

# The Constitutional Court and Freedom of Expression

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## **Abstract**

*The 1987 Constitution underscores the crucial role of courts in freedom-of-expression jurisprudence in connection with judicial independence and activism in a democratic Korea. This is especially the case with the growing impact of judicial review upon the broadened notion of freedom of expression as a constitutional right. On the premise that freedom of expression is firmly embedded in Korea's constitutional law, this Article explores the question how the Constitutional Court has drawn the lines in reconciling individual rights to free expression with community interests since 1988. It first analyzes the textual framework on freedom of expression under the Constitution and then examines the defining decisions of the Constitutional Court on freedom of expression in Korea. The study concludes that the Constitutional Court has contributed immeasurably to institutionalizing freedom of expression as a permanent fixture of Korean democracy, although it tends to be self-consciously restrained in invalidating politically sensitive statutes.*

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## I. Introduction

The Republic of Korea (South Korea) is widely considered a functioning democracy not only in theory but also in reality. One Western diplomat in Seoul said: “We think democracy functions well here. Koreans have won their long struggle for democracy, and it is working well.”<sup>1)</sup> Korea’s evolution to a liberal democracy since 1988 is remarkable.<sup>2)</sup> Now Koreans do not have to worry whether they will be in trouble when they criticize President Kim Dae Jung. “Indeed, one gauge that South Korea remains vibrantly democratic is that Mr. Kim’s critics say the nastiest things about him and get away with it,” according to a *New York Times* report.<sup>3)</sup>

Korea’s emergence as a thriving democracy is exemplified by the fascinating metamorphosis of freedom of expression from an empty rhetoric to an everyday reality. Seoul National University law professor Kyong Whan Ahn stated in a law review article on constitutionalism in Korea: “Korea is undergoing a rapid transformation in many ways: from an authoritarian society to a democratic one, from a non-litigious society to a litigious one, and from a country with a decorative constitution to a country with a working constitution.”<sup>4)</sup> The “most notable textual” improvement in the civil liberties of Koreans, according to Ahn, was the newly amended Constitution’s guarantee of freedom of expression as a right.<sup>5)</sup>

After all, the 1987 Constitution illustrates a new Korea, “where constitutions come in to mark the transition from the Before to the After--stating the principles by which the People henceforth will govern themselves,” and “[w]ithin this framework, judicial review appears as a possible (but not inevitable) institutional device to prevent

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1) Nicholas D. Kristof, *Seoul’s Leader Irked by Opposition Criticism at U.N. Over Rights*, *New York Times*, April 23, 1999, at A5 (quoting a Western diplomat in Seoul).

2) See generally *Consolidating Democracy in South Korea* (Larry Diamond & Byung-Kook Kim eds., 2000); *Institutional Reform and Democratic Consolidation in Korea* (Larry Diamond & Doh Chull Shin eds., 2000).

3) Kristof, *supra* note 1, at A5. See also U.S. Department of State: Republic of Korea Country Report on Human Rights Practices for 1999 (visited June 30, 2001) <[http://www.state.gov/www/global/human\\_rights/1999\\_hrp\\_report/southkor.html](http://www.state.gov/www/global/human_rights/1999_hrp_report/southkor.html)> (noting that “press criticism of the Government is extensive in all fields, and authorities have not used repressive measures to stop media reporting. Many radio and television stations are state supported, but they maintain a considerable degree of editorial independence in their news coverage”).

4) Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. Ill. U. L.J. 71, 115 (1997).

5) *Id.* at 110.

collective backsliding: although ‘We the People’ have emerged into a new age, it is all too easy for us to lose our way, and the judges are there to make it harder to regress.”<sup>6)</sup> As Harvard law professor William P. Alford aptly put it, the Constitutional Court in Korea has established itself as “one of the most important bulwarks” against Korea’s possible regression to its authoritarian past.<sup>7)</sup>

The freedom of speech and press law of Korea, of course, cannot reveal the entire picture of how Koreans’ political rights and civil liberties are defined and practiced amidst Korea’s continuing progress to a liberal constitutional State in which the freedom of the individual is a preferred value. “[F]reedom of the press,” said professor David A. Anderson of the University of Texas School of Law, “depends less on the laws that protect or restrict the press than on the society’s values, traditions, culture, and political philosophy.”<sup>8)</sup>

Nonetheless, the crucial role of courts in freedom-of-expression jurisprudence merits systematic attention because an independent judiciary is indispensable to making constitutionalism more than an embellishment. Chief Justice William H. Rehnquist of the U.S. Supreme Court stated: “Many nations have impressive guarantees of free speech, free elections, and the like. But these have not had the same meaning in those countries because of the want of an independent judiciary to interpret them.”<sup>9)</sup>

Judicial independence and activism in a democratic Korea have been a hallmark of the expanding political liberties in Korea during the past 13 years. This is decidedly true of the enormous impact of judicial review upon the broadened notion of freedom of speech and the press as a constitutional right. “Korea is not a country where an active judiciary is expected or tolerated,” professor Kyong Whan Ahn wrote. “There have been significant changes, however, in recent years. Courts have declared many statutes void, and governmental actions are now constantly challenged.”<sup>10)</sup> Instead of

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6) Bruce Ackerman, *The Rise of World Constitutionalism* 8 (1997).

