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- Text, Cases and Materials -

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Preface

The Republic of Korea ("Korea") has been recognized as one of few countries that have succeeded in achieving both constitutional democracy and economic development since the end of the World War II. Korea is now ranked as the 10th largest country in the world by trading size and plays an important role in the international community as a member state of G20 and OECD. Korea has completed six consecutive transfers of power since 1987 democratization and its constitutional development is basically constant and stable despite the "North Korean Problems". Korea's role and contributions to international co-prosperity grows consistently. However, these developments on both domestic and international dimensions are not well recorded and disseminated to foreign researchers who are interested in the causes and effects of the "Korean tale of double success". This lack of knowledgeable information about Korea is particularly noticeable in the field of the constitutional arrangement where the Korean government operates and its dynamic development takes place. Although there have been several short introductory overviews on the Korean constitutional arrangement and partial or focused essays and articles in this regard, no English textbook on the Korean Government and the Constitution in any form has ever been published. This short book is intended to fill in this gap.

This book is concerned with a short history of Korean constitutionalism and the structure and functions of the government and their interactions in the Korean constitution. In writing this book, I tried to keep a constitutional lawyer's perspective though I have also a strong conviction that lawyers' perspective and peculiar approaches are not complete and

comprehensive enough to catch all the diverse aspects of constitutional dynamics. For one thing, the constitution itself is not merely a law but something at the crossroads between the law and the politics or the administration.

This book has taken the form of "cases and materials" not unusual to the common law countries with a strong tradition of empiricism but not familiar to the civil law countries. Two reasons are to be mentioned. The first is a very technical reason related to the main objective of the Korean Law Textbook Series of the Korea Legislation Research Institute (KLRI) to which this book belongs. The character of the books of this series originally intended was a guidebook to provide an introductory map for foreign users to get access to the materials written in both Korean and in non-Korean languages about Korean laws and practices of all fields. However, as noted above, the lack of contents on Korean laws makes us feel that it is too premature to write a guidebook. The original plan therefore was postponed until an abundant content is ready to use. Instead, it was decided that while a short exemplary guide for legal materials on the Korean laws and practices is contained in the appendix, the selective introduction of how laws and practices on each field of life represent in the useful cases and materials is to be written. As the first book of the series, this book attempted to explain the organization, powers and responsibility of government in the Korean constitution in a way of showing the raw materials in the relevant subject. The second reason is my personal ambition to try a new style of textbook on the Korean constitutional law seducing readers' own initiative to find targeted issues or questions and responses or answers to them from not only texts but also raw materials like constitutional cases and legislations. I believe that

as far as constitutional law is concerned, the character of the common law system has begun to come into practice in Korea because a number of constitutional law cases have been accumulated and had a great influence on the political system as well as civil society since 1989 when the first unconstitutionality of a statutory law or Act under the 1987 constitutional regime was came out by the Constitutional Court of Korea.

Notwithstanding all these benign purposes, I must confess that the outcome seems to be far behind the anticipated level. Let alone my lacked talent, the time limit set by the KLRI which plans this book has had me to confine the scope and quantity of the book to more manageable level. I would like to relieve myself of the guilty feelings by promising that I will do my best to write the extended version of this book as soon as possible to cover the issues and materials deserved to be contained but omitted by the process of selection and concentration.

Seoul

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I wish also to thank the anonymous translators of cases of the Constitutional Court of Korea and legislations of Korea excerpted and reformulated in this book.

Finally, I am grateful to those concerned with permission to reuse my writings in the following:

Kim, Jongcheol, *"Constitutional Law", in Korea Legislation Research Institute (ed.)*, Introduction to Korean Law, *Springer: Berlin, 2013, pp.31-84*

Kim, Jongcheol, *"The structure and basic principles of constitutional adjudication in the republic of Korea", K.Cho (ed)* Litigation in Korea, *London: Edward Elgar Publishing, 2010.6., ch.6*

Kim, Jongcheol, *"Government Reform, judicialization, the development of public law in the Republic of Korea", Tom Ginsburg and Albert Chen (ed.)*, Administrative Law and Governance in Asia : Comparative Perspectives, *Routledge, 2008, ch.6*

Kim, Jongcheol, *"Some Problems with the Korean Constitutional Adjudication System"*, Journal of Korean Law, *Vol.1, No.2, 2001, ch.2*

Abbreviations

Institutions

KCC *Korean Constitutional Court*

Acts

CCA Constitutional Court Act

COA Courts Organization Act

Other publications

KCCR Korean Constitutional Court Reports [in Korean]

Chapter 1 Introduction: An Outline of the Korean Constitution

A. Modern Constitutionalism and the Korean Constitution

What is a constitution?

A British constitutional jurist Albert Venn Dicey defines constitutional law as “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state”.[1] These rules include “all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.”[2] He intentionally used the word "rules" instead of "laws" to “call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.”[3] According to Dicey, constitutional law consists of two set of rules: “constitutional law “or “the law of the constitution” and the “conventions of the constitution” or “constitutional morality”.[4] While the latter is set of rules consisting of “conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since

[1] A.V. DICEY, *INTRODUTION TO THE STUTY OF THE LAW OF THE CONSTITUTION*, INDIANAPOLIS: Liberty Classics, 1982, p.cxl.
[2] A.V. DICEY, ibid..
[3] A.V. DICEY, ibid..
[4] A.V. DICEY, ibid.. pp. cxl – cxlv.

they are not enforced by the Courts", the former is set of rules which are "in the strictest sense "laws," since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the Common Law) are enforced by the Courts".[5]

As well known, the British Constitutionalism depends upon conventions without a written constitution, one might think this definition of constitutional law would not be fit to other countries with a written constitution. However, although the existence of a written constitution may affect the form of law and its validity in the judicial process, it would not be true that in a country with a written constitution, there is no constitutional convention in terms of Dicey's definition. For one thing, even though ROK has a written constitution, the KCC recognized the existence of the customary constitutional law which has the same legal force as that of the written constitution as follows:

> Our nation has a written constitution, and, as such, fundamentally, the source of law for our constitutional law is the text of the Constitution of the Republic of Korea. However, notwithstanding the existence of a written constitution, it is impossible to completely provide without omission for all constitutional law matters in the written constitution, and, in addition, the Constitution pursues succinctness and implication as the basic law of the nation. Therefore, there is room for recognizing certain matters though not written out in the formal code of the Constitution as unwritten constitution or customary constitutional law. Especially, there may

[5] A.V. DICEY, ibid., pp.cxl – cxli.

> be certain circumstances where no express provision is necessarily included in the text for those matters that are self-evident or presupposed or that are general constitutional principles at the time of the establishment of the written constitution. However, not all practices or conventions formed concerning constitutional law matters may be recognized as customary constitutional law. Instead, strict elements should be satisfied in order for the recognition thereof as the constitutional norm with legal enforceability, and, only those customs satisfying such elements have the same legal force as the customary constitutional law as that of the written constitution. [Relocation of the Capital City Case, 16-2(B) KCCR 1, 2004Hun-Ma554, etc.,(consolidated),October 21, 2004][6] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

On the one hand, some of conventions in countries without a written constitution probably would take the form of actual laws while some would not. On the other hand, some of laws in a formal part of the constitution in countries with a written constitution are also regarded as laws even though they are not enacted but as resulted from the "combined action of several legal principles" As Dicey takes as a proof, the responsibility of Ministers is an example.

According to Dicey, two things should be noted. First, although the word of "convention" suggests a notion of insignificance or unreality, some of constitutional conventions or practices are as important as any laws. Second, this distinction differs essentially from the distinction between "written law" and "unwritten law" as laws of the constitution such

[6] Constitutional Court's decisions in English excerpted in this book may be found at the following link: http://search.ccourt.go.kr/ths/ep/ths_ep0101_L1.do).

as, the Bill of Rights, the Act of Settlement, and Habeas Corpus Acts, are "written law," while other most important laws of the constitution(for example, the establishment or relocation of the capital in the KCC's jurisprudence in the Relocation of the Capital City Case[7] and a convention relating to the Vice President of the United States within the Senate in that he should not use his position as President of the Senate to influence the passage of legislation or act in a partisan manner, except in the case of breaking tie votes), are "unwritten" laws.

Elements of modern constitutionalism

Modern constitutionalism is the political doctrine that political power should be authorized and bound by the constitution as the fundamental law enacted according to the will of the people. This doctrine was emerged in the West circa 1600 and adopted by most western countries over centuries. The basic components of constitutionalism are the protection of human rights, popular sovereignty, the separation of powers, a written constitution and the rigidity of constitutional amendment.

The raison d'être of modern 'free state' is to protect life, liberty and property of individuals from arbitrary rule of men. Constitutionalism is the idea that the supremacy of the constitution in government can best protect human rights from arbitrary abuse of power. Therefore, the protection of human rights is the first element of constitutionalism. It is generally known, however, that the early constitutionalism was dependent upon a particular civil rights-centered conception of rights, especially the right to property. This particular constitutionalism went hand in hand with

[7] Constitutional Court Decision 2004Hun-Ma554, etc.,(consolidated), October 21, 2004, 16-2(B) KCCR 1 (Constitutional Court's decisions in English may be searched for at the following link: http://search.ccourt.go.kr/ths/ep/ths_ep0101_L1.do).

the minimalist state. However, as laissez-faire accelerated social inequality, ‘new liberalism' which understands that liberty does not mean freedom from the State but freedom through the State prevailed the classic negative idea of liberty. One result is that the State became the provider of minimal social resources required for the people to enjoy human dignity. And the system of constitutional adjudication including constitutional review of statutes and constitutional complaints was adopted to further the protection of human rights.

The second element of constitutionalism is popular sovereignty. The modern liberal state presupposed that free individuals are the origin of state power and political authority should be legitimated by the consent of the people. Therefore, the exercise of political power should follow the procedures designed to secure free will of the people, that is, peoples' control of state power in terms of legal authorization and limitation is essential to constitutionalism. In the contemporary world, a number of ideas to strengthen popular sovereignty such as referenda, electoral reform towards proportional representation are proposed to solve legitimation crisis in representative democracy.

The separation of powers is the third element of constitutionalism. Dependent upon the premise that power has a tendency of corruption and abuse, this principle intends to allocate state powers into three branches according to their function in the process of government. Underlying this idea is that checks and balances between these branches can best prevent arbitrary rule and protect people's liberty.

The final components of constitutionalism is the existence of a written constitution and the difficulty in amending the constitution. Although there is some exceptions, for example, the UK, the existence of a written

constitution setting conditions of the exercise of state power and providing fundamental rights of individuals is essential to the stability of constitutionalist government. By the same token, the procedures for the amendment of constitution should be tighter than in case of ordinary legislation.

Modern Constitutionalism in Korea

It was in 1948 when the three-year long American military rule came to the end that Koreans who have never experienced western-style civil revolution in their history first had the opportunity to establish a republican form of government adopting constitutionalism. On the surface, since then Korea has been a country governed by constitutionalism as there was always a written constitution confirming popular sovereignty and unalienable human rights. However, nobody would convincingly say that the reality of Korea has been matched with this superficial appearance. The history of modern Korea has shown that the core components of constitutionalism, that is, the protection of human rights, popular sovereignty and the separation of powers, have never properly put into practice. The provisions of Korean constitutions since the First Republic were ‘nominal’ one in a German constitutionalist Lowenstein's term as they were ignored by authoritarian regimes. However, Korean people's consistent struggle for democracy encountered a watershed in June 1987 Uprising which resulted in the 9th revision of the Korean Constitution. Under this new constitution, the peaceful transfer of power took place in six consecutive presidential elections.

Having a written constitution since 1948, Korea met at least one formal element of constitutionalism. However, it is little doubt that at least

before 1987, constitutionalism has been firmly established in Korea and thus state powers have been legitimately organized and exercised within the boundary of the constitution.

B. The Origin and Basis of the Republic of Korea

The Republic of Korea(ROK), internationally known as South Korea, is located in the Korean Peninsula between China and Japan in the East Asian region. After liberated from Japanese colonial rule between 1910 and 1945, the Peninsula was politically divided into two different polities in the course of military occupations respectively by the USA in the South and the Soviet Union in the North until 1948. The Korean War, which lasted from 1950 to 1953, consolidated this division of territory and then the two Koreas have been so far regarded as separate independent countries at least at an international level. However, since 1948 when the first effective constitutional government within the territory was launched, the ROK Constitution has explicitly declared that the ROK is the only legitimate country in the Korean Peninsula while imposing a mission of reunification on State authorities as a whole (current Article 3 and Article 4). Given that, the ROK courts recognize the Democratic Peoples' Republic of Korea (hereinafter the “DPRK”), internationally known as North Korea, as a unique political organization having double legal entities; on the one hand, the counterpart of the ROK in the political negotiations on reunification; and, on the other hand, a subversive organization of which political activities as well as other individuals’ or organizations' activities supporting them can be prohibited and sanctioned

according to the procedures prescribed by law.[8]

A fundamental difference between the two Koreas lies in their nature of constitutional systems. The ROK is based on constitutional democracy while the DPRK has developed a totalitarian political system based upon a combined ideology of both Marxism-Leninism and the “Juche Idea", a nationalistic ideology formulated by Kim Il-sung, emphasizing on the Korean People's spirit of self-reliance and independence. Now I will focus here on the development of constitutionalism of the ROK.

C. A Brief History of the Korean Constitution[9]

The birth of the First Constitution

As soon as it became clear that the political deadlock in the negotiation process towards a unified new nation between the Soviet-occupied Northern territory and the US-occupied Southern half could not be solved in a short period, the US military government decided to allow the Korean People to establish a new nation within the Southern territory. On May 10, 1948, the first general election took place to establish the National Assembly as the legislative branch with the special competence of constitution-making.

The first constitution of 1948 was known to be influenced by the German Weimar Constitution 1919 at least in terms of the latter's characteristic propensity for social justice as a basic norm governing the relationship between the State and society in general (economy in particular).

[8] Constitutional Court Decision 92Hun-Ba48, July 29, 1993, 5-2 KCCR 65; Supreme Court Decision 2007Do10121 (Kong2011Sang, 148).

[9] This section is based upon my article titled “Constitutional Law” in Korea Legislation Research Institute (ed.), *Introduction to Korean Law*, Springer: Berlin, 2013.

It not only explicitly listed social rights such as the right to education, the right to work and the right to membership in trade unions along with civil and political rights, but also chartered social justice or public welfare as a basic standard to regulate economic freedom and the exercise of the right to hold property.[10] Although this inclination to social justice was not effectively realized in reality, its legacy was so strong that the ensuing constitutions have continued to keep this value as a governing norm on social and economic relationships between individuals and the state. For example, what survived nine revisions of the first constitution over sixty years was the format of the Constitution in that a separate chapter is given to the subject of national economy allowing a regulatory or facilitative role of the State over the economy to enhance public welfare, although there have been changes in its tone and the scope of the state's involvement in economy.

The "nominal" feature of the first constitution can also be found in the gap between the form of government envisaged in constitutional arrangements and its actual operation in reality. It adopted a modified presidential system incorporating a variety of institutional elements peculiar to a parliamentary system. The President was elected by the National Assembly rather than by the direct vote of the people. The State Council consisting of the President, the Prime Minister and State Councilors was envisaged to be the highest deliberative authority within the Executive, so that it should pass a resolution on major constitutional agenda referred to the President as the head of the Executive. However, contrary to the lit-

[10] The radical feature of the First Constitution can be identified by two representative provisions. First, workers are constitutionally entitled to the equal allotment of profits earned by private companies (Article 18). Second, the economic order is based upon the accomplishment of social justice guaranteeing basic needs in the normal life of every citizen and the well-balanced development of the national economy (Article 84).

eral institutional arrangements in the Constitution, the First President Syng-man Rhee and his supporters tried to make the State Council and other constitutional authorities within the executive 'nominal' institutions by yielding President's power as if the executive power was, like the USA, vested in the President alone. What is worse than the distorted operation of the executive power was President Rhee's relationship with the opposition and the National Assembly. President Rhee, who had been respected as a national hero due to his consistent commitment to the independence movement in the colonial period, had a tendency to ignore the principle of checks and balances and misuse political and executive power to oppress political opposition from the National Assembly and opposition parties. This gap between constitutional ideals and reality caused continuous political conflicts between the ruling class and the opposition during the Rhee government.[11] Not surprisingly, the first and second amendments of the First Constitution made respectively in 1952 and 1954 were the result of a wave of political strife caused mainly by the different views among political groups on how to reconcile the President's power with that of other administrative agencies and the National Assembly.

The sagas of the constitutional amendments in 1952 and 1954

The 1952 constitutional amendment was motivated by President Rhee's supporters to introduce the direct presidential election to get rid of the power to elect the President from the National Assembly. Although this constitutional change was made in the course of severe political oppressions accompanied by the illegal abuse of law-enforcement power and

[11] Young-sol Kwon, T*he Relevance of Constitutional Law: Theories and Discourses*, Bobmunsa, 2006, pp.142-143, 149-151.

was intended in bad faith to strengthen political influence of President Rhee whose chance of reelection was seemingly very dim because of his confrontations with the majority of the National Assembly, its long-term impact on the Korean constitutional history is not all negative, because the experience of direct election of the President became a legacy in the long process of democratization in following periods.

This ambivalent evaluation can be applicable to the 1954 constitutional amendment, too. It was unarguably initiated by President Rhee's faction to make a detour for him to be eligible for a third term, prohibited by the old constitution. President Rhee's faction conspired to make an exception for the incumbent President Rhee to serve for two more terms by making constitutional changes for, among others, the introduction of a referendum with the propaganda of strengthening democracy. Although this change was marred by not only its hidden conspiracy but also its procedural error in implementing a two-third quorum in the National Assembly for constitutional amendment, the propaganda for direct democracy contributed to the democratic education of the people.

The Civil Revolutionary Constitution of 1960

Dissatisfaction with the authoritarian rule of President Rhee for more than a decade in general, and the rigged presidential election in 1960 in particular, prompted the Korean people to overthrow the Rhee government in order to enhance constitutional democracy. With this first civil revolution in 1960, the new constitution went into effect. It adopted a parliamentary system to wipe out the authoritarian image of the presidential system. In a reaction to the nightmare of a rigged election, the Electoral Commission was constitutionalized as an independent agency with a na-

tionalized organization. The constitutional entity of the Electoral Commission has so far been kept as one of the institutional features of Korean constitutional arrangements. Aside from a change in the form of government, the 1960 Constitution tried to strengthen the safeguards of fundamental rights. For example, it set a limitation on legislative power to regulate basic human rights by making the essential elements of each basic right unrestricted under any circumstances. In addition, reflecting the previous government's political oppression on the opponent, it absolutely prohibited censorship and prior restraints on assembly and association of the people. Moreover, the 1960 Constitution introduced, for the first time, the constitutional court as the final arbiter of the Constitution with the power of constitutional review.[12] However, it was not able to take a full opportunity to put these institutions into practice due to the military coup in 1961.

The collapse of the constitutional government set up as a result of a civil revolution had a significant impact on the development of Korean constitutionalism from then on. For example, by the short-lived experience of a parliamentary system, bad memory on this form of government was inscribed in the constitutional history of Korea and thus several attempts to switch to a parliamentary system once more have failed to obtain significant popular support. However, the spirit of self-determination and eagerness to the protection of basic human rights, which blossomed in the course of the civil revolution, remained at the heart and mind of the Korean people and became the driving force of unstopped movements for constitutional democracy challenging the longstanding authoritarian regimes that followed the military coup in 1961.

[12] In the previous constitutions, the Constitutional Commission as a special agency had the competence of constitutional adjudication. However, the composition of the Constitutional Court could not be completed as the constitution was ceased by the military coup.

Military junta, party state and pseudo-constitutionalist autocracy between 1961 and 1979

After around two years' rule of the military junta, constitutional democracy was restored by the 1962 Constitution.[13] This Constitution returned to the presidential system in which the President was to be elected for a term of four years by direct public ballot and was barred from re-election for a third term. Aside from this change in the form of government, there are four main features of the 1962 Constitution that are worth mentioning. First, it constitutionalized the idea of the "party system" in which political parties were constitutionally recognized and every candidate for public office like the President as the head of the Executive and the members of the National Assembly was required to be nominated by any constitutionally recognized political parties. The legacy of the party system remained in the following constitutions until now, although the mandatory party nomination for elected public offices was abolished. Second, it gave for the first time to the Supreme Court the jurisdiction of constitutional review on the constitutionality of laws, which had been granted to a specialized commission or independent court since the First Constitution of 1948. The system of judicial review lasted until the Constitution 1972, and returned to the specialized commission system partly because the then authoritarian leader Chung-hee Park was dissatisfied with the Supreme Court's decision striking down the State Compensation Act in 1971. Third, it introduced a referendum for the process of constitutional amendment which has survived ensuing constitutional revisions to date. Fourth, it extended the power of the audit board which had been constitutionalized since 1948 by giving it the general

[13] The Constitution of 1962 was enacted in 1962 but came into effect in December 1963.

power of inspection over the performance of the executive agencies and public servants of which a legislatively-created inspection agency had taken charge. The newly created Board of Audit and Inspection as a presidential commission continues to exist without significant changes until now and becomes another unique feature of Korean constitutional arrangements.

The constitutional democracy based upon the 1962 Constitution which had once been marred by the controversial amendment for extending the maximum number of terms of the President from two to three terms in 1969 came finally to the end by a kind of self-inflicted palace coup organized by the then President Chung-hee Park in 1971. With the successful enactment of the 1972 Constitution, later known as the notorious "Yushin Constitution", President Park institutionalized an autocratic rule under the slogan "Korean-style democracy," which could not be compatible with the ideals and principles of constitutionalism, such as the separation of powers and the rule of law. The sovereign power of the people was constitutionally delegated to the National Convention for Self-Dependent Reunification, the chairperson of which was the President selected by itself rather than the direct public ballot. The President was intended to overpower other governmental branches and partisan-oriented political order in that he was entitled, among others, to select a third of members of the National Assembly and place an emergency order with the effect of restraining individual's basic rights.

Transition to the flourishing constitutional democracy after 1980

The pseudo-constitutional regime collapsed thanks to the assassination of President Park by his right-hand man in the course of increasing chal-

lenges and resistance of the people calling for the restoration of constitutional democracy in 1979. However, despite the fall of President Park, the swift restoration of verified constitutional democracy did not occur since a group of military officers led by General Doo-whan Chun, the then head of the Military Security Force, successfully took over political power through a series of military coups in 1979 and 1980.[14] The new constitution of 1980 enacted by a referendum under martial order adopted a hyper-presidentialist governmental system where the President elected by the electoral college was envisaged to have ultimate executive authority overpowering other government branches. One symbolic camouflage of this autocratic system was the fact that the elected President was prohibited from rerunning after his or her first seven- year term, but such change could not be applied to the incumbent President. This institutional limitation to prevent long-term autocratic rule received strong support from the people, which made it survive the constitutional amendment in the wake of the People's uprising in 1987, although the term was reduced from seven years to five years. Although the 1980 Constitution had a fine list of fundamental rights and adopted, like previous constitutions, a constitutional review system, it has never been activated so that no cases were delivered partly because the Supreme Court with the power of initial review was very reluctant to refer those cases worth being reviewed to the constitutional adjudication process.

The rule with an iron fist under the 1980 Constitution led people to participate in the consistent movement for democratization. The aim of this longstanding movement was to revise the Constitution to restore the direct presidential election system and the checks and balances mechanism

[14] Supreme Court en banc Decision 96Do3376 (Jip45(1)Hyung, 1; Gong1997.5.1.(33), 1303).

in constitutional arrangements which had been mostly disappeared since 1972. The people's determination to change the authoritarian status quo expressed in the general election of 1985, which returned a victory to the opposition even in the oppressed political atmosphere. Stimulated by the victorious outcome of the election, the opposition started its campaign for constitutional amendment with an emphasis on the reform of presidential election to a direct ballot system. However, on April 23, 1987 President Chun refused to accept this request, and declared the next presidential election would take place through the electoral college system under the old constitution, mimicked as a "gymnasium election." As dissatisfaction with President Chun increased, the people poured out into the streets to demonstrate against his plan and, finally, the then presidential candidate Tae-woo Roh and the ruling Democratic Justice Party agreed with the constitutional amendment. The new constitution was drafted by a joint committee consisting of four equal number of representatives from the ruling Democratic Justice Party and the first opposition New Korea Democratic Party. By this constitutional amendment triggered by the People's Uprising 1987, constitutional democracy that had been collapsed or suspended since 1972 finally resumed in Korea. The 1987 Constitution, the ninth from the First Constitution of 1948, consolidated democracy and the rule of law to the level and extent that modern Koreans had never experienced until that time. It has successfully managed six consecutive peaceful transfers of government and is developing a stable system of human rights protection.

Characteristics of Korean Constitutional History since 1948

Since the enactment of the First Constitution of 1948, nine constitutional amendments have been made. Although there were differences among these amendments, it is worthy to point out that only one amendment was nothing to do with change in governmental structure. The fifth amendment in November 29, 1962 was intended to provide interim measures in the addendum of the Constitution to sanction in retrospect those involved in illegal and corrupt activities under the Rhee Administration. It implied that lack of democratic tradition and relatively less consciousness of constitutionalism in society, as a whole, in the nation-building process tends to make the political system instable. However, Korean constitutionalism, even before 1987, developed a number of significant characteristics in the course of longstanding democratization.

First, as far as the form of government is concerned, representative democracy has always been guaranteed and such means as to allow direct involvement of the people in the governance have been exceptional. Referendum has been stipulated to be called upon under particular conditions while popular initiatives or recall has never been reflected in constitutional arrangements. Moreover, the presidential system has been preferred to the parliamentary system. Despite of this preference, however, it should be borne in mind that the presidential system implemented in modern Korea has been, in large part, adapted by some elements inherent in the parliamentary system. For example, in most Constitutions, the executive powers were not granted to the President alone, but a collective entity of administrative agencies and committees as a whole. As a corollary, it is not difficult to see that the Prime Minister, the State Council

and State Councilors have been parts of the executive branch in most Constitutions. This feature remains in the present Constitution.

Second, most Constitutions, except the Constitutions of 1952, 1954 and 1960, have not adopted a bicameral system. It means that the period for which the Korean legislature consisted of two chambers was less than ten years out of more than 60 years of the total constitutional history.

Third, all the Constitutions with no exception tended to empower the Legislature to exercise broad discretion in law-making, so that it has enjoyed great authority to elaborate on and/or supplement what the Constitutions explicitly delegated to the Legislature or left in abeyance. Unlike the Constitution of the United States where Congress can act only as prescribed by the Constitution, the legislative body was vested with the general regulatory power to guarantee national security and public order, or even to promote public welfare.

Fourth, there has always been a system of constitutional adjudication expressly entrenched in the provisions of the Constitutions, whether or not separate from the ordinary judiciary, although their performance can scarcely be said active. The present Constitution also has the Constitutional Court with the competence of five constitutional adjudicative powers.

Fifth, from the beginning, all Constitutions had a Bill of Rights ranged from civil and political rights to social, economic and cultural rights though such guarantees could hardly have reached its full-fledged level in practice.

The Constitution of 1987

The present Constitution of 1987 features full-fledged constitutionalism by making both democracy and the protection of human rights entrenched.

The Constitution, starting with the preamble, consists of 130 articles categorized into ten chapters and addenda of six articles.

The preamble declares that the constituent power lies in the people of Korea "with the pride of a resplendent history and traditions dating from time immemorial", and describes the constitution-making process since 1948. It is worth noting that the preamble makes clear that the legitimacy of the Constitution stems from the Provisional Government established in the wake of the March First Independence Movement of 1919. It also elaborates on the visions and goals that the ROK has pursued through its constitutional history, for example, the enhancement of basic free and democratic order, contribution to lasting world peace and the common prosperity of mankind, and the safeguards of security, liberty and happiness for the people of Korea.

The first chapter, consisting of nine articles, sets forth general provisions. It includes three basic elements of the national state (sovereignty, nation, territory), a sacred mission for reunification imposed upon the constitutional polity as a whole, and general principles and basic institutions essential to constitutional democracy, such as the renunciation of all armed aggressions, respect for international law and principles, the political neutrality of the Armed Forces, the political impartiality of public officials, and the protection of political parties.

The second chapter is the Bill of Rights and Duties of the Nationals. The ensuing four chapters grant powers to the four branches of government: the National Assembly as the legislature, the Executive as the executive branch, the Courts as the ordinary judiciary and the Constitutional Court as a specialized adjudication authority.

The seventh chapter stipulates an electoral management mechanism on top of which hierarchy is the National Election Commission. The eighth

chapter consists of two short articles devoted to brief principles of local autonomy.

One chapter showing a unique characteristic of Korean constitutionalism is the ninth chapter, which provides basic principles of national economic order and the relationship between the State and the economy.

The last chapter provides constitutional amendment procedures consisting of two stages: a concurrent vote of the National Assembly and a national referendum on the amendment proposal.

D. The Idea and Fundamental Principles of the Constitution[15]

The principles of popular sovereignty and democracy

The polity that the Constitution of the ROK has intended to establish and maintain is a democratic republic. Korea had a monarch before Japan's colonization, but became one of the few countries that the restoration of a monarch has never been seriously debated in the course of liberation after World War II. It 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 emanated from the people. What the present Constitution establishes to accomplish the ideal of democratic republic is a representative form of government rather than that of direct democracy. Although the people have the basic right to vote in elections to select members of the National Assembly and the President as the head of the State and the Executive, it is the representative branches that are con-

[15] This section is based upon parts of my article titled "Constitutional Law" in Korea Legislation Research Institute (ed.), *Introduction to Korean Law*, Springer: Berlin, 2013.

stitutionally vested with the power of deciding the direction of policies and the ways of implementing them.

Only on two occasions are the people exceptionally empowered to take part in the decision-making process within the Constitution. First, the people are entitled to have a final say on whether a proposal to amend or revise the Constitution initiated by either the President or the majority of the total members of the National Assembly and then concurred by two thirds or more of the total members of the National Assembly (Article 130(2)). Second, the people may have an opportunity to decide upon important policies relating to diplomacy, national defense, unification and other matters relating to the fate of the nation in a national referendum proposed by the President (Article 72). However, even in those cases where the people have a constitutional power or the right to take part in a referendum, the power to call a referendum on both occasions is granted to the President or the National Assembly.[16]

This system of representative government poses a critical danger of relegating the principle of popular sovereignty to a nominal justification for oligarchy or elitist democracy unless the people's right to vote is so entrenched to afford a real voice in elections of representatives. To make the right to vote be realized to the fullest extent possible, Article 24 safeguards the right to vote as a basic right as prescribed by the Act of the National Assembly, while Articles 41(1) and 66(1) provide the principles of universal, equal, direct and secret ballot by the people in presidential and National Assembly elections. It is well established in Korean

[16] In the impeachment case against President Roh Moo Hyun, the Constitutional Court ruled that the President has a discretion to decide whether a referendum is deemed necessary (Constitutional Court Decision 2004Hun-Na1, May 14, 2004, 16-1 KCCR 609).

constitutional jurisprudence that 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" so that restrictions on such rights can be justified only when an extraordinary and compelling reason exists.[17] In 2007, the Constitutional Court invalidated an electoral law denying the right of Korean nationals residing abroad to vote in presidential and National Assembly elections on the grounds that the requirement of residence registration as a determinative factor to deny the eligibility of vote is of no rational legislative purpose and therefore violates the right to vote, the right to the equal treatment of Korean nationals abroad, and the principle of universal suffrage.[18] Changing its previous stance in the case with the same merit,[19] the Court unanimously held that reasons, such as obscure and intangible risks with regard to fairness of election or misuse of voting rights, financial difficulties or technical obstacles which can be overcome through efforts by the government, are not justifiable grounds for restricting such a supreme right pertaining to the principle of popular sovereignty.

[17] Constitutional Court Decision 2004Hun-Ma644, 2005Hun-Ma360 (Consolidated), June 28, 2007, 19-1 KCCR 859(The Right of Nationals Residing Abroad to Vote Case).
[18] Ibid., 859.
[19] Constitutional Court Decision 97Hun-Ma253・270 (Consolidated), January 28, 1999, 11-1 KCCR 54.

The Right of Nationals Residing Abroad to Vote Case

[19-1 KCCR 859, 2004Hun-Ma644, 2005Hun-Ma360 (consolidated), June 28, 2007]

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

….

The majority opinion is followed by concurring opinions by two Justices.

1. Summary of the Majority Opinion

A. Concerning voting rights for the presidential and national assembly election (in short, 'voting rights for State elections')

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

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

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

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

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

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

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

equality of Korean nationals abroad, and the principle of universal election.

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

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

B. Concerning voting rights and eligibility for local election

(1) Korean nationals abroad residing in Korea is the people who cannot register as residents according to the Resident Registration Act. However, they are 'Korean nationals living in Korea' and in reality they are no different from 'Korean nationals registered in Korea' in terms of living in the same environments and sharing the same responsibility in their local district. Therefore there is no reasonable cause to justify any

discrimination when it comes to granting the right to vote for local election. Furthermore, the Public Official Election and Prevention of Election Irregularities Act provides certain foreigners with the right to vote. Thus the reality amounts to the unjust result where the right to vote for local election reserved for Korean nationals abroad which is 'constitutional right' is being trumped by the right to vote for local election reserved for foreigners which is 'statutory right'. For the reasons stated above, stripping the right to vote for local election reserved for Korean nationals abroad living in Korea, just because they are not being registered as residents regardless the length of their stay, infringes the right to equality as well as the right to vote for local election.

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

C. Concerning right to vote in national referendum

National Referendum is a process where citizens make decisions regarding the vital national-policy-making and the constitutional revision as supreme rulers. Whether someone is registered as resident is a factor which

cannot affect their status of citizens as supreme rulers. Therefore, denying the right to vote of the Korean nationals abroad depending upon whether they are eligible for registration as residents is in violation of the right to vote in national referendum with the same rationale as the above holding concerning the voting rights for national government.

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Notes

1. The majority Justices have the opinion that political rights including the right to vote are considered to hold a supreme status over other basic rights in order to realize the principle of popular sovereignty. Does it mean that every right considered to be useful to enhance the popular sovereignty has a preferred position over "any" other basic rights? Has the KCC consistently taken this stance in a number of cases concerning political regulations? For example, compare this case where strict test was applied with the case below at 2 concerning the age limit of voting right holders.

2. What implication does the principle of universal election have for the principle of popular sovereignty? Article 15 of the Public Officials Election Act provides that "A national of 19 years of age or above shall have a voting right for the elections of the President and the members of the National Assembly". In 2012 Hun-Ma 174(July 25, 2013), the KCC ruled this provision constitutional on the ground that the legislature's political decision denying political ability of those under 19 must be respected. The majority of six Justices took a kind of "rational basis test" on the ground that the Article 24 of the Constitutional confirms

statutory reservation by providing that "All citizens shall have the right to vote *under the conditions as prescribed by Act*". Can this looser test be compatible with the strict test recognized by *The Right of Nationals Residing Abroad to Vote Case?* Unlike the dissenting opinion of three Justices argue, why the majority do not pay full attention to the points that many laws relating to military service, civil service eligibility and harmful working conditions recognize independent judgment ability of those 18 year old?

Age requirement in election is not confined to the right to vote but the right to hold public office, in particular the right to be the member of the National Assembly. The KCC upheld in 2005 that the requirement of 25 years of age or above is constitutional by taking a looser test deferential to the legislative discretion.[20] This stance was confirmed in 2013 again.[21] However, in another case where the Decree on Civil Service Entrance Examination setting age restriction on applicants for every rank of civil service was reviewed, the KCC ruled that the age limit of applicants of the open-competitive exam for rank 5 of public official set at the age of 32 violates the applicants' constitutional right to hold public office.[22] Is the test taken at this case is a loose test or strict test? Do you agree with the argument that the proportionality test or the prohibition of excessive restriction test would provide constitutional justices with too wide a margin of appreciation?

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[20] Constitutional Court Decision 2004Hun-Ma219, April 28, 2005, 17-1 KCCR 547.

[21] Constitutional Court Decision 2012Hun-Ma288, August 29, 2013, Constitutional Court Gazette No. 203, 1200.

[22] Constitutional Court Decision 2007Hun-Ma1105, May 29, 2008, 20-1(B) KCCR 329.

In seeking constitutional protection, is there any difference between the right to vote and the right to hold public office? If so, what justifications can be envisaged?

3. How can disenfranchisement of criminal prisoners be justified under the principle of universal election? See Article 18 (Disfranchised Persons) of the Public Officials Election Act: *(1) A person falling under any of the following subparagraphs, as of the election day, shall be disfranchised: 1. A person who is declared incompetent; 2. A person who is sentenced to imprisonment without prison labor or a heavier punishment, but whose sentence execution has not been terminated or whose sentence execution has not been decided to be exempted; 3. A person who commits an election crime, who commits the crismes provided for in the provisions of Articles 45 and 49 of the Political Fund Act or who commits the crimes in connection with the duties while in office as the President, member of the National Assembly, member of local council, and head of local government, which are referred to in Articles 129 through 132 of the Criminal Act (including the case subject to an aggravated punishment pursuant to Article 2 of the Act on the Aggravated Punishment, etc. of Specific Crimes) and Article 3 of the Act on the Aggravated Punishment, etc. of Specific Crimes, and for whom five years have not passed since a fine exceeding one million won is sentenced and the sentence becomes final or ten years have not passed since the suspended sentence becomes final, or for whom ten years have not passed since imprisonment was sentenced and the decision not to execute the sentence became final or since the execution of the sentence was terminated or exempted (including a person whose punishment becomes invalidated); and 4. A person whose*

voting franchise is suspended or forfeited according to a decision by court or pursuant to other Acts.

4. If the principle of popular sovereignty is so important that any regulation should be subject to strict scrutiny, the freedom of political activities of nationals should be protected as broad as possible. However, most public officials and teachers of public as well as private schools are not permitted to join political parties because Article 22 of the Political Parties Act articulates those who are denied the right to join a political party as follows: *1. Public officials provided for in Article 2 of the State Public Officials Act or Article 2 of the Local Public Officials Act: Provided, That, excluded herefrom shall be the President, the Prime Minister, State Council members, members of the National Assembly, members of local councils, publicly elected heads of local governments, the senior secretary officials, secretary officials, secretaries, and administrative assistants for the Vice Speaker of the National Assembly, administrative assistants for the Chairman of the Standing Committee of the National Assembly, the Special Committee on Budget or Accounts, and the Special Committee on Ethics, the assistant officers, secretary officials and secretaries of a member of the National Assembly, administrative secretary officials for the representatives of the negotiation groups of the National Assembly, the policy research members and administrative assistants of the negotiation groups of the National Assembly, and presidents, deans, professors, assistant professors, and associate professors provided for in Article 14 (1) and (2) of the Higher Education Act; 2. Teachers of a private school other than its president, deans, professors, associate professors, and assistant professors; and 3. Persons holding the social*

positions of public officials under the provisions of Acts and subordinate statutes.

Also, the same provision stipulates that only those who have the right to elect members of the National Assembly may become either the promoter or a member of a political party. Does it mean that political activities can be recognized only when they are related to election?

5. Why does the majority see the right to vote for local election reserved for foreigners as a "statutory right"? Is it because it is nothing to do with the principle of popular sovereignty?

6. Does the majority opinion prohibit any form of legislative regulation of political rights on the ground of residence requirement?

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The Separation of Powers

The government envisaged in the present Constitution is a limited one. This is so, not only because one assumption underlying modern constitutionalism is a distrust in the government in general, but also because the Korean people had so far suffered from grave misuses and abuses of governmental power, especially by authoritarian Presidents.

One major tenet pertaining to limited government is the principle of separation of powers. It is designed to set structural limitations on constitutional arrangements to avoid the risk of official oppression by distributing governmental powers among different state branches and by allowing one branch to check and balance misguided or illegal actions of another.[23]

[23] In some countries, like the United States, the structural principle of checks and balances

As outlined above, the Constitution distributes governmental powers to the National Assembly, the Executive, the Courts, the Constitutional Court and the National Election Commission. One feature the Constitution contains in this regard is that there are express provisions to guarantee autonomy and self-regulation of each branch. For example, each branch has the power to make rules of proceedings and internal regulations within the statutory boundaries in Article 64(1), Articles 75 and 95, Article 108, Article 113(2), and Article 114(6), respectively.

Aside from this formal distribution of powers, a subtle functional mechanism designed to impede the possible abuse of power is provided for in the Constitution. A number of provisions vest consenting or approving power in the National Assembly. This ranges from consent to the appointment of certain public office holders like the Prime Minister, the Chairperson of the Board of Audit and Inspection, the Chief and panel of Justices of the Supreme Court and the President of the Constitutional Court, consent to the conclusion and ratification of treaties listed in the Constitution like one pertaining to mutual assistance or mutual security, to approvals for emergency orders having the effect of Act. The President is empowered to veto legislation if it deems necessary and the vetoed bill can be an Act only when re-passed with a concurrent vote of two thirds or more of the members of the Legislature present. Even effective Acts can be subject to constitutional review by the Constitutional Court. Ordinary courts have jurisdiction over unreasonable or illegal gov-

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that developed as a safeguard against the possible abuse of governmental power is regarded as an independent one, separate from that of the separation of powers (David Currie, *The Constitution of the United States: A Primer for the People*, Chicago; University of Chicago Press, second edition, 2000, p.2). However, in Korean constitutional jurisprudence, the latter is often understood as incorporating the former (Young Huh, *Theory of the Korean Constitution*, Pakyoungsa, 2010, pp. 717-719; Constitutional Court Decision 90Hun-Ba24, April 28, 1992, 4 KCCR 225).

ernmental activities while the Constitutional Court is granted the power to determine whether activities or omission of legislative and executive branches infringes basic rights of the people.

It is sometimes very difficult, however, to draw a clear line between functions of different branches partly because even original functions of each branch can intervene in that of another or the relationship between them. If the Legislature makes an obscure or overly broad law, it may result in the arbitrary use of power by the Executive or the Judiciary. This may be incompatible not only with the rule of law, but also with the separation of powers.[24] A number of laws enacted in the authoritarian period to restrict judicial discretion in examination of evidence and sentencing by allowing too much power to the prosecutors or setting out mandatory sentencing clauses were declared unconstitutional on those grounds.[25] However, in a 7-2 decision, the Constitutional Court ruled that the law granting to the Chief Justice of the Supreme Court the power to recommend a special prosecutor is not a violation of the principle of separation of powers.[26]

In sum, it is notable that the present Constitution breaks with the old legacy of authoritarian presidency outclassing other branches, at least in constitutional arrangements, although there are still some criticisms challenging misguided or unreasonable practices deeply rooted in actual politics.[27]

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[24] Constitutional Court Decision 89Hun-Ga8, January 28, 1992, 4 KCCR 4, 18; Constitutional Court Decision 90Hun-Ba23, April 14, 1992, 4 KCCR 162, 171.

[25] Constitutional Court Decision 92Hun-Ga8, December 24, 1992, 4 KCCR 853, 882-883; Constitutional Court Decision 95Hun-Ga5, January 25, 1996, 1 KCCR 1, 18-19.

[26] Constitutional Court Decision 2007Hun-Ma1468, January 10, 2008, 10-1(1) KCCR 1, 33-34.

[27] Above all, one remaining task in the democratization process is the reform of institutions and practices in relation to law-enforcement authorities, like the police, prosecutors, and national intelligence officials, which have arguably been major means of socio-political

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Case on Special Prosecutor to Probe Myung-bak Lee, Presidential Candidate of Grand National Party

[20-1(A) KCCR 1, 2007Hun-Ma1468, January 10, 2008] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

In this case, the Constitutional Court … found the provisions, regarding the object of investigation by the special prosecutor, appointment procedure of the special prosecutor, and the trial period of the case in which the special prosecutor filed an indictment, did not infringe complainants' right.

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SPA, Article 2 empowers the special prosecutor to investigate and prosecute a specific case. Considering the merits and demerits of Special Prosecutor System and its history in Korea, the National Assembly has, in essence, wide discretion in deciding whether to allow the Special Prosecutor System as an exception of exclusive power and discretion of the prosecutors to make an indictment under the current criminal procedures, whether to conduct an investigation by the special prosecutor for a specific case, and to what scope the special prosecutor would investigate by taking into account various factors such as appropriateness of prosecutors' exclusive power to indict, necessity to control prosecutors' power to indict, merits and demerits of the Special Prosecutor System and public interests and demands in the specific case. Hence, it is neither arbitrary nor unreasonable that the National Assembly empowers a special

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control by the authoritarian Presidents. See Jongcheol Kim, "Does Korean Democracy Really Need Another Constitutional Revision?: A Critical Review on Proposals of the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly", Korean Journal of Law and Society, Vol. 38(2010)[in Korean], p.147.

prosecutor to investigate the matters provided under Article 2 of SPA after consideration of such circumstances above. ···. According to the said SPA, Article 3, Chief Justice recommends two candidates of Special Counsel to the President, and the President appoints the Special Counsel between them. Although Chief Justice shall appoint the judges (Article 104 Section 3 of the Constitution), it is limited to the affairs concerned with judicial administration that Chief Justice can command and supervise the personnel of all the instances of courts (Court Organization Act Article 13 Section 2). Hence, Chief Justice cannot give effect to a specific case pending in a trial. Further, article 3 of SPA provides that Chief Justice only recommends two candidates of Special Counsel among lawyers to the President and the President appoint the Special Counsel. Accordingly, it cannot be seen that the prosecuting organization and the decision-making organization are not separate or the decision-making organization determines the cases where they are self- interested parties. Finally, the appointment processes in the Article 3 of SPA are neither against the great principle of modern criminal law, that is, the separation of the prosecuting organization and the decision-making organization, nor due process doctrine. ···. Considering the purport and function of Special Counsel system that essentially has the function of power regulation, it cannot be acknowledged that it is against the separation of powers doctrine that the power to decide whether to adopt the Special Counsel system or not is given to the legislature and the power to appoint Special Counsel is distributed among other constitutional organizations. Although the issue of making Chief Justice, who should strictly maintain political impartiality, involved with the appointment of Special Counsel who will be in charge of political cases is desirable could be in controversy, the

political decision by the National Assembly on this issue is neither against the constitutional doctrine of separation of power nor beyond the scope of legislative discretion. ⋯ Therefore, the Article 3 of the Act does not infringe upon the basic right of complainants related with the violation of the due process doctrine nor the separation of power doctrine.

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Notes

1. Compare the majority opinion with the minority opinion: "SPA, Article 3 is against the principle separating the prosecuting organization and decision-making organization because judges under Chief Justice's power of personnel management decide the case which was investigated and prosecuted by the Special Counsel who was practically appointed by Chief Justice. In addition, it results in the unreasonable situation where Chief Justice becomes the presiding judge when the case comes before the full-bench of Supreme Court. Furthermore, Article 3 of the Act hinders the functions of the judiciary whose essential function is to contribute to the maintenance of legal order and peace through dispute resolutions and is against the separation of power doctrine through imposition to Chief Justice, who is required to be more impartial than anyone else to achieve judicial independence as the personnel manager in judiciary, the obligation to recommend Special Counsel. Also, it makes him possibly involved in political conflict between political forces. Therefore, SPA, Article 3 is against the Constitution by infringing upon the complainants' constitutional right not to have illegal check and right to fair trial."

2. In this case, the KCC ruled that, the Accompanying Order Provision

of SPA is against the Warrant Clause in Article 12 Section 3 of the Constitution on the ground that the clause should be applied to the accompanying order system to the witnesses because while it is practically same as taking him a certain place virtually restricting the witness's freedom of body, the Accompanying Order Provision provides that not the judge but the Special Counsel shall issue accompanying order and punish the witness when the witness refuse the order without any justifiable reasons and it also results in the same effect with taking the witness to a designated place practically infringing upon the witness's freedom of body.

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The Rule of Law or the principle of Rechtsstaat

Although there are a variety of understandings of the rule of law or Rechtsstaat,[28] no one can seriously deny that it is another tenet pertaining to a limited government in the sense that governmental activities intended to restrict the rights and freedoms of the people should be based on the law enacted by their representatives.[29] More specifically, the rule of law requires executive power to be implemented according to law and any

[28] The doctrine of the rule of law may be discerned from that of Rechtsstaat at least in terms of its diverse ideological origins and different paths of development. However, considering the purpose and scope of this chapter, it would be safe to assume that both are the same at least in the constitutional implications and functions in constitutional democracies. In fact, the Constitutional Court and the ordinary courts have used these two ideas as similar principles in their constitutional meanings by often citing together in the same context (e.g., "The system of impeachment against the President intends to realize the rule of law or the principle of *Rechtsstaat* that every citizen is governed by law and even a man of national power does not stand above the law[Emphasis added.]." Constitutional Court Decision 2004Hun-Na1, May 14, 2004, 16-1 KCCR 632).

[29] Young-sung Kwon, *Constitutional Law*, Bobmunsa(2010)[in Korean], p.146.

governmental wrongs should be redressed in the judicial process. It also requires that cases and controversies relating to individuals' rights, whether private or public, are to be effectively resolved according to law by independent authorities.

As the idea of constitutionalism evolved, the emphasis in the idea of the rule of law moved from the formal conception to the substantive one. Therefore, that law as a norm of government made in due process of legislation is not enough to fulfill the rule of law; the substance of law itself should be due or just. One implication of this change is that even the legislative power should be subject to constitutional review in terms of substantive standards of due law. Not surprisingly, with the development of constitutionalism across the globe since the middle of the 20th century, constitutional adjudication has blossomed in new democracies as well as old democracies.

The ROK is not an exception to this trend. The 1987 Constitution adopts a constitutional adjudication system, including constitutional review of the law and constitutional complaints. It also entrenches not only the due process of law in Article 12(1) and 12(3), but also the requirement in restricting basic rights and freedoms, and the prohibition of law infringing essential elements of basic rights and freedoms in Article 37(2). Elaborating on such open-ended clauses, the Constitutional Court has established a couple of substantive standards pertaining to the idea of the rule of law, such as the rule of clarity of law, the principle of proportionality and the principle of legal expectation or protection of trust.

The rule of clarity

The rule of clarity or the Korean equivalent of the doctrine of "void-for-vagueness" in American constitutional law requires that law should be as clear as possible to guarantee predictability of the people whose lives are affected by it. Generally speaking, although the rule of clarity should be implemented in all areas of law, criminal law requires its strictest application under the principle of *nulla poena sine lege*. For example, the Constitutional Court annulled the Family Ritual Standards Act on the ground that the concept of “reasonable scope in light of the true meaning of family etiquette and rituals” used as an element of criminal punishment was not sufficiently predictable in overall content to be used as a guide for one's action and thus violated the rule of clarity.[30]

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Family Ritual Standards Act case

[10-2 KCCR 586, 98Hun-Ma168, October 15, 1998] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

The practice of serving alcoholic beverage and meals to one's guests at his or her wedding ceremony has long been common part of the social life of the mankind and belongs to the domain of an individual's general freedom of action and it should be protected by the Article 10 right to pursuit of happiness. … The provision, while generally banning serving of alcoholic beverage and meals, enables presidential decrees to provide for exceptions. Then, the statute must be sufficiently clear so that ordinary people can easily predict what the enjoined conduct is. … The ele-

[30] Constitutional Court Decision 98Hun-Ma168, October 15, 1998, 10-2 KCCR 586.

ments of crime under this statute are determined inversely by the presidential decrees that specify the permitted conduct, the scope of which must be 'reasonable in light of the true meaning of family etiquette and rituals' according to the statute. Therefore, the rule of clarity is satisfied by whether the statutory phrase allows sufficient inference on the overall extent of the presidential decree. The concept of 'the true meaning of family etiquette and rituals' does not allow people to predict how one can treat the guests at the wedding ceremonies and the sixtieth birthday parties in accordance to that 'true meaning.' In our tradition, a wedding is a very generous festivity. It is such an important event for one that he or she is expected to make it extravagant even if it requires exceeding his or her budget. The records show diverse understandings which people have of the provision. 'The true meaning of family etiquette and rituals' is not easily discernible to people. ⋯ In the end, the concept of 'reasonable scope in light of the true meaning of family etiquette and rituals' is not sufficiently predictable in overall content to be used as a guide for one's action. It is dangerously conducive to arbitrary action of those administering the law. The provision violates the requirement of clarity under the principle of nulla poena sine lege, and violates people's general freedom of action.

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Notes

1. The KCC recognizes not only the rule of law but also democracy as the constitutional basis of the rule of clarity in the Ban on Improper Communication on the Internet Case[14-1 KCCR 616, 99Hun-Ma480, June 27, 2002]: “Elements of regulation by the law must be clearly de-

fined in order to inform individuals being subject to the law what actions would be regulated under the law so that they can determine the course of their action accordingly, and this would prevent discriminatory or arbitrary interpretation of law by providing an objective guideline to the law enforcement agency (4 KCCR 255, 268-269, 90Hun-Ba27, etc., April 28, 1992). The rule of clarity is an expression of the democracy and the rule of law, and it is required of all legislation restricting basic rights of citizens. The rule of clarity is an inherent part of the principle of *nulla poena sine lege*, the principle of statutory taxation, and the principle of the rule against blanket delegation."

2. The concepts the KCC regarded as an unconstitutionally unclear and ambiguous include '[T]he true meaning of family etiquette and rituals' in the Family Ritual Standards Act case, "the communication with contents harming the public peace and order or social morals and good customs" of Article 53(1) of the Telecommunications Business Act in the Ban on Improper Communication on the Internet Case and 'indecent materials" of Article 5-2 Item 5 of the Registration of Publishing Companies and Printing Offices Act in Case on Registration Revocation of Obscenity Publishers[10-1 KCCR 327, 95 Hun-Ka 16, Apr. 30, 1998]. However, "deliberation on information prescribed by Presidential Decree as necessary for nurturing sound communications ethics" of Article 21 Item 4 of the Act on the Establishment and Operation of Korea Communications Commission" in the Sound Communications Ethics Case[24-1(A) KCCR 25,2011 Hun-Ka 13, Feb. 23, 2012] was declared constitutional with no violation of the rule of clarity.

3. Another major area where the rule of clarity is strictly applied is the freedom of expression cases. As American constitutional jurisprudence develops, an impermissibly vague law creates dangers of a "chilling effect" upon protected expression. If expression is related to political issues, such risks would become more serious harms to a democratic society: "The rule of clarity takes on an especially important meaning in legislation restricting the freedom of expression. In a democratic society, freedom of expression is an essential tool to realize the people's sovereignty. Ordinarily, the freedom of expression functions to en- courage exchange of diverse opinions, interpretations, and ideas among individuals and during the course, to verify validity of such expressions. However, restriction of freedom of expression by an unclear statutory provision would bring about the chilling effect on constitutionally protected expression, and cause malfunctioning of this freedom. When it is unclear what kind of expression is being prohibited by such legislation, it is very likely that a person would abstain from expressing himself lest he should be punished for making such expression because he is not certain that what he is about to express is not subject to regulation. Therefore, it is constitutionally required that statutes regulating freedom of expression should be specific and clear about what expression would be subject to regulation (10-1 KCCR 327, 342, 95Hun-Ka16, April 30, 1998)."[The Ban on Improper Communication on the Internet Case, 14-1 KCCR 616, 99Hun-Ma480, June 27, 2002].

