrest, compulsory attendance to the pre-trial investigation body.

Regarding Korea, as stressed in Article 4 of the Korean Constitutional Court Act, judges "shall adjudicate independently according to the Constitution and laws, guided by their consciences". Also, no judge is subject to be "expelled from office except by impeachment or a sentence of imprisonment without prison labour or heavier punishment".

As in Kazakhstan, the Korean Constitutional Court Law sets up a requirement that judges shall not join any political party or take part in political activities. This also applies to the compatibility of this position with the deputy's seat, engagement in other paid job. Also, judges of the Constitutional Court of Korea may not engage in business for profit or simultaneously hold any of the following positions: a member of the National Assembly or a local council; a public official in the National Assembly, executive branch, or ordinary court; an advisor, officer, or employee of a corporation, organisation, and others.

Such restrictions are fully justified and are aimed at ensuring the independence, fairness, and integrity of the representatives of the constitutional adjudicatory bodies.

On the other hand, the Constitutional Council of Kazakhstan and the Constitutional Court of Korea have some structural differences. In Kazakhstan, the state body includes the members of the Council, its administration, as well as the Scientific Advisory Council, which we will discuss below.

In contrast, the Constitutional Court of Korea consists of the President, judges, the Council of Judges[2], the Department of Court Administration, the Rapporteur Judges, and the Constitutional Research Institute.

The Council of Judges consists of judges and the President as the chair of the Court. They consider the matters concerning the establishment and revision of the acts of the Constitutional Court; budget request, expenditure, and settlement of reserve funds; appointment and dismissal of the Secretary-General, Deputy Secretary-General, the President of the Constitutional Research Institute, the rapporteur judges, and others.

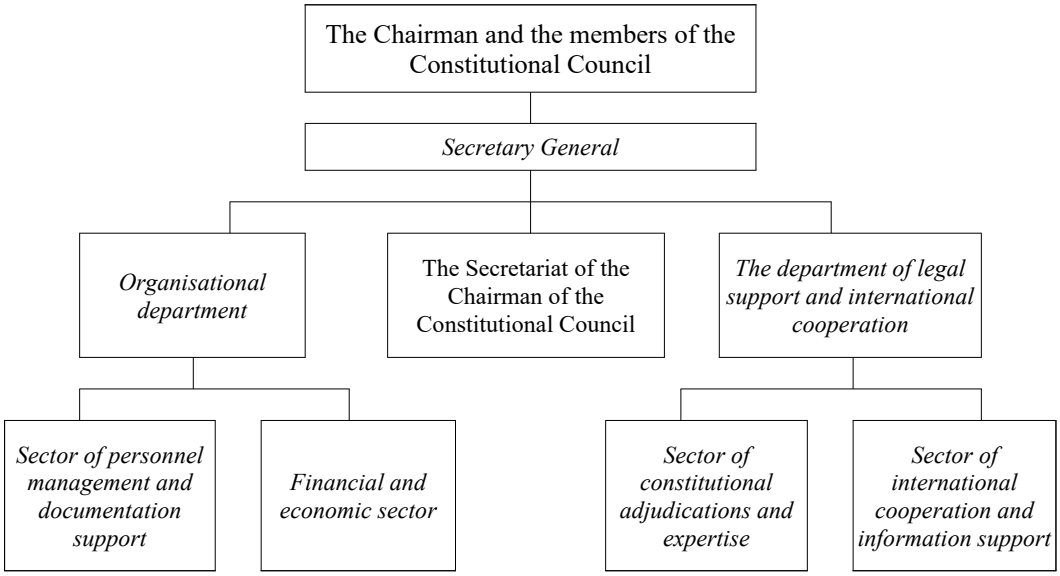
The figure of Constitutional rapporteur judges, present in the structure of the Constitutional Court of Korea, is unfamiliar for Kazakhstani model. They, on behalf of the President of the Constitutional Court, are engaged in investigation and research, review of documents on the initiated procedures of adjudication.

Also, the President of the Constitutional Court appoints the rapporteur judges based on the decision of the Council of Judges for a renewable 10-year term. There are significant eligibility requirements for them. As a rule, these are citizens who obtained a doctorate in law or engaged in legal affairs with qualified experience (judges, prosecutors, attorneys-at-law).

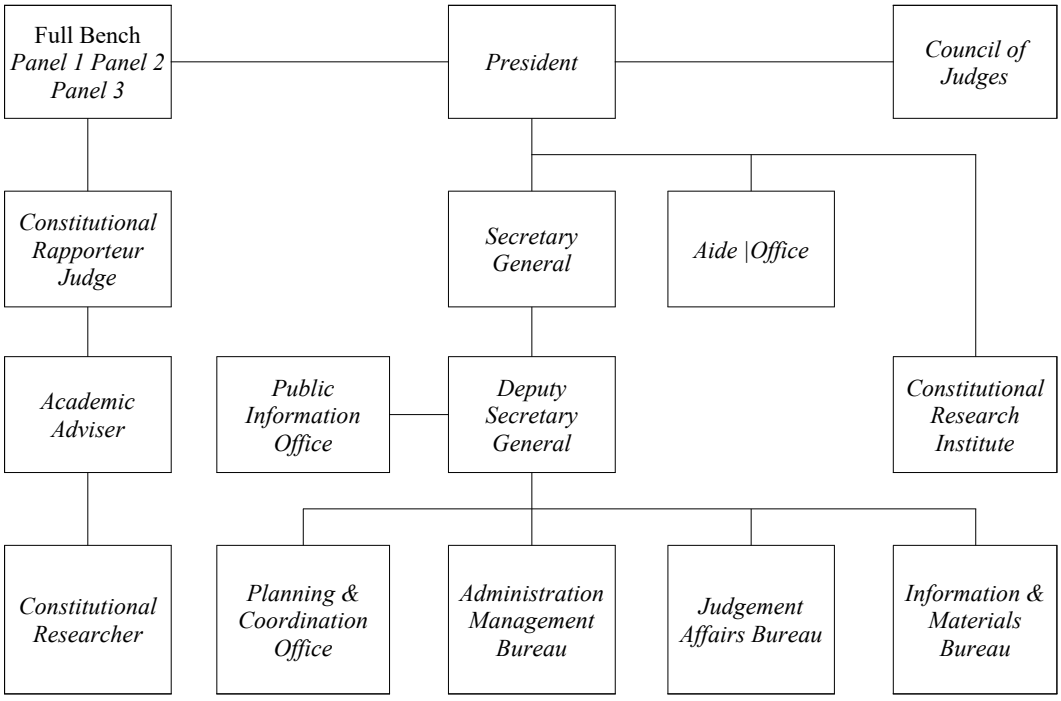
In addition to the rapporteur judges, there is a position of an academic advisor in the Korean Constitutional Court. They help in investigating critical issues of the case materials and preparing them for trial.

