

Past and Present of the Korean Constitutional Justice - Independence of the Constitutional Court of Korea -

I. Foundation of the Constitutional Court of Korea

When Korea was making the ninth constitutional amendment in October of 1987, the people of Korea, motivated by their thorough reflection on the dark ages of the Korean constitutional history under the military dictatorship and prompted by a strong desire for democracy, pushed for the establishment of a constitutional court designed to guarantee individuals' fundamental rights and rein in government abuses of power. In accordance with such aspiration, the Constitutional Court of Korea (the "Court" or the "Constitutional Court") was launched on September 1, 1988 and stands as it is today.

Looking back, when the Court was founded 23 years ago, the ideas of the supremacy of the Constitution and people's fundamental rights seemed ornamental and symbolic rather than practical, and norm control was practiced very limitedly. Consequently, creating an independent constitutional court was a commitment with no assurance of success, and in fact, the Constitutional Court did go through a host of tests and trials while exercising its power of constitutional justice.

At every challenge it faced, however, the Constitutional Court continued to demonstrate the ideals and values of the Constitution as the highest law of Korea and persistently strived to bridge the gap between the constitutional norm and its reality by advising and convincing the Korean people about its duty to safeguard the fundamental rights of individuals. As such efforts gradually gained the confidence of the people yearning for the rule of law and guarantee of fundamental rights, the Court was able to secure its status and become influential as an independent institution adjudicating constitutional cases.

Over the past 23 years, more than 19,600 cases have been filed with the Constitutional Court, of which 19,000 cases were disposed of. Existing laws were struck down as unconstitutional in more than 607 cases, and in around 330 constitutional complaints, individuals' fundamental rights were found to have been violated.

The Constitutional Court is no longer a simple ornament in the code of laws. Instead, it has become a living norm in our day-to-day lives, the standard for all state actions, and a trustworthy guardian of the Constitution by restoring its normative power to

protect the dignity and worth of the people.

Reflecting this transformation, the Constitutional Court has continuously been lauded as the most trusted and influential state agency in the recent opinion polls. The Court is also being noted and recognized around the globe as well as in Asia for having successfully established the constitutional adjudication system within such a short period of time.

II. Constitutional Status and Competence of the Constitutional Court of Korea

The Korean Constitution has a separate chapter (Chapter 6) dedicated to the competence, status, and function of the Constitutional Court aside from the ordinary courts, stressing the identity and independence of the Constitutional Court. Based on such competence and status prescribed in the Constitution, the Constitutional Court, as one of the highest state agencies, continues to practice the principle of separation of powers and rein in government abuses of power by assuming the function of controlling and balancing government powers.

Although the Constitutional Court is specified under a separate chapter apart from the ordinary courts (including the Supreme Court), that does not mean the core of its judicial function is being denied, which is constitutional adjudication. On the contrary, such separation in the Constitution may rightfully be perceived as a constitutional ground for the Constitutional Court's unique nature and its function mentioned above, not to mention its typical function as judicature.

Meanwhile, Article 111, Section 1 of the Constitution provides for five enumerated areas of jurisdiction: the constitutionality of a law upon the request of the ordinary courts; impeachment; dissolution of a political party; competence disputes between state agencies, between state agencies and local governments and between local governments; and constitutional complaints as prescribed by Act. The Korean Constitutional Court's jurisdiction on aforementioned types of cases is similar to other constitutional courts' systems, with some variances.

First, in adjudication on constitutionality of statutes, only the concrete norm control is adopted, as the constitutional review of statutes is exercised upon the request of an ordinary court when the constitutionality of laws is at issue in a pending case.

In the case of adjudication on competence disputes, the Korean Constitutional Court differs from those of other countries where constitutional competence disputes

between state agencies are the principal subject matter of review. The Korean Constitutional Court is vested with more comprehensive powers to adjudicate on constitutional or legal competence disputes between all government institutions established on the basis of the Constitution as well as disputes between the state agencies.

Last but not least, there are two types of constitutional complaints: one filed by individuals who have had their constitutional fundamental rights violated by exercise or non-exercise of governmental power (Article 68, Section 1, Constitutional Court Act) and the other directly filed by an individual who had his or her motion to request for constitutional review denied at an ordinary court (Article 68, Section 2, Constitutional Court Act). The second type of constitutional complaints has been an effective tool in keeping the Constitutional Court's norm control power from being relegated to merely nominal level when the ordinary courts are reluctant to request the constitutional review of laws. That kind of a constitutional complaint system is unique to the Korean system, but widely accepted as a prudent method of making the Constitutional Court's norm control more effective. Over the past three years, such types of constitutional complaints filed by individuals have amounted to some 30 percent of the total constitutional complaint cases, and the acceptance rates of such constitutional complaints have become as high as those of cases where the ordinary courts requested the constitutionality review of statutes, demonstrating the current system's effectiveness.

