



Strasbourg, 23 September 2005

CDL-JU(2005)045
Engl. only

CCS 2005/07

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with
THE CONSTITUTIONAL COURT OF SLOVENIA

**THIRD CONFERENCE
OF SECRETARIES GENERAL
OF CONSTITUTIONAL COURTS AND
EQUIVALENT BODIES**

Bled, Slovenia, 29-30 September 2005

REPORT

**LAW CLERK SYSTEM OF THE KOREAN CONSTITUTIONAL COURT:
CURRENT SITUATIONS AND CHALLENGES**

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1. Introduction

In order to understand the characteristics and problems of law clerk system of the Constitutional Court of Korea, it is important to first understand the reality of the Korean judiciary, bar, and academia. In addition, the Korean constitutional adjudication system should also be explained. After exploring these issues, I would like to describe the recruitment, operation, and problems of the current law clerk system of the Korean Constitutional Court.

2. The Current Situation of the Judiciary, Bar, and Academia in Korea

The only way to become a judge, prosecutor, or lawyer in Korea is to take and pass the Korean Judicial Examination. The exam is offered once a year and the government has fixed the number that may pass the exam. After passing the judicial exam, a successful candidate should complete a 2-year program at the Judicial Research and Training Institute operated under the supervision of the Supreme Court of Korea.

Until now, judges, public prosecutors, and lawyers in Korea have always been considered the top of the social elites due to their social role, relative scarcity, and high income. For these reasons, many competent Korean young people have believed that passing the judicial exam is the ticket to success that anyone may realize regardless of their gender, age, and educational background.

In Korea whose population is more than 48 million, up until 1980, there were only 10 to 100, at the most, successful candidates for the judicial exam each year. From 1981 till 1995, 300 applicants per year passed the exam, and thereafter, the number of successful candidates increased by 100 a year up to 1000 in 2001. The number of applicants, however, also increased each year; and before 1980's approximately 5000 applicants took the exam, but nowadays more than 30,000 take the exam every year. The ratio of successful candidates to applicants was about 1% in 1980's, and even though it is 3.5% now, the pass rate is still very low.

Because of this low pass rate, the Korean bench and bar could be composed of equally competent people, which heightens the pride and authority of the legal profession and the spirit of *noblesse oblige*. The professional pride and social responsibility facilitated them to more faithfully carry out their social roles in protecting human rights and eliminating social corruption. On the other hand, however, the low pass rate has made them indulge in legal elitism, such as cronyism, self-righteousness, or occupational egoism, etc., and they have increasingly lost the confidence of people in legal profession. The more serious problem lies with the distorted allocation of national human resources while so many smart young people who could more productively work in various other social fields are tied up in preparing for the judicial exam for 2 years, at the shortest, to more than 10 years.

In addition, the department of law in universities gave up its conventional role as a legal educational institution, and instead focused its attention more on the success of the judicial examination degrading itself as a mere instrument for the examination. This has been a hindrance to the development of legal education and academia. For these reasons, it is difficult to combine practical legal experiences with the product of legal scholars. It is not very difficult to imagine the estrangement of the two societies from the fact that only dozens of law professors are qualified lawyers out of 921 law professors in 91 universities in the whole nation in April 2002. In Korea, even a law professor is not eligible to be a member of the Korean Bar Association unless he or she passes the judicial examination.

For the last few decades, the effort to solve these problems has been continued, but only resulted in compromises with temporary measures. However, since the advent of current government whose main slogan is “social reform”, the Judicial Reform Committee has been established for the last two years under the support of the Korean Supreme Court and the government. It is composed of a wide-range of people from journalists and businessman to various jurists and legal scholars and came up with the reform plan throughout the whole judicial system including the introduction of American law school system and the improvement of the judicial examination process, etc. Now the Committee is discussing some practical measures to achieve the reform plan.

