

Some Problems with the Korean Constitutional Adjudication System

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Abstract

Despite its very short history, the Korean Constitutional Court has been successful in carving out its position as the bastion of the Constitution and human rights. However, it now faces the more difficult task of consolidating its identity as such. This task requires not only more activist efforts on the part of the Court itself but also institutional reforms. Indeed, the relatively active performance of the Court over the last decade has veiled certain institutional defects of the present adjudication system. For the further development of the Korean constitutional adjudication system, these defects must be corrected not only by constitutional and statutory interpretation but also by revision of the relevant provisions of the Constitution and the Constitutional Court Act.

This essay examines major institutional problems requiring constitutional and statutory revision and provides alternative proposals. Three kinds of problems will be looked into in this essay: (1) those requiring both constitutional and legislative revision; (2) those requiring the adoption of new legislative devices; and (3) those requiring only legislative revision. The first category includes (1) expansion of the Court's jurisdiction, (2) reform in the composition of the Court, (3) changes in the quorum of judgement, and (4) problems of the separation of the power of constitutional review between the Court and the Supreme Court. The second category includes (1) measures to address the weak binding force of the Court's decisions, (2) the lack of general procedures for provisional remedies or injunctions, (3) the statutory base for modified decision of unconstitutionality. The third category is concerned with (1) mandatory representation by attorney and (2) exclusion of ordinary courts' judgements from constitutional complaint.

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I. Introduction

When the new Constitutional Court of Korea (hereinafter, the “Court”) was established in the wake of the Korean people’s victory over President Chun Doo Whan’s iron-fisted rule in 1987, skepticism about the success of this new institution and uncertainty about its proper working was deep and widespread. For one thing, the previous constitutional adjudication bodies¹⁾ were anything but successful, and were derided as mere rubber stamp institutions for the military dictatorship or a nominal institution existing only on paper.²⁾ However, with the people’s strong will for further democratization and their growing awareness of constitutional rights, the Court has successfully overcome this early skepticism by taking on an activist role in wielding its powers of constitutional review and hearing constitutional complaints.³⁾

Indeed, since there were a great number of laws passed in haste and for unjustifiable purposes, as well as many unreasonable governmental practices under the authoritarian regimes, the early Court faced little problem in striking them down and thus establishing the image of the protector of the Constitution and people’s fundamental constitutional rights. As of April 30, 2001, almost six months after the launch of the third term of the Court and thirteen years after its establishment, the Court has invalidated or partially repudiated legislative acts in 315 cases, of which 102 cases were referred by the ordinary courts for rulings on the constitutionality of laws and 213 cases were heard in the form of constitutional complaints.⁴⁾ Given that the

1) The forms of constitutional adjudication adopted between 1948 and 1987 have included the Constitutional Committee system, a European Constitutional Court system, and an American Judicial Review system. For a brief history of constitutional adjudication in Korea, see the Constitutional Court, *The First Ten Years of the Korean Constitutional Court*(2001), at 6-11; G. Healy, *Judicial Activism in the New Constitutional Court of Korea*, 14 Colum. J. Asian L. 213, 214-218 (2000) .

2) For example, no case was laid down by the Constitutional Committee during the fifteen years between 1972 and 1987. Kun Yang, *The Constitutional Court in the Context of Democratization: The Case of South Korea*, *Verfassung und Recht in Übersee* 31 (1998), at 161.

3) Professor Yang pointed out four factors contributing to the unprecedented activism of the early Constitutional Court: (1) a more liberated political climate than before, (2) people’s heightened consciousness of rights in general, (3) active role of “human rights lawyers,” and (4) the appointment of activist judges made possible due to the creation of an independent constitutional court separated from bureaucratized ordinary courts. See Yang, *supra* note 2, at 166-167. See also, Kyong-Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S.Ill. U. L. J. 71,76-85 (1997).

4) See the official statistics of the Court in its website, <<http://www.court.go.kr/intro/i3.html>>.

number of cases the Court disposed of in the form of norms control or constitutional review,⁵⁾ the highlight of the constitutional adjudication system, amounts to 1,035 cases, the proportion of the judgements resulting in unconstitutionality, unconditional or conditional, is thus relatively high.

Despite broad support and positive evaluations from both ordinary people and specialists in academia and practice over the past thirteen years, the present Constitutional Court now faces the more difficult task of consolidating its role as the champion of individual rights and the trusted bastion of the rule of law in the Korean governmental structure and in the hearts and minds of the people.⁶⁾ Such a task cannot be tackled by the Court itself. Rather, certain institutional defects inherent in the present system must be removed. Indeed, the relatively active performance of the Court over the last decade has veiled certain institutional defects of the present adjudication system as provided for by the Constitution and the Constitutional Court Act (hereinafter, CCA).

