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Legal Framework on Constitutional Review: Cases and Experiences Learnt from Korea

Pawè Si Pôn A Ech Kaan U P Ed A Ya Pyan Li Thôn That Hmu Saoin Ya U P Ed Mu Baung: Ko Yai Ya Naing Ngan -E A Hmu Mhaa Hnin A Etw A Kyon Mhaa Ko El La Chin

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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. Comparatively, Myanmar Constitutional Tribunal has been recently established under the 2008 Constitution with the new democratic government. 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.

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Contents

1. 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.

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.

For Myanmar case, the researcher's home country, 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.

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.

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.

This research consists of 8 parts. This Part 1 is introduction. Part 2, Country Profile of the Republic of Korea, sketches the historical background of Korea and present days' Republic of Korea's legislative, executive and judicial systems. Part 3 summarizes constitutional review history of Korea. This Part states the constitutional review practices carried out by the former Korean Republics. Next, Part 4 and Part 5 explain an organizational structure and adjudicatory powers of Constitutional Court under the provisions of the Constitution and Constitutional Court Act. Part 6 reviews some cases among others the Constitutional Court has decided. This part provides some new thoughts and jurisprudence for constitutional adjudication system of researcher's own country, Constitutional Tribunal of Union of Myanmar. Second last part, Part 7, studies on Constitutional Court of Korea and Constitutional Tribunal of the Union of Myanmar comparatively. Part 8, Cases and Experiences Learnt from Constitutional Court of Korea, is conclusion.

In drawing up this research, relevant provisions under Korean Constitution and Constitutional Court Act of Korea and some cases decided by the Constitutional Court, which, in the opinion of the researcher, could give some new thought and could be taken as good examples to develop her own country constitutional review system academically and practically, are studied . Qualitative and descriptive research methods have been used in this research.

2. Country Profile of the Republic of Korea

The Republic of Korea, internationally known as South Korea, is located in the Korean Peninsula between China and Japan in the East Asian Region. Its population is 50.95 million as of 2012 statistics. A 2005 census showed that one half of the population practiced religion and majority of whom are Buddhists and Christians. [1]

It has a long history more than 4300 years since its first dynasty; Gojoseon was established in 2333 BC in the northern part of the Korean Peninsula. [2] The Joseon Dynasty of Korea, a hermit kingdom during the last part of the dynasty, was occupied by Japan beginning in 1905 following the Russo-Japanese War. In 1910, Tokyo formally annexed the entire Peninsula. Korea regained its independence following Japan's surrender to the United States in 1945. [3] Korea's liberation from Japanese rule in 1945 was an epoch-making event in modern Korean history. The vacuum created upon Japanese surrender and withdrawal was then replaced by the occupation of the Korean Peninsula by the Soviet and U.S. Armies north and south of the 38th parallel respectively.[4]

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[1] http://www.korea.net/AboutKorea/Korea-at-a-Glance/Facts-about-Korea .

[2] Jongcheol Kim, *Constitutional Law: Introduction to Korean Law*, Korea Legislation Research Institute, Springer Heidelberg, 2013, p 2.

[3] http://www.korea.net/AboutKorea/Korea-at-a-Glance/Facts-about-Korea.

[4] Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, Institute for Far Eastern Studies, Kyungnam University Press, 2010, p 13.

The Republic of Korea was formally established on 15 August, 1948. The Korean War, which lasted from 1950 to 1953, consolidated this division of territory and then the two Korea have been so far regarded as separate independent countries at least at an international level. [5]

Though the establishment of the Republic of Korea in 1948 was recognized by the United Nations through the General Assembly Resolution 195, it was only in 1991 that both the Republic of Korea and the Democratic People's Republic of Korea were simultaneously admitted to the United Nations as applications by the Republic of Korea to become a member of the United Nations were blocked since the armistice of 1953. Since its admission to the United Nations, the Republic of Korea has made significant contributions to the work of the United Nations through peacekeeping operations, development and the promotion of human rights. It has already ratified the core international human rights conventions and has signed newly established human rights instruments.[6] Korea is also one out of a total seven founding countries of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), a regional forum for constitutional adjudicative institutions in Asia.[7]

2.1 State Pattern of Korea

The Republic of Korea 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. [8] Article 117 (1) of the Constitution expressly provides that the power 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. The form of government under the present Constitution is a presidential system which has been modified to incorporate some elements of a parliamentary system. [9]

Constitutional power is divided into three branches based on the principle of separation of powers: the Executive, the Legislature and the Judiciary. Separation of powers limits each other's power and provides for checks and balances among the executive, legislative and judicial branches of government. Legislative power is vested in the National Assembly. Executive power is vested in the Executive Branch, headed by the President. Judicial power is vested in the courts comprised of judges and the Constitutional Court. In addition to the separation of power provisions, the Korean Constitution has provisions concerning delegation of legislative power. [10]

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[5] Jongcheol Kim, *Constitutional Law: Introduction to Korean Law*, p 31.
[6] http://www.mofa.go.kr/ENG/policy/un/overview/index.jsp?menu=m_20_40_10 .
[7] http://www.aaccei.org/ccourt?act=noticeView&bbsId=3100&bbsSeqn=36 .
[8] Jongcheol Kim, *Constitutional Law: Introduction to Korean Law*, p 61.
[9] Kipyo Kim, *Overview: Introduction to Korean Law*, Korea Legislation Research Institute, Springer Heidelberg, 2013, p 6.
[10] Ibid, p 13.

2.2 Legal System of Korea

Legal development of Korea dates back to 4300 years ago when the Gojoseon Dynasty enacted its own statutory law, Eight-Article Law.[11] The Korean legal system was deeply influenced by the tradition of continental law, thus resembling the modern European Civil law or Japanese legal system at the beginning of its modernization. However, with the growing interchange and influence of other countries, especially of the US, various laws and regulations were revised modeling the Anglo-American laws. In addition, many Korean customary laws or legal traditions were reflected and codified in the Civil Law of Korea. In this regard, Korean modern legal system absorbed and modified the necessary features of the European civil law system, Anglo-American law system and Korean customary laws together. [12]

According to Article 6 (1) of the Constitution, treaties duly concluded and promulgated under the Constitution are to have the same effect as domestic statutes. Therefore, the act of concluding a treaty is an act creating norms with the same effect as domestic laws.

The Constitution is the paramount law in the hierarchy of the Korean legal system. Acts passed by the National assembly are enacted or amended to realize the constitutional targets and ideals and to protect people's rights. Orders refer to administrative legislation issued by the President, Prime Minister and Ministers. Orders[13] are enacted to implement the Acts properly and effectively. In cases where the question of whether any order, any rule or any disposition is in violation of the Constitution or Acts is brought to court, the Supreme Court has the authority to make a final review of the question. The question of whether any Act is in violation of the Constitution is decided by the adjudication on the constitutionality system and the constitutional petition system of the Constitutional Court.[14]

There is no principle of *stare decisis* or precedent in the Korean legal system.

2.3 Executive System of Korea

The form of government under the present Korean Constitution is a presidential system which has been modified to incorporate some elements of a parliamentary system. 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, which is comprised of the Prime Minister and Ministers, as a whole, rather than in the President alone. Jongcheol Kim, author of Constitutional Law, declared that, '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'.[15] The State Council has the authority to deliberate on important affairs of the

[11]Kipyo Kim, *Overview: Introduction to Korean Law*, p 2.The contents of three articles among them are known to the present. One of the articles stipulates that anyone who kills a person shall be killed. It reflects the old legal idea of *lex talionis* or eye for eye and ear for ear.
[12]Ibid, p 6.
[13]The categories of orders are Presidential Decrees, Ordinances of the Prime Minister, Ministerial Ordinances and Administrative Rules.
[14] Kipyo Kim, *Overview: Introduction to Korean Law*, p 7.
[15]Jongcheol Kim, *Constitutional Law: Introduction to Korean Law*, p 44-45.

State. It consists of the President, the Prime Minister, and State Councilors appointed by the President on the recommendation of the Prime Minister with a size of between 15 and 30 members. [16]

The President is elected by direct vote of the people for a single five-year term with no additional terms being allowed. Because of the country's bitter historical experience, the Korean people believed that this single-term provision is a safeguard to prevent any individual from holding the reins of governmental power for a protracted period of time.

2.4 Judicial System of Korea

The Republic of Korea has six types of courts[17]: the Supreme Court, the High Court, the District Court, the Family Court, the Administrative Court and the Patent Court.[18] The courts are empowered to adjudicate civil, criminal and administrative cases as well as electoral review and other judicial cases. [19]

The judicial system of Korea, which is generally similar to the American judicial system, [20] is based on three-tier court system: the District Courts being at the lowest tier, the High Courts at the middle tier, and the Supreme Court at the highest tier. Other courts exercise specialized functions with the Patent Court positioned on the same level with the High Courts and the Family Court and the Administrative Court positioned on the same level with the District Courts. The District Court and Family Court may establish a Branch Court and/or a Municipal Court and registration office if additional support is necessary to carry out their task. The Branch Court of both the District Court and the Family Court may be established under one roof. [21]

There are also martial courts. The difference between martial courts and non-martial courts is that military officers who are not qualified as judges hear cases in martial courts, whereas in non-martial courts only judges may adjudicate a case. However, even in military trials, the Supreme Court has final appellate jurisdiction. Except for in the military courts, adjudication including hearings and rendering judgments is presided over by a judge. Neither the jury nor the participation of laymen or technicians in the bench is allowed as of whom.[22]

In general, hearings and rendering judgments are open to the public. However, if opening of hearing to the public would impair national security, public peace and order, or be contrary to good morals, the court may decide that hearing shall be closed to the public. Rendering judgments should be open to the public under any circumstances. [23]

There is no principle of stare decisis as in common law. Unlike in common law jurisdictions, case law in Korea is not deemed a source of law. Yet, the decisions of a higher court, particularly those of the Supreme Court, are of de facto binding effect.

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[16] Kipyo Kim, *Overview: Introduction to Korean Law*, p 14.
[17] Apart from the general courts, Korea has a European model Constitutional court. Some writers classified the types of Korean courts as seven including the Constitutional Court. The details of the Korean Constitutional Court will be learnt by next proceeding parts of this work.
[18] Chongko Choi, *Law and Justice in Korea: South and North*, Seoul National University Press, Seoul, 2005, p 247.
[19] Kipyo Kim, *Overview: Introduction to Korean Law*, p 6.
[20] Chongko Choi, *Law and Justice in Korea: South and North*, p 11.
[21] Kipyo Kim, *Overview: Introduction to Korean Law*, p 6.
[22] Chongko Choi, *Law and Justice in Korea: South and North*, p 247.
[23] Ibid.

Subordinate court judges have a strong tendency to follow the rules set forth by the Supreme Court. The Supreme Court is comprised of the Chief Justice and 13 Justices, serving as the final and highest tribunal regarding civil, criminal, family, administrative and military cases. The Supreme Court's opinions are recognized as the most authoritative precedents providing standards for the interpretation of laws, while contributing to the development of legal theories and practices. The independence of judges is one of the core elements of the separation of powers and the rule of law and is regarded as a crucial part of free and democratic order. For this purpose Article 103 of the Constitution ensures that judges shall render judgment independently according to their conscience and in conformity with the Constitution and laws. [24]

3 Constitutional Adjudication under Former Constitutions of the Republic of Korea

Founding Constitution of the First Republic of Korea was established on 12 July 1948 and promulgated on 17 July 1948. The Republic of Korea was formally established on 15 August 1948. The Constitution was amended eight times subsequently, and the present Constitution of the Sixth Republic was promulgated and went into effect on 29 October 1987 as the ninth constitutional revision. [25] Judicial review[26] practices under the old Constitutions of the Republic of Korea will be briefly explored by this part.

3.1 Constitutional Adjudication of the First Republic of Korea

The First Republic of Korea (1948-1960) was established by the adoption of Founding Constitution on 17 July 1948. [27] The first Constitution of Korea, the Constitution of the Republic of Korea, gave the authority to review the constitutionality of laws passed by the National Assembly to the Constitutional Committee. The Constitution Committee, with the power of judicial review of laws, was a combination of German and French practices.[28]

The Constitution Article 81provided that

> The Supreme Court shall have the jurisdiction to finally decide whether administrative orders, regulations and administrative acts are consistent with the Constitution and law.
>
> When the judgment in any case is premised on the constitutionality of law, the court shall refer such question to the Constitution Committee and shall render judgment in accordance with the decision thereof.
>
> …
>
> ....

[24] Kipyo Kim, *Overview: Introduction to Korean Law*, p 6.

[25] The Constitution was amended on July 7, 1952; November 29, 1954; June 15, 1960; November 29, 1960; December 26, 1962; October 21, 1969; December 27, 1972; October 27, 1980 and lastly October 29, 1987. Among these amendments, 1962, 1972, 1980 and 1987 amendments, the Constitutions of Third to Sixth Republic of Korea respectively, were fully amended. Korean jurists divide the history of constitution and system of constitutional adjudication in Korea into six periods beginning with the First Republic until the recent Sixth Republic. See Hyo-Jeon Kim (compiled), *The Constitutions of the Republic of Korea*, Korean Constitutional Law Association, 2008.

[26] The term 'judicial review' here is meant on the constitutionality of a law which was passed by the legislature, i.e. National Assembly.

[27] http://english.ccourt.go.kr/cckhome/eng/introduction/history/historyOfConsAdju.do .

[28] Dae-Kyu Yoon, *Law and Political Authority in South Korea*, Boulder: Westview Press, 1990, p 153.

Therefore, while Constitution Article 81 paragraph (1) gave the authority to review the constitutionality of administrative orders, regulations and administrative acts to the Supreme Court, Article 81 paragraph (2) endowed the power to decide the constitutionality of law passed by the National Assembly[29] to the Constitution Committee.

The Constitution Committee was composed of five justices of the Supreme Court, three members of the House of Representatives and two members of the House of Councilors with the Vice President as the Chairman of the Committee. A decision holding unconstitutionality required a two-thirds majority vote of the Constitution Committee. [30] In order to determine the detailed procedures for organization and the rules of the Constitution Committee, Constitution Committee Act was enacted as Law No 100 on 21 February 1950 in accord with Article 81, last paragraph. [31]

From 1948 to April 1961, there were six cases referred to the Constitution Committee for review; the Committee rendered a decision of unconstitutionality in two of these six cases. [32]

3.2 Constitutional Adjudication of the Second Republic of Korea

On 2 May 1960, an interim government was formed and a new committee for revising the constitution was set up. The committee presented its final draft for a new constitution to the National Assembly. The Constitution of the Second Republic went into effect on 15 June 1960.[33] The Constitution Committee was replaced by Constitutional Court under new Constitution.

Though the Founding Constitution created the Constitution Committee under the same chapter as those for the ordinary judicial courts and military courts titled on 'The Courts', [34] the Second Constitution established the Constitutional Court under the Chapter VIII, 'The Constitution Court', separated from Chapter VII, 'The Courts' Chapter. Moreover, the Constitutional Court gained wider jurisdiction than the Constitution Committee did have. Under Article 83 –III of the Second Constitution, the Constitutional Court had the jurisdiction over the matter in any of the following items:

(1) Review as to the constitutionality of law;
(2) Final interpretation on the Constitution;
(3) Dispute as to jurisdiction among the State authorities;
(4) Dissolution of political party;
(5) Impeachment trial;
(6) Litigation on the election of the President, Chief Justice, and Justices of the Supreme Court.

Article 83-IV provided that

The Constitutional Court should be composed of nine Judges.

The President, the Supreme Court, and the House of Councillors shall designate three judges respectively.

[29] Under Article 31 of the Constitution, the legislative power shall be exercised by the National Assembly.
[30] Article 81 paragraphs 3 & 4.
[31] Dae-Kyu Yoon, *Law and Political Authority in South Korea,* p 153.
[32] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, Seoul, the Constitutional Court of Korea, 2010, p 78.
[33] Ibid, p 79.
[34] Ibid, p 77.

The tenure of the Judge shall be six years, and three of the judges shall be replaced every second year.

No Judge shall be affiliated with any political party nor participated in politics.

The decision on the constitutionality of law and the judgment of impeachment shall require the concurrence of six or more Judges.

Matters necessary for the organization of the Constitutional Court, the qualification and formalities of the appointment of the Judges and legal proceedings of the Court shall be determined by law.

The Constitutional Court Act was passed on 17 April 1961 in accord with the last paragraph of Article 83 IV. [35] However, all pertinent provisions concerning the Constitutional Court were suspended by Article 5 of 'Supplementary Provisions' under 'Law concerning Extraordinary Measures for National Reconstruction' promulgated on 6 June 1961.[36] The Constitutional Court had no opportunity to function at all. [37]

3.3 Constitutional Adjudication of the Third Republic of Korea

The Constitution of the Third Republic became effective on 17 December 1962. [38] The Third Republic adopted the American style of separation of powers, together with a system of judicial review patterned on the American model. Under the Constitution, the Supreme Court was designated as the highest court of the country. Article 96 read as

(1) The 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 specific levels.

(3) ….

Moreover, the Supreme Court had the final authority to review the constitutionality of legislation as well as other government acts. Article 102 of the Constitution stated as follows:

(1) The Supreme Court shall have the power to decide with finality of a law, when its constitutionality is prerequisite to a trial.

(2) The Supreme Court shall have the power to decide with finality the constitutionality or legality of administrative orders, regulations or administrative actions, when their constitutionality or legality is prerequisite to a trial. [39]

Accordingly, the Constitutional Court was abolished.

In addition, the Supreme Court was authorized to dissolve political parties in case their activities and objectives violated the Constitution. In that case, a vote of at least three fifths of the total number of Supreme Court Justices was required. [40]

The Impeachment Council was separately established under Article 62 (1) of the Third Constitution for the purpose of impeachment proceeding. [41] A motion for impeachment was proposed by at least thirty members of the National Assembly and

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[35] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 81. Hyo-Jeon Kim (compiled), *The Constitutions of the Republic of Korea*, Korean Constitutional Law Association, 2008, p. 59.