7) William P. Alford, *Recent Transformations in Korean Law and Society*, 1 *J. Korean L.* 173, 174 (2001) (reviewing *Recent Transformations in Korean Law and Society* (Dae-Kyu Yoon ed., 2000)).

8) David A. Anderson, “Press Law in Modern Democracies: A Comparative Study,” 3 *Const. Commentary* 184, 184 (1986) (reviewing *Press Law in Modern Democracies: A Comparative Study* (Pnina Lahav ed., 1986)). In this context, Seung-Mock Yang, *Political Democratization and the News Media*, in *Institutional Reform and Democratic Consolidation in Korea*, *supra* note 2, at 149-70, is insightful.

9) William H. Rehnquist, *The Constitution: An Independent Judiciary Makes It Work*, 23 *Trial* 69, 74 (1987).

10) Ahn, *supra* note 4, at 75 (citation omitted). Ahn has cited five major factors behind making Korean courts

“categorical” or “declaratory” law, Koreans now opt for “justificatory” law under their constitutional-law politics.<sup>11)</sup> Thus, the emergence of the Constitutional Court<sup>12)</sup> as a key factor in making the rule of law undergird Korea’s open democracy should come as little surprise.<sup>13)</sup>

On the premise that freedom of expression is firmly embedded in Korea’s constitutional law, the present study examines how the Constitutional Court has drawn the lines in reconciling individual rights to free expression with community interests since 1988. This Article analyzes the textual framework on freedom of expression under the Constitution. It then takes a critical look at the ideas and principles underpinning freedom of expression as they have been enunciated by the Constitutional Court as “the most important line drawer between the rights and obligations of the individual and those of society.”<sup>14)</sup>

## II. The Constitution on Freedom of Expression

Among the fundamental liberties protected under the Constitution of Korea is freedom of expression. The Constitution provides for freedom of expression thus:

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more active than ever: (1) Access to constitutional adjudication has become easier; (2) Judicial independence has been enhanced; (3) The Korean bar has expanded rapidly; (4) Korea has joined the world economy; and (5) Koreans have a different attitude toward litigation and the Constitution. *Id.*

11) For a discussion of “categorical or declaratory” vs. “justificatory” law, see Alan M. Dershowitz, *The Genesis of Justice* 221 (2000).

12) For an informative overview of the Constitutional Court in 1988-1998, see *The Constitutional Court*, [Heonbeopjaepanso 10nyeonsa] 71-86 (1998). For a discussion of the structure and authority of the Constitutional Court under the Constitution of Korea, see Gavin Healy, Note, *Judicial Activism in the New Constitutional Court of Korea*, 14 Colum. J. Asian L. 213, 218-28 (2000).

13) Professor Alan M. Dershowitz of Harvard Law School noted:

A legal system that sees the need to justify itself by reference to the experience of the people “signifies that it reckons with the will of the people to whom the laws are directed; it seeks their approval, solicits their consent, thereby manifesting that it is not indifferent to man”.... This contrasts sharply with other ancient codes that reflect “no concern for the will of the people to whom the laws are directed. The laws are to be obeyed; they need not be understood. Motives are not necessary. The law’s authority is derived from the need to have law and order, and it is the king and his entourage who decide what law and order are; the people are not privy to that decision”....

Dershowitz, *supra* note 11, at 223 n.11 (citation omitted).

14) Henry J. Abraham & Barbara A. Perry, *Freedom and the Court*, at vii (7th ed. 1998).

- (1) All citizens shall enjoy freedom of speech and the press and freedom of assembly and association;
- (2) Licensing or censorship of speech and the press and licensing of assembly and association shall not be recognized;
- (3) The standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by law;
- (4) Neither speech nor the press shall violate the honor or rights of other persons or undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom.<sup>15)</sup>

The explicit prohibition of prior censorship of speech and the press under the 1987 Constitution is a significant improvement of the Constitution of 1980, which did not proscribe censorship of expression.