3. The Korean Constitutional Adjudication System: Current Situations

The Korean constitutional adjudication system began with the establishment of the Founding Constitution in 1948. Over nine revisions to the Constitution, different organizations such as the Constitutional Committee, the Supreme Court, and the Constitutional Court exercised constitutional jurisdiction. However, until the present Constitutional Court was created by the last constitutional revision in 1988, constitutional jurisdiction was exercised in less than 10 cases for a period of 40 years. Constitutional jurisdiction virtually existed only in the text of the Constitution. The main reasons for the dormant exercise of constitutional review in Korea in spite of the expressive provisions in the Constitution may be explained in that not only the authoritarian regimes controlled the governmental systems during those periods but also people generally did not realize the importance of human rights.

However, since the current Constitution was revised in 1987 as a result of the people's aspiration for democratization and human rights, and thereby the new Constitutional Court was created in 1988, the Korean constitutional adjudication system has been significantly advanced in both quality and quantity. The Korean Constitutional Court has decided more than 10,000 cases among which over 250 articles of statutes and 230 governmental actions or inactions were held unconstitutional. A considerable number of precedents have been accumulated such that more than 30 volumes of case reports (more or less 1,000 pages per volume) have been published even only with major cases contained in them.

The Korean Constitutional Court has jurisdiction over constitutional review of statutes referred by ordinary courts, impeachment of high governmental officials including the President and judges, dissolution of political parties, competence disputes between governmental entities (between national governments, between regional governments, and between a national government and a regional government), and constitutional complaints. The number of cases filed with the Constitutional Court has continuously increased by 10 to 15 percents every year. More than 1,200 cases were filed with the Constitutional Court in 2004 alone. As the number of cases increases, the workload of Justices at the Constitutional Court also increases. It was particularly aggravated as 10 to 15% of all filed cases were dealing with the constitutionality of statutes, which requires significant time and efforts to resolve.

In order to be appointed as a Justice at the Constitutional Court, the person must be a qualified attorney over the age of 40 with experience of 15 years or more in the following positions: (1) Person who has handled legal affairs as a judge, prosecutor, or lawyer, or other legal officers; or (2) Person who has been in a position higher than an assistant professor of law in an accredited university.

Every case filed with the Constitutional Court is equally allocated to each Justice except for the Chief Justice who is always the Presiding Justice for all cases. Each Justice works on his or her assigned cases in terms of their legal issues, related foreign and domestic laws and precedents, academic researches, and other necessary materials for the cases. After analyzing the cases, the Assigned Justice must present the result of his or her work to the Justices' Council in the form of a written report. In addition, the Assigned Justice is responsible for drafting the opinion of the Court following the conclusion of the Justices' Council. (When the Assigned Justice does not concur with the majority opinion, he or she may write his or her own minority opinion.)

4. Law Clerk System of the Korean Constitutional Court: Selection and Operation

The tasks of law clerks basically coincide with those of Justices although they are subordinate to Justices and generally their names are unknown to the public.

In constitutional adjudication, the Constitution is the only and final standard to be applied to the specific cases. Accordingly, vast knowledge about the constitutional law is essential for law clerks at the Constitutional Court. On the other hand, since constitutional adjudication is also a type of judicial adjudication which should be carried out in accordance with the strict judicial procedures, the familiarity with various types of judicial procedures is important as well. (The Korean Constitutional Court Act stipulates that provisions concerning civil, criminal, administrative litigation procedures may be applied with necessary modifications to the procedure for adjudication of the Constitutional Court.) In addition, since legal issues in constitutional adjudication are closely related to the interpretation of ordinary laws such as civil and criminal laws, law clerks should also be well equipped with a comprehensive understanding of other laws. Furthermore, resolving constitutional cases may not be separated from the reality of the society, in particular, its political, social, and economic changes. In general, the young generation tends to be more sensitive to social changes and, I believe, fresh and untamed voices from them are useful in resolving constitutional issues. It is said that this benefit is one of the main reasons why the U.S. Supreme Court only hires recent law graduates. I think this point should also be taken into account when selecting law clerks in other constitutional courts.

Considering all these aspects as mentioned above, the Korean Constitutional Court adopts three different ways of hiring law clerks.