2) Council of Justices is replaced by Council of Judges for the integrity of meaning throughout the article.

The Structure of the Constitutional Council of the Republic of Kazakhstan



The Structure of the Constitutional Court of Korea



IV. Competency

The Constitutions of countries regulate the powers of both the Constitutional Council of Kazakhstan and the Constitutional Court of Korea. In general, they are typical of their types of models. At the same time, there are also distinctive features. For instance, Article 72 of the Constitution of the Republic defines the competency of the Constitutional Council of the Republic of Kazakhstan, according to which it:

1) decides in the event of a dispute the question of the correctness of election conduct of the President of the Republic, the deputies of Parliament and the conduct of a republican referendum;
2) considers, before they are signed by the President, the laws adopted by the Parliament for their compliance with the Constitution of the Republic;
3) considers, for compliance with the Constitution of the Republic, resolutions adopted by the Parliament and its Chambers;
4) gives an official interpretation of the norms of the Constitution;
5) gives conclusions on the compliance with the established constitutional procedures in case of premature release from office or dismissal of the President of the Republic;
6) The Constitutional Council examines the requests of the courts in cases when the court finds that the law or other normative legal act that will be applied violates the constitutional rights and freedoms of an individual and citizen.

Besides, the Constitutional Council annually sends to the Parliament a Report (Message) about the state of constitutional legality in the country.

In fact, the constitutional reforms conducted in the country played a significant role in the development of the Kazakhstani institution of constitutional adjudication.

In 2007, the decisions of the Parliament and its Chambers were included in the subject of the review of the Constitutional Council.

With this trend, in 2017, following the results of the constitutional reform, the range of competency of the Constitutional Council was expanded. The later constitutional adjudication was strengthened by giving the President the right to send requests to the Constitutional Council on considering the law or other legal act that came into force to follow the Constitution of the Republic.

This is done with the interests of protecting the rights and freedoms of an individual and a citizen, ensuring national security, sovereignty, and integrity of the state. Also, there has been introduced mandatory preliminary constitutional adjudication over the amendments to the Constitution of the country. They can be submitted to a republican referendum or for consideration by the Parliament of the Republic only if a positive conclusion is given by the Constitutional Council.

The Constitutional Law on the Constitutional Council has some additional powers of the Constitutional Council. They include the adoption of a decision on the interpretation of earlier adopted resolutions and the revision of their own decisions in case of a change in the norms of the

Constitution and the discovery of new circumstances significant for the subject of the request.

In contrast with the Constitutional Council of the Republic of Kazakhstan, the Constitutional Court of Korea does not exercise preliminary constitutional adjudication over laws before their promulgation. Such an adjudication is possible only after the entry into force of law.

The investigation of matters on the adjudication of laws with the Constitution takes place upon the request from courts or complaints from citizens.

Kazakhstan, as mentioned above, also uses the institution of adjudication of the constitutionality of laws upon the requests from courts. However, in Korea, the corresponding submissions of the lower courts are referred to the Constitutional Court through the Supreme Court (we have each court independently). According to the Constitutional Court Act, courts can make the requests for the adjudication on the constitutionality of law both by their initiative and upon the request of the parties (Article 41). The courts, in their petitions, requested in writing, indicate the law (norm), which they consider unconstitutional, the evidence to support such an opinion and other information and documents (materials).

The decision of the court to request from the Constitutional Court to adjudicate the constitutionality of the law is non-appealable.

Subsequently, the parties of the trial have all the rights to submit their written opinion on whether or not the law is unconstitutional to the Constitutional Court (Article 44).

Furthermore, we stick to the same approach when it comes to the suspension of adjudications. In the Constitutional Court of Korea, when the court of the first instance takes the initiative to adjudicate the constitutionality of the applicable law, the case is suspended until the Constitutional Court decides on the constitutionality of the law. However, if the case is urgent, the adjudications may continue, but the final decision may be postponed (Article 42). As for Kazakhstan, its Criminal Procedure Code also stipulates that the court, which applies to the Constitutional Council, suspends the adjudications. Other courts that consider similar cases make such a procedural decision upon the request of the parties. If there are no such requests, then the adjudications on the case continue, but the judgement is postponed until Constitutional Council makes a final decision.

Such a mechanism allows a flexible approach in each specific case, does not delay the trial, and at the same time does not violate the constitutional rights of citizens.

Another important institution in the Korean legal system is a constitutional complaint, divided in two. So, any person whose constitutional rights were violated due to the exercise or non-exercise of powers of authority can refer a constitutional complaint to the Constitutional Court. It is possible to use this after exhausting all tools considered in other laws.

The second type is unique and is used in the case when the court of the first instance refused to satisfy the request of the parties of the trial to request to the Constitutional Court. Having received such a refusal, the party has the right to independently send a constitutional complaint.

Both types of constitutional complaint are of great interest, and currently, we are studying them to improve further the legal framework of the Constitutional Council.

Moreover, the points of contact between the two constitutional bodies can be found in the exercise of their powers in the prosecution for impeachment.

Overall, impeachment is a legal procedure for the removal or dismissal of high-ranking officials and civil servants in a special position in case of violating the Constitution or laws.

According to Article 47 of the Constitution of Kazakhstan, the Constitutional Council can issue an opinion on following the established constitutional procedures in case of early dismissal of the President of the country (continued incapacity to perform the duties due to illness) or discharge from the office (high treason).

The officials, who fall under the impeachment by the Constitutional Court of Korea, includes not only the President but also several other officials: the Prime Minister, Members of the State Council, ministers, judges of the Constitutional Court, judges, Commissioners of the National Election Commission, the Chairperson of the Board of Audit and Inspection and Commissioners, and others.

We noticed that the Constitutional Court of Korea exercises some powers that the Constitutional Council of our country does not have. These are the cases about the adjudication of the dissolution of the political party and the adjudication on competence disputes.

In democratic states, everyone has the right to take part in politics and freedom to form political parties following their political convictions. However, if the purpose and the activities of a party contradict the foundations of a democratic order, the government has the right to demand that the Constitutional Court dissolves it.

The Constitutional Court resolves the disputes over competence between central state bodies; between the central state body and the local government; between local executive bodies.

On the other hand, the Constitutional Council of Kazakhstan also exercises some powers that are not vested in the Korean constitutional adjudicatory body. One of them is the official interpretation of the norms of the Constitution, which is the exclusive competence of the Council. However, even though this activity is not set directly in the Constitution, the Constitutional Court of Korea, when considering requests, conducts interpretive activities, revealing the semantics of constitutional provisions, and sometimes developing their content based on the spirit of the supreme legislative act. Today, the world recognizes the constitution as an evolving legal matter, which fits the concept of the so-called “living constitution”. The Constitution evolves and improves further by the introduced amendments, as well as the decisions of the constitutional adjudicatory bodies. So, the literature often quotes the words of Charles Evans Hughes, the two-time US Supreme Court judge – “The Constitution is what the judges say it is”.

