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| Title                                                      | Jurisdictions and Power of the Constitutional Court of Korea: Cases and Experiences Learnt from the Constitutional Court of Korea                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| All Authors                                                | Khin Khin Oo                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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## **Jurisdictions and Power of the Constitutional Court of Korea: Cases and Experiences Learnt from the Constitutional Court of Korea**

Khin Khin Oo\*

### **Abstract**

Constitutional adjudication can be carried out either by separate judicial organ which is apart from and not part of the ordinary court system or by apex court of the country through the ordinary court system. Countries practicing the Romano-Germanic legal system adopt the former system in its term of constitutional review while English Common Law countries establish the latter as judicial review, with two exceptional countries of South Africa and Myanmar which have specialized constitutional courts. Republic of Korea has adopted the constitutional review system in one form or another since the adoption of its first modern Constitution in 1948. This paper intends to give brief picture of the jurisdictions and power of Constitutional Court of Korea together some important cases and experiences learnt from the said Court for an academic purpose.

Key words: Constitutional review; constitutional courts; jurisdiction and power of the constitutional court.

### **Introduction**

Constitutional courts have been set up in many countries across the world, particularly in the last two decades. There are broadly speaking three models of constitutional adjudication, the Anglo American model, the German model, and the French model. The first decision based on American system was *Marbury vs. Madison* held by the United States Supreme Court in 1803. Supreme Court is the apex court being finally responsible for all matters of judicial determination and also determines constitutional cases that came before it, which involved concrete disputes. American system of judicial review is established in most of the common law countries, but not exclusively so. The German model was extremely influential in the establishment of Constitutional Courts in Europe during the second half of the twentieth century. These courts are apart from and not part of the ordinary court system. They deal with norm control in respect of issues referred to them by other courts, and with the determination of constitutional complaints raised after other remedies have been exhausted. The French Model is a system of anterior review by a specialized court which is not part of the ordinary court system. It conducts normative review in abstract proceedings before laws come into force. This paper intends to give brief picture of the jurisdictions and power of Constitutional Court of Korea, by comparing that of the Myanmar Constitutional Tribunal, in first place, and to study some important cases and experiences learnt from the said Court, in second place, for an academic purpose.

### **Establishment of the Constitutional Courts in Korea and Myanmar**

Since the establishment of the first modern Constitution in 1948, the Republic of Korea has undertaken the European type of constitutional review system except the Third Republic regime when the Supreme Court exercised American style of judicial review. The current Constitution of the Sixth Republic of Korea (1987 Constitution), a ninth-constitutional-revision, was promulgated and went into effect on 29 October 1987. The Constitution consists of ten chapters with 130 articles and a preamble and has established an independent Constitutional Court of Korea modeled on German system of constitutional review with concrete norm-control. The Constitutional Court was authorized by the Constitution to decide cases on all constitutional matters including constitutionality review of statutes, impeachment, dissolution of political parties, competence disputes and constitutional complaints. The Constitutional Court Act was passed on 5 August 1988 and went into effect on 18 September of the same year. Republic of Korea, since the adoption of Korean first

founding constitution of 1948, adopted different constitutional adjudication system either of German type of constitutional review through Constitutional Committee or Constitutional Council or of American type of judicial review through the Supreme Court. Finally, in 1988, the sixth Republic Constitution has established an independent Constitutional Court of Korea based on the German and Austrian models.

It is remarkable that although titles, types, and systems of constitutional adjudication were different under different constitutional changes of Korea, judicial review of constitution system itself has never been a target of controversy throughout its history. The present Constitutional Court has carried out constitutional adjudication matters actively and successfully as the last resort to uphold the Constitution and to protect fundamental rights of the citizens. Among the Asian countries, Republic of Korea has become the first country to adopt the system of a specialized constitutional court in 1988. With the leading role of the Constitutional Court of Korea, moreover, the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) has come into existence. It is an Asian regional forum for constitutional adjudicative institution established in July of 2010 to promote the development of democracy, rule of law and fundamental rights in Asia by increasing the exchanges of information and experiences related to constitutional justice and enhancing cooperation and friendship between institutions exercising constitutional jurisdiction. The member adopted the statute of the Association and announced the forum's official launch at the Final Preparatory Committee Meeting and the 7<sup>th</sup> Conference of Asian Constitutional Court Judges held in Jakarta, Indonesia in July, 2010 by signing the Jakarta Declaration on Establishment of the Association of Asian Constitutional Courts and Equivalent Institutions. A total of seven countries, namely, Indonesia, Malaysia, Mongolia, the Philippines, Thailand, Uzbekistan and Korea, joined the Association as founding member, and Myanmar, Turkey, Russia, Tajikistan, Pakistan, Azerbaijan, Afghanistan, and Kazakhstan have joined as members to AACC, too.