Several other provisions of the Constitution relate to freedom of expression in one way or another. Article 37 forbids Koreans' other basic freedoms and rights to be disregarded on the grounds that they are not enumerated in the Constitution. Nevertheless, the constitutional freedoms and rights of Koreans may be restricted by law under such circumstances as are necessary "for national security, the maintenance of law and order, or for public welfare."<sup>16)</sup>

Privacy, which often collides with free speech and press, is a right under the Constitution: "The privacy of no citizen shall be infringed."<sup>17)</sup> It is also protected under Article 10 of the Constitution, which provides: "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."<sup>18)</sup> Further, Articles 14 and 16 stipulate "freedom of residence and the right to move at will"<sup>19)</sup> and citizens' right to "be free from intrusion into their place of residence."<sup>20)</sup>

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15) The 1987 Constitution, Art. 21.

16) *Id.* Art. 37(2).

17) *Id.* Art. 17.

18) *Id.* Art. 10.

19) *Id.* Art. 14.

20) *Id.* Art. 16.

It is truism that “[t]he press cannot report what it does not know.”<sup>21)</sup> This general statement about the news media’s need to access information raises the question whether the Korean press as an agent of the public is granted a constitutional right to attend meetings, hearings, and similar proceedings of the executive, legislative, and judicial branches of government.<sup>22)</sup> The Constitution provides that trials must be open to the public, but courts can close the trials “when there is a danger that such trial[s] may undermine the national security or disturb public safety and order or be harmful to public morals.”<sup>23)</sup> Similarly, National Assembly sessions are required to be held in the open, but they can be closed if the majority of the lawmakers present decide to do so or if the Speaker deems closed sessions necessary for reasons of national security.<sup>24)</sup>

It has been debatable for years whether freedom of speech and the press under the Constitution guarantees freedom of information or right to know largely because no constitutional provision mentions it specifically. But professor Song Nak-in of Seoul National University’s College of Law, who has authored a definitive treatise on Korean media law, noted that “it is indisputable that the right to know has been accepted through scholarly treatises and case law as a basic right deserving constitutional recognition.”<sup>25)</sup> Indeed, in addition to the freedom of expression clause of the Constitution, the petition clause protects Koreans’ right to open records.<sup>26)</sup>

### **III. The Constitutional Court on Freedom of Expression**

The Constitutional Court’s treatment of freedom of expression as a right in Korea has been dynamic and bold. The Court has been keenly aware of “the liberal

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21) 2 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 25:1, at 25-2 (2000).

22) Access to government meetings is distinguishable from access to government records, although they share a common interest in promoting the public’s right to know. While the former focuses primarily on providing the press and the public with opportunity to attend the meetings of government bodies, the latter is mainly designed to ensure access to government records. Needless to say, the open meetings and open records law derives from the information-is-power notion that “[s]uppression is institutional: an agency of government chooses to conduct its business in secret, to make its work product inaccessible to the public, or to conceal from the public what it is up to.” Donald M. Gillmor et al., *Mass Communication Law: Cases and Comment* 423 (6th ed. 1998).

23) The 1987 Constitution, Art. 109.

24) *Id.* Art. 50(1).

25) Song Nak-in, *Media and Information Law* [Eollon Jeongbobeop] 359 (1998).

26) The 1987 Constitution, Art. 26.

justification of a free press and the acceptability of those justifications as part of the legal argument.”<sup>27)</sup> Law professor Chong Jong-sup of Seoul National University contextualized the Constitutional Court’s assertive role in institutionalizing free expression as a critical component of democratic politics in Korea:

Suppression of free expression was very severe during the period of dictatorship and authoritarian rule [in Korea] because freedom of expression was tantamount to permitting criticism of those in power. Demands for freedom of expression, however, were displayed more than anything else when Korea moved from an authoritarian rule to democracy. The Constitutional Court took an active attitude while drawing the boundaries for the constitutional guarantee of freedom of expression.<sup>28)</sup>

*A. Freedom of Expression Defies Mode of Communication and Warrants “Preferred Position”*

The constitutional clause on freedom of speech and the press applies the same way regardless of what medium of communication is involved. No distinction can be made in the mode of communication as far as freedom of expression as a constitutional right is concerned, the Constitutional Court held. The words “speech and the press” in Article 21 of the Constitution are not limited to oral and printed communication. Thus, production and manufacturing of disks and videos are protected so long as they are used as a means of communication to express thoughts, the Constitutional Court ruled.<sup>29)</sup> Likewise, the free expression clause of the Constitution applies to movies in their production and showing.<sup>30)</sup> Commercial speech is also protected by the Constitution because it “disseminates ideas, knowledge, and information” to the public.”<sup>31)</sup> The status of advertising as protected expression in Korea’s constitutional

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27) Pnina Lahav, *Conclusion: An Outline for a General Theory of Press Law in Democracy*, in *Press Law in Modern Democracies: A Comparative Study* 344 (Pnina Lahav ed., 1985).