Firstly, the Constitutional Court may employ the Constitutional Research Officers it chooses. The Constitutional Research Officers are appointed by the Chief Justice of the Constitutional Court through a resolution of the Council of Justices from those falling under any of the following subparagraphs: ① a person who is qualified for a judge, public prosecutor, or attorney-at-law; ② a person who has been in a position equal to or higher than an assistant professor of law in an accredited college or university; ③ a person who has obtained a doctorate in law, and engaged in legal affairs for five or more years in government agencies or an accredited research institute, such as a college or university; and ④ a person who has been engaged in legal affairs for five or more years as a public official of Grade IV or higher in the government agencies. (In Korea, public officials are classified from Grade I to Grade IX under the positions of Ministers and Vice-Ministers.) However, even though he or she meets any of the conditions listed above, the person may not be directly appointed as a Constitutional Research Officer. He or she must first be appointed as a Deputy Constitutional Research Officer for three years and then eligible for the position of Constitutional Research Officers depending on his or her service record. Since Constitutional Research Officers are entitled to a tenure of 10 years renewable up to the age of 60 and treated equally with judges at the ordinary courts, they are very carefully chosen through the observation process.

The full quota of Constitutional Research Officers including Deputy Constitutional Research Officers is 30 in 2005, but it will be increased to 36 in 2007. Currently, we have 27 Constitutional Research Officers including 4 Deputy Constitutional Research Officers. They are all qualified lawyers except for 3 Constitutional Research Officers who meet the condition ③ in the above list by being a doctor of law. Three Constitutional Research Officers are previously judges at the ordinary courts and three were practicing lawyers while the others have worked only at the Constitutional Court.

Out of 27 Constitutional Research Officers including deputies, females are 11, which comprises 40% of the research team. It is a very significant percentage of females when compared to other legal fields in Korea. Although the number of females passing the judicial exam has significantly increased to more than 30 percents of all test successors, the male to female ratio in other legal fields is still very low to the extent that female lawyers comprise much less than 10 percent of 8,200 all qualified lawyers. (Among them, judges: 1,800, prosecutors: 1,300, and attorneys: 5,100)

The Korean Constitutional Court provides Constitutional Research Officers with the opportunity to study abroad for two years. Every year, two Constitutional Research Officers enjoy this opportunity and the selected research officers usually have 4 or 5 years of working experience with the Constitutional Court. Until now, they have mainly chosen to study in the U.S. and Germany, but we would like them to go to other areas as well.

The second way of hiring law clerks at the Constitutional Court is to employ people with a doctorate degree in law or lawyers on a yearly contractual basis. These types of law clerks are called Constitutional Researchers. Their contractual term would be renewed if no extraordinary circumstance occurs. Specially, Constitutional Researchers may enter into an employment contract with the Court on an hourly basis so that college professors are also given the opportunity to work as Constitutional Researchers. In addition, foreigners with a doctorate degree in law may also be appointed as Constitutional Researchers. Since one of their major tasks is to promptly collect and analyze foreign materials related to pending cases at the Court, the Constitutional Court has been hiring people who received a doctorate degree in law from various countries such as Japan, France, Germany and the U.S. Currently, we have five Constitutional Researchers including one American lawyer with a Juris Doctor (J.D.) degree. Since the career goal of most Constitutional Researchers is to be a college professor, they usually move to a college after working at the Court for two or three years with a very small portion of them to continue to work with the Court as Constitutional Research Officers.

The last way of recruiting law clerks is for the Chief Justice to request other governmental agencies to dispatch public officials under their authority to the Constitutional Court so as to have them serve as the Constitution Research Officers.

Currently, nine judges, five prosecutors, and one public official from the Ministry of Legislation are working at the Court as Constitutional Research Officers. They have extensive work experience of 10 years or more at their respective offices. These Constitutional Research Officers usually return to their previous offices after serving at the Court for two years.

The most senior Constitutional Research Officer is appointed as Chief Research Officer to direct and manage the law clerks in the Constitutional Court. The Chief Officer maintains the highest rank over the law clerks, whereas the law clerks maintain equal rank with each other.

The nine Constitutional Court Justices are each assigned one Constitutional Research Officer who is a judge dispatched from the ordinary courts. The Chief Justice is assigned one prosecutor research officer while the other Justices are assigned one prosecutor to share with two justices. In addition, two Constitutional Research Officers directly employed by the Constitutional Court are assigned to each Justice with the exception of the Chief Justice.