[36] Hyo-Jeon Kim (compiled), *The Constitutions of the Republic of Korea*, p. 59.

[37] Dae-Kyu Yoon, *Law and Political Authority in South Korea*, p 158.

[38] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 82.

[39] Article 102 of the Third Constitution. Hyo-Jeon Kim (compiled), *The Constitutions of the Republic of Korea*, p. 83.

[40] Article 103 of the Third Constitution. Ibid, p. 83.

[41] Article 62 (1) of the Third Constitution. Ibid, p. 83.

passed by a majority of the total membership.[42] The Impeachment Council was chaired by the Chief Justice, and consisted of three Supreme Court justices and five members of the National Assembly. However, in the case of trial for impeachment of the Chief Justice, the Speaker of National Assembly became the Chairman of the Council.[43]

Dae-Kyu Yoon in his work of 'Law and Political Authority in South Korea' asserted that, 'The courts had many opportunities to review the constitutionality of laws and the lower courts occasionally made daring holdings of unconstitutionality, in fear of politicizing the judiciary, the Supreme Court maintained a principle of self-restraint by reversing all except one of the lower court's holdings of unconstitutionality.' Therefore, Supreme Court's jurisdiction over the Constitutionality of Statutes was almost never existed. [44]

3.4 Constitutional Adjudication of the Fourth Republic of Korea

On 17 October 1972, President Park Chung-hee, declared martial law throughout the country and banned all political activity. The National Assembly was dissolved and, an Emergency State Council was set up to exercise the powers of the legislature. This is the so-called October Revitalization Program (*Yushin*). The Emergency State Council prepared a draft for a new constitution, which was made public for a certain period and then put to a national referendum. On 27 December 1972, the new constitution was promulgated. This is referred to as the Yushin Constitution of the Fourth Republic.[45]

This Constitution decided to create a separate agency, rather than an ordinary court, for constitutional adjudication and reintroduced the Constitutional Committee. Powers of constitutional adjudication were granted to the Constitutional Committee and the Supreme Court was deprived of the final authority of review of legislation.[46] Article 109 (1) said as follows:

The Constitution Committee shall judge the following matters:

(1) The constitutionality of a law at the request of the Court.
(2) Impeachment.
(3) Dissolution of a political party.

Moreover, under Article 105 (1) of the Constitution mentioned that when the constitutionality of a law is involved in a trial, the Court shall request of Constitution Committee a decision thereof.

According to these Articles, the Committee had no power to review a law for its constitutionality on its own initiative but had to wait a request from the Supreme Court for such review. However, when the constitutionality of legislation was a prerequisite to a trial, the trial court would request a decision of the Committee through the Supreme Court, and would judge according to Committee's decision.

The Committee was comprised of nine members appointed by the President, three of whom were selected by the National Assembly, and three nominated by the Chief

[42] Article 61 (2) of the Third Constitution. Ibid, p. 73.
[43] Article 62 (2) of the Third Constitution. Ibid, p. 74.
[44] Dae-Kyu Yoon, *The Constitutional Court System of Korea: The New Road for Constitutional Adjudication*, Journal of Korean Law, Vol.1, No.2, 2001, p 5.
[45] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 87.
[46] Dae-Kyu Yoon, *Law and Political Authority in South Korea*, p 164.

Justice of the Supreme Court. [47] The Constitution Committee Act of 1973 [48] was enacted in order to lay down necessary measures of the Constitution Committee in accord with article 111 (2) of the Constitution.[49] However, both institutionally and practically, the Constitutional Committee of the Fourth Republic existed only at the nominal level. During the period 1972 to 1980, the Constitution Committee, though it was a permanent organ, did not make a single decision on constitutionality. [50]

3.5 Constitutional Adjudication of the Fifth Republic of Korea

A new constitution was drafted and promulgated on 27 October 1980, after assassination of President Park Chung-hee on 26 October 1979. The Constitution of the Fifth Republic followed the pattern of the Constitution of the Fourth Republic.[51]

Article 112 (1) of 'The Constitution Committee' under Chapter VI mentioned the power of the Committee as follows:

The Constitution Committee shall judge the following matters:

1. The constitutionality of a law upon the request of the courts;
2. Impeachment ; and
3. Dissolution of a political party.

Article 108 (1) under the Chapter heading 'The Courts' gave the ordinary courts the initial power to send request a decision of the Constitution Committee. It read as:

> When the constitutionality of a law is a perquisite to a trial, the court, if it construes that the law at issue runs counter to the Constitution, shall request a decision of the Constitution Committee, and shall judge according to the decision thereof.

According to this article, the ordinary court could send request to the Constitution Committee for its decision, if it, however, construed that the law at issue ran counter to the Constitution.

Article 113 (1) said that the term of the office of the members of the Constitution Committee shall be six years and they may be reappointed in accordance with the provisions of law. This Constitution allowed the members of the Constitution Committee to be reappointed while the previous four did not.

Though the organization, operation and other necessary matters of the Constitutional Committee were provided by in accord with Article 114 (2), not a single case was filed with the Constitutional Committee of the Fifth Republic (1980-1987).[52]

3.6 Constitutional Adjudication of the Sixth Republic of Korea

The Constitution of the sixth Republic as the 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. The first chapter regulates the general principles, the second chapter addresses the rights and duties of the citizens, the third chapter deals with the National Assembly, the fourth chapter regulates the executive, the fifth chapter regulates the courts, the sixth chapter deals with the Constitutional Court, the

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[47] Article 109 (2) & (3) of the Fourth Constitution, Hyo-Jeon Kim (compiled), *The Constitutions of the Republic of Korea*, p 117.
[48] The Constitution Committee Act, Law No. 2530, February 16, 1973.
[49] Hyo-Jeon Kim (compiled), *The Constitutions of the Republic of Korea*, p. 117.
[50] Dae-Kyu Yoon, *Law and Political Authority in South Korea*, p 166.
[51] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 90.
[52] Ibid, p 91.

seventh chapter addresses the election management, the eighth chapter provides for local autonomy, the ninth chapter addresses the economy, and the tenth chapter deals with amendments of constitution. The sixth Republic Constitution has established an independent Constitutional Court based on the German and Austrian models.[53]

The Constitutional Court was authorized 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.[54]

The details of the constitutional court system of the sixth Republic, the Republic of Korea, will be provided in next proceeding part.

4. Institutional Structure of the Constitutional Court of Korea

The present Constitution of 1987 was promulgated and went into effect on 29 October 1987. This marked the ninth time that the Korean Constitution was revised. The recent 1987 Constitution adopted the Constitutional Court system, abandoning the Constitutional Committee system employed by previous constitution. [55]

Establishment of 'The Constitutional Court' under Chapter VI of the Constitution consisted of three articles, Articles 111 to 113. In order to set forth provisions necessary for the organization and operation of the Constitutional Court and its adjudication procedures, the Constitutional Court Act was passed on 5 August 1988 in accord with Article 113 (3) of the Constitution,[56] and it went into effect on 1 September 1988. The Constitutional Court Act consisted of 76 articles under five Chapters which correspond to three constitution provisions of Articles 111 to 113 [57] and added some more specific detail adjudication procedures. Chapter I is General Provisions; Chapter II deals with Organization: Chapter III states General Adjudication Procedure: Chapter IV concerns Procedures for Special Adjudication and last Chapter V mentions Penal Provisions. Constitutional Court Act provisions which correspond to three constitutional provisions, i.e. Articles 111 to 113 of the Constitution, and some other relevant provisions are main subjects of present part 3.

Article 111 (1) of the Constitution[58] gives the constitutional jurisdiction to the Constitutional Court as follows:

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

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[53] Chongko Choi, *Law and Justice in Korea: South and North*, p 6.
[54] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 97.
[55] Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, p 119.
[56] Article 113 (3) of the Constitution provides that the organization, function and other necessary matters of the Constitutional Court shall be determined by Act.
[57] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 97. The Constitutional Court Act was amended on Nov. 30, 1991; Dec. 22, 1994; Aug. 4, 1995; Dec. 13, 1997; Jan. 19, 2002; Jan. 26, 2002; Mar. 12, 2003; Mar. 31, 2005; Jul. 29, 2005; Dec. 21, 2007; Mar. 14, 2008 and lastly Dec. 29, 2009.
[58] Article 2 of the Constitutional Court Act provides the same provision in terms of the jurisdiction of the Constitutional Court what the Article 111(1) of the Constitution stated.

5. Constitutional complaint as prescribed by Act.

The Constitutional Court is composed of nine Justices qualified to be court judges.[59] Article 5 (1) of the Constitutional Court Act spells out the qualifications of justices as follows:

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.

1. A judge, a public prosecutor or an attorney.
2. 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.
3. A person licensed to practice law who has held the position of assistant professor of law or higher at an accredited college or university.

Again the Article 5 (2) of the Act prohibits the following disqualified persons who shall not be appointed as Justice:

1. A person who is disqualified from serving as a public official under other pertinent laws and regulations.
2. A person who has been sentenced to imprisonment without forced labor or heavier punishment.
3. A person for whom five years have not yet passed since being dismissed as a result of impeachment.

The Justices of the Court 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.[60] The President of the Constitutional Court represents the Constitutional Court, takes charge of the affairs of the Constitutional Court, and directs and supervises the Court's public officials. [61]

The status and remuneration of the President of the Constitutional Court 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. [62] The term of office of the Justices of the Constitutional Court is six years and they may be reappointed under the

[59]The Constitutional Court Act initially created two classes of justices without any constitutional basis. Six of nine are "standing justices" while the remaining three are 'non- standing justices'. The standing justices serve full time and are entitled to the same remuneration and privileges and rights enjoyed by the justices of the Supreme Court. The non-standing justices have an honorary status and receive no salary for their service, although they are entitled to an allowance for expenses connected with their work. Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, p 119.
Under the amendment done in 1991, however, all nine Justices stand full-time members of the Court. This was due to the criticism that adjudication at the Court not be done properly with some members of the Court serving only part-time and receiving only travel expenses rather than a regular salary and coming in only for deliberation and announcement of decisions. Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, pp 101-102.

[60] Article 111 (2) to (4) of the Constitution, and Articles 3, 6 (1) & 12 (2) of the Constitutional Court Act.

[61] Article 12 (3) of the Constitutional Court Act.

[62] Article 15 of the Constitutional Court Act.

conditions as prescribed by Act. [63] The retirement age of Justices is sixty-five with the exception of retiring age of seventy for the President of the Constitutional Court. [64]

The 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.'[65] The Constitution additionally guaranteed that judges would not be removed from office for any reason other than impeachment, criminal acts, or incapacity.[66]

The Justices have constitutional obligation neither to join any political party nor to participate in political activities during their term of office. [67] Article 14 of the Constitutional Court Act adds more detailed list of concurrent service. It reads as follows:

> The Justices shall not concurrently hold any of the following positions, or conduct any business for profit.
>
> 1. A member of the National Assembly or of a local legislative council.
> 2. A public official in the National Assembly, the Executive, or ordinary courts.
> 3. An advisor, officer or employee of a corporation or an organization, etc.

Article 113 (1) of the Constitution fixes required quorum for a decision of the unconstitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmative decision regarding the constitutional complaint as the concurrence of six out of nine Justices.[68] Article 23 (2) first proviso of the Constitutional Court Act corresponds to this Constitution Article. Second proviso further states that the same quorum is required for overruling the Court's earlier precedent on the interpretation and application of the Constitution or statutes. A simple majority is sufficient in making decision on other cases. [69]

The Council of Justices consisting of all nine justices with the President as the chairman, a final decision making body regarding the administration of the constitutional court, decides the following matters.

1. Matters relating to the enactment or amendment of rules of the Constitutional Court, and to the submission, pursuant to Article 10-2, of opinions regarding legislation.
2. Matters relating to requests for budget, appropriation of reserve funds and settlement of accounts.
3. Matters relating to the appointment or removal of the Secretary General, Deputy Secretary General, Constitutional Research Officers and public officials of Grade III or higher.

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[63] Article 112 (1) of the Constitution which are also stated in Article 7 (1) of the Constitutional Court Act.
[64] Article 7 (2) of the Constitutional Court Act.
[65] This is also provided by Article 4 of the Constitutional Court Act.
[66] Article 112 (3) of the Constitution which is also stated in Article 8 of the Constitutional Court Act.
[67] Article 112 (2) of the Constitution which are also stated in Article 9 of the Constitutional Court Act.
[68] In terms of the general adjudication procedures of the Constitutional Court Act, Article 22 of the Constitutional Court Act lays the rule that, 'The adjudication of the Constitutional Court shall be conducted by the Full Bench composed of all (nine) the Justices and the President of the Constitutional Court is the Presiding Justice of the Full Bench.'
[69] Article 23 (2) of the Constitutional Court Act. A simple majority is sufficient in cases presenting an intra governmental jurisdictional dispute. Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, p 147.

4. Matters deemed especially important and submitted by the President of the Constitutional Court for discussion.[70]

Department of Court Administration is established to manage the administrative affairs of the Court; Constitutional Research Officers, Assistant Constitutional Research Officers and Academic Advisers are appointed to assist the Justices and to conduct systematic study and research on constitutional law and constitutional adjudication; and a Secretariat is assigned to take charge of confidential affairs under the direction of the Justices.[71]

Article 113 (2) of the Constitution authorizes the Constitutional Court to establish its own regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of the Constitutional Court Act passed under Article 113 (3) of the Constitution. Accordingly, the Constitutional Court makes rules regarding its adjudication procedures, internal discipline, and management of general affairs, subject to the Constitutional Court Act and other statutes.[72]

5. Jurisdictions of the Constitutional Court

The 1987 Korean Constitution adopted the Constitutional Court system. The Constitutional Court has the jurisdiction to review the constitutionality of law as the most important jurisdiction. Its second jurisdiction concerns the removal of high-level public officials, including the President, while the third is to determine the matters on dissolution of political parties. It also has the jurisdiction over competence disputes between State agencies, between State agencies and local governments, and between local governments. The last jurisdiction goes with the protection of basic human rights and freedoms by hearing constitutional complaints made by private individuals who challenge governmental activities and omission to redress their basic rights. The detailed adjudication procedures for above mentioned five jurisdictions of the Constitutional Court are provided under the Chapter IV, Special Adjudication Procedures, of the Constitutional Court Act. This part explains on these jurisdictions.

5.1 Jurisdiction to Review Constitutionality of Statutes

Reviewing the constitutionality of laws[73] appears to be regarded as the central and most typical function of constitutional courts. In terms of the first and the most important jurisdiction of the Constitutional Court, Article 111 (1) of the Constitution 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. [74] This Constitution Article is corresponded in details by Article 41, Request for Adjudication on the Constitutionality of Statutes, of the Constitutional Court Act as follows:

[70] Article 16 of the Constitutional Court Act.
[71] Articles 17 to 21 of the Constitutional Court Act.
[72] Article 10 of the Constitutional Court Act.
[73] Law means laws proceeded from the primary or supreme legislation only.
[74] While the Constitutional Court has the authority to review the constitutionality of a statutory legislation, that is, a law that has been duly passed by the legislature, the Supreme Court has 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 under Article 107 (2) of the Constitution.

(1) When the constitutionality of a statute must be determined prior to reaching a judgment in a case, ordinary courts[75] shall make a request, *sua sponte* or on motion by a party, for an adjudication by the Constitutional Court on the constitutionality of the statute.
(2) The party's motion referred to in Section (1) shall be made in writing, stating matters indicated in Items 2 through 4 of Article 43.
(3) For reviewing the party's written motion referred to in Section (2), the provisions of Article 254 of the Civil Procedure Act shall apply *mutatis mutandis*.
(4) No appeal may be made against the decision of ordinary courts to make a request for an adjudication of the constitutionality of statutes.
(5) When an ordinary court other than the Supreme Court makes a request referred to in Section (1), it shall do so through the Supreme Court.

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. In this sense, the Korean Constitution adopts a system of concrete review of statutes.[76] This is pronounced by Article 107 (1) of the Constitution under the title of 'The Courts' as, '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.'

When an ordinary court makes a request to the Constitutional Court for an adjudication of the constitutionality of statutes, the proceedings of the ordinary court will be suspended until the Constitutional Court makes a decision on the constitutionality of statutes.[77] If the Constitutional Court interpreted and declared that the contents of a statute or the statute as a whole is unconstitutional,[78] the concerned legislation loses its legal validity and the ordinary courts are bound by the Court's decision in accord with Article 47 of the Constitutional Court Act.

Article 47 (Effect of Decision of Unconstitutionality)
(1) A decision of statute's unconstitutionality shall be binding on the ordinary courts, other state agencies and local governments.
(2) A statute or statutory provision held unconstitutional shall become invalid as of the day that the decision is made. Provided, that statutes or statutory provisions relating to criminal penalties shall become invalid retroactively.
(3) When a statute or statutory provision becomes invalid according to the proviso of Section (2), retrials may be requested for final convictions reached on the basis of the unconstitutional statute or statutory provision.
(4) The provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to retrials requested pursuant to Section (3).

The Constitutional Court, however, reviews the constitutionality of statutes when and where the ordinary court requests it to do so. Therefore, if the ordinary court is not

[75] Ordinary courts include military courts.
[76] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 109. Concrete review is the power of the court to review the constitutionality of legislation when it appears to a particular case. By contrast, abstract review is the power of the court to decide on the constitutionality of legislation without a concrete case to base it on.
[77] Article 42 (1) of the Constitutional Court Act.
[78] According to Article 45 of the Constitutional Court Act, the Constitutional Court shall give its decision on constitutionality or unconstitutionality of the requested law only, not on any other matter of the case.

willing to make any request for a review or rejects the motion made under Article 41 (1), the review powers of the constitutional court cannot be exercised. In order to avoid this situation, Article 68 (2) of the Constitutional Court Act has set up a mechanism which allows the parties to the suit to file a constitutional complaint against the relevant statute its constitutionality is in question at the Constitutional Court.