28) Jong-Sup Chong, *The Constitutional Court and the Attainment of Fundamental Rights in the Democratization of Korea: 1988-1998*, 40 *Seoul Law Journal* [Beophak] 226, 241 (1999).

29) Constitutional Court, 99 heonga 17, Feb. 24, 2000 (en banc).

30) Constitutional Court, 93 heonga 13, 91 Honba 10 (consolidated), Oct. 4, 1996.

31) Constitutional Court, 96 heonga 2, Feb. 27, 1998.



law parallels the “commercial speech” doctrine the U.S. Supreme Court articulated in 1976.<sup>32)</sup>

The “preferred position” concept<sup>33)</sup> has been embraced in a number of freedom of expression decisions of the Constitutional Court. “Freedom of speech is the very basis of the survival and development of a democratic State,” the Constitutional Court held in 1991. “Therefore, it is especially characteristic of the modern constitutional law that the freedom possesses a preferred status.”<sup>34)</sup> The preferred position of free speech is more often accepted in protection of political expression. In 1994, for example, because electioneering is an element to constitute a democratic society as a mode of political expression, the Constitutional Court stated, legislators do not have unlimited discretion in determining the extent to which electioneering should be allowed. The Court continued: “The constitutionality of an election statute should be reviewed under the strict scrutiny standard.”<sup>35)</sup>

### *B. Prior Restraints: Administrative Preclearance vs. Judicial Injunctions?*

The Constitutional Court has defined censorship of speech and the press as an administrative office’s prior review of ideas or opinions to prohibit their publication on the basis of their contents.<sup>36)</sup> In order for censorship to constitute a violation of the Constitution, the Court required that it should entail an obligation for the press to

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32) See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding that advertisements convey vital information to consumers and that a free enterprise economy depends on a “free flow of commercial information”).

33) The notion of a “preferred position” for freedom of expression, as widely accepted in U.S. constitutional law, holds that “some constitutional freedoms, principally those guaranteed by the First Amendment, are fundamental in a free society and consequently are entitled to more judicial protection than other constitutional values.” C. Herman Pritchett, *Preferred Freedoms Doctrine*, in *The Oxford Companion to the Supreme Court of the United States* 663 (Kermit L. Hall ed., 1992).

34) Constitutional Court, 89 heonma 165, Sept. 16, 1991.

35) Constitutional Court, 93 heonga 4, June 17, 1992. If the “strict scrutiny” test adopted by the Constitutional Court of Korea is employed in the same way as it is in the First Amendment law of the United States, it protects more speech than any other method. As constitutional law experts Gerald Gunther and Kathleen M. Sullivan of Stanford Law School noted, the strict scrutiny “requires ... both a showing of ‘compelling’ state ends and the unavailability of less restrictive means, [and] the government virtually always loses and the speaker virtually always wins.” Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 1033 (13th ed. 1997)

36) Constitutional Court, 93 heonga 13, Oct. 4, 1996.

submit expressive material to the government for approval, a prior review process employed by an administrative agency, and the compulsory means for the agency to enforce its proscription against expression of unapproved ideas.<sup>37)</sup>

As the Constitutional Court held in 1996, “because the anti-censorship principle does not extend to *judicial* restrictions, court-issued injunctions against the exhibition of films (for example, provisional measures on grounds of defamation, violation of copyright, etc.) or seizure of the publications for violations of similar statutes (obscenity, defamation, etc.) do not violate the constitutional ban on censorship.”<sup>38)</sup> The Court also said the constitutional ban on prior restraint “does *not* prohibit governmental interference with constitutionally unprotected ideas after their expression.”<sup>39)</sup>

Meanwhile, the Constitutional Court stated that the censorship clause of the Constitution does not altogether prohibit the screening of motion pictures prior to their public showing:

It will constitute censorship to allow a review board to ultimately rule on the exhibition of the movies through a licensing system. But it does not

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37) *Id.*

38) Constitutional Court, 93 heonga 13, 91 heonba 10 (consolidated), Oct. 4, 1996 (parenthetical notes in original) (emphasis added). The Constitutional Court’s distinction between administrative and judicial prior restraints brings to mind University of Virginia professor John Calvin Jeffries, Jr.’s argument that “administrative preclearance” should be treated differently from “injunctions” in American law. Professor Jeffries wrote in 1983:

Under ... a system [of administrative preclearance], the lawfulness of speech or publication is made to depend on the prior permission of an executive official. Ordinarily, publication without such permissions is punished as a criminal offense, even where the particular speech in question could not constitutionally have been suppressed. Thus, it is the failure to obtain preclearance rather than the character of the speech itself that determines illegality.