4. In the KCC's jurisprudence concerning the freedom of expression, this concern is in principle strongly recognized but in reality, i.e. when the rule is applied to a specific cases, it tends to be done in a lesser density of scrutiny. In the Prohibition of Internet Use for Election

Campaign Case[[23-2(B) KCCR 739, 2007Hun-Ma1001, 2010Hun-Ba88, 2010Hun-Ma173·191(consolidated), December 29, 2011], the KCC held that interpreting "the like" to include "the act of posting writings, videos or other information on Internet websites or forums, or transmitting electronic mails" infringes on the freedom of political expression and the freedom of election campaign in violation of the principle against excessive restriction, and thus is unconstitutional. This case was a representative case that the importance of freedom of political expression and its preferred position vis-à-vis other interests and took strict scrutiny on statutory regulation on political expression. However, it has not applied the rule of clarity which was argued by the claimants and one of main issues of review in the precedent case of 2009, i.e. the Prohibition of Distribution of UCC in Prior-Electioneering Case [2007 Hun-Ma 718, July 30. 2009, 21-2 (A) KCCR 311] where the provision at stake was held constitutional on the ground that it did not violate the rule of clarity and the right of electioneering.

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The principle of proportionality or the prohibition of excessive restriction

The principle of proportionality, usually called the prohibition of excessive restriction in Korea, is also well established in Korean constitutional case law. The Constitutional Court derived this principle, not only from the idea of the rule of law or the principle of Rechtsstaat inherent in the Constitution, but also from the requirement expressed in Article 37(2).[31] In a number of cases, it developed a four-tier test in reviewing

[31] Jongcheol Kim, "The structure and basic principles of constitutional adjudication in the

state's restrictions on the basic rights and freedoms of individual citizens. The four substantive standards of this test are (1) legitimacy or rationality of the objective, (2) appropriateness of the means, (3) the least restrictive means, and (4) balance between the importance of public interest and the degree of infringement of freedoms or rights. Legislation intended to limit fundamental rights must meet these four requirements to pass the test and to be declared constitutional.[32] One feature of the Constitutional Court's reasoning in this regard is that such strict criteria are, in principle, expected to apply regardless of the nature of the rights and freedoms at stake. This is quite different from the jurisprudence of its American counterpart, such as the "doctrine of double standards" in which the nature and emphasis of rights in terms of the relationship between the rights and State interests tend to be considered in deciding the level of requirements for constitutional review. For example, the Constitutional Court has sometimes been criticized that it applied the strict standard, such as the least restrictive means test, not only when fundamental values or interests of democratic society are at stake, but also when general economic or social regulatory issues requiring less strict review, like the "rational basis test," are taken on board.[33]

The principle of legitimate expectation or the protection of trust

The principle of legitimate expectation or the protection of trust is another infra-principle derived from the idea of the rule of law according

Republic of Korea", K. Cho (ed), *Litigation in Korea*, London: Edward Elgar Publishing (2010), p.130.

32 Constitutional Court Decision 89Hun-Ga95, September 3, 1990, 2 KCCR 245.

33 Jongcheol Kim, "Property Rights and Economic Order under the Constitution of the Republic of Korea", the 1st Asian Forum for Constitutional Law 2005 - Constitutionalism and Constitutional Adjudication in Asia, Proceedings, September 24, 2005.

to the Constitutional Court. It is dedicated to the protection of expectations or trust on the part of the people, formulated from the law existing at the time of their actions so that no new law to the detriment of the people whose actions completed before its promulgation should be applied to them.[34] One typical example of this principle is the prohibition of ex post facto criminal punishment stipulated in Article 13(1) of the Constitution. The Constitutional Court recognized the need for the protection of legitimate expectations beyond cases related to criminal punishment and annulled a provision of the Regulation of Tax Reduction and Exemption Act on the ground that the amendment of tax law to the disadvantage of taxpayers during the applicable period of taxation, without any transitional clauses, infringed their legitimate expectation in having relied upon the existing law.[35]

Welfare State

The ideal of the Welfare State is generally regarded as one of key principle of the Korean Constitution, though some concern is given to the very word of "welfare state". Influenced by the German Constitutional Court's ideology of a 'Social State', the Constitutional Court prefers the Social State to the Welfare State. However, both concepts can be regarded as the same ideal in the sense that both have a commonality in that the State is entitled or even obliged to intervene in the coordination of private sectors to promote public welfare.

[34] Constitutional Court Decision 96Hun-Ga2, 96Hun-Ba7 · 13 (Consolidated), February 16, 1996, 8-1 KCCR 51.

[35] Constitutional Court Decision 94Hun-Ba12, October 26, 1995, 7-2 KCCR 447.

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Mandatory Employment of Disabled Persons Case

[15-2(A) KCCR 58, 2001Hun-Ba96, July 24, 2003] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

B. Summary of the Decision

The Constitutional Court, by four out of nine Justices with respect to the mandatory employment of disabled persons provision of the Act, and by a unanimous decision with respect to the disabled employees employment charge provision, held that the respective provisions are not unconstitutional. …

(1) Decision with respect to the Mandatory Employment of Disabled Persons Provision

(A) Opinion of four Justices that the provision is constitutional

The Preamble of the Constitution declares that an equal opportunity is guaranteed for all citizens and seeks to realize a welfare state by presenting the direction of the guarantee of the social basic rights. Article 32 of the Constitution provides that all citizens are entitled to the right to work, and that the state shall make effort to promote employment and to guarantee appropriate wages by social and economic means. Article 34 of the Constitution declares that every citizen is entitled to a life worthy of human beings; at the same time, it obligates the state to promote social security and social welfare to specifically realize such humane living conditions, and emphasizes that especially those citizens lacking capability of living due to such factors as disability, ailment, or aging shall be protected by the state pursuant to the relevant statutes. Also, Article 119(2) of the Constitution provides that the state may regulate and coordinate in

order for the democratization of economy through harmonization among various subjects and actors within the economy.

Disabled persons often face extreme hardship in reality in obtaining a vocation appropriate to their ability due to their physical or mental conditions, which requires a measure at the social and national level in order to guarantee the right to work of disabled persons. From this perspective, despite the guarantee of the freedom of economic activities of business entities and the declaration of the freedom of contract among private individuals under the Constitution, it is an inevitable measure to restrict such freedom to a certain degree in order to recognize human dignity and value and to guarantee humane living conditions for disabled persons who are in a socially and economically weaker position. As the creation of jobs relies on general private business entities as well as the state, it is inevitable to obligate private businesses with respect to the guarantee of employment for disabled persons to an appropriate extent. Therefore, the mandatory employment of disabled persons provision at issue in this case does not excessively restrict the freedom of contract and other economic liberties of the employers.

The state and the local governments are the public actors responsible for carrying out education, publicity campaigns, and employment promotion drives for disabled persons to increase understanding of the employers and the general public with respect to the employment of disabled persons, carrying out support and subsidy for the employers, the disabled employees, and other parties concerned and vocational rehabilitation measures reflecting the unique characteristics concerning disabled individuals, and harmonically and effectively carrying out measures necessary to promote employment and job security for disabled persons. Also, the Act re-

laxes the employment requirement when applied to private industry where the Act acknowledges a considerable portion thereof consists of the vocation for which it is difficult to employ disabled persons. Therefore, although the Act provides that the state and the local governments shall make efforts to recruit and retain two-hundredths of the public officials employed therein among disabled persons unlike private business entities with the exceptional exclusion of certain public offices as set forth in the presidential decree, it is a differential treatment based on a reasonable ground and is thus not against the principle of equality.

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Notes

1. What is the relationship between the principle of welfare state and social rights in the Korean Constitution?
2. What constitutional implications can be drawn from the KCC's jurisprudence that it is an inevitable measure to restrict such freedom to a certain degree in order to recognize human dignity and value and to guarantee humane living conditions for disabled persons who are in a socially and economically weaker position?
3. In this case, the KCC applied the prohibition of excessive restriction to economic freedoms and rights though it ruled in favor of social rights. Is this approach plausible?

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International Peace and Peaceful Unification

Articles 5 and 6 of the Korean Constitution together with the Preambl e[36] declares the principle of international peace in three terms. First, the Korean Government has a constitutional obligation to maintain international peace and to renounce all aggressive wars. This constitutional stance is different from the Japanese constitutional approach in that the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes and to accomplish such aim any form of forces are to be negated. Second, the Korean Government is obliged to respect international law by way of giving treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law the same effect as the domestic laws of the ROK. Third, the status of aliens shall be guaranteed as prescribed by international law and treaties.

The KCC regards the constitutional promise of international peace and peaceful unification as an undeniable duty of a state to provide the condition under which citizens enjoy the maximum capacity of constitutionally guaranteed basic rights, hold human dignity and value and live peacefully free from war and terror.[37]

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[36] In preamble, “perpetual world peace” is declared as one basic value of the Constitution.

[37] However, the KCC denies that this state obligation denotes the individual right to peaceful livelihood: “Despite pacifism is the goal and spirit of the Constitution, however, it does not directly create citizen's individual right to peaceful livelihood. In order to acknowledge a basic right not enumerated in the Constitution, first, we should find the special need for the right. Additionally, the scope of the right (scope of protection) should be relatively clear so that the right retains the power to demand its contents of concrete substance from the subjected person or entity.” (See Wartime Reinforcement Military Practice of 2007 Case, 21-2(B) KCCR 769, 2007Hun-Ma369, May 28, 2009).

Chapter 2 The Structure of the Republic of Korea

A. Divided Polity

Although Article 3 of the Korean Constitution declares that "The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands", it is also constitutionally recognized that a certain part of Korean territory, that is, those areas uner the controle of North Korea is not effectively governed under the Korean Constitution. For example, Article 4 of the Constitution confirms that a basic goal of the Republic of Korea is the pursuit of peaceful unification of the divided polity while Article 66 (3) of the Constitution impose on the president the duty to pursue sincerely the peaceful unification of the homeland. This peculiar political situation becomes consistent sources of constitutional and international dilemma.

At the domestic level, the Democratic Peoples' Republic of Korea(DPRK), known as North Korea, is regarded as a dual entity: a subversive anti-state organization and a negotiating partner for dialogue and cooperation in the pursuit of a common goal of unification.[38] On the one hand, the National Security Act, a special criminal law enacted to counteract anti-state activities by DPRK or such organizations sympathizing DPRK, criminalizes any activities to praise and encourage the activities of an anti-state organization or its members.[39] On the other hand, DPRK is recognized as a special political entity entitled to exchanges and cooperation under the Inter-Korea Exchanges and Cooperation Act. However, this

[38] Supreme Court Decision 2003Do758, April 17, 2008; 92Hun-Ba6, January 16, 1997, 9-1 KCCR 1.

[39] Article 7 of the National Security Act.

does not mean that ROK recognizes DPRK as an independent state. For example, the Supreme Court and the KCC made it clear that the inter-Korea relationship is not that between two independent states but a tentative and special relationship formed in the course of unification within a Korean Community.[40]

At the international level, ROK as well as DPRK are regarded as independent states so that they are respectively members of the United Nations from 1991.

One practical issue in this context is the legal status of those who defected from DPRK to abroad and ROK. The Supreme Court ruled that North Korean residency should not interfere with the acquisition of the nationality of ROK.[41]

As the ROK is a divided polity, there is a unique constitutional principle stipulated in Article 4 of the Constitution that requires the Korean Government and People to pursue peaceful unification based upon a free and democratic basic order. First of all, the way to pursue unification should be peaceful in the sense that the use of force in any form as a method of unification cannot be justified. Also, there is a substantive limitation on the policy for unification: the new polity created after the successful movement for unification must be based upon "a free and democratic basic order"(or the basic order of a free democracy, or the principles of freedom and democracy[自由民主的 基本秩序]). The KCC defined "the free and democratic basic order" as a negation of "the rule of violence or arbitrary rule of one man or one party". More specifically, it was construed as "the integrity of constitutional system such as the sepa-

[40] Supreme Court Decision 2003Do758, April 17, 2008; 92Hun-Ba6, January 16, 1997, 9-1 KCCR 1.

[41] Supreme Court Decision 96Nu1221, November 12, 1996.

ration of power, representative democracy, multi-party system, electoral system, the economic system based on private property and market economy, and the independence of the judiciary".[42]

B. A Unitary State and Local Autonomy

The ROK is a unitary State and thus, the vertical distribution of governmental powers is implemented in the relationship between the central government and local autonomous governments. Unlike most countries having a federal system, central authority appears to be very extensive so that the powers delegated to local autonomous bodies are few and defined by Acts of the National Assembly. To avoid any misunderstanding, Article 117(1) expressly provides that the powers of local governments are confined to the administrative matters pertaining to the welfare of local residents, management of relevant properties and rule-making within the delegated ambit of Acts and accompanying subordinate regulations in relation to local autonomy.[43] Moreover, Articles 117(2) and 118(2) of the Constitution delegate to the National Assembly a wide discretion in determining the types of local governments and all the required matters in relation to the organization and operation of local councils. The only constitutional requirement in the organization of a local government is that the local government shall have a local council (Article 118(1)).

However, it is construed that the wide nature of central legislative authority does not amount to the infringement of the essential element of local autonomy. In a competence dispute brought by a group of local governments against the BAI, the Constitutional Court recognized such a

[42] Constitutional Court Decision 89Hun-Ka113, April 2, 1990, 2 KCCR 64.

[43] Constitutional Court Decision 2001Hun-Ra1, October 31, 2002, 14-2 KCCR 362, 370; Constitutional Court Decision 2002Hun-Ra2, October 31, 2002, 14-2 KCCR 378, 386.

constitutional limitation on legislative discretion, although the majority opinion refused to find in that case that the statutory provision that BAI's right to audit and inspection can be extended to "autonomous affairs" of local governments is in violation of such limitation and thereby infringes on local governments' rights to autonomy.[44] It stressed, among other things, that the independence of the BAI in its function is statutorily guaranteed as opposed to the normal central agencies, and that the relationship between the central government and local governments is a sort of conciliation in pursuit of the common objectives of enhancing welfare of nationals as well as residents by way of harmonizing the efficiency of central administration and autonomy of local administration while distributing administrative functions and responsibilities among them.[45] This does not mean that the Court is reluctant to recognize self-governing power of local governments because, in another competence dispute case between Seoul Metropolitan City and the Executive Branch in re a group of central executive agencies including the Minister of Public Administration and Security, the Court ruled that if the head of a central administrative agency conducted a sort of comprehensive and blanket inspection on the autonomous affairs of a local government without any proof of specific violations of relevant statutes, it infringed on the self-governing authority of the local government guaranteed by the Constitution and the Local Autonomy Act.[46]

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[44] Constitutional Court Decision 2005Hun-Ra3, May 29, 2008, 20-1(B) KCCR 41.
[45] Constitutional Court Decision 2005Hun-Ra3, May 29, 2008, 20-1(B) KCCR 41.
[46] See Competence Dispute over Inspection of Autonomous Affairs of Local Government Case (Constitutional Court Decision 2006Hun-Ra6, May 28, 2009, 21-1(B) KCCR 418).

C. Bureaucracy and the Military

Bureaucracy

Article 7 (1) of the Constitution declares that “All public officials shall be servants of the people and shall be responsible to the people”. This clause has been construed to have an implication that “the public officials shall perform their official duties for the welfare of the public as a whole and should not serve the interest of a particular political party or organization”.[47] The scope of public servants with this constitutional obligation does not confine those in a career civil service system but include those who elected or appointed in the political process such as the president, the prime minister and ministers. This provision was used by the KCC as a constitutional justificatory basis for Article 9 of the Public Officials Election Act specify and realizing the constitutionally requested 'obligation of public officials to maintain neutrality concerning elections.[48]

Article 7 (2) of the Constitution adopts a career civil service system by protecting the status and political impartiality (or neutrality) of public officials. The scope of public officials guaranteed by this provision is by definition confined to those who are not appointed by political purpose. This clause is construed to make it clear that the consistency and continuance of the administration will not be deprived by the change of the political powers and the administration will not be depended upon the political beliefs of the public officials.[49]

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[47] Constitutional Court Decision 95Hun-Ba48, April 24, 1997, 9-1 KCCR 435, 442-443.

[48] Article 116 (Principle of equal opportunity among the political parties) of the Constitution is also suggested to justify such interpretation.

[49] Prohibition of Political Party Membership of Primary and Middle School Teachers

Career public servants are subject to the intensified statutory duties prescribed by relevant Act. For example, the State Public Officials Act provides a number of duties. They include the duty to take an oath in the presence of the head of the agency to which he/she belongs at the time of assumption of office (Article 56), the duty of obedience to orders of his/her superior officer with respect to his/her duties (Article 57), the duty to concentration or prohibition of deserting from office without permission of his/her superior officer or any justifiable reason (Article 58), the duty of kindness and impartiality to all citizens (Article 59), the duty of religious neutrality[50], the duty confidentiality (Article 60), the duty of integrity from corruption (Article 61), the duty to maintain dignity (Article 63), and the prohibition of pecuniary business and concurrent office (Article 64). There has been controversies not only on the wide range of duties imposed on public servants but also the overbroad and open-ended elements of such duties. Criticisms stress that since the status as public servants is the result of their exercise of the constitutional right to hold public office and the nature and character of public service is not always different from that of private service in market economy, the public status of civil servants itself cannot justify the deprivation of their civil and political liberties though they can be more restricted compared to ordinary people.

However, the most controversial duty based upon a career civil service system is whether this can justify the legislative ban on political freedom of public officials. Article 65 of the State Public Officials Act prohibits public officials from participating in an organization of, or join in, any political party or other political organization. Public officials are also pro-

Case (2001Hun-Ma710, March 25, 2004, 16-1 KCCR 422).

50 Article 59-2 of SPOA enacted in the wake of political scandals related to religious impartiality in the Lee Myong Bak Government allows every public official to disobey any religiously partial order of his/her superior officers.

hibits from engaging to support or oppose a specified political party or person in an election in soliciting any person to cast or not to cast a vote; attempting, superintending, or soliciting a signed petition campaign; putting up, or causing another person to put up, documents or books at public facilities, etc.; raising, or causing another person to raise, any contribution, or using, or causing another person to use, public funds; soliciting another person to join or not to join a political party or any other political organization. Furthermore, Article 66 of the same Act prohibits any collective activities of public officials for any labor campaign, or activities other than public services.

A peculiarity of bureaucracy in the Korean governmental system is that administration of independent powers such as the National Assembly, the Supreme Court, the KCC and the Electoral Management Commission have respectively separate administration systems independent from the executive branch on the ground that such independent administration is essential to the independent performance of their functions.

The Military

The military is constitutionalized in Article 5(2) and Article 74 of the Constitution. Article 5 (2) provides that the Armed Forces shall be charged with the sacred mission of national security and defense of the land and their political neutrality shall be maintained. This provision has a special constitutional implication because ROK has experienced military coup twice in 1961 and 1980.

The President is the Commander-in-Chief of the Armed Forces of which organization and formation is governed by the Act on the Organization of National Armed Forces.

The National Armed Forces shall be composed of the Army, the Navy and the Air Force and the Marine Corps shall be established in the Navy. The Headquarters of the Joint Chiefs of Staff shall be established under the Ministry of National Defense in order to direct and supervise the operation units of each service of the Armed Forces and to carry out joint or allied operations.[51]

The Minister of National Defense shall, by order of the President, take charge of the matters concerning military affairs, and shall direct and supervise the Chairman of the Council of the Joint Chiefs of Staff and the Chief of Staff of each service of the Armed Forces.[52] According to the doctrine of 'civilian command of armed forces', no member of the military with active duty shall be appointed a member of the State Council of which position is required to be the Minister of National Defense.[53] The Chairman of the Council of the Joint Chiefs of Staff shall assist the Minister of National Defense with regard to military commands, and shall direct and supervise, by order of the Minister of National Defense, the operation units of each service of the Armed Forces, the main duty of which is combatting, and shall direct and supervise the joint units established for the purpose of carrying out joint operations.[54] The Chief of Staff of the Army shall be installed at the Army, the Chief of Staff of the Navy at the Navy, and the Chief of Staff of the Air Force at the Air Force and the Chief of Staff of each service of the Armed Forces shall direct and supervise the respective service of the Armed Forces by order of the Minister of National Defense.[55]

[51] Article 2 of the Act on the Organization of National Armed Forces.
[52] Article 8 of the Act on the Organization of National Armed Forces.
[53] Article 87 (4) of the Constitution.
[54] Article 9 of the Act on the Organization of National Armed Forces.
[55] Article 10 of the Act on the Organization of National Armed Forces.

Chapter 3 Democracy and the Government

A. Form of government

The Form of government concerns how to allocate state powers among governmental branches according to the constitutional principles of separation of powers and checks and balances. Although it can cover the relationship between judicial power and other branches, what is usually focused in the debate on the form of government is the relationship between legislative and executive branches because the judicial power, being conceived as a politically neutral power, is not envisaged to be directly responsible to the political powers.

Recent public concerns about the current form of government in Korea are not the exception for this general tendency so that they are focused upon how to reorganize the relationship between the two political powers. On August 2009, the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly published a proposal for constitutional revision. Although it suggests not only changes in the form of government but also other desirable constitutional reforms, main public attention has been drawn to the former issue. Actually, considering that Korean constitutional democracy has been consolidated under the current constitutional arrangements by achieving five consecutive peaceful transfers of powers and high level of human rights protection, this move for constitutional revision sounds odd. However, it is also true that the current constitutional arrangements contain part of old legacy of authoritarian regimes embedded in Korean political culture during pre-democratization period that are arguably believed to cause recurrent political turmoil be-

fore and after the presidential election, for example, political scandals caused by political bribery and governmental abuses. Notwithstanding the persuasiveness of this argument, it cannot be easily denied that the success of constitutional democracy is relying upon effective and efficient governmental arrangements. This short essay aims to examine the arguments for constitutional revision to change the form of government in terms of historical implications of Korean constitutionalism and a couple of essential considerations that must be addressed in the quest for a desirable form of government such as oriented values of governmental arrangement, relevant constitutional and political institutions having a great impact on its proper working.

A Brief History of Governmental Structure in Modern Korea

Since the formal establishment of the first republican government in South Korea in 1948, nine constitutional revisions or amendments were made. Most changes except the fourth amendment were involved in the change of form of government in a broader sense that covers the method of presidential election, the term of presidency, the relationships between president and state council or prime minister. Chart 1 shows the brief outline of constitutional revisions in terms of form of government.

<Chart 1> Outlines of Constitutional Revisions in terms of governmental structure

constitution	Form of government	Method of presidential election	Nature of state council	Main political causes
Founding Constitution (July 7, 1948)	Presidential system	Indirect election by the National Assembly	Decision-making organ	* American Military Government and Syngman Rhee's personal preference for presidential system
First Revision (July 7, 1952)	Presidential system	Direct popular ballot	Decision-making organ	* negotiation between direct ballot system and cabinet system
Second Revision (November 29, 1954)	Presidential system	Direct popular ballot	Decision-making organ	* permission to reelection for the First President
Third Revision (June 15, 1960)	Cabinet system	Indirect election by Joint Assemblies of Two Houses	Cabinet	* reflection on autocratic presidential rule
Fourth Revision (November 29, 1960)	Cabinet system	Indirect election by Joint Assemblies of Two Houses	Cabinet	* no change in form of government
Fifth Revision (December 26, 1962 revised/ December 17, 1963 enforced)	Presidential system	Direct popular ballot	Deliberative organ	* May 16 Military Coup by General Park Chung Hee
Sixth Revision (October 21, 1969)	Presidential system	Direct popular ballot	Deliberative organ	*Permission to reeleciton for Park Chung Hee

constitution	Form of government	Method of presidential election	Nature of state council	Main political causes
Seventh Revision (December 27, 1972)	Autocratic-Presidential system	Indirect election by National Convention for Reunification	Deliberative organ	* Palace Coup by President Park Chung Hee
Eighth Revision (October 27, 1980)	Autocratic-Presidential system	Indirect election by the electoral college	Deliberative organ	* May 17 Military Coup
Ninth Revision (October 29, 1987 revised/ February 25,1988 enforced)	Presidential system	Direct popular ballot	Deliberative organ	* June 10 People's Uprising

Relatively unstable political reality between 1948 and 1987 has hindered Korean Constitutionalism from being consolidated early and firmly so that the constitutions of Korea have not thoroughly taken off a nominal image until the establishment of 1987 constitutional regime. The "nominal" feature of the constitution was anticipated from the first constitution of 1948 which entailed the gap between the form of government envisaged in constitutional arrangements and its actual operation in reality. It adopted a modified presidential system incorporating a variety of institutional elements peculiar to a parliamentary system. President was elected by the national assembly rather than by the direct vote of the people. The state council consisting of the president, the prime minister and state councilors was envisaged to be the highest deliberative authority within the executive, so that it should pass a resolution on major constitutional agenda referred to president as the head of the executive.

However, contrary to the literal institutional arrangements in the Constitution, the First President Syng-man Rhee and his supporters tried to make the state council and other constitutional authorities within the executive 'nominal' institutions by yielding president's power as if the executive power was, like the USA, vested in president alone. What is worse than the distorted operation of the executive power was President Rhee's relationship with the opposition and the national assembly. President Rhee, who had been respected as a national hero due to his consistent commitment to the independence movement in the colonial period, had a tendency to ignore the principle of checks and balances and misuse political and executive power to oppress political opposition from the national assembly and opposition parties. This gap between constitutional ideals and reality caused continuous political conflicts between the ruling class and the opposition during the Rhee government.[56] Not surprisingly, the first and second amendments of the First Constitution made respectively in 1952 and 1954 were the result of a wave of political strife caused mainly by the different views among political groups on how to reconcile the president's power with that of other administrative agencies and the national assembly.

Dissatisfaction with the authoritarian rule of President Rhee for more than a decade in general, and the rigged presidential election in 1960 in particular, prompted the Korean people to overthrow the Rhee government in order to enhance constitutional democracy. With this first civil revolution in 1960, the new constitution went into effect. It adopted a parliamentary system to wipe out the authoritarian image of the presidential system. In a reaction to the nightmare of a rigged election, the Electoral

[56] Young-sol Kwon, *The Relevance of Constitutional Law: Theories and Discourses*, Bobmunsa (2006)[in Korean], pp.142-143, 149-151.

Commission was constitutionalized as an independent agency with a nationalized organization.

The collapse of the constitutional government set up as a result of a civil revolution in 1960 had a significant impact on the development of Korean constitutionalism from then on. For example, by the short-lived experience of a parliamentary system, bad memory on this form of government was inscribed in the constitutional history of Korea and thus several attempts to switch to a parliamentary system once more have failed to obtain significant popular support. However, the spirit of self-determination and eagerness to the protection of basic human rights, which blossomed in the course of the civil revolution, remained at the heart and mind of the Korean people and became the driving force of unstopped movements for constitutional democracy challenging the longstanding authoritarian regimes that followed the military coup in 1961.

After around two years' rule of the military junta, constitutional democracy was restored by the 1962 Constitution.[57] This Constitution returned to the presidential system in which the President was to be elected for a term of four years by direct public ballot and was barred from re-election for a third term.

The constitutional democracy based upon the 1962 Constitution which had once been marred by the controversial amendment for extending the maximum number of terms of the President from two to three terms in 1969 came finally to the end by a kind of self-inflicted palace coup organized by the then President Chung-hee Park in 1971. With the successful enactment of the 1972 Constitution, later known as the notorious "Yushin Constitution", President Park institutionalized an autocratic rule

[57] The Constitution of 1962 was enacted in 1962 but came into effect in December 1963.

under the slogan "Korean-style democracy," which could not be compatible with the ideals and principles of constitutionalism, such as the separation of powers and the rule of law. The sovereign power of the people was constitutionally delegated to the National Convention for Self-Dependent Reunification, the chairperson of which was the President selected by itself rather than the direct public ballot. The President was intended to overpower other governmental branches and partisan-oriented political order in that he was entitled, among others, to select a third of members of the National Assembly and place an emergency order with the effect of restraining individual's basic rights.

The pseudo-constitutional regime collapsed thanks to the assassination of President Park by his right-hand man in the course of increasing challenges and resistance of the people calling for the restoration of constitutional democracy in 1979. However, despite the fall of President Park, the swift restoration of verified constitutional democracy did not occur since a group of military officers led by General Doo-whan Chun, the then head of the Military Security Force, successfully took over political power through a series of military coups in 1979 and 1980.[58] The new constitution of 1980 enacted by a referendum under martial order adopted a hyper-presidentialist governmental system where president elected by the electoral college was envisaged to have ultimate executive authority overpowering other government branches. One symbolic camouflage of this autocratic system was the fact that the elected President was prohibited from rerunning after his or her first seven- year term. This institutional limitation to prevent long-term autocratic rule received strong support from the people, which made it survive the constitutional amendment in the wake of the People's uprising in 1987, although the term was re-

[58] Supreme Court en banc Decision 96Do3376 (Jip45(1)Hyung, 1; Gong1997.5.1.(33), 1303).

duced from seven years to five years. The rule with an iron fist under the 1980 Constitution led people to participate in the consistent movement for democratization. The aim of this longstanding movement was to revise the Constitution to restore the direct presidential election system and the checks and balances mechanism in constitutional arrangements which had been mostly disappeared since 1972. The people's determination to change the authoritarian status quo expressed in the general election of 1985, which returned a victory to the opposition even in the oppressed political atmosphere. Stimulated by the victorious outcome of the election, the opposition started its campaign for constitutional amendment with an emphasis on the reform of presidential election to a direct ballot system. However, on April 23, 1987 President Chun refused to accept this request, and declared the next presidential election would take place through the electoral college system under the old constitution, mimicked as a "gymnasium election." As dissatisfaction with President Chun increased, the people poured out into the streets to demonstrate against his plan and, finally, the then presidential candidate Tae-woo Roh and the ruling Democratic Justice Party agreed with the constitutional amendment. The new constitution was drafted by a joint committee consisting of four equal number of representatives from the ruling Democratic Justice Party and the first opposition New Korea Democratic Party. By this constitutional amendment triggered by the People's Uprising 1987, constitutional democracy that had been collapsed or suspended since 1972 finally resumed in Korea. The 1987 Constitution, the ninth from the First Constitution of 1948, consolidated democracy and the rule of law to the level and extent that modern Koreans had never experienced until that time.

Challenges to the Current form of government under 1987 Constitution

Features of the current form of government

The form of government under the present Constitution adopted in the wake of the June People's Uprising in 1987 is a presidential system which, like the previous Constitutions, has been modified to incorporate some elements of a parliamentary system. First, although the President is the head of the Executive as well as the head of the State, the executive power is vested in the executive branch as a whole, rather than in the President alone. The collective layout of the executive power, however, is not a significant erosion of the presidential form of government, because it is generally accepted that the President, as the head of the Executive, is empowered to have a final authority in the decision-making process within the Executive. That is, other executive organs are considered assistants to the President so that their constitutional powers are apt to perform the function of procedural checks and balances within the decision-making process of the executive branch.[59] For example, the State Council is the highest deliberative authority within the Executive, but it is arguably construed that the President may not be bound by a resolution of the State Council. In fact, no such occasions have taken place, partly because deliberation at the State Council tends to be coordinated at the preparation stage by the President's secretarial aids and it is almost unthinkable in Korean political culture for the Council to decide against

[59] Constitutional Court Decision 89Hun-Ma221, April 28, 1994, 6-1 KCCR 239. In this 8-1 decision where the Government Organization Act together with the National Security Planning Agency Act, the Constitutional Court held that the President is the final decision-maker within the executive branch while others including the Prime Minster are assistants to the President.

the explicit intention of the President. If some Councilors have different opinions from the President's, they would resign rather than defy the President's unequivocal opinion.

Second, the Prime Minister who is designed to be appointed by the President with the consent of the National Assembly is next down from the President in the hierarchy of the Executive and in the position to direct the Executive Ministries under the order of the President. He (or she) also takes the positions of Vice-Chairperson of the State Council and the first possible acting President when the office of the presidency is vacant or the President is unable to perform his/her duties. Given this constitutional status, the Prime Minister is understood to be accountable to the National Assembly so that he (or she) be subject to the no-confidence recommendation of the Assembly, although the President is not legally bound to that motion.[60]

Third, unlike the US Constitution, the Executive has the constitutional power to introduce bills for consideration at the National Assembly.

Fourth, the heads of executive ministries, like countries with a parliamentary system, shall be appointed by the President among State Councilors on the recommendation of the Prime Minister, and a State Councilor or Minister can be appointed among members of the National Assembly.[61]

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[60] In the presidential impeachment case of 2004, the Constitutional Court made clear that the resolution for the removal of the Prime Minister or State Councilors from office cannot be construed to have binding force on the President because the nature of the resolution is literally a recommendation rather than a self-executing final decision.

[61] Article 43 of the Constitution prohibits members of the National Assembly from concurrently holding any other office prescribed by law, but the office of a State Councilor or Minister does not fall into the category of statutory prohibited offices.

Challenges to the current governmental structure

a. Proposals for constitutional revision by ACCR

In the course of public movements, the Final Report of the Advisory Commission on Constitutional Revision for the Speaker of the National Assembly was published on August 2009. There were three points in this Report. First, the Bill of Rights should be reorganized in a manner that is supplemented by new freedoms and rights, such as the right to life and security and the basic right to access to information. Second, the constitutional structure of the government should be reformed in the direction of lessening President's power, for example, by changing the form of government from the current five-single term presidency to the semi-presidential or premier-presidential system. Third, the judicial system should be democratized and rationalized by adopting new institutions and changing the formation of the Judiciary, including the Constitutional Court. Proposed judicial reforms include the repeal of recommendation power of the Chief Justice of the Supreme Court for Associate Justices when there is vacancy, the introduction of abstract norm control[62], the transfer of jurisdiction of election suits from the ordinary courts to the Constitutional Court.

b. Criticisms against the current form of government

Basically, two problems by and large have been raised against the current form of government. First, five-year-single-term presidential system

[62] "Abstract norm control" is a system of constitutional review as opposed to "concrete norm control" in that even if there is no specific cases or controversies in the judicial proceedings, the Constitutional Court may review whether laws governing such hypothetical cases are compatible with the Constitution upon the request of designated applicants such as the President or members of the National Assembly.

has been attacked as the main cause of inefficiency and instability of political system. It is argued that a relatively short term of president with no possibility of reelection and difference in the terms of president and legislative representatives has a number of built-in problems which ranges from high possibility of divided government, lack of responsible government, instability of national policies due to frequent elections, weakening party politics to frequent constitutional strife to inflict grand change of constitutional regimes such as constitutional revision movement, demand for interim evaluation of presidency, and impeachment.

Second, democratic deficit in the formation of executive and legislative branches is another issue of criticism. Majoritarian election with no run-off election not only in presidential but also in parliamentary elections is pointed out to be the main reason of political instability by resulting in the selection of minority president in most presidential elections and "manufactured majority" in the formation of the National Assembly disproportionate to popular support for political parties. The office of prime minister instead of vice presidency is also attacked as an incommensurate existence in presidential system.

c. Proposed Alternatives to the current form of government

Based upon the raised criticisms challenging the current form of government, the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly 2009 provided two alternatives: a semi-presidential system and four-year-double-term presidential system. Chart 2 shows their schematic outlines as proposed by the Commission.

<Chart 2> Alternatives to the current form of government

	Semi-presidential system	Four-year-double-term presidential system
Formation of legislature	* bicameral system	* bicameral system
Power to submit legislative bills	* prime minister	* repeal of the executive power to submit bills as provided in the current system
Power to dissolve Legislature	* president's power to dissolve legislature * Prime minister's power to propose to the president in the case of non-confidence vote by the lower house	* not necessary
Method of presidential election and term	* five-year-single-term * Direct popular ballot	* four-year-double-term * direct popular ballot
State council(cabinet)	* deliberative organ for president on policies entrusted to president	* not necessary
Prime minister	* *head of government elected by the lower and appointed by president	* * not necessary
cabinet membership of representatives	* * necessary	* * prohibited by the constitution
Recommendation of discharge of prime minister or ministers/non confidence vote	* * collective responsibility of the cabinet ministers in the case of non-confidence vote for prime minister	* * repeal of legislature's power to recommend discharge of prime minister as provided in the current constitution

• Source: The Advisory Commission for Constitutional Revision for the Speaker of the National Assembly 2009

d. Relevant factors for evaluation of alternatives

In order to evaluate the current form of government and its alternatives, a number of relevant factors should be considered to produce effective scientific outcomes.

First of all, the form of government must accommodate oriented values of constitutional democracy shared by the people of the political community. The ultimate ideals of constitutional democracy lie in the popular sovereignty based upon self-government of the people. Although a full-fetched direct democracy is not possible and in reality does not always produce the best policy for the people as a whole and the perpetual prosperity of the society, a reduction of the ideal of democratic republic to a mere façade of the rule of a handful of ruling elites cannot be justified too. Therefore, any attempt to reform the form of government must be undertaken in the direction to enhancing popular participation in the political process. In addition, not only the separation of powers but also efficiency of governmental activities must be considered to redesign or evaluate governmental structures of a polity.

Second, the difference between presidential system and parliamentary system is not an absolute one so that it should not be exaggerated by uttering any institutional implications beyond constitutional principles shared despite the differing forms of government. For example, the ideal of parliamentarism derived from the principle of rule of law and representative democracy cannot be an exclusive doctrine pertaining to the parliamentary system of government but a core element of constitutional democracy that should be cherished even in presidential system. Although, as an independent representative of the people, the presidency is not politically

dependent upon parliamentary confidence, it does not mean that president is not envisaged to be accountable to parliament for his exercise of executive power. Above all, even in presidential system, most presidential power is to execute what legislature decides for the executive to do so that without any legislative endorsement, president can do almost nothing. A widespread belief among a number of Korean people that it is president who leads national policies rather than legislature is a distorted myth of authoritarian presidentialism giving an overarching supreme status to president sitting above other governmental branches. The essential difference between presidential system and parliamentary system is nothing but the very notion that president as the head of government is regarded institutionally superior to his ministers and cannot be stepped down without impeachment while his counterpart in parliamentary system, i.e. prime minister, is considered as the first minister among associate ministers and should be subject to confidence vote by legislature.

Third, it should be borne in mind that governmental arrangements come into effect through constitutional institutions such as the party system, the electoral system, parliamentary system and local autonomy system. Without the corresponding development of such institutions, the satisfactory functioning of governmental arrangements could not be achieved.

As far as the party system is concerned, whether a polity has a strong tradition of two-party system as in the UK or not has an influence on the relationship between the executive and legislature. If a country adopted the presidential system is coupled with a multi-party system in which stable majority within legislature is unlikely to take place, a divided government would become a constant condition of the political system, which means that the efficient functioning of this system requires a consensus

politics in that political compromise among political actors can be smoothly obtained by avoiding political deadlocks rather than a conviction politics.

The electoral system also plays an important role in the stabilization of the governmental arrangements. Majoritarian system or the first-past-the-post (FTPT) system is said to have a strong tendency to producing a stable majority in legislature unless it is chosen together with an ultra multi-party system. For example, the British parliamentary election under a majoritarian system often results in stable majority which can be easily transformed to either an "electoral dictatorship" by giving both the legislative as well as administrative powers to a single party or a "government in a vegetative state" regardless of whether the form of government is presidential or parliamentary system. Proportional election system coupled with a multi-party system tends to produce a hung parliament which without special helps of other factors would be destined to a weak government.

The formation of legislature and the levels of local autonomy and/or federalism are other important factors having an impulse to the working of governmental arrangements. In a presidential system, bicameral system may camouflage the possible political tension between the lower house and president which can be easily caused due to their rivalry based upon the fact that both have a full democratic legitimacy. Whether a polity has a federal system or not is another important factor we should consider in designing or evaluating governmental structure. If a non-federal polity is highly centralized, the sacrifice of checks and balancing mechanism among state branches in favor of governmental efficiency, for example, the coincidence of presidential election and parliamentary election would not be an acceptable option for constitutional design because it could easily result in an autocratic single party rule.

Fourth, since all these institutions and structure are set into force by actors in the political system, political culture of a society and political practices and understandings constituted and evolved through communications of those actors in the political process have a great importance in implementing oriented values and purposes of institutional arrangements. In sum, without proper consideration of these surrounding factors, the evaluation of governmental structure cannot achieve actual relevancy so that fail to produce a shared support of the people essential to the success of constitutional reform.

Then, what are characteristics of the Korean political culture? It is generally accepted that Koreans do have a strong desire to choose the head of government by direct popular election, which has been recognized especially in June 1987 Uprising. Unless there is significant change in people's sentiment to direct presidential election, it would not be plausible that other form of government would be chosen in the near future. Korean politics features not only a weak party system captured by pre-modern leader oriented party organization and less proportional electoral system prone to be in disfavor of minority parties. In addition, Korean election law notorious for severely regulatory electoral management puts inroads to free choice of representatives and equal competition among candidates in detriment of new comers in political arena. Another cultural peculiarity of Korean politics is chronic abuses of law enforcement powers of the police, prosecutors, tax officers and information agents that oppress rational function of the political and governmental system. These abuses undermine the very base of the rule of law so that any institutional reform to rationalize governmental process would not produce the intended result. Still endemic corruption and cronyism of es-

pecially bureaucrats and political and economic vested interests also hinders governmental system from working properly. Finally, regionalism rooted in real politics has distorted the will formation of the people. With such a less responsive political sphere, an adoption of parliamentary government system is highly likely to deepen the gap between the representatives and the people.

e. Evaluation of alternatives

The most powerful proposal widely supported by politicians is the four-year-double-term presidential system. This alternative focuses upon the single term of presidency in current governmental structure. However, it is not clear that the change of presidential term can solve the problems with the current system that include the dangers of divided government, irresponsible imperial presidency and early lame duck syndrome because those problems are not caused solely by the single term itself but instead they are the built-in problems of the presidential system per se. The worst case of this kind is the proposal suggested by the late President Roh Moo Hyun in 2007. His proposal intended to adopt the four-year-double-term and to make presidential election and parliamentary election take place at the proximate period on the ground that divided government which often happens in governmental arrangements where presidential term and parliamentary term is different is prone to result in a weak government that could not effectively respond to the present needs of the people. However, the almost simultaneous election of president and parliamentary representatives would, not necessarily but with high possibility, result in an omnipresent president supported by the ma-

jority of parliament so that this electoral dictatorship would ruin the possibility of harmonious consensus politics.[63]

Another powerful alternative suggested by the Advisory Commission for Constitutional Revision is semi-presidential system or dual executive system where president as the head of the state is entrusted to cover higher national politics such as national security and foreign affairs while prime minister as the head of government responsible to the National Assembly takes in charge of ordinary administration of law. Looking into this system by using evaluating criteria, it is not very realistic option for Korean people. Above all, Korean people who as mentioned above have a strong aspiration for direct election of the head of government would accept the reality that power of president chosen directly by them is limited to a couple of constrained areas detached from their ordinary life. Second, the rationale of the new system centers on the efficiency and stability of the political system in comparison with the current system, it is problematic that dualist executive system has different dangers of instability and inefficiency by adding to the traditional separation of powers between legislature and the executive extra institutional built-in division of labor within the executive branch, i.e. between president and prime minister. If the relationship between them is amicable in favor of president, the actual politics may be run in the form of imperial presidency. Otherwise, political discord between the two would cause even more serious constitutional instability.

[63] The 17th President Lee Myong Bak (2008-2013) appeared to be very lucky since he used to be able to enjoy an imperial presidency due to the overwhelming support of the ruling Grand National Party that obtained the absolute majority in the 18th National Assembly election which took place four months after the presidential election. The 18th President Park Geun Hye also enjoys relatively friendly political atmosphere because the Saenuri Party which she affiliates became the majority in the 19th general election held eight months before the presidential election.

One essential commonality between these two powerful alternatives proposed by the Advisory Commission for Constitutional Revision is that both appear to seek the enhancement of parliamentary power as opposed to presidential power by way of either diminishing president's political power and status or increasing powers of legislature.[64] However, the low public confidence in politicians or legislative representatives as a whole prevents this concealed purpose from being realized in the near future. What is missing in this move is a reflexive approach in seeking desirable governmental arrangements. They lack the plausible causation between the causes of problems inherent in the current governmental structure and the alternatives to it. Also, despite the plausibility of the arguments for constitutional revision, it is also true that some problems with current constitutional politics can be solved, not only by way of constitutional amendment, but also legislative reform or changes in political culture which play a substantial role in the working of constitutional arrangements. Given the above considerations, the premise to the specific arguments for constitutional amendment may be such that they are envisaged to respond to the cause of problems imbedded in the target constitutional institutions and the alternatives to the present system are more effective than other means like legislative solutions. Without such practical implication, arguments for constitutional amendment cannot easily attract public support.[65]

[64] The remaining alternative would be the cabinet system but since it has been unpopular among the Korean people, those who support constitutional change of the single term presidential system need to first persuade the Korean people to take the cabinet system seriously instead of tickling them with a disguised mutation of the cabinet system like the semi-presidential system.

[65] For the rough examination of the Final Report above from this point of view, see Jongcheol Kim, iDoes Korean Democracy Really Need Another Constitutional Revision?: A Critical Review on Proposals of the Advisory Commission for Constitutional Revision for the Speaker of the National Assembly"o Korean Journal of Law and Society, Vol.

From this point of view, what should be given more attention in my opinion is how to enhance independence and effectiveness of non-political branches such as the Judiciary, the Constitutional Court, the Election Commission, and the Board of Audit and Inspection rather than the relationship between the legislature and the executive partly because the latter factor requires more constitutional flexibility than the former.

Furthermore, irrespective of the persuasiveness of constitutional reform, it is the will of the sovereign people that decides whether or not a new Constitution is necessary. If they prefer practical agenda like economic and social policies to the institutional or constitutional change, this choice should be respected in the real politics.

A movement for constitutional revision in field of governmental structure must be reflexively examined from various perspectives because the form of government alone cannot produce any intended objectives-the enhancement of democracy, limited government, efficient decision-making and implementing political process-. The relevant factors used as criteria of evaluation include the historical context of the existing governmental arrangements, their institutional elements like the electoral system, the party system and local autonomy, constitutional values and principles and constitutional practices and understandings. Above all, the point we need to take into account here is that the development of institutional arrangements depends upon not only constitutional provisions but also political practices the formation of which in turn counts on cultural attitudes of the people in general and politicians in particular. Given that, the premise to the specific arguments for constitutional revision, e.g. the change of governmental structure to a semi-presidentialism and four-year-double-term

38(2010)[in Korean], pp.125-157.

presidentialism may be that they are envisaged to respond to the cause of problems imbedded in the target constitutional institutions and the alternatives to the present system are more effective than other means such as legislative solution. Without such practical implication, arguments for constitutional revision cannot easily acquire public support.

More specifically, considering that the constitution is a complex system where institutions and political culture interact with each other, most problems of the single term presidential system should be examined not only from the perspective of constitutional institution but also from the perspective of legislative institution such as electoral system or party system and cultural angle. Without a full understanding of such factors, for example, lack of political leadership, majoritarian parliamentary election system, weak party system, over-politicized mass media, unbalanced politicization of society(coexistence of over-politicization of some part of society and apoliticization of other part of society), any attempt to change single term presidential system could not produce any meaningful effect. Also, the causes of pathological inefficiency and instability of the political system can be found in the presidential system itself rather than the term of president as some politicians assume so that any attempt to introduce four-year-double-term presidential system or semi-presidential system cannot be the right alternative to the present system.

B. Representative Democracy and Election

ROK is a democratic republic and its sovereignty is in hands of the people. The popular sovereignty comes into effect mainly in the form of representative democracy. The legislative power is vested in the National Assembly, the executive power in the Executive Branch headed by the

President, the judicial power in courts composed of judges and the constitutional adjudicatory power in the KCC.

The success of representative democracy depends upon two key elements: a free and democratic election of representatives and their ample responsiveness to the sovereign people. A free and democratic election denotes that election is to be governed by the constitutional principles of universal, equal, direct and secret ballot by the citizens. The responsiveness of representatives requires the highest level of political freedom of expression and transparency of political process.

Election System of the National Assembly

The electoral system is the most specific manipulative instrument of politics, and the difference between various electoral systems is of special importance in determining both the nature of democracy and the status of political parties in a given country.

The present electoral system of the National Assembly members is a "mutated" relative majoritarian system. Five sixth of the representatives are elected from single-member constituencies, and around one sixth from national lists of party candidates.[66] In this system, each voter has two votes. One vote is cast for the preferred candidate in a constituency. A constituency candidate who gets the highest number of votes is declared elected. The other vote is cast for the party of the voter's choice. Whether or not it puts up constituency candidates, every party is entitled to present a list of candidates ranked in an unalterable order of preference. The number of non-constituency MPs returned from each par-

[66] In the last general election held in 2012, 246 representatives out of the total of 300 are elected in the local constituencies while 54 are from the national proportional constituency.

ty's list is determined by the level of support given to a party.

Unlike a German style mixed system the nature of which is basically a proportional system, the Korean system is basically majoritarian system because only one sixth of the overall representatives are elected by a party list system. This majoritarian system has been generally accused of producing an "unfair", distorted representation on the ground that it tends to give grossly exaggerated representation to the two major parties by simply focusing on who tops the poll and ignoring the size of the majority. The huge number of 'wasted votes' of ordinary citizens in every constituency in reality results in the disenfranchisement of many millions of voters within the country. The major victim of these wasted votes is the smaller party whose vote obtained, across the local constituencies, cannot be translated into the seats in the National Assembly.

Constitutional Review of Election System

Mutated proportional election system

In a 2001 landmark election law case, a mutated proportional election system was declared unconstitutional. The KCC struck down the element of proportional representation of the old election law designed to distribute seats according to the number of votes cast in favor of candidates of political parties in constituencies instead of allowing the voters to cast a separate ballot to party list of their own choice.[67] The KCC ruled that such a mutated system violated the constitutional principles of democratic

[67] Constitutional Court Decision 2000Hun-Ma91 · 112 · 134 (Consolidated), July 19, 2001, 13-2 KCCR 77. See also Jongcheol Kim, "Critical Review of the Decision of Unconstitutionality on the Method of Voting and Distribution of Seats in the System of Nationwide Proportional Seats - Constitutional Court Decision, July 19, 2001, 2000Hun-Ma91 · 112 · 134 (Consolidated)", 3 *Study on Constitutional Practice* 321 (2002) [in Korean].

election and direct election as well as the equal protection before the law. As far as the principle of direct election is concerned, the KCC ruled as follows. The principle of direct election applied to the proportional representative system requires that elections of proportional representatives, as well as the acquisition of the number of seats of proportional representatives of a particular political party, be decided by the result of the direct election. Since the election of proportional representatives in the National Assembly and the election of district assemblyperson are two different elections, the voter should be allowed to cast two separate ballots, one for his or her favorite candidate in the electoral district and the other for the political party of his or her choice. The election system, however, only allows one vote for the candidate in the electoral district, and does not allow a separate vote for the slate of party nominees for seats of proportional representatives. This means that nomination by the political party has the final and decisive effect in electing the proportional representatives to the National Assembly, and voters cannot exert a direct and conclusive influence in the election of the proportional representatives. This is contrary to the principle of direct election.

Responding to this decision, the national assembly introduced the so-called 'one person two votes' system in which every voter is permitted to cast two votes respectively to a candidate of election district and a party list. This new system would ideally help advance small parties like the Democratic Labor Party in the 2004 and 2008 national elections and the Unified Progressive Party in the 2012 election.

The election reapportionment plan

In another 2001 case dealing with the election reapportionment plan, the KCC declared that the constitutional principle of equality in election

requires the population disparity among all election districts to meet a limit of 50% deviation (in which case the maximum permissible ration between the most populous district and the least would be 3:1), though in principle, a limit of 33⅓ deviation would need to be achieved in the future. According to this temporary permissible range which was tightened compared to the KCC's previous decision requiring a limit of 60% deviation (in which case the maximum permissible ration between the most populous district and the least would be 4:1), the existence of election district with a 57% deviation from national average was enough to nullify the total reapportionment plan.[68] However, the KCC applied a different permissible range of population in local elections. In 2007, the KCC ruled that considering the peculiarity of social circumstances, for example, unbalanced urbanization, as far as local elections are concerned, a limit of 60% deviation is acceptable.[69]

Election Commission

The seventh chapter of the Constitution covers a special administration of election management in that a specialized politically-neutral agency performs the constitutionally designated duties independently of the President and the other Branches.

In particular, it entrusts the authority of electoral management to the National Election Commission and subordinate Election Commissions.[70]

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[68] Constitutional Court Decision 2000Hun-Ma92 · 240(consolidated), October 25, 13-2 KCCR 502.

[69] Constitutional Court Decision 2005Hun-Ma985, March 29, 2007, 19-1 KCCR 287.

[70] There are four prongs of subordinate election commission: 16 *Si* (special metropolitan city, metropolitan city)/*Do* (Provincial) Election Commissions, 249 *Gu* (ward)/*Si* (municipal)/Gun (country) Election Commissions and 3,479 voting District Election Commissions in each *Eup/Myun/Dong* to guarantee more convenient voting. See the English version of

This constitutionalization of the election commissions has its origin in the Constitution of 1960 that established the National Election Commission in the hope that it would contribute to the prevention of rigged and corrupt elections which had finally resulted in the April 29 Democratic Revolution ousting President Syng-man Rhee. Originally, the constitutional ambit of this independent agency was the fair management of elections, but it has been extended to cover the fair management of referendum and administrative affairs of political parties since the Constitution of 1972.

The National Election Commission, the highest in the administrative hierarchy of the election commissions, consists of nine members, three of whom are appointed by the President, three selected by the National Assembly, and the remaining three designated by the Chief Justice of the Supreme Court. The Chairperson of this politically neutral institution shall be elected by its members, but in reality there has been a long established practice that a Justice of the Supreme Court designated as a member of the Commission by the Chief Justice has taken the post. The origin of this practice that seems to be in contradiction to constitutional provisions can be traced back to the original provision of the 1960 Constitution in that the Chairperson should be elected among three Justices of the Supreme Court designated as members of the National Commission by the Chief Justice (Article 75-2(2) of the 1960 Constitution).

This practice has been criticized to have some practical and institutional problems. Practically, the Chairperson's term has been less than two years on average since it depends upon the term of the Justiceship. Institutionally, it would be problematic that the head of a constitutionally independent agency holds another principal position belonging to another

homepage of the National Election Commission (http://www.nec.go.kr/engvote/about/organization.jsp).

branch. As recently as in 2005 in the 17th term of the National Assembly, an amendment bill for the Election Commission Act (Bill No. 173475) was proposed to change this practice by making the Chairperson of the National Election Commission permanent, but it failed to be passed before the end of the term.

Members of the Commission have a duty of political neutrality and, at the same time during the six-year term, are guaranteed strong protection like judges so that a difficult process of impeachment or a sentence of imprisonment without labor or a heavier punishment can remove them from office. Moreover, the National Election Commission may enjoy the self-regulatory rule-making power like other branches. In comparison with its counterparts in other democracies, what is unique in the Korean election management system is that the election commissions are constitutionally granted the power to issue necessary instructions to officials concerning the election and referendum affairs (Article 115(1)).

C. Direct Democracy and Referendum

Although the basic form of democracy adopted by the Korean Constitutttion is a reprepresentative democracy, there are two occasions when national referendum, a form of direct democracy, can be called upon. First, according to Article 72, the President is empowered to propose a national referendum on important policies matters concerning such national security as diplomacy, national defense, unification. Second, Article 130 provides that the constitutional amendment shall be confirmed by a referendum participated by more than a half of the eligible voters.

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Impeachment of the President (Roh Moo-hyun) Case

[16-1 KCCR 609, 2004Hun-Na1, May 14, 2004] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

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(3) Act of suggesting a confidence vote in the form of a national referendum on October 13, 2003

Since the National Assembly's impeachment resolution specifically mentions the President's 'unconstitutional suggestion to have a confidence referendum' with respect to its third stated ground for impeachment of 'unfaithful performance of official duties and reckless administration of state affairs' and the National Assembly further specified on this issue in its brief submitted subsequent to the initiation of the impeachment adjudication, we examine this issue as a subject matter of this impeachment adjudication.