> Article 68 (2)
> When a motion made pursuant to Article 41, Section (1) for adjudication on the constitutionality of a statute has been rejected, the motioning party may file a constitutional complaint with the Constitutional Court. In this case, the party may not motion again for a request for adjudication on the constitutionality of the statute, for the same reasons within same underlying legal proceeding.

When a party to the suit requests the court to refer a question on the constitutionality of legislation to the Constitutional court under Article 41 (1) of the Constitutional Court Act and is refused, he or she has the right to appeal to the superior courts. In addition, he or she also has right to renew the claim of unconstitutionality by immediate petition to the Constitutional court under article 68 (2) of the Act. Therefore, though Article 68 (2) is under the heading of 'Adjudication of Constitutional Complaints', it has connection with Article 41 (1) of the Act and it grants an alternative access for review of the constitutionality of legislation for those who requests for referral to the court have been rejected by the ordinary court at hand.

5.1.1 Types of Decisions for Adjudication on Constitutionality of Laws

There is no article other than Article 45 within the Constitutional Court Act that mentions the different types of decisions for adjudication on the constitutionality of law. Article 45 under the heading of 'Decision of Unconstitutionality' provides as follows:

> The Constitutional Court shall decide only whether or not the requested statute or statutory provision is unconstitutional. Provided, that when a decision of unconstitutionality regarding a statutory provision is deemed to render the entire statute unenforceable, the Constitutional Court may make a decision of unconstitutionality on the entire statute.

Therefore, by looking at this Article 45 of the Act, it can be safely presumed that there are two types of decision for constitutionality of law cases; constitutional or unconstitutional.

However, the abridged edited book of 'Twenty Years of the Constitutional Court of Korea' claimed that, 'The Court found that it was impossible to deal with all the myriad issues arising from constitutionality review with just two types of holdings − constitutional or unconstitutional. Since the First Term, the Court has thus adopted various forms of holding such as limited constitutionality, limited unconstitutionality or nonconformity with the Constitution to suit the particular needs of each case. These modified decisions are in fact widely used in other countries with constitutional courts (e.g., Germany) and are a means to implementing the basic principle of preference for 'constitution-consistent' interpretations.' [79]

[79] Modified decisions refer to the variety of decisions made by the Constitutional Court in its review of the constitutionality of statutes where, despite a finding of unconstitutionality, the Court avoids striking down the statute in its entirety and yet proclaims that the statute is deficient from the Constitution's point of view. The Court employs such decisions either out of respect for the legislature's formative powers or in order to avoid confusion that may arise from the gap in the legal system which will be created if the whole statute is

Accordingly, the statistics of the cases adjudicated by the Constitutional Court of Korea, which were uploaded by its official website during the Fifth Term of Constitutional Court as of 31 December 2014, has shown six different categories of decisions as unconstitutional, unconformable, conditionally unconstitutional, conditionally constitutional, constitutional and upholding. Given explanations for these types of decisions by the Constitutional Court are as follows:

> Unconstitutional decision is used in constitutionality of laws cases. Unconformable means that though the Court acknowledges unconstitutionality of a law, it merely requests the National Assembly to revise it within a certain period of time. So that law remains effective till then. It is conditionally unconstitutional where the Court prohibits a particular way of interpretation of a law as unconstitutional, while other interpretations remain constitutional. Conditionally constitutional means that a law is constitutional if it is interpreted according to the designated way. This is the converse of unconstitutional in certain context. Both are regarded as decisions of partially unconstitutional. The conclusion 'upholding' is used when the Court accepts a constitutional complaint which does not include a constitutionality of law issue.[80]

There is no controversy in recognizing the fact that two constitutional decision types exist (constitutional or unconstitutional), but there is controversy in recognizing whether there is a middle ground between the two types of decisions, such as a modified decision type, or in what form the decision order should be given. The categories of the types of decisions differ slightly between scholars and the Constitutional Court. [81] In this connection, Nak-In Sung in his article of 'A perspective on the Development of Constitutional Adjudication in Korea' argued that, 'While Germany's Federal Constitutional Court acknowledges the binding effect of the 'Constitutional Courts Decisions', our Constitutional Court Act Article 47 Clause 1 only prescribes 'any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments', and therefore there is controversy as to whether modified decisions can be allowed, or whether there is any binding effect to the modified decisions.'[82]

5.2 Jurisdiction 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. [83]

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struck down. As there is no explicit provisional grounding for these modified decisions in the relevant statutes, there has been some debate regarding their legal grounds, legitimacy and permissibility. However, less than a year after its establishment, the Constitutional Court recognized the need for such modified decisions, and by the end of the Court's First Term in 1994, they had become regular practice. Nevertheless, it is difficult to find critics who flatly deny the need for modified decisions. See Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, pp 130, 155.

[80] http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do;jsessionid=yAyWJKIGGLZoXGGfLQEJTadKWbYpnFPHxEyaXvqRtbRRrEHMqITKrDG3c1OvXFvS.cowas_servlet_engine10.

[81] Nak-In Sung, *A perspective on the Development of Constitutional Adjudication in Korea*, Seoul Law Journal, Vol. 53, No. 2, 2012, p 194.

There was a disagreement between the Constitutional Court and the Supreme Court in this context of modified holdings. See Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, pp 155-156.

[82] Nak-In Sung, *A perspective on the Development of Constitutional Adjudication in Korea*, p 199.

[83] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 111.

Ever since the Korean Founding Constitution, different institutional arrangements for impeachment proceeding were set up. Impeachment institution was separate from the institution which exercised the constitutional adjudication till the Third Republic Constitution; however, starting from the period of Fourth Republic Constitution, adjudication on impeachment proceeding came under the constitutional adjudication system.

Second jurisdiction of the Constitutional Court under the existing Korean Constitution concerns the removal of public officials prescribed by the relevant laws, including the President. Articles 48 to 54 of the Constitutional Court Act provide the details procedures for adjudication of impeachments.

Article 48 (Institution of Impeachment)

If any of the following public officials violates the Constitution or statutes in the performance of his or her duties, the National Assembly may pass a resolution of impeachment in accordance with the provisions of the Constitution and the National Assembly Act:

1. President of the Republic, Prime Minister, Members of the State Council or Ministers of Various Administrative Ministries.
2. Justices of the Constitutional Court, judges, or Commissioners of the National Election Commission.
3. Chairman and Commissioners of the Board of Audit and Inspection.
4. Other public officials as prescribed by relevant statutes.

This Article 48 of Constitutional Court Act corresponds with the Article 65 (1) of the Constitution.

The National Assembly has the power start the impeachment process by passing a motion to impeach in accord with Article 65 (2) of the Constitution as follows:

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.

It can be seen that above article provides different processes and different requirement for motion to impeach the President and other designated officials other than the President. Then, the impeachment prosecutor, the Chairperson of the Legislation and Justice Committee of the National Assembly, [84] shall request the Constitutional Court which has jurisdiction to adjudicate the impeachment proceeding under second item of Article 111 (1) of the Constitution.

When the request for impeachment adjudication is found to have merit, the Constitutional Court will announce a decision of dismissing the impeached person from the currently held public office.[85] Impeachment proceeding is, however, in nature of disciplinary sanction rather than criminal punishments. Hence, Article 65 (4) of the Constitution, a decision on impeachment shall not extend further than removal from public office. However, the impeached person will not be exempted from civil and criminal

[84] In impeachment adjudications, the Chairperson of the Legislation and Justice Committee of the National Assembly shall be the impeachment prosecutor. Article 49 (1) of the Constitutional Court Act.
[85] Article 53 (1) of the Constitutional Court Act.

liability under proviso of the Article 65 (4) of the Constitution and Article 54 (1) of the Constitutional Court Act.

The Constitutional Court adjudicated 'Presidential Impeachment' case[86] which was one and only impeachment case decided by the Court in 2004, so far. On 12 March 2004, the National Assembly of Korea passed a resolution to impeach President Roh Moo-hyun for violation of election laws, corruption involving his aides and his incompetency. However, the petition for impeachment was denied by the Court in May with the conclusion that the violations of the president found in this case did not amount to such grave violations. The case will be stated in details under next part.

5.3 Jurisdiction on Dissolution of Political Parties

The system of State intervention to initiate on dissolution of political parties was first introduced by the Second Republic of Korea Constitution though the responsible institution for making the final determination was changed over time. The Constitutional Court has been exercising this adjudication on dissolution of political parties under existing Korean Constitution. Article 8 of the Constitution says as follows:

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.

'Twenty Years of the Constitutional Court of Korea', an official publication published by the Constitutional Court of Korea, states 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.'[87]

In this connection, Article 55 of the Constitutional Court Act under the title of 'Request for Adjudication on Dissolution of a Political Party' mentions as follows:

If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may, after deliberation at the State Council, request the Constitutional Court for adjudication for the dissolution of the political party.

Therefore, the Constitutional Court exercises this authority upon the request of the executive after resolution by the State Council. The detailed procedures for adjudication for dissolution of political parties are further provided by Articles 56 to 60 of the Constitutional Court Act.

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[86] 2004 Hun-Na 1, May 14, 2004.

[87] Militant democracy is a paradigmatic concept in the study of democratic responses to political extremism. Dae-Kyu Yoon in his work of '*Law and Democracy in South Korea: Democratic Development Since 1987*', p 164 expresses this 'militant democracy' as 'contrary to the fundamental democratic orders'.

When the Constitutional Court Act announces its decision to dissolve the political party, the said political party shall be dissolved and the decision of the Constitutional Court shall be executed by the National Election Commission in accordance with the provisions of the Political Parties Act. [88]

The Constitutional Council has just exercised its power to dissolve the political party and has ruled out to dissolve Unified Progressive Party (UPP), the opposition party, on 19 December 2014 as very first time throughout the history of Constitutional Court of Korea. The court decision clearly confirmed that Unified Progressive Party tried to use violence to overturn the liberal democratic system and realize North Korean-type socialism. The details of the case will be provided in next part.

5.4 Jurisdiction on Competence Disputes

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 as fourth jurisdiction of the Court.

Constitutional Court Act Article 61 lays the cause for the relevant state agency to request for adjudication. It provides that

> When a 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, the relevant state agency or local government may request the Constitutional Court for adjudication of the competence dispute. The request for adjudication, however, may only be allowed when a disposition or inaction by the respondent infringes upon, or is in clear danger of infringing upon, the competence of the requesting party as granted by the Constitution or statutes.

Republic of Korea believes that, 'By clarifying the competence and jurisdictional boundaries of state agencies and other entities exercising public power in relation to one another, the system of adjudicating competence disputes seeks to maintain checks and balances within the government structure, as well as ultimately securing the normative power of the constitution itself.' [89] According to this Article, however, it is Court's discretion whether to allow the petition for competence dispute or not. The Court main concern is if the constitutional or legal rights of the requesting agency has been violated or is in clear danger of being violated by an action or non-action of the respondent.

Article 62 of the Constitutional Court Act classifies the competence disputes as follows:

1. Competence disputes between state agencies: Competence disputes among the National Assembly, the Executive, ordinary courts, and the National Election Commission.
2. Competence disputes between a state agency and a local government:
   (a) Competence disputes between the Executive, on the one hand, and a Special Metropolitan City, a Metropolitan City or a Province, on the other.
   (b) Competence disputes between the Executive, on the one hand, and a City, a County, or District which is a local government (hereinafter 'Self-governing District'), on the other.

[88] Articles 59 and 60 of the Constitutional Court Act.
[89] Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea: Abridged Edition*, p 112.

3. Competence disputes between local governments:
   (a) Competence disputes among a Special Metropolitan City, Metropolitan Cities, or Provinces.
   (b) Competence disputes among Cities, Counties, or Self-governing Districts.
   (c) Competence disputes between a Special Metropolitan City, a Metropolitan City, or a Province, on the one hand, and a City, a County or a Self-governing District, on the other.[90]

In addition, when a competence dispute relates to the affairs of a local government concerning education, or science and the arts, as prescribed by Article 2 of the Local Educational Self-Governance Act, the Superintendent of the Board of Education shall be the party in disputes enumerated in Section (1), Items 2 and 3. [91]

After being satisfied with the existence or scope of the competence dispute, the Constitutional Court either cancels the disposition of the respondent or confirms the invalidity of the disposition. When the Constitutional Court has rendered a decision to recognize the request against inaction, the respondent shall make a disposition in accordance with the contents of the decision.[92]

As an effect of the decision, although the decision of the Constitutional Court on competence dispute binds on all state agencies and local governments, the decision cancelling a disposition of a state agency or a local government does not affect previous legal relations between the respondent state agency and the concerned persons of such disposition.[93]

5.5 Jurisdiction of Constitutional Complaints

The last jurisdiction of the Constitutional Court granted by the Constitution is 'the adjudication on constitutional complaint as prescribed by the Act'. 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. In other words, Article 68 sets the causes by which private individuals can utilize the Constitutional Court to challenge governmental actions and omissions by means of constitutional complaints as follows:

Article 68 (Cause for Request)

(1) A person whose constitutionally guaranteed basic rights have been violated on account of an exercise or non-exercise of state power may file a constitutional complaint with the Constitutional Court, except against the judgments of ordinary courts. Provided, that in case other relief processes are available under other statutes, no constitutional complaint may be filed unless all such processes have been exhausted.

(2) When a motion made pursuant to Article 41, Section (1) for an adjudication on the constitutionality of a statute has been rejected, the motioning party may file a constitutional complaint with the Constitutional Court. In this case, the party may not motion again for a request for adjudication on the constitutionality of the statute, for the same reasons within same underlying legal proceeding.

[90] Article 62 (1) of the Constitutional Court Act.
[91] Article 62 (2) of the Constitutional Court Act.
[92] Article 66 of the Constitutional Court Act.
[93] Article 67 of the Constitutional Court Act.

Although Korea has practiced constitutional review system since its First Republic Constitution era, application for adjudication of constitutional complaints under Article 68 is a new system first adopted under the 1987 Constitution.[94] This system of constitutional complaint provides a means for individuals to seek relief when their constitutional rights have been violated by state power.[95] Whereas, therefore, involvement of the National Assembly, the executive, the courts, or the local governments can be seen in other constitutional cases, each individual can involve directly as subject of the adjudicatory procedure in the constitutional complaints processes since the constitutional complaint is designed to provide direct relief to individuals.

Petitions under Article 68 fall into two categories. First, Article 68 (1) of the Constitutional Court Act provides that the petition jurisdiction is available in situations where existing laws do not afford remedies through ordinary court processes for constitutional state action. A petition of this type may be filed only if all available administrative and judicial remedies have been exhausted. [96] If other relief processes under other statutes are still available, no constitutional complaint is permissible. Time to request for the petitions under Article 68 (1) is limited by Article 69 (1) of the Constitutional Court Act. It reads as follows:

> A constitutional complaint under Article 68, Section (1) shall be filed within ninety (90) days of learning the existence of the cause, and within one (1) year of the occurrence of the cause. Provided, that constitutional complaints filed after going through other relief processes available under other statutes shall be filed within thirty (30) days of receiving notice of the final decision.

Second, the party, whose motion made under Article 41 of the Constitutional Court Act was rejected, may file an immediate constitutional complaint [97] with the Constitutional Court under Article 68 (2) of the Act. In this case, such party may not motion again for a request for adjudication on the constitutionality of the statute, for the same reasons within same underlying legal proceeding. Therefore, Article 68 (2) grants the motioning party an alternative remedy to ask the Constitutional Court for reviewing the constitutionality of legislations, in addition to right to appeal to the Superior courts.

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[94] As of 31 December 2014, total 26,781 petitions have been filed. 25, 848 cases out of total number of cases are constitutional complaints under article 68 of the Constitutional Court Act. A total of 21,030 petitions had been filed with the Constitutional Court under article 68 (1) and 20,590 cases were settled, while 440 cases were still pending. Not including 574 petitions withdrawn by the parties concerned, and11, 294 petitions dismissed by the court in the screening process, the Court reviewed 8,722 petitions on their merits. The court found state actions unconstitutional in 80 petitions. Petitions made under article 68 (2) of the Constitutional Court Act, which are requests for constitutional review on legislation, are 4,818 only out of total 25,848 filing. Yet the court decided 176 cases as unconstitutional out of 4,487 settled cases and the rest 331 is pending.

[95] The Constitutional Court has interpreted 'state power' in this provision to encompass legislative power. The Court ruled in the case of 89 Hun-Ma 220, June 25, 1990 that if an individual's constitutional rights are being violated directly and currently by a statute, even before any specific act takes place to implement it, then the individual may file a constitutional complaint without having to go through prior relief procedures. Moreover, the Court extended its power to the rules and the regulations made by the executive and the judiciary if they directly infringe upon an individual's constitutional rights even before being implemented through a particular act in 1989 Hun-Ma 178, October 15, 1990.

[96] Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, p 156.

[97] This constitutional complaint shall be filed within (30) days of receiving notice of the ordinary court's ruling rejecting the motion for request for adjudication on the constitutionality of the statute under Article 69 (2) of the Constitutional Court Act.