For Myanmar case, the 2008 Constitution of new democratic government established a Constitutional Tribunal of the Union of Myanmar for the purpose of constitutional review for the first time in Myanmar's constitutional history. Constitutional courts are more typically a feature of civil law countries and the choice of creating a constitutional court was a departure from the common law norm. It was, however, consciously and deliberately provided for in the 2008 Constitution. Myanmar is the second country with a common law tradition having a constitutional court separate from its supreme court after South Africa, which similar to Myanmar combines both common and civil law legacies. Literally and historically speaking, Burma, which today is known as Myanmar, had two quasi-constitutional documents before its independence, namely the Government of Burma Act 1935 and the Constitution of Burma under Japanese Occupation. It had two constitutions after independence, namely the Constitution of the Union of Burma and the Constitution of the Socialist Republic of the Union of Burma. The current (third) constitution of the country since independence is the Constitution of the Republic of the Union of Myanmar (2008). It came into force when new civilian Government, the Republic of the Union of Myanmar, took over the state power on 31 January 2011. The Union is constituted by 'Union system'. The three branches of sovereign power namely, legislative, executive, and judicial power, are 'separated to the extent possible, and exert reciprocal, checks and balances among themselves.' The 2008 Constitution also established the Constitutional Tribunal of the Union of Myanmar for the purpose of constitutional review. It is an institution that has never existed in Myanmar's legal history before.

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Burma Act 1935 and the Constitution of Burma under Japanese Occupation. It had two constitutions after

independence, namely the Constitution of the Union of Burma and the Constitution of the Socialist Republic of the Union of Burma. The current (third) constitution of the country since independence is the Constitution of the Republic of the Union of Myanmar (2008). The current constitution of Myanmar came into force when new civilian Government, the Republic of the Union of Myanmar, took over the state power on 31 January 2011. The Union is constituted by the Union system with some basic features of federalism. The three branches of sovereign power namely, legislative, executive, and judicial power, are separated to the extent possible, and exert reciprocal, checks and balances among themselves. The 2008 Constitution also established the Constitutional Tribunal of the Union for the purpose of constitutional review. It is an institution that has never existed in Myanmar's legal history before. Though judicial review by the Supreme Court was practiced in the country after independence to some extent until the revolutionary council period, and the erstwhile Supreme Court had received much appreciation for its jurisprudence including writs, the Myanmar court system established and practiced after 1974 had made courts, judges, attorneys and parties lacking in knowledge and training in the concepts and practice of judicial/ constitutional review for over 35 years. ( First phase was people's judicial system under the Socialist government from 1974 to 1988 and second phase was judicial system under the military government from 1988 to 2011). Therefore, it is essential to proceed carefully and to develop the Tribunal legislation and jurisprudence on constitutional review not only for judges and political institutions but also for society at large.

Concerning with establishment of the Constitutional Court of Korea, it is composed of nine Justices qualified to be court judges. Article 5 (1) of the Constitutional Court Act provides the qualifications of justices. The Justices must have reached the age of forty and be appointed from among those who have held one of the following positions for fifteen or more years. A judge, a public prosecutor or an attorney or a person licensed to practice law who has been engaged in legal work at a state agency, a state-owned or public enterprise, a government-invested institution or other corporation or a person licensed to practice law who has held the position of assistant professor of law or higher at an accredited college or university are entitled to become Justices of the Constitutional Court. According to this definition, although the Constitutional Justices should be selected from various backgrounds, including scholarly field, the most seats of the Justices of the Constitutional Court are always occupied by the judges who have had prescribed service length in judicial field with one exception of public prosecutor appointee as Constitutional Court justice.