The Justices have much discretion on how to direct and manage the Constitutional Research Officers assigned to them. Generally, Justices allocate cases to their respective research officers and let them research and manage the cases throughout the proceeding in terms of clarifying disputed issues, researching the cases, and drafting memos.

The law clerks not assigned to a particular Justice work on two specialized divisions, one for tax cases and the other for criminal cases. They are created to handle the needed efficient resolution of complex legal cases with respect to the above-mentioned areas. The Justices can assign these tax and/or criminal cases to the specialized divisions when the Justice deems it necessary for further in-depth research on these intricate legal matters. Once assigned, the team leader of the specialized research division work with their team members to research the legal issue and submit a written report to their respective Justice.

Furthermore, on special cases, an ad hoc research team with five or more law clerks can be formed to do a wide range of legal research. It is, however, not very common and is usually done for two or three cases a year.

5. Challenges to the Law Clerk System

To revitalize the clerkship system at the Constitutional Court, new members must be admitted each year to bring new energy and innovation. However, when our quota is full, we cannot recruit new members unless an incumbent retires. To deal with this problem, the Constitutional Court has tried to increase the full quota of law clerks continuously, but it is not possible to expand the number without limit.

There is another difficulty in recruiting a new permanent law clerk. Unlike other legal professions, the tasks of law clerks are anonymous and subordinate in nature. Moreover, this situation is aggravated by the lack of merits the Constitutional Court can provide in order to secure experienced and talented law clerks in the Court. Even though their payments are increased in proportion to service years, it cannot be a special merit for law clerks since other legal professions are the same in this matter. The Chief Justice is entitled to appoint the Secretary General of the Constitutional Court who is a minister level public official and the Deputy Secretary General who is a vice-minister level public official and surely law clerks are eligible for the positions, but the promotion to the limited offices is not a enough merit to maintain many capable law clerks.

As mentioned before, most Constitutional Researchers tend to leave the Court for positions at universities and, in fact, many of them have followed the track, making it difficult for the Court to maintain experienced and skilled researchers in constitutional matters. In addition, since most Constitutional Researchers have studied abroad in English or German speaking countries, another difficulty lies in collecting and filing legal materials in foreign languages other than English and German.

Seventeen years has passed since the Constitutional Court was established in Korea. Many national disputes and political controversies have been brought to the Constitutional Court as constitutional cases. However, most lawyers are still not familiar with constitutional law and it is difficult to find experienced lawyers in constitutional matters. Therefore, after appointed as law clerks at the Constitutional Court, even experienced lawyers need a significant training period in order to be familiar with constitutional matters. It is also equally applicable to judges and prosecutors who work as dispatched Constitutional Research Officers only for two years at the Court. Two years is not enough time for them to be trained in constitutional matters and get to work on the cases.

As human rights issues which are the core subjects of constitutional law become universal throughout the world, it is very important in constitutional adjudication to refer to international or foreign experiences. More human rights cases are presented to the Korean Constitutional Court, and the Court consults many foreign legal documents to better judge these human rights issues. Therefore, the Korean Constitutional Court puts a high emphasis on foreign language ability in selecting law clerks. As already mentioned before, the Court provides Constitutional Research Officers with an opportunity to study abroad. Each year, two officers are selected to study abroad for two years. Most of the dispatched research officers also have experiences of studying abroad. Furthermore, in order to maintain and enhance their knowledge and research skills on foreign law, law clerks periodically attend seminars on foreign constitutional adjudication systems and experiences.

Despite these efforts, the Court does not seem to have enough law clerks with proficiency in collecting and analyzing various foreign constitutional theories and law materials. Including their normal duties, law clerks also have various additional administrative duties which are not properly dealt with at the administrative level. Therefore, though we have fifty law clerks, the Korean Constitutional Court still faces a manpower shortage.

6. Conclusion

To cope with the problems mentioned above, the great increase of the number of law clerks and the improvement of their treatment may be considered. However, it has not been realized because it entails a great budget increase. There is no simple solution to these challenges. I believe the most feasible answer we can expect right now is the change of circumstances surrounding the Constitutional Court such as spreading the acknowledgement of the importance of the Constitution and the Constitutional Court and the improvement of the status and reputation of the Constitutional Court.