Thus two kinds of petition are quite distinct. An article 68 (1) petition, if granted, vindicates individual rights infringed upon by the state and involves fact-finding by the constitutional court itself. An article 68 (2) petition, if granted, stays ongoing litigation pending the constitutional court's judgment on the validity of a legislative act, but the finding of facts and the final disposition are made by the court of original jurisdiction , subject to the guidance of the constitutional court on the constitutional question. An article 68 (2) petition is the alternative way to approach the Constitutional Court for the judicial review of legislation in cases where an ordinary court refuses to help the parties and parties concerned are otherwise about to lose an opportunity to challenge the constitutionality of legislation at issue.[98] Therefore, a motion made under Article 68 (2) of the Constitutional Court Act links with judicial review of legislation made under Article 41 (1) of the same Act.

The detailed procedures for adjudication of constitutional complaints are stated in Articles 70 to 74 of the Constitutional Court Act. A decision to grant a constitutional complaint binds on all State agencies and local governments. Article 75 of the Constitutional Court Act says as follows:

(1) A decision to grant a constitutional complaint shall be binding on all state agencies and local governments.
(2) When granting a constitutional complaint filed pursuant to Article 68, Section 1, the infringed basic rights and the exercise or non-exercise of state power which caused the infringement shall be specified in the holding of the written decision.
(3) In cases referred to in Section (2), the Constitutional Court may cancel the exercise of state power that caused the infringement of basic rights, or confirm the unconstitutionality of the non-exercise of state power.
(4) When the Constitutional Court makes a decision to grant a constitutional complaint challenging the non-exercise of state power, the respondent must make a new disposition in accordance with the contents of the decision.
(5) In cases referred to in Section (2), when the exercise or non-exercise of state power is deemed to be caused by an unconstitutional statute or statutory provisions, the Constitutional Court may declare in the decision to grant the complaint that the statute or statutory provisions are unconstitutional.
(6) In cases referred to in Section (5), and when making decisions to grant a constitutional complaint filed pursuant to Article 68, Section 2, the provisions of Articles 45 and 47 shall apply *mutatis mutandis*.
(7) When a constitutional complaint filed pursuant to Article 68, Section 2 has been granted, and when the underlying litigation related to the said constitutional complaint has already been decided by a final judgment, prescribed, the parties may request a retrial.
(8) For retrials referred to in Section (7), the provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to criminal cases, and those of the Civil Procedure Act to other cases.

In case of Article 68 (1) of the Constitutional Court Act, the upholding decision shall bind the ordinary courts, other state agencies and local governments. In particular,

[98] Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, pp 157-158.

when a decision of upholding was made against the non-exercise of governmental power, the respondent must take new action in accordance with the decision. [99]

Regarding Article 68 (2) of the Constitutional Court Act, the upholding decision shall bind the ordinary courts, other state agencies and local governments. Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made: provided, that the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively. When the constitutional complaint under Article 68 (2) of the Constitutional Court Act has been upheld, the party may claim for a retrial with respect to a final judgment having applied the statutes or provisions thereof decided as unconstitutional, whether criminal, civil or administrative. In addition, because the statutes or provisions relating to criminal litigation lose their effect retroactively, a person convicted based on a statute held as unconstitutional may claim a retrial, even if the case is not related to the constitutional complaint. [100]

There are three types of decisions in the final judgment of the Constitutional Court; rejection, dismissal and upholding a case. Rejection is made when the request of adjudication does not have a rationale behind the request; dismissal is made when the request was made unlawfully; and upholding is made when the request has reason. According to Article 68 (1) of the Constitution, if a request of adjudication was found to have rationale, the Constitutional Court must specify the exercise or non-exercise of governmental power that infringed basic rights. In this case, if the Constitutional Court finds that the cause of such infringement was from the laws or statutes, the Court may hold the statute unconstitutional. Provided, if the unconstitutionality of a clause makes the whole statute unenforceable, the Court may announce the whole statute unconstitutional.[101]

6. Some Cases Decided by the Constitutional Court of Korea: Special Emphasis on Court's Adjudication on Constitutional Complaints

From the day of establishment of the Constitutional Court of Korea in September 1988 up to as of 31 December 2014, total 26,781 cases have been filed at Constitutional Court and the Court settled 25,957 cases with 824 pending cases. People have primarily accessed the Court for reviewing the constitutionality of legislation and for petition of the constitutional complaints. As of 31 December 2014, 83 cases of competence disputes, one impeachment case and one case on the dissolution of political parties have been filed out of total case statistics. [102]

There was an on and off-line survey participated by citizens, journalists and employees of the Court to select 25 unforgettable decisions of the Constitutional Court among all decided cases through a 25-year history of the Court. Being based on that survey, the Constitutional Court has published the book of '25 Unforgettable Cases of the Korean Constitutional Court in Cartoons' in June 2014. There is another category of selection of important cases given special emphasis on the respective terms of the Constitutional Court. 'Major decisions of the Term Courts' were mentioned in 'A Quick Glance at the Constitution and Constitutional Court of the Republic of Korea'. [103] And the

[99] http://english.ccourt.go.kr/cckhome/eng/jurisdiction/jurisdiction/constComplaint.do
[100] Ibid.
[101] Ibid.
[102] See Appendix 1 under part 9 of this work.
[103] There are 49 cases in total as of 31 August 2014.

Constitutional Court of Korea website has uploaded another category of cases which integrated Korean people socially titled on '12 Landmark Cases on Social Integration'. Most of the decisions decided by the Constitutional Court are differently categorised as 'Decisions on Freedom of Press and other Intellectual Freedoms', 'Decisions concerning Politics and Elections', 'Decisions concerning Economic and Property Rights and Taxation', 'Cases concerning Social Relations such as Family, Industrial Relations'. There may be many more categories of selected cases depending on relevant circumstances to which the researcher cannot reach through because of time constraint and language constraint.

Therefore, although the researcher acknowledges the fact that most cases decided by Constitutional Court was worth enough to study, she has chosen some cases among above mentioned four different categories of case-selection by giving priority to her home country's needs and experiences. Within the framework of present research, constitutional complaint cases made under Article 68 (1) of the Constitutional Court Act will be a primary consideration together with some cases on constitutionality of statutes, on impeachment, on dissolution of political parties, on competence disputes and on constitutional complaints under Article 68 (2) of the Constitutional Court Act.

6.1 Constitutionality Cases

6.1.1 Restriction on Judge's Discretion in Releasing Defendants of Serious Crimes Case [104]

The defendants of the underlying case were arrested and prosecuted for assault in robbery and special assault in the Seoul District Criminal Court on 20 March 1992. They confessed to all the facts alleged in the prosecution on the first day of the trial. After inspection of evidence and other trial procedures, the prosecutor demanded a sentence of imprisonment between ten and seven years. In this connection, Article 331 of the Criminal Procedure Act provided that a warrant of detention lost its effect in event of acquittal, judicial exemption of prosecution, exemption from punishment, suspension of sentencing, suspension of punishment, dismissal of the prosecution, or sentence of a fine or minor fine. However, when the prosecutor demanded a death penalty, a life sentence, or a sentence of imprisonment for more than ten years, the first trial court and the appellate court should not set the accused free until it is upheld by the Supreme Court. Therefore, the trial court found that the proviso of Article 331 violated the Constitution and requested, *sua sponte,* for this 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 as follows:

[104] 1992 Hun-Ka 8, Dec. 24, 1992. The number is preceded by the four-digit filing year and followed by a three digit serial number, as maximum, given in the order of filing in that year. Hun-Ka stands for constitutional review of statutes. 'Hun' is English pronunciation of Korean word (憲) meaning Constitution and 'Ka' is first alphabet of Korean language like English alphabet A. Hence, the word 'Hun-Ka' may be conveniently translated into English language as 'Constitutional Court case type A'. Therefore, 1992 Hun-Ka 8 means the Constitutionality case referred by an ordinary court, the docket number of which is No. 8 in the year 1992.

Every citizen is guaranteed the right to bodily freedom (Article 12 (1) of the Constitution). In event that it be restricted by such legal process as arrest, due process of law (Article 12 (1) and (3) of the Constitution) and the general rules of statutory restrictions on basic rights (Article 37(2)) demand such restriction to remain at the minimum extent necessary. Therefore, a judge or the court can cancel such 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.

The due process of law under Article 12 (1) and (3) are independent constitutional principles. These relevant principles of arrest by warrant apply not only to the question of issuing a warrant but also to their continued effects; and also allow the judges, whose impartial status is protected by the principle of judicial independence, to determine both questions Therefore, the proviso of Section 331 of the Criminal Procedure Act, which allows the continued validity of a warrant depending on a prosecutor's decision, violates this due process of law. Some gave focus on the legislative purpose of said proviso and argued that 'it, once released on a judge's misjudgment, may be difficult to bring the defendant back into custody and under the criminal justice system despite the seriousness of his crime'. They argue that it is inevitable to hold the defendant under the arrest warrant.

However, Article 93 of the Criminal Procedure Act allows the prosecutor to appeal a judge's cancellation of a warrant immediately. Other provisions of the Act also allow the appeals court to arrest the defendant again if it is needed. In accord with these provisions, the proviso in question contravenes the basic principles of statutory abridgement of basic rights such as the legitimacy of the end, the appropriateness of the means, the doctrine of the least restrictive means, and the balance between the interests. It therefore violates the rule against excessive restriction. The Constitutional Court finally ruled in this case that, in light of the Article 12 (3) of principle of arrest by warrant and due process of law, 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.[105]

6.1.2 Motion Pictures Pre-Inspection Case[106]

This combined case[107] arose out of motions to request for constitutional review by the 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. The first claimant made this motion during his trial. After getting the permission from the Court, he requested the Constitutional Court to review. The second claimant, who was already convicted and imposed a one million won fine, made the motion in appeal of such conviction, but he was denied. Accordingly, they filed a constitutional complaint with the Court.

Article 21(1) of the Constitution stipulates that, 'All citizens shall enjoy freedom of speech and the press, and freedom of assembly and association' by means of providing general protection for freedom of expression.' The second part of the same Article bans censorship or licensing of the speech and press, and licensing of assembly and

[105] The proviso of Article 331 of the Criminal Procedure Act was deleted by Act No. 5054 on December 29, 1995 following by this decision of Constitutional Court.
[106] 1993 Hun-Ka 13 et al., Oct. 4, 1996.
[107] 1993 Hun-Ka 13 and 1991 Hun-Ba 10.

association.[108] Various Articles of old Motion Picture Act[109] **,** 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's reasons and decision are as follows:

A motion picture is a form of expression, and its production and releasing in public should be protected by the Article 21(1) of the Constitution as freedom of speech and press. It is protected also under the Article 22 (1) under the title of freedom of science and arts since it is often used as means to publish the results of academic research or as a form of art. Censorship forbidden by Article 21(2) is an administrative authority's act of deliberating on the contents of an idea or opinion and suppressing it from being published on the basis of its contents−in other words, a ban on publication of the unlicensed material. Censorship debilitates originality and creativity of people's artistic activities and poses a grievous danger to their mental functions and may suppress in advance the ideas adverse to the government or the ruler, leaving at large only the opinions controlled by the government or innocuous ideas to it.

Compared to Article 37 (2) that allows all liberties and rights of the people to be limited by means of statute for reason of national security, public order or public welfare, Article 21 (2) stands for prohibition of censorship as a means at all, even if in form of a statute, when freedom of press and publication is at stake. However, this unconstitutional censorship under Motion Picture Act is only a system of pre-inspection conducted by an administrative body with complete control to decide whether a material can be published or not, based on compulsory submission mechanism supported by penalty of banning such material in the event of no license.

Therefore, for all these reasons, the Court finally 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.

6.1.3 Special Act on the May Democratization Movement, etc. Case[110]

Before going through the details of the case, in order to have clear understanding of the case, it is necessary to explain briefly about the political situation of Republic of Korea at that time. President Park Chung-hee was assassinated on October 26, 1979 after ruling for 18 years. General Chun Doo-hwan (he became the fifth President of South Korea from 1980 to 1988) took control of the government through the Coup d'état of December Twelfth in 1979. [111] In May 1980, the military troop was sent to Gwangju, a city in southwest Korea, to repress with force civilian protesters who were speaking out against the coup of December 1979. In the course of Gwangju Democratic Uprising lasted from May 18 through May 27, several hundred civilians were killed and thousands more

[108] The ban on censorship was first introduced to the Constitution in the proviso of Article 28 (2) of the Second Republic's Constitution, and was also declared by the Third Republic's, although exceptions for motion pictures and entertainment were allowed. The Fourth and Fifth Republic did not separately provide for the ban, but the present Constitution does and does so without any exception.

[109] Motion Picture Act was repealed by Act No. 5129, The Promotion of Motion Pictures Industry Act, on December 30, 1995.

[110] 1996 Hun-Ka 2 et al., Feb. 16, 1996.

[111] http://en.wikipedia.org/wiki/Gwangju_Uprising .

were injured. Countless arrests were made.[112] Roh Tae –woo[113] who gave critical support to a December coup, was a military general and he helped Chun by leading troops at Gwangju Incident. Gwangju massacre was an important landmark in the struggle for South Korean democracy. In 1993, an anti-corruption campaign led by President Kim Young-sam, Roh's successor, found out huge slush funds owned by former presidents Chun Doo-hwan and Roh Tae –woo. The two former presidents were later separately charged with mutiny and treason for their roles in the 1979 coup and the May 18 Gwangju massacre [114] based on by newly enacted law of 'Special Act on the May Democratization Movement, etc'.

The facts of recent case are as follows: The civilian government that took office in February 1993 drove Chun Doo-hwan and Roh Tae-woo, the leaders of the December 12 Mutiny and May 18 Treason , and their followers out of power, and newly defined the December 12 incident as a coup d'état. President Kim Yeong-sam was initially satisfied with leaving judgment on these incidents to the history; but Roh's slush fund incident became the turning point whereby he had to yield to the demands of the academia, dissident leaders, citizens' organizations and student activists. Subsequently, Kim announced the plan to enact the special law. The Special Act on the May Democratization Movement, etc was enacted and promulgated on 21 December 1995. Shortly after that, the Seoul District Public Prosecutor's Office reopened the cases against all the suspects in the two incidents, which they had previously closed by non-institution of prosecution. The office then applied warrants at the Seoul District Court to arrest major suspects involved in the December 12 mutiny and the May 18 treason. The accused argued that suspension of the period of limitation in Article 2 of the May 18 Act constitutes an ex post facto law[115] prohibited by Article 13(1) of the Constitution, and moved to request for the constitutional review. The court granted the motion and requested to the Constitutional Court to review the constitutionality of May 18 Act.

Article 2 (1) of the May 18 Act provides that in applying Article 2 of the Act on Special Cases concerning the prescription for public prosecution etc. against Crimes Disrupting Constitutional Order, accrual of the period is hereby considered having been suspended during the time of disability of prosecution power for the crimes that took place around 12 December 1979, and 18 May 1980. Item 2 of the said Article then states that, 'The period of disability of prosecution power is hereby determined to be the period from the completion of the crime and 4 February 1993.'

The summary of the decision was as follows:

At one point, in general, case-specific legislation is prohibited. The May 18 Act made clear at the time of enactment that it applies only to the December 12 Incident and the May 18 Incident; it thereby limited range of people that it applied to, and therefore could be said to be a case specific legislation. However, the rule against case-specific legislation was meant to require the legislature to abide by the principle of equality. A case-specific legislation was not inherently unconstitutional. It could be constitutional if its discriminatory provisions could be justified with reasonable cause. The discrimination against the accused in the May 18 Act could be justified in light of the illegalities they

[112] Dae-Kyu Yoon, *Law and Democracy in South Korea: Democratic Development Since 1987*, p 183.
[113] Later he served as the sixth President of South Korea from 25 February 1988 to 25 February 1993.
[114] http://en.wikipedia.org/wiki/Roh_Tae-woo .
[115] *ex post facto law* means the law that makes illegal an act that was legal when committed or increases the penalties for an infraction after it has been committed.

committed in coming to power and also in consideration of the mandate of 'rectifying the past' and starting us on the right path of constitutional history. Therefore, case-specific legislation here was constitutional.

Ex post facto criminal law was prohibited as second point. The issue, therefore, was whether the provision here merely deduced from the preexisting laws another reason for suspension of the period of limitation and affirms it (a *declaratory* statute) or it created a new reason for suspension and therefore constituted a retroactive legislation (a *formative* statute). Four Justices out nine replied this issue whether the provision was a declaratory statute or a formative statute was up to the ordinary courts. Other three Justices reasoned that it was not retroactive legislation. The rest two Justices ruled that since the provision suspended the period of limitation for all suspects and specified the time of suspension, it was a retroactive, formative law.

In the end, the ultimate ruling on constitutionality had to depend on the ordinary courts' statutory interpretation. First of all, all Justices agreed that, if the ordinary courts find the period of limitation not expired and the provision merely extending it, and therefore quasi-retroactive, the public interest in punishing the crimes against the constitutional order and restoring justice overwhelms the relatively weak interest in expectation in law, and the provision is constitutional. Contrarily, the Justices differed about the result if the ordinary courts found the period of limitation already expired and therefore the provision genuinely retroactive, giving new effects to the acts or legal relations already completed or formed in the past.

At the end of the discussion, four Justice ruled that, although genuine retroactive legislation is prohibited in principle by the rule of law, it can be allowed exceptionally when protection of the private interest of confidence in the existing status of law cannot be justified in light of the compelling public interest in changing it. They found that the provision pursues the public interest overwhelmingly more important than the protection of expectation interest of the criminals, and deemed it constitutional. Five Justices first posited that, in substantive criminal law, punishment has direct implications on bodily freedom, and therefore, in this area, no public or national interest has precedence over protection of expectation interest and the stability of law. They then reasoned that making a new law to prosecute a crime against which the period of limitation has already expired is equivalent to legislating new elements into a crime that has been already committed. They ruled that such legislation is not permissible under the Article 12 (1), principle of due process, of the Constitution and Article 13(1), prohibition of *ex post facto* criminal punishment, of the Constitution. As a result, they held the provision unconstitutional to the limited extent that it applies to the crimes on which the period of limitation had expired before it was enacted.