Section 333 of the 2008 Myanmar Constitution and Section 4 of the Myanmar Constitutional Tribunal of Law provide the required qualifications for membership of the Tribunal. Specific qualifications are being 50 years of age; having served as a Judge of the High Court of a Region or State for at least five years; or having served for at least ten years as a Judicial Officer or a Law Officer at a level not lower than that of a Region or State; or having practised as an Advocate for at least 20 years; or, in the opinion of the President, being an eminent jurist; having a political, administrative, economic and security outlook; and being loyal to the Union and its citizens. The prescribed age limit is relatively high. Comparatively speaking, the minimum age for presidential candidacy and or to be Attorney General is 45 and for Union Ministers is 40. Some of the prescribed professional qualifications for the Constitutional Tribunal of Union members are too specific, for instance, several prescribed minimum service length at level concerned must be fulfilled, while some are too vague, for instance, person, who is, in the opinion of the President, an eminent jurist, can become Tribunal member. Section 333, however, requires no minimum educational background in a

relevant field, which is surely the most important qualification. Comparatively speaking by the Korean Constitutional Court of Korea, Myanmar Constitutional Tribunal appointed one Professor, who was the retired dean of law department at East Yangon University, as one of the member of the Constitutional Tribunal of the Union of Myanmar in previous Government. An entire new bench of CTU Members was appointed in March 2016 following the election of the new President.

### **Formation and selection of the Justices of the Constitutional Courts of Korea and of Myanmar**

Let us now consider briefly the formation and selection of the Justices of the Constitutional Court of Korea. The Justices are appointed by the President. Among these nine Justices, three are appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court. The President appoints the president of the Constitutional Court among nine Justices with the consent of the National Assembly.

The Myanmar Constitutional Tribunal is formed with nine members including the Chairperson. The provision outlining the formation of the Tribunal is Section 321 of the 2008 Myanmar Constitution, which provides that, ‘The President shall submit the candidature list of a total of nine persons, three members chosen by him, three members chosen by the Speaker of the Pyithu Hluttaw (Lower House), and three members chosen by the Speaker of the Amyotha Hluttaw (Upper House), and one member from among the nine members to be assigned as the Chairperson of the Constitutional Tribunal of the Union, to the Pyidaungsu Hluttaw for its approval.’ Under this section, the Tribunal consists of nine members, as do some other countries’ tribunals. However, three of them are nominated by the President, i.e. the head of the executive branch; the other six are nominated by the legislature, i.e. three by the Pyithu Hluttaw and the remaining three by the Amyotha Hluttaw. The Supreme Court plays no role in the nomination or election of members of the Tribunal under these provisions. Moreover, there is a risk that the legislature may well influence the executive in nominating the Chairperson of the Tribunal, since the President’s vote is outnumbered by the legislature’s two votes.

Concerning the independence of justices, the Korean Constitution Article 103 officially endowed all these justices with judicial independence as ‘Judges shall rule independently according to their conscience and in conformity with the Constitution and the law.’ One of the functions of Myanmar Constitutional Tribunal is that, ‘Assign the Tribunal members the duty to report on his or her undertakings to the President or the Pyithu Hluttaw Speaker or the Amyotha Hluttaw Speaker who nominated him or her.’ This provision is not included in the Constitution and probably harms the power and status of the Tribunal as being supreme amongst all the courts of law.

The researcher now turns to the status of the Justices who carries out the constitutional adjudication in Korea and Myanmar. The status and remuneration of the President of the Constitutional Court of Korea shall be commensurate with those of the Chief Justice of the Supreme Court, and the Justices of the Constitutional Court shall be political appointees whose status and remuneration shall be commensurate with those of the Justices of the Supreme Court. The term of office of the Justices of the Constitutional Court of Korea is six years and they may be reappointed under the conditions as prescribed by Act. The retirement age of Justices is sixty-five with the exception of retiring age of seventy for the President of the Constitutional Court.

Although there is no expressed provision in terms of the status of the Chairperson and members of the Myanmar Constitutional Tribunal, according to Sections 5 to 7 of Law Relating to the Emoluments, Allowances and Insignia of the Union Level Persons, it can be safely presumed that the status of the chairperson of Myanmar Constitutional Tribunal is not equivalent to the status of Chief Justice of the Union, though the status of members of the Myanmar Constitutional Tribunal are the same as that of the Supreme Court judges. The term of the Constitutional Tribunal is the same as that of the Pyidaungsu Hluttaw being five years.

In terms of the involvement in political activities of the Constitutional Court Justices, the Korean Constitutional Court Justices have constitutional obligation neither to join any political party nor to participate in political activities during their term of office. Article 14 of the Constitutional Court Act adds more detailed list of concurrent service. It reads as that, 'The Justices shall not concurrently hold any of the following positions, or conduct any business for profit as a member of the National Assembly or of a local legislative council, a public official in the National Assembly, the Executive or ordinary courts or an advisor, officer or employee of a corporation or an organization, etc.'

