

THE CONSTITUTIONAL COURT AND LEGAL CHANGES IN KOREA: POST 1987 DEVELOPMENT

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SUMMARY: I. *Introduction*. II. *Constitutional Court and Judicial Activism*. III. *Constitutional Court and Political Decisions*. IV *Conclusion*.

I. INTRODUCTION

The year of 1987 is an indelible landmark in the history of Korean democratization. It marked a farewell to the era of the top-down politics and an ambitious leap toward the bottom-up democracy. It was a clear victory for the people (or “*Minjung*”) of Korea, who for a long time had staged an all-out war against the repressive regimes.¹ The victory of popular will resulted in the birth of new constitutional amendments in the following year. The most significant contribution of the 1988 amendment may be the establishment of the Constitutional Court.

Widespread consensus exist that law, courts and politics are important for three sets of activities that are central to every modern state: Policy making, social control, and regime legitimation. Each of these activities has legal, judicial and political elements, and they interact among themselves.²

To honor Easton’s definition, politics is “the process that produces an authoritative allocation of values”.³ According to Easton’s definition,

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¹ For the possible diverse definitions of “*Minjung*” and its role in the democratization of Korea, see Wells, Kenneth M. (ed.), *South Korea’s Minjung Movement: The Culture and Politics of Dissidence*, Honolulu, University of Hawaii Press, 1995; “The June Uprising is the long awaited triumph of the Minjung”.

² See Jacob, Herbert *et al.*, *Courts, Law and Politics in Comparative Perspective*, New Haven, Yale University Press, 1996, p. 3.

³ Easton, David, *The Political System: an Inquiry Into the State of Political Science*, 2nd ed., New York, Knopf, 1971, p. 8.

law is a distinctive form of politics. Law as the symbol of legitimate power and courts as authoritative instruments of states cannot escape such allocation of values allocation of privileges, status, advantage and money. In this sense, law inevitably interacts with politics.⁴ How politics affects law and courts and *vice versa* can be fully comprehended only with an understanding of national histories and contemporary dynamics.

Courts make policies in many ways, by applying the law to new situations, by interpreting it in novel ways, even by creating new rights.

As Bruce Ackerman argued, constitutional history of America suggests the possibility of a revolution within the framework and on the basis of exiting constitution. He claimed that in the American case, there was not only the act of foundation —the creation of American Constitution *sensu stricto*— but the eras of the Reconstruction and the New Deal, which are tantamount to virtual creation of constitution.⁵ As a Polish scholar argues, unlike western European countries where democracy and capitalism gradually developed, sometimes in violent struggles within the framework and with creative use of the institutional devices of mass democracy, Korean constitutional frames have frequently been imposed through an authoritarian regime which identified itself with the imperatives of a rigid capitalist market economy.⁶ Dubious legitimacy of an “imposed constitution” does not hinder the development of legal justice within the framework of the Constitution.

The political nature of Court decision is conspicuous in constitutional adjudications. Distinguished from ordinary Court decisions, constitutional decisions are basically policy-oriented judgments. Justifications for constitutional decisions are more often sought from the philosophical or policy ground, rather than from the justice served to the individual parties.

The political role of a Constitutional Court and political nature of its decision are more desirable in a country where democracy and rule of law are not firmly rooted in. The experience of the Constitutional Court provides an example.

⁴ Jacobs, *op. cit.*, footnote 2, p. 9.

⁵ Ackerman, Bruce, *We the People-Foundations 1*, Cambridge, Harvard University Press, 1991, chapter 5.

⁶ Preuss, Ulrich K., *Constitutional Revolution: The Link Between Constitutionalism and Progress*, Deborah Lucas Schneider translator, Atlantic Highlands Humanities Press, 1995; *Revolution, Fortschritt und Verfassung: zu einem neuen Verfassungsverständnis*, Berlin, Preuss, 1990.

