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**Questionnaire**

**Reply by the Constitutional Court of Korea**

**A. Court Description**

**1. Basic texts**

Basic rules on the Korean constitutional justice are described in Articles 111, 112, and 113 of the Korean Constitution, which was amended on October 29, 1987, and the Constitutional Court Act, which was enacted in August 5, 1988.

**2. Composition, procedure and organization**

The Constitutional Court is composed of nine Justices who are appointed by the President of the Republic of Korea. Among them, three are elected by the National Assembly; three are designated by the Chief Justice of the Supreme Court; and the remaining three are nominated and appointed by the President after a confirmation hearing before the National Assembly. The President of the Constitutional Court, who represents the Court and serves as the Chair of the Full Bench, is appointed by the President of the Republic of Korea with the consent of the National Assembly.

In the Constitutional Court, there are the Constitutional Research Officers, who are engaged in doing research and drafting legal memos and opinions concerning the Courts' cases; the Department of Court Administration, which is in charge of the administrative affairs of the Court; and the Constitutional Research Institute, which was established primarily for carrying out long-term research on the constitutional law and the constitutional adjudication.

**3. Jurisdiction/Powers**

Based on Article 111 (1) of the Constitution and Article 2 of the Constitutional Court Act, the Constitutional Court has jurisdiction over the following five matters: (i) the constitutionality of statutes (enacted by the legislature) when requested by the ordinary courts (courts other than the Constitutional Court); (ii) impeachment of high-ranking government officials (including the Korean President); (iii) dissolution of a political party (in the event that the Court finds the political party is in violation of the fundamental democratic order); (iv) competence disputes among state agencies or local governments; and (v) constitutional complaints, which can be directly filed by individuals who claim that their fundamental rights have been violated by the government's action or inaction (a pending case before an ordinary court is not a pre-requisite).

#### **4. Nature and effects of judgments**

The Constitutional Court's decisions regarding the constitutionality of a statute, competence disputes, or constitutional complaints shall bind all state agencies and local governments.

Any statute or provision decided as unconstitutional by the Constitutional Court loses its effect from the day on which the decision is rendered. However, the statutes or provisions related to criminal penalties lose their effect retroactively.

When a request for impeachment is upheld, the Constitutional Court decides that the accused person be removed from the public office, and the decision will not exempt the accused person from the civil or criminal liabilities.

When a decision ordering the dissolution of a political party is pronounced, the political party shall be dissolved.

#### **B. Social Integration**

##### **1. Challenges of social integration in a globalized world**

###### **1. 1. What challenges has your Court encountered in the past, for example in the field of asylum law, taxation law or social security law?**

In this globalized world, markets are being opened up faster and faster, and multinational investment funds are moving in and out of national borders freely across the globe, which leads to socioeconomic polarization and aggravates social conflict and instability. In this context, many governments have taken various measures in an effort to mitigate social polarization and enhance social integration, which need a considerable amount of budget and can bring about additional conflicts.

In the constitutional complaint challenging the constitutionality of Article 5 of the Comprehensive Real Estate Tax [2006 Hun-Ba 112 ("Hun-Ba" is a constitutionality case filed by individual complainant(s) in the form of constitutional complaint according to Article 68 Section 2 of the Constitutional Court Act)], the Constitutional Court decided that the provision of the Comprehensive Real Estate Tax Act that stipulates aggregate taxation on all the properties held by members of the same household (not aggregate taxation on the properties held by an individual) violates Article 36 (1) of the Constitution. In addition, in the constitutionality decision on Article 33 (2) of the National Health Insurance Act [2009 Hun-Ma 299 ('Hun-Ma' is a constitutional complaint case filed by individual complainant(s) according to Article 68 Section 1 of the Constitutional Court Act)], the Court decided that the provision that mandated the integration of funds from insurance premium of the company-employed and those of the self-employed and the provision regarding the dual system of insurance premium calculation for the above two categories do not violate the rights to equality and the property rights of the company-employed; the Court's decision is basically aimed at preventing the formation of economic classes and promoting the national solidarity.

###### **1. 2. How were issues of social integration or conflict transformed into legal issues?**

Since its inception, the Constitutional Court of Korea has dealt with a variety of issues that have drawn diverse controversies and contentions, and many of them had not been resolved through the political process, and thus referred to the Court for their resolution. For example, in 2004 the Court resolved the capital relocation case (2004 Hun-Ma 554 et al; KOR 2004 3 003), in which it held that Seoul is the nation's capital city pursuant to the customary constitution, and thus it is against the Constitution to relocate the nation's capital without a national referendum. There have been many criticisms against the decision, but the intensity of the conflict over the capital relocation subsided, and the conflict came to an end ultimately.