(A) The President, during 'his speech' at the National Assembly on October 13, 2003 'concerning the budget for fiscal year of 2004,' stated that "I announced last week that I would submit myself for public confidence. ... Although it is not a matter that I can determine, I think a national referendum is a correct way to do this. Although there are disputes as to legal issues, I think it is feasible even under the current law by interpreting the 'matters concerning national security' more broadly, should there be a political agreement," thereby suggesting a confidence vote to be instituted in December of 2003. Debates concerning the constitutional permissibility of a confidence vote were thereby caused. Finally, such debates upon the constitutionality of a confidence referendum reached the Constitutional Court through a constitutional petition,

but the Constitutional Court, in its majority opinion of five Justices in 2003Hun-Ma694 (issued on November 27, 2003), dismissed such constitutional petition on the ground that the 'act of the President that is the subject matter of the case was not an act accompanying legal effect but an expression of a mere political plan, therefore did not constitute an exercise of governmental power.'

(B) Article 72 of the Constitution vests in the President the authority to institute national referendum by providing that the "President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he or she deems it necessary. Article 72 of the Constitution connotes a danger that the President might use national referendum as a political weapon and politically abuse such device by employing it to further legitimize his or her policy and to strengthen his or her political position beyond as a mere means to confirm the will of the public toward a specific policy, as the President monopolizes the discretionary authority to institute national referendum including the authority to decide whether to institute a national referendum, its timing, and the specific agendas to be voted on and the questions to be asked at the referendum, under Article 72 of the Constitution. Thus, Article 72 of the Constitution vesting within the President the authority to institute a national referendum should be strictly and narrowly interpreted in order to prevent the political abuse of national referendum by the President.

(C) From this standpoint, the 'important policy matters' that can be subjected to a national referendum under Article 72 of the Constitution do not include the 'trust of the public' in the President.

An election is for the 'decision on persons,' that is, an election is to

determine the representatives of the public as a premise to make representative democracy possible. By contrast, the national referendum is a means to realize direct democracy, and its object or subject matter is the 'decision on issues,' that is, specific state policies or legislative bills. Therefore, by the own nature of the national referendum, the 'confidence the public has in its representative' cannot be a subject matter for a national referendum and the decision of and the confidence in the representative under our Constitution may be performed and manifested solely through elections. The President's attempt to reconfirm the public's trust in him that was obtained through the past election in the form of a referendum constitutes an unconstitutional use of the institution of a national referendum provided in Article 72 of the Constitution in a way not permitted by the Constitution.

The Constitution does not permit the President to ask the public's trust in him by way of national referendum. The constitution further prohibits as an unconstitutional act the act of the President subjecting a specific policy to a referendum and linking the matter of confidence thereto. Of course, when the President institutes a referendum for a specific policy and fails to obtain the consent of the public concerning the implementation of such policy, the President may possibly resign by regarding such outcome as public's distrust in him or her. However, should the President submit a policy matter to a referendum and declare at the same time that "I shall regard the outcome of the referendum as a confidence vote," this act will unduly influence the decisionmaking of the public and employ the referendum as a means to indirectly ask confidence in the President, therefore will exceed the constitutional authority vested in the President. The Constitution does not vest in the President the authority to

ask the confidence in him or her by the public through a national referendum, directly or indirectly.

(D) Furthermore, the Constitution does not permit a national confidence referendum in any other form than the national referendum that is expressly provided in the Constitution. This is also true even when a confidence referendum is demanded by the people as the sovereign or implemented under the name of the people. The people directly exercise the state power by way of the election and the national referendum, and the national referendum requires an express basis therefor within the Constitution as a means by which the people exercise the state power. Therefore, national referendum cannot be grounded on such general constitutional principles as people's sovereignty or democracy, and, instead, can only be permitted when there is a ground expressly provided in the Constitution.

(E) In conclusion, the President's suggestion to hold a national referendum on whether he should remain in office is an unconstitutional exercise of the President's authority to institute a national referendum delegated by Article 72 of the Constitution, and thus it is in violation of the constitutional obligation not to abuse the mechanism of the national referendum as a political tool to fortify his own political position. Although the President merely suggested an unconstitutional national referendum for confidence vote and did not yet actually institute such referendum, the suggestion toward the public of a confidence vote by way of national referendum, which is not permitted under the Constitution, is itself in violation of Article 72 of the Constitution and not in conformity with the President's obligation to realize and protect the Constitution.

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Notes

1. Do you agree with the KCC's opinion that the 'important policy matters' that can be subjected to a national referendum under Article 72 of the Constitution do not include the 'trust of the public' in the President?
2. Why did the KCC go further to declare that "The constitution further prohibits as an unconstitutional act the act of the President subjecting a specific policy to a referendum and linking the matter of confidence thereto". However, some would think that although the constitution adopts a representative democracy as a basic form of government, it cannot mean that there is no way in which the nation as the holder of political sovereignty can take a part in solving political deadlock between the president and the National Assembly. Do you agree with this argument in favor of indirect national referendum?

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Relocation of the Capital City Case

[16-2(B) KCCR 1, 2004Hun-Ma554, etc.,(consolidated),October 21, 2004] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

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6. Separate Concurring Opinion of Justice Kim Young-il

I agree with the conclusion of the majority opinion. However, I believe that the Act at issue in this case is unconstitutional because it infringes upon the right to vote on the national referendum guaranteed for the

complainants by Article 72 of the Constitution, than because, as the majority asserts, it infringes upon the right to vote on the national referendum under Article 130 of the Constitution. Thus, I respectfully disagree with the reasoning adopted by the majority opinion. The grounds for my separate concurring opinion are as follows.

A. Content of the Act at Issue in this Case

I generally agree with the majority opinion with respect to the following points: … the Act at issue in this case is not a statute merely to execute the capital relocation policy previously determined by other methods of national decision-making or to regulate no more than the preparation stages for the relocation of the capital in expectation of the national decision-making in the future for the relocation of the capital, instead, the Act itself contains and implicates the decision-making for the relocation of the capital.

B. Whether Decision-making Concerning Relocation of Capital should be Subject to National Referendum

Article 72 of the Constitution provides that "the President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary," thereby subjecting the 'important policy relating to national security such as diplomacy, national defense, unification and other matters' to the national referendum. Therefore, whether the decision-making concerning the relocation of the capital is an 'important policy relating to national security such as diplomacy, national defense, unification and other matters' is now examined.

(1) Whether Relocation of Capital is a Policy relating to National Security

(A) 'National security' within the meaning of Article 72 of the Constitution is a concept relevant to the existence of the nation, and, as such, means the existence and the abolition of the nation. This not only has to do with the existence or the abolition itself, but also includes such matters related to the existence and the abolition, thus including matters critically determining the existence of the nation itself and also the matters affecting the meaning of the existence of the nation.

'National security' within the meaning of Article 72 of the Constitution does not necessarily mean a state of national emergency or a national crisis equivalent thereto. The temporal imminency such as in national emergency or national crisis is a constituting element for such concepts in the legal text of the constitutional provisions as 'internal turmoil, external menace, natural calamity or a grave financial or economic crisis' in Article 76, Section 1, of the Constitution, 'major hostilities' or 'when it is required to take urgent measures' in Article 76, Section 2, of the Constitution, 'in time of war, armed conflict or similar national emergency' in Article 77, Section 1, of the Constitution; however, it is not intrinsic in the concept of 'national security' itself. as Article 72 of the Constitution does not impose any conditions requiring temporal imminency.

'Diplomacy,' 'national defense,' and 'unification' enumerated in Article 72 of the Constitution are examples of policies relating to national security. Therefore, policies relating to diplomacy, national defense or unification are policies relating to national security per se. Further, even if not relating to diplomacy, national defense or unification, should it be a policy relating to national security, it may be subjected to the national referendum.

(B) Relocation of the Capital is a Matter relating to National Security.

The capital of a nation is the city symbolizing that nation, and, at the same time, functions as the afferent center of the nation. Therefore, the location of the capital determinatively affects the meaning of the existence of the nation, and, as such, is one of the core elements in determining the identity of the nation.

Furthermore, even assuming the case where the capital does not function as the only centripetal city in all domains of politics, economy, society and culture, the location of the capital widely and significantly influences the life of the people in all of the above domains. Therefore, the location of the capital in this situation also affects the meaning of the nation. Therefore, in all cases, determining the location of the capital is a matter relating to national security.

Then, constructing a new administrative capital that will have the pivotal function in the nation's politics and administration, and relocating major state institutions and organs to the new administrative capital pursuant to the Act at issue in this case is undeniably a matter relating to national security. This would not be different even if Seoul Special Metropolitan City were to maintain the unchanged function as the centripetal city in all the rest of the areas of economic, societal and cultural domains with the exception of the political and administrative domains.

(C) Relocation of the Capital is Also a Matter relating to Unification specifically referred to in Article 72 of the Constitution.

In our nation, as a divided country, the location of the capital has an important meaning not only in the present time of unachieved unification, but also in the future during the unification process and post-unification.

Should South Korea and North Korea discuss matters for unification,

those cities that will be functioning at that time or will have functioned until then as the central cities in the respective areas(viewed under current circumstances, for example, Seoul and Pyongyang) will be considered as candidates for the location of the capital of the unified Republic of Korea. Therefore, the location of the capital has a greatly significant meaning in the process of unification.

Also, Article 3 of our Constitution provides that the territory of the Republic of Korea consists of the Korean Peninsula and its adjacent islands. Therefore, the capital of the Republic of Korea is a symbolic city not only for the territory that is south of the Military Demarcation Line under the actual control of the Republic of Korea, but also for the entire Korean Peninsula encompassing the territory that is north of the Military Demarcation Line. Thus, when the unification recovering actual control over the part north of the Military Demarcation Line is achieved, as long as it is not decided otherwise, the capital of the Republic of Korea will have the status as the capital of the unified Republic of Korea. Therefore, the location of the capital will have a greatly significant meaning subsequent to unification as well.

As such, the location of the capital does have a greatly significant meaning prior to and subsequent to the unification and also during the unification process. Therefore, the relocation of the capital is undeniably a matter relating to unification.

(D) Furthermore, Relocation of the Capital is also a Matter relating to National Defense specifically referred to in Article 72 of the Constitution.

As the capital is where the core of state power and authority exists, its location is undeniably one of the most important elements of consideration for the national defense strategy. In addition, in our nation where

politics has had an abstruse impact upon the overall economy, society and culture, the degree of impact of the location of the capital on the national defense strategy is extraordinarily high. Therefore, the relocation of the capital inevitably results in and should result in a fundamental change in the defense strategy for the Republic of Korea in its entirety.

Therefore, the relocation of the capital is inevitably a matter relating to national defense.

(E) In sum, decision-making concerning the relocation of the capital is a policy relating to unification and national defense, and, at the same time, a policy also otherwise relating to national security.

(2) Whether Relocation of Capital is an Important Policy

A national referendum results in the exclusion of representative democracy with respect to the matter subjected thereto. Therefore, in determining whether a matter is an 'important policy' within the meaning of Article 72 of the Constitution, the appropriate standard for judgment is whether a specific policy is worth confirming the actual intent of the citizens separately from the intent of the citizens presumed from that of the representative organ.

Assessing the matter of relocation of the capital from this standard, the matter of relocation of the capital is sufficiently worth confirming the actual intent of the citizens separately from the intent of the citizens presumed from that of the representative organ, in light of the facts that it is a historic issue relevant to the future of the nation and the destiny of the entire citizenry, that there is a concern for crisis over unity of the citizens due to the current division of nation's opinions and sentiments on the subject, and that it draws attention and interest of the entire citizenry as the entire citizenry has interests therein.

Therefore, decision-making concerning the relocation of the capital is an 'important policy' within the meaning of Article 72 of the Constitution.

C. Whether President's Submission of a Matter to National Referendum is a Discretionary Act

With respect to the nature of the act of the President submitting a matter to the national referendum, the President's submission of a matter to the national referendum is an act of absolute discretion, considering that: first, Article 72 of the Constitution that is the legal basis for act of submission to the national referendum provides, unlike Article 130 of the Constitution, that the President may submit a matter to the national referendum as the President deems it necessary, thus, seemingly vesting a wide discretion under the structure and the language of the provision's text; second, submission of a matter to the national referendum is undertaken by the President when a national consensus is requested concerning an important policy relating to national security, therefore, as such, is an act in the area where political considerations are requested; and, third, submission of a matter to the national referendum, by its own nature, should be decided by the President following a comprehensive consideration of the totality of the circumstances to assess what fits the national interest and serves to guarantee the fundamental rights of the citizens and not simply through the interpretation of Article 72 of the Constitution, therefore should be determined by assessing what best serves the purpose beyond a judgment over what is the law.

D. Whether Non-Submission of Matter of Relocation of Capital is Beyond Limit of Discretion

(1) Limit of Discretion upon Submission to National Referendum

The principle of the government by the rule of law requires that none

of the exercise of public power or authority be free from law, but merely permits a difference in the degree to which a particular exercise of public power or authority is bound by law. Therefore, even if the President's submission of a matter to the national referendum is an act of absolute discretion, this may not be free from law.

Thus, even when a particular exercise of public power or authority is an act of absolute discretion, the discretion allowed for that act should be exercised within the limit of discretion permitted by law(external limit), and, also, even the exercise of discretion within the external limit should be appropriate for the purpose for which the law vests such discretion and observant of the constitutional law principles and the general principles of law(internal limit). Therefore, in the case of a deviation from discretion in excess of the external limit of the discretion or an abuse of discretion beyond the internal limit, such exercise of the discretion is in violation of the legal provision that is the basis of the discretion.

This legal principle is not only appropriate in the field of administrative law, but is also applicable to the exercise of public power in general. As such, also to the act of the President submitting a matter to the national referendum, apart from the difference in the degree of discretion vested thereto, this legal principle applies as is.

Therefore, in the President's decision concerning the submission of a matter to the national referendum, where there is a deviation from or an abuse of discretion, such an exercise of discretion is in violation of Article 72 of the Constitution that is the basis of the discretion.

(2) Deviation from or Abuse of Discretion

In determining whether or not there is a deviation from or an abuse of

discretion, specific standards for the judgment include (i) the conformity to the legislative purpose and spirit of the legal provision vesting the discretion, (ii) the observance of the constitutional principles and the general principles of law and (iii) the justness of the motive, of the particular exercise of discretion in question.

(A) Conformity to Legislative Purpose and Spirit

1) Bound by Legislative Purpose and Spirit

The discretion in exercising public power is vested to the state organs by law, thus should be exercised in a way appropriate to the legislative purpose and the legislative spirit of the legal provision that is the basis of the discretion. Therefore, in the President's exercise of discretion concerning the submission of a matter to the national referendum, such discretion should be exercised in a way appropriate to the legislative purpose and the legislative spirit of Article 72 of the Constitution, which is the basis of such discretion. An exercise of discretion that is not in conformity with such legislative purpose and spirit, that is, the intended purpose of the system set forth by Article 72 of the Constitution, is a deviation from and abuse of discretion, and, as such, is in violation of Article 72 of the Constitution.

2) Intended Purpose of System Set Forth by Article 72 of the Constitution

Our Constitution adopts the representative democracy as the principle under which the national decisions are made by the President and the members of the National Assembly who are elected directly by the citizens, on behalf of the citizenry. At the same time, our Constitution adopts the elements of the direct democracy by setting forth the circumstances in Article 72 and Article 130, Section 2, of the Constitution, un-

der which the citizenry directly makes the national decision by way of national referendum. Thus, Article 72 of the Constitution is not a provision simply providing for the authority of the President concerning the submission of a matter to the national referendum, but instead understood to be a provision providing for the systemic basis of the governing structure under our Constitution that also provides for the right of the citizens to vote on national referendum(Refer to, for example, 93 Gazette 574, 592, 2000Hun-Na1, May 14, 2004; 15-2(Vol. (B)) KCCR 350, 360, 2003Hun-Ma694, November 27, 2003; 13-1 KCCR 1431, 1439, 2000Hun-Ma 735, June 28, 2001).

In a pure representative democracy, the representative institution is in a delegation-representation relationship under which it represents the entire citizenry in abstract form. Specifically, this presupposes the free delegation relationship under which the voters may control the representative institution only by election, yet may not order or direct the representative institution concerning specific matters. On the contrary, a direct democracy is premised upon an order-bound delegation relationship under which, when the citizenry exercises sovereign power through the representative institution, the citizens in non-abstract form issue upon the representative institution a concrete order with binding force, and, upon failure to follow the order, the citizens may dismiss the representative institution.

Our Constitution, as indicated above, adopts a governing structure compromising the pure representative system and direct democracy, by adopting the representative system as the principle while employing direct democracy concerning national referendum. Therefore, the relationship between the representative institution and the citizenry that is presupposed

by our Constitution is a free delegation relationship based upon the representative system in the area of general national policies, however, the order-bound delegation relationship based upon the direct democracy in the area of national referendum, i.e., concerning the policies that are subjected to the national referendum.

Therefore, concerning policies that are subjected to national referendum, the representative institution is bound by the actual intent of the non-abstract, actual, citizens. The representative institution may not make a decision that is inconsistent with the actual intent of the non-abstract, actual, citizens, nor may it disregard such actual intent in decisionmaking when its own decision is expected to be different from the citizens' actual intent.

3) Relation between Discretion and Actual Intent of the Citizens

The delegation concerning policies that are subjected to national referendum is an order-bound delegation, therefore, the citizens, who are the delegators as holders of sovereignty, may withdraw the delegation for a particular matter by specifying such a matter. Undertaking of national referendum upon a particular matter means that the citizens have withdrawn their delegation to the representative institution upon that matter and directly made a decision thereupon. Furthermore, when there is sufficient reason to deem that a majority of the citizens have the intent to withdraw delegation, that is, the intent to directly make a decision upon a particular matter and forego the decision-making by the representative institution, if the representative institution made its own decision in disregard of such intent, this would be directly against the legislative purpose and the legislative spirit of Article 72 of the Constitution adopting the national referendum system, and, as such, it would be a deviation

from and abuse of discretion. This is equally applicable regardless of whether the decision of the representative institution and the actual intent of the citizens coincide with the merits of that particular matter.

On the other hand, as the representative institution may not make a decision that is inconsistent with the actual intent of the citizens concerning policies that are subjected to national referendum, decision-making inconsistent with the actual intent of the citizens is in itself beyond the limit of delegated authority, and, as such, a deviation from discretion in excess of the external limit of the discretion. Furthermore, even when the actual intent of the citizens has not yet been confirmed, when there is sufficient reason to deem that the intent of the representative institution is different from the actual intent of the citizens, if the representative institution disregarded the intent presumed to be the actual intent of the citizens and made a contrary decision, it would be against the legislative spirit and the legislative purpose of Article 72 of the

Constitution and thus a deviation from and abuse of discretion.

4) Actual Intent of Our Citizens Concerning Relocation of Capital

The public opinion poll around January of 2004 when the Act at issue in this case was legislated and promulgated indicates that there were approximately equal opinions in favor of and opposition to the relocation of major national institutions and organs to a new administrative capital, while the public opinions at that time were undergoing a shift towards gradually decreasing approval and gradually increasing opposition. The January 2004 public opinion poll also indicates that, although there were more opinions in favor when the political authorities made a promise to determine this matter by national referendum, the opinions in opposition gradually increased as the possibility of national referendum diminished

by the proposition of the bill for this Act at issue in this case and the President's statements. Public opinion polls after June of 2004 indicate that those who were of the position that the matter should be determined by national referendum were around sixty(60) per cent.

Pursuant to the above facts, it is concluded that there is sufficient reason to deem that, concerning the relocation of the capital including the relocation of major national organs to a new administrative capital, our citizens intended to withdraw delegation, that is, to directly determine this matter without delegating the matter to such representative institutions as the President or the National Assembly. Also, upon the merits of the matter, there is a sufficient reason to deem that our citizens have an intent opposing the relocation to the new administrative capital. …

(B) Violation of Constitutional Principles and General Principles of Law

In light of the fact that the decision-making by way of National Assembly's legislation has caused a deeper division of national opinions concerning the matter upon which many of the citizens desire and the President himself previously indicated his intent to submit to the national referendum, it is objectively clear that non-submission of the decision-making concerning the relocation of the capital to the national referendum lacks rationality. Therefore, such non-submission is in violation of the principle against arbitrariness.

In addition, the facts of the case indicate that the President publicly made an election pledge as a presidential candidate that he would submit the matter concerning the relocation of the capital to national referendum, and, after being elected as the President, promised to submit the matter to national referendum as an alternative; that the President did not completely exclude the possibility of national referendum until immediately

after the enactment and the promulgation of the Act at issue in this case on January 16, 2004; and that the President, however, publicly announced non-submission to the national referendum subsequent to the seventeenth general election to constitute the National Assembly that took place on April 15, 2004. Adding to these facts the result of the public opinion polls indicated previously, it is ratified that the citizens have the trust in the submission to the national referendum and the trust in the representative institution that it will not act against the intent of the citizens, concerning the matter of the relocation of the capital. Non-submission of the matter of relocation of the capital notwithstanding such trusts is a betrayal of the above trusts of the citizens, and is thus against the principle of protection of expectation interest.

Then, non-submission of the decision-making concerning the relocation of the capital to national referendum is against the constitutional principle and the general principle of law, therefore, it is an unconstitutional exercise of discretion as a deviation from and abuse of discretion.

(3) Obligation to Submit to National Referendum

As examined above, non-submission of the decision-making concerning the relocation of the capital to the national referendum is a deviation from and abuse of discretion. Thus, should the President lawfully exercise discretion without deviation therefrom or abuse thereof, the President has no other choice but to submit the decision-making concerning the relocation of the capital to the national referendum. Therefore, the President is obligated to submit the decision-making concerning the relocation of the capital to the national referendum.

E. Whether the Complainants Have Right to Vote on National Referendum for Decision-making Concerning Relocation of Capital

(1) Content of Right to Vote on National Referendum

The right to vote on national referendum of Article 72 of the Constitution is a right to participate in politics, and one of the basic rights guaranteed in our Constitution(13-1 KCCR 1431, 1439, 2000Hun-Ma 735, June 28, 2001).

The right to vote on national referendum as a basic right is, inter alia, in its substance, the right to request the guarantee of a free democratic national referendum system. Therefore, when, for example, a statute diminishes the scope of an important policy to a further extent than what is intended by Article 72 of the Constitution or corrodes the general, equal, direct, secret and free vote, its unconstitutionality may directly and actually be asserted on grounds of the right to vote on national referendum.

The right to vote on national referendum of Article 72 of the Constitution also includes the right to vote on national referendum upon a particular matter. Here, however, the right to vote on national referendum upon a particular matter is a right qualified by a condition precedent of the President's submission of that particular matter to the national referendum, therefore, this right becomes real only upon the act of the President submitting the matter to the national referendum. The right to vote on national referendum likewise realized encompasses the right to hold an actual national vote upon the particular matter.

The right to vote on national referendum of Article 72 of the Constitution further encompasses the right to request the submission of a particular policy to the national referendum, when the President does not submit such policy to national referendum notwithstanding the legal obligation to submit such policy to national referendum. The obligation of the President to submit to the national referendum is an obligation to-

wards the citizens, therefore, the citizens as the holders of the right have the right to request submission to national referendum that is on the other side of the coin. In this case, the President is in breach of the obligation to satisfy the above condition precedent, while the right to request submission to the national referendum is a type of claimable right, requesting the performance of the above obligation. Therefore, the right to request submission to the national referendum in such a case is a right as an instrumental and procedural right to restore to the lawful state the state of unlawful infringement upon the citizens' right to vote on national referendum upon particular policy caused by the President's failure to perform the submission obligation.

As the right to request submission to the national referendum presupposes the existence of the right to vote on national referendum which is a substantive right, in such a case, the citizens have the right to vote on national referendum upon the particular matter from the substantive aspect of the right to request submission to the national referendum, even prior to the actual submission to the national referendum by the President. That is, the right to vote on national referendum encompasses as a partial content thereof the right to request submission to the national referendum.

(2) Right to Vote on National Referendum upon Decision-making concerning Relocation of Capital

As examined above, when the President is obligated to submit a particular policy to the national referendum, the citizens have the right to request submission of that policy to the national referendum and the right to vote on national referendum encompassing such right, even prior to the President's submission of that policy to the national referendum. In

this case, as the President is obligated to submit the decision-making concerning the relocation of the capital to the national referendum as examined in Paragraph D(3) above, the citizens have the right to request the President to submit the decision-making concerning the relocation of the capital to the national referendum, and the concrete and actual right to vote on national referendum upon the above decision-making even prior to the actual submission by the President.

Therefore, the complainants who are the Korean citizens have the actual right to vote on national referendum of the above substance.

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Notes

1. Is the right to vote on the national referendum a constitutional right? If so, on what ground? Can the principle of popular sovereignty or democracy provide any meaningful ground?
2. According to Justice Kim Young-il's concurring opinion, what is different between the right to vote on the national referendum guaranteed by Article 72 and that under Article 130?
3. How does Justice Kim Young-il differentiate national security in Article 72 and that in other provisions like Art 76? Does it make sense? Justice Kim's broader interpretation of national security under Article 72 may lead to the substantial limitation on the President's discretion to initiate the national referendum. Also, it may provide the President with more opportunities to put pressures on the Legislature with the monopoly power of legislation. Are these consequences conformable to the intent of the Constitution framers? Is

this broader interpretation helpful to enhance direct democracy?

4. Do you agree with Justice Kim's reasoning that "the location of the capital in this situation also affects the meaning of the nation"? Can Justice Kim's reasoning in relation to the constitutional significance of the capital of the nation be compatible with the principle of popular sovereignty cherishing individual citizen's equal but diverse dignity rather than the collective identity of the nation?
5. Is it plausible to determine the importance of the proposed policy under Article 72 of the Constitution in terms of the necessity of direct democracy? How and who can best judge the necessity of actual intent of citizens? Do you think that the fact that the entire citizenry has interests can confirm the necessity of direct democracy? In a modern welfare state, can we easily find any matters the entire citizenry does not have interests?
6. Is it logical that although the President's initiative of the national referendum is an act of absolute discretion, it should not be abused according to the principle of the rule of law? If we follow such reasoning, the authority of final say in determining the necessity of direct democracy would be given to the KCC or the judiciary rather than the President. Is it conformable to the intent of the Constitution framers? Justice Kim suggests three criteria as specific standards for the judgment of abuse of discretion: (i) the conformity to the legislative purpose and spirit of the legal provision vesting the discretion, (ii) the observance of the constitutional principles and the general principles of law and (iii) the justness of the motive, of the particular exercise of discretion in question. Are they workable?

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D. Pluralist Democracy and Political Parties

The Korean Constitution contains several provisions relating to political parties, e.g., Article 8, Article 41 (3), Article 112 (2), Article 113 (1), Article 114 (4), Article 116 (2). In particular, Article 8 prescribes that the organization and activities of political parties must be democratic while allowing them state aid. Obviously, these provisions confirm the importance of political parties in modern democracy and the corollary need for their constitutional protection and regulation.

However, a fundamental constitutional question has yet to be answered. What significance does this constitutional recognition of political parties have in understanding and enforcing the basic ideas of the Korean Constitution? This question, in turn, gives rise to a number of other, preliminary, questions. What is a political party in modern democracy? What is the desirable relationship between political parties and the state, on the one hand, and civil society, on the other? What is the current legal status of political parties in Korea? What functions do and/or should political parties perform within the political and constitutional arrangements?

The following aims at answering some of these questions by examining the changed nature and role of political parties in modern democracy. Main arguments are three-fold. First, the current practices and theories concerning the constitutional status of political parties still depend upon liberal associationalism and are in conflict with the pluralist political reality. Secondly, the public nature of political parties and the governmentalized aspects of party organizations require their constitutionalization. Thirdly, a cartel party model will provide a useful conceptional tool to

constitutionalize political parties by properly reflecting their organizational duality as a social sphere, on the one hand, and on the other, a governmentalized political sphere.

The Current Practices and Theories concerning the Constitutional Status of Political Parties in Korea

The constitutional status of political parties

After the model of Article 21 of the German Basic Law, Article 8 of the Korean Constitution recognizes political parties as one of essential elements in the constitutional order. It provides that:

(1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.
(2) Political parties shall be democratic in their objectives, organization and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.
(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act.
(4) If the purposes or activities of a political party are contrary to the fundamental democratic order[or the democratic basic order, 民主的基本秩序], the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

However, debates about the significance of this provision have not yet come to the end. Some public lawyers argue that the constitutional protection and regulation of political parties prescribed in Article 8 cannot be interpreted as changing their original nature as private associations. They further argued that being basically extra-constitutional organizations, they should be controlled by private laws unless the Constitution and its implementing statutes such as the Parties Act pay specific attentions to them.[71] In this view, a political party is no more than the sum of its individual members and cannot claim its own legal entity independently of the members unless they choose to be incorporated. At least two problems with the special treatment of political parties in the constitutional order are generally cited. First, such institutionalization undermines the whole process of representation by placing a barrier between the people and government, creating artificial divisions between groups of citizens, and inhibiting the free expression of their opinions. Secondly, it threatens the autonomy of individuals to determine their own affairs for the ultimate purpose of personal fulfilment. In this line of argument, there is no room for a premium placed on the autonomy of political parties to regulate their own affairs.

Others criticize this conventional view on the grounds (a) that the constitutional recognition of parties and the existence of its implementing laws intend to distinguish them from other private associations such as pressure groups and (b) that it ignores the public function of political parties in modern democracy.[72] Their premise seems to be that Article 8

[71] Tae-Yeon Han, an, an, an, cracy and Political P*Gosiyeongu* (Nov. 1997)[in Korean], p.189.

[72] Tscholsu Kim, *Constitutional Law* (1999)[in Korean]; Young-Sung Kwon, *Constitutional Law* (1999)[in Korean]; Young Huh, *Constitutional Theory and Constitutional Law*(1995) [in Korean]; Byung-Hoon Lee, Hoon Lee, “g-Hoon Lee, 9)[in Korean]; Young-Sung Kwo Political *Political Parties and Constitutional Order* [in Korean]; Konrad Hesse,

is the result of the Constitution framers decision that constitutional ideal should accord with pluralist political reality. However, they still focus on the conventional function of political parties between the state and civil society, stressing that their raison d'être lies in enabling the people to take part in the political process. For this reason, they argue that the constitutional protection of political parties must not amount to making them organs of the state. Two main rationales for distinguishing them from organs of the state have been suggested. First, the relationship between the party organization and its members is not public law relationship. In other words, as far as their organizational origin is concerned, their nature as a social sphere should not be ignored. Secondly, they cannot decide public policies in their own capacity but simply help organs of the state such as the legislature and the executive decide.

The Constitutional Court of Korea which was established in 1988 appears to take this line of thought. In 91 Hun-Ma 21, March 11, 1991[3 KCCR 91], the Court defined a political party as peoples voluntary association, the basic aim of which is to participate in the formulation of public political opinions in such ways as supporting candidates in elections or proposing political policies for the sake of the public interests. This view was reconfirmed in 96 Hun-Ma 18 etc., March 28, 1996[8-1 KCCR 823] where the Court regarded the functions of political parties as mediating people political influence to the political process within the boundary of the state in such ways as representing social demands at various levels, criticizing government policies and proposing desirable alternatives to them.

Die verfassungsrechtliche Stellung der politischen Parteien im modernen Staat translated by Gye Hee-Yul in Gye Hee-Yul, The Basic Theories of Constitutional Law 1985[1958]) [in Korean].

Problems with the current approaches

a. Problems with the private law approach

The first conventional view regarding political parties as private associations tends to undermine the efficiency and integrity of political parties and consequently the totality of individual members whose interests they exist to serve. The historical development of modern party government makes such a liberal conviction that political parties cannot be viewed as organized actors within political society unrealistic. The KCC rejected this conventional view drawing upon the public functions which the Constitution allows political parties to perform.[73]

b. Problems with the revisionist approach

Although the second approach recognizes the public nature of political parties and the need for the distinction between them and private associations in certain circumstances, it fails to precisely reflect the pluralist reality in the constitutional arrangements. Its premise that political parties mediate between the state and civil society while lying in between the individual and an overarching state still reflects the legacy of liberal associationalism that a political party is no more than the sum of its individual members.

One cannot seriously discount the importance of individual choice within the political market unless the political system is professed to be undemocratic. The rigid party machine can function as a means of political manipulation or effective social control rather than a catalyst of polit-

[73] See, e.g. Constitutional Court Decision 96 Hun-Ma 18 etc., March 28, 1996, 8-1 KCCR 823.

ical communication. However, it is equally true that liberal associationalism not only failed to arrest the increasing party penetration of the state without increasing civil society involvement in the working of the party system but also paradoxically contributed to the consolidation of such an unexpected result by continuing its unrealistic hands-off policy. What is problematic is the single-minded preoccupation of the dominant liberal theory with both the negative conception of liberty and the market-oriented conception of efficiency (or control). The points are (a) that although the institutionalization of political parties has the demerits feared by liberals, it equally has certain advantages and (b) liberal laissez-faire policy in relation to political parties has its own serious defects.

On the advantage side, as even the liberal view reluctantly admits, the management of a variety of individual choices in an orderly political process is inevitable in a modern society. Well-organized political associations, in particular the party system, provide individuals with a stable mechanism for the realization of political demands at a reasonable level, though the maximization of those demands is not necessarily guaranteed. In a simplest way, the stability of the system is achieved at the cost of the constant maximization of interests. For this functional reason, liberty of association is one of what Feldmann terms "higher order rights"[74] or what Cohen and Rogers define as "the fundamental liberties in a democratic order, with a place of pre-eminence in political argument"[75]. Apparently, this conception of high class liberties departs from the negative conception of freedom as the absence of restraint and veers toward

[74] David Feldman, Democracy, the Rule of law and Judicial Review, *Federal Law Review*, Vol. 19 (1990), p.11.

[75] Joshua Cohen and Joel Rogers, “Secondary Association and Democratic Governance” in Erik Olin Wright (ed.) *Associations and Democracy* (London: Verso) (1995), p.18.

the positive one defined as the absence of impediment. In other words, stringent protection of this high class liberty is consistent with regulations of, and restrictions on, market choice in order to ensure political equality. To make this conceptual transformation effective, as Hirst suggests[76], such "particular liberty" should be given not only to individual citizens but also to those bodies essential to the stable workings of the political system. An additional assumption of this theory is that intermediary associations of this kind have personality, whether real or artifactual. Whether this personality is real or artifactual partly depends on what background view is taken on the desirable relationship between the state and civil society. In suggesting a consequentially similar view of the positive role of secondary associations in democratic governance in a modern society, Hirst criticizes[77], with the reference to early English pluralist thought, Cohen and Rogers view[78], saying that by stressing the artifactuality of organizations and ignoring their real personality, Cohen and Roger give excessive credit to the state as a neutral actor rather than the voluntary initiative of civil society.

As to the limits of market-based political control, it should also be pointed out that, apart from the systematic difference between the political system and the economic system, there is a theoretical defect inherent in the liberal preference for public choice and the invisible hand. Under a regime of laissez-faire which dismisses an effective tool for rationalizing political competition, inequalities, rooted in different inherited po-

[76] Paul H. Hirst, "Democracy and Civil Society" in Paul Hirst and Sunil Khilnani (ed.) *Reinventing Democracy* (Oxford: Blackwell) (1996), p.102.

[77] Paul H. Hirst, "Can Secondary Associations Enhance Democratic Governance?" in Erik Olin Wright (ed.) *Associations and Democracy* (London: Verso) (1995), pp.111-113.

Cohen and Rogers, ibid., pp. 27,31,33.

litical fortunes, proliferate. Apparently, these inequalities considerably distort individual choice. Indeed, the current system is open to the criticism of failing to see that there are serious discrepancies between the ideal and the reality. The ideal is that fair competition and self-regulation among parties under equal conditions can produce the best political outcome and the stability of the whole political system. But the reality is that de facto inequality in terms of resources and institutional barriers allow either certain parties to enjoy a privileged position compared to other parties or certain groups compared to others within a party. Hence, in seeking an appropriate method to modify the formidable rigidity of the party system, what is of greater relevance is the unrepresentative electoral system and the substantial financial inequality between even the main political parties, which have undermined the foundations of liberal associationalism. That is, the ugly reality of the unequal political market is in tension with a fundamental ideal of democracy, itself essential to justifying the importance of individual choice which liberal associationalism values.

The Public Nature of Political Parties as an Essential Element of the Political Process

We have sought to demonstrate in the previous section the problems of the current approaches to the constitutional status of political parties. Then, should we regard political parties as organs of the state? Before answering this question, we need to examine what functions political parties perform in modern democracy.

Elections as a battleground for political parties

In modern democracies, the electoral system has become almost entirely a battleground for the political parties. The rarity of successful independent candidates would verify this reality. Electors are more concerned with parties than candidates when casting votes and, therefore, political parties play an essential role in elections.

The changing function of general elections

The importance of parties in elections becomes even clearer when we realize the true function of a general election. A general election is not only to elect representatives to parliament. It is also to choose a governing party and the basic policies which will be implemented during the term of parliament.

Political parties as mini-collective systems of government

The reality is that, as organizations, political parties are in effect mini-systems of collective government. They impose conditions of membership and expulsion. They also formulate their own rules and impose their own discipline. Furthermore, they are distinct from private interest groups, being communitywide in orientation. From this perspective, political parties themselves are para-governmental bodies. This tends to interfere with individual members interests in order to advance general public interests. Two particular aspects deserve closer attention.

The character of political parties as mini-systems of collective government is reinforced by the fact that the major political parties as a whole enjoy a de facto monopoly in recruiting political personnel. Few who

wish to take a ticket to political office can achieve their objectives without the membership and support of one of the main political parties. Under such circumstances, party discipline is as powerful and effective as any obligations under public law. Once we accept the necessity of party discipline, what is inevitable is a question of the legal, as well as moral or political, accountability of political parties. Despite their paragovernmental functions and their performance as a kind of mini-collective government, political parties are not sufficiently subject to the principles of public accountability under the current legal system.

If we consider that the internalization of the political process within political parties requires the organization to be more sensitive to the logic of administration, then some external supervision of internal affairs is inevitable. For example, the right to join political parties and regulation of the expulsion process can be more coherently dealt with when they are institutionalized.

The internalization of the political process means, inter alia, abandoning a conception of the political party as a unitary actor while adopting the changed nature of political parties that now come to cover not only social demands but also requirements of systemic integration. The nature of the mediation which political parties provide is different from the conventional conception of mediation as an opinion linkage between civil society and the state. Political parties no longer locate themselves in a vertical framework which has the state at the top and the individual at the base. Rather, they can be seen as a network within which different social discourses interact in the logic of politics, on the one hand, and, on the other, systemic political propaganda is diffused in an organized form to attract the general public. This implies that a political party is not merely

an association of like-minded people in a general sense but also a pluralized sphere where a number of groups compete with one another to achieve their own interests under relatively qualified rules. These groups within a party are not a permanent entity but highly fluid and provisional in the sense that they can be organized and dissolved as a number of single complex issues are raised and resolved. In addition, as elections become the battleground between political parties, the selection of party candidates for general election or presidential election becomes the essential part of the whole process of election. This is particularly so when proportional representation is adopted allowing party involvement in making lists of provisional representatives of parliament.

Therefore, it is almost inevitable for political parties to perform similar activities to the government administration. As a result, there is no reason why they should be free from a public law review applicable to the states governmental activities. In other words, the demand for the public supervision of political parties arises out of the need for the integration of public and private interests, which results, in turn, from the internalization of the political process within political parties.

This internalization poses a new problem of legitimization. It transforms the location of such a problem from the external relationship between political parties and civil society to the internal relationship between individual members or groups and their leadership. This means that the demand for intra-party democracy or democratic procedures needs to be constitutionalized to a similar standard as that which official governmental activities are required to meet. The constitutionalization of some operating procedures of political parties may, in turn, provide a constitutional mechanism in which individuals or groups within a political party have

the right to challenge decisions taken by their party leaders. The courts may intervene in the internal order of political parties to the extent that such constitutionalized values permit.

The required democratic control of the internal affairs of political parties

Taken together, the activities of political parties should be undertaken in the interests not only of themselves and their members but also of the public at large. Thus, it should be borne in mind that the rules of political parties, like governmental administrative decisions, are not merely an instrument of exchange underpinning contractual relations but constitute a device for political organization and regulation.

Yet this does not mean that political parties have to be subject to the principles of conventional public regulation. Needless to say, the forms of regulation can vary, depending on a wide range of factors from the nature of activities subject to regulation, coupled with the institutional arrangements surrounding them, to cultural and historical peculiarities which may affect certain types of regulation. From this perspective, of course, the judicial supervision of the affairs of political parties under the conventional rule of public law is merely one of a number of ways of pursuing good administration. Hence, we disagree with Youngs' view[79] that an emphasis on the application of constitutional rights and principles can impoverish political debates and thus may leave issues which should be decided in the democratic arena to be resolved by the courts instead.

[79] Raymond Youngs, "Freedom of speech and the protection of democracy: the German approach", *Public Law* (1996), p.233.

A New Perspective on Party Organizations as a Prerequisite for the Constitutionalization of Political Parties

The conventional approaches to the constitutional status of political parties have common problems in two respects. First, they fail to properly reflect the governmentalization of political parties elaborated in the previous section. Secondly, they ignore the complexity of the modern development of party organizations. They see a political party only as a unitary actor which exclusively locates either in the state or in the civil society, externally coordinating the political system with the social system. In the following, drawing upon Katz-Mair's cartel party model, I will seek to demonstrate the complex development of party organizations and the corollary need for a hybrid approach to the constitutional status of political parties.

Cartelization of political parties

As political parties become largely fused with the state, what Katz and Mair called "the cartel party"[80] begins to replace the conventional party types such as the elite party, the mass party and the catch-all party. Katz and Mair pinpoint several key characteristics of this newly emerging party type. First of all, it is marked by a high degree of self-referentiality in terms of the political goals and limited inter-party competition.[81] The range of political aims and struggles are contained to ensure the stability of the political system, instead of being extended to achieve social change with a progressive agenda. As party politics becomes less purpo-

[80] Katz, Richard and Peter Mair, "Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party Party", *Party Politics* Vol. 1, No. 1(1995), pp.5-28.

[81] See Katz & Mair, ibid., p.19.

sive and thematizes less their representative capacities, it becomes increasingly a skilled profession, a job rather than a vocation, which is primarily marked by the logic of administration and power.[82]

One consequence of this is a change in the patterns of electoral competition. In the cartel party model, competition between parties becomes contained and managed in the sense that they share with their competitors a mutual interest in collective organizational survival.[83] This is the outcome of two noticeable trends. First, the governmentalization of political parties makes them relatively independent vis-a-vis their members in terms of the means of legitimization. Second, the nature of party work, including campaigning, becomes ever more capital-intensive, professionalized and centralized. Indeed, the internal bureaucratization of political parties, which is one major characteristic of Kirchheimer's catch-all-party, is still more reinforced in this model. Now that differences between rival party agendas have lessened, the focus of party work has shifted from the gathering of the political will of the people to the creation of an efficient and effective form of propaganda aimed at the dynamic political market. To deal with the almost infinite image of factors that may determine the electoral outcome, political parties increasingly rely on professional and managerial personnel. These professional advisers and spindoctors have acquired their knowledge and experience in managerial and organizational action fields such as business or public administration, advertising agencies, and the media. Not surprisingly, they are not primarily concerned with ideological coherency or purity and focus their attention on the efficient management of the party organization and effective propaganda. Furthermore, this professionalization creates a

[82] See Katz & Mair, ibid., p.23.
[83] See Katz & Mair, ibid., pp.19-20.

need for greater resources and, thus, in turn, leads parties to seek more financial support from the state.

The implication of all these features is that the status of civil society vis-a-vis parties is viewed not simply as the source of legitimacy but also as the object of propaganda. Stressing this aspect, the systems theoretic view of the modern politics reduces the boundary of the political to the functional subsystem, uncoupled from intersubjective strategies. Luhmann argues that despite political inclusion, the people can never be one of the two responsible forces within the political system, but merely a third force.[84] Therefore, the public is le parasite, which can benefit from the performance of the two responsible forces but is incapable of directly carrying out its will without destabilizing the political system itself. In this view, political parties are forced (or privileged) to locate themselves either as the government or opposition at the top of the differentiated political system.

Party organization in a new paradigm: Stratarchy

One major feature of the cartel party model is what Katz and Mair style the stratarchic mode of intra-party organization: "Stratarchy".[85] In reviewing Katz & Mair[86], Koole was uneasy about this term, arguing that it tends to ignore the organizational link between higher and lower strata and proffers a more moderate term "federalization" means the relative mutual autonomy between the "organized" party on the ground (i.e. local office-holders) and the national party elite.[87] Given the cartel party, the

[84] Niklas Luhmann, *Political Theory in the Welfare State* (Berlin: Wlter de Gruyter) (1990), p.178.

[85] See Katz & Mair, ibid., p.21.

[86] See Katz & Mair, ibid..

[87] Ruud Koole, “Cadre, Catch-all or Cartel? - A Comment on the Notion of the Cartel

blurring of the distinction between members and non-members results in the atomistic conception of party membership, which is usually manifest in the "individualization" of power structures of political parties. Party elites still need to legitimize their position in their relationship to members, but at the same time their autonomy is enhanced since they are no longer dependent solely on members or local activists. Indeed, with the advent of the cartel party, two contradictory trends can be witnessed in terms of the character of party membership. On the one hand, given the increased demand for intra-party democracy or participatory democracy, members are allowed to take part more directly in the process of leadership selections or party conferences so that they may enjoy even more rights than those of the conventional parties. On the other hand, individual members are more likely to exercise their rights as individuals rather than through delegates. We can see this trend, for example, in British Labour's recent endeavor to modulate their, mainly trade-union, interest-group relations in such a way as not to discourage potential voters who are reluctant to identify themselves with any specific interest. This trend, combined with the increasingly blurred distinction between members and non-members, sometimes leads to a reduction of privilege and influence on the part of members in matters pertaining to decision-making. This atomization of memberships results in making it easier for party leaderships to undercut the role of local intermediaries by preferring direct appeal to a large and formally empowered individual membership and/or the electorate at large. On the other hand, local activists also have an advantage in being allowed corresponding local autonomy, which is more likely to encourage involvement and participation on the

Party, *Party Politics*, Vol. 2, No.4 (1996), pp.518-519.

part of local members. In short, the assimilation of parties into the state apparatus leads to the functional fragmentation of party organization itself.

Sub-differentiation of party organization

The changed (and enlarged) function of political parties necessitates some further changes to their internal structure. It is necessary to move away from the conception of party as a unitary actor, and especially from almost exclusive concern with the relationship between parties and civil society. Peter Mair provides a feasible framework in this regard. He suggests that party organizations can be disaggregated into at least three different elements - the party in public office, the party on the ground and the party in central office.[88] In his view, the party in public office means the party in government and parliament. The party on the ground means the membership organization. The party in central office is organizationally distinct from the party in public office but forms a link between it and the party on the ground.

The conventional party models (in particular, the mass party model), emphasizing the origin of political parties in civil society, tend to regard the party on the ground as the essential element. That is, both the party in public office and the party in central office are regarded as complementary elements to the party on the ground and, thus, as a means of social control over the state. More specifically, the party in central office was seen as the "voice, or guardian" of the party on the ground, and as the means by which the party in public office could be held accountable to the mass membership. However, as both the party system and in-

[88] Peter Mair, "Party Organisations: From Civil Society to the State" in Richard Katz and Peter Mair (eds.) *How Parties Organise Changes and Adaption in Party Organisations in Western Democracies* (London: SAGE Publications Ltd)(1994), 4ff.

dividual party become cartelized, this conventional view has to change. One consequence of cartelization is that the balance between the party in public office and the party on the ground shifts in such a way as to favor the former. This, in turn, alters the role of the central office from that of the representative or guardian of the party on the ground to one seeking on behalf of the party leadership and the party in public office to mobilize the support of the electorate at large. This change explains why much of the work at central office is being carried out increasingly by professionals and consultants, rather than traditional party bureaucrats or activists. Naturally, these changes are looked on with apprehension or disapproval by theorists wedded to the conventional views of party.

However, if we look at this from a different perspective, then, we see political parties are merely changing and no overall party decline is apparent. Even the party on the ground cannot be said to be in fundamental decline. Despite some shift of power away from it, the empowerment of individual members, for example, their enhanced role in the selection of candidates for public office or party leaders, is meant to arrest any excessive centralist tendency. What the party system is losing is nothing but the image of the dominant form of mass participation.[89]

The party in public office can be regarded as the institutional core of an "organized public" and belongs to the realm of the state, while the party on the ground can be viewed as an organizational link between the core area of the political system and its outer periphery. Yet, the relationship between the party in public office and the party on the ground is an internal one, while both components are involved with the general public, the one at national, and the other at regional or local levels. The

[89] See Claus Offe, "Competitive Party Democracy and The Keynesian Welfare State: Factors of Stability and Disorganisation", *Policy Sciences*, Vol.15(1983), pp.233-236.

conventional concept of party remains mainly that of the relationship between the party on the ground and the public. The raison d'être of the party on the ground lies in its characteristic role as a necessary intermediary for people to participate in the political process. To that extent, the image of the mass membership party as the catalyst of public opinion is still useful even in the cartel party model.

Reformulation of party organization

It is important to see that the reformulation of party organization, via the cartel party model, is nothing but a reflection of the changed division of political labor. The shift from a stable, rigid division of political labor to a more flexible and contingent one is paralleled by the internalization of political processes within political parties (and other intermediary organizations). The functional differentiation of party organization, combined with the flexible division of political labor in general, means that a political party no longer can be seen simply as a unitary actor, externally coordinating the political system with the social system. Rather, this requires it to be seen as a complex entity, integrating within itself differing social demands with political decision-makings. This is what some socio-legal theorists have in mind when they suggest that in a pluralized society, intermediary associations play a fundamental role, acting not as brokers between rulers and ruled, but rather as intermediaries linking different parts of society.[90] In other words, political parties are at the crossroads of civil society and the state.

This implies that in Korea practical and legal policies relating to political parties need to be reoriented. The starting point for this has to be a

[90] See Gunther Teubner, "The State of Private Networks: The Emerging Legal Regime of Policorporatism in Germany", 1993 *Brigham Young University Law Review* 553, p.556ff.

recognition that the law governing political parties can no longer solely depend upon the traditional internal-external distinction. There is a need to depart from the conventional approach which considers the constitutional status of political parties purely in institutional terms and thus to focus on the concrete role that they play in complex and pluralist socio-political contexts. Above all, the constitutional status of political parties, which has so far been basically covered by private law, needs to be reformulated in the light of the changed situation in which, performing integrative para-governmental functions, they have become a complex entity.

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Registration Requirement of Political Parties Case

[18-1(A) KCCR 402, 2004Hun-Ma246, March 30, 2006] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

In this case, the Constitutional Court denied a constitutional complaint alleging that Articles 25 and 27 of the former Political Parties Act (revised on March 12, 2004 through Act No. 7190 but prior to revision on August 4, 2005 through Act No. 7683) requiring for registration of political parties to have at least five city or provincial (Do) parties, each having at least 1,000 party members, infringes upon the Complainant Socialist Party's freedom of party formation.

…

A. Article 25 of the Political Parties Act aims to exclude 'regional parties' and Article 27 aims to exclude 'minor parties'. Exclusion of minor parties is a legitimate legislative purpose because proper functioning of

representative democracy under our Constitution requires a stable majority within the legislative branch. Also, exclusion of regional parties representing the political wills of only certain regions cannot be said to be an illegitimate purpose under the Constitution when party politics depending excessively on regional affiliation has become problematic in our political reality. Therefore, the Instant Provisions have a requisite legitimate purpose.

B. The provisions at issue require for party registration two constants, namely, 5 or more city or provincial branches and each city or provincial branch having more than 1,000 party members, for the purpose of excluding regional parties and minor parties. These regulations prevent the parties from being organized only in certain areas, and require city and provincial organizations in at least five cities or provinces, in each of which at least a certain number of members are active. Therefore, these regulations are appropriate means to suppress election-related entities and minor regional political organizations from indiscriminately participating in party politics. The provisions at issue also concretize the requirement in Article 8 Section 2 of the Constitution concerning "the organization necessary for participating in the formation of people's political will" in the form of the minimum 5 city or provincial branches and the minimum 1,000 members for each of the branches. The legislator's decision that at least 5 city or provincial branches are required for fulfilling faithfully the functions and position of a national party is not unreasonable. Also, the requirement of at least 1,000 members for each city or provincial branch is not excessive even for minor or newly formed parties such as complainant in light of the size of the populations of the cities and provinces of our country.

C. The provisions at issue do restrict people's freedom of party formation with the requirements of 5 or more city or provincial branches and 1,000 or more party members for each of the branches. However, these restrictions are reasonable restrictions materializing the constitutional concept of a political party through which people shall participate in the formation of people's political will 'for a substantial time' 'in substantial areas'. These restrictions are constitutionally justified.

(1) Instant provisions

The Political Parties Act (revised on March 12, 2004 through Act No. 7190 but prior to revision on August 4, 2005 through Act No. 7683, hereinafter, "PPA")

Article 25 (Statutory Number of City or Provincial Parties)

A political party shall have five or more city or provincial branches.

Article 27 (Number of Party Members of City or Provincial Parties)

Each city or provincial branch party shall have one thousand or more party members.

(2) Related Provisions

PPA, Article 4 (Establishment)

(1) Political party shall come into existence when its central party is registered with the National Election Commission.

(2) Registration under Section 1 shall satisfy the requirements of Articles 25 and 27.

Article 38(Revocation of Registration)

(1) When a political party falls into any of the following Items, the competent election commission shall revoke its registration.

(i) When it becomes incapable of satisfying the requirements under Articles 25 and 27. Provided, that such revocation shall be postponed until after the election day when a failure to satisfy such requirements has occurred three months before the general election day, and in other cases until three months from the failure to satisfy such requirements

(ii) When failing to participate, during the past four years, in an election of National Assembly members due to an expiration of term of office or the election of the head of the local government due to the expiration of term of office or that of the members of City or Provincial council; and

(iii) When failing to obtain a seat in the National Assembly after participating in an election of National Assembly members, or failing to obtain more than 2/100 of total number of effective votes

…

4. Review on Merits

A. Related basic rights

(1) Freedom of party formation and freedom of association

Freedom of party formation is set forth in the beginning part of Article 8 Section 1 of the Constitution. Yet it is a 'basic right' of individual persons and parties on the basis of which a constitutional complaint can be surely filed. In this case, what is in controversy is infringement of freedom of party formation in the beginning part of Article 8 Section 1, which is a special provision of freedom of association under Article 21 Section 1 of the Constitution (11-2 KCCR 800, 810, 99Hun-Ma135, December 23, 1999).

B. Freedom of party formation and its contents and significance

(1) A political party is an intermediary between the state and people, acting as political conduit, which actively induces formation and convergence of the diverse political wills of people and thereby forming a political will at a magnitude sufficient to affect the national policy decision-making. A political party in today's participatory democracy acts as the conductor and intermediary in the people's political will-formation and an indispensable element in democracy. Free formation and activities of political parties is a prerequisite for materialization of democracy (16-1 KCCR 422, 434, 2001Hun-Ma710, March 25, 2004).

Taking into account a party's significance and role in today's democracy, our Constitution has separated a political party from the purview of general freedom of association and regulated it separately in Article 8, thereby emphasizing the special status of a political party. Article 8 Section 1 of the Constitution states "The establishment of political parties shall be free, and the plural party system shall be guaranteed.", thereby guaranteeing all people the right to form a political party in principle without the state's interference as a basic right, and institutionally guaranteeing a multi-party system, the obvious legal consequence of freedom of party formation (11-1 KCCR 800, 813, 99Hun-Ma135, December 23, 1999).