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. Because of having no sufficient votes for deciding unconstitutionality as required by Article 23(2) (1) of the Constitutional Court Act, Court finally held that 'Special Act on the May Democratization Movement, etc.' is constitutional.

6.1.4 Case on the House Head System[116]

This is the combined case of two separate groups of petitioners. The petitioners fro first group were divorced with children and they established their new families. However, they held custody and raised their children from previous marriage. The children were registered under the name of their ex-husbands as the house heads. These petitioners reported to the family registration office to register their children under their own households, but the family registration office refused. Another group is married ones and registered under the same households as their husbands or wives. In these households, husbands are registered as house heads. Petitioners (some are husbands from relevant households and some are wives) filed a change of house head system in order to register their household with house heads. However, the family registration office did not accept the filing.

Both group of petitioners appealed the disposition of the family registration office to court. During the trial, the petitioners filed a motion to request a constitutional review of the provisions of the Civil Code regarding the house head system. The trial court granted the motion and requested the case to the Constitutional Court.

The summary of the assenting opinion of Constitutional Court is as follows:

As the Constitution is the supreme norm of the state, the family system cannot deviate from the superior force of the Constitution even though it is distinctively an outcome of history and society. Therefore, if a law regulating the family system impairs actualizing the constitutional ideal and makes the gap between a constitutional norm and the reality, such law should be amended. The Constitution expresses to no longer tolerate the patriarchal and feudal order of marriage, that come from our past society, by declaring equality of men and women in marriage as the basis of the constitutional marital order. Sexual equality and individual dignity are firmly seated by the current Constitution as the supreme value regarding marriage and the family system.

Meanwhile, ‘traditions’ and ‘cultural heritage’, respectively states in the preamble and Article 9 of the Constitution, are concepts reflecting both their history and the times in which they are used. These concepts need to be defined according to their contemporary meanings considering the constitutional value order, the common values of mankind, justice, humanity, etc. Perceiving the meaning of the concept in such a manner, we understand that a certain limit - that tradition and cultural heritage of the family system should at least not be contrary to the constitutional ideals of individual dignity and sexual equality−exists. Therefore, if a certain family system, coming from the past, is contrary to the individual dignity and sexual equality required by Article 36 (1) of the Constitution, it cannot be justified on the basis of Article 9.

The house head system under Article 778 of Civil Code and other relevant Article of 781 and 826 of the same Code,[117] bases on concept of a collective household system and it passes through to direct male descendants as successive house heads. In other words, the house head system is a statutory device to form a family with male lineage at the center and perpetuate it to successive generations. Hence, the house head system is discrimination based on stereotypes concerning sexual roles. This system, without

[116] 2001 Hun-Ka 9 et al., Feb. 3, 2005.

[117] Although the original judgment discussed the details of the relevant provisions of Civil Code, the researcher would not discuss these technically as her main concern deals with the jurisprudence of the Constitutional Court.

justifiable grounds, discriminates men and women in determining the succession order to house head, forming marital relations, and forming relations with children. Due to this system, many families are suffering inconvenience and pain in many ways since they cannot form a legal family relationship appropriate to family life in reality and the welfare of the family. Traditional ideology or public morals such as ancestor worship, respect for the aged and obedience to parents, and harmony in family can be passed down and developed through cultural and ethical aspects, but cannot justify the blatant sexual discrimination of the house head system. The house head system, in addition, one-sidedly prescribes and demands a certain family system deeply rooted in the ideal of maintaining and expanding a family centered on male lineage regardless of the intention or welfare of the people concerned. It does not respect individuals inside a family as individuals with dignity but rather treats them as a means to succeeding a family. Such attitude does not comply with Article 36 (1) of the Constitution that demands respect for the right of autonomous decisions of individuals and families in deciding how to manage marriage and family life.

The relationship inside a family, these days, is no longer an authoritarian one, in which a family is divided into a house head and the followers who obey the house head. It is changing into a democratic relationship where all family members are equally respected as individuals with dignity regardless of sex. As the society is becoming specialized the form of families have become very diverse including families with single mothers, remarried couples and their children from the previous marriage, etc. Also, due to the increased economic power of women and the increased number of divorces, the rate of women filling the role of a house head is also on the rise. Even if the house head system is related to the past family system based on the principle of lineage, as can be seen above, the foundation of the principle's existence has now collapsed and the system no longer can be harmonized with the changed social environment and family relations. Therefore, there is no need for the house head system to be retained.

On the other side there were dissenting opinions given by three Justices, which will briefly be mentioned as follows:

All these three Justices more or less agreed that the house head system of the current law succeeded our own rational tradition of the principle of paternal lineage that had started from the ancient times traceable to the middle period of the Chosun Dynasty. The system can be said to have rid itself of the vestiges of Japanese imperialism and has returned as truly our own tradition. Family law, regulating marriage and family relations, can have strong traditional, conservative, and ethical features. Therefore, in interpreting the constitutional provision on marriage and family relations, the nature of the family law as a tradition should be considered. Especially, in the realm of family law, we should not imprudently cut up our traditional culture with a mechanistic rule of equality rejecting and dismantling totally the traditional family culture. The house head system, in the current law, is designed to actualize the constitution of family and succession of family system based on the principle of paternal lineage. The principle that the wife and children are registered as annexed to the husband, and the system of house head succession, have been designed for such purpose, and are based on our society's long tradition. Therefore, as it is also difficult to see that the house head system of the current law does not respect individual dignity, the system does not violate Article 36 (1) of the Constitution. However, each of the Justices held its own different concurring opinion for constitutionality of Articles 778, 781 and 826 of the Civil Code.

The Constitutional Court, finally, issued an incompatible decision by a six-to-three-vote (one concurring in the dissenting opinion) and it mentioned that, 'If the provisions on review, the framework of the house head system, are found unconstitutional, the system cannot be retained. As a result, the current Family Register Act, which prescribes that each family in the Family Register be compiled according to each house head, cannot be enforced the way it is. However, if the Family Register Act is not enforced at all, there will be a vacuum in the public records used for notice and verifying the relations among people. Therefore, we pronounce 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.'[118]

6.2 Impeachment Case

6.2.1 Presidential Impeachment[119]

One and only impeachment case adjudicated by the Constitutional Court was the most well-known case of the impeachment of President Roh Moo-hyun. The National Assembly of Korea passed a resolution to impeach President Roh Moo-hyun (of the 195 Assembly members who voted, 193 voted in favor and 2 against) on 12 March 2004. The president's powers were suspended according to the Constitution as of the date the resolution was delivered to the President's office. Although respondent argued that the impeachment itself was unlawful because of procedural irregularities, the Court, after doing careful examination, recognized the impeachment resolution as lawful to judge the merits of the case.

In order to start adjudicating the impeachment claim, the Constitutional Court had to first resolve one by one among many procedural issues. Substantively, the most crucial issue was how the language in Article 65 (1) of the Constitution, '…violated the Constitution and other Acts in the performance of official duties', should be interpreted. Other substantive issues included: when does the performance of official duties start and end; should a distinction be made between the president and other officials in analyzing the impeachment grounds; should a requirement of 'grave' violation be read into the constitution; if not, what are the criteria for setting a reasonable limit to impeachment grounds; can unfaithful performance of official duties or violation of the duty to uphold the constitution be grounds for impeachment as claimed by the petitioners, etc.

The Court acknowledged only three out of numerous counts of impeachment which violate the Constitution or other statutes. They are as follows:

First, the president's expression of support for a particular political party at a press conference prior to a general election was a violation of the public officials' duty to

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[118] Article 778 and other relevant provisions under the Civil Code was deleted by Act No. 7427 in 2005 pursuant to the this decision made by the Constitutional Court.
http://elaw.klri.re.kr/eng_service/lawView.do?hseq=29453&lang=ENG .

[119] 2004 Hun-Na 1, May 14, 2004. The number is preceded by the four-digit filing year and followed by a three digit serial number, as maximum, given in the order of filing in that year. Hun-Na stands for impeachment case submitted by the National Assembly against certain high-ranking public officials according to Article 48 of the Constitutional Court Act. 'Hun' is English pronunciation of Korean word (憲) meaning Constitution and 'Na' is second alphabet of Korean language like English alphabet B. Hence, the word 'Hun-Na' may be conveniently translated into English language as 'Constitutional Court case type B'. Therefore, 2004 Hun-Na 1means the Impeachment case submitted by the National Assembly, the docket number of which is No. 1 in the year 2004.

maintain neutrality in relation to elections as stipulated in Article 9 of Public Election Act. Secondly, after being warned for his speech as violation of the Public Election Act, the president delivered the statement, 'A relic of a by-gone era of government-manipulated elections', which again denigrated the current election law. Thirdly, the president's proposal of a national vote of confidence, which is not allowed by the Constitution, and accordingly he never goes through with it, is contrary to Article 72 of the Constitution. Therefore, there is a violation of presidential duty to uphold and protect the Constitution which is mandated constitutionally.

The Constitutional Court, however, finally concluded that, 'The wording specified by Article 53 (1) of the Constitutional Court Act, '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. In connection with the presidential impeachment, a grave violation that can justifiably cause his dismissal from office must be limited to 'cases where maintaining the office of the presidency can no longer be allowed from the perspective of protecting the Constitution or where the president has betrayed the trust of the people and therefore is no longer qualified to administer the affairs of the state.' 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.

6.3 Case on Dissolution of Political Party

6.3.1 Dissolution of Unified Progressive Party Case[120]

This is the case which has been recently adjudicated by the Constitutional Court of Korea. The decision marks the first time that a South Korean political party has been dissolved by the order of the Court exercising constitutional review throughout the history of such court.

Under the Constitutional Court Act Article 55, if the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may request to the Constitutional Court, upon a deliberation of the State Council, adjudication on dissolution of the political party. Accordingly petitioner, existing Government, [121] requested adjudication on dissolution of the Unified Progressive Party[122] 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 whole court including Justice Kim Yisu (the only one out of 9 Justices of the Court who gave dissenting opinion for this case) gave the same opinion regarding justifiability of the request, meanings of the dissolution of political party system and requirements for dissolving a political party as follows:

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[120] 2013 Hun-Da 1, Dec 19, 2014. The number is preceded by the four-digit filing year and followed by a three digit serial number, as maximum, given in the order of filing in that year. Hun-Da stands for dissolution of a political party. 'Hun' is English pronunciation of Korean word (憲) meaning Constitution and 'Da' is third alphabet of Korean language like English alphabet C. Hence, the word 'Hun-Da' may be conveniently translated into English language as 'Constitutional Court case type C'. Therefore, 2013 Hun-Da 1 means the Dissolution of a political party, the docket number of which is No. 1 in the year 2013.

[121]The State Council chaired by the Prime Minister (he acted for the President when the President was abroad on official duty) decided to request for adjudication on dissolution of the respondent party.

[122] It was the third-largest political party of South Korea.

The dissolution of a political party should be understood as the normative will of the constituent power to guarantee the privilege of political parties, especially the activities of the opposing parties as critics of government. While this system recognizes the freedom of the political party regarding its activities, there also exist constitutional limits, that the activities of the political party may not violate the basic democratic order.

In terms of the requirements to dissolve a political, it is stated that either one or both of the objectives or activities of the political party shall be in violation of the basic democratic order.

The 'basic democratic order' stipulated in Article 8 of the Constitution is premised upon the pluralistic view of the world which assumes respect for individual intellect and that all political ideals have verity and rationality. The 'basic democratic order' rejects violent or arbitrary rule. It is a political order constituted and operated by the basic principle of democratic decision making which respects the majority yet is considerate of the minority, and the basic principles of freedom and equality.

Political parties are entitled to freely pursue political ideals of a diverse spectrum as long as they do not deny the basic democratic order. Violation of the basic democratic order does not merely mean a simple breach of or conflict with the basic democratic order. The objectives or activities of the party should incur specific danger to cause substantial threat to society. Enforced dissolution of political parties is a fundamental restriction on the freedom of activities of the political party, which is an essential political right. Therefore the principle of proportionality prescribed in Article 37 (2) of the Constitution must be satisfied.

Summary of the assenting opinion of majority of the Court are as follows:

Though platform of a political party is generally coded, the respondent party does not hold specific contents. Progressive democracy was adopted into the platform of a political party by the Jaju faction [123] of the party. The 'Jaju' faction is affiliated to the so-called National Liberation (NL) front. They understand Korean society as a semi- feudal or semi-capitalistic society subordinated to the imperialism of the United States and assert that a peoples' democratic revolution for national liberation is needed. The leading influence of the respondent consisted of major members of the East Kyeongi Alliance, Gwangju Geonnam Alliance, Busan Ulsan Alliance and other party members are all affiliated to the 'Jaju' faction. They have led the respondent party according to their principles in deciding important matters such as party officials. The Court also stated that, ‘They have blindly supported North Korea while overly criticizing the government in issues regarding North Korea. A majority of the respondent also attended assemblies led by Representative Lee Seokgi [124] and have actively supported those charged.’

[123] It is translated as self reliance.

[124] Lee Seokgi, a member of South Korea's left-wing United Progressive Party, at meetings hosted by the East Kyounggi Alliance, a local subordinate organization of the respondent, on 10 & 12 of May 2013 mad a statement of idea that the Jaju faction of South Korea should form a union with the Jaju group of North Korea against the United States of America and attack national infrastructure, in case of war. In August 2013, South Korean prosecutors accused him plotting to overthrow the country's democratically elected government if war broke out with North Korea. After further investigation, on 26 September 2013, South Korean prosecutors indicted Lee Seokgi was charged for his plotting a pro-North Korea rebellion to overthrow the government since his plan posed a "grave" national security threat. On 17 February 2014, he was sentenced 12 years imprisonment by a Suwon District Court. The appellate court acquitted him of the key charge of plotting an insurrection, but guilty of incitement to insurrection and violation of the National

The leading influence of the respondent see present Korean society as pariah capitalism or colonialist anti capitalism, subordinated to foreign powers. They also see the free democratic system as a capitalist class regime where the privileged ruling class has seized power, have exploited and abused the people and substantially extorted the sovereignty of the people, resulting in a systematically unequal society. The leading influence of the respondent asserts that in order to solve such contradictions of the free democratic system, we need to transform into a popular sovereignty.

In case mass struggle develops into an overall resistance where the right of resistance is exercised, they plan to seize power by overthrowing the free democratic system through violence including the use of armed forces and amend the Constitution to form a new progressive democratic system. The position of the leading influence of the respondent has been brought to life in the insurrection related trial of Representative Lee Seokgi.

Considering the details of holding the assemblies, the status and role of the attendees in the respondent party, the assemblies being held by the leading influence of the respondent, the role of Representative Lee Seokgi, leader of the assemblies as leader of the East Kyeongi Alliance, the support and protection on the part of the respondent party regarding Representative Lee Seokgi's insurrection related charges, the Court deems the aforementioned assemblies as attributable to the activities of the respondent party.

Moreover, the illegitimate primary in selecting proportional representatives, the violent incident of the central committee, manipulation of public poll incident in Gwanak district constituency show that members of the respondent party sought to secure election of certain candidates through undemocratic and violent methods other than debate and voting of members. This corresponds to a vacating of the election system and damages the principle of democracy.

The issues whether the objectives or activities of the respondent party are against the basic democratic order; whether to order the dissolution of the respondent and whether seats of the National Assembly members affiliated to the respondent party shall be forfeited were principal questions to be decided by the Court.

Regarding the issue whether the principle of proportionality is satisfied, the court came to conclude as follows:

> The respondent has attempted to damage the basic democratic order in an active and organized manner thereby undermining and abolishing its foundation. Therefore it is necessary to dissolve the political party for the purpose of promptly removing the possible risk therein. The importance and the interest of safeguarding the basic democratic order by dissolving the political party far outweighs the disadvantage given to the respondent through its dissolution, namely the fundamental restraint on the respondent's freedom to take part in political party activities or partial restriction on democracy. Consequently, the decision to dissolve the respondent is an inevitable solution to effectively remove the risk posed to the basic democratic order and is justified by Article 8 (4) of the Constitution. Therefore it does not violate the principle of proportionality.

In connection with forfeiture of seats of the National Assembly members affiliated to the respondent party, the court gave its opinion as follows:

Security Law. The appeal court cut three years off the sentence from the first trial, and had his eligibility to serve in the National Assembly suspended for seven years.

The Court's order to dissolve a political party on the basis of a judicial founding of unconstitutionality under strict scrutiny is derived from the view of defensive democracy to protect the Constitution. In this exceptional situation where the Court decides to dissolve the unconstitutional party, it is therefore inevitable that the status of the members of the National Assembly as representatives of the people should also be sacrificed.

If assemblymen who are the members of the unconstitutional political party to be dissolved keep their seats in the National Assembly, it would result in an actual continuation of the unconstitutional party by practically allowing activities representing and realizing unconstitutional political ideologies in the process of forming political opinions. In this regard, allowing the assemblymen affiliated with the dissolved political party to retain their seats in the National Assembly runs afoul of the function of the dissolution of political party system, which is to protect the Constitution or to defend democracy. This will lead to a failure to secure effective execution of the Court's decision to dissolve the party.

Therefore, the Court finds that forfeiture of seats of the National Assembly members affiliated to the political party dissolved by the Court's decision is the fundamental effect derived from the essence of the system on dissolution of unconstitutional political parties.

Justice Kim Yisu, however, called for a strict construction and application of the requirements for dissolution of political party as follows:

In interpreting the requirements of the dissolution of a political party, the text should be restrictively and limitedly construed. In selecting data or grounds on which the objectives or activities of the party are to be judged, watertight scrutiny on its relation with the party is required.

As the data or grounds regarding the objectives or activities of political party are mostly related to expressive behavior, their meanings should be construed on the basis of interpretation methodology as objective and generally acceptable as possible. Also, there should be no logical error or leap in interpreting and applying the requirements of the dissolution of a political party.