The official explanation of the norms of the Constitution given by the Constitutional Council is mandatory for all subjects and leads to the corresponding legal consequences. To be precise, about half of all received requests are the requests for the official interpretation form.

The Constitutional Council with its resolution from December 13, 2001, No.19/2, highlighted that the official interpretation of the norms of the Constitution is the establishment and explanation of the content and meaning of the constitutional norms by the Constitutional Council. This procedure is essential due to the specific terminological characteristics of some of them, and the uncertainty in the perception of certain provisions of the Constitution by the subjects of request, as well as the contradictions in their practical application. Whilst conducting the official interpretation

of the norms of the Constitution, the Constitutional Council is independent and subordinate only to the Constitution. Owing to the right to give an official interpretation of the norms of the Constitution, the decisions of the Constitutional Council receive the legal force, equal to the legal force of those norms that have become the subject of its interpretation.

The distinctive features of the Kazakhstani constitutional adjudicatory body are also the consideration of international treaties for compliance with the Constitution before their ratification by the Parliament, as well as the decisions about the correctness of the elections of the President, deputies of the Parliament and a republican referendum, in case of a dispute.

V. Constitutional Adjudications

The consideration of cases in our bodies follows constitutional adjudications. It has certain stages, legalized by the Constitution, the Constitutional Law on the body and its regulations.

The Constitutional Law on the Constitutional Council of the RK in the chapter "Constitutional adjudications" includes the norms that characterize the participants of the constitutional adjudications, their rights and obligations, the form and content of the request to the Constitutional Council, the terms of consideration of requests, the procedures for considering requests and the termination of the constitutional adjudications. The Regulations of the Constitutional Council have comprehensive descriptions of the procedural actions performed by the Council.

The Constitution also regulates the categories of the subjects of request to the Constitutional Council. These categories include:

1) the President of the Republic;
2) the Chairperson of the Senate of the Parliament;
3) the Chairperson of the Mazhilis of the Parliament;
4) the deputies of the Parliament of at least one-fifth of their total number;
5) the Prime Minister;
6) the courts of the Republic.

In the Republic of Korea, the Constitutional Court Act regulates these issues, which defines as the subjects of request in the following cases:

A) in cases of the adjudication of the constitutionality of laws - the courts (their request or upon the request of the parties) and citizens by writing a constitutional complaint;
B) in cases of the adjudication on the impeachment of officials - the prosecution commissioner, who is the Chairperson of the Legislation and Judiciary Committee of the National Assembly;
C) in cases of the adjudication of the dissolution of political parties - the Government after discussing this issue in the State Council;
D) in cases of the adjudication on jurisdiction disputes on competency - a State agency and local governments.

The requests to the Constitutional Council of RK, as well as to the Constitutional Court of Korea, must be submitted as the written requests and must contain certain details. The failure to follow these requirements may lead to the refusal to accept the request for adjudications.

Our bodies consider requests, as a rule, in full court (a full bench in the Constitutional Court of Korea). We also use both oral pleadings and paper hearing.

The Constitutional Council of Kazakhstan has full authority to consider the requests without inviting the participants to the constitutional adjudications and holding the hearings. The Constitutional Council uses this rule only when it concludes that the matter can be resolved based on legal reasoning covered in the previously adopted normative resolutions of the Council.

In the Korean Constitutional Court, the adjudication on impeachment, the dissolution of a political party, and jurisdiction disputes are conducted through oral pleadings. The adjudication on the constitutionality of a law and a constitutional complaint is conducted through paper hearing. If it is deemed necessary, the full bench may hold oral pleadings, and hear the statements of parties.

Besides, the development of digital technologies affected the activities of constitutional adjudicatory bodies. Most countries, including Korea, created digital resources that allow submitting requests and performing adjudications in the electronic form. This system proved its efficiency, especially, today, when we face the coronavirus pandemic.

For instance, chapter 5 of the Constitutional Court Act of Korea considers the performance of the adjudication through the electronic data processing system. Subsequently, according to the regulations, a party or relevant person in various procedures of adjudication may make a written claim or submit other necessary documents in an electronic form, deploying information and communication networks. Any submitted electronic document has the same validity as a written document. Then, to verify its authenticity, a party or an interested person must electronically sign the electronic document submitted to the Constitutional Court. The Constitutional Court may service a written decision or various document to the party or a related person by deploying the electronic data processing system and information and communications network.

As for Kazakhstan, because of new requirements and challenges, the Constitutional Council of the RK in its regulations also highlights that the constitutional adjudications, fully or partly, can be conducted electronically, based on the resolution. Thereby, all the acts and the actions of the Constitutional Council and its officials, the participants of the constitutional adjudications transform to electronic documents, affixed with the electronic digital signature, by deploying information and communication technologies (hereinafter referred to as ICT) and by creating an electronic record. If required by the Constitutional Council, the participants of the constitutional adjudications, their representatives, as well as experts, specialists, interpreters, and other individuals may join the meetings of the Council by deploying ICT. The Administration of the Constitutional Council defines the procedures of deploying ICT during constitutional adjudications by following the requirements of the Constitutional Law, the Regulations of the Council, and the legislation of the Republic of Kazakhstan.

Also, for comparative reasons, it is worth mentioning the quorum required for the adjudication.

The Constitutional Council of the RK applies collective decision-making by the majority of

votes out of the total number of its members by open ballot, and if requested at least by one member of the Constitutional Council - by secret ballot. In case of an equal split of votes when adopting a decision of the Constitutional Council members, the vote of the Chairman of the Constitutional Council is pivotal, who in any cases casts his/her vote last.

In the Korean Constitutional Court, the full bench will try a case with the attendance of seven or more judges. This Quorum decides on a case with the affirmative vote of most judges. However, the affirmative vote of six or more judges is needed in any of the following cases:

1) where it makes a decision of acceptance on the unconstitutionality of a law, impeachment, dissolution of a political party or acceptance of a constitutional complaint;
2) where it changes an opinion on the interpretation and application of the Constitution or laws previously declared by the Constitutional Court.

As for the deadlines for pronouncing the final decision, the Constitutional Council of the RK performs that within one month, while the Constitutional Court of Korea within 180 days as they receive the case for adjudication.