Likewise, many conflicts arose where the interests of some groups of people contradicted those of other groups, and since the political circle failed to resolve them even through new legislations in most cases, the issues knocked on the door of the Court for their resolution.

The Public Official Election Act had strictly limited the scope of election campaigns for the purpose of ensuring the impartiality of elections and the freedom of election campaigns. As new on-line communication tools including social networking sites (SNS) advanced, the public began to utilize those tools more actively for their political expression. Against this backdrop, the Constitutional Court, on December 29, 2011, decided the ban on the election campaigns on the Internet unconstitutional (2007 Hun-Ma 1001). Through this decision, the Constitutional Court encouraged the public to be more involved in politics by protecting the freedom of political expression, and that decision is thought to make a great contribution to social integration.

Moreover, as the globalization progresses, the need for market intervention by the State is also increasing, and the Korean Constitution stipulates in relation to it in Article 119 that the state may regulate and coordinate economic affairs for economic democratization, among the economic players.

For example, in the case involving Article 25 (4) of the Act on Foreign Workers' Employment, ETC (2007 Hun-Ma 1083 etc.; KOR 2112 3 016), where the constitutionality of certain provisions that prevent migrant workers with employment permits from changing workplaces more than three times was at issue, the Court concluded that foreign workers are entitled to fundamental rights that are closely related to human dignity and the right to pursue happiness, and that the freedom to choose one's place of work falls into those categories. This decision, which recognized migrant workers' fundamental rights is also regarded as a socially integrating and inclusive ruling of the Court in terms of its reasons for decision.

### **1. 3. Is there a trend towards an increase in cases on legal issues relating to social integration? If so, what were the dominant questions before your Court in the past and what are they at present?**

Cases regarding social integration or conflict have dramatically increased in Korea. In the past, problems arose mainly in relation to social status or hierarchical social order, mostly in the area of criminal or family matters. In the decision of constitutionality on Article 781 of the Civil Act [2001 Hun-Ka 9 etc ("Hun-Ka" is a constitutionality case referred by ordinary courts according to Article 41 of the Constitutional Court Act)], the Court ruled that the family head registration system (*hojuje*) is a discrimination based on stereotypes concerning gender roles; and in the decision on Article 224 of the Criminal Procedure Act (2008 Hun-Ba 56), which stipulates the prohibition of filing a complaint against lineal ascendants, the Court concluded that the provision does not violate the principle of equality. These cases are regarded as good examples of reconciling the constitutional values with traditional values in this rapidly changing social environment in a globalized world.

In addition, along with the above mentioned disputes, there are several economic-democratization-related cases awaiting the Court's decisions that will have huge socio-economic implications, such as cases concerning how the ordinary wages should be calculated according to the Labor Standards Act.

## **2. International standards for social integration**

### **2.1. What are the international influences on the Constitution regarding issues of social integration/social issues?**

The Korean government has strived to play an active role to foster social integration since its inception, through various measures including the introduction of social rights. Currently,

issues such as gender equality, poverty reduction, protection of small and medium-sized enterprises, and prisoners' rights are addressed in the Constitution and in a number of relevant statutes.

How to deal with these issues is generally defined in many multilateral treaties that Korea has duly ratified under the Constitution--e.g., the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention Relating to the Status of Refugees (CRSR), and since most of the standards described in those international treaties are already incorporated into the Korean law, it is safe to say that the international standards concerning social integration/social issues have been of great influence on the Korean Constitution.

## **2.2. Does your Court apply specific provisions on social integration that have an international source or background?**

The Constitution of Korea does not have specific provisions on social integration that have an international source or background, other than Article 6 (1) of the Constitution, which provides, "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." Based on this article, the Constitutional Court of Korea has adopted the principle of respect and observance of the international law when applying it to specific cases, and it is generally accepted that the international law is regarded as not having a constitutional status in the Korean legal order.