The respondent is a political party that has more than thirty thousand active members paying party membership fees. As such, the political stance indicated only by a very small portion of the party members should not be considered as the entire position of the respondent in the process of proving the political direction of the majority of the party.

I doubt that the majority opinion has strictly interpreted and applied the requirements of dissolution of a political party in deciding that the objectives of the respondent mainly consisting of so-called 'Jaju' faction are to first realize progressive democracy with the use of violence and ultimately to realize North Korean-style socialism in this country.

There is not sufficient evidence that the respondent adopted 'progressive democracy' as a prerequisite in pursuing North Korean style socialism; that they blindly support North Korea or pursue North Korean style socialism; that the respondent aims for change through violence or unlawful means in violation of the democratic principles or aims to overthrow the basic democratic order.

The respondent party should not be held responsible for specific activities regarding the meetings held by Lee Seokgi at East Kyeongi Alliance, or Lee Seokgi's statement of which a violation of the basic democratic order is questioned.

The social benefits achieved by the dissolution of the respondent party would not be substantial in the ordinary sense. In contrast, the social disadvantages occurred by the dissolution of the respondent is significant enough to exercise negative influence on the proper function of the democratic principle. The mandatory dissolution of a political party is a substantial restriction on the freedom of political party and freedom of political association that are the most essential factors of a democratic system. The dissolution of the respondent would impair the diversity of ideas that should be encouraged and protected in our society. Especially, it may lead to a chilling effect on the political freedom of minorities. Further, the dissolution of the respondent may exercise a severe influence on the true integration and stability of our society.

Although the dissolution of political parties system has good grounds for its existence, it should be used as a final and supplementary means. Given all the circumstances above, dissolving the respondent does not meet the constitutional request for the observance of the proportionality principle as the grounds to justify the dissolution of a political party.

Therefore, this case should be rejected. This is not to give immunity for the problems caused by the respondent and to defend them. It is to prevent the undermining of hard-earned democracy and the rule of law achieved after so many years. It is to declare our firm trust in the constitutional order of the Republic of Korea, and to safeguard the essence of the spirit of the Constitution.

The Constitutional Court of Korea finally held 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.

The activities of the respondent party, which include assemblies to discuss insurrection with the hidden objective of realizing North Korean style socialism, is in violation of the basic democratic order. In order to eliminate the specific danger of the respondent to cause substantial threat to society, there exists no less measure than to dissolve the said party. Therefore, the decision to dissolve the respondent party is not against the principle of proportionality, under the exceptional circumstances in which the Court decides to dissolve the unconstitutional political party, the status of the Members of the National Assembly as representatives of the people cannot but be sacrificed. The Court finds that the forfeiture of seats of the National Assembly members affiliated to the respondent party is a basic effect recognized by the essence of the system on dissolution of political parties.

In contrast, the dissenting opinion of Justice Kim Yisu is that the requirements of the dissolution of a political party should be construed and applied strictly. There is no sufficient evidence on the concealed objectives of the respondent. The objectives of the respondent proclaimed by the platform of the political party including progressive democracy are not against the democratic order. Certain activities associated with insurrection by assemblies of the Kyounggi branch which is in violation of the democratic order cannot be attributed to the responsibility of the party. Other activities of the respondent also do not violate the basic democratic order.

Meanwhile, the Court dismissed the petitioner's motion for preliminary injunction of restriction on party activities.

6.4 Competence Disputes Cases

6.4.1 Legislative Railroading Case[125]

This was the case brought before the Court in 1996 by the representatives and the Speaker of National Assembly for competent disputes. As a matter of fact, it was a second case petitioned to the Constitutional Court. When the first railroading case was brought before the Court[126] in 1990, the Court interpreted that Article 62 (1) (1) of the Constitutional Court Act allowed competence disputes only between various state agencies and limits them as among the National Assembly, the Executive, the Courts and the National Election Commission; held that an individual assembly person or a party with negotiating rights was only a component of the National Assembly who could not petition for competency disputes; and then dismissed the petition. Yet six Justices out of nine of the Court proposed a departure from the Court's previous decision and held that 'Article 62 (1) (1) of the Constitution was not a definitive or enumerative provision but rather an illustrative one. The individual representatives and the Speaker are state agencies under Article 111(1) (4): therefore can be parties to competence disputes. The petition meets the justifiable requirements. However, three Justices followed the former case reasoning and they posited that Article 62 (1) (1) of the Constitutional Court Act specified and limited the permitted types of competence dispute and that the plaintiffs not listed there could not file for a competence dispute.

The followings are facts of the present case.

The 182nd Extraordinary session of the National Assembly convened on 23 December 1996. The proposed revisions to the National Security Planning Agency Act, the Labor Standards Act, the Labor Relations Commission Act, the Labor-Management Consultative Council Act, and the revised Trade Union and Labor Relations Adjustment Act 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 the 182nd Extraordinary 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. On 30 December, the plaintiffs who were the members of the opposition National Congress for New Politics and the United Liberal Democrats petitioned for review of a competence dispute. They argued that the Plenary was convened secretly and the Speaker did not notify them about the meeting. Though independent constitutional entities had right to review and to vote on the bills, National Assembly Act usurped their powers and it therefore was unconstitutional.

The six Justices voted the representatives' capacity to competent disputes also voted for violation of the plaintiffs' constitutional right granted by the Constitution for the following reasons:

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[125] 1996 Hun-Ra 2, July 16, 1997. The number is preceded by the four-digit filing year and followed by a three digit serial number, as maximum, given in the order of filing in that year. Hun-Ra stands for competence disputes. 'Hun' is English pronunciation of Korean word (憲) meaning Constitution and 'Ra' is fourth alphabet of Korean language like English alphabet D. Hence, the word 'Hun-Ra' may be conveniently translated into English language as 'Constitutional Court case type D'. Therefore, 1996 Hun-Ra 2 means the Competence disputes, the docket number of which is No. 2 in the year 1996.
Cambridge Dictionaries Online gives definition of 'railroad' as force something to happen or force someone to do something, especially quickly or unfairly.
http://dictionary.cambridge.org/dictionary/british/railroad .

[126] 1990 Hun-Ra 1, Feb. 23, 1995.

Representatives' power to review and vote on bills is not explicitly mentioned in the Constitution. But, the principle of parliamentary democracy, Article 40 granting exclusive legislative power to the National Assembly, and Article 41(1) forming the National Assembly with the representatives elected by the people lend themselves to a guarantee of those powers to all representatives. Around 5:30 A.M., the deputy floor leader of the New Korea Party phoned the deputy floor leader of the National Congress for New Politics and the floor leader of the United Liberal Democrats Union and informed the changes of the meeting time to 6:00 a.m. of 26 December 1996. The opposition party members could not be expected to present there within a short time. Such a short notification clearly did not meet the requirements of Article 76 (3) of the National Assembly Act and caused the violation of plaintiffs' opportunity to attend the meeting and to review and vote on the proposed bills as granted by the said Article. Therefore respondent action clearly violated the plaintiffs' constitutional right granted by the Constitution.

However, in terms of the question if the passage of bills is unconstitutionality or not, these six Justices held different opinions. Three Justices noted that 'bills were passed by a unanimous vote at a meeting attended by the majority of the representatives 155. Therefore, although there was a violation of the National Assembly Act, there was no clear violation of the constitutional provisions on legislative processes. Contrarily, other three Justices considered that the failure to notify about the meeting to the members of opposition party members forfeited their opportunity to attend the meeting and, then violated Article 49 of the Constitution and Articles 72 and 76 of the National Assembly Act which were concrete expressions of the principle of majority vote of Article 49 of the Constitution.

In the end, the Constitutional Court held that the individual members and the Speaker of the National Assembly can be the parties to a competence dispute and also 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 and could not gather the required affirmative voting number of justices for such finding.

6.4.2 Competence Dispute between Legislators and the Government[127]

In this case, members of the National Assembly filed a competence dispute by claiming that the president had infringed upon the National Assembly's right to consent for conclusion and ratification of treaties. Facts of the case are as follows:

In 2004, the government of Korea negotiated with member states of the World Trade Organization to obtain an extension for the delay of imported rice tariff. As a result, a partial amendment to Korea's schedule of commitments was adopted by the WTO. In the process of negotiations, Korea signed an agreement with the governments of the United States, India, and Egypt in which Korea accepted some of the demands of those countries in return for obtaining the extension. When the government sought the National Assembly's consent to ratify the revised schedule, the government did not reveal the said agreement. Plaintiffs, therefore, argued that the president's conclusion and ratification of the agreement without the National Assembly's consent was a violation of the right of the

[127] 2005 Hun-Ra 8, July 26, 2007.

National Assembly regarding treaties, as well as the rights of the individual members of the National Assembly to deliberate and vote on treaties presented by the government.

This case raised the issue of whether members of the National Assembly can file an adjudication of competence dispute on behalf of the National Assembly for the infringement of the rights of the National Assembly, i.e., if third party litigants were entitled to initiate a competence dispute. Article 60 (1) of the Constitution provides that, 'The National Assembly shall have the right to consent to conclusion and ratification of treaties which will incur grave financial burden on the State or people; or treaties related to legislative matters.' The Court concluded therefore that, 'Right to give consent for conclusion and ratification of treaties was an authority of the National Assembly, and National Assembly itself is the party to any competence dispute over such authority. If individual members of the National Assembly are to be allowed to initiate a competence dispute over said issue, they must be in the form of a 'third party litigant', a person who has the power to pursue legal proceedings on behalf of the actual rights-holder, under his own name, even though he is not the actual rights holder. The law, however, recognizes such litigants only under exceptional circumstances.' The Court continued to reason that allowing individual members of the National Assembly to claim a violation of a right of the National Assembly and initiate a competence dispute can have undesirable consequences. If that were allowed, individual legislator will be able to contest to the results of the National Assembly's decision-making process, which normally takes the form of a majority vote. Legislators who do not agree with the majority could claim that the National Assembly's authority had been violated, and start a competence dispute. This clearly goes against the basic premise of majoritarianism and the fundamental principles of parliamentary lawmaking. Furthermore, it creates the potential for abuse in which legislators may prefer to settle all issues by resorting to a judicial mechanism, rather than making the effort to reach decisions through democratic means of discussion and dialogue. Under the current legal system, there are no legal provisions that explicitly allow a subunit of a state institution to claim, on its own initiative as a third party litigant, the rights of the entire state institution. In sum, therefore, individual members of the National Assembly may not initiate a competence dispute on behalf of the National Assembly itself.

The second question whether the individual legislators' right to deliberate and vote on a bill can be violated by any state agency other than by the National Assembly. The Court stated that, 'A violation of legislators' right to deliberate and vote may be occurred either among members of the National Assembly or between a member and the Speaker of the National Assembly, but not between a member and the president. Consequently, if the president concludes and ratifies a treaty without the consent of the National Assembly, there might be a violation of the right of the National Assembly itself, not be a violation the individual legislator's right.'

Only one Justice stated a dissenting opinion that, 'Members of the National Assembly should be permitted to act as a third party litigant on behalf of the National Assembly. When the majority party controls both executive and legislative branches of the government, it is conceivable that the constitutional authority of the legislature is, or is in danger of being, damaged by the executive. Under such a situation where the legislature's powers are being infringed upon and the constitutional principle of separation of powers is being distorted, it makes sense to empower the minority lawmakers who meet certain qualifications to protest the infringement on behalf of the entire legislature. There is therefore a need to allow third party litigants, as a concrete means of meeting this need. In

a case like this, we should allow a group of lawmakers who have a sizeable presence within the National Assembly (as measured by the formation of negotiating bodies or other comparable size) to initiate a competence dispute as third party litigants on behalf of the National Assembly.'

All in all, by an 8 to 1vote, the Constitutional Court decided that 'an adjudication of competence dispute in this case is not justifiable and dismissed'.

6.4.3 Competence Dispute over Inspection of Autonomous Affairs of Local Government Case [128]

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 from 9 to 29 September 2006 infringed on the plaintiff's right of local autonomy.'

The Minister of Public Administration and Security, the respondent, gave notice to Seoul City, the plaintiff, for joint inspection by central government agencies on the city's autonomous affairs. The joint inspection was conducted from 14 to 29 of September, 2009. In this connection, Article 158 of the Local Autonomy Act provides the Minister of Government Administration and Home Affairs or Mayor/ Do governor may receive a report on the autonomous affairs of a local government, or inspect its documents, books or accounts. In this case, the inspection shall be made only in respect of matters which are in violation of Acts and subordinate statutes. The plaintiff filed this competence dispute adjudication to the Constitutional Court, by arguing that, 'The preemptive and blanket joint inspection was conducted by the respondent having neither proof nor reasonable doubt for the violation of Acts and subordinate statutes. Consequently, this conduct infringed the self governing authority of the Seoul City such as the right to autonomous administration and finance endowed by the Constitution and the Local Autonomy Act.'

Subject matter of this case is whether the joint inspection of the respondent on plaintiff's autonomy conducted from 14 to 29 of September 2009 infringed on the plaintiff's autonomy guaranteed by the Constitution and Local Autonomy Act.

The Court considered all facts including the starting point of the local government system under the Constitution; background reason of enacting Article 158 of the Local Autonomy Act, which is to curtail inspection conducted by a central administrative agency on the autonomous affairs of a local government; the purpose of Local Autonomy Act, which changed the relationship between a central administrative agency and a local government from supervisory, hierarchical one to complementary, supportive one; limitation on supervisory power exercised by a central administrative agency over local autonomy and being not necessary for additional inspection after inspected by Board of Audit and Inspection.

The Court, therefore, concluded that, 'The inspection power of a central administrative agency on the autonomous affairs of a local government stipulated by the proviso of Article 158 of the Local Autonomy Act should not be considered preemptive, general and comprehensive power but be considered limited power in its subject matter and scope. In order to conduct inspection under the proviso of Article 158 of Local Autonomy Act, there should be proof or a reasonable doubt that a specific statutory

[128] 2006 Hun-Ra 6, May 28, 2009.

provision is violated in relation to the autonomous affairs of the local government, and the matters subject to inspection should be specifically identified. The respondents failed to specifically designate the matters to be inspected to identify which specific statutory provisions were being violated by the plaintiff. Therefore, joint inspection conducted by the respondents did not fulfill the facts required by the proviso of Article 158 of the Local Autonomy Act, and accordingly violated autonomy power of Seoul City endowed by the Constitution and the Local Autonomy Act.'

Although Two Justices gave dissenting opinion for this case based not only on the sole provision of Article 158 of the Local Autonomy Act but also on other Articles under the same Law and other relevant legislations, in a 7 to 2 vote, the Constitutional Court 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 Article 158 of the former Local Autonomy Act.

6.5 Constitutional Complaints Cases

6.5.1 Constitutional Complaint Against Article 21 of the Urban Planning Act[129]

This constitutional complaint was combined case of two cases [130]filed for vacation of the order to demolish at Seoul High Court and one case[131] filed for damages for loss at Seoul District Court.

The subject matter of review is the constitutionality of Article 21 of the Urban Planning Act. The contents are as follows:

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[129]1989 Hun-Ma 214, etc., Dec. 24, 1998. The number is preceded by the four-digit filing year and followed by a three digit serial number, as maximum, given in the order of filing in that year. Hun-Ma stands for Constitutional complaints made under Article 68 (1) of the Constitutional Court Act. 'Hun' is English pronunciation of Korean word (憲) meaning Constitution and 'Ma' is fifth alphabet of Korean language like English alphabet E. Hence, the word 'Hun-Ma' may be conveniently translated into English language as 'Constitutional Court case type E'. Therefore, 1989 Hun-Ma 214 means the Constitutional complaints, the docket number of which is No. 214 in the year 1989.

[130] In original case of 1989 Hun-Ba 214, complainants Bae Ok-sup, Kim Sung-bok, and Kim Young-soo built a building without governmental approval between 1978 and 1980 at a development-restricted zone, designated by Notice No. 385 of the Ministry of Construction. When the Inchon Suh-gu 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 (89Gu- 1928). Then, the complainants requested constitutional review under Article 21 of the Act. They filed this constitutional complaint when their request was denied by the Constitutional Court.

In another original case of 1990 Hun-Ba 16, complainant Lee Byung-gwan built a building without governmental approval on a development-restricted zone around 1982, designated by Notice No. 385 of the Ministry of Construction. When the Inchon Buk-gu District Head ordered to demolish the building, the complainants sought vacation of the administrative order at the Seoul High Court, but it was denied. The complainants appealed to the Supreme Court and then sought constitutional review under Article 21 (1) & (2) of the Act. When the court denied the request on May 8, 1990, he filed this constitutional complaint.

[131] At 1997 Hun-Ba 78 case, complainants owned properties within the areas designated for development restriction by the Minister of Construction and Transportation under Article 21 of the Act between July 30, 1971 and December 4 of the same year. The complainants sought compensation for the loss caused by the development-restricted zone for the amount of three hundred thousand wons per complainant at the Seoul High Court. Pending the trial, the designated parties requested constitutional review of Article 21 of the Act. When they were denied by the Court, the complainants filed this constitutional complaint.

Article 21 (Designation of development-restricted zone)

(1) Minister of Construction and Transportation may designate an area in which urban growth is restricted (hereinafter, ‘development restricted zone’) in order to prevent disorderly urban expansion, preserve the natural surroundings, and obtain a healthy living space for the citizens, or upon request of Minister of Defense that urban development needs be limited for a security purpose.

(2) Inside the development-restricted zone designated pursuant to Section 1, there shall not be any construction or structure erected, any change in the quality and form of the ground, any subdividing, or any urban planning activity. Provided, those who had commenced construction or a project under a proper approval (including when no such approval is required) may continue as specified by presidential decrees.