The Myanmar Constitution and Constitutional Tribunal Law also provide disqualifications for Tribunal membership that a member of the Tribunal should not be a member of a political party nor be a Hluttaw representative, if he or she is a member of any political party, he or she shall not take part in party activities during his or her term, commencing from the day he or she was appointed a Tribunal member. If he or she is a representative of any Hluttaw, he or she shall be deemed to have resigned as representative of the Hluttaw commencing from the day he or she was appointed as a Tribunal member. However, Myanmar Constitutional Tribunal Law section 11 grants members of the Tribunal including Chairperson the right to carry out preparatory work for his or her intended election while he or she is exercising judicial power to review constitutional issues. Though the drafters' intention 'not to infringe citizen's right to be elected' may be welcomed, a conflict of interest could occur between these two capacities because of this ambiguous provision. There is no other detailed provision in Myanmar Constitutional Tribunal Law which can help evading such a situation of holding two capacities by the same individual.

### **Accessibility of the Constitutional Court**

Concerning with individual's accessibility to the Constitutional Court, Korea Constitutional Court has the jurisdiction for individual complaints. Any person, whose basic constitutional rights are being infringed and whose recourse processes allowed by any other laws are exhausted, can submit his case to the Constitutional Court. Moreover, anyone, whose fundamental constitutional right has been violated by an exercise or non-exercise of either executive act or legislative act, may file a constitutional complaint to the Constitutional Court.

Comparatively, Myanmar Constitutional Tribunal Law prescribed persons and organizations which have *locus standi* before the Tribunal. They are the President; the Speaker of the Pyidaungsu Hluttaw; the Speaker of the Pyithu Hluttaw; the Speaker of the Amyotha Hluttaw; the Chief Justice of the Union; and the Chairperson of the Union Election Commission; the Chief Minister of a Region or State; the Speaker of a Region or State Hluttaw; the Chairperson of a Self-Administered Division Leading Body, or a Self-Administered Zone Leading Body; and minimum of 10% of all representatives of the Pyithu Hluttaw or the Amyotha Hluttaw also have the right to access to the Tribunal in accordance with section 326 of the Constitution. In addition, a court may request the Tribunal through the Supreme Court of the Union to examine the constitutionality of a statute when the case falls within Section 323 of the Constitution. These submissions shall, however, be sent to the Tribunal in accordance with the prescribed procedures and cannot be initiated by parties in court proceedings themselves. If an individual citizen wishes to allege that a governmental act

violates his or her constitutional rights, jurisdiction on these matters is within the competence of the Supreme Court through writ proceedings under section 378 of the Constitution. In connection with the filing of an application for fundamental rights and duties of citizens

granted under the Constitution, the Supreme Court of the Union has the power to issue writs of *habeas corpus*; *mandamus*; *prohibition*; *quo warranto* and *certiorari*. As it has been provided, natural or juristic persons or organizations are not allowed to request the Tribunal for decisions either as to the violation of their constitutional rights or on electoral issues, except as indicated above.

The Myanmar Constitutional Tribunal has the power to interpret the Constitution; to vet the constitutionality of executive and legislative acts; to decide on constitutional disputes between the Union and its Units or among the Units; and to decide disputes relating to rights and duties of the Union and its Units arising in implementing legislation. It started to operate as per the Constitution and the law. The first Tribunal was assigned on 30 March 2011. At one point, the legislature disagreed with one of the Tribunal's decisions, and refused to accept it, rather, demanding the resignation of its members. After failed attempts to resolve the crisis on the basis of the wording of the Constitution, the members of the Tribunal collectively resigned on 6 September 2012. The reappointment of second Tribunal was assigned on 25 February 2013. Between 31 March 2011 and 31 December 2015, the CTU admitted 12 submissions, decided eight and dismissed one. One submission (Number 1/2013) was closed and two submissions (Numbers 2 and 3/2014) were withdrawn by the applicants. The existing new bench of CTU Members was appointed in March 2016 following the election of the new President.

### **Cases and Experiences Learnt from Constitutional Court of Korea**

Jurisdictions of the Constitutional Court of Korea are constitutional review of statutory provisions; adjudication on the impeachment of high public officials; adjudication on the dissolution of political party; adjudication on competence disputes between state agencies, between state agency and a local government or between local governments; and adjudication on constitutional complaint. Although the fact that all five jurisdictions of the Constitutional Court are worthy to be studied is acknowledged, some cases on constitutional complaints will be studied under this heading.