(2) Freedom of party formation in the beginning part of Article 8 Section 1 guarantees not only freedom of party formation but also freedom of party activities. Article 8 Section 1 of the Constitution not only specifically refers to freedom of party formation but also guarantees everyone's freedom of enrolling in and withdrawing from political parties without the state's interference. If only party formation is freely allowed

while a party thus formed can be banned at any time and party activities can be restricted arbitrarily, freedom of party formation means nothing. Accordingly, freedom of party formation shall guarantee maintenance of the parties and freedom of party activities.

Therefore, the agency enjoying freedom of parties shall be both individuals intending to form parties and the parties thus formed. Concretely, freedom of parties include individuals' freedom of party formation, freedom of joining parties, and freedom of the organizational or legal form. Freedom of party formation includes the corresponding freedom of dissolving parties and merging and dividing parties. Freedom of party formation includes individuals' negative freedom of not joining any party or any particular party and of withdrawing from the party that they have previously joined.

C. Constitutionality of the Instant Provisions

(1) Concept of a political party and meaning of party registration

(A) The Constitution in its Article 8 Section 2 states "Political parties …… shall have the necessary organizational arrangements for the people to participate in the formation of the political will". Article 2 of PPA states "For the purposes of this Act, the term 'political party' means a national voluntary organization that aims to promote responsible political arguments or policies and to take part in the formation of the nation's political wills in order to promote the national interests by endorsing or supporting candidates for public offices".

As set forth above, our Constitution and the Political Parties Act define a political party in terms of the following features: (1) affirm the State and free democracy or constitutional order; (2) endeavor to promote pub-

lic interest; (3) participate in elections; (4) have party platforms or policies; (5) participate in people's political will-formation; (6) have continuing and stable organization; (7) specify the qualifications to become party members, and etc. In other words, political parties, other than the defining features set forth above, shall meet the requirement of participating in people's political will-formation 'for a substantial period or continuously' 'in a substantial area'.

(B) PPA, Article 4 Section 1 states "Political party shall come into existence when its central party is registered with the National Election Commission.", thereby requiring party registration as the prerequisite to party formation. Therefore, if any political association aims to participate, as a political party, in people's political will-formation, it is not recognized as a political party under PPA unless it is registered as a party to the National Election Commission.

Under the such party registration system explained above, an association claiming to be a party applies for registration with a competent administrative agency in accordance with certain statutory conditions, and if the conditions are met, the association is placed on the party roster and thereby established as a party. The party registration system facilitates confirmation of whether a political association is a party, and therefore permits relatively clear definitions of whether an association is entitled to the rights and duties of a political party. The party registration system contributes to legal stability and certainty.

(2) Whether freedom of party formation is infringed

(A) Standard of review

Expressing in the form of statutory provisions the definitional requirement of participating in people's political will-formation 'for a substantial

period or continuously' 'in a substantial area' is in principle within the discretion of the legislature. In other words, the legislature must consider comprehensively our national history of party politics, the current conditions and regional uniqueness of party politics, people's value systems and senses of justice, the effects of the regulation, and etc., and thereby expressing in concrete terms the requirement of temporal continuity, organization, and regional breadth.

Therefore in terms of deciding whether the Instant Provisions infringe on complainant's freedom of party formation, the standard of review is about deliberating on whether the legislative purpose is a legitimate purpose that can be constitutionally pursued by the legislature and whether the means adopted by the Instant Provisions abide by a reasonable relationship of proportionality in order to accomplish such legislative purpose.

(B) Legitimacy of legislative purpose

The legislative purpose of the Instant Provisions is to exclude regional parties and minor parties. In other words, Article 25 demanding five or more city or provincial parties is aimed at excluding 'regional parties' which are established in reliance upon and conduct activities around affiliation with certain regions. Article 27 demanding 1,000 or more members from each city or provincial branch party is aimed at excluding 'minor parties' which have not recruited a sufficient number of members to win a certain level of people's support or represent people's interests.

Representative democracy under our Constitution, in order to function properly, requires a stable majority in the parliament. Therefore, there is a legitimate interest in exclusion of minor parties. One may contest the legitimacy of excluding regional parties. However, exclusion of regional

parties representing the political wills of only certain regions cannot be said to be of an illegitimate purpose under the Constitution when party politics depending excessively on regional affiliation has become problematic in our political reality. Therefore, the Instant Provisions have a requisite legitimate purpose.

(C) Proportionality between ends and means

1) The Political Parties Act, first enacted on December 31, 1962 through Act No. 1246 under the 1962 Constitution and repeatedly revised since then, requires political parties to procure an organization sufficient to participate in people's political will-formation and guarantee the parties democratic organization and activities, thereby aiming to contribute to sound development of democratic politics.

Article 25 of the first Political Party Act (Statutory Number of District Party Members) provides, "a political party shall have district parties equal to or more than one third of a total number of electoral districts under the National Assembly Election Act". Article 26 (Distribution of Regional Parties) provides "district parties set forth in the preceding article shall be set up in at least five regions out of Seoul Metropolitan City, Busan City and other provinces. Article 27 (Statutory Number of Party Members) provides a district party shall have fifty or more party members".

The law revised on January 23, 1969 through Act No. 2089 strengthened the requirement of the statutory number of district parties to one half of all electoral districts (Article 25), and required the district parties to have one hundred or more party members (Article 27). The law revised on November 25, 1980 through Act No. 3263 changed the required

number of district parties to one fourth of all electoral districts (Article 25) and changed the required number of members for each district party to 30 (Article 27). The law revised on March 25, 1989 through Act No. 4087 again changed the required number of district parties to one fifth of all electoral districts (Article 25) and the required number of party members for each district party to 30 (Article 27). The law revised on December 27, 1993 through Act No. 4609 changed the required number of district parties to one tenth of all electoral districts (Article 25) and the required number of party members for each district party to 30 (Article 27).

2) The Instant Provisions differ in form from the previous regulations which defined the statutorily required number of party members in terms of one variable and one constant - namely, a percentage of all electoral districts and the statutory minimum number of party members - in that the Instant Provisions define the same in terms of two constants - namely, five or more district parties and 1,000 or more party members for each district party - thereby requiring at least 5,000 party members for party registration.

However, as aforementioned, the above regulations aim to exclude 'regional parties' and 'minor parties'. The regulations prevent the organization to be formed only in certain regions and require an organization in at least five cities or provinces and a certain number of party members in each organization, and therefore constitute appropriate means to prevent election-bound organizations and minor local political parties from indiscriminately obtaining party status.

On the other hand, the Instant Provisions, in materializing the requirement of 'the organization necessary for participating in formation of peo-

ple's political will under Article 8 Section2, require five or more district parties and 1,000 or more party members for each district party. The legislator's decision that at least 5 city or provincial branches is required for fulfilling faithfully the functions and position of a national party is not irrational. Also, the requirement of at least 1,000 members for each city or provincial branch is not excessive even for minor or newly formed parties such as Complainants in light of the size of the populations of the cities and provinces of our country.

Therefore, the Instant Provisions do restrict freedom of party formation with the requirements of 5 or more city or provincial branches and 1,000 or more party members for each of the branches. However, these restrictions are reasonable restrictions materializing the constitutional concept of a political party through which political party shall participate in formation of people's political will for a substantial time in substantial areas'. These restrictions are constitutionally justified.

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Notes

1. Can we agree with the KCC's view that "Exclusion of minor parties is a legitimate legislative purpose"? For example, regional parties having a strong base in a certain region though the support for them is not widespread across the nation may have a good rationale to concentrate their political energy on their strong political base.
2. In this case, the KCC held that freedom of party formation in the beginning part of Article 8 Section 1 is a special provision of freedom of association under Article 21 Section 1 of the Constitution.

What is the implication of this explanation? Does it give a more preferred position to the freedom of party formation than the general freedom of association?

3. The consequence of political party's failure to meet the registration requirement is very harsh. If the political party is in the process of party building, it cannot have a legal recognition. If the party is a registered party, the registration will be canceled so that it cannot enjoy constitution and statutory privileges. However, how can we reconcile this outcome with the special protection given to political parties according to Article 8(4) of the Constitution providing that a party's breach of the fundamental democratic order[or the democratic basic order, 民主的 基本秩序] is the only reason of dissolution through the adjudication of the KCC. On November 5, the Park Geun Hye Government filed the dissolution of the United Progressive Party(UPP) to the KCC for the first time in the Korean constitutional history on the ground that, among others, UPP, a small left-wing party, has party platforms pursuing pro-North Korean political campaigns and involved anti-state activities including conspiracy of overthrowing the ROK government in the event of a war against the North Korea. The forthcoming decision of the KCC on this case will affect the future constitutional jurisprudence and practices in relation to political parties in Korean constitutional arrangements.

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E. Economic Democratization: the State and the Economy

One feature of the Constitution of the ROK is that there is a separate chapter entitled 'Economy' designated for the relationship between the State and the economy. Chapter IX, consisting of seven Articles, sets force basic principles governing the national economy and basic institutions the Constitution-makers think important to pursue and implement those principles.

Basic Principles of Economic Order

Article 119(1) of the Constitution states that "the economic order of the Republic of Korea shall be based on respect for the freedom and creative initiatives of enterprises and individuals in economic affairs." Together with the recognition of property as a basic constitutional right, this provision is construed to make clear that the Korean economic order is a capitalist economy.

However, it might be too hasty to anticipate that the Korean Economy is a purely laissez-faire economic order, because a competing principle, i.e., the principle of democratization of the economy allowing the State's wide intervention in the economy is ensued in Article 119(2) providing that "the State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure the proper distribution of incomes, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents." The Constitutional Court has put forward a compromised interpretation of these seemingly

competing ideas of economic order that, although the basis of economic order is free-market-centered order respecting private property rights and free competition, the State may intervene in the economy to eliminate social problems stemming from free market and to pursue social welfare and justice.[91]

As a consequence, the Korean economy can be regarded as a kind of mixed-economy or a "social market economy" in the sense that market can be regulated to promote social welfare. However, it is not meant that the State can intervene in the economy whenever it wishes because of the principle of subsidiarity in that the State's intervention in private economy should be implemented only when it is necessary to complement self-determination on the part of individuals and enterprises.[92] It is also reiterated in a number of cases that even when the State's intervention is required, it should be limited to the degree and level restricted by the proportionality rule stemming from the rule of law principle.[93]

Democratization of Economy - Pluralist Economic Order

As mentioned above, democratization of the economy is declared as a counter-balancing principle to the free-market economy in the Constitution.[94] To implement this principle, the Constitution of the ROK is construed as arranging a pluralist economic order by promoting the organization and management of socio-economic self-help groups, such as cooperative societies for farmers and fishermen, federation of small and medium busi-

91 E.g., Constitutional Court Decision 96Hun-Ga4, 97Hun-Ga6・7, 95Hun-Ba58(Consolidated), May 28, 1998, 10-1 KCCR 533, 534.
92 E.g., Constitutional Court Decision 88Hun-Ga13, December 22, 1989, 1 KCCR 377.
93 E.g., Constitutional Court Decision 94Hun-Ga2, November 30, 1995, 7-2 KCCR 544.
94 Cf. Young-sol Kwon, *The Relevance of Constitutional Law: Theories and Discourses*, Bobmunsa(2006), pp.897-898.

nesses, and consumers' cooperative association (Article 123(5) and Article 124).[95] The organization and activities of trade unions, the most important interest groups in a capitalist economy, are not mentioned in this part of the Constitution, but more strongly protected by workers' constitutional rights of association, collective bargaining and collective action safeguarded in Article 33 of the Constitution.

Furthermore, the Constitution mandates that the State shall establish and implement plans to comprehensively develop and support agriculture and fisheries, and small and medium enterprises (Article 123(1) and (3)). In particular, the State is obliged to endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems (Article 123(4)).

Balanced development of the national economy is not confined to the dimension of functional industrial division but also required in the dimension of regional division. Therefore, the Constitution imposes constitutional duty on the State to foster regional economies to ensure the balanced development of all regions (Article 123(2)).[96]

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[95] See Jongcheol Kim, "Social Polarization and the Korean Constitutional Law," *Korean Journal of Law and Society*, Vol. 31(2006), pp.9-32.

[96] The Constitutional Court confirmed this in t*he Local Soju Compulsory Purchase System* case. The Court ruled that, while the primary aim of regional economic development stated in Article 123 is the reduction of economic disparity among regions, there is no concrete regional disparity calling for such adjustment under the Liquor Tax Act seeking to maintain one soju maker in every province (Constitutional Court Decision 96Hun-Ga18, December 26, 1996, 8-2 KCCR 680).

Chapter 4 The National Assembly as the first branch

A. Parliamentary democracy under the presidential system

A majoritarian parliamentary democracy

As we have seen in Chapter 3, the Constitution of the ROK pursues a representative democracy. The chief representative organ entrusted with the legislative authority is the National Assembly. It does not, however, mean that the National Assembly is the only representative organ because the form of government of the ROK is a presidential system in the sense that the head of the state as well as the executive is the President elected by the direct ballot of the people. The dual representation of the political will of the sovereign people by both the National Assembly and the President leads the ROK to a parliamentary democracy in a different sense from the British style of parliamentary supremacy. The introduction of constitutional review by the KCC is another institutional feature characterizes the Korean parliamentary democracy.

Notwithstanding these differences, the Korean democracy contains main features of a parliamentary democracy. The legislative power of the legislature is the first source of political legitimacy to transform the political will of the sovereign people into the executive and the judiciary. Supported by the Rule of Law or *Rechtsstaat*, the National Assembly may enjoy the primary authority to decide national agenda and control other branches. Although the nexus between the executive and the legis-

lature is implemented through political parties or the negation groups statutorily recognized within the legislature, there is always a possibility of 'divided government' in the sense that the executive is backed by the parliamentary minority. This weak nexus between the executive and the parliamentary majority sometimes causes ineffectiveness and instability of the political system due to the chronic confrontation between the President and the majority party. However, if a single party wins both the presidential election and the parliamentary election, an "electoral dictatorship" which the British style of parliamentary democracy often produces makes it possible for the President supported by the majority party not only to serve as an effective rule but also to incapacitate the opposition and even the will of the majority of the people at certain time.

This institutional flexibility has been criticized as one major structural problem inherent in the current form of constitutional government. As noted in Chapter 3, the ineffective and instable character of the Korean political system is not caused from the institutional flexibility because the alternatives to the current system themselves may not be able to eradicate those defects unless the corresponding political reforms, e.g., electoral reform, liberation of political activities and association, democratization and decentralization of law enforcement authorities such as the police, the prosecutor office, the tax office and the intelligence agency, were not accompanied. Above all, minority rights must be entrenched in the execution of the parliamentary power to control the executive. For example, as in the German style of parliamentary democracy, the investigative power of the legislature must be initiated by the minority, e.g. one third or one fourth of the members of the National Assembly, rather than the majority of the parliament.

The recent reform for advancing the parliamentary process in favor of the minority rights

The majority-takes-all system featuring the Korean parliamentary system has caused a vicious circle of the majority's attempt to pass laws or resolutions and the minority's physical blockage of the resolution process. One advance to cure this chronic problem was the revision of the National Assembly Act ("NAA") which took place on May 2, 2012 and began to be implemented in the 19th National Assembly. The list of key reforms for advancing the parliamentary process include the rationalization of the Speaker's power to table agenda or bills directly to the plenary session, the so-called "fast track" of parliamentary process, and the introduction of a filibuster.

In the past, the Speaker's authority to table bills to the plenary session at his or her discretion has often been exercised to break a partisan deadlock over contentious bills in favor of the majority or to implement the intentional railroading. The revision confines the scope of this by-passing power to the cases where a natural disaster, a war, an incident, or a national emergency occurs and where the Speaker reaches an agreement with the representative members of each negotiating party (Article 85 (1) of NAA).

The revision of NAA inserts Article 85-2 designated to introduce a fast track or "expeditious processing" of agenda. The "motion for designation of the agenda for expeditious processing" signed by a majority of all incumbent National Assembly members or members of the competent committee responsible for an agenda can be submitted to the Speaker or the chairperson of the competent committee. In such cases, the Speaker or

the chairperson of the competent committee responsible for an agenda shall without delay pass a resolution on the motion for designation of the agenda for expeditious processing by secret vote, with the affirmative votes of at least 3/5 of all incumbent National Assembly members or of at least 3/5 of all incumbent National Assembly members of the competent committee responsible for the agenda. The committee shall finish the examination on any agenda for expeditious processing within 180 days from the date of designation of such agenda. If a committee fails to meet within this period, it shall be deemed that the competent committee has finished the examination on the date after expiration of the aforementioned period and the agenda is referred to the Legislation and Judiciary Committee for examination of its system and wording. If the agenda, other than legislative bills and draft regulations of the National Assembly, shall be deemed directly referred to the plenary session. When the Legislation and Judiciary Committee fails to finish examination on any agenda for expeditious processing within 90 days, the agenda can be directly referred to the plenary session. Any agenda for expeditious processing shall be presented to the plenary session within 60 days from the date on which the agenda is deemed referred to the plenary session. Any agenda for expeditious processing failing to be presented to the plenary session within 60 days shall be presented to the plenary session which first opens after the expiration of the aforementioned period. All these processes can be waived in the case where the Speaker reaches an agreement with the representative members of each negotiating party.

A remarkable advance in the NAA reform in 2012 is the introduction of a filibuster or “unlimited debate” intended to institutionalize the minority right to impede parliamentary proceedings by means of debate instead

of violence. NAA has several restrictions on speaking in terms of the time, frequency, topic and so on in Article 99 through Article 106. The enactment of Article 106-2 provides an exception to these restrictions in order to protect the minority right with the parliamentary process. A National Assembly member who wants unlimited debate on the agenda referred to the plenary session submit to the Speaker a letter of request therefor signed by at least 1/3 of all incumbent National Assembly members. In such cases, the Speaker shall implement the unlimited debate on such agenda. National Assembly members may engage in an unlimited debate on the relevant item with the limitation of one time only. A plenary session implementing an unlimited debate shall continue its meeting without adjourning until termination of the unlimited debate is declared. In this case, even the quorum of the meeting, that is, the presence of at least 1/5 of all incumbent National Assembly members can be waived. The unlimited debate can only be terminated by the resolution by the affirmative votes of at least 3/5 of all incumbent National Assembly members. An unlimited debate may not be made with respect to the termination of an unlimited debate. One exception is allowed for the budget bills, etc. and the legislative bill annexed to the budget bill. A filibuster on such budget bills shall apply until December 1st each year.

The main character of the NAA reform in 2012 can be summarized as a reconciliation between the majority and the minority to prevent violent confrontation in the parliamentary process. However, a strong dissatisfaction with this reform, especially a super majority scheme in favor of the minority has already come to the surface only after one year implementation from the side of the majority party because a simple majority cannot take any initiative in the parliamentary process. This dis-

content may represents the chronic inertia built-in the majoritarian parliamentary democracy under the presidential government system. The NAA reform in 2012 may provide those obsessed with the macro-level reform such as constitutional revision on the form of government with an opportunity to reflect the reasonable way of political reform at a micro, legislative level by showing a possible path of the Korean parliamentary democracy towards a consensus politics overcoming a majoritarian politics.

B. The Organization and function of the National Assembly

Composition of the National Assembly

The third chapter of the Constitution confers legislative authority on the National Assembly as a unicameral body whose members are elected directly by the people for a four-year term. The National Assembly has the sole power to determine in the form of an Act, what kind of electoral systems, including proportional representation, can be adopted and how many members are elected, being no less than two hundred (Article 41 of the Constitution).[97]

At present, the electoral system for the National Assembly is a modified relative majority system in which a total of 246 constituency representatives are chosen at a single-member district under the majority rule and the remaining 54 members are elected by the party list system in one national constituency. The present electoral system is the result of an

[97] The number of members in the National Assembly is the only constitutional regulation except for the electoral principles of universal, equal, direct, and secret ballot. Therefore, minimum age, citizenship, and residence requirements for the members of the National Assembly, and restrictions on the right to vote are provided in the Election Act.

electoral reform responding to a decision of the Constitutional Court in 2001. In this landmark election law case, it struck down the element of proportional representation of the old election law, which was designed to distribute seats according to the number of votes cast in favor of candidates of political parties in constituencies instead of allowing the voters to cast a separate ballot to party list of their own choice.[98]

The Constitution has several provisions about the status of the members of the National Assembly. They are entitled to two notable constitutional privileges. First, they are exempted from being arrested or detained during the sessions without the consent of the National Assembly, except in cases of flagrante delicto. When a member is in a state of detention or arrest prior to the opening of a session, he or she shall be released during the session upon the request of the National Assembly, except in cases of flagrante delicto (Article 44 of the Constitution). Second, they shall not be held responsible outside the National Assembly for opinions officially expressed or votes cast during the session (Article 45 of the Constitution).

In responding to these privileges, Article 46 of the Constitution imposes some constitutional duties on the members of the National Assembly. They include the duty to maintain high standards of integrity and to give preference to national interests in performing their duties in accordance with conscience. Interestingly, the third paragraph of the same clause requires members of the National Assembly not to abuse or misuse their positions.

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[98] Constitutional Court Decision 2000Hun-Ma91 · 112 · 134(Consolidated), July 19, 2001, 13-2 KCCR 77. See also Jongcheol Kim, "Critical Review of the Decision of Unconstitutionality on the Method of Voting and Distribution of Seats in the System of Nationwide Proportional Seats - Constitutional Court Decision, July 19, 2001, 2000Hun-Ma91 · 112 · 134(Consolidated)", *Study on Constitutional Practice*, Vol. 3, 2002, pp.321-366.

The organization of the National Assembly

Speaker and Vice-Speaker

The only clause the Constitution explicitly provides in relation to the organs of the National Assembly is Article 48 stating that "The National Assembly shall elect one Speaker and two Vice-Speakers" while the chapter III of the NAA provides a basic organs of the National Assembly.

There are a Speaker and two Vice-Speaker of two year term, elected by the National Assembly through a secret vote, obtaining the votes of a majority of the National Assembly members on the register. (Article 9 and Article 15(1)). In cases of accidents to both the Speaker and Vice-Speaker, the Speaker pro tempore shall be elected to act for the Speaker (Article 13 and Article 17). It is a parliamentary custom that one Vice-Speaker is elected from the main opposition party. Article 20-2 of NAA prohibits the elected Speaker from retaining any party registry from the date next to that on which he/she is elected as such and while he/she remains in this post. When the Speaker who has left a party registry has completed his/her term of office, he/she shall return to the political party whereto he/she had belonged at the time of leaving such party registry.

Supporting organs

To support the activities, such as legislation, examination of the budget and the settlement of accounts, etc., and to manage the administrative affairs of the National Assembly, the Secretariat of the National Assembly shall be established in the National Assembly (Article 21 of the NAA). The Secretariat of the National Assembly is governed by the Secretary

General appointed or dismissed by the Speaker with the approval of the plenary session of the National Assembly in consultation with representative members of each negotiating party. It is a parliamentary custom that the majority party has an initiative to appoint the Secretary General, though he or she is under the supervision of the Speaker.

Apart from the Secretariat of the National Assembly, National Assembly Library, National Assembly Budgetary Policy Office, National Assembly Legislation Investigation Office are statutorily established to support proper function of the National Assembly.

Plenary Session and Committees

Although the plenary is "the highest decision-making body of the National Assembly, composed of the entire membership of the National Assembly", the values of efficiency and professionalism requires a small and focused organs of discussion and decision-making bodies of the National Assembly, namely, committees. According the NAA, there are three kinds of committees: standing committees, special committees, the whole House committee.

The Standing Committees shall perform the examination of bills and petitions falling under their respective jurisdictions, and other duties prescribed by Acts (Article 36 of the NAA). The jurisdiction of each Standing Committees are designated by the NAA mainly corresponding to the affairs of the Executive (Article 37 of the NAA).[99]

[99] As of December 15, 2013, there are 16 Standing Committees: the House Steering Committee, the Legislation and Judiciary Committee, the National Policy Committee, the Strategy and Finance Committee, the Foreign Affairs, Trade and Unification Committee, the National Defense Committee, the Public Administration and Security Committee, the Education, Science and Technology Committee, the Committee on Culture, Sports, Tourism, Broadcasting and Communications, the Food, Agriculture, Forestry and Fisheries

Special Committees are established to examine efficiently matters related to the jurisdictions of several Standing Committees, or matters deemed necessary in particular, by resolution of the plenary session (Article 44 of the NAA). Although special committees can be set up on an ad hoc basis, there are three statutorily required special committees: Special Committee on Budget and Accounts, Special Committee on Ethics and Special Committee on Personnel Hearing (Article 45, Article 46, Article 46-1 through Article 46-3). Special Committee on Budget and Accounts composed of fifty members of the National Assembly with one year term is envisaged to examine the budget bills, a bill for the fund operation and the settlement of accounts.

Special Committee on Ethics consisting of fifteen members including one chairperson is in charge of examining matters concerning the qualification and discipline of a National Assembly member. The Special Committee on Ethics is required to seek the opinions of the Ethics Investigation Advisory Committee comprised of eight advisors, including one chairperson, who are commissioned by the chairperson on the recommendation of the representative members of each negotiating party before deliberating on the discipline of a National Assembly member (Article 45 (3) and Article 46-2 of the NAA).

Special Committee on Personnel Hearing is designated to examine the approval bill for appointments of the Chief Justice of the Supreme Court, the President of the Constitutional Court, the Prime Minister, the Chairperson of the Board of Audit and Inspection and the justices of the Supreme Court, whose appointments require an approval of the National Assembly

Committee, the Knowledge Economy Committee, the Health and Welfare Committee, the Environment and Labor Committee, the Land, Transport and Maritime Affairs Committee, the Intelligence Committee, the Gender Equality and Family Committee.

under the Constitution, and the approval bill for appointments of the justices of the Constitutional Court and the commissioners of the National Election Commission who are to be elected at the National Assembly, or the bill for election introduced by the Speaker in consultation with the National Assembly members representing each negotiating party.

The Whole House Committee is a committee the National Assembly establishes, in case where there exists a request from not less than a quarter of the registered National Assembly members before or after the presentation of major bills to the plenary session, such as a bill for the Government organizations or bills for taxes or for imposing burdens on the people from among the bills which have gone through the examination by the committee or proposed by the committee, open the Whole House Committee consisted of all the National Assembly members in order to examine them (Article 63-2 of the NAA). Unlike the plenary session, the chairperson of this committee is a Vice-Speaker designated by the Speaker.

Negotiation Party or Group

With the advance of a party-centered democracy under the flag of the parliamentary democracy, the ordinary function of the National Assembly depends upon a party democracy and a collectivist approach. The major organ symbolizing this development is the recognition of negotiation party or group as the major actor in performing the functions of the National Assembly.

Article 33 of the NAA set the minimum quorum of a Negotiating group twenty or more members of the National Assembly. In order to assist in the legislative activities of National Assembly members belong-

ing to a negotiating party, policy research members shall be assigned to each negotiating party.

As of December 15, 2013, there are two negotiation Party: the Saenury Party as the majority party and the Democratic Party as the main opposition Party. To facilitate a consensus politics and protect the minority rights, there has been continuous demands especially from small members parties to lower the threshold of the requisite number of a negotiation group.

C. Powers of the National Assembly

Powers entrusted to the National Assembly by the Constitution can be categorized in terms of the basic elements of parliamentary democracy: legislation, control over national affairs towards the full implementation of legislative purposes, budget and national finance control.

Legislative power

The possible subject matters of legislation are, unlike the federal Constitution of the US, not listed in detail in the Constitution. Rather, there is one general provision permitting legislation to restrict the rights and freedoms of the people in Article 37(2) and a number of separate provisions across the Constitution granting general legislative power in specific areas which cover not only the organization of public bodies and their execution of powers, but also the protection of rights of the people. Therefore, generally speaking, the scope of legislation is open to interpretation and thus, like other constitutional democracies, judicial decisions regarding legislation and political practices, in practice, may have a role

in setting the limits of legislation. The constitutional principles such as the rule of law as outlined above together with the express provisions concerning the scope of legislation play a certain guiding role in this regard.[100]

Power to control over national affairs

Aside from the basic power of legislation, the Constitution grants a variety of powers to the National Assembly mostly in order to fulfill the objectives of democracy, the separation of powers and the rule of law. First, there are several clauses granting consenting or approving powers to the National Assembly to enhance checks and balances on the other Branches. These powers can be divided into two categories, depending on the nature of subject matters at issue. The first category is concerned with the composition of the other Branches. It has consenting powers in the appointment of the Prime Minister, the Chairperson of the Board of Audit and Inspection, the Chief and Associate Justices of the Supreme Court, and the President of the Constitutional Court. It also has the power to select three out of nine Constitutional Justices and three out of nine members of the National Election Commission. The second category of consent or approval powers of the National Assembly is apt to control powers of the other Branches, in particular that of the President. What require the consent or approval of the National Assembly are those powers which pose a danger of eroding constitutional principles by overriding essential powers of the other Branches. The President's emergency powers, such as the promulgation of orders having the effect of Act or the proclamation of martial law, may affect respectively the legislative power

[100] Young-sol Kwon, *The Relevance of Constitutional Law: Theories and Discourses*, Bobmunsa, 2006, pp.409-421.

and the judicial power so that they are subject to the consent or approval of the National Assembly as the representatives of the sovereign people. The President's powers in relation to the accession and ratification of treaties of certain subject matters, which may have significant influence on the powers of the other Branches or public security and order of the country, should also be consented by the National Assembly before they come into force. Such subject matters include the declaration of war, the dispatch of armed forces to foreign states, the stationing of alien forces in the territory of ROK, treaties pertaining to any restriction on sovereignty, treaties that will burden the State or people with an important financial obligation and so on.

Another category of power in the hands of the National Assembly is one that, assuming the representatives of the sovereign people, is apt to control the other Branches. It has the power to inspect general affairs of the other Branches and investigate specific matters of their affairs (Article 61). It may also request the attendance and responses to the raised questions of the Prime Minister, State Councilors and other government delegates at any meeting of the National Assembly (Article 62). Moreover, the National Assembly may pass a recommendation for removal from office of the Prime Minister or State Councilors (Article 63). Finally, it is authorized to pass the motion for impeachment of high-level public officials designated under Article 65(1) and other Acts. One constitutional effect of the passage of the impeachment motion is the suspension of the impeached public officials from exercising their powers until the Constitutional Court's decision on that matter is delivered (Article 65(3)). In the first impeachment trial against the then President Roh Moo Hyun in 2004, the KCC held that even if the minimum requirements of im-

peachment are met, it may decide whether an impeached official's violation of the Constitution or Act amounts to a sufficient level of gravity to remove him (or her) from public office. As far as President Roh was concerned, the KCC ruled that, although the violations of the Constitution or Act on three accounts were recognized, they were not sufficiently serious to remove him from office.[101]

Budget and national finance control

Other important powers granted to the National Assembly are related to the national budget. In the process of formulation and approval of the national budget, another dimension of the separation of powers is installed. The formulation of the national budget bill belongs to the Executive while the deliberation and determination of the money bill is under the jurisdiction of the National Assembly. The power to audit and inspect the closing of accounts of revenues and expenditures is given to the Board of Audit and Inspection (BAI). The BAI is institutionally located under the direct jurisdiction of the President, but its constitutional functions are to be carried out independently of the President under Article 2 of the Board of Audit and Inspection Act.

[101] Constitutional Court Decision 2004Hun-Na1, May 14, 2004, Decisions of the Korean Constitutional Court, Vol. 16, No. 1, 609. In this case, the Constitutional Court discerned the President from other officials in determining whether the required violation amounts to the required level of gravity because, being the head of the State as well as the head of the Executive elected directly by the people, the dismissal of the President can cause much greater change in the working of constitutional arrangements and political conflicts.

Parliamentary privilege or self-regulation

Parliamentary democracy is unthinkable without the autonomy and self-regulation on the part of the National Assembly. To carry out the functions of the National Assembly effectively, two kinds of privileges are recognized by the Article 64 of the Korean Constitution. The first required privilege is the autonomy of the National Assembly in establishing the rules of its proceedings and internal regulations unless they are compatible with relevant Acts. The second is the privilege to review the qualifications of and to take disciplinary actions against the members of the National Assembly. One constitutional limitation in relation to disciplinary action is that the expulsion of any member requires the intensified quorum, that is, the concurrent vote of two thirds or more of the total members of the National Assembly (Article 64(3) of the Constitution). A resolution of disqualification also requires the same intensified quorum by the Article 142 (3) of the NAA. Courts should not allow any action with regard to disciplinary actions and disqualification decision of the National Assembly (Article 64(4) of the Constitution).

Chapter 5 The Executive and administration

A. Hybrid form of government: Presidency with a constitutionalized cabinet

The fourth chapter of the Constitution is divided into two sections, each of which is allocated to the President and the Administrative Branch, respectively. In other words, the Korean style of presidency is unique because the executive power is not entrusted with the President alone but with the Executive Branch as a collective entity which consists of the President as its head, the Prime Minister and the State Councilors, the State Council and ancillary advisory organs (Article 66(4) of the Constitution). The President must defer the state affairs designated in Article 89 of the Constitution to the deliberation of the State Council before he or she lay down the final decision. They include almost all important executive powers as follows: Basic plans for state affairs, and general policies of the Executive; Declaration of war, conclusion of peace and other important matters pertaining to foreign policy; Draft amendments to the Constitution, proposals for national referendums, proposed treaties, legislative bills, and proposed presidential decrees; Budgets, settlement of accounts, basic plans for disposal of state properties, contracts incurring financial obligation on the State, and other important financial matters; Emergency orders and emergency financial and economic actions or orders by the President, and declaration and termination of martial law; Important military affairs; Requests for convening an extraordinary session of the National Assembly; Awarding of honors; Granting of amnesty, commutation and restoration of rights; Demarcation of jurisdiction

between Executive Ministries; Basic plans concerning delegation or allocation of powers within the Executive; Evaluation and analysis of the administration of State affairs; Formulation and coordination of important policies of each Executive Ministry; Action for the dissolution of a political party; Examination of petitions pertaining to executive policies submitted or referred to the Executive; Appointment of the Prosecutor General, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of each armed service, the presidents of national universities, ambassadors, and such other public officials and managers of important State-run enterprises as designated by Act. Other matters presented by the President, the Prime Minister or a member of the State Council are also taken on board in the State Council. In addition, the acts of the President under law including military affairs should be executed in writing with the countersigns of the Prime Minister and the State Councilors concerned (Article 82 of the Constitution). As far as the formulation of foreign, military and domestic policies related to national security are concerned, the President must get advices of the National Security Council prior to the deliberation by the State Council (Article 91(1) of the Constitution). Although the President is not responsible and not bound to be accountable to the National Assembly, his ministers and advisers should be called to attend meetings of the National Assembly or its committees and report on the state administration or deliver opinions and answer questions (Article 62 of the Constitution). Furthermore, the National Assembly may pass a recommendation for the removal of the Prime Minister or a State Councilor from office. This recommendation may be introduced by one third or more of the total members of the National Assembly, and shall be passed with the concurrent vote of a majority of the total mem-

bers of the National Assembly (Article 63 of the Constitution). The recommendation resolution is construed to have no legal binding force[102] but political pressure, especially in the case of a divided government, is too immense to be ignored.

This formation can be evidence of semi-dualist character of the executive branch, although different from that of the parliamentary system or the cabinet system.

The combination of presidency with a constitutionalized cabinet has an inherent institutional problem. It may increase instability in the workings of government system. On the one hand, under the circumstance of a divided government when the ruling party the President belongs to fails to take the majority of the National Assembly, there is a high risk of 'impotent' government. If the President is supported by the majority of the National Assembly, on the other hand, an "imperial presidency" or "electoral dictatorship" can take place.

The flexibility of the government system, however, has its own advantage. It may increase the responsiveness of the executive to the will of the sovereign people. The President may have an opportunity to consider and respond to the swing of the popular will in interim elections taken place during his term. If his or her party fails to win the majority, he or she can appoint the Prime Minister from the opposition party to call upon a "cohabitation" executive branch so that they can overcome a political deadlock in a divided government.

[102] See Constitutional Court Decision 2004Hun-Na1, May 14, 2004, 16-1 KCCR 609, 650.

B. The presidency

Constitutional status of the president

The President is elected by the direct ballot of the people for a single five-year term. If the direct election results in two or more candidates receiving an equal largest number of votes, the National Assembly selects the President in an open session (Article 67(2)). Unlike in America, there is no vice-presidency.

The President, unlike his (or her) assistants like the Prime Minister or State Councilors, is not directly accountable to the National Assembly. The only way to remove the President from office is through the difficult process of impeachment. The impeachment trial can be formed only by the impeachment resolution supported by two thirds or more of the total members of the National Assembly and the decision of dismissal must be upheld by the concurrence of six out of nine Constitutional Justices. The President, like other public officials, may not be impeached for political reasons,[103] but only for "violations of the Constitution or other Acts in the performance of official duties."

Only one President has actually undergone an impeachment trial since 1948. In 2004, President Roh Moo Hyun was impeached for, among others, violations of the Election Act, corruption stemming from abuse of power and the unfaithful performance of presidential duties. The Constitutional Court found, first, that his open support for a political party at a press conference prior to the scheduled general election violated Article 9(1) of the Public Official Election Act requiring public officials' neutrality in elections; second, that his seemingly defiant comments on

[103] Constitutional Court Decision 2004Hun-Na1, May 14, 2004, 16-1 KCCR 601, 609.

the warning of the National Election Commission which prohibits him from making political speeches in relation to general election was in violation of the presidential duty to uphold and protect the Constitution; and third, that his proposal of a national referendum on the people's confidence in his presidency was not compatible with Article 72(1) allowing referendum only on specific policies, and thus, breached his duty to uphold and protect the Constitution.[104] Despite these findings, however, as mentioned above, it refused to dismiss him from the presidency on the ground that they did not amount to the gravity enough to do so. The protection of the President from outside interference is reinforced by the provision of Article 84 vesting him with the privilege exempted from criminal charges except for insurrection or treason during his term.

Another case relating to the constitutional status of the President was also involved with President Moo-hyun. In 2007, he filed a constitutional complaint to the Constitutional Court alleging that his freedom of political speech was breached by the warnings of the National Election Commission which relied upon an unconstitutional provision of election law. His political speeches at, among others, a political meeting organized by his supporters and an awarding convocation for his honorary doctoral degree around election periods caused fierce political controversies in particular from the Grand National Party, which finally denounced him to the Election Commission. It confirmed at the separate sessions for the two denouncements that his speeches were against the general neutrality principle stipulated in Article 9 of Public Official Election Act and requested him to restrain himself from making speeches similar to those at issue.

In this complaint case, the Constitutional Court was divided on one

[104] Constitutional Court Decision 2004Hun-Na1, May 14, 2004, 16-1 KCCR 601, 609.

substantive issue and on two procedural matters. Seven Justices agreed that President Roh's filing of complaint met the procedural requirements prescribed by the Constitutional Court Act while two remaining Justices disagreed with the majority, either because the warning at stake was merely a request for cooperation rather than a governmental activity restricting President Roh's right or because the President was unable to file a constitutional complaint in relation to his activities in the performance of presidential duties, and President Roh's speeches at issue had something to do with such duties. So far as the substantive merit is concerned, five Justices had the opinion that the election law provision is constitutional, while two Justices held of unconstitutional. The reasoning of the majority was, among others, that although the President has a constitutional status of politician or political institution, his freedom of political speech can be restrained for the sake of the prevailing interest of maintaining fairness in election management, because his status as the head of the Executive has a real danger of rigged election. The dissenting opinion of two Justices argued that the President, being by nature a political official, could not be subordinate to the public officials' general obligation of neutrality in election provided by Article 9 of the Public Official Election Act, so that the measure by the Election Commission was not grounded on justifiable law and thereby infringed upon President Roh's political right.[105]

The powers of the President

The President's powers enumerated mostly in Section 1 of Chapter IV by and large can be divided into four categories. First, he (or she) has

[105] Constitutional Court Decision 2007Hun-Ma700, January 17, 2008, 20-1(A) KCCR 139.

authority to initiate proposals of national importance, such as constitutional revision or amendment and referendum on important policies.

Second, with the consent or cooperation of the other Branches, he (or she) is empowered to get involved in the formation of the other Branches by appointing the Chief and Associate Justices, the Constitutional Justices and three members of the National Election Commission. He (or she) also appoints the Prime Minister, State Councilors, the heads of the Executive Ministries, the Chairperson and Commissioners of the Board of Audit and Inspection as well as public officials as prescribed by the Constitution and other Acts.

Third, he (or she) has a variety of powers to implement Acts of the National Assembly as well as the authority entrusted to him/her by the Constitution. He (or she) is in the highest position in the hierarchical system of the Executive branch so that his/her directive and supervisory power may control the heads of the central administrative agencies, including the Executive Ministries, and may suspend or cancel any order or disposition by them when deemed unlawful or unjust.[106] He (or she) may issue Presidential Decrees necessary to the execution of any authority delegated to him/her by Act. He (or she) has authority to take the minimum necessary actions, to issue orders having the effect of an Act, or to proclaim martial law in certain extraordinary circumstances under the prior or subsequent control of the National Assembly. He (or she) may conclude and ratify treaties, receive or dispatch envoys, and declare war and conclude peace. He (or she) has authority to award decorations and other honors. He (or she) is commander-in-chief of the Armed Forces, the organization and formation of which shall be determined by Act.

[106] Article 11 of the Government Organization Act.

Fourth, the President is envisaged to play an important role in checking and balancing other branches as prescribed by the Constitution or other Acts. He (or she) may pardon crimes. He (or she) is entitled to attend and address the National Assembly or express his/her views by written addresses, although he (or she) has no obligation to be requested to attend and address it. He (or she) may promulgate the bill passed by the National Assembly or veto it.

Article 82 requires the President to exercise or carry out his/her powers and duties in writing with the countersignatures of the Prime Minister and the State Councilors concerned. What has yet to be decided authoritatively is the question of whether the acts of the President without the required countersignatures can be valid or what would happen if there exist neither the Prime Minister nor the State Councilors concerned.

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Impeachment of the President (Roh Moo-hyun) Case [16-1 KCCR 609, 2004 Hun-Na 1, May 14, 2004) [Decisions/Major Decisions at http://english.ccourt.go.kr/]

5. Whether the respondent violated the Constitution or statutes in exercising his official duties

Article 53(1) of the Constitutional Court Act provides that the "Constitutional Court shall issue a decision removing the respondent from office should the grounds for the impeachment petition be valid." Therefore, in order to determine whether to issue a decision to remove the President from office, an examination should precede upon the existence of the grounds for impeachment set forth in the Constitution, i.e., whether the 'President violated the Constitution or statutes in the performance of his

official duties.' In the immediately following paragraphs, we will examine each of the grounds for impeachment stated in the impeachment resolution of the National Assembly under the respective categories.

A. Act of supporting a particular political party at a press conference (the statements at the press conference with six of the Seoul-Incheon area news media organizations on February 18, 2004, and as an invited guest at the press conference with the Korean Network Reporters Club on February 24, 2004)

Pursuant to the acknowledged facts, the President stated, at a press conference on February 18, 2004 with six of the Seoul-Incheon area news media organizations, that "... I simply cannot utter what will follow should the quorum to resist the constitution revision be destroyed"; and, at a press conference with the Korean Network Reporters Club, as an invited guest, which was broadcasted nationwide on February 24, 2004, in response to a question posed by a reporter concerning the upcoming general election that 'how the respondent would run the political affairs if the Uri Party would remain as a minority party unlike the anticipation of Chung Dong-young, the Chairman of the Uri Party, projecting about 100 seats as a goal,' the respondent stated that "I expect that the public will overwhelmingly support the Uri Party," "I would like to do anything that is legal if it may lead to the votes for the Uri Party," and "when they elected Roh Moo-hyun as the President, the public will make it clear whether I will be backed to do it well for the four years to come or I cannot stand it and will be forced to step down."

On the other hand, no arbitrary amendment to the impeachment resolution by the impeaching party in order to add new facts not stated in the original resolution is permitted in the impeachment adjudication

proceeding. The statement of the President made on March 11, 2004 that 'connected the general election to the matter of confidence of the President' is a fact not included in the original impeachment resolution of the National Assembly and merely stated in the impeaching party's brief submitted to the Court as an additional ground for impeachment subsequent to the National Assembly's resolution of impeachment and, as such, the Court does not examine such additionally stated ground.

(1) Obligation of a public official to maintain political neutrality concerning elections

The political neutrality obligation concerning elections owed by public officials is a constitutional request drawn from the status of public officials set forth in Section 1, Article 7, of the Constitution; the principle of free election set forth in Section 1, Article 41, and Section 1, Article 67, of the Constitution; and the equal opportunity among the political parties guaranteed by Section 1, Article 116 of the Constitution.

(A) Article 7(1) of the Constitution provides that "all public officials shall be servants of the entire people and shall be responsible to the people," thereby setting forth that the public officials shall perform their official duties for the welfare of the public as a whole and should not serve the interest of a particular political party or organization. The status and the responsibility of the state institutions as the servant for the entire citizenry is, in the area of election, realized in concrete terms as the 'obligation of the state institutions to maintain neutrality concerning elections.' The state institutions should serve the entire population, therefore, should act neutrally in the competition among the political parties or political factions. Thus, Article 7(1) of the Constitution mandates that no state institution should exercise influence in the free competition among political

factions by identifying itself with a particular political party or a candidate or taking sides with a particular political party or a candidate in electoral campaigns by use of the influence and authority vested in the office.

(B) Articles 41(1) and 67(1) of the Constitution provide for the principles applicable to the general election for members of the National Assembly and the presidential election, respectively. Although such provisions do not expressly mention the principle of free election, in order for any election to properly represent the political will of the public, the voters should be able to form and decide their own opinions through a free and open process without undue extraneous influence. Therefore, the principle of free election is part of the fundamental principles of election as a basic premise to provide legitimacy for the state institutions constituted by and through an election.

The principle of free election not only means that the voters should be able to vote without forceful or undue influence from the state or the society, but also that the voters should be able to make their own judgment and decisions in a free and open process to form their own opinions. The principle of free election, in turn, in the context of state institutions, means the 'obligation of public officials to maintain neutrality,' that is, the prohibition against the state institutions from supporting or opposing any particular political party or candidate by identifying themselves with such particular political party or candidate.

(C) The obligation of public officials to maintain neutrality concerning elections is mandated by the Constitution also from the standpoint of equal opportunity among the political parties. The principle of equal opportunity among the political parties is a constitutional principle derived

from the interrelationship of Article 8(1) of the Constitution that guarantees the freedom to form a political party and the multi-party system and Article 11 of the Constitution that sets forth the principle of equality. Particularly, Article 116(1) of the Constitution provides that "an equal opportunity should be guaranteed ... in the electoral campaign," thereby specifying the 'principle of equal opportunity among the political parties' concerning the political campaign. The principle of equal opportunity among the political parties requires state institutions to act neutrally in the competition among political parties at the elections, thus prohibiting the state institutions from either favoring or prejudicing any particular political party or candidate in the electoral campaign.

(2)Whether the respondent violated Article 9 of the Public Officials Election Act

(neutrality obligation of a public official)

Article 9 of the Public Officials Election Act provides that "no public official or no one obligated to maintain political neutrality should act in a way unduly influencing the election or otherwise affecting the outcome of the election," and thereby provides for the 'obligation of public officials to maintain neutrality concerning elections.'

(A) Whether the President is a 'public official' within the meaning of Article 9 of the Public Officials Election Act

The issue here is whether the officials at certain political offices such as the President fall within the definition of a 'public official or anyone obligated to maintain political neutrality' of Article 9 of the Public Officials Election Act.

1)Article 9 of the Public Officials Election Act is a statutory provision that specifies and realizes the constitutionally requested 'obligation of pub-

lic officials to maintain neutrality concerning elections,' derived from Article 7(1) (status of a public official as a servant for the public as a whole), Article 41, Article 67 (principle of free election) and Article 116 (principle of equal opportunity among the political parties) of the Constitution. Therefore, the 'public official' within the meaning of Article 9 of the Public Officials Election Act means any and all public officials who should be obligated to maintain neutrality concerning elections, that is, more particularly, any or all public officials who are in a position to threaten the 'principle of free election' and 'equal opportunity among the political parties at the election.' Considering that practically all public officials are in a position to exercise undue influence upon the election in the course of exercising through exercise of their official duties, public officials here include, in principle, all public officials of the national and local governments, that is, all career public officials as narrowly defined, and, further include public officials at offices of political nature who serve the state through active political activities (for example, the President, the Prime Minister, the ministers of the administration, and the chief executive officer at various levels of local government such as the governor, the mayor, and the county magistrate).

The possibility of affecting the public's open opinion formulation process and distorting the political parties' competitive relationship through the function and influence of the official duties is particularly greater for the executive institutions at the national or local governments. Therefore, political neutrality concerning elections is even more greatly requested than other public officials for the President and the chief executive officers at the local governments.

2)Obligating public officials to maintain neutrality concerning elections

in Article 9 of the Public Officials Election Act is a mere specification of the constitutional request of the principle of free election, the principle of equal opportunity among the political parties, and the 'obligation of public officials to maintain neutrality concerning elections' derived from Article 7(1) of the Constitution, made applicable to public officials in the area of election law. Thus, such provision is constitutional as long as it is interpreted to exclude the members of the National Assembly and the members of the local legislatures from whom political neutrality concerning elections cannot be requested.

The members of the National Assembly and the members of the local legislatures are not 'public officials' within the meaning of Article 9 of the Public Officials Election Act, due to their status as political party representatives and as active figures at the electoral campaign. The state institutions bear the obligation to maintain neutrality concerning elections, in order to provide a 'forum for free competition' where the political parties can compete fairly at the election. In such 'free competition among the political parties' guaranteed by the state's neutrality obligation, the members of the National Assembly play an active role at the electoral campaigns as the representatives of their respective political parties. That is, whereas the state institutions administrate the election and should not affect the election as the institutions that are mandated to guarantee a fair election, the political parties, on the other hand, are premised on the mission to affect the election.

3) Also, a systematic analysis of the meaning of 'public officials'

in Article 9 of the Public Officials Election Act in its interrelationship with other provisions of the Public Officials Election Act or with other statutes mandates an interpretation that the concept of 'public officials' in

the Public Officials Election Act includes all public officials at political offices with the exception of the members of the National Assembly and of the local legislatures. For example, the Public Officials Election Act uses 'public officials' as a general term to include public officials at political offices in its Article 60(1)(ⅳ) that prohibits, in principle, the political campaign of public officials and also in Article 86(1) that prohibits the acts of public officials influencing the election. Furthermore, in such other statutes as the State Public Officials Act (in Article 2 and other provisions) and the Political Party Act (in Article 6 and other provisions), the term 'public official' is used inclusive of public officials at political offices.

4) Therefore, political neutrality concerning elections is a basic obligation of all public officials of the executive branch and the judiciary. Furthermore, since the President bears the obligation to oversee and manage a fair electoral process as the head of the executive branch, the President is, as a matter of course, a 'public official' within the meaning of Article 9 of the Public Officials Election Act.

(B) The President as a 'constitutional institution of a political nature' and the 'obligation to maintain neutrality concerning elections'

The fact that the President is a 'constitutional institution of a political nature' is a distinct matter and should thus be distinguished from the question of whether the President bears the 'obligation to maintain political neutrality concerning elections.'

The President, in ordinary circumstances, is elected through the electoral campaign endorsed and supported by a political party, as a party member. Therefore, the President generally maintains party membership after being elected as the President and also retains an affiliation with

such particular political party. Current law also pro-

vides that the President may maintain party membership (Article 6(1) of the Political Party Act) and thus permits party activities, unlike in the case of other career public officials who are not allowed to be a member of a political party.

However, the President is not an institution that implements the policies of the ruling party, but instead, the President is the constitutional institution that is obligated to serve and realize the public interest as the head of the executive branch. The President is not the President merely for part of the population or a certain particular political faction that supported him or her at the past election, but he or she is the President of the entire community organized as the state and is the President for the entire constituents. The President is obligated to unify the social community by serving the entire population beyond that segment of the population supporting him or her. The status of the President as the servant of the entire public is specified, in the context of election, as the status of ultimately overseeing a fair election, and the Public Officials Election Act therefore prohibits a political campaign by the President (Article 60(1)(iv) of the Public Officials Election Act).

Therefore, neither the fact that the President is a public official of a political nature who is elected through nomination and support by a political party nor the fact that certain political and party activities of the President are permitted can serve as a valid ground for denying the obligation owed by the President to maintain political neutrality concerning elections.

(C) The President's 'obligation of political neutrality' concerning elections and 'freedom to express political opinions'

Every person in public office is obligated to maintain political neutrality concerning elections; on the other hand, at the same time such person is a citizen of the state and is subject of basic rights who may assert his or her own basic rights against the state. Likewise, in the case of the presidency, the status of the President as a private citizen who may perform party activities for the party of his of her membership and the status of the President as a constitutional institution bearing the obligation to serve the entire population and the public welfare should be distinguished as two distinct concepts.

The mandate that the President should maintain political neutrality concerning elections does not require no political activities or indifference to party politics on the part of the President. Unlike other public officials who are prevented from any party activities, the President, as a member or an officer of a political party, may not only be involved with the internal decisionmaking process of the party and perform ordinary party activities, but also may participate in the party convention to express his or her political opinions and express support for the party of his or her membership. However, at the same time, even when the President exercises his or her freedom of expression as a political figure, the President should restrain and limit himself or herself in light of the significance of the office of the presidency and the potential reflections of his or her remarks and acts, and should not make an impression towards the public that the President may no more fairly exercise presidential duties due to his or her political activities outside the presidential duties. Furthermore, since the ultimate noticeability of the President obscures the President's 'exercise of basic rights as a private citizen' and 'activity within the boundary of the presidential duties,' the President, even in the case

where the President is exercising the freedom of speech as a private citizen and performing party activities, should do so in a way appropriate to a harmonious implementation of the presidency and the maintenance of the functions thereof, that is, in accordance with the request of Article 7(1) of the Constitution that the President should serve the entire public.

Therefore, the President should, in principle, restrain himself or herself from expressing his or her personal opinions towards party politics when exercising duties as the head of the state or the chief executive officer. Furthermore, when the President makes statements concerning elections as the state institution of president and not as a party member or as a mere political figure, the President is bound by the obligation to maintain political neutrality concerning elections.

(D) Violation of Article 9 of the Public Officials Election Act

Article 9 of the Public Officials Election Act provides that "no public official shall exercise undue influence upon the election or otherwise affect the outcome of the election," thereby setting forth acts to be prohibited in order to realize the obligation of public officials to maintain neutrality concerning elections. Specifically, Article 9 of the Public Official Act provides the 'act affecting the outcome of the election' as the violation of the neutrality obligation, and mentions the 'exercise of undue influence upon the election' as a typical example therefor.

Therefore, the question of whether the President violated the neutrality obligation concerning elections depends upon whether the President 'exercised undue influence upon the election,' and should a public servant affect the election by taking advantage of the political weight and influence vested in the official duties in a way not appropriate for the mission to serve and be held responsible for the entire public or residents, such is

beyond the boundaries of political activities permitted for a public official at the election, thus constituting an act of exercising undue influence upon the election.

Thus, if a public official is acting in the status of a public servant and taking advantage of the influence vested in the public duties, undue influence upon the election is found to be exercised, thus constituting a violation of the neutrality obligation concerning elections.

(E) Whether the statements of the President violated the neutrality obligation owed by public officials

Whether the statements of the President violated Article 9 of the Public Officials Election Act depends upon the judgment as to 'whether the President affected the election through his statements by taking advantage of the political weight and influence of the public office of presidency in a way that was not appropriate for his status to serve the entire national public' in light of the specific contents of the statements, their timing and frequency, and the specific circumstance thereof.