## **2.3. Does your Court directly apply international instruments in the field of social integration?**

The Constitutional Court of Korea does not directly apply the international law, since it always looks into the four corners of the Constitution first, when dealing with many cases and issues, and the international law is to be indirectly applied through Article 6 of the Korean Constitution, which pronounces the principle of respect and observance of the international law; thus, if the violation of the international law is at issue in a specific case, the Court's decision will be rendered as to whether the above article has been violated. The Court once held that the Universal Declaration of Human Rights is meaningful only as a declaration, and did not regard it as legally binding or effective as international law (89 Hun-Ka 106; 2005 Hun-Ma 971).

In addition, regarding the issue of conscientious objection to mandatory military service, the Court concluded that the principle of respect and observance of the international law is not violated on the grounds that, even though Korea has joined the International Covenant on Civil and Political Rights (ICCPR), the right to conscientious objection to military service has not been explicitly recognized as a fundamental right according to the Covenant but acknowledged as a right only by international human rights bodies through interpretation (2008 Hun-Ka 22 et al.).

There has been no statute decided as unconstitutional solely on the grounds of the principle of respect and observance of the international law; if a statute were decided unconstitutional in violation of the principle, the decision would be based on Article 6 (1) of the Korean Constitution, not as a result of applying the international law itself.

#### **2.4. Does your Court implicitly take into account of international instruments or expressly refer to them in the application of constitutional law?**

The Constitutional Court of Korea often explicitly refers to the international law in a decision where a claimant makes an argument based upon it. In the case of the Ministry of Labor's established rule limiting the rights to labor of foreign workers, the Court referred to Article 5 of the Labor Standards Act and Article 4 of the ICESCR, which mentions the rights to enjoy working conditions which are commensurate with the value of labor, and the Court concluded that this should be considered in the interpretation of the constitutional provisions, thus, holding that the case is unconstitutional based on the fact that the limitation of such rights must be determined only by statutes, not by enforcement regulations (2004 Hun-Ma 670). However, the Court has never rendered a decision solely based on the violation of the international law (gender equality cases - 98 Hun-Ma 363, 97 Hun-Ka 12; convicted prisoner cases - 2002 Hun-Ma 478).

#### **2.5. Has your Court ever encountered conflicts between the standards applicable on the national and on the international level? If so, how were these conflicts solved?**

If there is a discrepancy between domestic and international standards in the case, where the domestic standards are on a higher level than the international ones, the Constitutional Court will choose the domestic standard rather than the international one. However, questions arise when the international standards are on a higher level than the domestic ones. In this case, the first step is to decide whether there are grounds that a specific international standard is applicable. A review should be made as to whether the international standard applicable to a specific case is binding or generally approved. In a few cases that have concerned the conflicts between the international standard and the domestic standard, the Court has not directly applied the international one based upon the fact that they failed to pass the first step. For example, in the cases that dealt with the constitutionality of the legislation that applied the three basic labor-rights of civil servants (the rights to independent association, collective bargaining, and collective action) only to civil servants who are engaged in de facto physical labor, excluding other civil servants, the claimants argued that this legislation violated the international human rights laws and the International Labor Organization conventions Korea had agreed on, as well as international organizations' recommendations and guidelines; the Court concluded that there was no violation of international law on the grounds that the related conventions or provisions were not ratified (or reserved), and were not effective as a generally approved international law, and that the recommendations by international organizations do not automatically invalidate the provisions in question (2003 Hun-Ba 50).

### **3. Constitutional instruments enhancing/dealing with/for social integration**

#### **3.1. What kind of constitutional law does your Court apply in cases of social integration – e.g. fundamental rights, principles of the Constitution (“social state”), “objective law”, *Staatszielbestimmungen*, ...?**

The Constitutional Court of Korea initially examines the express language of the Constitution when deciding cases concerning social integration or conflict as it does in other cases. That includes not only provisions on fundamental rights but also on constitutional principles. In addition, the customary constitution may also be relied on as a source of law in constitutional adjudication. For instance, in the capital relocation case, the Court concluded that even though Seoul is not explicitly mentioned as the capital city in the expressive language of written Constitution, it is the nation's capital according to the customary constitution (2004Hun-Ma554 et al; KOR 2004 3 003).