VI. Research Activities as a Crucial Tool for Enhancing the Efficiency of the Constitutional Adjudication

Both the Constitutional Council of the Republic of Kazakhstan and the Constitutional Court of the Republic of Korea pay considerable attention to the issues of research support in the implementation of their powers.

The development dynamics of legal systems of contemporary states, the growth of globalization and the increase of challenges set new targets for the constitutional adjudicatory bodies. So, to solve them, we all understand that we need to apply significant research and evidence-based methodological support.

Thereby, the constitutional adjudicatory bodies of numerous countries develop research-based advisory structures that they use to closely interact with the research and other interested organizations. Their primary responsibility is ensuring scientific assistance to the constitutional adjudicatory body, while their functions are to develop and submit research-study-based recommendations on specific legal matters.

In 2018, Kazakhstan set up the Scientific Advisory Council within the Constitutional Council of Kazakhstan. Serving as consultants and advisors, the Scientific Advisory Council promotes research support for performing constitutional adjudication and ensuring the rule of the Constitution. The members of this council are well-known legal professionals of the country who contributed significantly to set up and develop the constitutional basics of the state. This institute contributes highly to resolving practical issues that the Constitutional Council faces, using research

and studies as well as international experience.

The Scientific Advisory Council meets several times a year. Their agenda includes crucial issues about constitutional and legal development. Since its establishment, this institutional structure considered such issues like the rule of law, balance, and integrity while restricting the rights of citizens, constitutional monitoring, constitutional identity, constitutional security, constitutional economics, and others. All the recommendations and proposals are serviced to authorized state bodies and further posted on the official website of the Constitutional Council. These data are useful as Kazakhstani law schools and researchers use them constantly.

As for the Constitutional Court of Korea, it has Advisory (hereinafter referred to as CRI), set up on January 1, 2011. In 2021, it celebrates its 10th anniversary. CRI approached its anniversary with impressive achievements. Over the years, it has become a recognized centre for studying and researching innovative ideas in the field of constitutional and legal policy.

CRI conducts research and undertakes studies on the Constitution and constitutional adjudication from a mid-to a long-term perspective, through which it explores the ways of improving the Constitution and constitutional adjudication that best suit the South Korean society. An important task of CRI is to raise public awareness about the fundamental rights of citizens, using education and training programs for the public employees, legal professionals, law school students, government officials, and others.

The organizational structure of CRI includes the President, the Research and Instruction Department (wherein Institution Research Team, Basic Rights Research Team, Comparative Constitutional Law Research Team, Instruction Team) and Planning and Administration Division that manages the administrative work of the Institute.

The President of the Constitutional Court of Korea, following the decision of the Council of Judges, appoints a rapporteur judge or a first-rank civil servant as the President of CRI.

The thoroughness of the annual research programs implemented by CRI also worth mentioning. For instance, in 2019, the constitutional research performance focused on the following issues: adjudication of the legislative process concerning the precedents of the European Court of Human Rights and the Court of Justice of the European Union; fake news; freedom of movement in the French Constitution; the legal status of North Korean people; adjudication of statutes and transitional arrangements by the German Federal Constitutional Court; public welfare in the Japanese Constitution; state crime against human rights, and other essential studies. All programs implemented by CRI over the years are up-to-date, effective, and practical.

CRI has the largest public law library in South Korea. This library is a repository of rich resources for research and education on the Constitution and constitutional adjudication. The library also preserves the diverse materials and resources necessary for research and education.

CRI publishes its results and findings of research as research reports, while the Constitutional Council of the RK publishes them in its Bulletin, issued twice a year and disseminated within the country and abroad.

Moreover, both the Constitutional Council of the RK and CRI are promoting the constitutional spirit and values and improving the legal culture of society.

The primordial aim of all the measures that our institutions perform is developing the culture of the rule of the law and nation-wide law-abidance.

For example, the Constitutional Council of the RK, within the framework of the national project "Rukhani Zhangyru" (translated as Spiritual Revival), is working on the modernization of the constitutional culture of our citizens as a part of awakening public consciousness.

Thereby, there are regular issuing of the comments to the Constitution of the Republic of Kazakhstan and targeted measures to educate the students to understand the legal culture (by organizing contests, business simulation games, meetings, open door days, invitations to hearings, and others)

Overall, as the Constitutional Council of the RK emphasizes, the purpose of this activity is to cover a new generation capable to encapsulate the current national legal traditions of a democratic, secular, legal and social state, the highest values of which are an individual, his/her life, rights, and freedoms, as well as to acknowledge the Kazakhstani constitutional identity signified in unchanging constitutional values.

We know that CRI is implementing similar programs among legal professionals, government officials, secondary school and college students, schoolteachers, and others.

Besides, CRI also performed fruitful work about publishing specialized legal literature on constitutional topics. In fact, we issue publications too, periodically congregating the activities of the Constitutional Council of the RK and systematizing the most important decisions on legal issues and further ways to strengthen the basics of the constitutional order and statehood. These data are accessible through the website of the state body in the "Electronic Library" section.

VII. Separate Decisions on the Protection of Constitutional Rights and Freedoms of an Individual and Citizen

While comparing the legal activities of our bodies, it is important to consider the practical aspects of the constitutional adjudication. Mostly, it relates to the nature of human rights and the prevention of violation of the citizens' constitutional rights. The analysis shows that our Korean colleagues were also studying similar issues. Further, I will discuss a few of them.

1. The Death Penalty

Every person has an absolute right to life, secured across all universal international agreements and treaties.

Since its independence, Kazakhstan is abolishing the death penalty step-by-step. The dynamics of changes in the relevant legislation is proof of this process.

The Penal Code of the Kazakh SSR, with its amendments and additions as of September 1, 1986,

had the death penalty for 34 categories of crimes.

In the early 90s of the XX century, certain legislative measures helped exclude the death penalty from the penal part of Article that regulates the responsibility for financial and other non-violent crimes.

The current Constitution of the Republic of Kazakhstan (Article 15), until mid-2007, used the death penalty only to most serious crimes.

On December 17, 2003, the Decree of the President of the Republic of Kazakhstan officially suspended the use of the death penalty in the Republic of Kazakhstan until the final decision about its abolition. In the meantime, on January 1, 2004, the provisions of the Penal Code of the Republic of Kazakhstan on punishment introduced life imprisonment as an alternative to the death penalty.

In 2003, the Constitutional Council of the RK introduced the amendments to the paragraph 2 of Article 15 of the Constitution concerning the death penalty and limited the exceptional measures of punishment by using them against most serious crimes but not against the crimes of other categories of severity. The criminal law defines the constituent elements of most serious crimes that fall under the death penalty. At the same time, the criminal law regulates other punishments for most serious crimes apart from the death penalty. These legal positions formed the basis for further improvement of the criminal law.