II. CONSTITUTIONAL COURT AND JUDICIAL ACTIVISM

As many observers have pointed out, traditional Korea was not a society where active role of the judiciary is expected or tolerated.⁷ However, there have been significant changes in recent years. Courts have become more active, and judges more independent-minded. Many statutes have been declared void, and governmental actions are constantly challenged in Court. Somewhere else, I pointed out five factors responsible for the increasing judicial activism.⁸ Here I emphasize only two of them: first, active role of the Constitutional Court; second, the emerging spirit of participatory democracy.

1. *Constitutional Court as the Battlefield for Justice*

Institutional changes have paved the way for an easier access to constitutional adjudication. The Constitutional Court has manifested its ambitious intention to “safeguard constitution” and to “protect the fundamental rights” of the people.⁹

Since its inception, the Constitutional Court has played an active role, oftentimes to the embarrassment of the ruling party and its rival institution, the Supreme Court. In 1992, an attempt was made by the ruling party to curtail the jurisdictions of the Constitutional Court by amending the Constitutional Court Act, but the plan had to be withdrawn due to strong public criticism.¹⁰

In the short period slightly over seven years (September 1989-October 1996), the Constitutional Court disposed some 3,155 cases, declaring 54 statutes constitutionally defective,¹¹ and it granted redress in 57 constitu-

⁷ Hahm, Pyong-Choon, *Korean Jurisprudence, Politics and Culture*, Yonsei, University Press, 1986, pp. 109 and 112.

⁸ 1) Active role of the Constitutional Court, 2) Growth and new currents in the bar, 3) Emerging spirits of the participatory democracy, 4) Judicial awakening of young judges, 5) Challenge of globalizatoin. Kyong-Whan, Ahn, “The Influence of American Constitutionalism of South Korea”, *Southern Illinois Law Journal*, num. 21, 1997, pp. 71-137.

⁹ Korean Constitutional Court, *The first Ten Years of the Korean Constitutional Court*, (1988-1998), Seoul, The Constitutional Court, 2001.

¹⁰ Yang, Kun, “Judicial Review and Social Change in the Korean Democratizing Process”, *American Journal of Comparative Law*, num. 1, vol. 41, 1992, p. 8.

¹¹ The number includes decisions of unconstitutionality and modified decisions of “*de facto* unconstitutionality”. Due to the special quota requiring six out of nine votes to

tional petitions. The statistics are impressive and exceed all the projections made at its birth.¹² (The statistics in the following years does not show the same degree of judicial activism. However, once it has demonstrated the institutional precedents, the possibility of the revived activism ever exists). In trying to establish its own legitimacy as a suprapolitical organ of a “rule of law” the Constitutional Court has confronted serious dilemmas. It has been exposed to simultaneous criticism from both sides. Rightist groups within and outside the government blamed some of the “progressive” decisions, while the more progressive factions criticized the same decisions “conservative”.¹³ However, the Court has successfully established both as an authoritative *interpreter* of the Constitution and as an allocator of values.

2. *Emerging Spirits of the Participatory Democracy*

The most important factor contributing to increased judicial activism in Korea is the dramatic change in the attitudes of the Korean people toward the litigation and nature of the Constitution. Korea traditionally has been a non-litigious society. Such a generalization, however, may no longer be true. Lawsuits have skyrocketed in the past two decades, and judges constantly complain about a work overload.¹⁴ A recent survey shows the dramatic change in the daily life of the Korean people and their attitudes toward the law. Nearly 30% of the adult population are

declare a statute unconstitutional (article 113 (1), Constitution), and “institutional courtesy” to avoid direct assault on the political institution in majoritarian democracy, the Constitutional Court has invented many so-called “modified decisions”. The author labels these modified decisions as ones of “*de facto* unconstitutionality”.