The existence of such defects can be attributed in part to the haste in which the new constitutional adjudication system was formed, as sweeping changes were made to the previous Constitution in a relatively short period of time in 1987.⁷⁾ Another cause for the existence of such defects is the competition of interests between political parties, as well as conflicting interests within the Judiciary itself, since it was sure to be most affected by the creation of the new independent constitutional court.⁸⁾

The original plan agreed upon in the political sphere was to endow the Supreme Court with the power of constitutional review while there was disagreement between the ruling party and the opposition parties over which institution would have jurisdiction over matters such as impeachment, party dissolution and competence dispute. The Supreme Court was reluctant to address such political matters and thus

5) That is, those cases decided through the Art. 41 of the Constitutional Court Act procedure (constitutional review of statutes upon judicial requests) and the Art. 68 (2) of CCA procedure (constitutional review of statutes upon individual requests).

6) Healy, *supra* note 1, at 234.

7) For a brief description of the background of the 1987 Constitution introducing the present Constitutional Court system, J. West and Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 Am. J. Comp. L. 73, 73-75 (1992); The Constitutional Court, *supra* note 1, at 15-20.

8) *See generally*, the Constitutional Court, *supra* note 1, at 18-19; West and Yoon, *supra* note 7, at 75-77; Healy, *supra* note 1, at 218-219.

sided with the ruling party advocating the creation of the Constitutional Committee endowed only with the powers to decide political matters. Opposition parties argued for leaving all the powers of constitutional adjudication with the Supreme Court. The final result was the creation of the independent Constitutional Court with full jurisdiction including constitutional complaints.

After agreeing to the proposal, the Supreme Court was eager to place some institutional limitations on the powers of the new Constitutional Court. Its demands were reflected primarily in three limitations on the new Court's power. First, only ordinary courts can request the Court to review the constitutionality of statutes.⁹⁾ However, this limitation soon became nominal as individuals are allowed to challenge the constitutionality of a law in a form of constitutional complaint.¹⁰⁾ Second, the power to review on the constitutionality of inferior legislation such as administrative orders, regulations, and measures is given to the Supreme Court instead of the Constitutional Court.¹¹⁾ Third, the scope and procedure of constitutional complaint is delegated to the implementing legislation, i.e. CCA which in reality excludes ordinary courts' judgements from the scope of constitutional complaints.¹²⁾

In short, the lack of time and competing interests of concerned parties installed institutional defects in the new constitutional adjudication system. For the further development of the Korean constitutional adjudication system, these defects must be corrected not only by constitutional and statutory interpretation on the part of the Court itself but also by revision of the relevant provisions of the Constitution and CCA.

The purpose of this essay is to examine major institutional problems and provide alternative proposals. The problems to be examined can be placed under three categories: (1) those requiring constitutional revision together with legislative revision; (2) those requiring the adoption of new legislative devices; and (3) those requiring only legislative revision. The first category includes (1) the expansion of the Court's jurisdiction, (2) the qualification and term of constitutional justices and their appointment procedure, (3) quorum of judgement, and (4) the division of the power of constitutional review between the Court and the Supreme Court. The second category

9) Constitution, Art. 107 (1).

10) Constitution, Art. 111(1)(v) and CCA, Art. 68(2).

11) Constitution, Art. 107(2).

12) CCA, Art. 68(1).

includes (1) some required measures to cope with the weak binding force of the Court's decisions, (2) the lack of general procedures for provisional remedies or injunctions, (3) the required statutory base for modified decision of unconstitutionality. The third category is concerned with (1) mandatory representation by attorney and (2) exclusion of ordinary courts' judgements from constitutional complaint.

II. Problems with Constitutional Provisions on Constitutional Adjudication

A. Necessity to Expand the Court's Jurisdiction

Under Article 111 of the Constitution, the Court has jurisdiction in five areas: (1) constitutional review of statutes upon request; (2) impeachment; (3) dissolution of political parties; (4) competence dispute; and (5) constitutional complaint.¹³⁾

Some constitutional lawyers have argued that the scope of the Court's jurisdiction is not sufficient to allow the constitutional adjudication system to protect the values and order enshrined in the Constitution.¹⁴⁾ They have been advocating and expanding the jurisdiction of the Court in three main areas.

First, it is unclear why the constitutional review of statutes should be undertaken only upon a request from an ordinary court and only when the constitutionality of statutes is relevant to the judgement in judicial proceedings. Some have advocated the introduction of a French-style preliminary review or a German-style abstract norms control. The French Constitutional Committee or *Conseil Constitutionnelle* has the power to review the constitutionality of laws before their promulgation upon the requests of President, Prime Minister, President of National Assembly (Assemblée Nationale), President of Senate (Sénat) or a group of Members of National Assembly or Senate.¹⁵⁾ The main advantage of this preliminary review system is that it can avoid the legal instability which inevitably results from a decision of unconstitutionality under

13) Almost same provision is contained in Art. 2 of CCA.