1) The statements of the President at issue herein should be deemed

to have been made in the president's status as a public servant and in implementing the official duties of the President or in relation thereto. The President held the above press conferences not as a private citizen or a mere political figure, but as the President, and the President, in such course, made the statements supporting a particular political party by taking advantage of the political weight and influence vested in his status as the President. Therefore, the statements made by the President at the above press conferences constitute an act 'in the performance of his official duties' within the meaning of Article 65(1) of the Constitution.

2) In the case of the general election to constitute the National

Assembly, general parliamentary activities of the individual assembly persons, the political parties, and the negotiating parties during the four-year term function as an important and meaningful indicator for the voters to form their judgment at the next election. Especially during the period designated for the electoral campaign under the Public Officials Election Act, the political parties, the negotiating parties and the individual candidates are involved in a feverous competition in order to obtain the trust and a vote from the voters in every possible legitimate way, by presenting their policies and political designs and criticizing the policies of the opposing parties or candidates in competition.

Here, if the President makes a statement unilaterally supporting a particular political party and influences the process by which the public forms its opinions, the President thereby intervenes and distorts the process of the independent formation of the public's opinions based on a just evaluation of the political parties and the candidates. This, at the same time, diminishes by half the meaning of the political activities continuously done by the political parties and the candidates in the past several years in order to obtain the trust of the public, and thereby gravely depreciates the principle of parliamentary democracy. An electoral campaign in a democratic country is a free and open competition for multiple parties and candidates, with a goal to obtain political power, to seek a vote, by emphasizing their political activities and achievements during the past and by convincing the voters of the legitimacy of the policy they pursue. Such free competition relationship among the political parties to obtain the votes through the voters' judgment upon the policies and political activities is significantly perverted by one-sided intervention of the President supporting a particular party.

The relevant part of the President's statements at issue repeatedly and actively expressed his support for a particular political party in the course of performing his official duties and further directly appealed to the public for the support of that particular political party. Therefore, the President's taking advantage of his political weight and influence vested in his public office through the above statements favoring a particular political party, by way of identifying himself with such political party, was an exercise of undue influence in a way not appropriate for his responsibility as a servant for the entire public by the use of his status as a state institution. The President thereby violated his obligation to maintain neutrality concerning elections.

3) The judgment upon whether there was undue influence on the election may also vary depending upon the timing certain statements supporting a particular party were made. Should a statement as such be made at a time where there is no temporally intimate relation to an election, there is only a remote or limited possibility for such statements to affect the outcome of the election. However, as the election approaches, the possibility for the President's statement supporting a particular political party to affect the outcome of the election increases, therefore the President bears during such time period, as a state institution, an obligation to restrain, as much as possible, any and all acts that may unfairly influence the election.

Although it is not possible to clearly discern when an one-sided act of the state institution begins to particularly affect the election, the statements by the President at issue herein were made on February 18, 2004 and February 24, 2004, with approximately two months remaining before the general election for the National Assembly on April 15, 2004. Thus,

at that time, there existed a temporal intimacy between the statements and the election as the preparation for the electoral campaign had practically begun and the probability of the act of a state institution to influence the election was relatively high, and there was an increased demand for the political neutrality of state institutions at least during that period of time.

4) The President, then, violated the obligation to maintain neutrality concerning elections, by making the statements at the press conferences toward the entire public in support of a particular political party by taking advantage of the political weight and influence of the presidency, when the political neutrality of public official was highly demanded more than ever due to the temporal proximity to the election, while the President is ultimately responsible to oversee a fair administration of election, since such statements constituted acts performed using the respondent's status as the President unduly influencing the election and thereby affecting the outcome of the election.

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Notes

1. *The President's filing* of a constitutional complaint In 2007, the constitutional status of the president was once again challenged. President Roh Moo Hyun filed a constitutional complaint to the KCC alleging that his freedom of political speech was breached by the warnings of the national election commission which relied upon an unconstitutional provision of election law. On June 2, 2007, President Roh, attending an open meeting organized by Evaluation

Forum on Participation Government, made some controversial comments on presidential candidates of a major opposition party such as "it will be a shame if foreign newspapers comment that the Korean leader is the daughter of a dictator.", “It will be a disaster if the GNP win the presidential election because this irresponsible party will strengthen regionalist policies. On June 8, 2007, he made another political speech at an awarding convocation for his honorary doctoral degree that “Korean People must not be deceived by the tax-cut policy and private investment oriented Grand Canal Proposal of GNP presidential candidate Lee Myong Bak”. Upon the GNP’s denouncements against President Roh, the election commission confirmed at the separate sessions that his speeches were against the general neutrality principle stipulated in Article 9 of the Public Officials Election Act and requested him to restrain himself from making speeches similar to those at issue. In this complaint case, five justices had the opinion that the election law provision was constitutional and two justices had opinion of unconstitutionality while the remaining two Justices opined that President Roh’s filing of complaint failed to meet the procedural requirements prescribed by the Constitutional Court Act. The reasoning of the majority was, among others, that although the president has a constitutional status of politician or political institution, his freedom of political speech can be restrained for the sake of the prevailing interest of maintaining fairness in election management, because his status as the head of the executive has the real danger of a rigged election. The dissenting opinion argued that the president, being by nature a political official, could not be subordinate to the public officials' general obli-

gation of neutrality in election provided by Article 9 of the Public Officials Election Act, so that the measure by the election commission was not grounded on justifiable law and thereby infringed upon President Roh's political right.[107]

2. *presidential emergency decree* In 2010, the Korean Supreme Court (KSC) drew public attention by nullifying presidential emergency decree under the 1972 Constitution (so-called "Yushin"[108] Constitution).[109] This decision was a dramatic change from its previous view that it could not review such decrees partly because Article 53(4) of the 1972 Constitution precluded the possibility of judicial review in this regard.[110] The KSC said that the procedural limit of former constitution cannot block judicial review of its substantive rationality or legitimacy under the present constitution. In addition, the KSC ruled that in a constitutionalist democracy, the notion of "Act of State", an equivalent of "political questions" according to the USA constitutional law, can be recognized only to the extent that it is not beyond the rule of law and be subject to judicial review though in a relatively less strict terms. On that ground, it is held that the promulgation of emergency decree should not be excluded from judicial review though it could be seen as an "Act of State". Furthermore, the KSC regarded the said decree as an order though it has been treated as having statutory effect because in the Constitution the legislature has not been allowed to approve or request to repeal.

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107 Constitutional Court Decision 2007Hun-Ma700, January 17, 2008, 20-1(A) KCCR 139.

108 Literally, 'Yushinally, shinalsalizing reforms but in reality, it is a counter-constitutionalist regime in the name of ame of yame of yctions on

109 Supreme Court Decision 2010Do5986(en banc), December 16, 2010.

110 Supreme Court Decision 74Do3510(en banc), March 22, 1997; Supreme Court Decision 77Mo19(en banc), May 13, 1977.

This approach is known to provoke the KCC, which has been hesitant to clarify the character of presidential emergency decree because if such decrees of statutory effect can be seen as an Act, then the KCC, not the KSC, has the constitutional power to review the constitutionality of Act.

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C. Administrative branch

Section 2 of Chapter IV consists of four sub-sections. The first sub-section deals with the Prime Minister and the State Councilors. The second covers the State Council and other presidential advisory councils. The third sub-section consists of three Articles regarding the Executive Ministries, while the fourth concerns the Board of Audit and Inspection. By and large, the administrative branch consists of deliberative and advisory institutions and administrative agencies.

Prime Minister and State Councilors

The Prime Minister appointed by the President with the consent of the National Assembly is the second highest official next to the President in the Executive Branch and the highest advisor to the President (Article 86 (1) and (2) of the Constitution). The Prime Minister is entrusted with the authority to direct and supervise the heads of central administrative agencies under orders from the President. Where an order or disposition issued by the head of a central administrative agency is deemed unlawful or unjust, the Prime Minister may suspend or revoke such order or dis-

position with the approval of the President (Article 18 of the Government Organization Act[“GOA”]).

The State Councilors or the members of the State Council appointed by the President on the recommendation of the Prime Minister are primary advisers for the President individually and as a member of the State Council. Only the State Councilors are qualified to be appointed as the Ministers of each Ministry (Article 94 of the Constitution). To verify the civilian government, member of the military are prohibited to be appointed the Prime Minister or a State Councilor unless they are retired from active duty (Article 86(3) and Article 87(4) of the Constitution).

Deliberative and advisory institutions

The State Council consists of the President, the Prime Minister, and State Councilors appointed by the President upon the recommendation of the Prime Minister within a size between 15 and 30 members. It has the authority to deliberate on important affairs of the State enumerated in Article 89, ranging from basic plans for state affairs and general policies of the Executive, declaring war, draft amendments to the Constitution, proposals for national referendums, budgets, emergency orders, important military affairs, granting of pardons, demarcation of jurisdiction between the Executive Ministries, action for the dissolution of political parties, examination of petitions pertaining to executive policies to other matters presented by its members.

There are four presidential councils to be established by the authorization of the Constitution, but their establishment is not mandatory except the National Security Council, the advisory body for foreign, military and domestic national security policies prior to the deliberation of

the State Council. In fact, the Advisory Council of Senior Statesmen, the chairperson of which is the immediate former President unless there is no such person, has never been established since 1988 when the first government under the present constitution inaugurated.

Administrative Agencies

The establishment of administrative agencies depends upon the will of the National Assembly because the Constitution delegated that authority to it, except for two rules regarding the status and order-making power of the heads of the Executive Ministries. Article 94 requires that heads of Executive Ministries be appointed among the State Councilors on the recommendation of the Prime Minister, while Article 95 confers order-making authority to them and the Prime Minister. At present, Article 2(2) of the Government Organization Act provides that central administrative agencies be basically categorized to Bu, Cheo, and Cheong unless differently provided by Act.[111]

The Prime Minister has a dual entity both as an assistant to the President and as a central administrative agency.[112] No active member of the military shall be appointed as either the Prime Minister or a State Councilor (concurrently the heads of Executive Ministries).[113]

Board of Audit and Inspection

One unique administrative agency established by the authorization of the Constitution itself is the BAI. It is the highest audit agency as well

[111] As of February 2011, there are fifteen *Bus*, two *Cheos*, and eighteen *Cheongs*, as well as four basic executive commissions.

[112] Article 18(1) of the Government Organization Act.

[113] See Articles 86(3) and 87(4) of the Constitution.

as inspection authority established under the direct jurisdiction of the President. The BAI is a rare case, in comparison with other democracies, that the highest audit agency is vested with additional general power by the Constitution to inspect the job performances of the executive agencies and public officials beyond the boundary of the settlement of the revenues and expenditures of the State and the accounts of public bodies. Following the evolution of constitutional democracy in the 21th century, which requires the independence and impartiality of the highest audit institution, the BAI's independence in carrying out its duties is guaranteed by Article 2(1) of the Board of Audit and Inspection Act, although there are still criticisms challenging the possible danger of indirect control by the President through his/her sweeping power to appoint high-level officials, and to formulate the budget, of the BAI. Recently, some politicians, including promising presidential candidates, have put forward a strong argument for the transfer of the BAI from the President's jurisdiction to that of the National Assembly or a newly established independent agency.[114]

D. Independent commissions

One constitutional issue having drawn public attention in relation to administrative agencies under the current constitutional arrangement is the constitutional or legal status of what is called "independent commission" established by Act. At the center of debates in this regard is the National Human Rights Commission (NHRC) set up for the first time in

[114] See generally, Jongcheol Kim, eol Kim, l Analysis of the Constitutional Status and Function of the Board of Audit and Inspectionionectionnspection.31, No.2, 2002, pp.195-223.

2001. The legislative history of NHRCA shows unprecedentedly fierce debates about the desirable legal status and scope of powers between human rights activists who prefer the independent human rights commission with significant executive powers and the Ministry of Justice seeking to have one as its' affiliated institution with limited advisory powers.

The key issue in such debates is as to whether the establishment of an independent administrative agency institutionally separated from the executive branch is compatible with the Constitution.[115] The advocates of an independent human rights agency argued that the Constitution would not prohibit the creation of a statutory independent agency for the completion of its basic goals, such as the protection of basic rights. The opponents argued that whatever good causes it pursues, such an administrative agency should be installed within the executive branch to which the executive power is entrusted. The compromised outcome of such debates was the obscure provisions about the legal status of the NHRC. The National Human Rights Commission Act provides no explicit provision to mention where the NHRC should be located in constitutional arrangements, but declares the purpose of the establishment and the principle of independence of the NHRC in dealing with the designated affairs in Article 3. As recently as in 2009, this obscurity finally backfired when the Ministry of Administration and Security attempted to curtail the number of public officials allotted to the NHRC by 21.2 percent through the revision of the relevant ordinance governing the organization of the NHRC.

The NHRC brought a competence dispute before the Constitutional Court, alleging that such revision constitutes a breach of its competence

[115] Jongcheol Kim, "Upgrading Constitutionalism?: The ups and downs of Constitutional Developments in South Korea 2000-2011", the Proceedings of the 4th Asian Constitutional Law Forum held at the University of Hong Kong on December 16-17, 2012.

and thereby should be declared invalid. In a 6-3 decision in 2010,[116] the majority ruled that the NHRC is not entitled to file a competence dispute because it is a mere statutory agency so that it cannot be recognized as a constitutional institution having a constitutional basis for its establishment and thereby granted standing for a competence dispute.[117] The dissenting opinions of three Justices opined that even those statutory institutions which have no explicit constitutional basis for its existence can be granted standing for a competence dispute if they are regarded as a constitutional institution because their existence and authorities, like in the case of the NHRC, are derived from the Constitution and if there would be no way to redress the breach of their competence as such independent bodies.[118]

[116] Constitutional Court Decision 2009Hun-Ra6, October 10, 2010, Official Gazette No. 169, 1821 (jurisdiction dispute between the NHRC and the President).
[117] Constitutional Court Decision 2009Hun-Ra6, October 28 2010, 22-2(B) KCCR 6.
[118] Constitutional Court Decision 2009Hun-Ra6, October 28 2010, 22-2(B) KCCR 10-11.

Chapter 6 The Courts and the judicial process

A. The structure and jurisdiction of the courts

The judicial power and its scope

Article 101 entrusts judicial authority to the courts composed of judges whose qualifications are determined by the National Assembly in the form of Acts. Article 2 (1) of the Court Organization Act ("COA") declares that "except as otherwise prescribed by the Constitution, courts shall judge all legal disputes and litigations". Courts are also empowered to administer and supervise "non-litigious cases and judicial enforcement" such as affairs concerning registration, registration of family relationship, deposits, execution officers and certified judicial scriveners (Article 2 (3) of COA).

The only exception prescribed by Article 111(1) of the Constitution is the constitutional adjudication cases entrusted with the KCC. A noticeable issue in this regard is whether the jurisdiction of the KCC should be confined to the five cases or controversies prescribed by the Constitution or not. For example, there has been a proposal from public lawyers that election cases the Supreme Court has its original jurisdiction as prescribed by Article 222 and Article 223 of the Public Officials Election Act should be transferred to the KCC since such disputes have a character of constitutional case so that the KCC is better suited than the Supreme Court.[119]

[119] Joon-il Yi, "Election Management and Election Litigationi, *Justice* No.130(2012)[in Korean], pp. 49-50.

Categories of courts and their composition

As Article 102(3) delegates the power to organize the Supreme Court and lower courts to Act, Article 3 of the COA classifies courts into the six categories : Supreme Court, High Court, Patent Court, District Court, Family Court, and Administrative Court.

The highest court is the Supreme Court consisting of the Chief Justice and Associate Justices appointed by the President with the consent of the National Assembly. The Chief Justice has the right to recommend Associate Justices and also the power to appoint ordinary judges with the consent of the Conference of Supreme Court Justices. He also has authority to take part in the composition of the Constitutional Court and the National Election Commission by nominating three out of nine Justices or members of the Commission, respectively.[120]

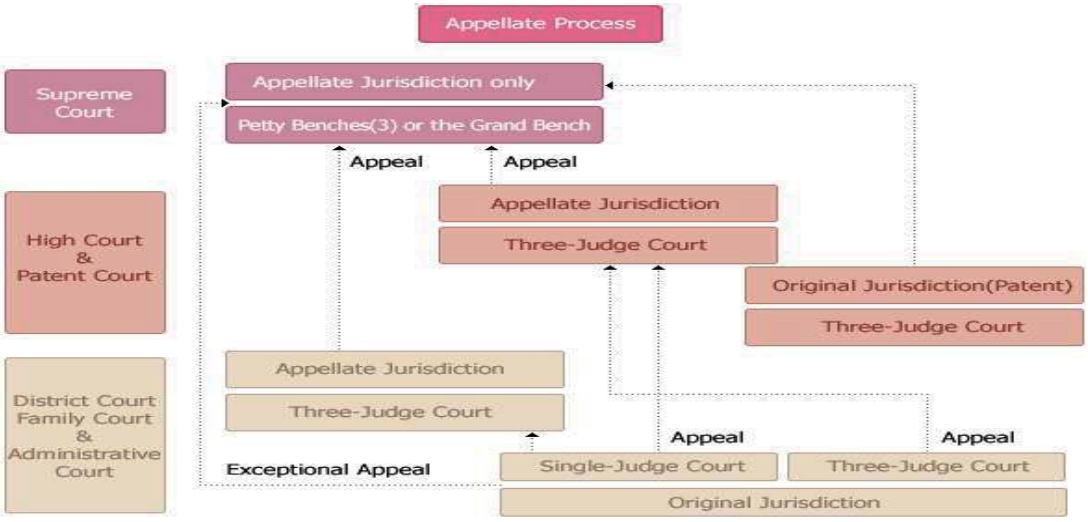
In principle, the Supreme Court is supposed to exercise their judgment authority by the collegiate panel composed of not less than two-thirds of all the Justices of the Supreme Court with the Chief Justice of the Supreme Court presiding. However, in practice, most cases are examined by a panel of three or more Justices except for four designated cases: where it is deemed that any administrative decree or regulation is in violation of the Constitution; where it is deemed that any administrative decree or regulation is contrary to Acts; and where it is deemed necessary to modify such opinion on the application of the interpretation of the Constitution, Acts, administrative decrees, and regulations, as was formerly decided by the Supreme Court; and where it is deemed that a trial by a panel is not proper. (Article 7 (1) of COA) If the Chief Justice of

[120] See Jongcheol Kim, "Constitutional Revision and Judicial Reform", *Constitutional Law Review*, Vol. 16, No. 3, September 2010, pp.120-123.

the Supreme Court thinks necessary, he or she may ask a specified panel to judge exclusively the cases of public administration, taxes, labor, military affairs, patents, etc. (Article 7 (2) of COA)

Other five courts are established by the COA. High Court and Patent Court is courts at the appellate level and their judgment authority are to be exercised by a collegiate panel of the court composed of three judges while District Court, Family Court, and Administrative Court are in principle those at the first instance level. A branch court, a family branch court, a Si court or Gun court may be established to handle part of the affairs of district courts and family courts (Article 3 (2) of COA). Two branches of the district courts and family courts may be united into one branch court. Except for Administrative Court is supposed to carry out its power in a collegiate panel, a family court, or the branch court or family branch court thereof shall be performed by a collegiate panel composed of three judges unless it is not required. (Article 7 of COA)

<Figure 1> The Hierarchy and Jurisdictions of the Courts in Korea



Military Court

The only special court recognized by the Constitution is Military Courts. Despite its special status, decisions of a military court should be subject to appellate review by the Supreme Court, unless the Constitution allows it in express terms. Article 110(4) recognizes that military trials under extraordinary martial law may not be appealed in cases of crimes of soldiers and employees of the military, military espionage, crimes as defined by law in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except when sentenced to the death penalty. According to Article 2 of the Military Court Act, the jurisdiction of the Military courts covers offenses committed by persons prescribed in Article 1 (1) through (4) of the Military Criminal Act and by Prisoners of war administered by the military units of the Republic of Korea Armed Forces.

What is special in military courts is, among others, that their composition constitutes an exception to the constitutional principle manifest in Article 101 (1) of the Constitution that the courts should be composed of judges. Military courts are to be composed of not only judges and but also adjudicators who do not have the qualification of judges though they are required to have a certain level of knowledge of law. Furthermore, judges and adjudicators are designated by the 'convening authority' appointed from the commander, head or commanding officer of a unit and the area in which a general military court is established and have a wide range of supervisory powers in the working of military justice system. The KCC ruled that this statutory exception is in compatible with the Constitution, though the legislative discretion in elaborating a special court must be subject to constitutional limitation.[121]

[121] See Constitutional Court Decision 93Hun-Ba25, October 31, 1996, 8-2 KCCR 443.

B. Judicial independence: Principles and practice[122]

Constitutional Principle of judicial independence

Judicial independence have three elements: functional independence, personal independence, institutional independence.

Functional independence means the required independence of the judicial branch in carrying out the function with which the judiciary has been entrusted by the Constitution, that is, in delivering judgments in cases or controversies is an essential function of the judiciary, from the intervention of other branches of government. Article 103 of the Constitution declares that 'Judges shall rule independently according to their conscience and in conformity with the Constitution and laws'. This principle can be put into practice to the fullest extent by providing realistic institutional safeguards for judicial independence so that judges can carry out their sacred duty without fear of reprisals by other branches. Functional independence cannot be accomplished without the other aspect of independence, the independence of judges or personal independence. That is why Article 106 assures that only the limited possibility of impeachment or a sentence of imprisonment without prison labor or heavier punishment can remove judges from office, and that only disciplinary action can suspend them from office, have their salary reduced or inflict on them any other unfavorable treatment. However, this assurance can be materialized only when they are guaranteed to hold office, like the assurance of life tenure for federal judges in the USA Constitution[123], for

[122] This section is highly depended upon Jongcheol Kim, "Courts in the Republic of Korea: Beyond a built-in authoritarian legacy of centralization and bureaucratization", presented at International Conference on "Asian Courts in Context", held at National Taiwan University College of Law, on March 23, 2012.

long enough to eliminate any possible outside influence on them. The term of office of the Chief Justice of the highest court is six years without the possibility of reappointment, while that of the Associate Justices six years with that possibility. Ordinary judges other than such Justices may hold office for ten years and be reappointed as prescribed by law. The relatively short term of office and the possibility of reappointment have been criticized for equipping the President and political parties with dangerous tools to have influence on judicial decisions.

As far as the independence of judges is concerned, it is notable that a number of laws that are intended to limit discretion of judges in sentencing in criminal or administrative proceedings have been reviewed in terms of whether they amount to violation of the independence of the Judiciary. For example, an early Constitutional Court struck down a law which made a hit-and-run driver who intentionally abandoned the victim to death be sentenced to such aggravated punishments as imprisonment of ten years or more, life imprisonment, and death penalty on the ground that such a law deprived judges of the discretion to consider the nature of the committed crime and the situation of the accused in criminal proceedings.[124]

Institutional independence is another backbone of the functional independence of the judiciary. The independent functioning of the judiciary is unthinkable without effective budgetary and administrative support. However, judicial independence is not the only concern in deciding how much financial and administrative support is to be given to the judiciary.

[123] Article III, Section 1 of the Constitution of the USA.

[124] Constitutional Court Decision 90Hun-Ba24, April 28, 1992, 4 KCCR 225 (Constitutional petition concerning Article 5-3(2) 1 of the Act on the Aggravated Punishment, etc. of Specific Crimes).

National budgets must be determined and controlled by the representatives of the sovereign nation according to the constitutional principle of democracy. The principle of checks and balances requires corroboration among branches in formulating and determining the size and portfolio of the national budget, depending on the financial situation of the nation. The principles of democracy and separation of powers also require functional specialization together with efficiency of administrative affairs so that court administration is not necessarily separated from other governmental administration. In sum, how to reconcile the need for judicial independence with other constitutional requirements depends upon the democratic will of the nation, unless the Constitution itself stipulates specific policies. The Korean Constitution leaves a wide margin of discretion to the National Assembly on these matters, and the current statutory arrangements very much cherish judicial independence, though the judiciary tends to demand more autonomy in this regard

Old legacy and new vision: beyond 'instrumental judicial administration'

In his analysis of the Japanese judicial system, Professor Mark Levin defines 'instrumental judicial administration' as 'mechanisms or actions employed by judicial administrators to intentionally bias adjudicatory processes in favor of a particular party or result despite lacking authority as to the disposition of the subject case or class of cases. In other words, intentional actions, carried out through the exercise of judicial administration that aim to distort a structurally neutral court proceedings towards a result determined extrinsically from the litigation process between the parties'.[125] According to Professor Levin, this negative feature[126] is in

[125] M. Levin, 'Civil justice and the constitution: limits on administrative judicial administration

evidence in Japanese civil proceedings, though Japan's judiciary 'enjoys a globally recognized reputation for its institutional integrity and the integrity of the judges within it'.[127] As far as the peculiarities built into the Korean judiciary are concerned, the concept of instrumentality of judicial administration is applicable to it, in particular considering its highly bureaucratized and centralized but very independent judicial administration.[128] Korea's judiciary has all the characteristics of instrumental judicial administration: an elite-oriented recruiting and selection system for judges, the lack of transparency in the judicial appointment process, a hierarchical career system, the proselytization of particular approaches to interpretations of the law, and rare but assumedly direct intervention in actual cases.

The first tier of instrumental judicial administration, the elitist selection system, is now changing, though with very limited effect for the time being, through the introduction of a new legal education and judicial recruiting system. The problem with judicial appointments and career paths can be indirectly found in statistics showing (1) de facto patronage routes for promotion and (2) lack of diversity in the judiciary. The constitutionally established omnipresent power of the Chief Justice together with the lack of democratic control of this power can also be a cause of the negative effects of independent judicial administration. The proselytizing aspect of judicial administration was also mentioned when we discussed judges' personal independence. Finally, a case of direct intervention can

in Japan', *Pacific Rim Law and Policy Journal*, 20 (2011), 267-8.

126 Since it inevitably has a detrimental effect on fairness, although, as Levin properly clarifies, this conception is not synonymous with corruption, its overall impact should be negative. M. Levin, 'Civil justice and the constitution', 267-8.

127 Levin, 'Civil justice and the constitution', 268-70.

128 See Jongcheol Kim, ibid(Courts in the Republic of Korea).

be found in the recent episode involving SCDC President Shin.[129]

Instrumental judicial administration is fortified by the relationship of judicial administration and promotion in the judiciary and the omnipresent power of the Chief Justice. Article 71(4) of the Court Organization Act allows judges to be appointed as chiefs of the administrative organs, and practically all major administrative chiefs are appointed from among judges. In general, as those judges serving in the NCA have been regarded as promising judges with better chances of attaining senior judgeships, one's career in the NCA is an important element of a 'royal route' to becoming a top judge in the notoriously hierarchical career system. As of September 2013, among 134 senior judges, 46(34.3 per cent) have worked at the NCA,[130] and 107 (79.9 per cent) graduated from Seoul National University.[131] The dominant role of judges in judicial administration combined with the promotional effect of such service on judicial career paths may have contributed to the consolidation of the bureaucratization and centralization of the judiciary, as well as to the corrupted relationship between the Executive and the Judiciary.

The excessive empowerment of the Chief Justice may be another issue challenging judicial administration. The ultimate authority of the hierarchical judiciary in Korea is the Chief Justice. The constitutional status of the Chief Justice has become fortified. Under the current constitutional arrangement, the Chief Justice has immense independent power affecting

129 See Jongcheol Kim, *ibid*(Courts in the Republic of Korea).

130 Yonhap News Agency, 'Shadows of the judiciary (3): NCA, A royal route to senior judge'[in Korean], September 25, 2013 (http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=001&aid=0006498025). This circumstance has never been changed in the modern history of the Korean judiciary. For this, see Kim, 'Career patterns of the Korean judges', table 8 at 177.

131 Yonhap News Agency, 'Shadows of the judiciary (3)'.

not only the judicial system but also political or constitutional arrangements. First, within the judiciary, he or she has the ultimate administrative power: the power to recommend Supreme Court Justices, to appoint judges, and to assign judicial positions to judges, though there are some procedural controls like the consent of the Council of the Supreme Court Justices. Second, outside the judiciary, the Chief Justice also has powers of constitutional importance in being entitled to have a voice in the composition of other independent constitutional bodies: he or she can recommend three out of nine Constitutional Justices as well as three out of nine Commissioners of the National Electoral Commission. In particular, in the case of the latter, a well-entrenched practice is that one of the Commissioners is recommended by the Chief Justice from among the Supreme Court Justices and becomes the chairperson of the Commission.

Despite the excessive internal or external empowerment of the Chief Justice, however, his or her appointment is still dependent upon the political will of the time, as it requires the agreement of both the presidential and legislative powers. In tandem with all the other problems of the hierarchical career path, the early retirement of judges, the domination of judicial administrators, the almighty Chief Justice and his/her dependence upon the confidence of the other branches of government have reinforced the bureaucratization and centralization of Korea's judiciary.

What makes these pathological problems so entrenched in the judicial arrangements? Two hypotheses can be provided. First, the autocrats' conspiracy may explain not all but a part of the story. One may easily assume that a centralized and bureaucratized judiciary, at the top of which is a Chief Justice with almost omnipresent administrative power, is easier for authoritarian rulers to control than a decentralized and less bureau-

cratic judiciary. Second, the special interests of judicial elites who have a strong sense of entitlement that is consolidated in the homogenized judicial culture would distort the constitutional principle of judicial independence by replacing it with judges' administrative independence. Instead of enhancing judicial control of authoritarian abuses of power and protecting the rule of law, this fortified bureaucratic administrative independence has a great impact on the exercise of judicial power in the direction of proselytizing particular approaches to interpretations of laws, especially in cases in which politically or socially sensitive matters are at stake.

C. Judicial responsibility and control on judicial power

The judicial power is not an exception to the general principle that all state powers are derived from the sovereign people so that the composition of courts and the exercise of judicial power be conformable to the democratic principle. Although it can be said that the judiciary is "the least dangerous branch" compared to the legislative and executive branches, it has also a danger of misusing its power leading to the encroachment of human rights and the deterioration of democracy. As seen above, above all, the negative effects of bureaucratized and centralized judicial administration manifest in "instrumental judicial administration" should be overcome by judicial reform intended to increase judicial responsibility and accountability to the sovereign people.

An ongoing demand in this regard is a continuous drive for citizen's participation in the judicial process. In order to accelerate this drive, three interrelated perspectives are to be addressed. First, it is necessary for the people to take a more active part in the formation of judicial

policy. The process of decision-making in relation to the allocation of judicial powers between ordinary courts and special courts, how much budget is distributed for the judicial sector, how to facilitate the people's access to the justice, whether the punitive damage system need to be introduced and how much citizen's participation are necessary in the given context and so on has to be decided pursuant to the will of the people as much as possible. Article 25 of the COA introduces the Judicial Policy Advisory Committee as an advisory agency of the Chief Justice of the Supreme Court. This Committee is to be composed of seven or less members appointed by the Chief Justice of the Supreme Court from among those of high learning and reputation on judicial policies, and matters necessary for the organization and operation of the Committee shall be prescribed by the Supreme Court Regulations. However, a number of questions might be raised. Has this committee system worked as an effective deliberate system to meet civil society's needs and opinions? Is the size of the committee good enough to comprehend diverse social opinions? Do the social backgrounds of the committee members match with the social strata? How regular does the committee convene? Who initiate major agenda of the committee?

Second, the citizen's participation in judicial administration, in particular in the high level judges' personnel system should be fortified. Article 25-2 of the COA institutionalizes the Judges Personnel Committee as a deliberate organ within the Supreme Court. This committee composed of 11 committee members appointed or commissioned by the Chief Justice of the Supreme Court from the judges, prosecutors, attorneys-at-law, professors of law and revered persons of profound learning and experience in the area of the their expertise. Similar questions raised regarding

Policy Advisory Committee can be raised.

Third, the most important citizen's participation in the judicial process is the citizen's involvement in the judgment and adjudication. There is no lay judge system in Korea as only those who are qualified as attorneys can be appointed as judges according to Article 42(2) of the COA. Moreover, they are not elected by the people. This democratic deficit in the judicial process has been attacked in the course of democratization and was partially corrected by the introduction of what is called "participatory trial" in 2007.[132] Responding to increasing social demand for the democratization of the judicial process, the Act on Citizen Participation in Criminal Trials in 2007 was enacted to establish a juror system in which lay jurors are vested with the power to deliver opinions about fact-finding application of governing laws and sentencing in a very limited scope of criminal cases enumerated in Article 5 of this Act. However, the effect of the jurors' opinions is very limited because they have no binding force on judges according to Article 46 of the Act above. Furthermore, judges may decide whether or not to refer the case to the participatory trial in certain circumstances (Article 9(1)), despite the accused's express intention to take advantage of that trial. In a unanimous opinion in a constitutional complaint challenging the constitutionality of such provisions as allowing mere advisory effect to the jurors' opinions and limiting the scope of eligible cases,[133] it is ruled that they are constitutional because the people's right to participate in trials is not guaranteed by the Constitution as the right of access to the court.

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[132] For a theoretical account for people: Theories and Discoursesntdicial process from the perspective of participatory democracy, seeYoung-sol Kwon, *The Relevance of Constitutional Law : Theories and Discourses*, Bobmunsa, 2006, pp.563-566.

[133] Constitutional Court Decision 2008Hun-Ba12, November 26, 2009, 21-2(B) KCCR at 493.

Chapter 7 Constitutional Court and Constitutional Politics

A. The Organization and jurisdiction of the Constitutional Court[134]

Background to the Creation of a European-Style Constitutional Adjudication System

The People's Uprising of June 1987 and the June 29 Declaration paved the way for the ninth constitutional revision, the thrust of which is the institutionalization of constitutionalism by adopting direct presidential election, curtailing the president's power, and the establishment of the Constitutional Court. As a matter of fact, it is true that debates among politicians about the new constitution after the June 1987 Uprising focused on the forms of government with relatively less attention paid to the new constitutional adjudication system. However, the Korean people, who had seriously suffered from arbitrary abuse of power during the prior periods of authoritarian rule, strongly demanded a new substantive device for the protection of human rights. Such sincere public demands resulted in the creation of a European-style constitutional adjudication system, much as the European countries who had previously suffered from totalitarian autocracy did after the Second World War.

The 1987 Constitution was not the first attempt to adopt a constitutional adjudication system in Korean constitutional history. However, due

[134] Some part of this section is a revised version of my article, titled "The structure and basic principles of constitutional adjudication in the republic of Korea", in K.Cho (ed) *Litigation in Korea*, London:Edward Elgar Publishing, 2010.6., ch.6.

to not only oppressive political environment but also institutional restraints, the previous constitutional adjudication bodies were anything but successful and were derided as mere rubber stamp institutions for the military dictatorship or as institutions existing only nominally on paper.[135] Institutionally, the Constitutional Commission (or occasionally the Supreme Court) in charge of constitutional adjudication under previous constitutions did not have authority equivalent to its constitutional importance as the final arbiter of the constitution. In particular, since the Supreme Court's decision striking down the State Compensation Act in the Third Republic (1962-1971), which caused a political dispute between the Judiciary and the President, political power tended to view the system of constitutional review as an inroad to the efficient execution of state policies. Therefore, in the Fourth Republic, called the Yusin period (1972-1979), the Constitutional Commission that took over the authority of constitutional adjudication from the Supreme Court but was not free from the president's political influence and did nothing in relation to its main function, i.e. constitutional review. This situation continued under the 1980 Constitution, which itself expressly excluded laws enacted by the Special Committee for National Security that had unconstitutionally taken over legislative functions from the National Assembly regarding the Constitutional Commission's jurisdiction over the review of laws' constitutionality. Furthermore, the Supreme Court, which was hesitant to refer cases to other institutions due in part to institutional egoism, had the power of prior review of the constitutionality of statutes. The agonizing situation was verified by statistics that illustrated that no case was overturned by the Constitutional Commission during the fifteen years between 1972 and

[135] Kun Yang, "The Constitutional Court in the Context of Democratization: The Case of South Korea", *Verfassung und Recht in Übersee* 31(1998), p.161.

1987. This was precisely the reason why there was widespread and deep skepticism about the success of this new institution and uncertainty about its proper functioning when the new Constitutional Court of Korea was established in the wake of the Korean people's victory over President Chun Doo-whan's iron-fisted rule in 1987.

However, with the people's strong will for further democratization and their growing awareness of constitutional rights, the Court has successfully overcome this early skepticism by taking an activist role in wielding its powers of constitutional review and hearing constitutional complaints.[136] Indeed, since there were a great number of laws passed in haste and for unjustifiable purposes, as well as many unreasonable governmental practices under the authoritarian regimes, the early Court faced little problem in striking them down and thus establishing the image of the protector of the people's fundamental constitutional rights.

As of October 31, 2013, in the twenty five years after its establishment, the KCC has invalidated or partially repudiated legislative acts in 593 cases, of which 311 cases were referred by the ordinary courts for rulings on the constitutionality of laws and 282 cases were heard in the form of constitutional complaints.[137] Given that the number of cases the KCC disposed of in the form of norms control or constitutional revie

[136] Professor Yang pointed out four factors contributing to the unprecedented activism of the early Constitutional Court: (1) a more liberal political climate, (2) a heightened rights consciousness, (3) the active role of "human rights lawyers", and (4) the appointment of activist judges made possible by the creation of an independent constitutional court separated from bureaucratized ordinary courts. See Yang, ibid.,, pp.166-167. See also, Kyong Whan Ahn, “The Influence of American Constitutionalism on South Korea”, 22 S.Ill. U. L. J. 71(1997), pp.76-85.

[137] The latter number is exclusive of 130 cases striking down statutory provisions in the course of constitutional complaints directly challenging public powers under Article 68 (1) of CCA. See the official statistics of the Court on its website, (http://english.ccourt.go.kr/home/english/decisions/stat_pop01.jsp).

w,[138] the highlight of the constitutional adjudication system, amounts to 5,049 cases, the proportion of the judgments resulting in unconstitutionality, unconditional or conditional, is relatively high. Although a high rate of unconstitutionality decisions is not always desirable, it would be safe to say that as far as the protection of human rights is concerned, the statistics show the active performance of the Court in their function as opposed to its predecessors' dormancy. Now most Koreans know at least roughly what the constitutional adjudication system means to their lives and which institution they have recourse in when their human rights are encroached.

Jurisdiction

The establishment and functioning of the KCC is based upon Chapter 6 of the current Constitution, consisting of three articles from Article 111 to Article 113. Article 111 consists of four provisions for five jurisdictions of the Court and sets forth the composition of the Court. Article 112 consists of three clauses that lay out the term of office of the constitutional justices and their privileges and concurrent obligations. Finally, three provisions for special quorum of important decisions, the power of making regulations of the Court and the legislative delegation for organization and function of the Court are stipulated in Article 113.

The Constitutional Court Act (hereinafter "CCA") was first enacted on August 5, 1988 and revised 18 times as of December 15, 2013 according to the legislative delegation clause of Article 113 of the Constitution to further elaborate the organization of the KCC and procedures of constitu-

[138] That is, those cases decided through Article 41 of the CCA procedure (Constitutional review of statutes upon judicial requests) and Article 68 (2) of the CCA procedure (Constitutional review of statutes upon individual requests).

tional adjudication.

The KCC has the constitutional power to make rules and regulations relating to its proceedings and internal discipline and regulations on administrative matters (Article 113 (2) of the Constitution). They include the Constitutional Court Rules on Adjudication Proceedings, the Constitutional Court Rules on Council of Justices, and the Constitutional Court Advisory Committee Rules.

Under Article 111 of the Constitution, the KCC has jurisdiction in five areas: the constitutionality of a law upon the request of ordinary courts, impeachment, dissolution of a political party, competence disputes between State agencies, between State agencies and local governments, and between local governments, and constitutional complaint as prescribed by Act.

Constitutional Review on the Constitutionality of Laws

The KCC has the power to review the constitutionality of statutes or Acts made by the National Assembly upon the request of ordinary courts. The KCC has ruled that its constitutional review covers not only statutes or Acts made by the National Assembly but also other forms of law that have equivalent force as Acts, such as treaties and extraordinary presidential decrees.[139]

The courts set up by Article 101 of the Constitution, including the military court, shall request a decision of the KCC when they find that the constitutionality of a law is at issue in a trial or judicial judgment (Article 107 (1) of the Constitution). The necessity of such a request can

[139] As a matter of fact, this is not the only way to trigger constitutional review of laws though it is the most common one. The Court can perform the same function in two different procedures of the Constitutional Complaints.

be decided ex officio or by decision upon a motion by a party to the original case (Article 41 (1) of the CCA). The request of the courts to the Constitutional Court should be by way of the Supreme Court for administrative purposes (Article 41 (5) of CCA).[140] The decision of the courts on the request is final so that no appeal shall be made against it (Article 41 (4) of CCA). If the motion of a party to the original case is rejected, the party may file a constitutional complaint with the Constitutional Court (Article 68 (2) of CCA).

Decisions of unconstitutionality can only be made with the concurrence of six Justices or more (Article 113 (1) of the Constitution and Article 23 (2) of CCA). Any decision that statutes at stake are unconstitutional shall bind the ordinary courts, other state agencies, and local governments (Article 47 (1) of CCA). Such laws declared unconstitutional shall lose their effect from the day on which the decision is made, but laws relating to criminal penalties lose effect retroactively (Article 47 (2) of CCA). In this regard, however, there are some exceptions developed by not only the Constitutional Court but also the Supreme Court. The very case where the constitutional adjudication issue is given rise to should comply with the Court's unconstitutionality decision because it is made particularly not to apply the unconstitutional law to the pending case. The KCC expanded this exceptional effect to not only those cases that are already included in the docket of the KCC but also those cases that are pending in the courts where the same laws should be applied at the time of the KCC's unconstitutionality decision. The Supreme Court recognizes the invalidation effect of the Constitutional Court's unconstitutionality de-

[140] In the fifth Republic, the Supreme Court was empowered to review the constitutionality of laws before referring to the Constitutional Commission. In other words, final constitutional review was possible only with the Supreme Court's prior consent.

cision even in those cases that are brought before the courts after the day on which the decision is made if they would not cause any serious harm to the stability and credibility of judicial judgments.

As of January 31, 2009, 189 unconstitutionality decisions, including decisions of incompatibility with the Constitution and decisions of unconstitutionality/constitutionality in a certain context, were made out of a total of 595 requests made to the KCC.

Regarding the scope of the KCC's jurisdiction, there have been some criticisms.[141] For example, it has been argued that the legal requirement for constitutional review of statutes is too narrow to protect the values and order enshrined in the Constitution. It is suggested that a French-style preliminary review or a German-style abstract norms control should be adopted so that the constitutionality of laws should be examined before their promulgation or application to the citizen's life. Such recommendations have the advantage of avoiding the legal instability that inevitably results from a decision of unconstitutionality under post review systems. However, the expansion of the KCC's constitutional review power may pave a way for the "judicialization of politics"[142] in that what has been decided and should be decided in politics are increasingly referring to the constitutional review of the KCC.

Impeachment

The KCC is empowered to decide whether certain public officials have violated the Constitution or other Acts in the performance of their official functions and should therefore be removed from office. The officials des-

[141] J. Kim, "Some Problems with the Korean Constitutional Adjudication System", J. of Korean Law 1(2001), pp.22-24.

[142] Ran Hirschl, *Towards Juristocracy - The Origins and Consequences of the New Constitutionalism*, Cambridge Mass.: Harvard Univ. Press, 2004.

ignated to be impeached by Article 65 (1) of the Constitution and statutes or Acts of the National Assembly include the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and prosecutors.

The overall impeachment process starts with a resolution of the National Assembly that must be proposed by one-third or more of the total members of the National Assembly and passed by a concurrent vote of a majority of the total members of the National Assembly, except in cases of impeachment against the President. In the case of the President, the motion of impeachment must be proposed by a majority of the total members of the National Assembly and approved by two-thirds or more of the total members of the National Assembly (Article 65 (2) of the Constitution).

The official impeached by the National Assembly will be suspended from exercising his or her power until the KCC makes a decision on impeachment. The KCC's impeachment decision needs the concurrence of six Justices or more (Article 113 (1) of the Constitution and Article 23 (2) of CCA). It shall not extend further than the removal of the accused officials from public office though it shall not exempt them from civil or criminal liability (Article 65 (4) of the Constitution and Article 54 (1) of CCA). The impeached officials shall not be a public official until five years have passed from the date on which the impeachment decision is pronounced (Article 54 (2) of CCA).

As of December 15, 2013, only one impeachment case was brought before the KCC. It was against the President Roh Moo Hyun in 2004

and was ultimately rejected, though some counts of violation of the Constitution and the Election Act were found by the KCC.

Dissolution of Political Parties

The KCC has the power to dissolve political parties upon the Executive's motion with the State Council's deliberation if it finds that their purposes or activities would be contrary to the basic order of a free democracy.

The KCC may make, ex officio or upon a motion of the applicant, a decision to suspend the activities of the defendant until its final decision of dissolution is made (Article 57 of CCA). Notice of the written decision ordering dissolution of a political party should be given not only to the parties concerned but also the National Assembly, the Executive, and the National Election Commission (Article 58 (2) of CCA). While the KCC renders dissolution decisions, it is the National Election Commission that is in charge of execution of such a decision in accordance with the Political Parties Act.

On November 5, 2013, the Park Geun Hye Government filed the dissolution of the United Progressive Party, which is the first case since the introduction of constitutional adjudication system in Korea.

Competence Disputes

The KCC's fourth area of jurisdiction is Competence or Jurisdictional Disputes (hereinafter, "Competence Disputes") between public authorities. It has the power to decide which public authorities have competence or jurisdiction when any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments. However, every competence

dispute can be brought before the KCC. A concerned state agency or local government may request the KCC to engage in competence review only when an action or omission by the respondent infringes or is in obvious danger of infringing upon the applicant's competence granted by the Constitution or Acts (Article 61 (2) of CCA).

Public authorities qualified to make a request for a competence dispute are state agencies such as the National Assembly, the Executive, ordinary courts, and the National Election Commission and local governments such as the Special Metropolitan City, Metropolitan City or Province, the City/County, or Self-governing District. The KCC has expanded the scope of state agencies that may bring competence disputes depending on whether they are instituted by the Constitution and have independent powers granted by the Constitution or statute and/or whether there is any dispute resolution procedure through which competence disputes between such agencies can be resolved. State agencies have become recognized as qualified applicants in the KCC's jurisprudence on such matters, and such agencies include the Speaker and vice Speaker of the National Assembly, members of the National Assembly, and committees of the National Assembly.[143]

The KCC may, upon receiving a request for adjudication of a competence dispute, make ex officio or upon a motion by the applicant a decision to suspend the effect of an action taken by the respondent that is the object of the adjudication until the pronouncement of a final decision (Article 65 of CCA).[144] In such a final decision, the KCC shall decide

[143] E.g. 96Hun-Ra2, 9-2 KCCR 154 (Jul.16, 1997); 99Hun-Ra1, 12-1 KCCR 115 (Feb.24, 2000); 2002Hun-Ra1, 15-2 KCCR 17 (Oct.30, 2003); 2005Hun-Ra6, 18-1(Sang) KCCR 82 (Feb.2, 2006).

[144] The first case where this provisional order in competence dispute was accepted by

as to the existence or scope of the competence of disputed public authorities. In so doing, the KCC may cancel an action of the respondent that is the cause of the competence dispute or may confirm the invalidity of the action (Article 66 of CCA).

The KCC's final decision is a binding force over all public authorities. However, even such a decision to revoke public authorities' action may not alter any legal effect that has already been made to the person whom the action is directed against (Article 67 of CCA).

As of October 31, 2013, the KCC rendered 76 decisions out of 81 applications filed in this area of disputes.

Constitutional Complaints

The KCC also has jurisdiction over constitutional complaints brought by ordinary citizens, either when his/her basic constitutional rights have been violated by an exercise or non-exercise of governmental power or when a party of an original case for the concerned courts' request to the KCC for constitutional review of statutes or Acts is rejected. While complaints comprising the latter category of constitutional complaints are called "complaints for constitutional review" or "complaints via Article 68 (2) of CCA," the former are usually referred to as "complaints for rights redress" or "complaints via Article 68 (1) of CCA." The two categories are different from each other in terms of the legal requirements for a petitioner to file a complaint. As far as complaints for constitutional review are concerned, like constitutional review proceedings, relevancy of the laws applied to the original case is required to reach to the KCC's deci-

the Court is 98Hun-Sa98, 11-1 KCCR 264 (Mar. 25, 1999) where the City of Seongnam challenged Kyong-gi Province over the latter's direct order of construction.

sion on the merits. Complaints for rights redress require that the petitioners exhaust all relief processes provided by law. The petitioners in complaints for rights redress may not challenge the judgments of the ordinary courts except when those judgments were made according to such laws made unconstitutional by the KCC.

More than 90% of total cases of the KCC are constitutional complaints. As of October 31, 2013, 19,428 cases have been filed in the form of complaints for rights redress while 4,228 cases have been filed in the form of complaints for constitutional review. Since 2009, the annual number of complaint cases for constitutional review sharply increased by around three times.

Organization of the Court

The KCC consists of nine Justices appointed by the President. The President's power to appointment in this regard is constitutionally limited because among the Justices, he should appoint three selected by the National Assembly and three designated by the Chief Justice of the Supreme Court (Article 111 (2) of the Constitution). To be appointed as Justices, all the candidates should be "qualified as judges," more than forty years of age, and have more than fifteen years of career experience as a judge, prosecutor, or attorney (Article 111 (2) of the Constitution and Article 5 of the CCA). The Justices' term in office is six years and may be renewed (Article 7 (1) of the CCA). They should retire at the age of sixty-five except for the Chief Justice whose retirement age is seventy (Article 7 (2) of the CCA). Until their retirement age, no Justices are forced out of office against their will unless they are impeached or are criminally sanctioned with a sentence of imprisonment

or something more severe. Justices are subject to constitutional obligations not to join a political party or participate in politics (Article 112 (2) of the Constitution and Article 9 of the CCA).

Some problems with the process of constitutional justice appointment and the status of constitutional justices can be identified.[145] First, the Chief Justice of the Supreme Court's power of nomination of three Justices has been criticized.[146] Second, strong criticism has been raised against the Constitutional requirement that only those qualified as judges may be chosen as Justices. Given the homogeneous culture of the legal profession due to a highly selective judicial examination process combined with the simplified training course, such a requirement inhibits the diversity of Justices of Court. Third, it has been pointed out that the relatively short term of Justices with their reappointment scheme may hinder the independence of the KCC by making Justices sensitive to the opinions of those with appointive power.[147]

The Chief Justice of the KCC is appointed by the President with the consent of the National Assembly. He represents the KCC, takes charge of the affairs of the KCC, and directs and supervises those public officials under his or her authority.

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145 Jongcheol Kim, "A Proposal for Reform in the Composition of the Constitutional Court", *Constitutional Law Reivew* 11-2(2005).

146 Yang, Kun, Moon-hyun, Kim and Nam, Bok-hyun, "Report on Reform of the Korean Constitutional Court Act": *Studies on Constitutional Adjudication* 10(1999), pp.14-16; Hyo-jeon Kim, "The Constitutional Court in Korea: Its Problems and Proposed Improvement" [in Korean], Public Law (1998), pp.68-69, 72-73.

147 Yang et al., ibid., pp.17-19.

B. Features of Korean constitutional adjudication

Dualism in Constitutional Review of Norms

As seen above, the object of the Court's power of constitutional review is confined to statutes or Acts. According to Article 107 (2) of the Constitution, constitutionality of subordinate legislation such as administrative orders, regulations, rules, and measures are subject to the Supreme Court's judgment. This dualism causes serious problems: "[t]he Constitution has no express provision concerning whose opinion would be final if there is a difference in constitutional interpretation between the two institutions. This incomplete dualism not only sows the seeds of conflict between the two institutions, but also has a danger of undermining the consistency and uniformity of the constitutional order. Moreover, the Supreme Court's power to review administrative legislation can seriously undermine the function of constitutional complaint by excluding almost all administrative actions, which have the highest possibility of violating human rights."[148]

Intensified Quorum in Major Forms of Decision

There are two different quorums in the Court's decision-making process. In general, the KCC decides on a majority basis. However, Article 113 (1) of the Constitution and Article 23 (2) of the CCA requires a special quorum of six Justices when the Court strikes down a law, impeaches certain public office holders, decides to dissolve a political party, or makes a decision to uphold a constitutional complaint. Such an intensified quorum is also required to overrule a precedent on the interpretation and

148 Jongcheol Kim, ibid.(2001), p.28.

application of the Constitution or laws made by the KCC. The underlying justification of the special quorum is to make it much more difficult that other independent branches' decisions are made void or rejected. However, giving state institutions a much higher priority may not be compatible with the ideal of constitutional adjudication cherishing the protection of constitutional rights and the rule of law.[149]

Mandatory Representation by Attorney

Although litigation generally does not require mandatory representation by Attorney, Article 25 of the CCA requires that every party in any constitutional adjudication proceeding be represented by an attorney. This means that without an attorney, ordinary citizens cannot bring their own cases before the KCC as they are forced by law to hire an attorney. The problem of this requirement is that it may prevent those with limited financial resources from having recourse in the Court. For this reason, Article 25 (3) of the CCA was challenged in 1990. The KCC upheld the constitutionality of this provision, however, on the ground that "mandatory representation by attorney would be advantageous to the petitioners by guaranteeing professional and skillful representation and thus preventing reckless and negligent pursuit of complaints."[150] This line of the Court's jurisprudence can be challenged because the real issue at stake is the money required to hire an attorney and because it is very difficult to accept that the question of whether fundamental rights is infringed must depend on money rather the truth of the matter.

[149] See Constitutional Court Decision 96Hun-Ma172 etc., 9-2 KCCR 842(Dec.24, 1997).
[150] Constitutional Court Decision 89Hun-Ma120 etc., 2 KCCR 296 (Sept. 3, 1990).

Exclusion of Judicial Judgments from Constitutional Complaints

Article 68 (1) of the CCA excludes judicial judgments from the KCC's jurisdiction over constitutional complaints. At first glance, this exclusion may not raise any serious objections, especially because the ordinary courts including the Supreme Court, like the KCC, consist of judges and are envisaged to be guardians of constitutional rights just as much as the KCC. From this viewpoint, one could view such review as one more, final instance for the KCC to review judicial decisions. However, it is argued that the judicial branch itself is a public authority which has a danger of abusing power, though this danger is comparably less than legislative and administrative counterparts, and therefore it is justifiable to establish another mechanism to control judicial power in order to intensify the protection of individual constitutional rights.

The KCC upheld the exclusion clause itself in a constitutional complaint case by saying that it is within the discretion of legislature to decide to what extent the KCC can have jurisdiction over constitutional complaints. However, the KCC made clear at the same time that the exclusion clause should not be interpreted as allowing the courts to apply the laws made unconstitutional by the KCC in ongoing ordinary cases. Thus, in cases where the courts infringe peoples' constitutional rights by applying unconstitutional laws, the KCC's jurisdiction over constitutional complaints may apply.[151]

Procedural Principles and Rules

The Court has developed a number of principles and rules regarding procedures of constitutional adjudication over last twenty five years. They

[151] See Constitutional Court Decision 96Hun-Ma172 etc., 9-2 KCCR 842(Dec.24, 1997).

have been produced through instances of constitutional and statutory interpretation.