The constitutional reform of Kazakhstan from May 2007 restricted the scope of exceptional punishment. If previously, the Constitution allowed the use of death penalty for all most serious crimes, since 2007 this became possible only for terrorist crimes involving the death of people, as well as for most serious crimes committed in wartime, with giving the sentenced person the right to seek pardon. So, responding to the threats of the 21st century, Kazakhstan equated terrorist crimes involving the death of people to most serious crimes committed in wartime.

Recently, on September 23, 2020, Kazakhstan signed the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. According to Article 2 of the Optional Protocol, no reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war under a conviction for a most serious crime of a military nature committed during wartime. Currently, the Parliament of Kazakhstan is working on the ratification of this international act.

In this regard, at the request of the President of the Republic of Kazakhstan, the Constitutional Council in December 2020 gave an official interpretation to the provisions of the Constitution of the Republic regulating the use of the death penalty.

The Council noted, that according to the Constitution and universally recognized international acts, the right to life is a fundamental value of a democratic society and the State is obliged to guarantee the exercise of this right for all people.

As an equal member of the international community, Kazakhstan has, from the outset, taken into account the trend towards the abolition of the death penalty in its criminal legislation, and over the years a stable legal regime for the non-use of capital punishment has been formed in the country.

The Council indicated that the ratification of the international treaty on the abolition of the death

penalty falls within the competence of the Parliament of the Republic. The Basic Law, however, leaves the question of establishing or refusing the death penalty in the criminal law for these crimes, narrowing their circle, to the discretion of Parliament. The legislator may abolish the death penalty not only by making appropriate amendments to national legislation, but also by ratification an international treaty providing for the abolition or limitation of crimes, for which this type of punishment can be established.

Thereby, studying the practice of the Constitutional Court of Korea was of great interest for us.

In 1996, the Constitutional Court of Korea confirmed the constitutionality of the death penalty (two judges claimed the unconstitutionality of this type of capital punishment), restricting the use of the death penalty for limited cases, for example, when endangering the life of an individual.

Thereby, the Constitutional Court declared that the provisions for the Criminal Act, which regulates the death penalty for murdering a person, and the Sexual Violence Prevention and Victims Protection Act, which enforces the death penalty for sexual violence, do not violate the Constitution of the country.

The Korean colleagues pointed out critical arguments to support their decision:

- the death penalty is a punishment that invades the legitimate interests of the offender much more than life imprisonment, and it has a way stronger deterrent effect than imprisonment;
- in the case of most serious crimes, sentencing to life imprisonment does not ensure the proportionality of the offender's responsibility for the severity of the offence and does not encounter the sense of justice for the victim's family and the public;
- the death penalty, applied restrictively only for most serious crimes such as committing violent murder of several people, cannot be considered as an excessive punishment as compared to the severity of the crime.

2. Freedom of Expression

As underlined in Article 19 of the Universal Declaration of Human Rights, everyone has the right to freedom of opinion and expression. So, along with freedom of information and freedom of the press, freedom of expression creates favourable conditions for the exercise of all other rights.

The Constitution of the Republic of Kazakhstan also guarantees freedom of speech (paragraphs 1 and 2 of Article 20), which, along with the right to freely receive and disseminate information, presumes freedom of expression.

There is a definite obligation for state bodies, public associations, officials, and the media to provide every citizen with the opportunity to get acquainted with documents, decisions, and sources of information, affecting his/her rights and interests.

Thereby, the Constitutional Council of the RK in its normative resolution from May 18, 2015, No.3, highlighted that "according to paragraphs 2 and 3 of Article 20 of the Constitution, everyone has the right to freely receive and disseminate information in any means not prohibited by law. At the same time, propaganda, or agitation for the forcible change of the constitutional system,

violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, and clannish superiority as well as the cult of cruelty and violence, shall not be allowed".

Besides, in its resolution "On checking the Law of the Republic of Kazakhstan "On the Mass Media" for compliance with the Constitution of the Republic of Kazakhstan" from April 21, 2004, No.4, the Constitutional Council of the RK emphasized that "paragraph 1 of Article 20 of the Constitution of the Republic guarantees freedom of speech and creativity, which implies the right to the expression of opinions, views, beliefs, ideas in various kinds and forms, including through the mass media. The implementation of these constitutional provisions is ensured by the law, which regulates the legal ability of everyone to receive and disseminate information by any lawful means, as well as the prohibition of censorship (paragraphs 1 and 2 of Article 20 of the Constitution).

Then in its normative resolution "On the adjudication of the constitutionality of parts one and four of Article 361 of the Penal Code of the Republic of Kazakhstan upon the request of the Kapshagai city Court of the Almaty Region" from February 27, 2008,
No.2, the Constitutional Council stressed that "The Constitution of the Republic proclaims and guarantees freedom of speech (paragraphs 1 and 2 of Article 20), which, along with the right to freely receive and disseminate information, denotes freedom of expression".

Hence, the Constitutional Council concluded that "the acts of self-harm of prisoners can be a form of expressing their opinion (protest) and can be considered as a form of protecting own rights by individuals deprived of liberty. In such cases, the prosecution for self-harm must be regarded as a violation of the right to freedom of opinion, which is an integral part of freedom of expression guaranteed, by Article 20 of the Constitution".

As for the Constitutional Court of Korea, it has several decisions that express legal positions on various aspects of the right to freedom of expression.

For instance, concerning the authentication case of a person's name on the Internet, the Constitutional Court decided that the provisions set by the "Act on Promotion of Information and Communications Network Utilization and Information Protection" about a person's real-name registration on the Internet, requiring the users of Internet forums to prove their identity, is unconstitutional.

The purpose of the real-name registration system was to create a healthy Internet culture by decreasing illegal activities such as defamation of others on Internet forums and threats to basic data protection.

So, as the Court pointed out if a person is harmed due to illegal information posted in the public domain, the identity of the attacker uploading this illegal information is authenticated by tracking or verifying web addresses. Besides, a victim can be protected by blocking the dissemination of such information, by removing it or by temporary measures of a service provider that may restrict the operator to process illegal information, or by paying off the compensation after committing a crime or applying criminal punishment.

The Korean Constitutional Court declares that freedom of expression is one of the basic constitutional values that strengthen democracy. Thus, the limitation of this freedom is possible

only when if public interests are satisfied. However, even in this case, there is no evidence that the introduction of the real-name registration system will significantly decrease the publication of illegal information, including defamatory information.