14) *E.g.*, Kun Yang, Moon-Hyun Kim, Bok-Hyun Nam, Report on Reform of the Korean Constitutional Court Act [Heonbeopjaepansobeop-ui Gaejungbangahn-e Gwanhan Yeongu Yongyeok Bogoseo] (Studies on Constitutional Adjudication No.10, The Constitutional Court, Seoul, 1999), at 4-9.

15) Jong-Sup Chong, A Study of Constitutional Litigation (1) [Heonbeopjaepan Yeongu(1)] (1995), at 359-361.

post review systems. In the latter case, legal relationships or situations validly constituted under the statute in question must be changed when the governing law is declared unconstitutional. Although the German constitutional adjudication system does not have preliminary review, it has both “concrete norms control,” which conditions constitutional review on the relevance of laws to the judicial cases, and “abstract norms control,” which does not. The Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) can review the constitutionality of laws when the Federal and Land Governments and a group of Members of German Parliament (*Bundestag*) request adjudication on the constitutionality of federal and Land laws.¹⁶⁾ This system could greatly diminish the possible legal instability which may be caused by concrete norms control.

However, a system of preliminary review or abstract norms control should be introduced in a cautious way, with careful consideration of the political and institutional implications and peculiarities of such systems. In considering the adoption of a French-style preliminary review it should be borne in mind that, unlike our system modelling a German-style constitutional court system, the French *Conseil Constitutionnelle* is a highly political institution and its preliminary review of laws is understood as part of political process. As far as the adoption of abstract norms control is concerned, there would be less problem of institutional integrity with a German-style constitutional court system than with a French-style preliminary review. One caveat, however, is that it should be undertaken together with the improvements in the process of the composition of the Court designed to strengthen its independence. Without full independence from the political sphere, any process involving political institutions such as the executive branch or a group of National Assemblymen in the process of constitutional review has the danger of undermining the political neutrality of the Court.

The second field in which we need to consider the expansion of the Court’s jurisdiction is election cases, particularly those related to presidential and National Assembly election.¹⁷⁾ The subject matter of such election cases is the validity of a highly political process (*i.e.*, the composition of constitutional institutions), and thus has a close relationship with the legitimacy of the constitutional order. If our

16) *Id.* at 331-333.

17) Yang *et al.*, *supra* note 14, at 5, 8.

constitutional adjudication system should be consistent in its organizational formation, this subject matter should be determined by the Constitutional Court which, unlike ordinary courts, is dedicated to judicial resolution of political matters such as impeachment and dissolution of political parties.

The third area of which jurisdiction should be given to the Court is the judgement over whether the office of the presidency is vacant, or whether the President is unable to perform his/her duties for any reason.¹⁸⁾ Article 71 of the Constitution provides only that in such cases, the Prime Minister or the members of the State Council in the order of priority as determined by Act shall act for the presidency, and there is no provision giving any institution the power to determine when and how such conditions are to be met. Given the Court's specialized jurisdiction in constitutional questions relating to the composition of constitutional institutions, it would be reasonable for the Court to take in charge of such a matter.

B. Necessity to Reform the Composition of the Court

Articles 111 and 112 of the Constitution and Articles 3 through 9 of CCA provide for the composition of the Court and the privileges and obligations of Constitutional Justices. One Chief Justice and eight Constitutional Justices (hereinafter, "Justices") composed of the Court are to be appointed by the President. However, the President should appoint three candidates nominated by the National Assembly and three candidates nominated by the Chief Justice of the Supreme Court. To be appointed as Justices, all the candidates should be "qualified as judges," more than forty years of age and with more than fifteen years of career as judges, prosecutors or attorneys. Justices are guaranteed six years term with the possibility of reappointment, with a mandatory retirement age of sixty-five for Justices and seventy for the Chief Justice.

There are three main arguments challenging the constitutional justice appointment process and the status of constitutional justices. First, the present process of the appointment of Justices lacks democratic legitimacy.¹⁹⁾ In particular, giving the power

18) Yang *et al.*, *supra* note 14, at 6, 8.

19) See Yang *et al.*, *supra* note 14, at 14-16; Hyo-Jeon Kim, *The Constitutional Court in Korea: Its Problems and Proposed Improvement* [Heonbeopjaepanjedo-ui Munjaejeom-gwa Geui Gaesunchaek], Public Law [Gongbeopyeongu], Vol. 27 No.1 (1998), pp.68-69, 72-73.

to nominate three candidates to the Chief Justice of the Supreme Court, who is not elected but rather appointed by the President, has been criticized as undermining the democratic legitimacy of the Court. Moreover, although the nominees for Justices of the Supreme Court must be approved by the National Assembly, the candidates nominated by the Chief Justice of the Supreme Court are free from the control of the National Assembly.