Extension of the Rule of Justiciabilty in Constitutional Complaints

To bring their cases before the Court, claimants in constitutional complaints need to prove in principle that their constitutional rights are infringed in a direct way by activities or omissions of public authorities. First, the claimants themselves must show that they have suffered or will suffer an injury by their own constitutional rights being infringed. This means that if anybody else's rights are encroached rather than the claimant himself, it is not justiciable. For example, even the father of a victim of medical malpractice is not qualified to challenge the prosecutor's denial of indictment.[152] Second, the claimants should prove that the suffered right reaches the level of constitutional rights as opposed to de facto privileges. For example, the Court ruled that even though the legislature's decisions to expand permits to sell oriental herb medicines to pharmacists may affect the earnings of oriental medical doctors who had previously had exclusive permits to sell such herb medicines, the affected interests are not rights but privileges so that they cannot be redressed through constitutional complaint.[153] Third, the infringement should take place in a direct way from the activities of public authorities. This means that indirect impact between the cause of infringement and its result may not be sufficient to fulfill the standing requirement. For example, legislative provisions allowing construction zoning per se cannot be challenged in the process of constitutional complaints because they are merely the legal

[152] See Constitutional Court Decision 93Hun-Ma81, 5-2KCCR 535(Nov.25,1993).

[153] See Constitutional Court Decision 99Hun-Ma660, 42 Constitutional Court Official Notice 152(Jan.27,2000).

basis of administrative zoning so that their involvement with infringement cannot be recognized as a direct one.[154] Fourth, it should be alleged that the infringement has already taken place or that there is a danger of immediate infringement.[155]

The Court has developed jurisprudence stating that the standing requirements may be waived or eased in certain contexts. In a 1991 constitutional complaint case[156] reviewing law enforcement authority's rejection to detainees' application for meeting with their counsel, the Court held that (1) if an issue at stake has a vital importance to the maintenance of constitutional order so that the Court should clarify what the constitutional provisions mean, or (2) if there is a strong possibility that similar infringement upon constitutional rights would take place repeatedly, it would review on the merits even if personal and legally protectable interests in the relevant case were extinguished. The Court justified its position by declaring that constitutional complaints are envisaged to perform not single but dual functions so that they can be used not only to provide constitutional relief to particular individuals ("subjective" function) but also to protect constitutional order ("objective" function).

Exceptions to the Exhaustion Principle in Constitutional Complaints

As mentioned above, Art.68 (1) of the CCA requires anyone who wishes to file constitutional complaints to the Court to exhaust all relief processes provided by other laws. The Court narrowed the meaning of "relief process" to those processes through which the claimant may chal-

154 See Constitutional Court Decision 89Hun-Ma46, 3KCCR263,266(Jun.3, 1991).
155 See Constitutional Court Decision 92Hun-Ma68, 4KCCR659, 659(Oct.1, 1992)(Case concerning the Seoul National University Entrance Examination Plan).
156 Constitutional Court Decision 89Hun-Ma181, 3 KCCR 357, 358(Jul.8, 1991).

lenge directly the activities or omissions of public authorities. Therefore, the possibility of legal processes for damages or compensation cannot obstruct constitutional complaints. Furthermore, the Court recognized exceptional cases where the exhaustion principle does not apply. It held that the claimants may file constitutional complaints without prior exhaustion of other relief processes if requirement of such exhaustion is unreasonable. For example, if the failure of exhaustion is due to mistake, the responsibility of which cannot be reduced to the claimants, or if there is no reasonable expectation because the availability of other relief processes is not firmly recognized.[157] On the other hand, if there is no legal relief at all, the claimants may bring complaints before the Court. For example, constitutional complaints can be raised against orders and rules when they infringe upon the claimants' constitutional rights without any other substantive intermediate involvement of administration[158], or activities or omissions of public authorities that the Supreme Court has regarded as unjustifiable by using strict construction of protectable interests in administrative suits.[159]

[157] Constitutional Court Decision 91Hun-Ma80, 7-2 KCCR 851, 865(Dec. 28, 1995). For cases where this jurisprudence was applied, see Constitutional Court Decision 92Hun-Ma144, 7-2 KCCR 94,102(Jul.21, 1995)(censorship of letters in prison case).

[158] See, e.g., Constitutional Court Decision 89Hun-Ma178, 2KCCR365, 366(Oct. 15, 1990) (case concerning the Supreme Court Rules for the Judicial Certified Scriveners Act).

[159] See, e.g., Constitutional Court Decision 92Hun-Ma68, 4KCCR659, 659(Oct.1, 1992) (case concerning the Seoul National University Entrance Examination Plan).

C. Debates on Reform of the Constitutional Adjudication System[160]

Necessity of reform

Despite broad support and positive evaluations from both ordinary people and specialists in academia and practice over the past twenty five years, the present Constitutional Court now faces the more difficult task of consolidating its role as the champion of individual rights and the trusted bastion of the rule of law in the Korean governmental structure and in the hearts and minds of the people.[161] In tackling such a task, two problems should be solved. First, certain institutional defects inherent in the present system must be removed. Indeed, the relatively active performance of the Court over the last decade has veiled certain institutional defects of the present adjudication system as provided for by the Constitution and the CCA. Secondly, the role perception of the justices of the Constitutional Court as the "guardians of the Constitution" is another essential element in the development of the Court's overall institutional effectiveness.[162] The two problems are intertwined because an institutional reform in the composition of the Court as one of tasks tackling the former can improve the latter, though the latter requires more diverse and comprehensive approaches ranging from reform in legal education and practice to change of political culture and public consciousness.

The existence of institutional defects can be attributed in part to the

[160] This section is originated from my article "Some Problems with the Korean Constitutional Adjudication System", *Journal of Korean Law*, Vol.1, No.2(2001), ch.2.

[161] G. Healy, "Judicial Activism in the New Constitutional Court of Korea", 14 *Colum. J. Asian L.* 213 (2000), at 234.

[162] See Kun Yang, "The Constitutional Court in the Context of Democratization: The Case of South Korea", V*erfassung und Recht in Übersee* 31 (1998), at 170.

haste in which the new constitutional adjudication system was formed, as sweeping changes were made to the previous Constitution in a relatively short period of time in 1987.[163] Another cause for the existence of such defects is the competition of interests between political parties, as well as conflicting interests within the judiciary itself, since it was sure to be most affected by the creation of the new independent constitutional cour t.[164] The original plan agreed upon in the political sphere was to endow the Supreme Court with the power of constitutional review when there was disagreement between the ruling party and the opposition parties over which institution would have jurisdiction over matters such as impeachment, party dissolution and competence disputes. The Supreme Court was reluctant to address such political matters and thus sided with the ruling party advocating the creation of the Constitutional Committee endowed only with the powers to decide political matters. Opposition parties argued for leaving all the powers of constitutional adjudication with the Supreme Court. The final result was the creation of the independent Constitutional Court with full jurisdiction including constitutional complaints. After agreeing to the proposal, the Supreme Court was eager to place some institutional limitations on the powers of the new Constitutional Court. Its demands were reflected primarily in three limitations on the new court's powers. First, only ordinary courts can request the Court to review the constitutionality of statutes. (Article 107(1) of the Constitution) However, this limitation soon became nominal as individuals are allowed to challenge the constitutionality of a law in a form of con-

163 For a brief description of the background of the 1987 Constitution introducing the present Constitutional Court system, see J. West and Dae-kyu Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?", 40 *Am. J. Comp. L.* 73 (1992), at 73-75.

164 See generally, West and Yoon, *ibid*., 75-77; Healy, ibid., 218-219.

stitutional complaint.(Article 68(2) of the CCA) Second, the power to review on the constitutionality of inferior legislation such as administrative orders, regulations and measures is given to the Supreme Court instead of the KCC. (Article 107(2) of the Constitution) Third, the scope and procedure of constitutional complaint is delegated to the implementing legislation, i.e. the CCA, which in reality excludes ordinary courts' judgments from the scope of constitutional complaints. (Article 68(1) of the CCA) In short, the lack of time and competing interests of concerned parties created inherent institutional defects in the new constitutional adjudication system. For the further development of the Korean constitutional adjudication system, these defects must be corrected not only by constitutional and statutory interpretation on the part of the Court itself but also by revision of the relevant provisions of the Constitution and CCA.

The problems to be solved can be placed under two categories: (1) necessity to strengthen democratic background and function of the Court; (2) necessity to make the Court more efficient and effective in terms of the protection of human rights.

The first category includes (a) necessity to introduce preliminary review or abstract norms control; (b) necessity to reform in the qualification and term of constitutional justices and their appointment procedure, (c) necessity to change of quorum of judgment, (d) the division of the power of constitutional review between the Court and the Supreme Court, (e) necessity to limit the scope of mandatory representation by attorney and (f) exclusion of ordinary courts' judgments from constitutional complaint. The second category includes (a) some required measures to cope with the weak binding force of the Court's decisions, (b) the lack of general pro-

cedures for provisional remedies or injunctions, (c) the required statutory base for modified decision of unconstitutionality.

Reforms for Strengthening Democratic Background and Function of the Court

Necessity to Expand the Court's jurisdiction

Some constitutional lawyers have argued that the scope of the Court's jurisdiction is not sufficient to allow the constitutional adjudication system to protect the values and order enshrined in the Constitution.[165] Above all, the introduction of a French-style preliminary review or a German-style abstract norms control is taken on board. It is unclear why the constitutional review of statutes should be undertaken only upon a request from an ordinary court and only when the constitutionality of the statute is relevant to the judgment in the judicial proceedings. The French Constitutional Committee or Conseil Constitutionelle has the power to review the constitutionality of laws before their promulgation upon the requests of President, Prime Minister, President of National Assembly, President of Senate, or a group of Members of National Assembly or Senate.[166] The main advantage of this preliminary review system is that it can avoid the legal instability which inevitably results from a decision of unconstitutionality under post review systems. In the latter case, legal relationships or situations validly constituted under the statute in question must

[165] E.g., Kun Yang, Moon-hyun Kim and Bok-hyun Nam, *Report on Reform of the Korean Constitutional Court Act* [HunBupJaePanSoBupEui GaeJungBangAhnEh KwanHan Yun-GooYongYukBoGoSuh]: *Studies on Constitutional Adjudication* No.10 (Seoul: The Constitutional Court, 1999)[in Korean], 4-9.

[166] Jong-sup Chong, *A Study of Constitutional Litigation*, Vol. 1 [HunBupJaePanYun-Goo(1)] (1995)[in Korean], 359-361.

be changed when the governing law is declared unconstitutional. Although the German constitutional adjudication system does not have preliminary review, it has both "concrete norms control", which conditions constitutional review on the relevance of laws to the judicial case, and "abstract norms control", which does not. The Federal Constitutional Court (Bundesverfassungsgericht) of Germany can review the constitutionality of laws when the Federal and Land Governments and a group of members of German Parliament request adjudication on the constitutionality of federal and Land laws.

This system could greatly diminish the possible legal instability which may be caused by concrete norms control. However, a system of preliminary review or abstract norms control should be introduced in a cautious way, with careful consideration of the political and institutional implications and peculiarities of such systems. In considering the adoption of a French-style preliminary review, it should be borne in mind that, unlike our system modeling the German constitutional court system, the French Conseil Constitutionelle is a highly political institution in which the preliminary review of laws is understood as part of political process. As far as the adoption of abstract norms control is concerned, there would be less problem of institutional integrity with a German-style constitutional court system than with a French-style preliminary review. One caveat, however, is that it should be undertaken together with improvements in the process of the composition of the Court designed to strengthen its independence. Without full independence from the political sphere, any process involving political institutions such as the executive branch or a group of National Assemblymen in the process of constitutional review has the danger of undermining the political neutrality of the Court.

Necessity to Reform the Composition of the KCC

Articles 111 and 112 of the Constitution and Articles 3 through 9 of the CCA provide for the composition of the Court and the privileges and obligations of Constitutional Justices. One Chief Justice and eight Constitutional Justices are to be appointed by the President. However, the President should appoint three candidates nominated by the National Assembly and three candidates nominated by the Chief Justice of the Supreme Court. To be appointed as Justices, all the candidates should be "qualified as judges", more than forty years of age and with more than fifteen years of career experience as judges, prosecutors or attorneys. Justices are guaranteed six years term with the possibility of reappointment, with a mandatory retirement age of sixty-five for Justices and seventy for the Chief Justice.

There are three main arguments challenging the constitutional justice appointment process and the status of constitutional justices. First, the present process of the appointment of Justices lacks democratic legitimacy. In particular, giving the power to nominate three candidates to the Chief Justice of the Supreme Court, who is not elected but rather appointed by the President, has been criticized as undermining the democratic legitimacy of the Court. Moreover, although the nominees for Justices of the Supreme Court must be approved by the National Assembly, the candidates nominated by the Chief Justice of the Supreme Court are free from the control of the National Assembly.

Secondly, the requirement that all Justices must be qualified as judges has little justification. Considering that the number of qualified judges is very confined, the limitation inhibits the development of lawyers with di-

verse social backgrounds. This problem is exacerbated by the additional statutory requirement that Justice must have more than fifteen years of job experience as judges, prosecutors, and attorneys. Since most promising attorneys tend to have served as judges or prosecutors, the fifteen year career requirement means that candidates for Justices cannot be free from the bureaucratic culture of the Korean legal profession, creating a danger that the Court will become an insular and overly-fraternal system.[167]

Moreover, constitutional adjudication by nature requires practical wisdom and policy-related theoretical understanding rather than positivist juristic precision and miscellaneous knowledge of technical judicial procedures. Therefore, the membership of the Court should be open to those with diverse social and professional backgrounds. In particular, law professors with sufficient wisdom and experience in dealing with constitutional matters should be allowed to serve on the Court.[168]

Thirdly, the short limited term of Justices and their reappointment scheme needs to be reconsidered. The present scheme of short six year terms with the possibility of reappointment may represent a challenge to the independence of the Court by making Justices sensitive to the opinions of those with the appointive power. Possible alternatives to the present system are a system of life tenure or a system guaranteeing a longer single term for Justices. The latter is preferable to the former, as the for-

[167] Comparatively, the German system too requires in principle a lawyer's license. However, two differences from the Korean should be noted. First, the German Constitutional Court is open to law professors as an exception to the principle. Second, the German Bar is not such a closed and homogeneous society as the Korean Bar. Therefore, it is safe to say that the diversity problem is not very serious in the German system. For a comparative survey on this point, see Jibong Lim, "A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany, and Korea", 6 *Tulsa J. Comp. & Int'l L.* 123 (1999): 140-146.

[168] G. Healy, *ibid*., 227.

mer may make the Court fortress of conservatives. Finally, it should be noted that there is little reasonable justification for the difference in retirement age for the Chief Justice and other Justices.

Necessity to Reduce the Intensified Quorum in Special Decisions

Article 113 of the Constitution provides for a special quorum of six Justices when the Court holds a law unconstitutional, or makes a decision of impeachment, a decision to dissolve a political party, or a decision to uphold a constitutional complaint. Article 23 (2) of the CCA provides that such an intensified quorum is also required to overrule a precedent on the interpretation and application of the Constitution or laws made by the Court. This intensified quorum requirement may diminish the possibility of upholding such cases. For example, a majority of five Justices who find a law to be unconstitutional cannot override the minority in dissent. Therefore, the statute in question cannot be struck down even though a majority of the Justices believe it is in violation of the Constitution. Given the importance and serious effects of such special decisions, the intensified requirement may be justified.

However, this specified quorum may result in unexpected nonsense in certain cases. Article 23 (1) of CCA allows the Full Bench to be open with the attendance of seven or more Justices. This means that when the Full Bench is open with seven Justices, only two dissents can prevent the Court from finding an offending law unconstitutional and protecting an individual's constitutional rights. This requirement is too severe, and has the strong effect of giving state institutions a much higher priority than the protection of fundamental constitutional rights. In addition, the fixed quorum may create a self-conflicting judgment in the case of com-

petence dispute.[169]

Decisions in competence dispute do not require the intensified quorum and are made by the majority vote of Justices participating in the final discussion. The problem arises when the majority of five Justices affirm the infringement of the plaintiff agency's competence because they think the other party's measure is based on an unconstitutional law. The KCC may revoke the defendant's action according to the majority rule applied to competence dispute proceedings, while not declaring the relevant law is unconstitutional due to the intensified quorum.

One alternative to the present fixed intensified quorum might be the reduction of the special quorum from six to five. However, this being another version of fixed quorum, it cannot remove the logical problems built in the present system.[170] A second option is the ordinary majority rule with the condition that the consent of at least four Justices is required in the cases of unconstitutionality decisions and affirmative decisions on constitutional complaints. This option may increase the possibility of unconstitutionality decisions, thereby undermining legal stability. A third option may be to just address the problem of the Full Bench composed of seven Justices by introducing a system of spare Justices replacing the Justices excluded or recused in a specific case. The spare Justice or Ersatzmitglieder system benchmarked from the Austrian system is attractive because it requires no change in the present system of intensified quorum. However, this may cause more serious organizational problems. It may mean the creation of a kind of “second grade” Justice

169 Bok-hyun Nam, “Some Problems with the Quorum of Constitutional Adjudication Procedures” [HunBupJaePanEui GyulJungJungJokSoo], *Contemporary Public Law and the Protection of Individual's Rights and Interests* [HyunDai GongBupGwa GaeInEui GwunRi] (Seoul: 1994)[in Korean], p.989.

170 Yang *et al*., eds., *ibid*., p.39

whose status is different from that of the "first grade" Justices. The integral identity of the Court may be threatened by allowing the "second grade" Justices to change the pendulum in important cases. Although all options have their own merits and demerits, the second option is preferable, not only because it creates fewer administrative and institutional problems, but also because comparative research shows that most constitutional adjudication systems have such a scheme.[171]

Necessity to Unify Jurisdiction over Constitutional Review

As mentioned above, one problem built into the present constitutional adjudication system in the course of its creation is the separation of the power of constitutional review between the KCC and the Supreme Court. The latter has the power to review the constitutionality of inferior legislation such as administrative orders, regulations and measures while the former to review the constitutionality of statutes.

The Constitution has no express provision concerning whose opinion would be final if there is a difference in constitutional interpretation between the two institutions. This incomplete dualism not only sows the seeds of conflict between the two institutions, but also has a danger of undermining the consistency and uniformity of the constitutional order. Moreover, the Supreme Court's power to review administrative legislation can seriously undermine the function of constitutional complaint by excluding almost all administrative actions, which have the highest possibility of violating human rights.

[171] See generally, The Ministry of Justice, *Constitutional Adjudication System* [HunBupJaePanJeDo] : *Ministry of Justice Materials No. 95* (1988); Heung-soo Moon and Bong-ki Shin, *Constitutional Adjudication Systems in the World [SeGyeGakGukEui* HunBupJaePanJeDo] (1994).

It is ironic that the very system designed to protect the constitutional order, i.e. the constitutional adjudication system itself, is destined to cause constitutional conflicts which damage the uniformity of the constitutional order. Given that the raison d'être of the independent constitutional court is to be the final arbiter of the Constitution, the ideal solution to this problem would be to give the final say in constitutional interpretation to the KCC. Two options for implementing this idea can be taken into consideration.[172]

First, the Supreme Court could maintain the power to review the constitutionality of inferior legislation, but the Supreme Court's decisions could be challenged in constitutional complaints. Second, as in the review on statute, when the constitutionality of administrative orders or measures is at issue in a trial, the ordinary court should request a decision of the Constitutional Court and rule in accordance with that decision.

Necessity to Limit the Scope of Mandatory Representation by Attorney

Article 25 of the CCA requires that every party in any constitutional adjudication proceeding should be represented by an attorney. Article 25 (2) constitutes an exception to the principle under Article 3 of the "Act on Litigation to Which the State is a Party" that the Minister of Justice may allow officials having no qualification as an attorney to take charge of judicial cases to which the state is a party. Article 25 (3) is also an exception to the general rule in other judicial proceedings that no qualification as an attorney is required for a person to pursue a legal proceeding.

Although both provisions prescribe mandatory representation by an attorney, Article 25 (3) gives rise to more questions because it may pre-

[172] Yang *et al*., eds., *ibid*., pp.340-345.

vent ordinary citizens with limited financial resources from bringing their cases before the KCC, while the state agency would have no financial problem to hire attorney. Indeed, the most affected parties by mandatory representation requirement are those filing constitutional complaints, because other proceedings to which private person is a party (e.g., impeachment) are extremely rare.[173] Even in such a rare case, the involved individuals might be well represented, as they are high ranking officials. Therefore, the mandatory representation by attorney should be examined in the light of the nature and function of constitutional complaint.

Constitutional complaints are concerned with the infringement of an individual's fundamental right by governmental powers. Given the importance of fundamental rights, the application requirements should not be too strict. This ideal is reflected in the rule that the expenses for adjudication by the Court shall be borne by the state. (Art.37 (1) of CCA)

However, mandatory representation by an attorney may infringe upon an individual's right to file a constitutional complaint. The relatively high fees of attorneys in Korea may hinder individuals having limited financial resources from filing a constitutional complaint. This can be confirmed by statistics showing that the violation of mandatory representation by attorney requirement is the most common reason for rejection of such complaints by the Designated Bench of the KCC. As of November 31, 2013, the number of rejections due to violation of the mandatory representation rule is 1,601 cases out of a total of 11,921 cases rejected.[174]

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[173] So far, there is only one impeachment trial since the establishment of the Court in 1988. Even in this case resulted from consistent political strifes between opposition parties and President RohMoo-hyun Roh, impeachment was not granted. See Constitutional Court Decision 2004 Hun-Na 1, 16-1 KCCR 609(May 14, 2004).

[174] See the statistics column of the Constitutional Court website (http://www.ccourt.go.kr/).

We may also question why the mandatory representation rule should be applied to constitutional complaints, which are concerned not only with fundamental individual rights but also with the constitutional order, when no such requirement is applied in ordinary judicial proceedings where no such requirement is applied even though conflicts between private interests are at stake. In a case answering this question, the Court argued that mandatory representation by attorney would be advantageous to the petitioners by guaranteeing professional and skillful representation and thus preventing reckless and negligent pursuit of complaints.[175] Although it sounds logical or reasonable, the advantage of professional representation should not be overestimated or used to justify the total prohibition of the application for constitutional complaint itself. The requirement of professional assistance is not justifiable because professional techniques and knowledge are not crucial in our constitutional complaint procedure. Oral arguments in an adversarial system are not required in principle[176] and the KCC has the power to ask the relevant public authorities to provide records or materials necessary for the adjudication.[177]

What makes the situation worse is the relatively high requirements that the Court has suggested for allowing court-appointed counsel for the petitioners with limited financial resources,[178] which can help camouflage such a problematic requirement. In short, to enhance individual's liberties and rights, mandatory professional representation should be abolished.

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[175] Constitutional Court Decision 89 Hun-Ma 120 etc. September 3, 1990, 2 KCCR 296.
[176] Article 30(2) of the CCA.
[177] Article 32 of the CCA.
[178] Article 70 of the CCA.

Necessity to Include Ordinary Court's Judgment in the Jurisdiction of Constitutional Complaint

According to Article 68 (1) of the CCA, the judgments of ordinary courts are excluded from the jurisdiction of the Constitutional Court over constitutional complaints. One exception to this exclusion is Article 68 (2) of the CCA, which allows constitutional complaints against a court's denial of a request for constitutional review of a statute in any judicial proceeding. As mentioned above, the judiciary argued for the exclusion of judicial judgments from the constitutional complaint process. The judiciary argued that allowing the Court's review on judicial judgments would mean the creation of a fourth court higher than the Supreme Court. Underlying this argument is the belief that the Supreme Court itself is a guardian of individual rights and is in better position to review judgments of inferior courts than the Constitutional Court, which cannot be said a genuine judicial institution.

However, this stance may be in direct conflict with the essential aim of the system of constitutional complaints, under which jurisdiction is given to the KCC independently of the judiciary. In a constitutional democracy, all constitutional institutions must promote the realization of the fundamental values enshrined in the Constitution, and the ordinary courts cannot be an exception to this constitutional principle. Insofar as the constitutional complaint system is adopted to fulfill such a constitutional ideal, that is, to prevent and remedy any infringement of fundamental individual rights by any governmental powers, there is no reason for the ordinary courts to be free from such constitutional control, especially where they may violate the Constitution. This was partially confirmed by the KCC in a case where the constitutionality of Article 68 (1) of the

CCA excluding judicial judgments from the constitutional complaint process was at stake.[179] The Court held that the provision was unconstitutional insofar as it is interpreted to allow any judicial judgment violating an individual's fundamental rights by application of a statute declared void by the Court to be included in the category of such judgments excluded from the constitutional complaint process.[180]

However, the KCC's decision recognized only a shallow exception to the exclusion of the ordinary courts' judgment rule, and did not extend the Court's jurisdiction to cover all constitutional complaints against the judgments of ordinary courts. Therefore, the essential problems still remain. The most serious is that almost all administrative actions, which have a relatively high propensity for the infringement of fundamental rights, are excluded from the constitutional complaint process. This problem is attributed to the combined effect of the exclusion of judgment rule and the prior exhaustion rule, a legal requirement that the would-be petitioner should exhaust all other relief processes before he or she files a constitutional complaint.[181]

Administrative actions are subject to judicial review by the ordinary courts according to the exhaustion rule, and once the courts take over the case, there is no access to a constitutional complaint under the exclusion of courts' judgment rule. This problem was tackled by the KCC by extending exceptions to the prior exhaustion rule.

The KCC has developed three categories of the exception to the prior exhaustion rule: (1) where constitutional complaints directly challenge the

[179] Constitutional Court Decision 96 Hun-Ma 172, etc., December 24, 1997, 9-2 KCCR 842.

[180] Constitutional Court Decision 96 Hun-Ma 172, etc., December 24, 1997, 9-2 KCCR 842, 859-865, 867.

[181] Article 68(1) of the CCA.

validity of laws, (2) where there are no identifiable legal remedies, and (3) where, despite the existence of remedies, the possibility for redress almost none, for example, due to the established precedents of the ordinary courts.[182] However, the recognition of exception by way of interpretation is inevitably limited and insufficient. The authentic response to the problem is to allow the Court's review of the judgment of ordinary courts through legislative reform.

Reforms for Making the Court More Efficient and Effective

Necessity to Strengthening the Binding Force of the KCC's Decisions

The CCA has several provisions regarding the binding force of the Court's decision over public authorities, including the ordinary courts, other state agencies and local governments.[183] However, there is no general provision giving the KCC the power to take actions to enforce its decisions, leaving the enforcement of decision to the discretion of other state institutions. The only provision with regard to how the Court's decision is to be executed is Article 60 of the CCA, which orders the National Election Commission to take necessary actions to enforce the Court's decision to dissolve a political party in accordance with the Political Parties Act.

Therefore, the decisions of the KCC, the protector of the constitutional order and values, can be ignored by the other institutions since there are no specific means of processes for enforcement. Most countries with constitutional adjudication systems in any form have mechanisms for the en-

[182] See generally, the Constitutional Court, An Introduction to Constitutional Adjudication System [HunBupJaePanSilMooJeYo], 2nd ed. (2008)[in Korean], pp.261-264.

[183] Article 47(1)(Effect of unconstitutionality decision), Article 67(1)(Effect of decision on competence dispute), Article 75(1)(Effect of decision of upholding in a constitutional complaint case) of the CCA.

forcement of the decisions of the constitutional adjudication institutions. For example, Article 35 of the German Federal Constitutional Court Act provides that the Federal Constitutional Court may decide who should execute its decision, and how and what must be done. The Supreme Court of the United States may deliver enforcement decrees to execute its decision.[184]

One caveat is that even if general provision for the enforcement of the Court's decision is introduced, the KCC must not abuse such powers. Respecting the principle of the separation of powers, it must use its enforcement powers only as a last resort and only in those exceptional cases in which other institutions go against the Court's decision.

The Lack of General Provisions for Provisional Remedies

Under the CCA, only the two processes of competence disputes and dissolution of political parties have provisions regarding provisional remedies or injunctions.[185] In the case of impeachment, since Article 50 of the CCA provides for the suspension of the power of the impeached official, there is no room for the KCC to consider provisional remedies. In other words, there is no provision for provisional remedies or injunctions in cases of constitutional review of statutes and constitutional complaints. In addition, even in the cases of competence disputes and the dissolution of political parties, the provisions for provisional remedies specify only the KCC's power to suspend the defendant's actions. They are silent on the specific conditions, procedures and effects of provisional remedies. Some lawyers argue that under the mutatis mutandis provision of Article

[184] E.g., Brown v. Board of Education II, 349 U.S. 294 (1955); Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

[185] Respectively, Art. 57 and Art. 65 of the CCA.

40 of the CCA, the relevant provisions in the Civil Proceedings Act or the Administrative Proceedings Act are applicable to constitutional adjudication. In fact, the Court accepted the request for provisional remedies in a constitutional complaint case on such a ground.[186]

However, statutory interpretations supplementing legislative defects have built-in limitations. In particular, applying the Civil Proceedings Act or the Administrative Proceedings Act to the constitutional adjudication system may ignore its unique features. For example, provisional remedies in the constitutional adjudication system, unlike those in other proceedings, often involve the protection of the constitutional order and values together with subtle political issues.

The implementing law for constitutional adjudication needs to provide basic devices together with their requisites designed to realize aims of the system. If we agree on the need for the legislative introduction of provisional remedies in cases of constitutional complaint or the constitutional review of statutes, it would be preferable to create a general procedure articulating the basic conditions, procedures and effects of provisional remedies, applicable to all proceedings, while leaving some requisites peculiar to each proceeding in the special section for that proceeding.

The Statutory Basis Necessary for Modified Decisions of Unconstitutionality

Article 45 of the CCA provides that "the Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional." However, Article 47 of the CCA declares that "any statute or provision thereof decides as unconstitutional shall lose its effect from the day on which the decision is made," except criminal laws.

[186] Constitutional Court Decision 2000Hun-Sa471, December 8, 2000, 12-2 KCCR 382.

Literally, these provisions may mean that the Court can deliver only clear-cut decisions of unconstitutionality or constitutionality. If the Court finds a law to be the violation of the Constitution, it should invalidate immediately the statute in question in toto ; otherwise the law should be valid with no reservation. To put it differently, the KCC may not be allowed to affect the partial invalidation of a provision of a statute by limiting the scope of validity of the provision or to hold or maintain the validity of the provision for a certain period of time.

However, many public lawyers have recognized the necessity of such modified forms of decisions, either to avoid the vacuum in law caused by total invalidation or to give deference to the legislature's policy-making power. By the end of the first term of the KCC in 1994, the KCC firmly established that such modified forms of unconstitutionality are a kind of unconstitutionality decision and thus have the same effect as prescribed by Article 47 of the CCA.[187]

Modified decisions recognized so far by the Court are those of "nonconformity to the constitution" and "limited unconstitutionality (or constitutionality)." The former decision declares either that the statute at stake is unconstitutional but its legal effect is maintained until the legislature revises it,[188] or that the statute in question is unconstitutional. If the statute is declared unconstitutional, its application is immediately suspended and the legislature is requested to take necessary actions by a fixed point in time, after which the statute would become void.[189] The latter decision declares that the statute at issue itself is valid but is deemed void insofar as it is to be interpreted or applied as the Court

[187] E.g., Constitutional Court Decision 88Hun-Ka5, July 14, 1989, 1 KCCR 69; 92Hun-Ba49, July 29, 1994, 6-2 KCCR 64.

[188] E.g., Constitutional Court Decision 91 Hun-Ma 21, March 11, 1991, 3 KCCR 91.

[189] Constitutional Court Decision 88 Hun-Ma 5, March 11, 1993, 5-1 KCCR 59.

found unconstitutional. This form of decision is two-fold, i.e. the limited decision of unconstitutionality and the limited decision of constitutionality. However, they are not different in nature. The superficial difference is that the one is chosen to uphold a particular interpretation of a statute while the other is chosen to exclude.[190]

Some lawyers and commentators have criticized the introduction of modified decisions by statutory interpretation as a usurpation of legislative power which allows the Court to decide the kind and scope of unconstitutionality decision, or as a cover for the Court's reluctance to decide politically sensitive cases.[191] Indeed, the Supreme Court has refused to recognize the binding force of modified forms of unconstitutionality decisions, characterizing decisions of limited unconstitutionality as simply one possible interpretation of a statute which the ordinary courts are not obligated to follow.[192] Although the KCC nullified the Supreme Court's decision,[193] the Supreme Court continues to keep their defiant stance. As far as "nonconformity to the constitution" is concerned, the Supreme Court's stance is quite opposite. On the one hand, the KCC wish to add certain conditions, for example, that the effect of the statute at stake is kept continued until its revision by the legislature, when it decided to deliver "nonconformity to the constitution"[194] but, on the other, the Supreme Court refused to accept the effect of such conditions in particular if the law concerned is related to the criminal sanctions.[195]

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190 See Constitutional Court Decision 96 Hun-Ma 172, December 24, 1997, 9-2 KCCR 842.
191 E.g., Justice Byun Jung Soo's dissenting opinions in Constitutional Court Decision 88Hun-Ka6, September 8, 1989, 1 KCCR 199, 265-269 and 90Hun-Ka11, June 25, 1990, 2 KCCR 165, 171-177.
192 Supreme Court Decision 95 Nu 11405 (Apr. 9, 1996).
193 Constitutional Court Decision 96 Hun-Ma 172, December 24, 1997, 9-2 KCCR 842.
194 Constitutional Court Decision 2008Hun-Ka25, September 24, 2009, 21-2(A) KCCR 427.
195 Supreme Court Decision 2008Do7562, July 23, 2011(en banc).

No one would seriously deny that this conflict between the two highest constitutional institutions damages the uniformity of the constitutional order. Given the obvious necessity for modified forms of unconstitutionality decisions, legislation is needed to authorize such decisions and to stipulate their effects. Needless to say, the KCC should not abuse modified decisions, since this may lead to the people to lose faith in the KCC and thus undermine the foundations of constitutional review.

D. Judicialization of politics

Since the Roh Moo Hyun Government, a noticeable trend in the field of constitutional adjudication is the growing influence of the ordinary and/or constitutional courts on matters which were once considered purely political. The list of evidence showing this new trend in Korean constitutional reality includes the first impeachment trial against the President in the history of Korean constitutional democracy which resulted in the curtailment of presidential power by the Constitutional Court while impeachment itself being rejected, the unconstitutionality decision of the Special Act for the Construction of the New Administrative Capital which means the collapse of the most ambitious agendum of Roh Administration. President Roh himself filed a constitutional complaint to the Constitutional Court in June 2007. He challenged the National Election Commission's finding that a series of his speeches is in breach of the neutrality obligation of public servants required by the Election Law.

Apart from peculiar politico-legal circumstances of Roh Government, judicialization has two backgrounds in Korea. Firstly, there is a strong public demand for judicial control over the governmental activities as a

means for democratization. For one thing, imperial presidency together with bureaucracy-led industrialization featured Korean authoritarianism. It means that in pre-1987 period legislative and judicial control over administration remained only in constitutional and statutory texts but was far away from realization in practice. Even after 1987, the legacy of imperial presidency remained in force to some extent. Using various law enforcement offices from police, prosecutors' office and tax office to intelligence office, political and judicial control has been effectively tamed although the severity and scope of the de facto executive supremacy become diminished as time goes on before the launch of Roh Moo Hyun Administration in 2002.

Secondly, government reform initiatives in Korea tend to strengthen judicialization in a broader sense that not only the judges tend to involve policy matters more and more but also juristic interpretation of law becomes more and more an important criterion against which government policy and actions are made and evaluated. Some features of government reform, for example, decentralization or privatization, require a new mechanism for enhancing accountability of public actors. Instead of vertical administrative control mechanism based upon centralized and well-rationalized bureaucratic hierarchy, judicial accountability becomes highlighted together with professional and public accountability to cope with decentralized, commercialized government activities.

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The Relocation of the Capital Case [16-2(B) KCCR 1, 2004Hun-Ma554, etc.,(consolidated),October 21, 2004] [Decisions/Major Decisions at http://english.ccourt.go.kr/]

Held, the Special Act on the Establishment of the New Administrative Capital that intended to relocate the capital of the Republic of Korea by constructing a new capital for administrative function in the Chungcheong Province area was unconstitutional.

Background of the Case

As one of the election pledges, Roh Moo-Hyun, who was then the presidential candidate of the New Millenium Democratic Party, announced the plan to relocate the administrative function of the capital that 'the Blue House and the governmental ministries will be moved to the Chungcheong area as a curb on the concentration and overpopulation at the capital and a solution for the lagging local economy.' Roh Moo-Hyun was elected as the President at the 16th presidential election held on December 19, 2002.

Subsequently, the bill for the Special Act on the Establishment of the New Administrative Capital to transfer the administrative function of the capital to the Chungcheong area, which was proposed by the administration, was enacted at the National Assembly, and the Special Act on the Establishment of the New Administrative Capital was promulgated on January 16, 2004.

The complainants in this case, who are Korean citizens domiciled across the nation, filed the constitutional complaint in this case on grounds that the above Act was unconstitutional in its entirety as it was an attempt to relocate the nation's capital without revision of the Constitution, and that the Act violated the right to vote on referendum and the right of taxpayers.

Summary of the Decision

The Constitutional Court, in an 8:1 opinion, held the Act unconstitutional, with a separate concurring opinion of one Justice. The grounds for the KCC's opinion are summarized as follows:

1. Majority Opinion of Seven Justices

The Act at issue in this case determines the transfer of the capital of the nation, which falls within the meaning of the capital under the Constitution as the location of national institutions that perform pivotal functions of politics and administration of the nation. As such, the transfer of a new administrative capital pursuant to the Act at issue in this case means the transfer of the capital of the Republic of Korea.

The establishment or relocation of the capital is the geographical placement of the basis of the nation's organization and structure through determination of the location of the highest constitutional institutions such as the National Assembly and the President, and is thus a fundamental decision by the citizens concerning the nation, and, at the same time, a core constitutional matter that forms the basis for the establishment of a nation.

There is no express provision in our Constitution that states 'Seoul is the capital.' However, that Seoul is the capital of our nation is a continuing practice concerning the life in the national realm of our nation for a period of over six-hundred years since the Chosun Dynasty period. Such practice should be deemed to be a fundamental matter in the nation that has achieved national consensus from its uninterrupted continuance over a long period of time. Therefore, that Seoul is the capital is a constitutional custom that has traditionally existed since even prior to the estab-

lishment of our written Constitution, and a norm that is clear in itself and a premise upon which the Constitution is based although not stated in an express provision in our Constitution. As such, it is part of the unwritten constitution established in the form of a constitutional custom.

Constitutional custom is also part of the constitution and is endowed with the same effect as that of the written constitution. Thus, such legal norm may at the least be revised only by way of constitutional revision pursuant to Article 130 of the Constitution. That Seoul is the capital of our nation is unwritten constitutional custom, and, therefore, retains its effect as constitutional law unless invalidated by establishment of a new constitutional provision ordaining a new capital through the constitutional revision procedure. On the other hand, other than through formal constitutional revision, a constitutional custom may lose its legal effect by loss of the national consensus that supports it. However, in this case, such circumstance is not found.

Pursuant to Article 130 of the Constitution, national referendum is mandatory for the constitutional revision. Therefore, the citizenry has the right to express its opinion with respect to the constitutional revision through a binary pro-and-con vote. Here, the Act at issue in this case realizes the transfer of the capital, which is a matter to be undertaken by the constitutional revision, merely in the form of a simple statute without following the constitutional revision procedure. Thus, the Act is in violation of the Constitution as it excludes the exercise of the right to vote on referendum, thereby violating such right, which is a fundamental right to participate in politics retained by the people at the constitutional revision pursuant to Article 130 of the Constitution.

2. Separate Concurring Opinion of One Justice

Article 72 of the Constitution provides that "the President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary." The decision to transfer the capital falls within the meaning of the 'important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny,' and, is therefore a matter to be determined by referendum.

The act by the President of submitting a matter to the referendum is a deferred discretionary act. However, the act of not submitting the decision to relocate the capital to the referendum is a deviation and an abuse of discretion, and is in violation of Article 72 of the Constitution that is the legal basis of the endowment of the discretion.

Should the President exercise the discretion in a lawful way, the only possible choice would be to bring the decision to relocate the capital before the referendum. Therefore, the President is obligated to submit this matter to the referendum, and the Korean citizens in turn have the right to request the submission of this matter to the referendum as they have a specific right to vote on referendum even prior to the actual submission by the President.

The Act at issue in this case unequivocally and conclusively excludes the referendum in determining the intention to relocate the capital. The complainants, who are Korean citizens, were therefore deprived of the right to vote on referendum of Article 72 of the Constitution by the enactment and enforcement of the Act at issue in this case.

3. Dissenting Opinion of One Justice

In a legal system under a written constitution, customary constitutional

law may not be established or maintained apart from the written constitution, and, instead, is always given no more than supplementary effect as it may be established and maintained only when harmonized with various principles of the written constitution.

Also, the constitutional revision is a concept that pertains to the constitution in the formal sense, i.e., the written constitution. Therefore, the change of the customary constitutional law does not belong to constitutional revision, and may occur through the enactment or the revision of the statute that is the procedure for representative democracy established by the Constitution. In the case of a change in constitutional custom such as the transfer of the capital, as there is no particular constitutional provision that prohibits this, it may be done by the enactment of the statute by the National Assembly. Therefore, there is no possibility that the Act at issue in this case violates the right to vote on referendum under Article 130, Section 2, of the Constitution.

On the other hand, Article 72 of the Constitution endows the President with the discretion of whether or not to submit an 'important policy concerning the national security' to the referendum, which may not be interpreted to the effect that such discretion varies according to the significance of the matter. Further, such discretion is endowed directly by the Constitution. Thus, the legal principle of deviation and abuse of discretion of the administrative law may not apply. Therefore, there is no possibility that the right to vote on referendum of Article 72 of the Constitution is violated in this case. To conclude, the assertion of the complainants of the violation of the right to vote on referendum is unjustified, as the possibility of violation of the asserted right itself is lacking.

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Notes

In the 16th presidential election, one issue dividing major presidential contenders is the plan to construct an administrative capital in which the office and residence of the president (the Blue House) and major governmental ministries are relocated from Seoul to Choongcheong Province in order to enhance decentralization. Roh Moo Hyun who made the plan as one of his top pledges finally won the election and initiated the plan to be put into practice by proposing the Special Bill on the Construction of the New Administrative Capital. The Bill was passed and promulgated in the wake of fierce political controversies in the early 2004. A number of citizens who were unsatisfactory with the plan, including the then Seoul Mayer Lee Myong Bak (the 17th president succeeding Roh), organized an anti-relocation-of-the capital movement. Some of them brought their complaints before the KCC alleging that the Special Act was unconstitutional because it violated their constitutional right to vote on referendum which from their own opinions was required by the Constitution and other constitutional rights including the right to property, the right to become civil servants and so on.

The KCC accepted the complaints in 8-1 majority decision. The main thrusts of the majority opinion were four-fold. First, the relocation of the capital is a core constitutional matter that forms a requisite element of the Constitution. Second, although "Seoul is the capital" is not expressly stated in the written constitution, the fact becomes a customary constitution as a part of the unwritten constitution directly chosen by the

people for long time even prior to the enactment of the written constitution of the Republic of Korea. Third, since customary constitution is also part of the constitution with the same effect as that of the written constitution, its revision should be carried out only by the same way of the revision of the written constitution. Fourth, Article 130 of the Constitution requires a mandatory referendum for constitutional revision, the Act on the review that is intended to relocate the capital encroached upon the people's constitutional right to vote on the referendum.

Major and Preliminary Issues of the Relocation of the Capital Case

The basic issue underlying the Relocation of the Capital case can be questioned from two aspects which are internally intertwined with each other and actually constitute other sides of the same coin. The first aspect of the question is a judicial one which can be corresponding to the position of the KCC's majority opinion: whether customary constitution is a proper form of law having enough justification to strike down statutes. The second one is a constitutional aspect which the KCC veiled, intentionally or unintentionally, but concerns the constitutional effects in terms of the separation of powers delegated by the sovereign people in constitutional arrangements: which is better positioned to fill the gap caused by, if any, constitutional abeyance, the National Assembly or the Constitutional Court? Why are these two aspects intertwined with each other? My assumption is that the reason why the KCC's majority opinion lifted the controversial legal tool of customary constitution from the unknown vast of constitutional theories is to take over legislature's role to represent the will of the people in the form of constitutional construction or review. In other words, if the answer to the first judicial aspect of the

issue is No, the natural result of the KCC's majority opinion is nothing but the usurpation of legislative power of the National Assembly on political matters.

Two preliminary questions should be solved in order to get conclusion of the major issue. First, is it possible to identify customary constitution in the constitutional state with the written constitution? Second, if so, does the custom have the same effect as the written constitution? The answer to the first question may depend upon the structure of the written constitution, the constitutional history regarding the form of the constitution and the extent of constitutional stipulation. However, the KCC's majority recognized the form of customary constitution as a kind of a priori source of constitutional law by assuming that "notwithstanding the existence of a written constitution, it is impossible to completely provide written constitution, and, in addition, the Constitution pursues succinctness and implication as the basic law of the nation. Therefore, there is room for recognizing certain matters though not written out in the formal code of the Constitution as unwritten constitution or customary constitutional law. Especially, there may be certain circumstances where no express provision is necessarily included in the text for those matters that are self-evident or presupposed or that are general constitutional principles at the time of the establishment of the written constitution."

A lot of constitutional and legal arguments of each statement of this extract may be given rise to. But since the focus of this section is on the consistency of the reasoning of the majority of the KCC, it would be enough to mention just one major flaw here. The KCC's assumption of customary constitution as a priori source of law needs further justifications to give it the same status as the written constitution. The majority

moved upon to undertake this take as follows: "[As] the citizens of the Republic of Korea are the holders of the sovereignty of the Republic of Korea and of the highest authority to establish the constitution, the citizens not only participate in the establishment and the revision of the written constitution, but also may directly form as necessary constitutional law matters that are not included in the text of the written constitution, in the form of customs. Then, the customary constitutional law should be deemed as the expression of intent of the constitutional determination of the citizens as the holders of sovereignty, like the written constitution, and should also be deemed to have the same force as that of the written constitution. ⋯ The principle of sovereignty or democracy requires the participation of the citizens in the establishment of the positive law, written or customary, in the entirety, and the customary constitutional law established by the people binds the legislator and has the force as constitutional law." Finally, the majority of the KCC reached the conclusion that a priori recognition of customary constitution can be justified by the people's sovereignty that also provides a justification for customary constitution's status as the same effect as the written constitution.

Irony of customary constitution

The majority of the KCC needs further twists to carry out completely the self-imposed task to strike down the Act at issue because the recognition of customary constitution itself is not enough to find the violation of an individual's constitutional rights, a legal requirement in the constitutional complaints procedure. For that purpose, further reasoning on two counts are required. First, the question why the fact that Seoul has been the capital should become the norm with which the legislator is

supposed to comply must be answered. Second, even if the answer to the first question were to be answered properly, there should be another requirement to meet, i.e. a violation of an individual's constitutional rights to make the Act at issue invalidated.

The majority of the KCC provided the answer to the first question as follows: "that Seoul is the capital of our nation has been a given normative fact concerning the nation for over six-hundred(600) years since the Chosun period as the meaning of the word Seoul also indicates, therefore it can be estimated as a continuing convention practice traditionally formed in the nation(continuance); such practice has never been interrupted in the continuum as it has existed in actuality for a long period of time without change(maintainability); the fact that Seoul is the capital has a clear meaning to the extent that none among the citizens of our nation would hold a different opinion over it individually(unequivocalness); and, further, such practice is a basic element of the nation in whose effectiveness and enforceability the citizens believe, by obtaining the approval and the wide consensus of the citizens through firm establishment over a long period of time(national consensus). Therefore, that Seoul is the capital is part of the unwritten constitution established in the form of customary constitutional law, as it is a customary constitutional law that has traditionally existed since prior to our written constitution, and is a norm that is self-evident and presupposed in the constitution notwithstanding the absence of an express constitutional provision indicating this."

I am still unsatisfactory with the majority's reasoning that the fact that Seoul has been regarded as the capital in Korean history is a "dormancy of its normative nature behind the factual preposition". There is plenty of counter-evidence from various perspectives challenging its assertion that

the factual proposition met even the elements of customary constitutional law. However, the crucial argument showing the inconsistency of the majority is the majority's final step to meet the formal requirement of the constitutional complaints, i.e. the recognition of the violation of citizen's right to vote on referendum. The majority moved on to the argument that even customary constitution as a unwritten constitution can be revised only by way of the constitutional revision process of written constitution. It said that "[In] the case of our constitutional law, Articles 128 through 130 under Chapter 10 of the Constitution set forth a strict procedure for the constitutional revision that is different from the revision procedure for general statutes, and such constitutional revision procedures designates its object merely as the 'constitution'. Therefore, as long as customary constitutional law constitutes part of the constitution, it is within the meaning of the constitution that is the object of the constitutional revision procedure referred to here. Then, in order to eliminate the customary constitutional law that the capital of our nation is Seoul, constitutional revision pursuant to the procedure set forth by the Constitution is mandatory."

The logical consequence of this preposition is that even though the people may have the right to choose in which form they constitute the constitution, written or unwritten, as far as revision of the constitution is concerned, there is no right to choose the procedure as they wish but the duty to comply the revision procedure of written constitution. Upon a quick look, the reasoning on this part seems to be very logical. However, if the true nature of the revision procedure in the Constitution is recognized, the majority's hindsight can be unveiled. Constitutional revision clauses require both the concurrent votes of the two thirds or more of total members of the National Assembly and the determination confirmed

by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly. Therefore, the natural consequence of the majority opinion is that only one thirds of the total number of the National Assembly can block the transfer of the capital. Then, we can realize how feeble the intention of the majority to find justification for customary constitution in the people's sovereignty is. Why are the people themselves not entitled to change, if any, a customary constitution, and therefore they should be subject to the will of minority representatives, instead of majority, while the formation of a customary constitution can be done only by the will of the people?

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In the above, I tried to show the logical inconsistency of the majority opinion in the Relocation of the Capital Act 2004 case. If my argument in this regard is persuasive, a concurrent assumption would follow: the majority of the KCC in this case used intentionally the theory of customary constitution in order to fulfill political objectives to set up a permanent obstacle to the change of the capital. If so, it is nothing but a naked usurpation of legislative power on political matters in the form of constitutional review. To conclude, the proper answers to the major issues with two different but intertwined aspects shown in the above should be this. As far as judicial aspect is concerned, the answer should be: A customary constitution, if any, is not a proper form of law to strike down statute in a state with a written constitution because the form of written law is the token of peoples' will to give a special effect which cannot be given to a unwritten form of law. This will be followed a preposition

with constitutional perspective: It should be the National Assembly rather than the Constitutional Court that is better entitled to fill the gap caused by constitutional abeyance especially on purely political matters unless the latter is entitled to do by an explicit provision of the Constitution because the former is a political institution responsible for its decision directly to the people while the latter is not. Fortunately, the future of the constitutional development of Korea would not be too gloomy as it was shown in this case at issue because there was one persuasive minority opinion challenging the majority opinion's recognition of customary constitution and such a minority opinion was endorsed by two more justices in the subsequent case in which the Special Act on the Construction of the Administrative-Hub City replacing the New Administrative Capital was at stake.

Chapter 8 Conclusion : Challenges and Responses

Since the Roh Moo Hyun Administration, when constitutional strife has become routine in normal politics, the movement for the amendment or revision of the present Constitution has recurred. This movement, initiated not only by politicians but also civil society across the political spectrum, pointed out a number of problems arguably inherent in the Constitution of 1987.

First, it was made too hasty under a strong influence of major political forces led by Kim Young Sam, Kim Dae Jung, Roh Tae Woo, and Kim Jong Pil to reflect Korean people's genuine will and ideal of democracy and the rule of law, although some important progresses, such as people's direct presidential elections and the introduction of the Constitutional Court system, were accomplished through it.

Second, the form of government which the present Constitution envisaged to establish is a "balanced" system in which systematic cooperation between the National Assembly and the President is a pre-condition of well-functioning of the system, by giving them a room for intervention in each other's power. However, this system is very unstable because, according to political situation changes, it can result in either imperial presidency or a divided government leading to ungovernable presidency. The President's lack of accountability originated from one-term limitation is another source of criticism.

Third, the ROK Constitution needs to reflect a changed atmosphere within and outside the Korean Peninsula. The confrontation between South and North Koreas has caused a couple of fundamental constitutional issues repeatedly. Globalization and the creation of economic blocs

have transformed the relationship between domestic constitutional issues and international issues into a highly intermingled complex system, so that the independence of a sovereign nation has become vulnerable at least in the level of national economy. In response, the status of the people in this changing environment needs to be readjusted to the new development.

In the course of public movements, the Final Report of the Advisory Commission on Constitutional Amendment for the Speaker of the National Assembly was published on August 2008. There were three points in this Report. First, the Bill of Rights should be reorganized in a manner that is supplemented by new freedoms and rights, such as the right to life and security and the basic right to access to information. Second, the constitutional structure of the government should be reformed in the direction of lessening President's power, for example, by changing the form of government from the current five-single term presidency to the semi-presidential or premier-presidential system. Third, the judicial system should be democratized and rationalized by adopting new institutions and changing the formation of the Judiciary, including the Constitutional Court. Proposed judicial reforms include the repeal of recommendation power of the Chief Justice of the Supreme Court for Associate Justices when there is vacancy, the introduction of abstract norm control, the transfer of jurisdiction of election suits from the ordinary courts to the Constitutional Court.

Despite the plausibility of the arguments for constitutional reform, however, it is also true that some problems with current constitutional politics can be solved, not only by way of constitutional amendment, but also legislative reform or changes in political culture which play a substantial

role in the working of constitutional arrangements. Given the above considerations, the premise to the specific arguments for constitutional amendment may be such that they are envisaged to respond to the cause of problems imbedded in the target constitutional institutions and the alternatives to the present system are more effective than other means like legislative solutions. Without such practical implication, arguments for constitutional amendment cannot easily attract public support. From this point of view, what should be given more attention would be how to enhance independence and effectiveness of non-political branches such as the Judiciary, the Constitutional Court, the Election Commission, and the Board of Audit and Inspection rather than the relationship between the Legislature and the Executive partly because the latter factor requires more constitutional flexibility than the former.

Furthermore, irrespective of the persuasiveness of constitutional reform, it is the will of the sovereign people that decides whether or not a new Constitution is necessary. If they prefer practical agenda like economic and social policies to the institutional or constitutional change, this choice should be respected in the real politics.

Appendix

Ⅰ. CONSTITUTION OF THE REPUBLIC OF KOREA

Ⅱ. How to Find the Korean Constitution: Text, Legislation, Cases and Secondary Sources

CONSTITUTION OF THE REPUBLIC OF KOREA[196]

[Enforcement Date 25. Feb, 1988.] [No.10, 29. Oct, 1987.,]

PREAMBLE

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and To destroy all social vices and injustice, and To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and To help each person discharge those duties and responsibilities concomitant to freedoms and rights, and To elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our posterity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of

196 This English version of the Korean Constitution is translated by the Korea Legislation Research Institute.

July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently. Oct. 29, 1987

CHAPTER Ⅰ GENERAL PROVISIONS

Article 1 (1) The Republic of Korea shall be a democratic republic.
(2) The sovereignty of the Republic of Korea shall reside in the people and all state authority shall emanate from the people.

Article 2 (1) Nationality of the people of the Republic of Korea shall be prescribed by Act.
(2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.

Article 3
The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4
The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

Article 5 (1) The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.
(2) The Armed Forces shall be charged with the sacred mission of national security and defense of the land and their political neutrality shall be maintained.
Article 6 (1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international

law shall have the same effect as the domestic laws of the Republic of Korea.
(2) The status of aliens shall be guaranteed as prescribed by international law and treaties.