¹² “At the best, the Constitutional Court will reflect and coordinate a separation of powers instituted through political processes. It cannot be relied upon the long—entrenched military— executive supremacy”. West and Baker, “The 1987 Constitutional Reforms in South Korea: Electoral Process and Judicial Independence”, num. 1, *Harvard Human Rights*, Year Book 135, 1988, p. 165.

¹³ West, James and Yoon, Dae Kyu, “The Constitutional Court of Republic of Korea: Transforming the Jurisprudence of the Republic of Vortex?”, num. 40, *American Journal of Comparative Law*, num. 1, 73, winter, 1992.

¹⁴ Kyong Whan Ahn, “The Growth of the Bar and the Changes in Lawyer’s Role”, in Lewis, C. (ed.), *Technology and Law in Pacific Community*, 1994, pp. 119-135. Between 1982 and 1991 there was an increase of 47% in the total number of legal disputes recorded. Judiciary Almanac (in Korean) (1992). The record showed that almost one fourth of the total population was involved in legal disputes.

involved in a Court matter at least once during their lifetime, 49.1% showed their readiness to resort to legal methods as a prime means of resolving conflicts, and over 80% frequently read news accounts of statutes and Court decisions, and 62% declared an intention to challenge unjust laws rather than simply abide by it.¹⁵

As Korea has rapidly transformed from a rural agricultural society to a highly urbanized industrial society,¹⁶ it also has transformed into a litigious society, perhaps irreversibly. As one commentator has observed, lawsuits have become a *Zeitgeist* of modern Korea.¹⁷ For better or for worse, the Korean public has begun to perceive the Constitution as a working document from which to gain redress for their personal daily grievances.

Partial reason for recent judicial activism can be attributed to increasing independence of young judges. Apparently, the general mood of political democratization has greatly affected such changes in the attitude of judges. In every sector of life, Korea is undergoing a silent revolution toward democracy.

Additionally, a trend of writing dissenting opinions has developed among Korean Judges, which also has helped foster judicial independence judges. Until recently, lower courts' dissent was almost unknown in Korea, and before 1960 there was little dissent even in the Supreme Court.¹⁸ In the first six year term of the Constitutional Court (September 15, 1989 September 14, 1995), the fashion of dissenting opinions flourished. It was accelerated by one Justice. Justice Chung-Soo Byun, nominated to the bench by the opposition parties¹⁹ fully utilized his right to dissent.

¹⁵ Korean Legislation Research Institute, "A Survey on the Korean People's Attitude Towards Law", 1993, as translated and reproduced in Song, Sang-Hyun (ed.), *Korean Law in the Global Economy*, Bak, Young Sa, 1996, pp. 128-175. Q. 4, 18, 20a. 23.

¹⁶ The ratio of urban population rose from 28% in 1960 to 72% in 1989. Economic Planning Board, Population and Housing Census (in Korean) (1988-1993). In 1995, six major cities comprised 48% of the total population. The HanKook Ilbo, February 28, 1997.

¹⁷ Youm, Kyu Ho, "Libel Law and the Press: United States and South Korea Compared", 13, *Pacific Basin Law Journal*, 2, 31, 1995, p. 260; Yang, *op. cit.*, footnote 10, p. 6.

¹⁸ In more than a thousand reported cases decided before 1962, no dissenting opinion could be found. Hahm, *op. cit.*, footnote 7, p. 112.

¹⁹ All three branches of the government have equal voices in forming the Constitutional Court. Of nine justices, three are elected by the National Assembly, three are appointed by the Chief Justice of the Supreme Court and three are appointed by the president. Consent of the National Assembly is required for all the members, and president

Further, a recent rapid growth of the size of the Korean bar indirectly helped the blossoming of judicial activism. In the last two decades, the number of licensed lawyers in Korea almost quadrupled, from 811 in 1977 to over 3,000 in 1996.²⁰ Every year approximately 200 new lawyers are expected to join the bar.