From the day of establishment of the Constitutional Court of Korea in September 1988 up to as of 30 September 2016, total 30,031 cases have been filed at Constitutional Court and the Court settled 29,284 cases with 747 pending cases. People have primarily accessed the Court for reviewing the constitutionality of legislation and for petition of the constitutional complaints. As of 30 September 2016, 86 cases of competence disputes, one impeachment case and two cases on the dissolution of political parties have been filed out of total case statistics. There are many prominent cases and various categories of selected cases depending on relevant circumstances and the researcher acknowledges the fact that most cases decided by Constitutional Court was worth enough to study. She has chosen, however, some cases by giving priority to her home country's needs and experiences.

Reviewing the constitutionality of laws appears to be regarded as the central and most typical function of constitutional courts. It is the first and the most important jurisdiction of the Constitutional Court. Therefore Constitution itself grants the Constitutional Court the jurisdiction over the matter on the constitutionality of power to review the constitutionality of a law upon the request of the courts. An ordinary court, which is faced with a case that cannot be decided without first ascertaining the constitutionality of the applicable statute or statutory provisions, shall make a request for an authoritative determination by the Constitutional Court. The Constitutional Court, however, reviews the constitutionality of statutes when and where the ordinary court requests it to do so.

In *Restriction on Judge's Discretion in Releasing Defendants of Serious Crimes* case, the proviso of the one of the Articles under the Criminal of Procedure Act restricts the discretion of the trial judge in releasing the defendants of serious crimes. Therefore, the trial court requested for constitutional review. The Constitutional Court struck down the proviso of Article 331 of the Criminal Procedure Act after examining the role of a judge in an arrest. Therefore, the Constitutional Court finally ruled in this case that in light of principle of arrest by warrant and due process of law, judge or the court can cancel arrest warrant, *sua sponte* or upon the party's request, immediately at any stage of criminal procedure whenever they find that the causes of arrest did not exist or no longer exist; and the continuing effect of an arrest warrant is to be determined by an independent judge and not to be swayed by the opinion of the prosecutor. This jurisprudence could be a good example for Myanmar criminal adjudication practices.

*Motion Pictures Pre-Inspection* case was combined case of two claimants who were brought to the Seoul District Criminal Court for violation of Motion Picture Act by showing 'Opening the Closed Gate to the School' in 1992 and 'Oh, Country of Dream' in 1989 respectively without pre-inspection of the Ethics Committee. Although Article 21(1) of the Constitution grants all citizens freedom of speech and the press and freedom of assembly; and bans censorship or licensing of the speech and press, and licensing of assembly and association. Various Articles of old Motion Picture Act, however, required all motion pictures to be evaluated by the Ethics Committee before releasing movie in public. The failure to do so is punishable with imprisonment of up to two years or a fine up to five million won. The Court struck down the requirement of pre-inspection made by the Ethics Committee, which was statutory necessary under the former Motion Picture Act, as a violation of the constitutional banned on censorship. This case showed the freedom of expression standardized by the Constitutional Court.

The validity of the enactment and promulgation of 'Special Act on the May Democratization Movement, etc.' on 21 December 1995 in order to penalize two former Presidents for their involvement in 12 December 1979 mutiny and the 18 May 1980 treason incidents with retrospective effect is the main question in *Special Act on the May Democratization Movement, etc.* case. The accused argued that suspension of the period of limitation in Article 2 of the May 18 Act constitutes an ex post facto law prohibited by Article 13(1) of the Constitution, and moved to request for the constitutional review. All justices, however, agreed that the May 18 Act is constitutional if the period of limitations had not expired at the time of enactment. Four justices stated that they would still uphold it even if the period had expired at the time of enactment. Five other justices stated that they would find it unconstitutional to a limited extent in that case. The Court finally held that 'Special Act on the May Democratization Movement, etc.' is constitutional. In deciding this case, the Court answered the question based on the legal issues only and the details of the assenting and dissenting opinions of the Justices are worth observing.

A group of divorced with children who established their new families and another group of married ones who registered under the same households are petitioners of the *House Head System* case. Petitioners from both group filed a motion to request a constitutional review of the provisions of the Civil Code regarding the house head system. The Constitutional Court, finally, pronounced a decision of incompatibility in order to temporarily enforce the provisions on review until the Family Register Act is revised with a new family register system not premised on the house head system. In Myanmar there is no compulsory house head system and both Myanmar husband and wife have equal right to decide with

whose name they are going to register their household. It has been a good practice for long time in Myanmar.

Let us now consider on adjudication on impeachment. Impeachment proceedings are means for protecting the constitution in which the President and other high-level public officials may be held accountable to their legal obligations through a special process of indictment. In most legal system, impeachment has been regarded as a mechanism by which the representative bodies can enforce the oaths that high ranking officials undertake to execute their duties in accordance with the Constitution and law. In Korea, however, only the National Assembly can decide to bring charges against enumerated high ranking officials.