**3.2. In cases where there is access of individuals to the Constitutional Court: to what extent can the various types of constitutional law provisions be invoked by individuals?**

There are two types of adjudications that may be invoked by individuals to the Constitutional Court of Korea: adjudication on the constitutionality of statutes to be requested by the ordinary courts after constitutional challenges filed by individuals and constitutional complaints before the Court to be directly filed by individuals (Constitutional Complaint Type I: "Hun-Ma" type). In the former case, individuals may challenge the constitutionality of the statutes at issue but may not directly request the constitutionality review to the Court, since in this case the request should be made by an ordinary court where the underlying case is pending; however, it can be understood that individuals may have access to the Court in the sense that, even in this case, if their motions challenging the constitutionality of statutes at the ordinary court are rejected, they may file a constitutional complaint with the Court within 30 days of the rejection notice from the ordinary court (Constitutional Complaint Type II: "Hun-Ba" type).

While adjudications on constitutional complaints, based upon Article 68 (1) of the Constitutional Court Act ("Hun-Ma" type) may refer to the fundamental rights provision as a review standard, adjudications on the constitutionality of a statute are not limited to the fundamental rights provisions. When fundamental rights are invoked not based upon the specific provisions of fundamental rights but other provisions, those provisions may be applied as well to the adjudications on constitutional complaints. For example, the Court derived the rights to equal opportunity regarding election campaigns from Article 111(1) of the Constitution. (92 Hun-Ma 37 et al)

**3.3. Does your Court have direct competence to deal with social groups in conflict (possibly mediated by individuals as claimants/applicants)?**

According to the constitutional law, judicial proceedings regarding disputes between social groups are not directly addressed. Constitutional complaints based on Article 68 (1) of the Constitutional Court Act ("Hun-Ma" type) may be filed against an action or inaction of State powers, and disputes between individuals are not included in the area of the "action or inaction" of those powers.

However, if members of certain social groups are treated unfairly compared with their counterparts in other groups, or benefits are given to other competing social groups, these members are allowed to file a constitutional complaint based on the argument that, according to the provisions related to conflicting interests between social groups, their fundamental rights are violated.

For example, the Court settled a conflict between lawyers' associations and patent attorneys' association regarding the scope of their business areas (2007 Hun-Ma 956), and the Court's ground for such holding was that the required qualification of a lawyer for a patent lawyer does not violate the principle of equality and freedom of occupation of the claimants who applied for examinations to be a patent lawyer.

**3.4. How does your Court settle social conflicts, when such cases are brought before it (e.g. by annulling legal provisions or by not applying them when they contradict the principle of equality and non-discrimination)?**

The Constitutional Court decides that a statute is unconstitutional when the statute violates the Constitution, and the statute decided as unconstitutional loses its effect (Article 47 (2) of the Constitutional Court Act). The binding force of the decision of the Court prohibits the ordinary courts from applying the statute nullified thereby (Article 47 (1)).

In the case regarding the collection of fees to support school operation in public middle schools (2010 Hun-Ba 220), the Court declared the provision stipulating that the payment of the fees shall be made by the parents whose children attend public middle schools unconstitutional, since it violated the principle of compulsory education without cost, as prescribed in Article 31 (3) of the Constitution.

### **3.5. Can your Court act preventively to avoid social conflict, e.g. by providing a specific interpretation, which has to be applied by all state bodies?**

The current constitutional adjudication in Korea is based upon concrete norm control system (there should be a specific underlying case pending at the ordinary court) and a posteriori (control) system, and does not recognize abstract norm control (no pending required) or ex-ante control system.

The Constitutional Court Act, however, prescribes that, in a political party dissolution case or a competence dispute case, it may, upon receiving a request for adjudication on such cases, make ex officio or upon a motion of the plaintiff a decision to suspend the activities of the defendant until the pronouncement of the final decision (Articles 57 & 65), and the Court applies these rules to other types of constitutional cases as long as it is possible and necessary.

### **3.6. Has your Court ever encountered difficulties in applying these tools?**

Most of the difficulties the Constitutional Court of Korea has encountered arose after its decisions had been made; the examples of these difficulties include criticisms from the political circle, the media, and people who do not find their implications readily acceptable. One good example is the aforementioned capital relocation case (2004 Hun-Ma 554, etc; KOR 2004 3 003). After the decision, public opinions were divided, and there also was a huge controversy in the legal and academic community as to whether customary constitution may be recognized as a source of law in Korea where written law is recognized as the primary source of law.

However, most citizens considered the Court's decision that the relocation of the capital requires a national referendum convincing, and the National Assembly also respected the Court's decision and renounced the relocation of the capital. As such, the conflicts surrounding the relocation of the capital were finally resolved by the Court's decision.