A sharp increase in lawyers has necessarily changed the patterns of their practice.²¹ Many have explored (or were forced to explore) new areas of Law such as consumer law, labor law and civil rights law. Consumer law has been explored in concert with rising consumer activities. The current Constitution has a special provision guaranteeing consumer activities.²² As economic progress made the provisions of labor law principles workable, labor conflicts have intensified. Lawyers played decisive roles in keeping labor claims within the ball park of the law.

The term, “civil rights lawyer” in Korea originated in the 1970s to denote those lawyers who defended political dissidents persecuted by the authoritarian government. In May, 1988, 51 lawyers organized a group under the banner of “Lawyers’ Group for the Achievement of Democratic Society” (commonly called as “*MinByun*”). Led by the pioneer civil rights lawyers of 1970s, the Group launched its systematic activities to achieve the “full democratization” of Korea. Many constitutional cases have been represented by the members of this Group.

Lastly the “Citizens movements” also have put substantial pressure on the judges who used to enjoy seclusion from public view. The recent phenomenal lower Court decisions which awarded damages to the minority shareholders in their suit against the company management for their fatal mismanagement causing the company’s are the brilliant victory of such citizens’ movement activities.²³

holds the final authority of appointment (CCA, article 6). Justice Byun was one of the 3 electees of the National Assembly.

²⁰ An estimation for 1996. It was 2,820 in 1994. Korean Bar Association, “Lawyers in Korea”, in Song, *op. cit.*, footnote 15, p. 335.

²¹ For detailed discussions, see Ahn, *op. cit.*, footnote 14, pp. 119-135.

²² Article 124, Constitution. “In furtherance of inducing sound consumption and enhancing quality of the products, State shall guarantee the consumer protection activities as provided by law”.

²³ Judgment of Seoul District Court, July 10, 1998.

III. CONSTITUTIONAL COURT AND POLITICAL DECISIONS

The Korean judiciary had been noted for its well-established tradition of judicial restraint in the cases carrying even the slightest political overtones. Virtually any action taken by the president or his cabinet members had been given a sanctuary from judicial intervention. The dubious concept of *Regierungssakt* (act of reigning)²⁴ had provided theoretic justification both for the court's "hands-off" and the president's "above-the-law" attitudes.²⁵ Heavily influenced by the pre-War German state theories justifying strong administrative powers, Korean courts had been content with its self-imposed detachment from the "political questions".

Probably the most dramatic legal incident in the 1990s was the indictments of the two former presidents: Chun Doo-Hwan and Roh Tae-Woo, who rented the Blue House for seven and five years respectively, were eventually convicted as charged after lengthy controversial trials.²⁶ The Constitutional Court, by creative decisions, decisively supported the "Civilian Government's" determination to render the "historic judgments".²⁷

A strong argument can be made that unusual activeness of the Constitutional Court in these "political cases" is the very evidence that the Court is dependent on, not independent of the president's government. A speculation may be made that, since these decisions involved the matters perfected under the former regimes, these decisions could hardly be understood as a token for the activism by an independent judiciary.

²⁴ *Regierungsakt*, a German terminology of the State Law (*Staatsrecht*), is generally understood in Korea to mean a governmental action of highly political nature for which judicial review is categorically excluded. This term has been heavily misused to put the president outside the realm of law.

²⁵ Even today, after almost 50 years under the republican form of government, Korean legal scholars and press patronize the dynastic term, calling the power of the ruler (president) as *DaeKwon* (connoting "royal prerogative") or *TongChiKwon* (meaning "power to reign").

²⁶ For thorough and exacting analysis of the trials, See In Sup Han, *Cleaning the Past and Legal Process* (in Korean) Han Ul Sa 1998.

²⁷ February 16, 1996, 96 HonKa 2, 8 1 KCCR 51 (upholding the Special Law for the May 18th Democratization Movement, 1995, Law number 4992). For the analysis of the constitutional faults of this legislation and related concerns of the prosecution of the two former Presidents, see Waters, David M., "Korean Constitutionalism and the 'Special Act' to Prosecute Former Presidents Chun Doo—Hwan and Roh Tae-Woo", 10 *Columbian Journal of Asian Law*, 461, 1996. See also 8—1 KCCR 51, 58—59.