Secondly, the requirement that all Justices must be qualified as judges has little justification. This means that all the candidates must have passed the state judicial examination and have attended a single two-year training institute.²⁰⁾ The Korean judicial examination is extraordinary, as each year only a fixed small number of applicants can pass regardless of their objective capacity of handling legal matters. This highly selective exam, together with an intensively homogeneous training course, inhibits the development of lawyers with diverse social backgrounds. This problem is exacerbated by the additional statutory requirement that Justice must have more than fifteen years of job experience as judges, prosecutors, and attorneys. Since most promising attorneys tend to have served as judges or prosecutors, the fifteen year career requirement means that almost all candidates for Justices cannot be free from juristic and bureaucratic culture widespread in the Korean legal profession,²¹⁾ creating a danger that the Court becomes insular and overly-fraternal system.²²⁾

Moreover, it is important to see that constitutional adjudication by nature requires practical wisdom and policy-related theoretical understanding rather than positivist juristic precision and miscellaneous knowledge of technical judicial procedures. Therefore, the membership of the Court should be open to those with diverse social and professional backgrounds. In particular, law professors with sufficient wisdom and experience in dealing with constitutional matters should be allowed to serve on the

20) For a critical sketch of the Korean legal education and legal profession, see Jae-Won Kim, *The Ideal and the Reality of the Korean Legal Profession*, 2 *Asian-Pacific Law & Policy Journal* 45, 45-68 (2001).

21) *Id.* at 54-55. In reality, there are at least sixteen promotional steps for judges. See, Ahn, *supra* note 3, at 78.

22) Comparatively, the German system too requires in principle a lawyer's license. However, two differences from the Korean system should be noted. First, the German Constitutional Court is open to law professors as an exception to the principle. Second, the German Bar is not such a closed and homogeneous society like the Korean Bar. Therefore, it would be safe to say that the diversity problem is not very serious in the German system. For a comparative survey on this point, see Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany, and Korea*, 6 *Tulsa J. Comp. & Int'l L.* 123, 140-146 (1999).

Court.²³⁾

Third, the short limited term of Justices and their reappointment scheme needs to be reconsidered. The present scheme of short six year terms with the possibility of reappointment may represent a challenge to the independence of the Court by making Justices sensitive to the opinions of those with the appointive power.²⁴⁾ Possible alternatives to the present system are a system of life tenure²⁵⁾ or a system guaranteeing a single longer term for Justices. The latter is preferable to the former, as the former may make the Court fortress of conservatives. Finally, it should be noted that there is little reasonable justification for the difference in retirement age for the Chief Justice and other Justices.

C. Necessity to Reduce the Intensified Quorum in Special Decisions

Article 113 of the Constitution provides for a special quorum of six Justices when the Court holds a law unconstitutional, or makes a decision of impeachment, a decision of dissolution of political parties, or a decision to uphold a constitutional complaint. Article 23 (2) of CCA provides that such an intensified quorum is also required to overrule a precedent on interpretation and application of the Constitution or laws made by the Court. This intensified quorum may diminish the possibility of upholding such cases. For example, a majority of five Justices who find a law to be unconstitutional cannot override the minority in dissent. Therefore, the statute in question cannot be struck down even though a majority of the Justices believe it is in violation of the Constitution. Given the importance and serious effects of such special decisions, the intensified requirement may be justified.

However, this specified quorum may result in unexpected nonsense in certain cases. Article 23 (1) of CCA allows the Full Bench to be open with the attendance of seven or more Justices. This means that when the Full Bench is open with seven Justices, only two dissents can prevent the Court from finding an offending law unconstitutional and protecting individual's constitutional rights.²⁶⁾ This is too severe,

23) Healy, *supra* note 1, at 227.

24) Yang *et al.*, *supra* note 14, at 17-19.

25) Healy, *supra* note 1, at 229.

26) Bok-Hyun Nam, *Some Problems with the Quorum of Constitutional Adjudication Procedures*

and has the strong effect of giving state institutions a much higher priority than the protection of fundamental rights.

In addition, the fixed quorum may create self-conflicting judgement in the case of competence dispute.²⁷⁾ Decisions in competence dispute do not require the intensified quorum and are made by the majority vote of Justices participating in the final discussion. The problem arises when the majority of five Justices affirms the infringement of the plaintiff agency's competence because they think the other party's measure is based on an unconstitutional law. The Court may revoke the defendant's action according to the majority rule applied to competence dispute proceedings, while not declaring the relevant law is unconstitutional due to the intensified quorum.