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Under a regime of injunctions, there is no routine screening of speech and no administrative shortcut to suppression. The government has to shoulder the entire burden of identifying the case for suppression and of demonstrating in court a constitutionally acceptable basis for such action. Moreover, because an injunction must be sought in open court, the character of the government’s claims remains subject to public scrutiny and debate. Most important, the decision to suppress is made by a court, not a censor.

John Calvin Jeffries, Jr., “Rethinking Prior Restraint,” 92 *Yale L.J.* 409, 421-22, 426 (1983).

39) *Id.* (emphasis added).

amount to censorship to obviate possible violation of a positive law by the public showing of movies and to evaluate the ratings of the motion pictures in order to effectively manage their distribution if the exhibition of the movies is inappropriate to minors. Even prohibition of the showing of films without rating evaluation and imposition of administrative sanctions on the film exhibitors ... will not constitute prior censorship, for the ban on the exhibition of the unrated films does not result from the review of the films but it is only a measure to implement the uniform rating system.<sup>40)</sup>

The most determining factor in ruling on the censorship issue of the pre-publication review requirement is whether or not the review board is dictated by an administrative agency in reaching its decisions. The Constitutional Court was clear-cut in addressing the issue: “The no-censorship principle under the Constitution applies to administrative prior restraint. Thus, while censorship is enforced by an independent board, not by an administrative agency, the censorship entity should be viewed as an administrative authority in practice if the administrative agency is primarily responsible for setting up the censorship procedure and continues to influence the composition of the censorship mechanism.”<sup>41)</sup>

In 1992, the Constitutional Court ruled on the “delivery of copies” provision of the Periodicals Act<sup>42)</sup> in the context of prior restraint.<sup>43)</sup> Article 10 of the Act requires the publisher of a registered periodical to “immediately” deliver two copies of the periodical to the Ministry of Public Information (MOPI) after publication. The delivery of copies requirement was challenged as a prior restraint on the press in violation of the Constitution.<sup>44)</sup>

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40) *Id.* See also Constitutional Court, 99 heonga 117, Feb. 24, 2000; Constitutional Court, 97 heonga 1, March 27, 1997; Constitutional Court, 94 heonga 6, Oct. 31, 1996.

41) *Id.*

42) Act No. 3979 (1987), last amended by Act No. 5926 (1999).

43) Constitutional Court, 90 heonba 26, June 26, 1992. This 1992 Constitutional Court case started when the publisher of Labor Literature [Nodong Munhak] was fined by the Ministry of Public Information (MOPI) for not delivering the requisite copies. The publishers challenged the fine in a Seoul district court. The lower court rejected the petitioner’s request that the delivery and fine provisions of the Periodicals Act be referred to the Constitutional Court for review.

44) *Id.*

The Constitutional Court, defining the type of press censorship, said: “[The ban on] censorship of speech and the press means the prohibition of prior censorship where the authorities examine the contents of citizens’ expressions and then approve or disapprove certain expressions prior to their public dissemination.”<sup>45)</sup> The delivery of copies to the MOPI, the Court held, would not constitute press censorship because the contents of the publication were unrelated to the grounds for permitting or banning its circulation.<sup>46)</sup>

On the other hand, the Court cautioned that the MOPI would be abusing the delivery provision if its enforcement constituted de facto press censorship. Censorship would result if the MOPI demanded the delivery of copies “before” or “simultaneously with” the circulation of the periodical or if the MOPI, mayor, or governor delayed in issuing certificates of delivery and then punished the periodical on the grounds that it was disseminated without these certificates.<sup>47)</sup> Nevertheless, the Court concluded that the delivery provision serves the public interest in ensuring the efficient enforcement of the Periodicals Act, which is designed to promote the improvement of the publishing industry. The public benefits from the requirement would exceed the limits on the publisher’s property rights, the Court stated.<sup>48)</sup>

### *C. National Security Act Surviving Judicial Challenge--Political Compromise?*

In reviewing the National Security Act<sup>49)</sup> of 1980, the Constitutional Court ruled that the Act was “constitutional on condition of proper interpretation.”<sup>50)</sup> The Court, upholding the Act, laid out the proper application of the statute. The Court held that the Act would not violate the Constitution if it applied only to “the clear danger of bringing about substantive evils to the State,” not to actions unarmful to the security

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45) *Id.*

46) *Id.*

47) *Id.*

48) *Id.*

49) Act No. 3318 (1980), last amended by Act No. 5291 (1997).