Article 7 (1) All public officials shall be servants of the people and shall be responsible to the people.
(2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.

Article 8 (1) The establishment of political parties shall be free and the plural party system shall be guaranteed.
(2) Political parties shall be democratic in their objectives, organization, and activities and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.
(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act.
(4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

Article 9

The State shall strive to sustain and develop its cultural heritage

and to enhance its national culture.

CHAPTER Ⅱ RIGHTS AND DUTIES OF CITIZENS

Article 10

All citizens shall be assured of their human worth and dignity and shall have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Article 11 (1) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status. (2) No privileged caste shall be recognized or ever established in any form. (3) The awarding of decorations or distinctions of honor in any form shall be effective only for recipients, and no privileges shall ensue therefrom.

Article 12 (1) All citizens shall enjoy personal liberty. No person shall be arrested, detained, searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures.

(2) No citizen shall be tortured or be compelled to testify against himself in criminal cases. (3) Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search: Provided, That in a case where a criminal suspect is an apprehended flagrante delicto, or where there is danger that a person suspected

of committing a crime punishable by imprisonment of three years or more may escape or destroy evidence, investigative authorities may request an ex post facto warrant.

(4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.

(5) No person shall be arrested or detained without being informed of the reason therefor and of his right to assistance of counsel. The family, etc., as designated by Act, of a person arrested or detained shall be notified without delay of the reason for and the time and place of the arrest or detention.

(6) Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention.

(7) In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.

Article 13 (1) No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall he be placed in double jeopardy.

(2) No restriction shall be imposed upon the political rights of

any citizen, nor shall any person be deprived of property rights by means of retroactive legislation. (3) No citizen shall suffer unfavorable treatment on account of an act not of his own doing but committed by a relative.

Article 14 All citizens shall enjoy freedom of residence and the right to move at will.

Article 15 All citizens shall enjoy freedom of occupation.

Article 16 All citizens shall be free from intrusion into their place of residence. In case of search or seizure in a residence, a warrant issued by a judge upon request of a prosecutor shall be presented.

Article 17 The privacy of no citizen shall be infringed.

Article 18 The privacy of correspondence of no citizen shall be infringed.

Article 19 All citizens shall enjoy freedom of conscience.

Article 20 (1) All citizens shall enjoy freedom of religion.
(2) No state religion shall be recognized, and religion and state shall be separated.

Article 21 (1) All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association.
(2) Licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognized.
(3) The standards of news service and broadcast facilities and

matters necessary to ensure the functions of newspapers shall be determined by Act. (4) Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.

Article 22 (1) All citizens shall enjoy freedom of learning and the arts.
(2) The rights of authors, inventors, scientists, engineers and artists shall be protected by Act.

Article 23 (1) The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act.
(2) The exercise of property rights shall conform to the public welfare.
(3) Expropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by Act: Provided, That in such a case, just compensation shall be paid.

Article 24 All citizens shall have the right to vote under the conditions as prescribed by Act.

Article 25 All citizens shall have the right to hold public office under the conditions as prescribed by Act.

Article 26 (1) All citizens shall have the right to petition in

writing to any governmental agency under the conditions as prescribed by Act. (2) The State shall be obligated to examine all such petitions.

Article 27 (1) All citizens shall have the right to be tried in conformity with the Act by judges qualified under the Constitution and the Act.

(2) Citizens who are not on active military service or employees of the military forces shall not be tried by a court martial within the territory of the Republic of Korea, except in case of crimes as prescribed by Act involving important classified military information, sentinels, sentry posts, the supply of harmful food and beverages, prisoners of war and military articles and facilities and in the case of the proclamation of extraordinary martial law.

(3) All citizens shall have the right to a speedy trial. The accused shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary.

(4) The accused shall be presumed innocent until a judgment of guilt has been pronounced.

(5) A victim of a crime shall be entitled to make a statement during the proceedings of the trial of the case involved as under the conditions prescribed by Act.

Article 28 In a case where a criminal suspect or an accused person who has been placed under detention is not indicted as provided by Act or is acquitted by a court, he shall be entitled to claim just compensation from the State under the conditions as prescribed by Act.

Article 29 (1) In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by Act. In this case, the public official concerned shall not be immune from liabilities.

(2) In case a person on active military service or an employee of the military forces, a police official or others as prescribed by Act sustains damages in connection with the performance of official duties such as combat action, drill and so forth, he shall not be entitled to a claim against the State or public organization on the grounds of unlawful acts committed by public officials in the course of official duties, but shall be entitled only to compensations as prescribed by Act.

Article 30 Citizens who have suffered bodily injury or death due to criminal acts of others may receive aid from the State under the conditions as prescribed by Act.

Article 31 (1) All citizens shall have an equal right to receive an education corresponding to their abilities.

(2) All citizens who have children to support shall be responsible at least for their elementary education and other education as provided by Act.

(3) Compulsory education shall be free of charge.

(4) Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed under the conditions as prescribed by Act.

(5) The State shall promote lifelong education.

(6) Fundamental matters pertaining to the educational system, including in-school and lifelong education, administration, finance, and the status of teachers shall be determined by Act.

Article 32 (1) All citizens shall have the right to work. The State shall endeavor to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act.

(2) All citizens shall have the duty to work. The State shall prescribe by Act the extent and conditions of the duty to work in conformity with democratic principles.

(3) Standards of working conditions shall be determined by Act in such a way as to guarantee human dignity.

(4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions.

(5) Special protection shall be accorded to working children.

(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

Article 33 (1) To enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action.

(2) Only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective action.

(3) The right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by Act.

Article 34 (1) All citizens shall be entitled to a life worthy of human beings.

(2) The State shall have the duty to endeavor to promote social security and welfare.

(3) The State shall endeavor to promote the welfare and rights of women.

(4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.

(5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.

(6) The State shall endeavor to prevent disasters and to protect citizens from harm therefrom.

Article 35 (1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

(2) The substance of the environmental right shall be determined by Act.

(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

Article 36 (1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

(2) The State shall endeavor to protect mothers.

(3) The health of all citizens shall be protected by the State.

Article 37 (1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.

(2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Article 38 All citizens shall have the duty to pay taxes under the conditions as prescribed by Act.

Article 39 (1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.

(2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.

CHAPTER III THE NATIONAL ASSEMBLY

Article 40 The legislative power shall be vested in the National Assembly.

Article 41 (1) The National Assembly shall be composed of

members elected by universal, equal, direct and secret ballot by the citizens.

(2) The number of members of the National Assembly shall be determined by Act, but the number shall not be less than 200.

(3) The constituencies of members of the National Assembly, proportional representation and other matters pertaining to National Assembly elections shall be determined by Act.

Article 42 The term of office of members of the National Assembly shall be four years.

Article 43 Members of the National Assembly shall not concurrently hold any other office prescribed by Act.

Article 44 (1) During the sessions of the National Assembly, no member of the National Assembly shall be arrested or detained without the consent of the National Assembly except in case of flagrante delicto.

(2) In case of apprehension or detention of a member of the National Assembly prior to the opening of a session, such member shall be released during the session upon the request of the National Assembly, except in case of flagrante delicto .

Article 45 No member of the National Assembly shall be held responsible outside the National Assembly for opinions officially expressed or votes cast in the Assembly.

Article 46 (1) Members of the National Assembly shall have the duty to maintain high standards of integrity.

(2) Members of the National Assembly shall give preference to

national interests and shall perform their duties in accordance with conscience.

(3) Members of the National Assembly shall not acquire, through abuse of their positions, rights and interests in property or positions, or assist other persons to acquire the same, by means of contracts with or dispositions by the State, public organizations or industries.

Article 47 (1) A regular session of the National Assembly shall be convened once every year under the conditions as prescribed by Act, and extraordinary sessions of the National Assembly shall be convened upon the request of the President or one fourth or more of the total members.

(2) The period of regular sessions shall not exceed a hundred days, and that of extraordinary sessions, thirty days.

(3) If the President requests the convening of an extraordinary session, the period of the session and the reasons for the request shall be clearly specified.

Article 48 The National Assembly shall elect one Speaker and two Vice-Speakers.

Article 49 Except as otherwise provided for in the Constitution or in Act, the attendance of a majority of the total members, and the concurrent vote of a majority of the members present, shall be necessary for decisions of the National Assembly. In case of a tie vote, the matter shall be regarded as rejected.

Article 50 (1) Sessions of the National Assembly shall be open

to the public: Provided, That when it is decided so by a majority of the members present, or when the Speaker deems it necessary to do so for the sake of national security, they may be closed to the public.
(2) The public disclosure of the proceedings of sessions which were not open to the public shall be determined by Act.

Article 51 Bills and other matters submitted to the National Assembly for deliberation shall not be abandoned on the ground that they were not acted upon during the session in which they were introduced, except in a case where the term of the members of the National Assembly has expired.

Article 52 Bills may be introduced by members of the National Assembly or by the Executive.

Article 53 (1) Each bill passed by the National Assembly shall be sent to the Executive, and the President shall promulgate it within fifteen days.
(2) In case of objection to the bill, the President may, within the period referred to in paragraph (1), return it to the National Assembly with written explanation of his objection, and request it be reconsidered. The President may do the same during adjournment of the National Assembly.
(3) The President shall not request the National Assembly to reconsider the bill in part, or with proposed amendments.
(4) In case there is a request for reconsideration of a bill, the National Assembly shall reconsider it, and if the National

Assembly repasses the bill in the original form with the attendance of more than one half of the total members, and with a concurrent vote of two thirds or more of the members present, it shall become Act.

(5) If the President does not promulgate the bill, or does not request the National Assembly to reconsider it within the period referred to in paragraph (1), it shall become Act.

(6) The President shall promulgate without delay the Act as finalized under paragraphs (4) and (5). If the President does not promulgate an Act within five days after it has become Act under paragraph (5), or after it has been returned to the Executive under paragraph (4), the Speaker shall promulgate it.

(7) Except as provided otherwise, an Act shall take effect twenty days after the date of promulgation.

Article 54 (1) The National Assembly shall deliberate and decide upon the national budget bill.

(2) The Executive shall formulate the budget bill for each fiscal year and submit it to the National Assembly within ninety days before the beginning of a fiscal year. The National Assembly shall decide upon it within thirty days before the beginning of the fiscal year. (3) If the budget bill is not passed by the beginning of the fiscal year, the Executive may, in conformity with the budget of the previous fiscal year, disburse funds for the following purposes until the budget bill is passed by the National Assembly: 1. The maintenance and operation of agencies and facilities established by the Constitution or Act; 2. Execution of

the obligatory expenditures as prescribed by Act; and 3. Continuation of projects previously approved in the budget.

Article 55 (1) In a case where it is necessary to make continuing disbursements for a period longer than one fiscal year, the Executive shall obtain the approval of the National Assembly for a specified period of time.
(2) A reserve fund shall be approved by the National Assembly in total. The disbursement of the reserve fund shall be approved during the next session of the National Assembly.

Article 56 When it is necessary to amend the budget, the Executive may formulate a supplementary revised budget bill and submit it to the National Assembly.

Article 57 The National Assembly shall, without the consent of the Executive, neither increase the sum of any item of expenditure nor create any new items of expenditure in the budget submitted by the Executive.

Article 58 When the Executive plans to issue national bonds or to conclude contracts which may incur financial obligations on the State outside the budget, it shall have the prior concurrence of the National Assembly.

Article 59 Types and rates of taxes shall be determined by Act.

Article 60 (1) The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important

international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.

(2) The National Assembly shall also have the right to consent to the declaration of war, the dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.

Article 61 (1) The National Assembly may inspect affairs of state or investigate specific matters of state affairs, and may demand the production of documents directly related thereto, the appearance of a witness in person and the furnishing of testimony or statements of opinion.

(2) The procedures and other necessary matters concerning the inspection and investigation of state administration shall be determined by Act.

Article 62 (1) The Prime Minister, members of the State Council or government delegates may attend meetings of the National Assembly or its committees and report on the state administration or deliver opinions and answer questions.

(2) When requested by the National Assembly or its committees, the Prime Minister, members of the State Council or government delegates shall attend any meeting of the National Assembly and answer questions. If the Prime Minister or State Council members are requested to attend, the Prime Minister or State Council

members may have State Council members or government delegates attend any meeting of the National Assembly and answer questions.

Article 63 (1) The National Assembly may pass a recommendation for the removal of the Prime Minister or a State Council member from office.
(2) A recommendation for removal as referred to in paragraph (1) may be introduced by one third or more of the total members of the National Assembly, and shall be passed with the concurrent vote of a majority of the total members of the National Assembly.

Article 64 (1) The National Assembly may establish the rules of its proceedings and internal regulations: Provided, That they are not in conflict with Act.
(2) The National Assembly may review the qualifications of its members and may take disciplinary actions against its members.
(3) The concurrent vote of two thirds or more of the total members of the National Assembly shall be required for the expulsion of any member.
(4) No action shall be brought to court with regard to decisions taken under paragraphs (2) and (3).

Article 65 (1) In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board

of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment. (2) A motion for impeachment prescribed in paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: Provided, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly. (3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated. (4) A decision on impeachment shall not extend further than removal from public office: Provided, That it shall not exempt the person impeached from civil or criminal liability.

CHAPTER IV THE EXECUTIVE

SECTION 1 The President

Article 66 (1) The President shall be the Head of State and represent the State vis-a-vis foreign states.

(2) The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.

(3) The President shall have the duty to pursue sincerely the peaceful unification of the homeland.

(4) Executive power shall be vested in the Executive Branch headed by the President.

Article 67 (1) The President shall be elected by universal, equal, direct and secret ballot by the people.
(2) In case two or more persons receive the same largest number of votes in the election as referred to in paragraph (1), the person who receives the largest number of votes in an open session of the National Assembly attended by a majority of the total members of the National Assembly shall be elected.
(3) If and when there is only one presidential candidate, he shall not be elected President unless he receives at least one third of the total eligible votes.
(4) Citizens who are eligible for election to the National Assembly, and who have reached the age of forty years or more on the date of the presidential election, shall be eligible to be elected to the presidency.
(5) Matters pertaining to presidential elections shall be determined by Act.

Article 68 (1) The successor to the incumbent President shall be elected seventy to forty days before his term expires.
(2) In case a vacancy occurs in the office of the President or the President-elect dies, or is disqualified by a court ruling or for any other reason, a successor shall be elected within sixty days.

Article 69 The President, at the time of his inauguration, shall take the following oath: "I do solemnly swear before the people

that I will faithfully execute the duties of the President by observing the Constitution, defending the State, pursuing the peaceful unification of the homeland, promoting the freedom and welfare of the people and endeavoring to develop national culture."

Article 70 The term of office of the President shall be five years, and the President shall not be reelected.

Article 71 If the office of the presidency is vacant or the President is unable to perform his duties for any reason, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for him.

Article 72 The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.

Article 73 The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.

Article 74 (1) The President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act.
(2) The organization and formation of the Armed Forces shall be determined by Act.

Article 75 The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically

defined and also matters necessary to enforce Acts.

Article 76 (1) In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.
(2) In case of major hostilities affecting national security, the President may issue orders having the effect of Act, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.
(3) In case actions are taken or orders are issued under paragraphs (1) and (2), the President shall promptly notify it to the National Assembly and obtain its approval.
(4) In case no approval is obtained, the actions or orders shall lose effect forthwith. In such case, the Acts which were amended or abolished by the orders in question shall automatically regain their original effect at the moment the orders fail to obtain approval.
(5) The President shall, without delay, put on public notice developments under paragraphs (3) and (4).

Article 77 (1) When it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law un-

der the conditions as prescribed by Act.

(2) Martial law shall be of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act.

(4) When the President has proclaimed martial law, he shall notify it to the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members of the National Assembly, the President shall comply.

Article 78 The President shall appoint and dismiss public officials under the conditions as prescribed by the Constitution and Act.

Article 79 (1) The President may grant amnesty, commutation and restoration of rights under the conditions as prescribed by Act.

(2) The President shall receive the consent of the National Assembly in granting a general amnesty.

(3) Matters pertaining to amnesty, commutation and restoration of rights shall be determined by Act.

Article 80 The President shall award decorations and other honors under the conditions as prescribed by Act.

Article 81 The President may attend and address the National Assembly or express his views by written message.

Article 82 The acts of the President under law shall be executed in writing, and such documents shall be countersigned by the Prime Minister and the members of the State Council concerned. The same shall apply to military affairs.

Article 83 The President shall not concurrently hold the office of Prime Minister, a member of the State Council, the head of any Executive Ministry, nor other public or private posts as prescribed by Act.

Article 84 The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.

Article 85 Matters pertaining to the status and courteous treatment of former Presidents shall be determined by Act.

SECTION 2 The Executive Branch

Sub-Section 1 The Prime Minister and Members of the State Council

Article 86 (1) The Prime Minister shall be appointed by the President with the consent of the National Assembly.
(2) The Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President.
(3) No member of the military shall be appointed Prime Minister unless he is retired from active duty.

Article 87 (1) The members of the State Council shall be appointed by the President on the recommendation of the Prime Minister.

(2) The members of the State Council shall assist the President in the conduct of State affairs and, as constituents of the State Council, shall deliberate on State affairs.

(3) The Prime Minister may recommend to the President the removal of a member of the State Council from office.

(4) No member of the military shall be appointed a member of the State Council unless he is retired from active duty.

Sub-Section 2 The State Council

Article 88 (1) The State Council shall deliberate on important policies that fall within the power of the Executive.

(2) The State Council shall be composed of the President, the Prime Minister, and other members whose number shall be no more than thirty and no less than fifteen.

(3) The President shall be the chairman of the State Council, and the Prime Minister shall be the Vice- Chairman.

Article 89 The following matters shall be referred to the State Council for deliberation: 1. Basic plans for state affairs, and general policies of the Executive; 2. Declaration of war, conclusion of peace and other important matters pertaining to foreign policy; 3. Draft amendments to the Constitution, proposals for national referendums, proposed treaties, legislative bills, and proposed presidential decrees; 4. Budgets, settlement of accounts, basic

plans for disposal of state properties, contracts incurring financial obligation on the State, and other important financial matters; 5. Emergency orders and emergency financial and economic actions or orders by the President, and declaration and termination of martial law; 6. Important military affairs; 7. Requests for convening an extraordinary session of the National Assembly; 8. Awarding of honors; 9. Granting of amnesty, commutation and restoration of rights; 10. Demarcation of jurisdiction between Executive Ministries; 11. Basic plans concerning delegation or allocation of powers within the Executive; 12. Evaluation and analysis of the administration of State affairs; 13. Formulation and coordination of important policies of each Executive Ministry; 14. Action for the dissolution of a political party; 15. Examination of petitions pertaining to executive policies submitted or referred to the Executive; 16. Appointment of the Prosecutor General, the Chairman of the Joint Chiefs of Staff, the Chief of Staff of each armed service, the presidents of national universities, ambassadors, and such other public officials and managers of important State-run enterprises as designated by Act; and 17. Other matters presented by the President, the Prime Minister or a member of the State Council.

Article 90 (1) An Advisory Council of Elder Statesmen, composed of elder statesmen, may be established to advise the President on important affairs of State.

(2) The immediate former President shall become the Chairman of the Advisory Council of Elder Statesmen: Provided, That if

there is no immediate former President, the President shall appoint the Chairman.

(3) The organization, function and other necessary matters pertaining to the Advisory Council of Elder Statesmen shall be determined by Act.

Article 91 (1) A National Security Council shall be established to advise the President on the formulation of foreign, military and domestic policies related to national security prior to their deliberation by the State Council.

(2) The meetings of the National Security Council shall be presided over by the President.

(3) The organization, function and other necessary matters pertaining to the National Security Council shall be determined by Act.

Article 92 (1) An Advisory Council on Democratic and Peaceful Unification may be established to advise the President on the formulation of peaceful unification policy.

(2) The organization, function and other necessary matters pertaining to the Advisory Council on Democratic and Peaceful Unification shall be determined by Act.

Article 93 (1) A National Economic Advisory Council may be established to advise the President on the formulation of important policies for developing the national economy.

(2) The organization, function and other necessary matters pertaining to the National Economic Advisory Council shall be determined by Act.

Sub-Section 3 The Executive Ministries

Article 94 Heads of Executive Ministries shall be appointed by the President from among members of the State Council on the recommendation of the Prime Minister.

Article 95 The Prime Minister or the head of each Executive Ministry may, under the powers delegated by Act or Presidential Decree, or ex officio, issue ordinances of the Prime Minister or the Executive Ministry concerning matters that are within their jurisdiction.

Article 96 The establishment, organization and function of each Executive Ministry shall be determined by Act.

Sub-Section 4 The Board of Audit and Inspection

Article 97 The Board of Audit and Inspection shall be established under the direct jurisdiction of the President to inspect and examine the settlement of the revenues and expenditures of the State, the accounts of the State and other organizations specified by Act and the job performances of the executive agencies and public officials.

Article 98 (1) The Board of Audit and Inspection shall be composed of no less than five and no more than eleven members, including the Chairman.
(2) The Chairman of the Board shall be appointed by the President with the consent of the National Assembly. The term of office

of the Chairman shall be four years, and he may be reappointed only once.

(3) The members of the Board shall be appointed by the President on the recommendation of the Chairman. The term of office of the members shall be four years, and they may be reappointed only once.

Article 99 The Board of Audit and Inspection shall inspect the closing of accounts of revenues and expenditures each year, and report the results to the President and the National Assembly in the following year.

Article 100 The organization and function of the Board of Audit and Inspection, the qualifications of its members, the range of the public officials subject to inspection and other necessary matters shall be determined by Act.

CHAPTER V THE COURTS

Article 101 (1) Judicial power shall be vested in courts composed of judges.

(2) The courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels.

(3) Qualifications for judges shall be determined by Act.

Article 102 (1) Departments may be established in the Supreme Court.

(2) There shall be Supreme Court Justices at the Supreme Court:

Provided, That judges other than Supreme Court Justices may be assigned to the Supreme Court under the conditions as prescribed by Act.

(3) The organization of the Supreme Court and lower courts shall be determined by Act.

Article 103 Judges shall rule independently according to their conscience and in conformity with the Constitution and laws.

Article 104 (1) The Chief Justice of the Supreme Court shall be appointed by the President with the consent of the National Assembly.

(2) The Supreme Court Justices shall be appointed by the President on the recommendation of the Chief Justice and with the consent of the National Assembly.

(3) Judges other than the Chief Justice and the Supreme Court Justices shall be appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices.

Article 105 (1) The term of office of the Chief Justice shall be six years and he shall not be reappointed.

(2) The term of office of the Justices of the Supreme Court shall be six years and they may be reappointed as prescribed by Act.

(3) The term of office of judges other than the Chief Justice and Justices of the Supreme Court shall be ten years, and they may be reappointed under the conditions as prescribed by Act.

(4) The retirement age of judges shall be determined by Act.

Article 106 (1) No judge shall be removed from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action.
(2) In the event a judge is unable to discharge his official duties because of serious mental or physical impairment, he may be retired from office under the conditions as prescribed by Act.

Article 107 (1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.
(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.
(3) Administrative appeals may be conducted as a procedure prior to a judicial trial. The procedure of administrative appeals shall be determined by Act and shall be in conformity with the principles of judicial procedures.

Article 108 The Supreme Court may establish, within the scope of Act, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court.

Article 109 Trials and decisions of the courts shall be open to the public: Provided, That when there is a danger that such trials may undermine the national security or disturb public safety and

order, or be harmful to public morals, trials may be closed to the public by court decision.

Article 110 (1) Courts-martial may be established as special courts to exercise jurisdiction over military trials.
(2) The Supreme Court shall have the final appellate jurisdiction over courts-martial.
(3) The organization and authority of courts-martial, and the qualifications of their judges shall be determined by Act.
(4) Military trials under an extraordinary martial law may not be appealed in case of crimes of soldiers and employees of the military; military espionage; and crimes as defined by Act in regard to sentinels, sentry posts, supply of harmful foods and beverages, and prisoners of war, except in the case of a death sentence.

CHAPTER VI THE CONSTITUTIONAL COURT

Article 111 (1) The Constitutional Court shall have jurisdiction over the following matters: 1. The constitutionality of a law upon the request of the courts; 2. Impeachment; 3. Dissolution of a political party; 4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and 5. Constitutional complaint as prescribed by Act.
(2) The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President.

(3) Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court.
(4) The president of the Constitutional Court shall be appointed by the President from among the Justices with the consent of the National Assembly.

Article 112 (1) The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act.
(2) The Justices of the Constitutional Court shall not join any political party, nor shall they participate in political activities.
(3) No Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

Article 113 (1) When the Constitutional Court makes a decision of the constitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required.
(2) The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act.
(3) The organization, function and other necessary matters of the Constitutional Court shall be determined by Act.

CHAPTER VII ELECTION MANAGEMENT

Article 114 (1) Election commissions shall be established for the purpose of fair management of elections and national referenda, and dealing with administrative affairs concerning political parties.
(2) The National Election Commission shall be composed of three members appointed by the President, three members selected by the National Assembly, and three members designated by the Chief Justice of the Supreme Court. The Chairman of the Commission shall be elected from among the members.
(3) The term of office of the members of the Commission shall be six years.
(4) The members of the Commission shall not join political parties, nor shall they participate in political activities.
(5) No member of the Commission shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.
(6) The National Election Commission may establish, within the limit of Acts and decrees, regulations relating to the management of elections, national referenda, and administrative affairs concerning political parties and may also establish regulations relating to internal discipline that are compatible with Act.
(7) The organization, function and other necessary matters of the election commissions at each level shall be determined by Act.

Article 115 (1) Election commissions at each level may issue necessary instructions to administrative agencies concerned with

respect to administrative affairs pertaining to elections and national referenda such as the preparation of the pollbooks.
(2) Administrative agencies concerned, upon receipt of such instructions, shall comply.

Article 116 (1) Election campaigns shall be conducted under the management of the election commissions at each level within the limit set by Act. Equal opportunity shall be guaranteed.
(2) Except as otherwise prescribed by Act, expenditures for elections shall not be imposed on political parties or candidates.

CHAPTER VIII LOCAL AUTONOMY

Article 117 (1) Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statutes.
(2) The types of local governments shall be determined by Act.

Article 118 (1) A local government shall have a council.
(2) The organization and powers of local councils, and the election of members; election procedures for heads of local governments; and other matters pertaining to the organization and operation of local governments shall be determined by Act.

CHAPTER IX THE ECONOMY

Article 119 (1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.

(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

Article 120 (1) Licenses to exploit, develop or utilize minerals and all other important underground resources, marine resources, water power, and natural powers available for economic use may be granted for a period of time under the conditions as prescribed by Act.
(2) The land and natural resources shall be protected by the State, and the State shall establish a plan necessary for their balanced development and utilization.

Article 121 (1) The State shall endeavor to realize the land-to-the-tillers principle with respect to agricultural land. Tenant farming shall be prohibited.
(2) The leasing of agricultural land and the consignment management of agricultural land to increase agricultural productivity and to ensure the rational utilization of agricultural land or due to unavoidable circumstances, shall be recognized under the conditions as prescribed by Act.

Article 122 The State may impose, under the conditions as prescribed by Act, restrictions or obligations necessary for the efficient and balanced utilization, development and preservation of

the land of the nation that is the basis for the productive activities and daily lives of all citizens.

Article 123 (1) The State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries.
(2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.
(3) The State shall protect and foster small and medium enterprises.
(4) In order to protect the interests of farmers and fishermen, the State shall endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems.
(5) The State shall foster organizations founded on the spirit of self-help among farmers, fishermen and businessmen engaged in small and medium industry and shall guarantee their independent activities and development.

Article 124 The State shall guarantee the consumer protection movement intended to encourage sound consumption activities and improvement in the quality of products under the conditions as prescribed by Act.

Article 125 The State shall foster foreign trade, and may regulate and coordinate it.

Article 126 Private enterprises shall not be nationalized nor transferred to ownership by a local government, nor shall their man-

agement be controlled or administered by the State, except in cases as prescribed by Act to meet urgent necessities of national defense or the national economy.

Article 127 (1) The State shall strive to develop the national economy by developing science and technology, information and human resources and encouraging innovation.
(2) The State shall establish a system of national standards.
(3) The President may establish advisory organizations necessary to achieve the purpose referred to in paragraph (1).

CHAPTER X AMENDMENTS TO THE CONSTITUTION

Article 128
(1) A proposal to amend the Constitution shall be introduced either by a majority of the total members of the National Assembly or by the President.
(2) Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the re-election of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution.

Article 129 Proposed amendments to the Constitution shall be put before the public by the President for twenty days or more.

Article 130 (1) The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the

concurrent vote of two thirds or more of the total members of the National Assembly.

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

(3) When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.

ADDENDA

Article 1 This Constitution shall enter into force on the twenty-fifth day of February, anno Domini Nineteen hundred and eighty-eight: Provided, That the enactment or amendment of Acts necessary to implement this Constitution, the elections of the President and the National Assembly under this Constitution and other preparations to implement this Constitution may be carried out prior to the entry into force of this Constitution.

Article 2 (1) The first presidential election under this Constitution shall be held not later than forty days before this Constitution enters into force.

(2) The term of office of the first President under this Constitution shall commence on the date of its enforcement.

Article 3 (1) The first elections of the National Assembly under this Constitution shall be held within six months from the promulgation of this Constitution. The term of office of the members of the first National Assembly elected under this Constitution shall commence on the date of the first convening of the National Assembly under this Constitution.

(2) The term of office of the members of the National Assembly incumbent at the time this Constitution is promulgated shall terminate the day prior to the first convening of the National Assembly under paragraph (1).

Article 4 (1) Public officials and officers of enterprises appointed by the Government, who are in office at the time of the enforcement of this Constitution, shall be considered as having been appointed under this Constitution: Provided, That public officials whose election procedures or appointing authorities are changed under this Constitution, the Chief Justice of the Supreme Court and the Chairman of the Board of Audit and Inspection shall remain in office until such time as their successors are chosen under this Constitution, and their terms of office shall terminate the day before the installation of their successors.

(2) Judges attached to the Supreme Court who are not the Chief Justice or Justices of the Supreme Court and who are in office at the time of the enforcement of this Constitution shall be considered as having been appointed under this Constitution notwithstanding the proviso of paragraph (1).

(3) Those provisions of this Constitution which prescribe the terms of office of public officials or which restrict the number

of terms that public officials may serve, shall take effect upon the dates of the first elections or the first appointments of such public officials under this Constitution.

Article 5 Acts, decrees, ordinances and treaties in force at the time this Constitution enters into force, shall remain valid unless they are contrary to this Constitution.

Article 6 Those organizations existing at the time of the enforcement of this Constitution which have been performing the functions falling within the authority of new organizations to be created under this Constitution, shall continue to exist and perform such functions until such time as the new organizations are created under this Constitution.

How to Find the Korean Constitution: Text, Legislation, Cases and Secondary Sources

A. Texts

In some large libraries, you may find that the law books are placed in a separate law library. If not, the law books are collected together in one area or floor of the library. Also, most universities with a law department or a law school keep a separate law library for the benefit of its students and faculty members.

1. Korean Language Source

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• Online and Offline Publications of the Constitutional Court of Korea

B. Legislations

Constitution of the Republic of Korea

Numerous internet websites operated by government organizations provide full text of the Korean Constitution. The English version of the Constitution is available on the official website of the Supreme Court of Korea. The address is http://www.scourt.go.kr/ and a click on the word "English" at the top activates the English website. By clicking on the resources icon, you will be able to view and download the Korean Constitution, acts and regulations in their full text.

Korea Legislation Research Institution's website (http://elaw.klri.re.kr) also contains English translations of domestic statutes. A single click of the English icon on the upper right hand corner starts the English website. A

free membership is required to view all contents. It should be noted that the translations found on this website cannot be construed as having an official authority.

Other governmental websites such as the one run by the Office of Legislation are in the process of uploading all the statutes in English. However, most of these websites do not offer English websites yet.

1. Ministry of Government Legislation[197] Korea Law Service Center[198] ("법제처 국가법령정보센터")

(https://www.law.go.kr/lsSc.do?menuId=0&sub Menu=4&query=)

Korea Law Service Center is a national search tool for a variety of useful legal information.

It contains current laws of the Republic of Korea and historical materials, administrative rules, local laws and regulations, court decisions, case-interpreting statutes. It is designed to be representative of the Republic of Korea's legal information portal.

As of August 2013, Korea Law Service Center provides information service, including 106,681 Acts and subordinate statutes/treaties, 41,857 administrative rules, 354,375 local laws and regulations[199], 138,424 case laws (court decisions, decisions by Constitutional Court of Korea[200], interpretations of Acts and subordinate statutes, administrative trial decisions), 78,414 legal terminologies, and 1,042,093 appendices and forms (appendices and forms of Acts and subordinate statutes, administrative rules, local laws and regulations).

197 See http://www.moleg.go.kr/main.html.

198 See the Mobile application of the Ministry of Government Legislation, "Korea Law Service Center".

199 See http://www.elis.go.kr/.

200 See http://www.ccourt.go.kr/.

Korea Law Service Center provides (1) a three-column chart through which you can systematically compare by connecting the upper-level law and lower-level law by provision and (2) old law and new law comparative service in which the provisions of new law and old law can be compared to easily grasp the revisions to provisions.

- Korea Law Service Center supports the function of saving provisions of Acts and subordinate statutes, additional Acts and subordinate statues, appendices/forms, etc. in a format that you want without separate editing and printing. Furthermore, it provides additional service including Electronic Folder of Acts and Subordinate Statutes ("전자법령집")[201] in which anyone can easily produce and download in various file formats for use.

- Korea Law Service Center has Acts and Subordinate Statutes Information Common Use Service ("법령정보 공동활용 서비스") in which administrative and civil agencies at various levels can use all information regarding Acts and subordinate states provided by Korea Law Service Center.

- Korea Law Service Center provides Korean domain address service (e.g. http://www.law.go.kr/법령/건축법) such that you can type in short, easy-to-know Korean law name instead of long, complex URL.

- It provides recently amended laws, legislation pre-announcements, etc. via mobile services and social networking services like Facebook and Twitter so that you can search all law information anytime and anywhere.

[201] See http://www.law.go.kr/lbListR.do?menuId=4&subMenu=5.

- It provides ”OneClick, Practical Law”[202] : Ministry of Government Legislation provides “OneClick, Practical Law” website by re-organizing complex relationships among the laws into categories focusing on the real life and work for living of the citizens and make contents of difficult laws more digestible for the general citizens. The service is around areas closely related to the citizen’s real life including moving, parcel delivery, home care allowance support, inter-floor noise. It is planning to provide various storytelling format contents so that the general public can easily read and to offer easy-to-read, easy-to-find individually tailored service for new areas and existing areas. Also, it’s continuously expanding multi-language service in areas such as foreign worker employment, multi-cultural family, etc. where foreigners need help.

- Additional Service

Daily Life Laws[203] Research Service (“생활법령 탐구생활”) : Video service introducing law-related contents in a format of drama

E-book Service (“e-book 서비스”) : allows you to save and print Daily Life Laws contents for utilization

Solomon’s Trial (“솔로몬의 재판”) : offers quizzes related to events that are likely to happen in everyday life

202 See http://oneclick.law.go.kr/CSM/Main.laf?langCd=700101[in Korean] and http://oneclick.law. go.kr/CSM/Main.laf?langCd=700101[in English].

203 For “Daily Life Laws[SaengHwalBeopRyung]”, see http://www.docstoc.com/docs/141812278/ English-Life-Law-Info-Service-User-Guide.

c. How to Use

<메인페이지>

<Main Page>

- The blue taps below the main page logo of Ministry of Government Legislation Korea Law Service Center homepage is divided into integrated search ("통합검색"), law·treaty ("법령·조약"), administrative rule ("행정규칙"), local laws and regulations ("자치법규")[204], court

decision·interpretation decision (“판례·해석례”), Daily Life Laws (“생활법령”), law material collection (“법령자료집”), civil affairs office of law (“법령민원실”), and My Page. Through this, Korea Law Service Center supports search by law and related information. Right below, there is a space in which you can search by setting all categories.

- There is type search (by institution / by area) in the left and center position of the homepage and item space directly linked to recent law information and recent court decision in the middle of the homepage. Also, you can see representative service items including announcement, today’s law (“오늘의 법령”), legal terminology, electronic law book (“전자법령집”), etc.

- On the right of the homepage, there is a button linked to Facebook and Twitter. Also, you can use video materials related to Korea Law Service Center. In addition, it shows daily life laws information by popular area and new area. You can check relevant materials according to classified user demand, such as divorce, opening restaurant, retirement payment system, provisional attachment application, laid-off workers, people preparing for marriage, people under compulsory military duty, people who are party to an insurance contract, etc.

- On the bottom of the homepage, there is a direct go to button for smartphone service (“스마트폰서비스”), easy-to-find integrated search (“찾기쉬운 통합검색”), easy-to-know law information (“알기쉬운 법령정보”), Korean law address (“법령한글주소”), brochure-level law

[204] See http://www.elis.go.kr/.

print (“책자수준법령인쇄”), English version law service (“영문법령서비스”), Chinese version law service (“중문법령서비스”).

<Acts and Subordinate Statutes Search>

- If you go into law·treaty tab, Acts and subordinate statutes are listed in the descending order of promulgation date as a default. In the upper part of search results, there are tabs including promulgated Acts and subordinate statutes / implemented Acts and subordinate statutes / pending-to-be-implemented Acts and subordinate statutes / repealed Acts and subordinate statutes / Acts and subordinate statutes with limited period of effectiveness / provision with limited period of effectiveness / unconstitutional provision / etc.

- If you type in the law you want using keyword, law name, promulgation number, promulgation date, etc., the screen shows you a list according to the order of implementation date. You can click on the list to see the relevant text on the right. You can use a service of your preference including body text, reasons for legislation and amendment, history, 3-column comparison, old and new law comparison, system map of law (including court decision), etc. Also, you can use additional functions including legal terminology search, within-screen search, view with a new window, print, edit, save, etc.

2. Court of Korea Comprehensive Law Information (“대한민국 법원 법률종합정보”) (http://glaw.scourt.go.kr/wsjo/lawod/sjo120.do)

Introduction

- Comprehensive Law Information is a law information search system through which you can quickly and accurately search/check court de-

cisions, Acts and subordinate statutes, law references, Supreme Court rules/established rules/precedents, etc. It started service in 1998, undergone 1st and 2nd renovation in 2003 and 2007 respectively, and re-started renovation once again in July 2012 reflecting both changed service paradigm and developed information technology.

- Analyzing demands set forth by judges and court clerks based on their survey and its BPR/ISP analysis results, the recent renovation focused on providing easier search methods and new additional functions. In particular, Comprehensive Law Information greatly enhanced the user convenience by providing: (1) classification list from the search results such that you can easily select only the necessary information, (2) related materials network in which you can easily get to know related materials, and (3) keyword map service in which you can easily get to know related search terms.

Overview

① How to Access: Go to the website “http://glaw.scourt.go.kr/”.

② Integrated Search : Integrated Search is a function that searches all data available in Comprehensive Law Information and shows the results in one page. For example, if a user searches the term “automobile”, it searches for court decisions, Acts and subordinate statutes, references, rules/established rules/precedents with that term and shows 5 results for each item.

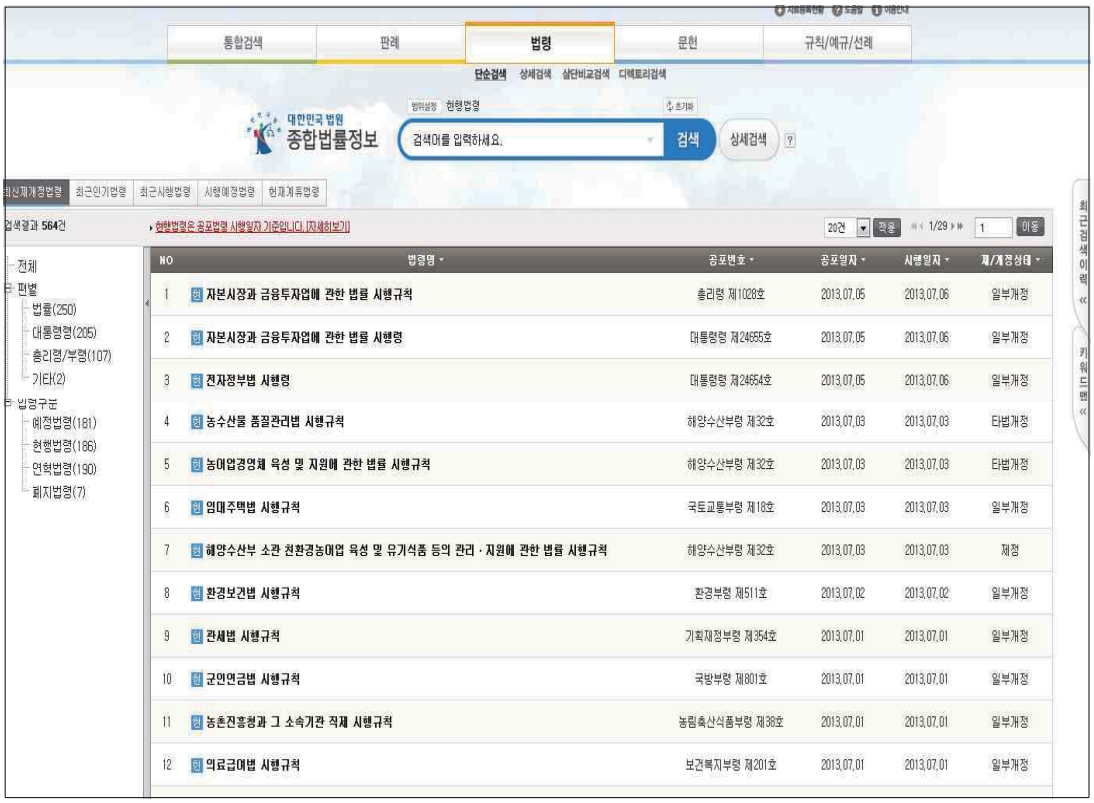
③ Other Functions

- Simple Search & Detailed Search : Simple Search unified rather complex existing search screens into one search screen. Detailed

Search contains all existing options and functions with Adjacent Search/Text Search/Partial Match Search appearing if you click on Advanced Search button.

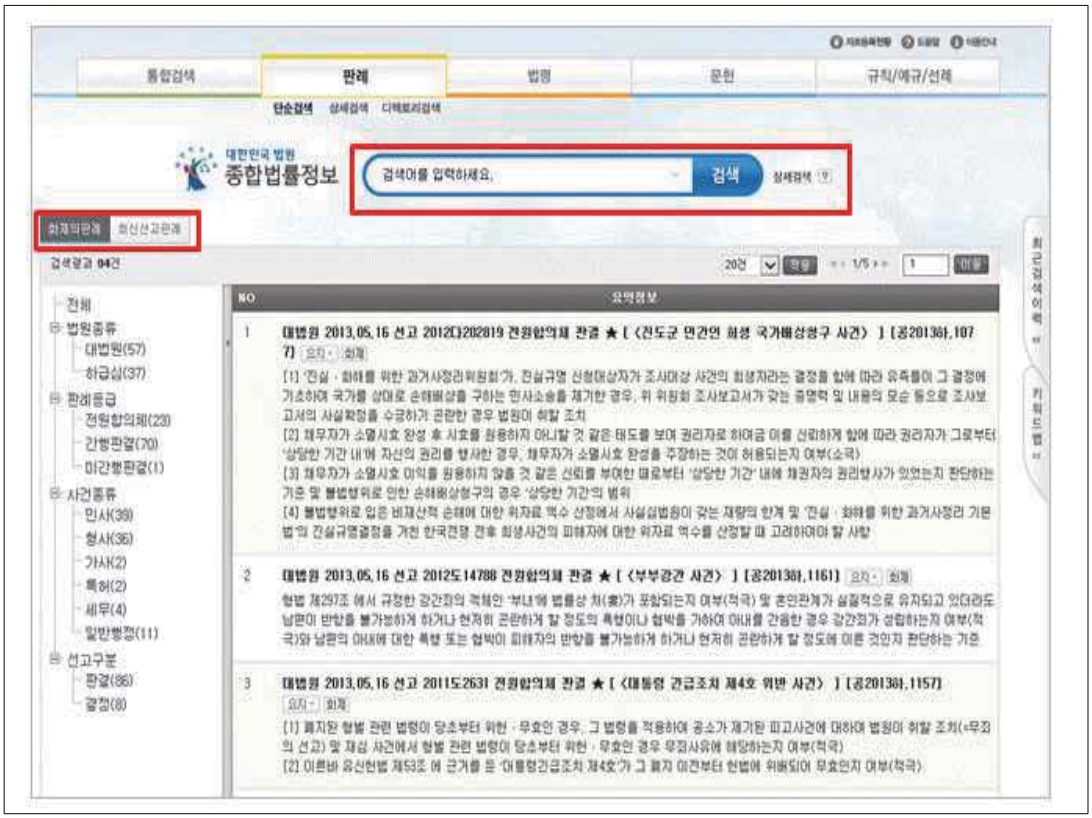
- Search Term Automatic Fill : A function that automatically recommends and complete the name of laws and references based on some characters typed into the search window.
  - Related Search Terms
  - Recent Search History
- Keyword Map: shows related search terms of the typed-in search term by category in a 방사 format. It offers a function that shows a list of recommended documents in accordance with their rankings of relevance level when you select a related word. You can turn it into a list format.
  - Text Printing Function
  - Recently Added Materials
- Search Results Classified List : In the case of court decisions, they are classified by court type, case type, and announcement date. In the case of Acts and subordinate statutes, they are classified by chapter. 법령구분 references are classified by published language, data type. Data rules/established rules/precedents are classified by rules, rule type.
  - Related Materials Network
- Provisional History : There is a [History] icon next to the provision number if that provision has been amended in the past. Upon clicking on the icon, you can see the amendment history of a particular provision via pop-up window connecting to Ministry of Government Legislation's history list screen in case of Ministry of Government

Legislation's data and National Assembly's provision history pop-up window in case of National Assembly's data.



Court Decision Search Method

① Simple Search : simultaneously searches for holding, key judgment, full text, case number, case title, reference provision, name of the judge relevant to the search term.



② Detailed Search : The type-in space for search term at the top is the same as Simple Search. However, unlike Simple Search, Detailed Search allows you to reduce the search scope (e.g. it is possible to limit search scope in the item scope checkbox by checking full search, holding, key judgment, full text).

- Excluded Term : a function excluding court decisions containing the typed-in search term.
- Full Match : a function that searches for documents with full match.
- Front Part Match / Back Part Match
- Adjacent Search : a function that helps find documents in which two or more words are within certain distance. It helps search for documents in which two search terms are highly likely to exist, related to each other.

③ View Search Results & Additional Function : Use Search Tab / Re-browse within Results / Re-organize Search Results are possible.

④ Directory Search Function : it classifies court decisions by law provision or law terminology. If you select a particular law and provision from the classification by law provision, it shows a list of court decisions relevant to that particular law and provision. Classification by law terminology - consisting of a part of related terms of legal terminology book ("법률관련어집") - shows court decisions containing relevant word.

⑤ View Text & Additional Function : The left side of court decision text screen shows relevant materials and table of contents, and the right side shows the full text of court decision. The lower side of the full text shows trackbacks and attached comments relevant to

that court decision. Reference court decisions, provisions, and repeal/amendment information contained in the full text of court decision are hyperlinked. The items for related materials are as follows:

- Following Court Decision : it is an opposite concept of reference decision extracted at the key judgment section. Whereas reference following court decisions are decisions announced after and referred to that particular decision.
- Related References : references referring to that particular decision.
- Reference Court decision
- Reference Provision : provision that the court decision in question referred to. If the provision history of that reference provision is available, you may view the history in a new window and may view the provision contents upon clicking on one.
- Reference provision in the Body Text : You may view hyperlinked reference provisions in the body text. It may not be listed in the reference decision, but may appear here if it is referred to in the body text.
- Reference Provision in the Body Text
- Original Court Decision (원심판결)
- Other Documents (Statement of Grounds of the Final Appeal, Annexed Paper, Answer, etc.)

Law Search Method

① Simple Search : You can simultaneously search for name of the law, provision title, provision contents, 부칙, appendices and forms with the search term in question. The lower side of Simple Search shows a list of recently legislated and amended laws, recent popu-

lar laws, latest implemented laws, laws announced to be implemented, and laws sitting pending in the Constitutional Court of Korea.

- Recently legislated and amended laws : laws registered in the past 2 months.
- Recent popular laws : laws that are most searched for in the past 15 days.
- Latest implemented laws : laws that are implemented in the past 3 months in the order of latest to oldest

  Laws announced to be implemented : laws that are to be implemented within 3 months

  Laws sitting in the Constitutional Court of Korea : a list showing cases regarding Acts and subordinate statutes that are currently pending in the Constitutional Court of Korea.

② Detailed Search : The search term type-in space has the same function as the Simple Search. In addition, it allows you to search for laws containing the word in question under various conditions It is possible to add Advanced Search / Detailed Condition Type-in / Search Scope Setting.

③ View Search Results & Additional Function

④ 3-Column Comparative Search : allows you to have a comparative view in which provisions connected among the law/enforcement ordinance (“시행령”)/enforcement rules (“시행규칙”) are displayed in parallel and conveniently view contents in which laws have delegated to lower-level regulations.

⑤ Directory Search : Search by Korean alphabet (i.e. Ga, Na, Da, etc.) / Search by area (i.e. areas of law including Constitution,

National Assembly, General Administrative, Court, Police, Military, Customs, Agriculture, Social Welfare, Labor, Foreign Affairs, etc.) / Search by origin of issue (i.e. origins of issue including Constitution, law, treaty, presidential order ("대통령령"), ordinance of the prime minister ("총리령"), Supreme Court rules ("대법원규칙"), National Assembly rules ("국회규칙"), etc.) / Search by relevant ministry are possible.

Document Search Method

① Simple Search : Allows you to simultaneously search for title, abstract, table of contents, body text, author, and publisher. At the bottom of the Simple Search, you can see latest registered documents and recent popular documents.

② Detailed Search

- Search Term and Excluded Term : The search term type-in space at the top has the same function as Simple Search. It searches for documents containing the word in question under various conditions.
- Functions for Advanced Search are the same for court decisions, Acts and subordinate statutes, documents, rules/established rules/ precedents.
- Detailed Condition Type-in : author / publisher / case number / reference provision (searching for reference provisions of document and laws with name changes are possible)

- Search Scope Setting : Subject Materials (possible to conduct separate search for (1) all documents in the Court Library and (2) materials that have digitalized body texts) / Material Type (you may select any of the buttons, including everything, book, periodicals, papers, commentary, judicial publications, for search) / published language (you may select any of the buttons, including everything, domestic documents, Japanese documents, English documents, German documents, French documents, and others, for search) / Year of Publication.

③ View Search Results & Additional Function : Use Search Tab / Re-browse within results / Re-organize research results

④ Directory Search : allows you to search for documents according to hierarchical classification by law document index.

Rules/Established Rules/Precedents Search Method

① Simple Search : You may simultaneously search for title, body text, additional rules, appendices and forms, established rule number, with regard to the search term in question.

- Shows a list of recently registered rules/established rules/precedents / recent popular rules/established rules/precedents : at the bottom of Simple Search, recently registered rules/established rules/precedents (newly registered materials in Comprehensive Law Information within the past 3 months), recent popular rules/established rules/precedents, legislation and amendment status (rules/established rules/precedents with the most view in the past 15 days).

- View status of legislation and amendment
- View repealed rules/established rules/precedents

② Detailed Search

- The search term type-in space at the top has the same function as Simple Search. It searches for rules/established rules/precedents containing the word in question under various conditions.
- Advanced Search / Detailed Condition Type-in / Search Scope Setting

③ View Search Results & Additional Function : Search Tab Use / Re-browse within Results / Re-organize Search Results

④ Directory Search : Classified into Supreme Court rules/administrative established rules, trial established rules, registration established rules, registration precedents, commercial registration precedents, family register ("호적") precedents, deposit ("공탁") precedents.

⑤ View Body Text & Additional Function : The left side of rules/established rules/precedents body text screen shows table of contents for provisions and history, and the right side shows the body text.

- View Body Text Detailed Function / Table of Contents for Provisions / Table of Contents for History / Related Materials

3. The National Assembly of the Republic of Korea Law Knowledge Information System ("국회 법률지식정보시스템") (http://likms.assembly. go.kr/law/jsp/law/Main.jsp)

- Ask for Help Page & Detailed Guidance (http://likms.assembly.go.kr/law/jsp/law/Help.jsp).

Appendix


법률지식정보시스템
The National Assembly of the Republic of Korea
제목 본문
검색
법령상세검색 열기
판례상세검색 열기
자료등록현황 / 오류신고 / 도움말
법률지식검색
폐지법률검색
최근제정·개정법률
법률관련정보
입법과정개관
국민과 함께하는
법/률/지/식
국회법률지식 DB
헌법지식DB
국회관계법지식DB
국회법 | 국정감사 및 조사에 관한 법률 | 국회에서의 증언·감정 등에 관한 법률
국회관계법지식DB
공직선거법 | 정당법 | 정치자금법
국회정보시스템
맞춤입법콘텐츠 검색
의안정보
회의록
예결산정보
국정감사정보
미디어자료관
인터넷의사중계
영상회의록
법률안정보메일링서비스
설정한 법률안의 발의 및 심사 정보를 메일링 서비스 받을 수 있습니다.
최근제정·개정법률
법제현안
법제참고자료
MORE
건설폐기물의재활용촉진에관한법률 2013-06-12
국립생태원의설립및운영에관한법률 2013-06-12
농림수산식품과학기술육성법 2013-06-12
농어업인삶의질향상및농어촌지역개발촉진에관한특별법 2013-06-12
농업기계화촉진법 2013-06-12
대한민국국회 홈페이지의 모든 정보의 권한은 국회에 있습니다.
서울시 영등포구 의사당로1 (여의도동) TEL: 02)788-2001
관련사이트 : ::: 선택하세요 :::
국회정보사이트 : ::: 선택하세요 :::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7
법률지식정보시스템
법률지식검색
폐지법률검색
최근제·개정법률
법률관련정보
입법과정개관
국민과 함께하는
법/률/지/식
국회법률지식 DB
헌법지식DB
국회정보시스템
법률안정보메일링서비스
최근제·개정법률
가맹사업거래의공정화에관한법률 2007-08-03
가정폭력범죄의처벌등에관한특례법 2007-08-03
공인노무사법 2007-08-03
국립사범대학졸업자중교원미임용자임용등에관한특별법 2007-08-03
군인사법 2007-08-03

Major Menu Overview

① Integrated Search : Search for law, name of the court decision, or body text contents.

Open Detailed Search : Type in detailed conditions of law or court decision for search.

③ Law Knowledge Search : View laws in the format of list by ministry, list by area, and list by dictionary-like alphabetical order.

④ Repealed Law Search : You can search for repealed laws (but only those repealed laws after the start of current 16th National Assembly)

⑤ Recently Legislated and Amended Law : You can see a list of laws that are legislated and amended in the last 6 months. Also, you can search using the name of law.

⑥ Law Related Information : You can search law related information such as pending legislative issues ("법제현안") and legislative reference materials. Also, you can search title, contents, and publication date.

⑦ Legislation Process Overview : You can find an introduction to the entire course of legislation process from draft and submission of a legislative bill to its evaluation, resolution, and promulgation by the National Assembly.

Search Method

① How to type in search terms

- Type-in Scope : It is divided into law and court decision's title and body text. You can use any and all words within the contents as a search term.