One alternative to the present fixed intensified quorum might be the reduction of the special quorum from six to five. However, this being another version of fixed quorum, it cannot remove the logical problems built in the present system.²⁸⁾ A second option is the ordinary majority rule with the condition that the consent of at least four Justices is required in the cases of unconstitutionality decisions and affirmative decisions on constitutional complaints. This option may increase the possibility of unconstitutionality decisions, thereby undermining legal stability. A third option may be to just address the problem of the Full Bench composed of seven Justices by introducing a system of spare Justices replacing the Justices excluded or recused in a specific case. The spare Justice or *Ersatzmitglieder* system benchmarked from the Austrian system²⁹⁾ is attractive because it requires no change in the present system of intensified quorum. However, this may cause more serious organizational problem. It may mean the creation of a kind of "second grade" Justices whose status is different from that of the "first grade" Justices. The integral identity of the Court may be threatened by allowing the "second grade" Justices to change the pendulum in important cases. Although all options have their own merits and demerits, the second option is most preferable, not only because it creates fewer administrative and institutional problems, but also because comparative research shows that most

[Heonbeopjaepan-ui Gyeoljungjungjoksu], Contemporary Public Law and the Protection of Individual's Rights and Interests [Hyundai Gongbeop-gwa Gaein-ui Gweonri] 989(Seoul, 1994).

27) *Id.* at 997-1000.

28) Yang *et al.*, *supra* note 14, at 39.

29) *See*, Chong, *supra* note 15, at 302-304.

constitutional adjudication systems have such a scheme.³⁰⁾

D. Necessity to Unify Jurisdiction over Constitutional Review

As mentioned above, one problem built into the present constitutional adjudication system in the course of its creation is the separation of the power of constitutional review between the Court and the Supreme Court. The latter has the power to review the constitutionality of inferior legislation such as administrative orders, regulations, and measures³¹⁾ while the former to review the constitutionality of statutes.³²⁾ The Constitution have no express provision concerning whose opinion would be final if there is a difference in constitutional interpretation between the two institutions. This incomplete dualism not only sows the seeds of conflict between the two institutions, but also has a danger of undermining the consistency and uniformity of the constitutional order. Moreover, the Supreme Court's power to review administrative legislation can seriously undermine the function of constitutional complaint by excluding almost all administrative actions, which have the highest possibility of violating human rights.

It is ironic that the very system designed to protect the constitutional order, *i.e.* the constitutional adjudication system itself, is destined to cause constitutional conflicts which damage the uniformity of the constitutional order. Given that the *raison d' être* of the independent constitutional court is to be the final arbiter of the Constitution, the ideal solution to this problem would be to give the final say in constitutional interpretation to the Constitutional Court.

Two options for implementing this idea can be taken into consideration.³³⁾ First, the Supreme Court could maintain the power to review the constitutionality of inferior legislation, but the Supreme Court's decisions could be challenged in constitutional complaints. Second, as in the review on statute, when the constitutionality of administrative orders or measures is at issue in a trial, the ordinary court in charge

30) *See generally*, The Ministry of Justice, Constitutional Adjudication System [Heonbeopjaepanjeddo] (Ministry of Justice Materials No. 95) (1988); Heung-Soo Moon and Bong-Ki Shin, Constitutional Adjudication Systems in the World [Segyegakguk-ui Heonbeopjaepanjeddo] (1994); Chong, *supra* note 15, at 297-395.

31) Constitution, Art. 107 (2).

32) Constitution, Art. 111 (1).

33) Yang *et al.*, *supra* note 14, at 340-345.

should request a decision of the Court and rule in accordance with that decision.

III. Some Problems with the Procedures of Adjudication under the CCA

A. Necessary Statutory Revisions

1. Mandatory Representation by Attorney

Article 25 of CCA requires every party in any constitutional adjudication proceedings should be represented by an attorney. Article 25 (2) constitutes an exception to the principle under Article 3 of “the Act on Litigation to Which the State is a Party” that the Minister of Justice may allow officials having no qualification as an attorney to take charge of judicial cases to which the state is a party. Article 25 (3) is also an exception to the general rule in other judicial proceedings that no qualification as an attorney is required for a person to pursue a legal proceeding.

Although both provisions prescribe mandatory representation by an attorney, Article 25 (3) gives rise to more questions because it may prevent ordinary citizens with no full financial resources from bringing their cases before the Court, while the state agency would have no financial problem to hire attorney. Indeed, the most affected parties by mandatory representation requirement are those filing constitutional complaints because other proceedings to which private person is a party (*e.g.*, impeachment) are extremely rare.³⁴⁾ Even in such a rare case, the involved individuals might be well represented, as they are high ranking officials. Therefore, the mandatory representation by attorney should be examined in the light of the nature and function of constitutional complaint.³⁵⁾

Constitutional complaints are concerned with the infringement of individual’s fundamental right by governmental powers. Given the importance of fundamental rights, the application requirement should not be too strict. This ideal is reflected in the

34) So far, no record of impeachment since the establishment of the Court in 1988.