In *Presidential Impeachment* case of 2004, the Korean legislature requested the Constitutional Court to impeach the then Korean president Roh Moon –hyun after passing the unprecedented motion on accounts of violation of election laws, corruption involving his aides, and incompetence. According to facts of the law and facts of the case, the Constitutional Court found that there is a violation of presidential duty to uphold and protect the Constitution which is mandated constitutionally. The Court, however, finally concluded that, ‘When the request for impeachment adjudication is found to have merit, ...’ should be interpreted not to include every single instance of violation of the Constitution or statutes, but to include only ‘grave violation’, which is sufficient enough to justified dismissal of the public official from office. The Court then concluded that the violations of the presidential duty found in this case do not amount to such grave violations. The petition for impeachment was thus denied. At one point, Myanmar legislators attempted to impeach the whole body of the Constitutional Tribunal being disagreed with one of the Tribunal’s decisions based on the ground of ‘inefficient discharge of duties assigned by law’ and the members of the Tribunal collectively resigned being impeached instead. It is hoped that the jurisprudence explored in this Korean presidential impeachment case could be a new idea for researcher’s home country to some what extent.

The researcher now turns to the Constitutional Court’s adjudication on dissolution of political party. The adjudication on dissolution of political parties has come under the jurisdiction of existing Korean Constitution. It is believed by the Constitutional Court of Korea that, ‘As a means for safeguarding the free and democratic order of the constitution, the system of dissolving political parties that contravene the basic principles of the constitution is an institutional manifestation of the idea of a ‘militant democracy’.

*Dissolution of Unified Progressive Party* case is the only case recently adjudicated by the Constitutional Court of Korea throughout the court history. The petitioner, existing Government, requested adjudication on dissolution of the Unified Progressive Party, which was the third major political party of Korea, and forfeiture of seats of the National Assembly members affiliated to the respondent party, alleging that the objectives and activities of the said party are against the basic democratic order. The court decision confirmed that, ‘The respondent, the Unified Progressive Party, shall be dissolved and that Members of the National Assembly affiliated to the said party shall lose their seats, by an 8:1 majority vote.’ But as a foreign researcher, of course, who may not know well than a native scholar though, she could not find a concrete legal background to dissolve this party. In contrast, the dissenting opinion of Justice Kim Yisu has more reasonable legal ground. It has to be admitted, however, that this is the jurisdiction the Myanmar Constitutional Tribunal never possess.

Turning to fourth jurisdiction of the Court, the current Constitution grants the Constitutional Court the power to adjudicate competence disputes between agencies of the central government, between the central and local governments, and between local governments.

**Legislative Railroad** case was the case brought before the Court in 1996 by the representatives against the Speaker of National Assembly for competent disputes. The 182<sup>nd</sup> Extraordinary session of the National Assembly was convened in 23 December 1996. The

proposed revisions to different Acts were on the agenda. However, the opposition party members interfered with the proceeding and the National Assembly therefore could not operate in a regular course of proceeding. Then, on the 26 of same month, the vice-Speaker acting on behalf of the Speaker convened the first Plenary of same session around 6:00 A.M. by notifying about the meeting to only 155 members of the ruling Party. He declared passage of the bills after a vote by those present. The plaintiffs petitioned for review of a competence dispute and argued that the Plenary was convened secretly and the Speaker did not notify them about the meeting. They lose their right to review and to vote on the bills, therefore the Act was unconstitutional. In the end, the Constitutional Court held that the railroad passage of the bills took away the plaintiffs' powers to review and vote on the proposed bills. But, the Court denied the plaintiffs' request to find the act unconstitutional as it did not amount to a clear violation of the provisions of the Constitution. Sometimes Myanmar Hluttaws gives short period of time to representatives to discuss the drafts with short notice. This case together with court's jurisprudence could be valuable for Myanmar legal scholars.

Seoul City filed a petition for competence dispute adjudication to the Constitutional Court by stating that, 'The joint inspection on the autonomous affairs of Seoul City conducted by the Minister of Public Administration and Security infringed on the plaintiff's right of local autonomy' in **Competence Dispute over Inspection of Autonomous Affairs of Local Government** case. Subject matter of this case is whether the joint inspection of the Minister of Public Administration and Security on Seoul City's autonomy conducted from 14 to 29 of September 2009 infringed the Seoul City's self governing authority such as the right to autonomous administration and finance endowed by the Constitution and the Local Autonomy Act. It was held that the general and blanket inspection on the autonomous affairs of a local government, conducted by the head of a central administrative agency without any proof of violation of statute, infringes on the self-governing authority of the local government guaranteed by the Constitution and relevant Act. This case could give a good example for Myanmar Union authorities (Federal authority) and for Regions and States authorities (Federating units) too.