Another example is the case of registration of periodicals. The Constitutional Court decided that requiring the publisher of a registered periodical to "deliver copies" following the procedures of the Periodicals Act was unconstitutional since they were interpreted as requiring the proof of the publisher's property rights. According to the Court's decision, freedom of speech and press in the Constitution protects the methods and the contents of essential and inherent manifestation of that freedom but does not protect the objects needed to materialize such expression or the business activities of the entrepreneur controlling the media. The registration is not needed for formulating and presenting views, nor for gathering and disseminating information - the substantive freedom of the press - but is required of the business entity and the facilities that are the means of reporting and periodicals publication. They can be required to be registered without infringing the essential content of freedom of speech and press. However, requiring proof of ownership of the printing facilities as a precondition of registration is too stringent to be constitutional. The printing facilities can be procured by rent or lease.

Then, finally, concerning the case of the motion's picture rating, according to which, all films were subject to the preliminary rating by an administrative body, the Constitutional Court issued the decision of unconstitutionality. The Court judged this case as a violation of the constitutional provision on no-censorship, which is also set up in Kazakhstan.

3. The Rights of the Arrested and Prisoners

Within the legal system positions of our bodies, we have decisions that cover the rights of citizens, arrested, or imprisoned for criminal offences.

The Constitutional Council in its normative resolution from February 27, 2008, No.2, highlights that individuals, deprived of their liberty in Kazakhstan, enjoy all the rights and freedoms guaranteed by the Constitution and international legal documents recognized by the Republic, considering the inevitable restrictions for those isolated from society, which corresponds with the international human rights standards. According to Article 5 of the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by the resolution 45/111 of the United Nations General Assembly from December 14, 1990, except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other United Nations covenants.

In Kazakhstan, among the most important human and civil rights is the right that human dignity is inviolable (paragraph 1 of Article 17 of the Constitution of the Republic), which are not subject to the limitation in any case (paragraph 3 of Article 39 of the Constitution). According to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the resolution 3452 (XXX) of the

United Nations General Assembly from December 9, 1975, any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and denies the purposes of the Charter of the United Nations and violates the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. Thereby, the Constitution of the Republic of Kazakhstan prohibits subjecting human dignity of a person to torture, violence, other cruel or degrading treatment or punishment (paragraph 2 of Article 17 of the Constitution of the Republic), which proves that the right to the inviolability of human dignity covers the individuals, arrested, or imprisoned in the places of deprivation of liberty.

Previously the Constitutional Council of the RK had expressed its position on the issue of depriving the voting rights of the arrested or prisoners. Within its normative resolution from April 9, 2004, No.5, the Council stressed that the requirements of the Constitution for the citizens of the country, exercising passive suffrage, are much higher than for the rest most voters, since they must bear the burden of legislation and government decisions. Citizens who have been judged incapable by a court, as well as imprisoned upon a court's sentence, do not have any right to elect and be elected and to take part in the all-nation referendum (paragraph 3 of Article 33 of the Constitution of the Republic). The Constitutional Council declared that the requirement about a candidate not to have a conviction, which is not cancelled or not removed by the time of registration, is constitutional. The fact that a criminal record has been removed or cancelled following the procedure set up by the law should not interfere with the right of a citizen to elect or be elected.

The decisions of the Constitutional Court of Korea also involve the issues of granting or depriving the voting rights of the prisoners. Following the case on restricting the prisoner's right to vote, the Court clarified that elections are the most important path through which the sovereign people exercise their sovereignty in a participatory democracy. By exercising the right to vote in elections, the people ensure the democratic legitimacy of state power, achieved by-election, and the exercise of their state powers. Therefore, the legislative body must adopt the laws that guarantee the rights to vote to the maximum level, while the Constitutional Court must scrutinize the constitutionality of laws that violate the rights to vote.

Moreover, the Constitutional Court ruled that restricting the rights to vote of probationers with suspended sentence violates the Constitution. The Court underlines that probationers are people, sentenced to imprisonment, but whose execution of the sentence is suspended for a period of one to five years. So, unless the execution of sentences is invalidated or cancelled, they will not be incarcerated in correctional institutions, leading the same life as other ordinary citizens. Therefore, the necessity to restrict their right to vote does not seem clear. Thereby, the provisions on restricting the rights to vote of probationers with suspended sentences violate the rule against excessive restrictions and the right to vote. Even though it is necessary to restrict criminal's right to vote, blanket restriction on both prisoners and probationer with suspended sentences, without considering the gravity of illegality of crimes committed by each of them, is contrary to the least restrictive requirement.

Besides, the decisions of the Constitutional Court of Korea on certain aspects of the administration of criminal justice played a significant role in improving the law enforcement

system of the country. For example, in the case of interfering with an attorney's visit to the client, the Court ruled it as unconstitutional and cancelled the law that allowed investigators and officers of correctional institutions to attend their meeting, listen and record a conversation between the defendant (suspect, client) and his/her attorney, since these activities violate the essence of the constitutionally of the guaranteed right to an attorney of a defendant. Another example is the case of the defendant's access to the criminal investigation records, the Constitutional Court ruled that the prosecutor's refusal to grant the defendant's attorney the access to his/her criminal investigation records for no reasonable cause as unconstitutional, because the refusal infringes upon his/her rights to a speedy and fair trial and the right to attorney's/counsel's assistance.

4. The Right to Personal Liberty

The right to personal liberty is one of the most fundamental human rights. It belongs to everyone from birth as it is absolute and indisputable. Its limitation is possible only in cases explicitly set up by the Constitution and laws.

According to paragraphs 2 and 3 of Article 16 of the Constitution of Kazakhstan, the arrest and detention are allowed only in cases stipulated by law and only with the sanction of a court granting the arrested person the right to request. Without the authorization of the court, a person can be detained for a period of not more than seventy-two hours. Then every person detained, arrested, and accused of committing a crime should have the right to attorney's (defender's) assistance from the moment of detention, arrest or accusation.

In 2012, the Constitutional Council judged the request of the Prime Minister of the country to give an official interpretation about the norms of the Constitution that regulate the issues of calculating the constitutional terms of detention of citizens, suspected of committing offences.

The Constitutional Council clarified that "detention" from the constitutional and legal sense means the enforcement action with a short-term, not more than seventy-two hours, restriction of an individual's personal liberty to suppress crimes or ensure the proper conduct of criminal, civil and administrative prosecutions, as well as to apply other measures of a compulsory nature, and carried out by authorized state bodies, officials and other persons on the basis and in the manner prescribed by the law.

The constitutional provision that "without the authorization of the court, a person can be detained for a period of not more than seventy-two hours" means that the court's decision falls within the scope of the specified time, but not later than seventy-two hours, until the court makes the decision on whether to apply the arrest or imprisonment, or apply other measures provided by the law, or release the detainee. Also, the Constitutional Council emphasizes that the legislator can take less time, within seventy-two hours, to make a proper decision. The detention period is the hour, accurate to the minute, when the detainee's liberty was restricted, including freedom of movement - compulsory detention in a certain place, compulsory attendance and investigation (seizure, closure in a premise, when forced to go somewhere or remain in place, and others), and when any other actions that significantly restrict the individual's liberty become real, no matter whether the

detainee received any procedural status or any other formal procedures were performed. The constitutional term of detention expires as seventy-two hours end, which is calculated continuously from the time of the actual detention (the normative resolution of the Constitutional Council of the Republic of Kazakhstan from April 13, 2012, No.2).