35) Jongcheol Kim, *Some Problems with General Procedure of Adjudication in the Constitutional Adjudication Act* [Heonbeopjaepansobeopsang Ilbansimpanjulcha-e Daehan Ipbeopnonjuk Gochal], Hanyang U. Law Rev. [Beophaknonchong], Vol. 16 (1999), at 299 ff.

rule that the expenses for adjudication by the Court shall be borne by the state.³⁶⁾

However, mandatory representation by an attorney may infringe upon individual's right to file a constitutional complaint. The relatively high fees of attorneys in Korea may hinder individuals having no financial resources from filing a constitutional complaint. This can be confirmed by statistics showing that the violation of mandatory representation by an attorney is the most common reason for rejection of such complaints by the Designated Bench of the Court. As of April 30, 2001, the number of rejections due to the violation of mandatory representation rule amounts to 797 cases out of a total of 2298 cases rejected.³⁷⁾

We may also question why the mandatory representation rule should be applied to constitutional complaints, which are concerned not only with fundamental individual rights but also with the constitutional order, when no such requirement is applied in ordinary judicial proceedings where conflicts between private interests are at stake. In a case³⁸⁾ answering this question, the Court argued that mandatory representation by an attorney would be advantageous to the petitioners by guaranteeing professional and skillful representation and thus by preventing reckless and negligent pursuit of complaints. Although it sounds logical or reasonable, the advantage of professional representation should not be overestimated or used to justify the total prohibition of the application for constitutional complaint itself. The requirement of professional assistance is not justifiable because professional techniques and knowledge are not crucial in our constitutional complaint procedure. Oral arguments in an adversarial system are not required in principle³⁹⁾ and the Court has the power to ask the relevant public authorities to provide records or materials necessary for the adjudication.⁴⁰⁾ What makes the situation worse is the relatively high requirements that the Court has suggested for allowing court-appointed counsels for the petitioners with no financial resources,⁴¹⁾ which can help camouflage such a problematic requirement. In short, to enhance individual's liberties and rights, mandatory professional representation should be abolished.

36) CCA, Art. 37 (1).

37) See the Constitutional Court website <<http://www.ccourt.go.kr/intro/i3.html>>.

38) 89 heonma 120 etc., 2 KCCR 296 (Sep.3, 1990).

39) CCA, Art. 30 (2) .

40) CCA, Art. 32.

41) CCA, Art. 70.

2. Exclusion of Ordinary Courts' Judgements from Constitutional Complaint

According to Article 68(1) of CCA, the judgements of ordinary courts are excluded from the jurisdiction of the Court over constitutional complaint. One exception to this exclusion is provided in Article 68(2) of CCA, which allows constitutional complaints against a court's denial of a request for constitutional review of a statute in any judicial proceeding. As demonstrated above, the Judiciary argued for the exclusion of judicial judgements from the constitutional complaint process.⁴²⁾ The Judiciary argued that allowing the Court's review on judicial judgements would mean the creation of a fourth court higher than the Supreme Court. Underlying this argument is the belief that the Supreme Court itself is a guardian of individual rights and is in better position to review on judgements of inferior courts than the Constitutional Court, which cannot be said a genuine judicial institution.

However, this stance may be in direct conflict with the essential aim of the system of constitutional complaints, under which jurisdiction is given to the Court independently of the judiciary. In a constitutional democracy, all constitutional institutions must promote the realization of fundamental values enshrined in the Constitution, and the ordinary courts cannot be an exception to this constitutional principle. Insofar as the constitutional complaint system is adopted to fulfill such a constitutional ideal, that is, to prevent and remedy infringement of fundamental individual rights by any governmental powers, there is no reason for the ordinary courts to be a sanctuary free from such constitutional control, especially where they may violate the Constitution. This was partially confirmed by the Court in a case⁴³⁾ where the constitutionality of Article 68(1) of CCA excluding judicial judgements from the constitutional complaint process was at stake. The Court held that the provision was unconstitutional in so far as it is interpreted to allow any judicial judgement violating individual's fundamental rights by application of a statute declared void by the Court to be included in the category of such judgements excluded from the constitutional complaint process.⁴⁴⁾

However, the Court's decision recognized only a shallow exception to the

42) The Constitutional Court, *supra* note 1, at 18-19.

43) 96 heonma 172, etc., 9-2 KCCR 842 (Dec.24, 1997).

44) 96 heonma 172, etc., 9-2 KCCR 842 (Dec.24, 1997), at 859-865, 867.

exclusion of courts' judgement rule, and did not extend the Court's jurisdiction to cover all constitutional complaints against the judgements of ordinary courts. Therefore, the essential problems still remain. The most serious problem is that almost all administrative actions, which have a relatively high propensity for the infringement of fundamental rights, are excluded from the constitutional complaint process. This problem is attributed to the combined effect of the exclusion of judgement rule and the prior exhaustion rule, a legal requirement that the would-be petitioner should exhaust all other relief processes before he/she files a constitutional complaint.⁴⁵⁾ Administrative actions are subject to judicial review by the ordinary courts according to the exhaustion rule, and once the courts take over the case, there is no access to a constitutional complaint under the exclusion of courts' judgement rule. This problem was tackled by the Court by extending exceptions to the prior exhaustion rule.⁴⁶⁾ However, the recognition of exception by way of interpretation is inevitably limited and insufficient. The authentic response to the problem is to allow the Court's review of the judgement of ordinary courts through legislative reform.