Last but not least, constitutional petitioning is a new system first adopted under the current 1987 Korean Constitution, although Korea has practiced constitutional review system since its First Republic Constitution era. Most Constitutional Court Justices and some of constitutional professors and writers appraised this constitutional complaint mechanism as that, 'This form of constitutional complaint is unique to the Korean system' and 'It stands as the backbone of political development and stability, enjoying the longest life of any of Korea's constitutions.' As a matter of fact, the Court's activities are primarily concerned with the review of the constitutionality of legislation and constitutional petition, which occupies the bulk of cases as provided above.

Accordingly, Constitutional Court Act, Article 68 provides the ability of the Constitutional Court to adjudicate on constitutional complaints made by private individuals whose fundamental rights and freedom under the Constitution are being infringed. This system of constitutional complaint provides a means for individuals to seek relief when their constitutional rights have been violated by state power.

In **Constitutional Complaint Against Article 21 of the Urban Planning Act** case, complainants built a building without governmental approval at a development-restricted zone, designated by Notice No. 385 of the Ministry of Construction. When concerned District

Head ordered to demolish the building in accord with the Urban Planning Act, the complainants sought vacation of the administrative order in the Seoul High Court. The other complainants owned properties within the area at a development-restricted zone. The complainants sought

compensation for the loss caused to them. The Court came to the conclusion that, 'The constitutional right to property does not guarantee the land owner to have right to use his land economically in all possible ways to the extent maximum. The legislature can limit certain use of land for public interest. Development and improvement of the land is permitted within the content and extent of the right to property determined by statutes in accord with constitution. If, however, such designation cause the land owner unable to use his or her land as previous time, or unable to enjoy the profit arising out of land, it exceeds the standard limit of social and public interest. If, again, there is no compensation provision, it violates the principle of proportionality and excessively limits the landowner's right to property. The legislature may provide the landowner not only the monetary means but also other alternative means such as releasing the properties from the development-restricted zone designation, setting up the system of petitioning the state to purchase the properties, and other means of ameliorating the loss. The Court finally concluded the case that Article 21 of the Urban Planning Act is unconstitutional but will be valid formally until the new compensation provisions are enacted. This type of problems relating to land acquisition and designation of development restricted zone can be seen frequently nowadays in Yangon and other major cities of Myanmar and decision of this case could be useful and can be of assistant in solving the problems.

*Relocation of the Capital City* case shared Myanmar's similar experience for new establishment of Nay Pyi Taw, which is the capital of the Union and also a union territory under the direct administration of the President of the Union of Myanmar. Myanmar, however, did not even have right to express their opinion to transfer the capital of Myanmar from Yangon to Nay Pyi Taw at that time. In this case, the bill for the 'Special Act on the Establishment of the New Administrative Capital' proposed by the administration was enacted as Law by the National Assembly. The complainants in this case are Korean citizens domiciled across the nation and they filed the constitutional complaint on grounds that the above Act was unconstitutional as a whole as it was an attempt to relocate the nation's capital without revision of the Constitution, and that the Act violated the citizens' right to vote on referendum and also taxpayers' right. Finally the court held that the Special Act on the Establishment of the New Administrative Capital which intends to relocate the capital of the Republic of Korea, Seoul, by constructing a new capital for administrative function in the Chungcheong Province area was unconstitutional.

In *Ban on Improper Communication on the Internet* case, according to order from the Minister of Information and Communication, the system operator deleted the complainant's message from the board, and suspended his use of computer network service for one month. Complainant filed a constitutional complaint by alleging that his constitutional right of freedom of expression was infringed, as well as violating the principles of due process. The Constitutional Court held unconstitutional to the contested statutory provisions as an infringement of petitioner's freedom of expression.

However, *Punishment of Insult as Criminal Offense* case was held by the Constitutional Court as justifiable act and it does not infringe on the freedom of expression. The complainant was prosecuted on charges of insult and defamation for making posts insulting a person on his blog as well as the members' page of the xxxx Party website, and also for defaming a person by publicly disclosing false information for purpose of libel on the xxxx Party website. He was fine 3 million Korean won and he, therefore, filed this complaint to review Article 311 of the Criminal Act which infringes his freedom of expression. The

Court reasoned that if an expression insulting someone's character is made publicly, the victim's social value will be degraded and his/her life and development as a member of society can be affected. Therefore, the act of defamation using insulting words definitely needs to be prohibited. The provision at issue, therefore, does not infringe on the freedom of expression.