The Constitutional Court of Korea also faced such questions throughout their activities. For example, in 1992, when considering a case on the restriction on the judge's discretion in releasing defendants of serious crimes, the Constitutional Court pointed out that all people have the right to personal liberty. If it becomes restricted, then the due process of law and the general rules of law concerning the restrictions on fundamental rights are necessary to ensure that such restriction is imposed to the minimum extent. Consequently, a judge or court, after issuing an arrest warrant, must cancel it, willingly, or upon party's request, at once at any stage of the criminal procedure whenever they find that the causes of arrest did not exist or no longer exist. Therefore, the provision, according to which, the continuing validity of a warrant depends on a prosecutor's decision violates the due process of law guaranteed by the Constitution.

In the other case about detainees' mandatory wearing of uniforms, the Constitutional Court ruled that requiring detainees on trial or appeal to wear inmate uniforms violates their rights to the presumption of innocence, human dignity, and the right to a fair trial. Besides, in the case on overcrowded detention centres, the Constitutional Court held that the act of confining convicted prisoners in detention centre rooms that do not provide the minimum space required by a person to meet the basic human needs infringes upon human dignity and violates the Constitution.

5. Protection of Family Rights

In any country, the family is the main unit of society. Such concepts as marriage, motherhood, fatherhood, and childhood evolve around this institution.

According to the Constitution of Kazakhstan, the state protects motherhood, and childhood, as well as marriage, family, and fatherhood (paragraph 1 of Article 27 of the Constitution of the Republic). Also, taking care of children and bringing them up is a natural right and duty of parents (paragraph 2 of Article 27 of the Constitution of the Republic).

The Constitutional Council in its normative resolution from May 18, 2015, No.3, explained that these provisions of the Constitution serve as the foundation for the socio-economic, political, and legal principles of a comprehensive child protection system, which is an unwavering constitutional value, to strengthen further and regulate the special legal status of children in sectoral legislation, their rights and freedoms, the guarantee of their implementation.

The violation of the rights of the child contradicts the very nature of this social value. The state must secure all the measures to create conditions that guarantee the full physical, moral, spiritual, and mental development of children. Due to the natural laws of nature during pregnancy and during the first years of children's lives, there is no way to consider the interests of the child separate from his/her mother. The mother of a child is a child's main guarantor during these periods, who can satisfy the child's initial life needs, and for the mother the child's needs are vital and thus, she aims

all her efforts to guarantee proper care. At this critical stage, it is necessary to ensure adequate protection of the rights and legitimate interests of mothers and children (the normative resolution of the Constitutional Council of the Republic of Kazakhstan from April 10, 2018, No.3).

These legal positions of the Council form the backbone of matrimonial legislation of Kazakhstan.

The Korean Constitutional Court has also made a significant contribution to modernize the state family support system and all the values mentioned above.

For example, in the case on the same-surname-same-origin marriage ban, the Constitutional Court of Korea delivered a decision that the provision of the Civil Code that did not allow the marriage between citizens with the same surname, regardless of the degree of their kinship, violates the Constitution. According to the Court, this rule is in direct conflict with the constitutional ideas on human dignity and the right to pursue happiness, as well as with the provisions of the Constitution, which call for the establishment and maintenance of marriage and family life based on individual dignity and gender equality.

VIII. General International Relations of Bodies

1. Collaboration within the Association of Asian Constitutional Courts and Equivalent Institutions

The Association of Asian Constitutional Courts and Equivalent Institutions (AACC) is a regional forum of Asian constitutional adjudicatory bodies, created to promote the common values of humankind such as democracy, the rule of law and fundamental human rights and freedoms. The Korean Constitutional Court has played an active role in the implementation of this idea.

In fact, the idea of creating such a structure on the Asian continent was first designed at the 3rd Conference of Asian Constitutional Court Judges (CACCJ), held in Ulaanbaatar, Mongolia, in 2005. Later at the 5th CACCJ, organized in Seoul, Korea, in 2007, the respective institutions of Indonesia, Korea, Mongolia and the Philippines signed a Memorandum of Understanding forming a preparatory committee for its implementation. Afterwards, the preparatory committee held four meetings in Seoul, Korea, between 2008 and 2010, to discuss the model of the Association, the draft of its Statute and other relevant issues.

On July 12, 2010, in Jakarta, Indonesia, the heads of constitutional/federal courts and equivalent institutions of Indonesia, Korea, Malaysia, Mongolia, Thailand, Uzbekistan, and the Philippines took part at the end-of-meeting, where “the Declaration of Jakarta” on the Establishment of the Association of Asian Constitutional Courts and Equivalent Bodies and its Statute (Charter) was adopted.

According to Article 2 of its Statutes, AACC acts as “an autonomous, independent, and non-political body”. Its functions are to hold regular meetings among its Members, organize symposia, seminars, and workshops, facilitate and promote the exchange of experiences related to

constitutional justice cases, the working methods, institutional, structural, and procedural issues related to public law and constitutional authority, as well as to provide technical and expert advice assistance in considering received requests.

The first inaugural congress of AACC with the theme "The Present and the Future of the Constitutional Justice in Asia" was also held in Seoul in 2012. The Kazakhstani delegation took part in it as an observer. Congress ensured an opportunity to exchange opinions and views, and improve relations between constitutional jurisdictions, regional and linguistic groups, invited from all continents.

Since 2013, the Constitutional Council of Kazakhstan has become an official member of AACC.

Currently, there are 19 states within AACC: Azerbaijan, Afghanistan, Bangladesh, Indonesia, Kazakhstan, The Republic of Korea, Kyrgyz Republic, Malaysia, Mongolia, Myanmar, Pakistan, Russia, the Philippines, Tajikistan, Thailand, Turkey, Uzbekistan, Maldives, and India.

Over the years, AACC was chaired by the Constitutional Courts of Korea, Turkey, Indonesia, Thailand as well as the Federal Court of Malaysia.

At the meeting of AACC secretaries and board of Members, held on November 3, 2019, in Bali (Indonesia), the Constitutional Council of Kazakhstan was elected respectively as the next President of AACC between 2019 and 2021.