III. Political Independence

Since its inception, the Constitutional Court has been positioning itself as an independent institution from all political powers as a guardian of the constitutional order and guarantor of individuals' fundamental human rights by exercising its constitutional adjudication power. Among the most high-profile cases that attest to its independence are the impeachment case of the former President Roh in 2004 (2004Hun-Na1, decided on May 14, 2004) and the constitutional complaint case opposing the relocation of Korea's capital city Seoul (2004Hun-Ma554, etc., decided on October 21, 2004).

The impeachment case involved a charge against former President Roh Moo-Hyun brought to the Court by the National Assembly led by the then opposition party, which argued that he violated an election law prohibiting the President's election campaign when he made a remark supporting a ruling political party at a press conference. The Constitutional Court dismissed the case, holding that even though the President in

effect violated the Constitution and some laws in his discharge of office, such violation was not serious enough to warrant an impeachment of the President.

The issue of the constitutional complaint concerning capital relocation was the constitutionality of a special act specifying the relocation of the capital as pledged by the former President Roh on his campaign trail for presidency, and, like the impeachment case, it received the attention of all Korean people. The Court found the capital relocation unconstitutional, holding that it is a well-established fact that Seoul is the Korean capital, which may not be specified in the Constitution itself but the fact is evident to all as “customary constitution” that has the same effect as written constitution.

The political circle was taken aback and markedly divided over the decisions of the Constitutional Court: then President and the ruling party that had welcomed the Court's decision in the impeachment case strongly condemned the Court in the capital relocation case, while the opposition party took a completely contrasting position. These cases have demonstrated clearly that the Constitutional Court has maintained its independence from any political party or public opinion, remaining free from any outside influence, and executed its adjudicative power solely based on the Constitution.

IV. Relationship with the Ordinary Courts

Pursuant to the current Constitution, the power of constitutional review of statutes is vested in the Constitutional Court, while that of administrative decrees, regulations or actions is granted to the Supreme Court, which distinguishes the nature and status of each judicial body. However, such a dual system for the power of norm control may cause conflicts between the Constitutional Court and the Supreme Court over the consistent interpretation of the Constitution and final say in the interpretation. Furthermore, there have been criticism and demand for overhaul of the current system (modeled after Austria), which prevents the Constitutional Court from adjudicating on the constitutionality of the ordinary courts' decisions, asserting such exclusion overshadows the institutional independence of the Constitutional Court.

V. Conclusion

1. Unlike in developed countries with long history and tradition of an independent constitutional court, the independence, particularly the independence and impartiality from political powers, is of utmost importance to countries where constitutional

justice is still in the making.

The decisions of a constitutional court, however outstanding their reasoning or legal principles might be, will lose significance once the people find it to be influenced by political powers or special interests. Besides, the citizens will no longer respect and believe in constitutional justice.

Of course, institutional guarantees and procedures are important to safeguard the independence of constitutional justice. What is more important is, however, a strong will and determination of the Justices of the constitutional adjudication institutions - that they would steadfastly preserve their political independence by distancing themselves from any political power or partisanship, so that they will be held accountable only to history and the future generation. This independence of the Justices will make a strong foundation of the independence of constitutional adjudication, thereby defending the ideals and values of the Constitution as well as protecting individuals' freedom and rights.

2. Constitutional courts safeguard people's fundamental rights and serve as the last resort in protecting the constitutional ideals and values - a natural conclusion of progress in human intellect and commitment to universal justice. As such, the courts assume the duty and responsibility to promptly and finally resolve the constitutional disputes taking place in society and thus greatly contribute to social integration. It is notable that this duty and responsibility of the court is becoming more significant, as all the ideological and social conflicts of modern society keep pouring into the doors of the constitutional courts.

As the Korean Constitutional Court has come of age with 22 years of history, we will continue to focus on further strengthening the Court's political independence and impartiality. We will also do our best in bringing a full-blown democracy and rule of law to Korea, so that the people of Korea, who have achieved a miracle in both industrialization and democratization, can live in a society where their human dignity and worth are more respected by the government and their pursuit of happiness is advanced toward a more righteous and affluent society.