Both cases shown that, 'Freedom of expression is granted but it has limitation and courts have to seek adequate balance between the freedom of expression and the protection of individual's reputation as justifiable act.'

*Restriction of Balloting Hours* case shown the extreme right and remedy the citizens expect from the Court based on the fundamental rights. The Constitutional Court dismissed the request to review on the constitutionality of legislative inaction for not granting paid holiday for the Election Day. The similar issue can be seen in *Collection of School Meal Money from Middle School Students under Compulsory Education System* case. The petitioners, who were middle school students and their parents, had to pay money for school meals. They filed a suit for seeking money back by arguing that it is an unfair profit for the State Government and concerned local governments. Their reason is that, 'Making school parents pay the money for school meals violates the provision of the Constitution which sets that compulsory education shall be free of charge.' The Court decided that, 'While it is desirable to provide all necessary things related to school education with free of charge under the compulsory education system, we must also consider financial conditions of the government in spending money for realizing people's social rights including rights to equal education. The scope of services provided free of charge under compulsory education system must be limited by the amount of costs and expenses indispensable for giving equal opportunity in education guaranteed by the Constitution.'

Complainants of *Qualifications for Becoming a Judge under Court Organization Act* case are the persons who, after passing bar exam, entered the Judicial Research and Training Institute and are expected to complete the course after 1 January 2013. According to the Court Organization Act as of the time when the complainants entered the Institute, they held qualifications to be judges immediately after completion of the course. However, the Court Organization Act was amended on 18 July, 2011 and thus, starting from 1 January 2013, no person can hold such qualification right after completing such course but he or she can be appointed as a judge only after having some legal experience for certain period of time. Therefore, complainants filed this constitutional complaint with the Constitutional Court. The Constitutional Court held that the relevant provision of the Court Organization Act are against the Constitution so far as they are applied to those who had already enrolled in the Judicial Research and Training Institute when the Court Organization Act is revised and applies for the position of judge in the year of completion of the course of such Institute. Myanmar rules and regulations are frequently and occasionally changed without prior announcement and this case could be taken into consideration when and where necessary for Myanmar practice.

### Conclusion

In this work, the researcher has studied the jurisdictions of the Constitutional Court of Korea with statutory provisions and cases decided by the said Court. This research has also learnt how the Constitutional Court of Korea meets its responsibilities and, in turn, what remedy the citizens could expect from the Court for the unconstitutional actions undertaken either by the executive branch or by the legislative branch to somewhat extent, though not in its ultimate extent. It is hoped that studies and observations conducted by this research could offer a useful tool and could be regarded as good examples for enhancing the jurisdiction and powers of the Constitutional Tribunal of the Union of Myanmar in deliberating and

adjudicating, keeping historical, social and legal system differences between two countries in mind.

It is an institution that has never existed in Myanmar's legal history before. It is hoped that general overview of Korean constitutional review system and jurisdictions of the Constitutional Court of Korea with special emphasis on constitutional complaints jurisdiction and case study with commentary provided by this research could offer a useful tool and might be regarded as good examples for enhancing the jurisdiction and powers of the Constitutional Tribunal of the Union of Myanmar in deliberating and adjudicating, by keeping historical, social and legal system differences between two countries in mind.

It is hoped that studies and observations conducted by this research could offer a useful tool and could be regarded as good examples for enhancing the jurisdiction and powers of the Constitutional Tribunal of the Union of Myanmar in deliberating and adjudicating, keeping historical, social and legal system differences between two countries in mind.

The purpose of this research is mainly informative. It is to mention the general overview and scope of constitutional review in Republic of Korea by giving special emphasis on constitutional complaint, which was adopted by the current 1987 Constitution. The intended audience is Myanmar legal scholars who are interested in this area of study and who are involved in constitutional adjudication processes of Myanmar one way or another.

Despite the differences in constitutional review institutions among countries, the ultimate goal of constitutional review would be the very same. Therefore, a constitutional jurisprudence developed in one country is universal in content and it is worth doing project to study these issues. To learn constitutional review systems and practices of the Republic of Korea; to give suggestions to Myanmar Constitutional Tribunal for an improved legislative framework and its role through knowledge and experiences obtained by conducting this research; to get mutual and better understanding of each country's judicial system especially on judicial review of constitution between Korea and Myanmar are the objectives of present research.

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