B. New Procedures Necessary in Constitutional Adjudication

1. The Weak Binding Force of the Court's Decisions

The CCA has several provisions regarding the binding force of the Court's decision over public authorities, including the ordinary courts, other state agencies and local governments.⁴⁷⁾ However, there is no general provision giving the Court the power to take actions to enforce its decisions, leaving the enforcement of decision to the discretion of other state institutions. The only provision with regard to how the Court's decision is to be executed is Article 60 of CCA, which orders the National Election

45) CCA, Art. 68 (1).

46) The Court has developed three categories of the exception to the prior exhaustion rule: (1) in case of constitutional complaints directly challenging the validity of laws; (2) in case that there are no identifiable legal remedies; and (3) in case that despite of the existence of remedies, the possibility to be redressed is almost none, for example, due to the established precedents of the ordinary courts. *See generally*, the Constitutional Court, An Introduction to Constitutional Adjudication System[Heonbeopjaepansilmoojeyo](1998), at 167-169.

47) CCA, Art. 47(1) [effect of unconstitutionality decision]; CCA, Art. 67(1) [effect of decision on competence dispute]; CCA, Art. 75(1) [effect of decision of upholding in the constitutional complaint case].

Commission to take necessary actions to enforce the Court's decision to dissolve a political party in accordance with the Political Parties Act.

Thus the decisions of the Court, the protector of the constitutional order and values, can be ignored by the other institutions since there are no specific processes for enforcement.⁴⁸⁾ Most countries with constitutional adjudication system in any form have mechanisms for the enforcement of decisions of constitutional adjudication institutions. For example, Article 35 of the German Federal Constitutional Court Act provides that the Federal Constitutional Court may decide who should execute its decision, and how and what must be done. The Supreme Court of the United States may deliver enforcement decrees to execute its decision.⁴⁹⁾

One caveat is that even if general provision for the enforcement of the Court's decision is introduced, the Court must not abuse such powers. Respecting the principle of the separation of powers, it must use its enforcement powers only as a last resort and only in those exceptional cases in which other institutions go against the Court's decision.⁵⁰⁾

2. The Lack of General Provisions for Provisional Remedies

Under CCA, only two processes of competence disputes and dissolution of political parties have provisions regarding provisional remedies or injunctions.⁵¹⁾ In the case of impeachment, since Article 50 of CCA provides for the suspension of the power of the impeached official, there is no room for the Court to consider provisional remedies. In other words, there is no provision for provisional remedies or injunctions in cases of constitutional review of statutes and constitutional complaints. In addition, even in the cases of competence dispute and dissolution of a political party, the provisions for provisional remedies specify only the Court's power to suspend the defendant's actions. They are silent on the specific conditions, procedures and effects of provisional remedies. Some lawyers argue that under the *mutatis mutandis* provision

48) Kim, *supra* note 35, at 314-315.

49) E.g., *Brown v. Board of Education II*, 349 U.S. 294 (1955); *Swan v. Charlotte-Mecklenburg Board of Education*, 402 U.S.1 (1971).

50) Kim, *supra* note 35, at 316.

51) Respectively, CCA, Arts. 57 and 65.

of Article 40 of CCA, the relevant provisions in the Civil Proceedings Act or the Administrative Proceedings Act are applicable to constitutional adjudication. In fact, the Court accepted the request for provisional remedies in a constitutional complaint case on such a ground.⁵²⁾

However, statutory interpretations supplementing legislative defects have built-in limitations. In particular, applying the Civil Proceedings Act or the Administrative Proceedings Act to the constitutional adjudication system may ignore its unique features. For example, provisional remedies in the constitutional adjudication system, unlike those in other proceedings, often involve the protection of the constitutional order and values together with subtle political issues.⁵³⁾ The implementing law for constitutional adjudication needs to provide basic devices together with their requisites designed to realize aims of the system. If we agree on the need for the legislative introduction of provisional remedies in cases of constitutional complaint or constitutional review of statutes, it would be preferable to create a general procedure articulating the basic conditions, procedures and effects of provisional remedies, applicable to all proceedings, while leaving some requisites peculiar to each proceeding in the special section for that proceeding.⁵⁴⁾

3. The Statutory Basis Necessary for Modified Decisions of Unconstitutionality

Article 45 of CCA provides that “the Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional.” Article 47 of the Act declares that “any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made” except criminal laws. Literally, these provisions may mean that the Court can deliver only clear-cut decisions of unconstitutionality or constitutionality. If the Court finds the law to be the violation of the Constitution, it should invalidate immediately the statute in question *in toto*; otherwise the law should be valid with no reservation. To put it differently, the Court may not be allowed to affect the partial invalidation of a provision of a statute by limiting the scope of validity of the provision or to hold or maintain the validity of the

52) 2000 heonsa 471 (Dec.8, 2000).