However, in a purely legal perspective, the Court's decision to rule on these "political matters" seems to be phenomenal. Laying a precedent itself is a ground-breaking event for the Korean judiciary and in the long run, it will benefit both the judiciary and the people.

A 1998 decision dismissing an *Organtreit* suit filed by 150 Congressmen against the president showed a clear retreat from judicial activism in a case of political nature.²⁸ The underlying facts disclose high irregularities of the political process of Korea. The newly elected president, Kim Dae-Jung nominated his political ally Jong-Phil Kim as the first prime minister of his cabinet, and asked for the consent of the National Assembly as provided in the Constitution. In the middle of the approval process, however, political maneuvers of the coalition, still minority, government parties and majority opposition party interrupted the process. The outcome was, against the manifest constitutional provision, a prime minister who had not acquired consent of the National Assembly assumed the office for almost five months in the name of an "Acting prime minister", a title with no legal basis.²⁹ In three opinions, five Justices agreed the dismissal of the suit without merits.

Even before this decision, the progressive nature of the Constitutional Court has substantially diminished in the beginning stage of its second term. The retreat can be explained in many aspects.

First, the Court has reverted to its most natural conservative position. Judicial restraint has a well-established tradition in Korea. Judges are so much accustomed to the "passive virtues". Unlike other countries with a Constitutional Court, Korea restricts qualifications for a Constitutional Court judge exclusively to "lawyers", which virtually excludes ones with academic career or other policy-oriented job experience. "The Great Dissenter", Justice Byun was simply an extreme exception to the cross-section of the Korean legal community.

Second, popular interest and support for the Constitutional Court have been substantially reduced in its second term, and conspicuously after the inauguration of the Kim Dae-Jung Government. In a sense, high expectations on the founding Court born in the political vortex has subdued to a reasonable degree. This signifies that constitutional adjudication has become a daily occurrence of Korean life.

²⁸ Judgment of July 14, 1998, 98 Honra 1, 98 Honra 2.

²⁹ After sequence of political twists, the consent of the National Assembly was eventually acquired.

The most notable textual improvement in civil liberties made by the new Constitution is found in the freedoms of expression. Prior permits are no longer required for a public speech, publication, association or assembly.³⁰ Decisions of the Constitutional Court also show a clear tendency to abide with the constitutional provisions.³¹

In the cases involving “national securities” also, some improvements have been made. Both press³² and individuals have been awarded much greater protection than before.³³ There are seen apparent efforts on the Court to curtail the abuse of governmental power.

A widely accepted rule in the Korean Court was that “prosecutors can do no wrong”. The presumption was almost insurmountable in implementing a standing order to crackdown on the left-leaning element.³⁴ Under the strong tradition of inquisitorial criminal system, the procuracy in Korea was regarded more than a mere party to the criminal proceeding. Monopolizing both powers of investigation³⁵ and prosecution, Korean prosecutors wielded almost uncontested power.

In many political cases, the prosecution took the initiative throughout the entire process, and Court opinions were almost identical to the prosecution briefs. The new Constitution has brought a significant change. As the constitutional petition has emerged as an effective means to supervise the abuse of prosecutorial discretion, the presumption of “procuracy, no evil” has substantially diminished. Since rulings on such petitions necessarily require Court’s own review on the facts, the court is given the legal power to supervise the business of the prosecution.

In a 1995 decision, the Constitutional Court officially declared that the Korean criminal procedures are based on the “adversary system”.³⁶ Now, the procuracy has been declared to be only one party to the adver-

³⁰ Article 2(2), Constitution.

³¹ October 4, 1996, 95 HonKa 6, 8 2 KCCR 76; October 31, 1996, 94 HonKa 6.