50) Constitutional Court, 89 heonma 113, April 2, 1990. For a detailed discussion of the Constitutional Court’s 1991 ruling on the National Security Act, see Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 *Stan. J. Int’l L.* 1, 10-12 (1994). The author’s discussion of the National Security Act draws from the *Stanford Journal of International Law* article.

of the State or to the basic order of a liberal democracy.<sup>51)</sup>

The restriction on the interpretation of the law, the Court argued, was “a natural demand evolving from the preferred position of freedom of expression” under the Constitution. In applying the statute to the specific facts of the case, the Court suggested that courts consider “the proximity between conduct and its danger to society” and “especially the gravity of the evil” resulting from the dangerous conduct.<sup>52)</sup>

Dean Kun Yang of Hanyang University’s College of Law in Seoul characterized the Constitutional Court’s ruling on the National Security Act as a case on point in which the Court’s activism was tempered by political reality in Korea.<sup>53)</sup> He noted that the Court’s judgment of “limited constitutionality” of the law was not necessarily a problem unique to Korean constitutional law. “The problem is, however, that it has been abused in many instances,” Dean Yang argued. “Too narrow an interpretation of a statute often happens. More problematic is that the Court did not take into consideration how the law in question actually had been interpreted and applied by law enforcement authorities or ordinary court.”<sup>54)</sup>

#### *D. Registration Requirements for Periodicals Not Licensing*

The registration requirements of the Periodicals Act were questioned about their constitutionality relating to a constitutional ban of licensing of the press.<sup>55)</sup> The Constitutional Court placed the constitutional issue in a broader perspective by discussing the “essential aspect of press freedom,” especially as exercised by the news media.

The press freedom clause of the Constitution, the Court held, “protects freedom of the press vigorously” and at the same time “imposes certain duties and responsibilities” on the press to the extent necessary to ensure the media’s sound development. The Constitution, for example, permits a statutory requirement that a

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51) *Id.*

52) *Id.*

53) Kun Yang, *The Constitutional Court and Democratization*, in *Recent Transformations in Korean Law and Society* 33, 42 (Dae-Kyu Yoon ed., 2000).

54) *Id.* at 42-43.

55) Constitutional Court, 89 heonma 113, April 2, 1990.

publisher possess certain facilities. This requirement, according to the Court, was designed to provide an institutional safeguard for the wholesome growth of the press industry and to protect the work environment, welfare, and treatment of media employees as well as their editing and printing processes.<sup>56)</sup>

Drawing a distinction between freedom of the press as “an internal essence” and freedom of the press as an institutional entity, the Court stated:

By confusing the essential aspect of freedom of the press with publication of periodicals which is a means of news reporting, people are likely to claim constitutional rights for the press on the assumption that publication of periodicals is part of press freedom. Freedom of the press under the Constitution represents a guarantee of the contents of expression, which is the internal essence of freedom of the press. It does not necessarily encompass the concrete printing facilities that might be necessary for exercising freedom of the press nor the activities of media owners as businessmen.<sup>57)</sup>

Therefore, “to statutorily require the publisher of a periodical to register with the government must be clearly differentiated from the interference with the essential aspect of freedom of the press.” The Court concluded that to censor or meddle in the contents of news reports would violate the internal essence of press freedom, while to impose these requirements on the actual publishing facilities to guarantee the proper functioning of the media industry would not. The Court thus ruled that the registration provision was constitutional because its purpose was to enable the MOPI to ensure the stable growth of the media industry, not to allow infringement of the contents of reports and editorials.<sup>58)</sup>

In examining the ownership-of-printing-facilities requirement, the Constitutional Court held that a strict interpretation of this requirement--that publishers must possess their own printing facilities as a prerequisite to registration--would be found to violate the Constitution.<sup>59)</sup>

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56) *Id.*

57) *Id.*

58) *Id.*

*E. Compulsory Apology for Defamation Violates Freedom of Conscience*

As a general rule, a public apology had been recognized by Korean courts as a “suitable” way for the defamed to vindicate their reputation under the Civil Code.<sup>60</sup> In connection with public apology as an accepted “suitable measure” under the Civil Code, the Constitutional Court in April 1991 ruled in a 9-0 decision that the Civil Code was unconstitutional insofar as the Code applies to a notice of apology.<sup>61</sup> In a carefully reasoned opinion, the Court struck down the “unlawful act” provision of the Code as a violation of the Constitution on freedom of conscience and on restriction of freedoms for public welfare.

The Constitutional Court emphasized that the Constitution guarantees freedom of conscience separately from freedom of religion. This separate recognition of freedom of conscience under the Constitution, the Court said, indicates unambiguously that the Constitution prevents the government from interfering with the value judgments of individuals.<sup>62</sup> The Court also stated that freedom of conscience includes the right not to be forced by the government to express publicly or to remain silent on moral judgments.<sup>63</sup> The Court added that “the [freedom of conscience] provision is designed to secure a more complete freedom of spiritual activities as the moral foundation of democracy, which has been indispensable to the progress and development of humankind.”<sup>64</sup>

The Constitutional Court argued that compulsory apology forces one to accept a guilt for libel against one’s will. Thus, the apology is against an individual’s freedom of conscience which includes his right of silence.<sup>65</sup> The Court observed:

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59) *Id.*

60) Act No. 471 (1958), Act No. 5454 (1997).