As part of our presidency, on August 27, 2020, for the first time, we held online, the 4th Congress of the Association on the topic "The XXI Century Constitution – The Rule of Law, The Value of Person and The Effectiveness of the State". Those who joined the Congress were the President of the Republic of Kazakhstan, AACC board of Members, heads of state structures of Kazakhstan, representatives of authoritative international organizations, constitutional adjudicatory bodies of foreign countries, as well as well-known legal scholars.

High-ranking legal professionals from all over the world discussed topical issues of further constitutional and legal development, including those related to the Coronavirus pandemic. They represented such international structures as the OSCE, the Council of Europe, the Venice Commission, the World Conference on Constitutional Justice, the EAEU Court, the German Foundation for International Legal Cooperation, the German Society for International Cooperation, and others. The list of speakers included the heads of the constitutional adjudicatory bodies of Azerbaijan, Afghanistan, Armenia, Belarus, Bulgaria, Germany, Georgia, India, Indonesia, Korea, Kyrgyzstan, Latvia, Malaysia, Maldives, Mexico, Myanmar, Moldova, Mongolia, Pakistan, Poland, Russia, Tajikistan, Thailand, Turkey, Uzbekistan, and Ukraine. The Congress culminated with the adoption of the Nur-Sultan Declaration (from August 30, 2020).

Besides, according to Article 22 of the Statute, the activities of AACC are provided by the Secretariat. The Secretariat of AACC consists of:

1) The Host Secretariat (now in Kazakhstan)
2) The Permanent Secretariat, which consists of the following units, performing the next functions:

The Secretariat for Planning and Coordination (The Republic of Indonesia)	The Secretariat for Research and Development (The Republic of Korea)	The Center for Training and Human Resources Development (The Republic of Turkey)
⬇	⬇	⬇
FUNCTIONS		
Rendering protocol and administrative support to the Association and its Members;	Planning, conducting, and coordinating joint research activities among Members and with third parties;	Conducting training programs, including summer school, workshops, and similar programs within the framework of the Association;
Encouraging and giving support to the Association in the conduct of relations with international organizations and forums, and other external parties;	Conducting studies and formulation of proposals for research activities in the sphere of constitutional justice;	Providing educational materials to the staff of the Members;
Coordinating activities for the development of human resources, the exchange of human resources, scholarships, and internships, excluding activities of the Center for Training and Human Resource Development;	Publishing an international journal on the outcome of the research activities conducted;	Coordinating the participation of expert staff of the Members in training activities organized by the Center for Training and Human Resources Development.
Planning and coordinating financial matters concerning the activities of the Association.	Constructing and managing a database of profiles and key decisions of Members;	
	Conducting research and development activities for the promotion of constitutionalism;	
	Organizing international conferences, seminars and forums at Justice/Judge level and researcher level on research themes chosen.	

Also, I want to highlight the productive work of the Secretariat for Research and Development, based in Seoul, and supported by the Constitutional Court of Korea. It has become a powerful centre for the research and comparative analysis of our constitutional and legal systems. The Secretariat office, its staff and facilities preserve standards highly and therefore, allow solving challenging issues. The organized conferences, seminars and meetings covered topical issues of common interest. In 2020, my colleagues took part in the 2nd Research Conference online, discussing the topic "Freedom of expression: the experience of AACC Members. The books and other literature published based on the results of the conference contributed to the library funds of many courts and everyday practice of all stakeholders. Overall, AACC is developing dynamically and allows its Members to jointly seek the ways of solving shared problems in constitutional and legal adjudications.

2. Cooperation within the Framework of the Venice Commission of the Council of Europe and the World Conference on Constitutional Justice

Both the Republic of Kazakhstan and the Republic of Korea rely on national and advanced global practice and commonly recognized international standards to advance their legal systems further. Over the years, our countries have joined several universal international treaties on the protection of human rights and recognized the jurisdiction of many international institutions operating in this area. They contribute to the implementation of convention requirements into the legislation of countries, which have high human rights potential and are shared by all members of the international community.

One of the most important partners of our states in matters of constitutional and legal construction is the Venice Commission, whose activities ensure substantial support to build the principles of the rule of law and democracy.

Since 1998, Kazakhstan used to have observer status in the Venice Commission, and in 2012, it officially became its equal member. On March 13, 2012, the First President of the Republic of Kazakhstan, Nursultan Nazarbayev, signed the Decree "On the membership of the Republic of Kazakhstan in the European Commission for Democracy through Law". This act of the Head of State followed the decision of the Committee of Ministers of the Council of Europe to satisfy the application of Kazakhstan, which is evidence of the recognition of Kazakhstan's achievements in strengthening the rule of law by the international community.

Over the years, the legal structures of Kazakhstan and Korea cooperated fruitfully with the Venice Commission. Upon the requests of Kazakhstani state bodies, the Commission continuously provided expert and methodological assistance in reforming certain legal institutions.

The Venice Commission emphasizes highly on the exchange of experience and knowledge between the constitutional adjudicatory bodies. It was one of the originators of the World Conference on Constitutional Justice (WCCJ) as an international association of constitutional

adjudicatory bodies. Owing to this global structure, the constitutional courts and equivalent institutions of countries can cooperate closely. Currently, its members are117 states, including the Republic of Kazakhstan and the Republic of Korea.

In 2014, Seoul held the 3rd Congress of WCCJ on the topic "Constitutional Justice and Social Integration". The event was successful and allowed discussing general relevant issues of constitutional development. The idea of creating an Asian Human Rights Court expressed by our Korean colleagues at this Congress is of great interest for us. We fully understand that this precise process requires significant study, the development of an international act on human rights, and the definition of a model of a supranational body.

As a member of the Bureau of WCCJ, I highly value the efforts of the Korean Constitutional Court to strengthen the constitutional principles of the rule of law in the Asian region.

To recap, I want to highlight that our countries work consistently to acknowledge constitutionalism and enrich the values of the Constitution. The Constitution is the most important legal document that joins the society, the source of the national idea of any democratic and legal state. The constitutional adjudicatory bodies on-duty work hardly to unlock the full potential of the Constitution in all spheres of life. This is the only and non-competitive way to secure the civilized development of the country.

Today the institutions of the constitutional adjudications both in Kazakhstan and Korea are evolving step-by-step to respond to global challenges. The results of their work and capacity confirm that performing the function of constitutional adjudication contributes to the growth of constitutional legality and the protection of human and civil rights and freedoms. Under current conditions, it is impossible to preserve the rule of law without them. The laws must follow constitutional requirements, be fair, consider the needs of society, international standards, while the restrictions, inscribed in them, must follow the principles of necessity, equality, and proportionality. Successively, we can synergize the best practices of our bodies. Finally, I want to wish my Korean colleagues all the success and prosperity.

The Constitutional Court of Korea as a Protector of Constitutionalism

- Global Perspectives -