### **3.7. Are there limitations in the access to your Court (for example only by State powers), which prevent it from settling social conflicts?**

As mentioned before, the constitutional adjudication in Korea is based upon concrete norm control system: thus, when constitutionality issues are dealt with in legal proceedings at the ordinary court, requests for adjudications on the constitutionality of a law may be made as long as a lawsuit is pending. As explained briefly before, Article 68 (1) of the Constitutional Court Act stipulates that a claimant shall be a person whose basic rights have been violated by an action or inaction of state powers; thus, there are limitations on individuals' access to the Court in terms of justifiability or admissibility requirements; those who are not affected by the government's exercise or non-exercise of power may not file a constitutional complaint even if a case involves social issues of far-reaching implications.

However, the Constitutional Court has shown some flexibility when applying admissibility requirements in cases; for instance, the Court has loosened those requirements in a number of cases, if it is reasonably expected for the same type of infringements to be repeated, or the Court's rulings on a specific issue are considered to be essential in order to safeguard

and protect the constitutional order (94 Hun-Ma 60). Furthermore, if a claimant cannot afford to file a constitutional complaint, or the constitutional adjudication on a specific case is required in terms of fostering public interest, a court-appointed counsel is appointed by the Court. Recently, the Court strives to expand the access of the general public to the court: Individuals have free online access to file a complaint, and may submit other documents online without bothering to visit the Court in person.

#### **4. The role of constitutional justice in social integration**

##### **4.1. Does your Constitution enable your Court to act effectively in settling or avoiding social conflict?**

The Constitutional Court of Korea has made its best efforts to duly perform the duty of social integration (mandated by the Korean Constitution) with the understanding that it is the institution that should foster social integration by resolving social conflicts within the boundary of the Constitution, which is the foundation of national integration, and the Court's duty for social integration is well addressed in the articles of the Constitution stipulating the functions and competence of the Court.

To be more specific, the Constitutional Court's jurisdiction ranges from the competence dispute between state or municipal powers (Adjudication on Competence Dispute), the constitutionality of statutes, administrative decrees (Adjudication on the Constitutionality of Statutes), and constitutional complaints filed by individuals (Adjudication on Constitutional Complaint), to impeachment and dissolution of political parties. In 2013, the Court received about 1,500 cases, and more than 95% of cases were constitutional complaints.

The Constitutional Court has enhanced social integration from time to time by deciding on constitutional complaint cases where fundamental rights of social minorities such as people with disability are involved. For example, the Court held that both a provision of Medical Service Act granting people with visual disability exclusive right to massage service (2006 Hun-Ba 1098) and a provision of Act on Employment Promotion and Vocational Rehabilitation for people with disability, in which business corporations shall employ certain number of people with disabilities (2001 Hun-Ba 96) as their employees, are constitutional.

Since the foundation of the Constitutional Court of Korea, it has taken pride in faithfully implementing the duty of social integration as mandated by the Constitution for the past two and a half decades; thanks to its efforts, the Court has been voted as the most trusted and influential government agency since 2005 in the public opinion polls conducted by one of the major media organizations.

##### **4.2. Does your Court de facto act as 'social mediator', or/and has such a role been attributed to it?**

As briefed before, the Korean Constitution defines the jurisdiction or functions of the Constitutional Court of Korea, and constitutional justice is to contribute to social integration by mediating social disputes; the good example of this is the above mentioned decision on the relocation of the capital. In addition, the Court's interpretation of the Constitution through its decisions is to serve as a standard when state agencies and other social powers are in serious conflict awaiting the Court's decision. Accordingly, when the Court renders a statute unconstitutional, the National Assembly of Korea comes under pressure to amend such a statute in conformity with the Court's decision.



**4.3. Has there been cases, when social actors, political parties could not find any agreement, they would 'send' the issue to your Court which had to find a 'legal' solution, which normally should have been found in the political arena?**

Generally speaking, it is ideal for disputes between state agencies (and other social conflicts) to be resolved in a democratic way such as dialogues and negotiations, or mediations among the relevant parties; however, the constitutional adjudication system, including the competence dispute resolution described in the Constitution, makes it possible for those disputes or conflicts, which might have been settled politically, to be resolved through judicial proceedings.

Some of the typical cases are competence disputes between the National Assembly and the Administration. If the party with which the incumbent President has been affiliated is the ruling party, there will be little chance of having those competence disputes; in other cases, they remain unsettled in the political circle, being passed to the Court for final resolution. (i.e. 1998 Hun-Ra 1).