- Operator Search : The title and body text search is possible using “and” (include all words typed in), “or” (include one of the words typed in), and/or “not” (exclude the word that comes after not).
- Re-browse within Results

② Title Integrated Search : You can select [Title (“제목”)], type in the search term, and search using the comprehensive search window (“통합검색창”) located at the top of the initial page.

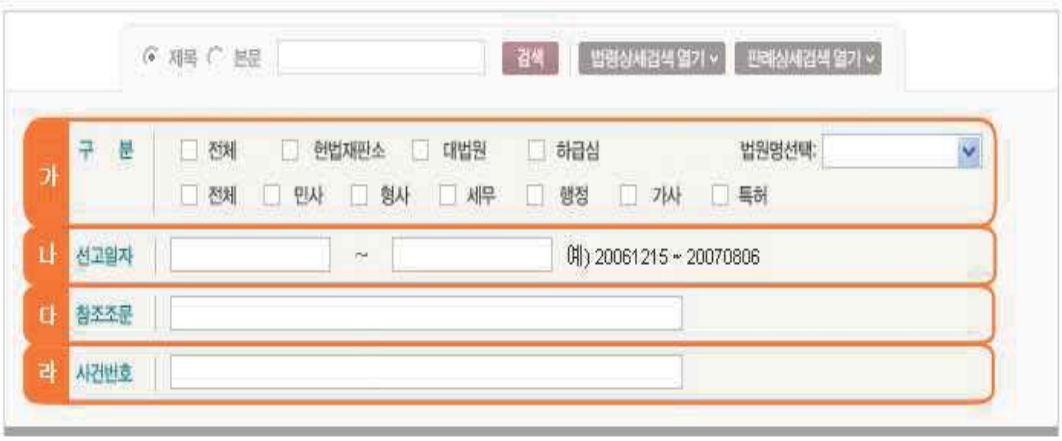
- You can search by selecting either [Current Law (“현행법령”)] tab or [Court decision (“판례”)] tab from the comprehensive search results list page.
- You can check the additional search results of the relevant category by clicking on [MORE] button.
- You can view the relevant full text by clicking on either law name or court decision name from the search results list.

③ Body Text Integrated Search

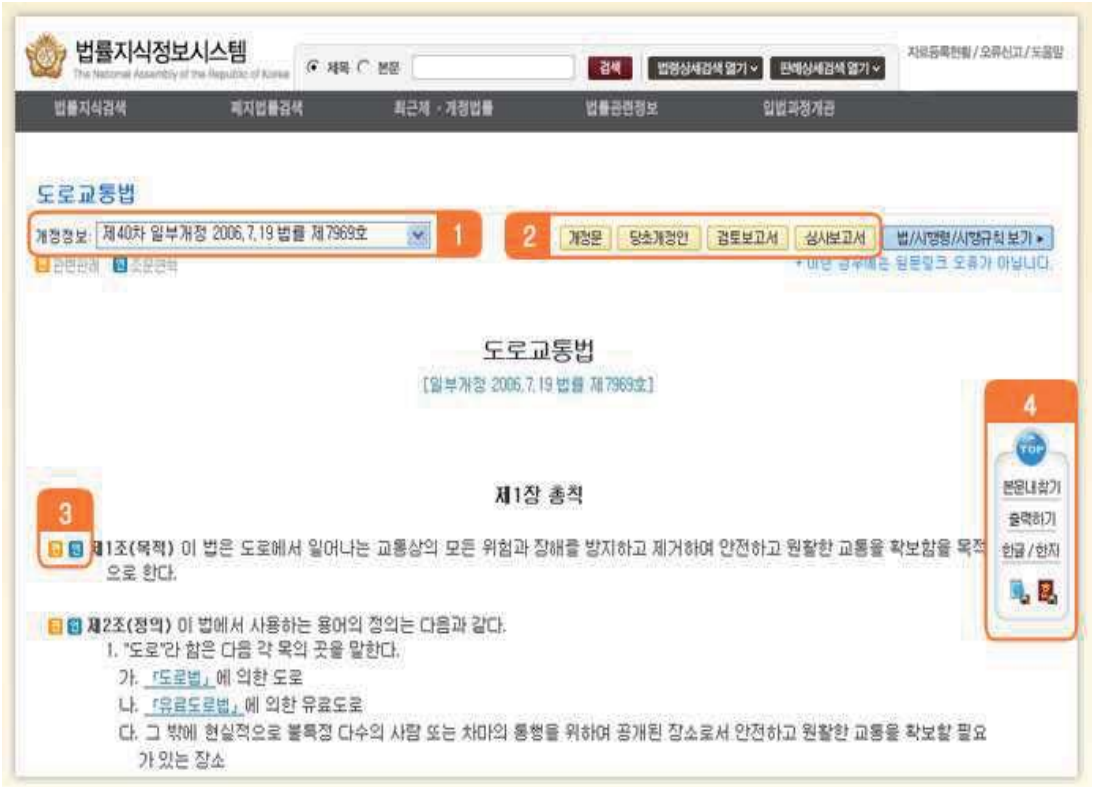
④ Detailed Law Search : You can search by clicking on [Open Detailed Law Search (“법령상세검색열기”)] button and typing in search conditions such as type of law, date of promulgation, and promulgation number.

⑤ Detailed Court decision Search : You can search using [Open Detailed Court decision Search (“판례상세검색열기”)] button and adding in

search conditions such as decision type, name of the court, date of announcement, reference provision, and case number.



⑥ View Full Text of Law & Detailed Function



- ① You can see information regarding amendment history. Also, you can access the relevant text by clicking on a particular period of time from the list of history.

- ② In case of a law, you can view legislation related materials such as amended text, originally proposed amendment, review report, and evaluation report.
- ③ You can view history information and court decision information by provision.
- ④ There is a quick menu for highly used functions such as search and find within body text, print, Chinese character/Korean conversion, and law file download.

⑦ View Full Text of Court Decision & Additional Function

- ① You can use the menu on the left to move directly to the interested part of the text on the right.

- ② You can click on the name of law and provision in blue to directly check relevant contents.
- ③ You can check the relevant full text by clicking on the case number in blue in the body text of court decision.

⑧ Others : Search List by Ministry / Area / Dictionary-like Alphabetical Order

4. National Assembly Secretariat[205] Constitution Knowledge Database ("국회사무처 헌법지식데이터베이스") (http://likms.assembly.go.kr/alkms/cgi-bin/counter.cgi?lawscode=1001)

- You can view relevant materials by clicking on the tab of current Constitution, amendment history, explanation by provision, Constitutional decision (directed into the homepage of the Constitutional Court of Korea), North Korea related materials, major foreign Constitutions, and related websites.
- You can view a pop-up window regarding meeting memorandum materials on each provision aside from explanation by each provision.

[205] See http://nas.na.go.kr/site;jsessionid=SxZ2weGT50vSloiBPjZvxZrpWlVQo4s3jZVaabLTADIJuRrv2QizLBaqmcusmTlm.expacific_servlet_nas2011?siteId=site-20111206-000001000&pageId=page-20111206-000001001.

5. LAWnB (“로앤비”) (www.lawnb.com/)

LAWnB is a domestic comprehensive law database providing court decision, law, administrative data, documents, forms, lawyer information, etc.

List of Contents

- Law :

  The database offers (1) 4,560 laws currently in effect and 91,991 laws historically, (2) current/historical laws, today’s implemented laws, recently registered laws, legislation pre-announcement, (3) law directory (by Korean alphabetical order, by area, and by relevant ministry), (4) 3-level comparative view of law/enforcement ordinance (“시행령”)/enforcement rule (“시행규칙”), comparative view of new and

old provision, preview of law provisions yet to be in effect, (5) organic connection between law provisions and court decision-regulation-document-form-example, (6) focus law (offered in an organized format of major law by industry and subordinate regulation rules)

- Court Decision

The database offers (1) 170,000 decisions (including 100,000+ lower court decisions and unpublished court decisions ("미공간판례")), (2) Supreme Court / Constitutional Court of Korea / Lower Court / unpublished court decisions (99% of the full text is provided), (3) organic connection among reference decision, following decision, original decision, reference law, document information, (4) court decision history service (visualize the deployment of upper-level court and lower-level court decisions, reference decisions, and following decisions), (5) court decision directory (major decisions are classified by area and system such as civil, criminal, and commercial), (6) recent German court decisions (original German decision and Korean commentary).

The database offers (1) 173,769 materials (comprehensive service of various administrative data of the central administrative agency), (2) notification ("고시")/directive ("훈령")/established rule/decision materials/related rules and authoritative interpretation ("유권해석")/forms/press release/Q&A/others.

- Documents

The database offers (1) 1,000,000+ materials, (2) commentary (offers 61 books published by the Association for Judicial Public Administration

("사법행정학회")), academic association papers (1,000,000+ papers from total 1,232 academic associations), practice papers (3,300+ papers covering 27 areas including general civil, commercial, etc.), e-book (622 books covering 8 areas including law in general, social science, business and economics, etc.), law terminology (total 6,734 terms).

- 5 Journals, including Gosi-law ("고시계")[206] (1980.1~), Judicial Administration ("사법행정") (1972.6~), Justice ("저스티스") (1957.1~), Gosi-yeongu ("고시연구") (1990.1~2006.11).

- Legal Professionals : 20,000 people (Who's Who, organization chart, lawyer network navigation, legal institution guidance, law firm information, lawyers by area, legal news, related institution personal information, etc.)

- Form Information (1,500,000+ forms)

  The database offers comprehensive forms (140,000 forms including by ministry, general forms, sample forms, etc.), legal forms (5,300+ forms including accusation ("고소장"), certification of contents ("내용증명"), civil execution ("민사집행") and 358 court forms), contract forms with commentaries (offers contracts such as franchise contract, annual salary contract, labor contract and their commentaries), litigation forms with commentaries (72 litigation forms including provisional attachment and deposit and their commentaries), Korean/English contract automatic writing service.

- Daily life laws (2,500+ materials)

[206] See http://www.gosi-law.com/front/main/main.asp.

The database offers Q&A for daily life laws, 해설 solutions to examples, traffic law, common sense guide to law, recommended websites for legal consulting.

- Litigation Help :

  The database offers litigation information, litigation cost automatic calculation, guide to jurisdiction and jurisdiction finding.

- Tax Information (85,000+ materials) : latest tax news, special report on value added tax ("부가세 신고특집"), special report on year-end tax settlement ("연말정산신고특집")[207], tax guide ("조세가이드"), labor income withholding income tax inquiry ("근로소득간이세액조회"), today's established rules court decisions ("예구판례(예규판례?)"), today's consulting case, etc.

- Law News :

  The database offers article by 50+ major press media including Law Times ("법률신문")[208], Legal Times ("리걸타임즈")[209], etc., news in the field of law, national exams, law school, column, live pole, enjoy LAWnB.

- Corporation Legal Affairs (2,700+ materials)

  The database offers corporation legal affairs manual, corporation legal affairs report, corporation legal affairs solutions to example cases, latest law interpretations, company legal affiars data storage, etc.

[207] See http://www.yesone.go.kr/login/raeaw001.jsp.
[208] See http://www.lawtimes.co.kr/.
[209] See http://www.legaltimes.co.kr/.

<Guidance to the Main Page>

1. Simple Menu Navigation

   You can easily access the menu you want with the horizontal, sliding type of menu selection method.

2. Major Recent Materials

   You can see the major recent materials out of newly updated menus including court decisions and Acts and subordinate statutes on the main homepage screen.

3. Understanding of the Legal Trends

   You can quickly get to know new legal trends including legal news, legal field news, hot issue legal professional, etc.

4. Recent Magazine, Academic Association Papers, Business Letter Recommendation

You can find recommendation for major data including recent magazine, academic association papers, business letter recommendation, etc.

5. Guidance to LAWnB Mobile Service

   You can find guidance to LAWnB mobile application service via smartphone and mobile web service. Also, you can find guidance to LAWnB Twitter service.

6. Update News

   You can find latest contents update news, announcements, today's Acts and subordinate statutes in implementation.

7. Organization Chart

   You can find organization chart of court/prosecutors' office[210]/school of law/law firm and detailed information of their organization members.

8. Corporation Legal Affairs/Daily life laws/Litigation Support
   - Corporation Legal Affairs : You can find tax information, trends in corporation legal affairs, and major materials, etc.
   - Daily life laws : You can find guidance to criminal litigation procedure, daily life laws to case examples, etc.
   - Litigation Support : You can find litigation cost automatic calculation and method of paying for and calculating the court fee.

9. Recommended E-Book
   - You can find recommended e-book information, out of total 500 books offered by area including law and social science.

[210] See http://www.spo.go.kr/eng/index.jsp.

메인 화면 안내

〈로앤비 메인화면〉

1 간편한 메뉴이동 방식

세로타입의 슬라이딩 메뉴이동방식으로 언제든지 원하는 메뉴로 쉽고 빠르게 접근가능

2 최신주요자료

판례, 법령, 문헌 등 메뉴 중 새롭게 업데이트 되는 주요자료를 메인화면에서 안내

3 법률동향 파악

법률뉴스, 법학계소식, 로스쿨정보, 회계의 법조인 등 새로운 법률동향을 신속하게 전달

4 최근 잡지, 학회논문, 비즈레터 추천

최근 잡지, 학회논문, 비즈레터 등 주요 자료를 추천

5 로앤비 모바일 서비스 안내

스마트폰을 통한 로앤비 모바일 앱(application) 서비스 및 모바일 웹서비스 안내 / 로앤비 트위터 서비스 안내

6 업데이트 뉴스

최신 콘텐츠 업데이트 소식, 공지사항, 오늘의 시행법령 정보 제공

7 조직도

법원/검찰청/법과대학/법률사무소의 조직도와 그 조직구성원의 상세정보 제공

8 기업법무/생활법률/소송도우미

- 기업법무-세무정보, 기업법무동향 및 주요자료 등
- 생활법률-형사소송절차안내, 사례별 생활법률 등
- 소송도우미-소송비용 자동계산, 인지액의 납부 · 계산방법

9 추천 E-Book

법률/사회과학 등 분야별로 제공되는 총 505권의 E-Book중 추천E-Book 정보를 제공

<Guidance to LAWnB Integrated Search>

1. Search Term Automatic Fill

   LAWnB Integrated Search automatically completes the search term, which consists of legal terminologies and law names.

2. Integrated Search Results Map

   LAWnB Integrated Search shows the results of the integrated search through the entire menus in LAWnB in the format of a map.

3. Opening the Integrated Search Results

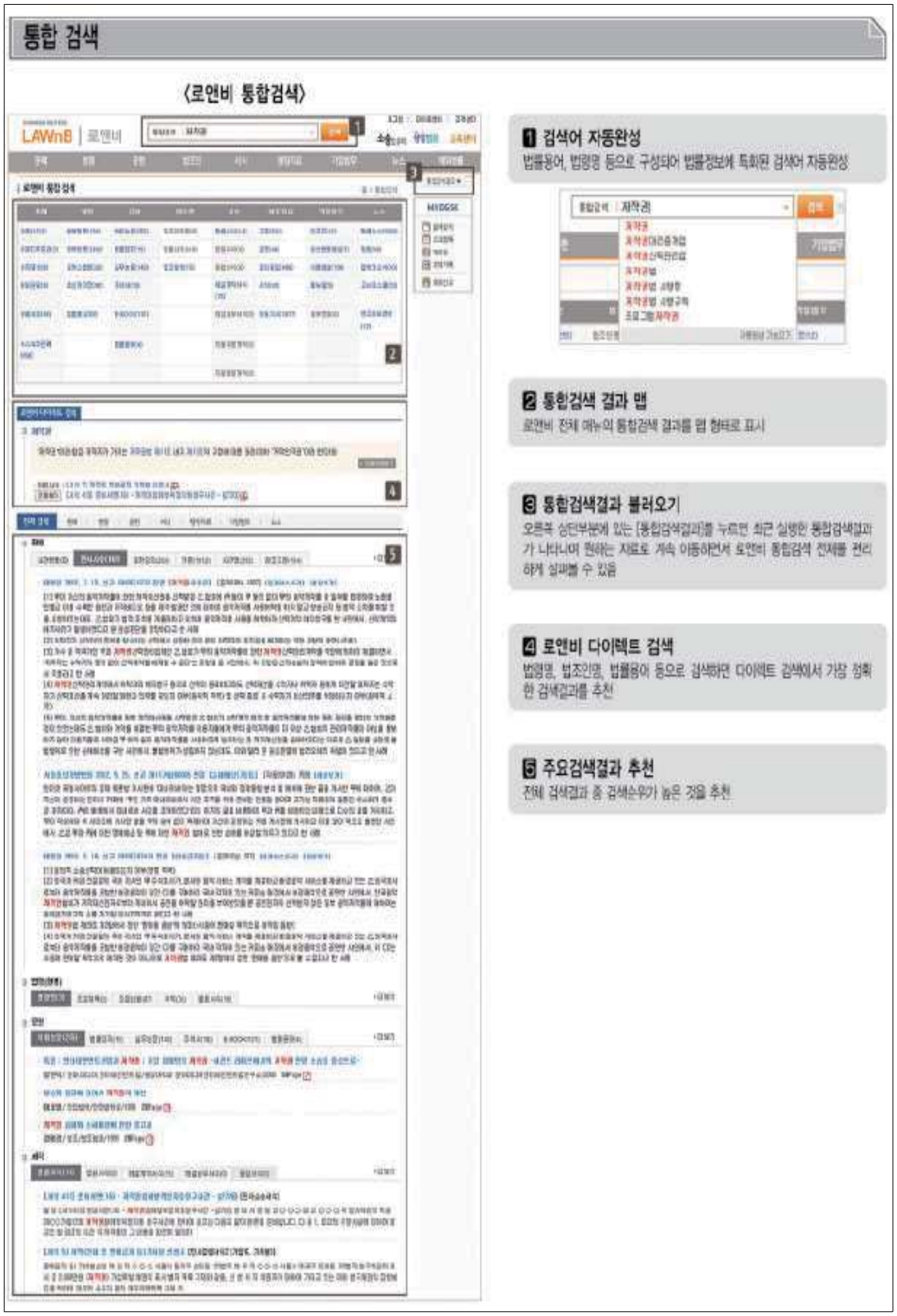
   You can click [Integrated Search Results ("통합검색결과")] on the upper right corner to have recently seen integrated search results appear. You can browse through materials you want to conveniently see the entire LAWnB integrated search.

4. LAWnB Direct Search

   If you search name of the law, name of the legal professional, legal terminology, etc., LAWnB Direct Search recommends you the most precise search results.

5. Major Search Results Recommendation

   You are recommended of materials with high search results ranking out of the entire search results.


통합 검색
〈로앤비 통합검색〉
1 검색어 자동완성
법률용어, 법령명 등으로 구성되어 법률정보에 특화된 검색어 자동완성
2 통합검색 결과 맵
로앤비 전체 메뉴의 통합검색 결과를 맵 형태로 표시
3 통합검색결과 불러오기
오른쪽 상단부분에 있는 [통합검색결과]를 누르면 최근 실행한 통합검색결과가 나타나며 원하는 자료로 계속 이동하면서 로앤비 통합검색 전체를 전리하게 살펴볼 수 있음
4 로앤비 다이렉트 검색
법령명, 법조인명, 법률용어 등으로 검색하면 다이렉트 검색에서 가장 정확한 검색결과를 추천
5 주요검색결과 추천
전체 검색결과 중 검색순우가 높은 것을 추천

<Guidance to the Main Page / Search of Court Decision>

On the Court Decision Main Page :

1. Simple Search for Court Decision

   You can simultaneously search for case number, holding, key judgment, full text, case title, reference provision if you type in search terms in the basic search window.

2. Court Decision Directory / 1,000 Character Commentary / Foreign Court Decision
   - Court Decision Directory : You can access court decisions classified by legal system and area.
   - 1,000 Character Commentary : You can see a short around 1,000 character commentary related to the court decision
   - Foreign Court Decision : You can access the full text and commentaries of recent German court decisions.

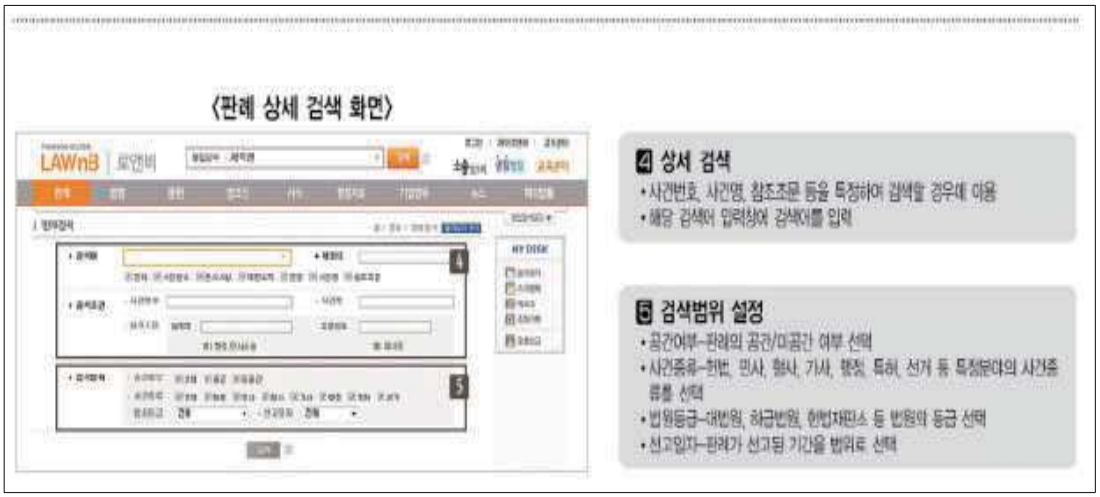
3. Latest Court Decision Check
   - Recently Announced Court Decision : You can see the list of court decisions that have been announced in the past 3 months out of all the court decisions registered in LAWnB.
   - Court Decision Quick News : You can see the court-published quick summary-format key judgments of court decisions.
   - Published Court Decision : You can see the list of court decisions that are on court-published court decision book.
   - Court Decision in the News : You can see the list of news articles related to the court decision.

On the Court Decision Detailed Search Page :

4. Detailed Search

- You can use it when you designate case number, case title, reference provision, etc. for search.
- You can type in the search terms in the relevant search term type-in window.

5. Search Scope Setting
   - Published Status : You can choose the published/unpublished status of court decision.
   - Case Type : You can choose a specific area of case type such as Constitution, civil, criminal, family, administrative, patent, election, etc.
   - Court Level : You can choose the court level such as Supreme Court, lower-level court, Constitutional Court, etc.
   - Announcement Date : You can choose the announcement date of court decision.



<References Main / Search>

On the References Main Page :

1. References Full Search

   It is a function in which you can conduct a full search of references within LAWnB, including academic association paper, legal magazine, practical paper, commentary, e-book, legal terminology, etc.

2. Academic Association Paper

   You can access academic association papers via a list of academic associations by area.

3. Other References Service

   You can select legal magazine, practical paper, commentary, legal terminology, e-book, etc.

On the References Main Page :

4. Search Results Tab

   You can organize the full search results for references by classifying them into academic association paper, legal magazine, practical paper, commentary, e-book, and legal terminology.

5. Search Results Organization
   - It is a function for narrowing down the search results by organizing each search result list.
   - In the case of academic association paper, you can organize it by the year of publication and area of academic association. Also, each offers different functions according to menu.
6. Change of Search Results Listing Method
   - It is a function of organizing search results by selecting the listing method such as by accuracy level and by order of most recent to least recent.
   - You can select 10, 20, or 50 search results to show per page as a setting.

<Acts and Subordinate Statutes Main / Search>

On the Acts and Subordinate Statues Main Page :

1. Simple Acts and Subordinate Statutes Search

   You can simultaneously search for the name of Acts and subordinate statutes, provision title, provision contents, additional rules, appendices and forms, if you type in the search terms in the basic search window.

2. Major Acts and Subordinate Statutes Service Connection

   - Acts and Subordinate Statutes Directory : You can run the search using search by Korean alphabets, search by area, and search by ministry.
   - Focus Acts and Subordinate Statutes : Yu can access Acts and subordinate statutes and subordinate rules by industry and by job classification.
   - 3-Column Comparative View : You can view law/enforcement ordi-

nance (“시행령”)/enforcement rules (“시행규칙”) in a comparative view.

- Old and New Provision Comparative View : You can have a comparative view of pre- and post- revision Acts and subordinate statutes.

3. Recent Acts and subordinate Statutes Check
   - Today’s Enforced Acts and Subordinate Statutes : You can see a list of Acts and subordinate statutes being implemented today.
   - Recently Registered Acts and Subordinate Statutes : You can see a list of most recently registered Acts and subordinate statutes in LAWnB.
   - Recently Legislated and Amended Acts and Subordinate Statutes : You can see a list of recently promulgated Acts and subordinate statutes.
   - Legislation Pre-announcement : You can see a list of Acts and subordinate statutes pre-announced for legislation.

On the Acts and Subordinate Statues Detailed Search Page :

4. Detailed Search

   You can designate the name of Acts and subordinate statutes, provision number, and appendices and forms for search.

5. Search Scope Setting
   - Currently Implemented : You can search by selecting the scope of current Acts and subordinate statutes such as history and repeal status.
   - Type : You can search by selecting the level of Acts and subordinate statutes such as law, presidential order, ministry ordinance, etc.

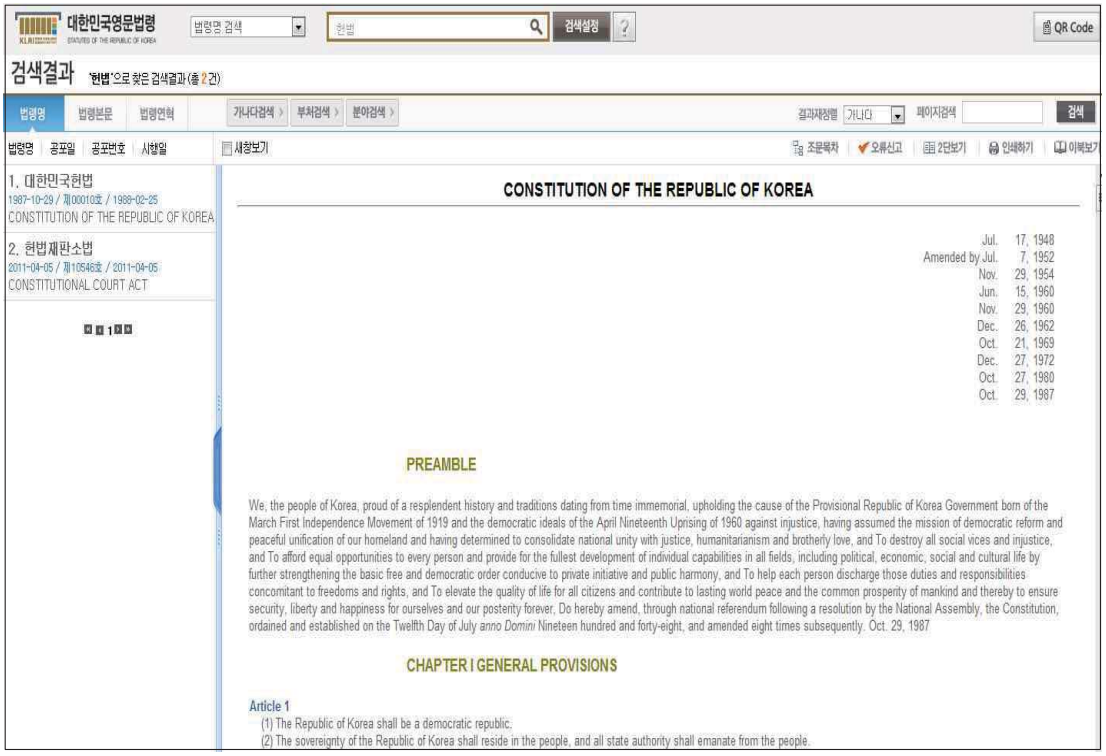
- Date : You can search by designating promulgation date or implementation date.

6. Korea Legislation Research Institute[211] English Version of Korean Law ("법제연구원 대한민국 영문법령") (http://elaw.klri.re.kr/kor_service/main.do)

- Korea Legislation Research Institute provides English version of laws just for the reference purpose such that in case of a discrepancy in meaning between the Korean version of law and the English version of law, the Korean version of law takes priority effect.

211 See http://www.klri.re.kr/kor/main.do.

- You can choose either Law Name Search (“법령명검색”) or Historical Law Search (“연혁법령검색”), type in the search term in the search window, and start search. Then, related list will appear on the left side (if you choose “Yes, Search Constitution”, then both Constitution of Korea and Constitutional Court of Korea Law both appear) and relevant law in English pops up on the main window to the right.
- However, you need to register for the website (free of charge) in order to view law in English.
- You can view it in the form of e-book, check the system of provisions using the provision table of contents function, utilize 2-column view, print, and report error functions.



English page

- If you click “English” icon on the upper right corner, you can use in English.

C. Cases

Constitutional Court Decisions

The official site of the constitutional court of Korea offers a complete database of all previous decisions held by the same court ever since its establishment in the year of 1988. The address is http://www.ccourt.go.kr/ and the English format is available once the word English on the top is clicked.

Supreme Court Decisions

Some Supreme Court decisions held since the year of 2000 were translated in English for the purpose of introducing them to global legal community. The selection was based on significance in terms of embodying clear and distinctive legal reasoning or containing global legal issues. These translated decisions are accessible through the official site of the supreme court of Korea's English format.

1. Constitutional Court Decision Search (“헌법재판소 판례검색”)

In the homepage of Constitutional Court, tabs are divided into [recently announced and advocated cases (“최근선고·변론사건”)], [easy-to-find major information (“찾기 쉬운 주요정보”)], [easy-to-know Constitutional trial (“알기쉬운 헌법재판”)], [together Constitutional Court (“함께하는 헌법재판소”)], [introduction to Constitutional Court (“헌법재판소 소개”)].

In the [announced cases (“선고사건”)] tab, you can see recent major decisions, list of announced decisions and their full texts, and announcement videos. In the [advocated cases (“변론사건”)] tab, you can see major advocacy schedule, list of advocacy, and advocacy videos.

In the [easy-to-find major information (“찾기 쉬운 주요정보”)] tab, you can see decision information, law information, published documents, status of non-amended law, case statistics information, etc.

- In the [easy-to-know Constitutional trial (“알기쉬운 헌법재판”)] tab, you can check and see information regarding overview of Constitutional trial, review process in general, decision of the Constitutional Court, methods of Constitutional appeals, public defender system, etc.

① Using Decision Search at the Homepage of the Constitutional Court (www.ccourt.go.kr/)

- The Constitutional Court Decision Information provides services like published court decisions, major decisions by area, key summary of decisions. Also, you can search decisions via Decision Search Page (you can search by adding detailed information such as case number, case title, provision brought to the trial, case type, date of end of trial, tribunal members, results of end of trial, excluded terms, reference provision, key decision summary, judgment, and information contained).

English Page of the Constitutional Court of Korea

② Using Mobile Constitutional Court Homepage (http://m.ccourt.go.kr)

- Constitutional Court developed its mobile homepage and is running the homepage since January 17, 2011 such that people can use Constitutional Court-offered judgment case ("심판사건") service on their mobile phones in order to keep in line with recent rise in use of Internet via smartphones. Due to the opening of mobile homepage, people can quickly find out basic information and status of proceedings of a Constitutional Court trial case, view the deci-

sion immediately after it is announced, and search any and all decisions via decision search, thereby greatly contributing to enhancement of people's benefits and people's trust on the Constitutional Court.

- It uses the standard web browser, so you can use it on various operating systems including iPhone (iPhone, iPod Touch, iPad), Android (Galaxy S, Vega, Motorola, Galaxy Tab), etc.

- There are two ways to access the newly opened mobile homepage: (1) using the web browser (http://m.ccourt.go.kr) and (2) using the mobile application by logging into the appstore and installing the Constitutional Court of Korea mobile app.

2. Supreme Court Decision and Other Decision Search ("대법원 판례 및 기타 판례 검색")

① Search at Korean Court Comprehensive Law Information Homepage (http://glaw.scourt.go.kr/wsjo/panre/sjo050.do)

② Ministry of Government Legislation Korea Law Service Center (“법제처 국가법령정보센터”) (http://www.law.go.kr/nwPrecSc.do?menuId=3&p1=&subMenu=5&nwYn=1&query=)

D. Secondary Sources

1. Korea Research Information Sharing Service, RISS (http://www.riss.kr/index.do) - Manual Korean File 2010 Edition (“한국연구정보서비스 RISS - 매뉴얼 한글파일 2010년도판”)

How to Use Integrated Search

① [Basic Search ("기본검색")] is a search method in which you type in a keyword for search.

- You can search the name, author, and publisher of the material you want to find by typing in keywords.
- You can search by indexing all the words that your search term may have as its meaning.

② You can use it when you want to type in a search term that you can't type with your keyboard. It supports 11 different languages including Japanese (Hiragana, Katakana), Ancient Korean, Greek, Latin, Russian, Roman, symbols, German, French, Mongolian, etc.

③ You can select the data type you want. You can select it using the

data type checkbox below the type-in space for search term.

④ It provides the search term automatic fill function when you type in the search term.

- However, original texts are offered in file formats such as PDF, ezPDF, DVI, and TIFF such that you can only see the original texts if you install suitable viewer program. In case of an original text requiring document security program such as Cox Guard due to the copyright protection policy of the institution providing the original text, you can follow the guidance to install the original text viewer program and document security program.

Detailed Search

① You select one search method out of Keyword / Front Part Match / Full Match.

② You type in the search term you want to find in the selected search item (supports multi-language type-in function)

③ You select search restriction items such as year of publication and data type.

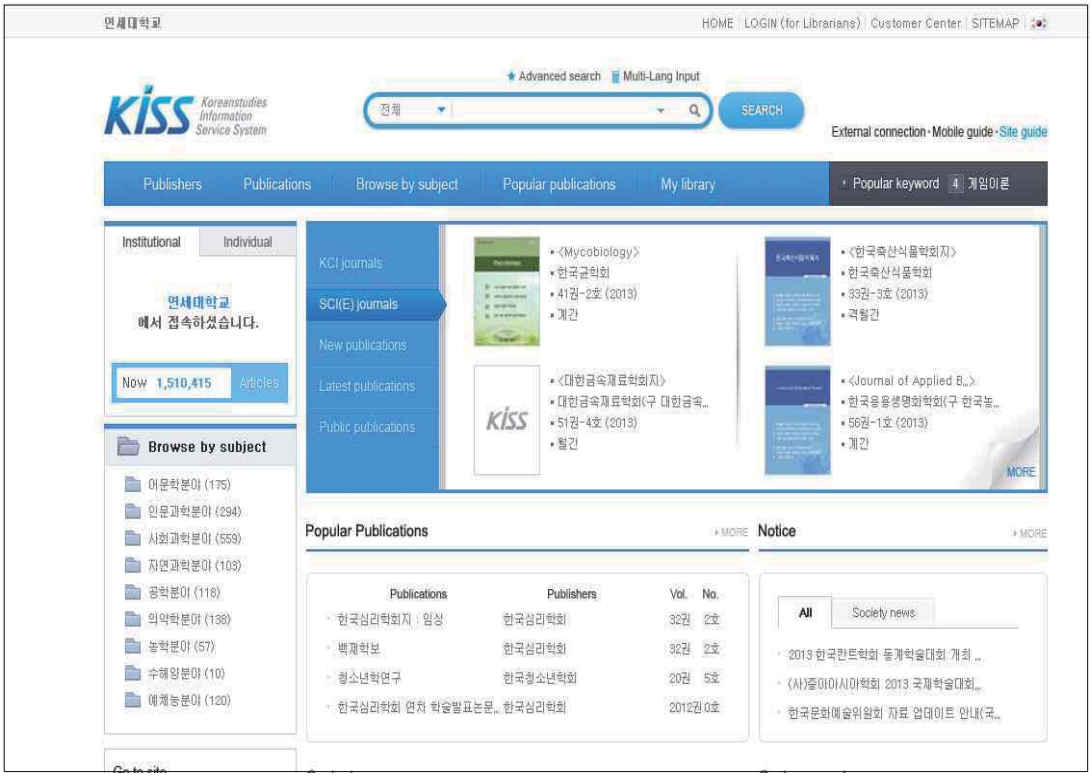
④ You click the search button.

- If the relevant data is available, the search results page shows the list in the order of thesis for diploma, domestic academic journal papers, foreign academic journal papers, academic journals, books, open lectures, and other materials.

2. Korean Studies Information Service System, KISS Search (http://kiss.kstudy.com/) - 2013 Edition Manual File (“2. KISS 검색 - 2013년도 매뉴얼 파일”)

English page

- If you click the “American flag” icon on the upper right corner, you can use in English.



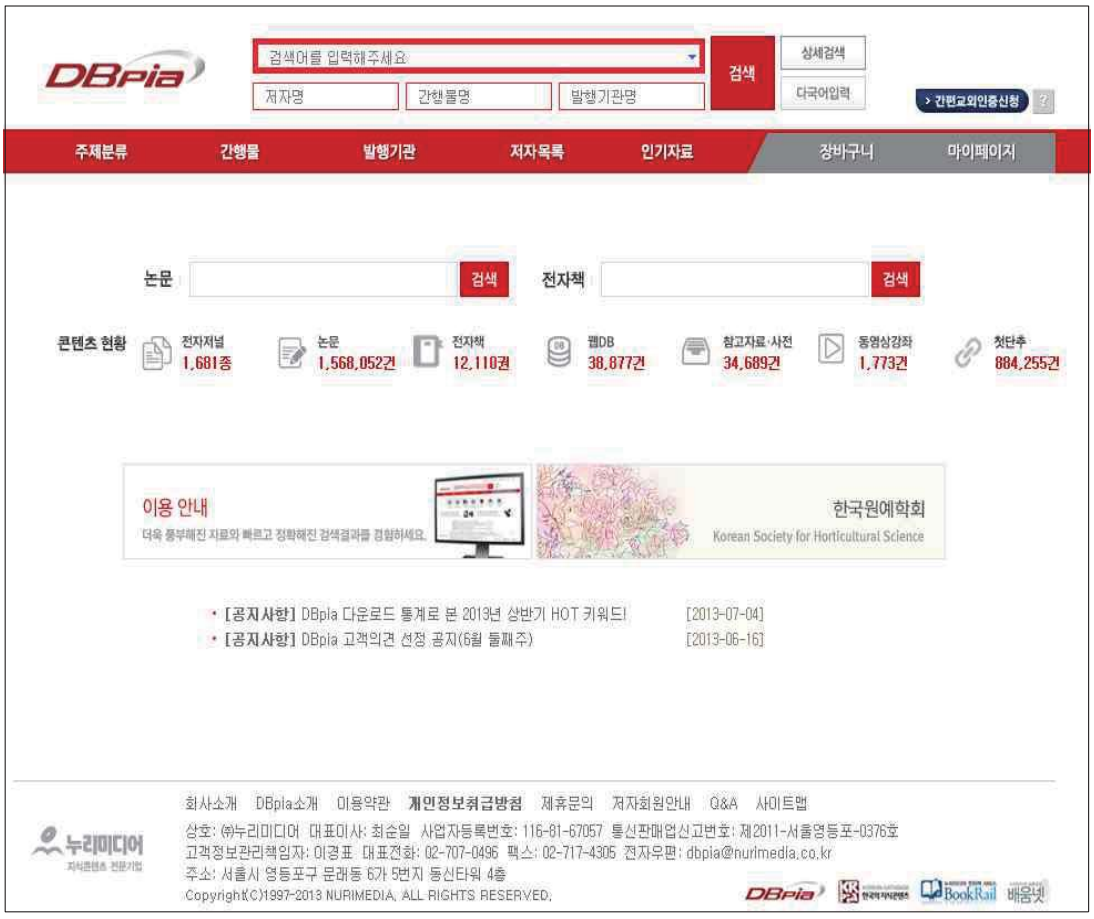
3. DBPIA (http://www.dbpia.co.kr/) - Manual File (“3. DBPIA - 매뉴얼 파일”)

Introduction

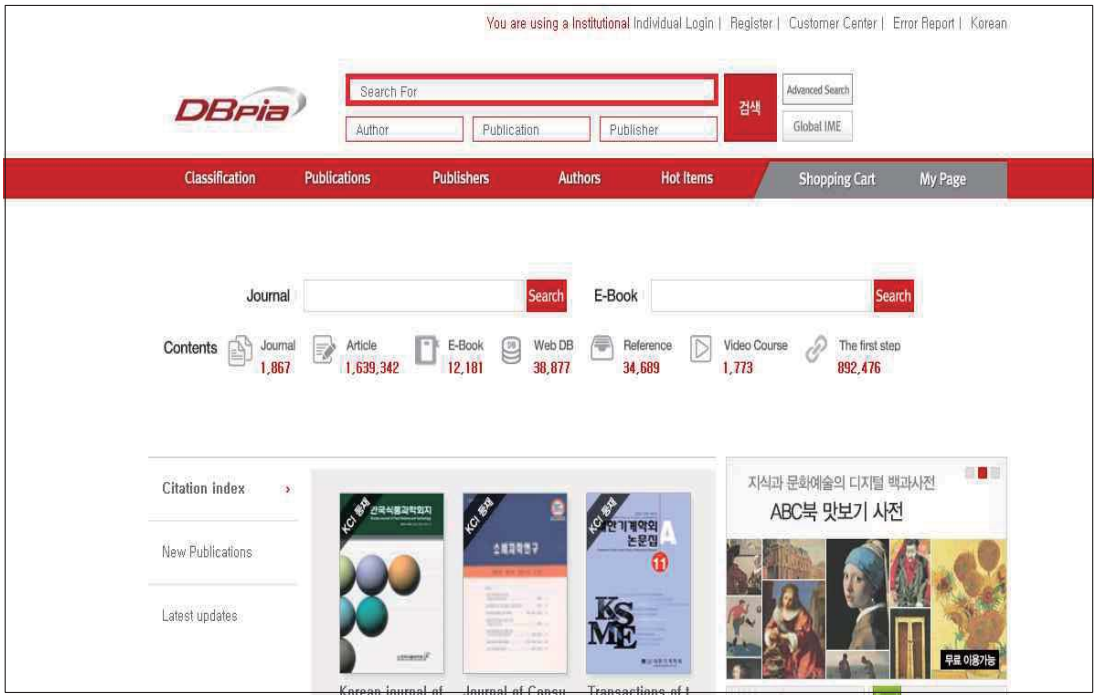
- The database is an online service providing domestic academic journals, conference proceedings, professional magazines, e-books, web database, video lectures, etc., which possesses 1,400,000+ pieces of papers (as of March 2013). It provides a service in which you can search and view original full text and detailed 서지정보 information. It provides around 1,500 journals including SCI-level journals and

updates 10,000+ papers every month. Starting in July 202, it entirely renovated the website such that you can conduct an integrated search encompassing e-book, web database, reference materials, and video lectures, thereby increasing its usefulness.

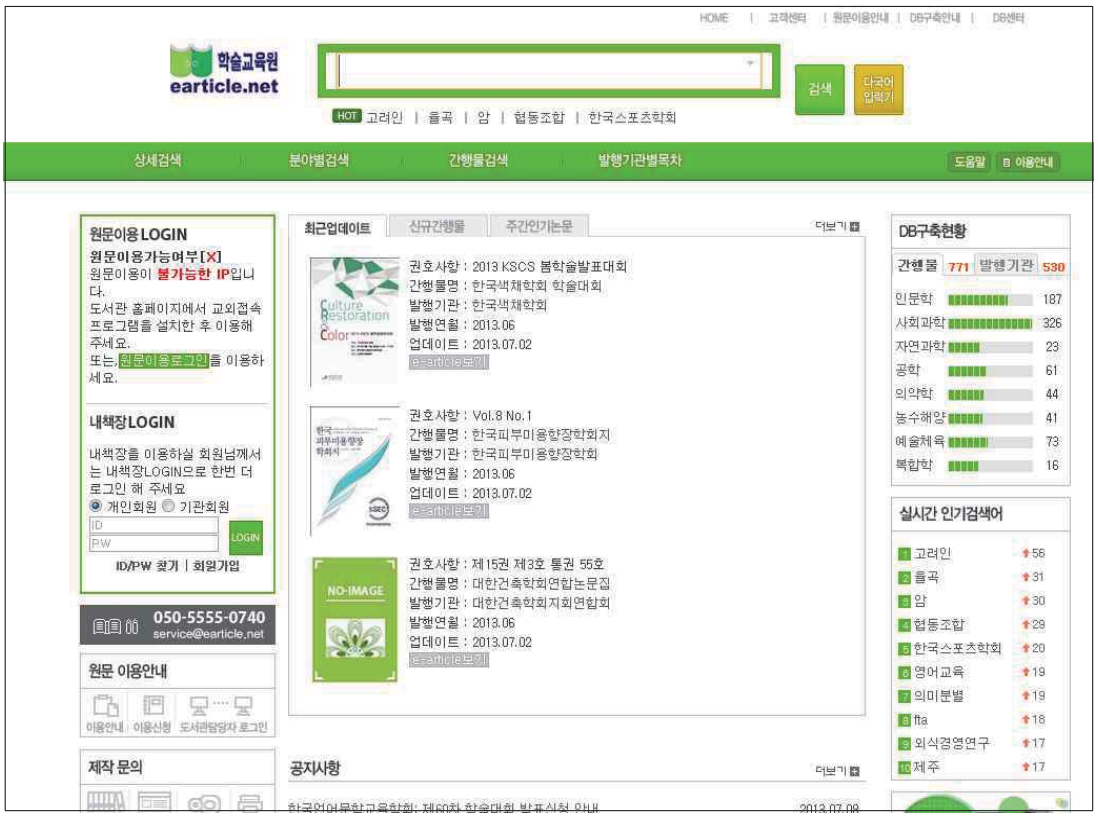
English page



- If you click “English” tab on the upper right corner, you can use in English.



4. e-article (http://www.earticle.net/) ("학술교육원")



5. New Nonmun (http://www.newnonmun.com/) - Hakjisa ("뉴논문 - 도서출판 학지사")

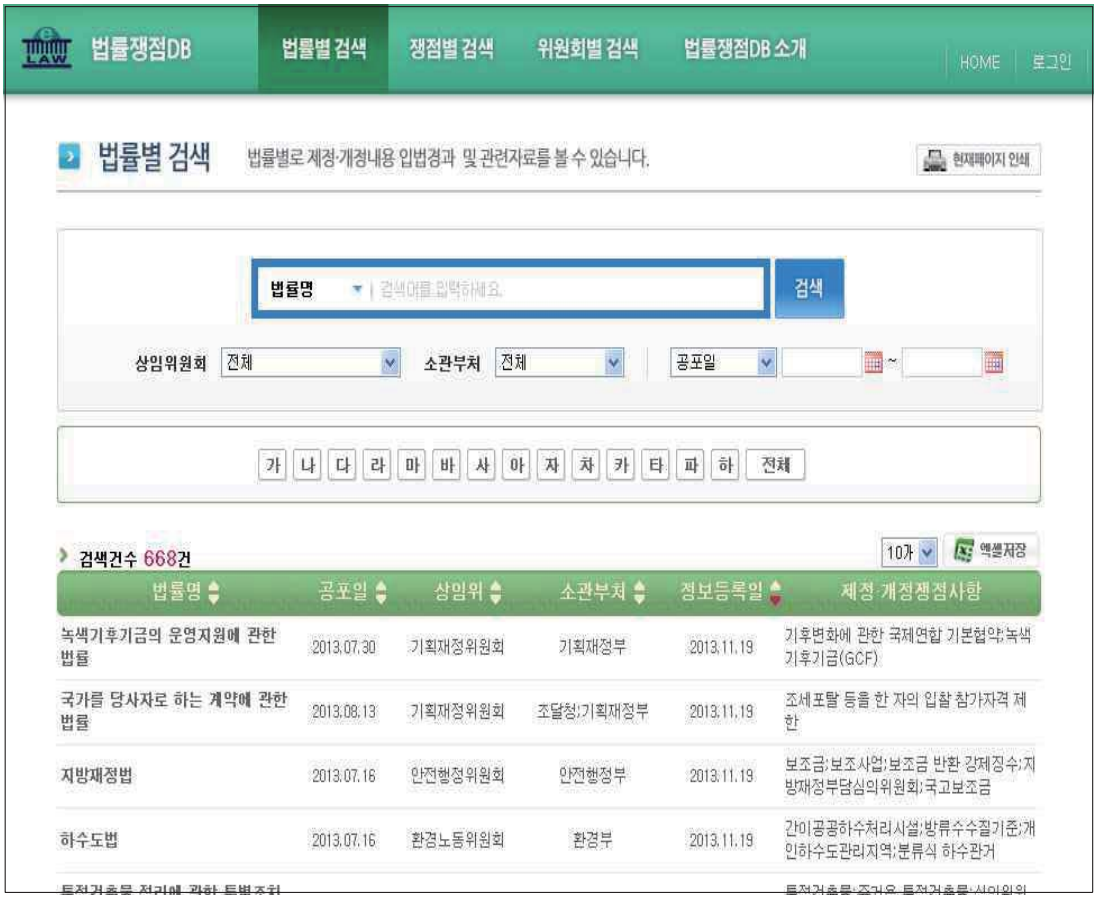
6. National Assembly Law Library (“국회법률도서관”) (http://law.nanet.go.kr/main/main.do)

National Assembly Library Homepage in Korean

- The National Assembly Library Law Information Service is a service providing comprehensive law information including domestic and foreign law-related data to Congressmen, legislation advisory clerk ("입법보좌직원"), and the general public. It includes law-related database construction and service, law-related materials publication and mailing service, law information search, law data view, etc.

① Legal Issues Database ("법률쟁점DB") provides Acts and subordinate statutes, court decisions, legislative bills, contentious points by individual law unit as well as National Assembly Library possessed materials.

Legal Issues Database Page



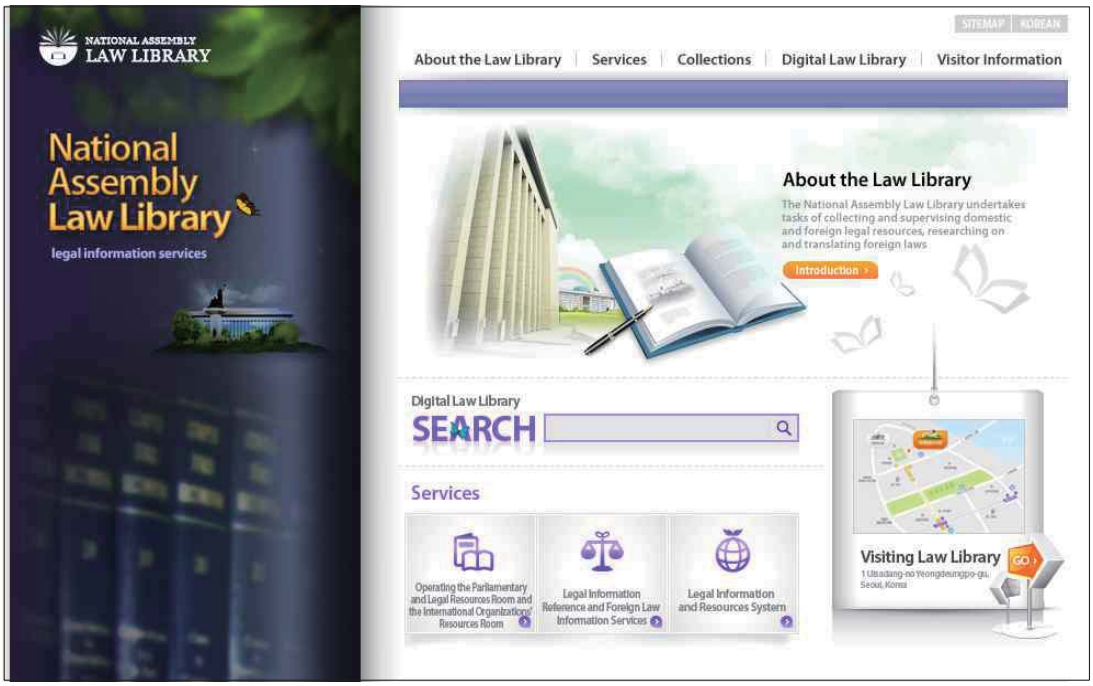
② Pending Legislative Issue Law Information (“입법현안 법률정보”) provides domestic and foreign law and related information relevant to pending legislative issues.

Pending Legislative Issue Law Information Homepage

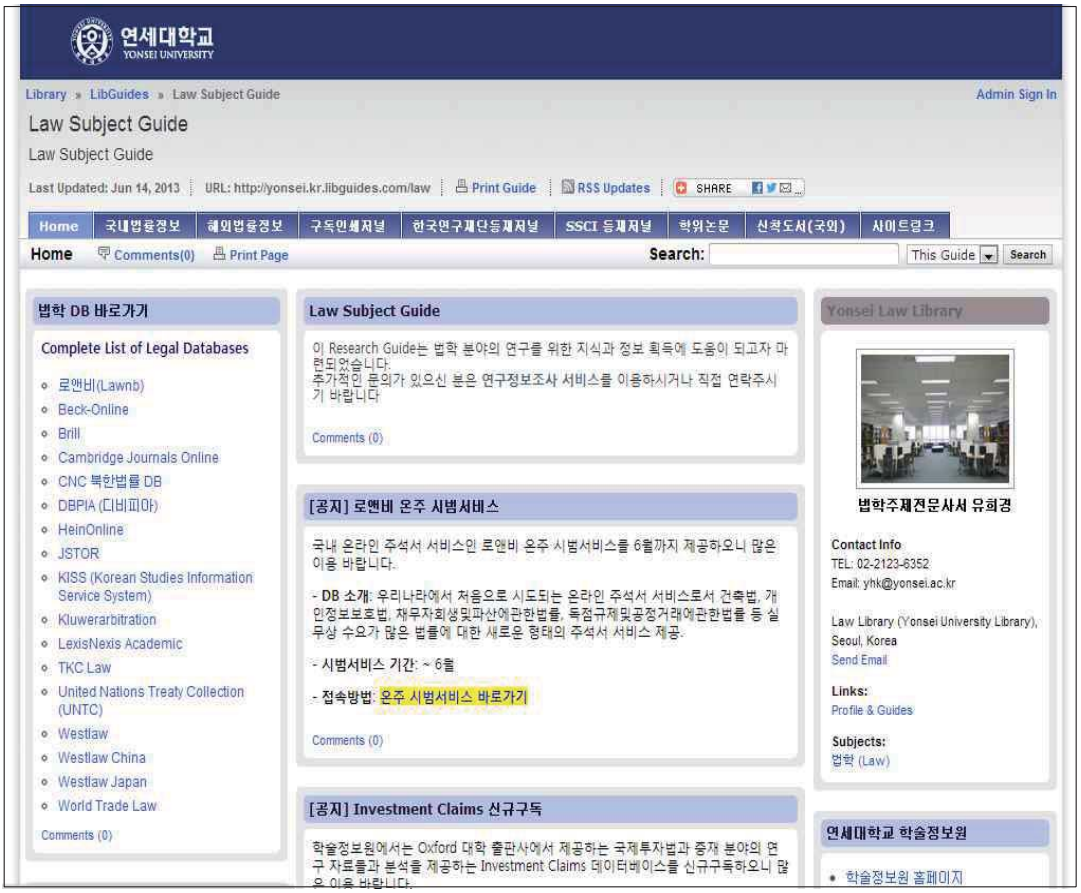
③ Law Answer Database

National Assembly Library Homepage in English

National Assembly Law Library Homepage in English



7. Yonsei University Law Subject Guide Homepage ("연세대학교 Law subject guide 홈페이지") (http://yonsei.kr.libguides.com/content.php?pid=449463&sid=3682512)



• Online sites of the selective Korean law schools