53) Kim, *supra* note 35, at 316.

54) *Id.* at 316-317.

provision for a certain period of time.

However, many public lawyers have recognized the necessity of such modified forms of decisions, either to avoid the vacuum in law caused by the total invalidation or to give deference to the legislature's policy-making power.⁵⁵⁾ By the end of the first term of the Court in 1994, the Court firmly established that such modified forms of unconstitutionality are a kind of unconstitutionality decision and thus have the same effect as prescribed by Article 47 of CCA.⁵⁶⁾

Modified decisions recognized so far by the Court are those of "nonconformity to the constitution" and "limited unconstitutionality(or constitutionality)." The former decision declares either that the statute at stake is unconstitutional but its legal effect is maintained until the legislature revises it,⁵⁷⁾ or that the statute in question is unconstitutional and its application is immediately suspended while requesting the legislature to take necessary actions by a fixed point in time after which it would become void.⁵⁸⁾ The latter decision declares that the statute at issue itself is valid but it would be deemed void insofar as it is to be interpreted or applied as the Court found unconstitutional.⁵⁹⁾

Some lawyers and commentators have criticized the introduction of modified decisions by statutory interpretation as an usurpation of legislative power which allows the Court to decide the kind and scope of unconstitutionality decision, or as a cover for the Court's reluctance to decide politically sensitive cases.⁶⁰⁾ Indeed, the Supreme Court has refused to recognize the binding force of modified forms of unconstitutionality decision, characterizing decisions of limited unconstitutionality as simply one possible interpretation of a statute which the ordinary courts are not

55) The Constitutional Court, *supra* note 1, at 86.

56) *E.g.*, 88 heonga 5, etc., 1 KCCR 69 (Jul. 14, 1989); 88 heonga 6, 1 KCCR 199 (Sep.8, 1989); 91 heonma 21, 3 KCCR 91 (Mar. 11, 1991); 90 heonga 23, 4 KCCR 300 (Jun. 26, 1992); 92 heonba 49, 6-2 KCCR 64 (Jul. 29, 1994).

57) *E.g.*, 91 heonma 21, 3 KCCR 91 (Mar. 11, 1991).

58) 88 heonma 5, 5-1 KCCR 59 (Mar. 11, 1993).

59) This form of decision is two-fold, *i.e.* the limited decision of unconstitutionality and the limited decision of constitutionality. However, they are not different in nature, though different on surface. The superficial difference is that the one is chosen to uphold a particular interpretation of a statute while the other is chosen to exclude. *See* 96 heonma 172 *etc.*, 9-2 KCCR 842 (Dec. 24, 1997).

60) *E.g.*, Justice Byun Jung Soo's dissenting opinions in 88 heonga 6, 1 KCCR 199 (Sep. 8, 1989), at 265-269 and 90 heonga 11, 2 KCCR 165 (Jun. 25, 1990), at 171-177.

obligated to follow.⁶¹⁾ Although the Court nullified such a decision of the Supreme Court,⁶²⁾ the Supreme Court continues to keep their defiant stance.⁶³⁾ No one would seriously deny that this conflict between the two highest constitutional institutions damages the uniformity of the constitutional order. Given the obvious necessity of modified forms of unconstitutionality decision, legislation is needed to authorize such decisions and to stipulate their effects. Needless to say, the Court should not abuse modified decisions, since this may lead to the people to lose faith in the Court and thus undermine the foundations of constitutional review.

IV. Concluding Remarks

I will make no attempt here to summarize the arguments I have made in this paper. However, it would be necessary to add to them that institutional reform of the constitutional adjudication system alone is not sufficient to guarantee its consolidation in the constitutional arrangements. The role perception of Constitutional Justices as the “guardians of the Constitution” is another essential element in the development of the Court’s overall institutional effectiveness.⁶⁴⁾

If these two conditions are met, the future of the Korean constitutional adjudication system will be very fine and bright. The remaining question is, *when* will the day come?

61) Supreme Court Decision 95 nu 11405 (Apr. 9, 1996).

62) 96 heonma 172, 173, 9-2 KCCR 842 (Dec. 24, 1997).

63) The latest record of the Supreme Court’s defiance as such is Supreme Court Decision 95 jaeda 14 (Apr. 27, 2001).

64) *See* Yang, *supra* note 2, at 170.