³² For the detailed features of the freedom of press in Korea, see the excellent monograph of Youm, Kyu Ho, *Press Law in South Korea*, 1996, and his two articles, *op. cit.*, footnote 17.

³³ *Ibidem*, pp. 166-177.

³⁴ West and Baker, *op. cit.*, footnote 12, p. 166.

³⁵ Under the Korean system, police is merely a subsidiary organ to the prosecution, lacking independent power of investigation.

³⁶ “As contrasted with the inquisitorial system under former law, the new Code of Criminal Procedures has adopted many ingredients of the adversary system such as... It is fairly understood that we are under *the adversary system*”. November 30, 1995, 92 HonMa 44, 7, 2 KCCR 651, 657 (emphasis added).

sary criminal system. As far as the Constitutional Court is concerned, the procuracy is no more a quasi-judicial officer or the protector of human rights as they claim themselves to be.³⁷

The right to the counsel also has been improved. The Constitution specifically guarantees the right to counsel immediately after arrest or detention,³⁸ to have a counsel appointed in case of indigence,³⁹ and right to notice of the counsel parts of the “Miranda warnings”.⁴⁰

IV. CONCLUSION

The year of 1987 is an indelible landmark in the history of Korean democratization. The victory of popular will resulted in the birth of new constitutional amendments in the following year. The most significant contribution of the 1988 amendment may be the establishment of the Constitutional Court.

Law is among others, a form of politics and authoritative allocation of values. Law as the symbol of legitimate power and courts as authoritative instruments of States cannot escape such allocation of values allocation of privileges, status, advantage and money. In this sense, law inevitably interacts with politics. How politics affects law and courts and *vice versa* can be fully comprehended only with an understanding of national histories and contemporary dynamics.

Unlike in many European countries where democracy and capitalism gradually developed, constitutional frameworks of Korea have frequently been imposed through an authoritarian regime which identified itself with the imperatives of a rigid capitalist market economy. Dubious legitimacy of an “imposed Constitution”, however, does not hinder the development of legal justice within the framework of the Constitution.

The political nature of Court decision is conspicuous in constitutional adjudications. Distinguished from ordinary Court decisions, constitutional decisions are basically policy-oriented judgments. Justifications for consti-

³⁷ The justification for not granting the police an independent power of investigation, it has been claimed, was to empower the procuracy, a protector of the human rights, to supervise the police misconducts.

³⁸ Article 12 (4), Constitution.

³⁹ *Idem*.

⁴⁰ *Ibidem*, (5), Constitution.

tutional decisions are more often sought from the philosophical or policy ground, rather than from the justice served to the individual parties.

The political role of a Constitutional Court and political nature of its decision are more desirable in a country where democracy and rule of law are not firmly rooted in. The experience of the Constitutional Court provides an example.

Korea is undergoing a rapid transformation in many ways; from an authoritarian society to a democratic one, from a non-litigious society to a litigious one, and from a country with a decorative Constitution to a country with a working Constitution.

With the launch of the 1988 Constitution and the Constitutional Court, the legal life of the Korean people has dramatically changed. The Constitution has become a living document, and constitutional adjudication has become a daily occurrence.

Judicial activism in Korea is something to be cherished, not to be frowned upon. Under the long tradition of strong administration and ineffective legislature, the Korean people had no alternative to the judiciary, to protect their fundamental rights. The activism of the recent Constitutional Court provides the Korean people with hope for a civil rights revolution through judicial process.

The Constitutional Court should be encouraged to play a certain degree of political role in the Korean system of justice. "Political branches" of Korea, supposedly democratic institutions established by popular will, fail to meet the standards expected of a fully democratic society. This invites the need for the court's extra role. The need for judicial activism will increase in the future as Korea continues its journey toward full democracy and rule of law, where the major disputes of society are expected to be resolved through an open and neutral forum of law. In the meantime, political role of the Constitutional Court should be encouraged.