61) Constitutional Court, 89 heonma 160, April 1, 1991. For criticism of the Constitutional Court’s decision on compulsory apology for defamation, see Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 *Cardozo J. Int’l & Comp. L.* 205 (2000).

62) *Id.*

63) *Id.*

64) *Id.* The Constitution Court noted the U.N. Universal Declaration of Human Rights of 1948, which South Korea ratified in 1990, for its guarantee of freedom of thought and conscience. The Declaration reads in relevant part: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

65) *Id.*

A notice of apology is for a person to publicize to the general public a humiliating expression of mind in his name against his will by publishing it in the mass media such as newspapers, magazines, etc., in violation of his freedom of conscience. While its specific contents are determined by the state authorities as part of the judicial proceedings, the humiliating message still appears to have been a voluntary opinion of the person involved.<sup>66)</sup>

Thus, the Court observed, the apology requirement undermines the right of character of individuals underlying the human dignity and value.<sup>67)</sup>

Second, the Constitutional Court expressed strong reservations about the effectiveness of apology as a means to recover from a reputational harm. The Court viewed it as exceeding its utility as a necessary measure to recompense for a lost good name. Given that an apology is forcibly imposed by the State upon the media organization which has no will to apologize or believes in the innocence of its publication, the apology is similar to the now outmoded “talion.”<sup>68)</sup> The Court characterized the justice of retribution in libel law as anachronistic and primitive and thus incompatible with humanitarianism to be protected in a civilized society.<sup>69)</sup> It said that the forcible apology for libel is a punitive sanction derived from the ancient law which valued the satisfaction of vendetta.<sup>70)</sup> Accordingly, it should be limited to criminal law. Examining the impact of apology upon the application of the Civil Code, the Court asserted that “apology is used as a principal means of recovery for libel while it makes damage awards a supplementary decoration of the Civil Code.”<sup>71)</sup> Consequently, the damage award tends to be so small, the Court said, that the apology measure proves an impediment to the constitutional requirement of just compensation for reputational injury.<sup>72)</sup>

Finally, the Constitutional Court addressed the question whether a notice of

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66) *Id.*

67) *Id.*

68) *Id.*

69) *Id.*

70) *Id.*

71) *Id.*

72) *Id.*



apology is the compellingly necessary means to restrict freedom of the press to promote the public welfare. Analyzing the issue from a comparative perspective, the Court stated that apology is recognized only in Japan, where arguments against its constitutionality are “vigorously” raised.<sup>73)</sup>

The Court, noting the libel laws of several Western countries including the United States,<sup>74)</sup> set forth three alternatives to apology under the Civil Code: “(1) Publication in newspapers, magazines, etc., of the court opinions on damages in civil libel cases at the expense of the defendant; (2) Publication in newspapers, magazines, etc., of the court opinions against the defendant in criminal libel cases; (3) A notice of retraction of defamatory stories.”<sup>75)</sup> Judicial impositions of these measures would not raise constitutional issues as did the compulsory apology for libel, the Court said, because they would not involve a forcible judgment on conscience or a violation of right of character of the defendant.<sup>76)</sup>

#### *F. Right of Reply Not a Violation of Press Freedom*

The Periodicals Act on the right of reply was challenged on the ground that it violated freedom of the press.<sup>77)</sup> The Constitutional Court pointed to the two rationales behind the statutory recognition of the right of reply. First, when an individual’s reputation has been injured by a news organization, the Court said, that individual should be given a prompt, appropriate, and comparable means of defense. To counter the effect of the offending article, the right of reply guarantees the injured party an opportunity for defense through the same news organization. Second, the right-of-reply requirement contributes to the discovery of truth and formation of correct public opinion. Readers often depend on information provided by the news media, and they

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73) *Id.*

74) The Constitution Court discussed the libel laws of England, the United States, Germany, France, and Switzerland. The Court said that in England and the United States, damages are awarded as a rule while a voluntary apology by the defendant is recognized as a mitigating factor in reducing the damage award and that in Germany, France, and Switzerland courts order a retraction of the defendant’s statements, rule on the truth of defamation, or award damages.

75) Constitutional Court, 89 heonma 160, April 1, 1991.