(3) The conduct restricted under Section 2 and other matters necessary for development restriction shall be determined by the decrees of Minister of Construction and Transportation within the scope of the presidential decree.

The reasons of the Court for making decision provided as follows:

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. The right to real property has more rights and obligations than other proprietary rights because of its strong social interest.

Article 21 of the Urban Planning Act, which designates a development-restricted zone and bans construction therein, specifies rights and duties concerning right to real property in accord with Article 23 (1) & (2) of the Constitution. As long as the landowner could use, profit from, or dispose of the land as before designation, then it does not exceed the limit of the social restriction to which he landowner must bear. It is consistent with the principle of proportionality.

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.

Therefore, the development-restricted zone system in Article 21 of the Urban Planning Act is in principally constitutional. However, it may become unconstitutional if it imposes a heavy burden exceeding the limit of social restriction on the landowner without making any compensation provision. The concrete standard and method of compensation should, by nature, not be determined by the Constitutional Court but determined as a matter of policy by the legislature with the broad legislative power. Until the legislature fixes the unconstitutional status of law by providing compensation provision, the court will leave the relevant provision valid on a decision of nonconformity. The legislature has an obligation eliminate the unconstitutional element of the statute as soon as possible. The administrative agencies should not designate a new development-restricted zone until the legislature enacts the compensation statute. The landowner should wait for enactment of the compensation statute and exercise his or her right according to new provision.

The legislature, in order to make the limitation on people's right to property in accord with the principle of proportionality, must provide compensation provision which can alleviate the loss of land owner caused by such limitation. The compensation provisions are required for regulating the right to property for reason of public interest and

concretely forming the content of the right to property in Article 23 (1) and (2). 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 two Justices stated their dissenting opinion as follows:

> All people have the right to environment (Article 35 of the Constitution) whereby they can live in a healthy and pleasant environment. That right is fundamental to realization of the human dignity and value and the right to pursuit of happiness. The right takes precedence over the economic liberty of exercising the right to private property. However, on the other hand, Article 21 of the Urban Planning Act is a regulatory legislation necessary for the prevention of environmental pollution harmful to national security and the preservation of the city's natural surroundings and its living area, and is therefore constitutionally valid. This regulatory provision may limit the use of bare building lots, working together with the change in the circumstances, and may interfere with the use of other properties, but it permits alternative uses that do not discord with its legislative intent and does not limit the owner's right of disposal. Such regulation is by nature a social limitation inherent in the right to property. In balancing the interests, the disadvantages to the property owner are small compared to the contribution to national security and public welfare. The Act is also reasonable and necessary for accomplishment of those legislative purposes, therefore not departing from the requirements for restricting basic rights stated in Article 37 (2) of the Constitution. Hence there is no violation of the principle of equality.

The Court finally concluded the case in pursuant to the consensus of seven Justices that Article 21 of the Urban Planning Act is unconstitutional but will be valid formally until the new compensation provisions are enacted.

6.5.2 Ban on Improper Communication on the Internet[132]

In this case, complainant was a university student, who used internet communications under the user name 'i-ui-je-ki'[133] at a comprehensive computer network service named Nownuri provided by Nowcom, Inc. Complainant posted a message titled 'Exchange of Gunfire on the West Sea and the Inept Response' by Kim Dae-jung'on 'Breaking News' board run by 'Chan Umul' internet community[134] maintained at Nownuri. According to order from the Minister of Information and Communication, the system operator of Nownuri deleted the said message from the board, and suspended the complainant's use of Nownuri for one month. Complainant filed a constitutional complaint alleging that the provisions of the Telecommunication Business Act and its enforcement decree, which authorized the above order by the Minister of Information and Communication, infringed upon the complainant's constitutional right to freedom of expression, as well as violating the principles of due process.

By a six-vote majority opinion, the Constitutional Court held unconstitutional to the contested statutory provisions as an infringement of petitioner's freedom of expression. According to Article 53 (1) of the Telecommunication Business Act, a person

[132] 1999 Hun-Ma 480, June 27, 2002.
[133] It literally means objections.
[134] It literally means cold spring.

using telecommunications are not allowed to make communications harmful to the public peace and order or to social morals and good customs. In Section 2 of the same article, the specification what is harmful to the public and order or to social morals and good customs is delegated to a presidential decree. Then, in Section 3, the Ministry of Information and Communication is authorized to order the telecommunication business to refuse, suspend, or restrict the communications banned by the preceding provisions.

First issue is whether the Article 53 (1) of the said Act, which regulates improper communications on grounds of being harmful to the public peace and order or to social morals and good customs, violates the freedom of expression. The principle of clarity is especially important in legislations that regulate the freedom of expression. If the prohibition under the law is uncertain and unclear, individuals cannot know which actions are allowed and which are prohibited. The definition of improper communication used in the Act is unclear and ambiguous. It may be argued that there is a need for certain regulations including the deletion of online expressions because of speedy nature of circulation of information through online networks. Nevertheless imposing broad regulations on the contents of expression on internet based on a vague suspicion or potential of harmfulness is inconsistent with freedom of expression. In sum, restrictions on the freedom of expression imposed by Article 53 (1) of the Telecommunication Business Act are too broad and too comprehensive, and therefore, it violates the principle against excessive restriction.

The another issue is if the provision of Article 53 (2), the contents of communications deemed harmful to the public peace and order or to social morals and good customs shall be determined by a presidential decree, violates the principle against blanket delegation of legislative authority. The terms like ‘public peace and order’ and ‘social morals and good custom’ are extremely abstract and vague. This causes the citizens unable to predict the criteria or general outline what will be banned by the presidential decree. Article 53 (3) is also unconstitutional as consequences of unconstitutionality of Article 53 (1) & (2).

Three Justices stated a dissenting opinion of unconstitutionality of the contested provisions, for the following reasons.

> Concepts of ‘public peace and order’ and ‘social, morals and good custom’ can be interpreted as ‘the bare minimum of order and morality that is expected of all citizens’, and it, therefore, cannot be said they necessarily cause excessive restrictions. At least as a guideline for the delegation of rule-making power, they are relatively clear.
>
> While the contested provisions may not be the optimal legislation in terms of their clarity in delegated legislative power, people will be able to predict the criteria and general outline of the improper communication to be defined by the presidential decree. Under Article 53(3) of the Act, an order to close online site or to suspend user ID, in addition to the deletion of individual communications, is theoretically possible. Yet, it does not impose direct legal sanctions on the individual user. In sum, the provisions of the said Act as well as the enforcing decree do not violate his freedom of expression for reasons of principle against excessive restriction.

The Constitutional Court held unconstitutional on provisions of the Telecommunication Business Act which banned communications containing contents harmful to the public peace and order or to social morals and good customs, and which authorized the Minister of Information and Communication to command a telecommunications business operator to refuse, suspend, or restrict such communications.

6.5.3 One Person-One Vote Case[135]

Complainants were voters, candidates for electoral districts and for proportional representation, and the inaugural committee for planning the launching of Democratic Labor Party, all of whom were expected to participate in the April 2000 general election for selecting the members of the Sixteenth Term of the National Assembly. They filed constitutional complaints for violation of their right to be elected at public office because of required high amount of deposit money for the election and because of because of excessive stringent criterion to receive such deposit back. They also argued that the principle of direct election is violated by the mechanism for selecting proportional representatives in which the voters are not allowed to cast their votes for particular political parties, but their votes cast in the electoral districts are used to allocate proportional seats.

A unanimous decision the Constitutional Court held unconstitutional the provisions in the Election of Public Officials and Prevention of Electoral Malpractice Act relating to the candidacy deposit and to the allocation of proportional seats. Regarding provision on 'one-person one-vote' system, the Court rendered a decision of limited unconstitutionality.

Article 56 (1) (2) of the Public Election Act requires all persons registering as candidates in the National Assembly election make a deposit of twenty-million Korean won. This is not an amount that can be easily procured by average citizens. Anyone who cannot raise such an excessive amount will be barred from running the National Assembly, even if such person could be the most qualified candidate. This will block the entry of candidates who may represent the working class citizens and the next generation of National Assembly. Moreover, this provision cannot prevent a multitude of insincere candidates, who is rich enough to procure such deposited amount.

Article 57 (1) and (2) mandates the forfeiture of candidacy's deposit when he gets the votes less than prescribed number of votes or less than 20/100 of the total valid votes. This criterion is too stringent to prevent the candidates who want to serve the public. It also unduly penalizes the candidate who lost after having campaigned earnestly during the election. The contested provisions on the deposit money for the candidacy; on the criteria set for refund purpose and on forfeiture of such money are unconstitutional as these provisions infringe the citizens' right to hold public office and right of equality.

As for second issue of the case which is 'method of allocating proportional seats in the National Assembly, and so called one-person one-vote system', the Constitutional Court reasoned as follows.

The Public Election Act adopts a system of one-person one-vote (Article 146 (2)). Under this system, the voters are not allowed to cast a separate vote for the political party of their choice, but which takes the voters' choice of the candidates in the electoral districts as a proxy for the expression of the voters' support for political parties, and allocates the proportional seats for each party according to the percentage of votes the party received in the electoral districts (Article 189 (1)). Under this system, a voter can support either a particular candidate or a party on his or her preference. If he votes his preferred candidate, he has no chance to vote again for his preferred party and vice versa. Therefore, half of his preference will be only expressed. Under this method of seats allocation, while the major established parties are enjoying more seats proportionately

[135] 2000 Hun-Ma 91 et al., July 19, 2001.

than they deserve in reality, newly formed political parties will tend to be under-represented. This incident is contrary the principles of democracy.

Since no separate vote is cast for a slate of party nominees, voters are able to indirectly participate in the election of proportional representatives. Only in the very accidental case, the voters' preferred candidates in the electoral districts coincides exactly with their preferred parties. The fact how a party decides on the slate of its nominees will be the ultimate and all-important deciding factor in election of proportional representatives, and the voters will not have the power to decide directly on proportional representatives. This is contrary to the principle of direct election. Further, under the current system, a vote cast for a party-affiliated candidate in respective districts will have the dual function of contributing to the election of the candidate him/herself as well as to the allocation of proportional representatives nominated by that party. By contrast, a vote cast for an independent candidate will only determine the fate of that candidate and have no role in the selection of proportional representatives. This creates a problem of inequality in the value of votes. For a voter who cannot avoid to vote for an independent candidate because his preferred party did not nominate a candidate in his district. This violates the principle of equality in election.

In sum, Public Election Act Article 189 (1) is unconstitutional, and the clause 'one person shall be entitled to one vote' in Article 146 (2) is unconstitutional to the extent which prohibits a separate vote for political parties in determining proportional representatives. As a result, the right of the citizens to elect proportional representatives is violated. Lastly, since Article 189 (1) of the Public Elections Act, the legal foundation for electing proportional representative, was unconstitutional, Article 189 (2 to 7) was unconstitutional as well. This decision confirmed the unconstitutionality of setting high amount of deposit for registration of National Assembly candidacy and modes to refund such deposit to concerned candidate and allocation of proportionality of representatives' seats in the National Assembly.

6.5.4 Relocation of the Capital City Case [136]

Roh Moo-Hyun, who was then the presidential candidate of the New Millennium Democratic Party, announced, as one of the election pledges, the plan to relocate the administrative function of the capital, 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 of Korea held on 19 December 2002. Subsequently, in order to transfer the administrative function of the capital to the Chungcheong area, the bill for the 'Special Act on the Establishment of the New Administrative Capital' proposed by the administration was enacted at the National Assembly. The proposed Bill was promulgated as Special Act on the Establishment of the New Administrative Capital on 16 January 2004. 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,

[136] 2004 Hun-Ma 554, etc., (consolidated), Oct. 21, 2004.

and that the Act violated the citizens' right to vote on referendum and also taxpayers' right.

The Constitutional Court, in an 8:1 opinion, held the Act unconstitutional, with a separate concurring opinion of one Justice. The grounds for Majority Opinion of Seven Justices are summarized as follows:

The issue of the case is the validity of 'The Special Act on the Establishment of the New Administrative Capital Act'. The Act can determine to transfer the capital of State. This matter falls within the meaning of the capital under the Constitution as the location of national institutions which performs pivotal functions of politics and administration of the nation. The establishment or relocation of the capital is the geographical placement on the basis of the nation's organization and structure determined by the highest constitutional institutions, such as the National Assembly and the President. Therefore, it is a fundamental decision of the citizens for the nation, and, at the same time, a core constitutional matter that forms the basis for the establishment of a nation.

There is no expressed provision in our Constitution that states 'Seoul is the capital.' However, Seoul is the capital of our nation. It is a continuing practice of our national real for a period of over six-hundred years since the Chosun Dynasty period. Such practice should be deemed to be a fundamental practice of nation with national consensus since long time ago continuously. Therefore, the fact, 'Seoul is the capital', is a constitutional custom. This custom has been traditionally existed even prior to the establishment of our written Constitution. Although there is no expressed constitutional provision, it is a clear constitutional norm. Therefore, it is said that the fact, 'Seoul is the capital', 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 least, be revised only by way of constitutional revision pursuant to Article 130 of the Constitution. The fact, 'Seoul is the capital of Korea' is unwritten constitutional custom, and, therefore, retains its effect as constitutional law unless invalidated by establishment of a new constitutional provision through the constitutional revision procedure. On the other hand, other than formal constitutional revision procedure, a constitutional custom may lose its legal effect by national consensus. However, in this case, there are no such circumstances.

Under Article 130 of the Constitution, national referendum is mandatory for the constitutional revision. Therefore, the citizenry has right to express their opinion to the constitutional revision through a binary pro-and-con vote. Although the issue under the present case, 'transfer of the capital', has to be undertaken by the constitutional revision, it has been done in the form of an ordinary statute without having constitutional revision procedures. The Act in issue excludes citizens' right to vote on referendum, which is a fundamental right of people to participate in politics at the constitutional revision process in accord with Article 130 of the Constitution. Therefore, the Act violates the Constitution.

A dissenting opinion of one Justice is as follows:

> Within a legal system under a written constitution, customary constitutional law may not be established or maintained apart from the written constitution, but it may be so only when it is necessary to harmonize the various principles of the written constitution by giving supplementary effect.
>
> In the case of a change made into constitutional custom such as the transfer of the capital, as there is no particular constitutionally prohibited provision, it may be done by the enactment of National Assembly. Therefore, there is no evidence that the Act in

issue of this case violates the right to vote at referendum under Article 130 (2) of the Constitution.

On the other hand, Article 72 of the Constitution endows the President with the discretion of 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, the president is endowed such discretion by the Constitution. Thus, the legal principle of deviation and abuse of discretion of the administrative law do not apply. Therefore, the right to vote on referendum of Article 72 of the Constitution is not violated. To conclude that the allegation made by the complainants for violation their right to vote on referendum is unjustified since they even do not have this alleged right.

Finally the court, in an 8 to 1 opinion, 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.

6.5.5 Case on the Restriction of Balloting Hours[137]

Complainants filed this constitutional complaint to request the confirmation of unconstitutionality of the legislative inaction for not granting the paid holiday for 18th Presidential Election Day on 19 December 2012 (a weekday); and requested the confirmation of unconstitutionality of Article 155 (1) of the Public Official Election Act that stipulates a polling place shall be opened from 6 a.m. to 6 p.m. on the election day (Wednesday) by alleging that it is impossible for the complainant, who are owner-operators or day-workers, to arrive at a polling place by 6 p.m. on weekdays, due to the nature of their occupations.

The subject matters of this case are whether the legislative inaction for not granting the paid holiday for the presidential Election Day violates the fundamental rights; and whether the part of ‘at 6 p.m.’ of Article 155 (1) of the Public Official Election Act violates the fundamental rights. The contents of the provision at issue are followed as below:

Article 155 (1) (Balloting Hours) under Public Official Election Act[138] spells that, ‘A polling station shall open at 6 a.m. and close at 6 p.m. (8 p.m. in the special election, etc.) on the election day: Provided, That if there are electors waiting to vote at the polling station at the time it is closed, the number tickets shall be given to them and the polling station shall be closed after they finish voting.’

The legislative obligation under the Constitution is a required element for the constitutional complaint against the legislative inaction. Despite Article 1 (2) of the Constitution provides the principle of national sovereignty; Article 24 of the Constitution provides the right to vote; and Article 34 of the Constitution provides the right to humane livelihood, these articles of the Constitution do not specify any legislative obligation to grant a paid holiday for an election day (Wednesday, in case of an election upon the termination of his/her office). The discretion to choose a measure to protect the right to vote is vested in the legislator. Therefore, the request against the legislative inaction for not grating paid holiday for the Election Day is not justiciable.

[137] 2012Hun-Ma 815, 905(consolidated), July 25, 2013.
[138] Revised by Act No. 7189 on March 12, 2004.

Article 155 (1) of the Public Official Election Act intends to confirm the result of election, to ensure the exercise of right to vote, and to allocate administrative resources to manage balloting and ballot-counting at a proper level. With the consideration of the above provision, it requires opening a polling place at 6 a.m. for enabling to vote before usual business hours. Article 10 of the Labor Standards Act stipulates 'an employer shall not reject a request from a worker to grant time necessary to exercise the right to vote during work hours, a voter who is a worker would be allowed to vote during work hours'. In addition, a voter may vote absentee at any absentee polling station of the Nation during the absentee ballot period (from 5 days prior to an election to 2 days prior to an election, Friday and Saturday in case of election upon the termination of his/her office) without prior registration, according to the integrated electoral register that was established after this constitutional complaint. An election upon the termination of his/her office is also designated as a holiday of public office. Accordingly, Article 155 (1) of the Public official Election Act is a way to coordinate the protection of the right to vote and the necessity of limiting ballot hours, not depriving voters of substantial opportunities to exercise their rights to vote. Therefore, the above provision does not violate the right to vote under the principle against excessive restriction.

Moreover, said Article provides that a polling place shall be opened earlier for an election upon the termination of his/her office than for a special election. Nonetheless, the difference in open hours is reasonable, based on the consideration that a special election is neither a holiday of public office nor a stipulated holiday of private enterprise; and a special election that is held at certain of electoral districts would impose less burden in extending ballot hours. Therefore, the above provision does not violate the right to equality.

The Constitutional Court dismissed the request to review on the constitutionality of legislative inaction for not granting paid holiday for the election day; and rejected the request to review on the constitutionality of Article 155 (1) of the Public Official Election Act.

6.5.6 Qualifications for Becoming a Judge under Court Organization Act[139]

Complainants 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 alleging that the part regarding Article 42 (2) of the proviso of Article 1 of Addenda of the Court Organization Act and Article 2 of such Addenda are against the Constitution.

The question at this case is if either Article 42 (2) of the proviso of Article 1 of Addenda of the Court Organization Act or Article 2 of such Addenda is against the Constitution. The relevant provisions at issues are as follows:

Article 1 (Enforcement Date) under Addenda to the Court Organization Act[140]

[139] 2011 Hun-Ma 786, Nov 29, 2012.

This Act shall enter into force on January 1, 2012: Provided, however that the amended provision of Article 41-2 of this Act shall enter into force on September 1, 2011 and the amended provisions of Article 42 Section 1 and Section 2 and Article 44 Section 2 and Article 45 Section 4 of this Act shall enter into force on January 1, 2013.
Article 2 (Provisional measures regarding training in office for appointment of judges)
Despite the amended provision of Article 42 Section 2, the judges shall be appointed in compliance with the following: in the instances of appointing a judge in the period between January 1, 2013 and December 31, 2017, the judge who has served one of the positions under Items of Article 42 Section 1 with more than 3 years' experience shall be appointed; in the instances of appointing a judge in the period between January 1, 2018 and December 31, 2019, the judge who has served one of the positions under Items of Article 42 Section 1 with more than 5 years shall be appointed; and, in the instances of appointing a judge in the period between January 1, 2020 and December 31, 2021, the judge who has served one of the positions under Items of Article 42 Section 1 with more than 7 years shall be appointed.

Regulations for Court Organization Act in connection with prescribed qualifications to be a judge had been maintained for last forty years without big change until the revision of the Act at issue of this case. And, in the meantime, the only way to acquire that qualifications was to pass the bar exam and to complete the course provided by the Judicial Research and Training Institute. In light of these, we found that the government provided a basis for the confidence that a person passing bar exam and then completing the course provided by the Judicial Research and Training Institute can acquire the qualifications to become a judge.

Complainants having such confidence spent substantial time and gave efforts on the bar exam for years. They passed the bar exam and entered the Judicial Research and Training Institute which enabled them to attain a position of judicial trainee, a sort of public official in special government service under Article 72 of the Court Organization Act . Thus, the complainants' confidence that they may obtain qualifications to become a judge by completing the course provided by the Judicial Research and Training Institute are worthy to be protected.

In this case, the public interest pursued by the provisions in question differed from complainants' interests, i.e., strengthening his or her qualifications to become a judge by keeping ample social experience and strong hopes. Since that public interest is significant and necessarily started from long term perspective, it is hard to consider that the provisions at this case have to be urgently applied even to the persons who have already entered the Judicial Research and Training Institute at the time of revision of the Court Organization Act. Meanwhile, it is difficult for us to find any reasonable grounds for treating the complainants, the judicial trainees spending their first year at said Institute at the time of revision of the Court Organization Act, differently from those spending their second year in that Institute.

Therefore, the provisions at issue violate the principle of protection of confidence in law because they are inadequate to protect the complainants' confidence in law: they make Article 42 (2) of the Court Organization Act to take effect on 1 January 2013 and binds to the people who have already entered the Judicial Research and Training Institute

[140] Revised by Act No.10861 on 18 July 2011.

at the time of revision of the Court Organization Act, although they stipulate only Article 2 of Addenda of the Court Organization Act as interim measures.

Notwithstanding, for the matter of the scope of protection of the complainants' confidence in previous laws, we found that the legislature has discretion in enacting laws for certain professional qualifications. It shall not be deemed that the revised statute must not be perpetually applied to the complainants only based on the fact that they entered the Judicial Research and Training Institute prior to the revision of the Court Organization Act. Thus, with respect to the protection of confidence in laws for the complainants having position of trainee of the Judicial Research and Training Institute as of the time of revision of the Court Organization Act, the complainants shall be given at least one opportunity to become a judge right after completing the course of the Institute as heretofore. Therefore, the provisions at issue are against the principle of protection of confidence in law so long as they do not give that opportunity to the complainants. In conclusion, so far as they are applied to those who had already been enrolled in the Judicial Research and Training Institute on 18 July 2011 when the Court Organization Act is revised, the provisions at issue violate the principle of protection of confidence in laws and thus infringe on the complainants' right to hold public office.

There were three dissenting opinions. In our view, the changes in qualifications for becoming a judge requiring certain period of experience was fully anticipated: even considering the details of revision of the Court Organization Act at issue, the revision of the laws and regulations with respect to qualifications of becoming a judge has underwent the process of publicity for at least 10 years; the legislature has broad discretion in enacting statutes regarding such qualifications pursuant to Article 101 Section 3 of the Constitution. Furthermore, we cannot find that the complainants' confidence in laws is worthy to be protected.

Moreover, the disadvantages to be suffered by the complainants are not likely to be so great because there is no restriction on the complainants to have other occupations rather than becoming a judge and only three years of legal experience are required to become a judge, while the public interest in reinforcing the protection of people's basic right and enhancing people's trust in the judiciary by appointing and making judges having legal experience make decisions on cases is significant. Therefore, for the reasons stated above, it shall not be considered that the damage on the complainants' interest in the confidence in laws outweighs the public interest pursued by the provisions at this case.

The Constitutional Court, in this case, held that the part regarding Article 42 (2) of the proviso of Article 1 and 2 of Addenda 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.

6.5.7 Punishment of Insult as Criminal Offense Case[141]

The complainant was prosecuted on charges of insult and violation of the Act on Promotion of Information and Communications Network Utilization and Information Protection, etc. (defamation) for making posts insulting a person on his Daum 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, and was sentenced to 3 million Korean won in fine by a Seoul District court in 2009. He appealed at Seoul High Court and Supreme Court in 2010, but he was denied by both Courts. And then, he, while pending his appeal before the Supreme Court, filed a motion at the Court requesting constitutional review of Article 311 of the Criminal Act that outlaws insult, arguing that the provision is void for vagueness under the vagueness doctrine and that it infringes on the freedom of expression. However, as the motion was again denied on 22 December 2011, then he filed the complaint of this case on 25 January 2012.

Two arguments made by the complainant are as follows:

1. The Provision regulating an overly abstract and broad concept of insult as an element of crime is contrary to the principle of clarity required by the restrictive legislation on freedom of expression and the void for vagueness doctrine derived from the principle of legality.
2. The purpose of punishing insult is to protect one's subjective, inner feelings of his/her reputation that tend to resist insult. Yet, this subjective perception of one's reputation is difficult to measure in an objective manner and is therefore not appropriate to warrant protection by law, so there is no conceivable legitimate purpose. Additionally, enforcing criminal punishment of insult, when there are other options such as social norms or dispute resolution measures, is neither an appropriate means nor satisfies the principle of proportionality. And it is impossible that a mere opinion, emotion or abstract judgment unaccompanied by factual statements would pose a clear and present danger to national security, maintenance of law and order, or public welfare.

   Therefore, the Provision violates the rule against excessive restriction serving limit for all legislations by restricting fundamental rights provided under Article 37(2) of the Constitution, and thus infringes on the complainant's freedom of expression.

The subject matter to review in this case, therefore, is whether Article 311 of the Criminal Act[142] is constitutional or is void for vagueness (negative); and whether the Provision infringes on the freedom of expression (negative).The question at this case, Article 311 (Insult) under Criminal Act, reads as follows:

> A person who publicly insults another shall be punished by imprisonment or imprisonment without prison labor for not more than one year or by a fine not exceeding two million won.

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[141] 2012 Hun-Ba 37, June 27, 2013. The number is preceded by the four-digit filing year and followed by a three digit serial number, as maximum, given in the order of filing in that year. Hun-Ba stands for constitutional complaints under Article 68 (2) of the Constitutional Court act. 'Hun' is English pronunciation of Korean word (憲) meaning Constitution and 'Ba' is sixth alphabet of Korean language like English alphabet F. Hence, the word 'Hun-Ba' may be conveniently translated into English language as 'Constitutional Court case type F'. Therefore, 2012 Hun-Ba 37 means the Constitutional complaints, the docket number of which is No. 37 in the year 2012.

[142] Amended by Act No. 5057, 29 December 1995.

It is reasoned by the Court that, 'Insult as a crime is an abstract judgment or an expression of derogatory emotion unaccompanied by factual statements that can undermine one's social reputation. Given the interest, legislative purpose, etc. of criminalizing insult, it does not appear to be significantly difficult for an ordinary citizen with common sense and conventional legal mind to foresee what kind of acts are banned, and there is no concern for arbitrary interpretation by law enforcement agencies. Thus, the "insult" stated in the Provision is not void for vagueness. Moreover, 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. Additionally, considering that insult is, among others, punishable only upon the victim's complaint and has relatively low statutory maximum, and that courts generally seek adequate balance between the freedom of expression and the protection of reputation by appropriately applying Article 20 of the Criminal Act on justifiable act, the Provision does not infringe on the freedom of expression.'

For all these reasons above, Article 311 of the Criminal Act does not contravene the Constitution. Three Justices filed a dissented opinion for holding of the Court as Article 311 violates the rule against excessive restriction and thus infringes on the freedom of expression, to which the researcher will not mention herewith.

6.5.8 Collection of School Meal Money from Middle School Students under Compulsory Education System[143]

During 3 March 2003 to 16 February 2006, 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 local governments, Gyeonggi-do and Anyang-si. 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. While the underlying case is pending, the petitioners filed a motion at the Constitutional Court for its constitutional review whether Article 8 (2) & (3) of the School Meals Act is unconstitutional. When the court dismissed the motion, the petitioners filed this constitutional complaint with the Court.

The questions with this case is whether, with respect to middle school, the second part of Article 8 (1) of the former School Meals Act and the first part of Article 8 (2) of the same Act are against the Constitution.

Article 8 (Bearing of Expenses) of Former School Meals Act[144]

1. In principle, the expenses set forth by Presidential Decree among the expenses for facilities, equipment and operation of meal services necessary for executing school meal services shall be borne by the founder and operator of the relevant school, but some of such expenses may be borne by a supporters association or the school parents, as prescribed by Presidential Decree.
2. In principle, expenses for school meal services other than those expenses stipulated in Section 1 of this Article shall be borne by the school parents pursuant to

[143] 2010 Hun-Ba164, April 24, 2012.
[144] Revised by Act No. 5236 on December 30, 1996 and before revised by Act No. 7962 on July 19, 2006.

Presidential Decree, but, if necessary, the State or local government may subsidize them.

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. Thus, in principle, the scope of services provided free of charge under compulsory education system must be limited by the amount of costs and expenses indispensible for giving equal opportunity in education guaranteed by the Constitution, that is to say, the amount of cost which is indispensable for all the students can study with no economical discrimination.

Thus, free of charge in terms of compulsory education must be those essential for actual and equal compulsory education and the examples can be: exemption of the entrance fee; personnel expenses and maintenance expenses for maintaining human resources and facilities such as teachers and school buildings; and exemption of financial burden of funding for new facilities. Besides, other expenses incurred in the course of providing compulsory education indispensible for securing actual and equal compulsory education are to be included in the scope of services provided free of charge. The issue 'whether the expenses other than those described above should be included within the scope of free of charge services under compulsory education' or not should be determined by the legislature based on legislative policy by taking into account of government's financial situation, income level of citizens, economic situation of school parents and social consensus.

Even though school meals have certain educational aspects, they cannot be essential and crucial part for securing equality in compulsory education. Thus, we have to allow the legislature to exercise its discretion in legislation in terms of expenses of school meals. Under the provisions at this issue, although they permit some of such expenses to be borne by school parents, the expenses for basic infrastructure for the execution of school meals are excluded and need not to be borne by school parents. In addition, there are statutory provisions setting forth State or local government's financial support to alleviate school parents' burden of bearing expenses for school meals. In particular, there are provisions setting forth a financial support for students from low-income families. For the forgoing reasons, it is hard to say that these provisions go beyond the scope of the legislature's policy-making power and thus violate the principle of compulsory education system under the Constitution.'

Finally, the Constitutional Court held that Article 2 of the Elementary and Secondary Education Act, the second part of Article 8 (1) former School Meals Act and the first part of Article 8 (2) of the same Act are constitutional as those provisions allow school parents to bear partial expenses for school meals while their children are at middle schools under compulsory education system.

7. Comparative Study on Constitutional Court of Korea and Constitutional Tribunal of the Union of Myanmar

This Part 7 gives overall picture of the Constitutional Court of Korea, by comparing Myanmar's brief history of Constitutions and its practices under existing Constitutional Tribunal, for an academic purpose.

As observed in the preceding parts of this work, 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.[145] 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.

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). 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.[146] 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.[147] Therefore, it is essential to proceed carefully and to develop

[145] 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 7th 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 several countries including Turkey, Russia and Tajikistan have applied for membership.

[146] The AACC invited Myanmar Constitutional Tribunal to be one of its members. As a first step, the Constitutional Tribunal of Myanmar is participating as an observer in the mean times. It is hoped Myanmar to be a full-fledged member of AACC in the near future to cooperate more closely with it.

[147] 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).

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.[148] Some of the prescribed professional qualifications for the Constitutional Tribunal of Union members are too specific,[149] while some are too vague.[150] 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 has appointed one Professor, who is the retired dean of law department at East Yangon University, as one of the member of the Constitutional Tribunal of the Union of Myanmar.

Let us know 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.[151] The provision outlining the formation of the Tribunal is Section 321 of the

[148] Comparatively speaking, the minimum age for presidential candidacy and or to be Attorney General is 45 and for Union Ministers is 40.

[149] For instance, several prescribed minimum service length at level concerned must be fulfilled.

[150] For instance, person, who is, in the opinion of the President, an eminent jurist, can become Tribunal member.

[151] We may note that the Constitution refers to the 'chairperson' and 'members' of the Tribunal, not the 'justices' or 'judges' of the Tribunal. This might be the intention of the drafters as they designated this type of institution as Tribunal, *KhonYone* (c½; in Myanmar language), not Courts, *Tayar Yone* (w&m;½; in Myanmar

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.[152] 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.

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language). They might have intended to draw a clear distinction between courts trying criminal and civil cases (*Tayar Yone*) from constitutional tribunal deciding only enumerated constitutional matters under the constitution (*Khon Yone*).

[152] It may come from the ideology that the Tribunal is exercising the judicial powers of the judiciary sector partially to check and balance the functions of the legislative and executive branch. Consequently, representatives from the judiciary are not necessary to be included in Tribunal.

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.

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 present Tribunal was assigned on 25 February 2013. Between 31 March 2011 and 30 September 2014, six constitutional submissions were disposed of by the Tribunal.

8. Cases and Experiences Learnt from Constitutional Court of Korea

As a conclusion part of the present research, jurisdictions of the Constitutional Court of Korea by giving special emphasis on Court's adjudication on constitutional complaints together with some cases, which is the main concern of present research, will be explored.

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 scholar acknowledges the fact that all five jurisdictions of the Constitutional Court are worthy to be studied, the primary emphasis of present research is constitutional complaint adjudication of the Constitutional Court of Korea.

From the day of establishment of the Constitutional Court of Korea in September 1988 up to as of 31 December 2014, total 26,781 cases have been filed at Constitutional Court and the Court settled 25,957 cases with 824 pending cases. People have primarily accessed the Court for reviewing the constitutionality of legislation and for petition of the constitutional complaints. As of 31 December 2014, 83 cases of competence disputes, one impeachment case and one case on the dissolution of political parties have been filed out of total case statistics. [153] 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

[153] See Appendix 1 under part 10 of this work.

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 Railroading case was the case brought before the Court in 1996 by the representatives against the Speaker of National Assembly for competent disputes. The 182nd 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 indispensible 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.

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.

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10. Appendix

9.1 Case Statistics of the Constitutional Court of Korea as of 31 December 2014

Type		Total	Constitu-tionality of Statutes	Impea-chment	Dissoluti-on of a Political Party	Compe-tence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed		26,781	848	1	1	83	25,848	21,030	4,818
Settled		25,957	798	1		80	25,077	20,590	4,487
Dismissed by Panel		13,478					13,478	11,294	2,184
Decided by Full Bench	Unconstitutional	496	240				256	80	176
	Unconformable	164	56				108	46	62
	Conditionally Unconstitutional	69	18				51	19	32
	Conditionally Constitutional	28	7				21		21
	Constitutional	1,960	296				1,664	4	1,660
	Upholding	500			1	16	483	483	
	Rejected	6,697		1		20	6,676	6,676	
	Dismissed	1,769	62			30	1,677	1,409	268
	Other	6					6	5	1
	Withdrawn	790	119			14	657	574	83
Pending		824	50			3	771	440	331

Source: http://english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do.

1. This type of ‘Constitutionality of Statutes’ case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.
2. ‘Unconstitutional’: Used in Constitutionality of Laws cases.
3. ‘Unconformable’: This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.
4. ‘Conditionally Unconstitutional’: In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.
5. ‘Conditionally constitutional’: This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in certain context". Both are regarded as decisions of "partially unconstitutional".
6. ‘Upholding’: This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

11. Index

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