76) *Id.*

77) Constitutional Court, 89 heonma 165, Sept. 16, 1991.

cannot make a sound judgment until they hear the opposing arguments of the other parties.<sup>78)</sup>

Dismissing the petitioner's argument that the reply provisions would violate the "essential aspect" of freedom of the press, the Court emphasized that other constitutional interests, i.e., reputation, privacy, and press freedom, were protected by the statutory requirements governing the right of reply. The Court concluded that the reasonable limitations on the right of reply functioned as "a safety mechanism to prevent the unwarranted encroachment on freedom of the press."<sup>79)</sup>

The Constitutional Court in 1996 again reviewed the constitutionality of Article 19(3), which requires that right-of-reply claims be brought to trial pursuant to the provisional measures of the Civil Code.<sup>80)</sup> The petitioner argued that the libel claims under the Civil Code are adjudicated through formal judicial proceedings, while the right of reply claims are subject to provisional measures, which are equivalent to "summary procedures." The Periodicals Act's judicial procedure on the right of reply claims, according to the petitioner, would violate the news media's right to a fair trial and the principle of equality, as guaranteed by the Constitution.<sup>81)</sup>

In rejecting the petitioner's claim, the Constitutional Court noted that the right of reply was conceived to provide the injured party with a method to recover his lost reputation promptly in light of the periodicals' capacity to disseminate information extensively. The Court held.

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78) *Id.*

79) *Id.* The Constitutional Court cited the following qualifications on the right of reply designed to protect the press: (1) Such reply is limited to statements of facts only and thus does not affect expression of opinion by the press; (2) The news media can deny the reply request when the injured party does not have proper interest in the reply, when the contents of the reply are clearly contrary to the facts, or when the reply is only for commercial purposes; (3) The request for reply must be made within one month of the publication of the assertion, or 14 days in the case of daily publications, thereby relieving the media's concern about out-of-date reply requests; (4) The reply is limited to factual information and clarifying statements and cannot contain illegal contents such as libelous or obscene expression, and the length of the reply cannot exceed that of the original story; and (5) The pre-trial requirement for arbitration by the Press Arbitration Commission guarantees an opportunity for a voluntary resolution of the disputes between the parties. The Court also maintained that the reputation or credibility of the news organization is not directly affected by the reply because the reply is published in the name of the injured party, not of the publisher. *Id.*

80) Constitutional Court, 95 heonba 25, April 25, 1996. The right of reply requirements of the Periodicals Act were one of the "suitable measures" provided by Article 764 of the Civil Code as a way to recover from reputational injury.

81) *Id.*

A person who is injured by a news report is able to defend himself from the injury to his right of character by immediately responding to the report. It is impossible for the injured person to effectively recover from his reputational loss if his recovery is made possible only through the formal judicial proceedings. This is because he will recover not until after the public forgets the original news report. When the request for a reply is enforced so late that it loses its timeliness and the readers or viewers cannot recall the contents of the story which precipitated the reply, its whole process will negate the freedom of participation in the formation of fair public opinion and the guarantee of a news media structure as an objective order.<sup>82)</sup>

*G. Obscenity (Unprotected) Distinguished from Indecency (Protected).*

“In most countries,” stated Sandra Coliver, ARTICLE 19’s law program director in London, “it is criminal offence to publish certain kinds of pornographic, obscene and/or other materials which offend public morality.”<sup>83)</sup> Korea is not an exception. Court rulings in Korea’s obscenity law interpret the vague provisions of various statutes that prohibit the creation and distribution of allegedly obscene material. More important, Korean courts decide how far the government may go in inhibiting sexual expression, though not necessarily obscene.

The Constitutional Court held that obscenity does not merit constitutional protection.<sup>84)</sup> In marked contrast with obscenity, however, indecent but nonobscene expression is protected by the Constitution. In distinguishing obscene expression from indecent, the Court offered a thoughtful discourse on freedom of expression relative to obscenity. Invoking the “free exchange of ideas,” “individual self-actualization,” and “discovery of truth” values of free speech, the Court argued that no democratic politics will be possible without “open space” for an unfettered interchange of ideas through freedom of expression.<sup>85)</sup>

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82) *Id.*

83) Sandra Coliver, *Comparative Analysis of Press Law in European and Other Democracies*, in *Press Law and Practice* 285 (Sandra Coliver ed., 1993).

84) Constitutional Court, 95 heonga 16, April 30, 1998.

85) *Id.*

Quoting from Articles 21(4) and 37(2) of the Constitution, however, the Constitutional Court contended that there is no absolute protection for speech or press. The Constitution does not allow the right of expression to jeopardize national survival or to impinge on more important personal rights of individuals, the Court noted. The critical question in balancing free speech against social interests is where to draw the line on governmental interference with expression. The Court relied heavily on the “preferred position” doctrine on free speech and press in arguing that the basic rights of citizens should be protected to the greatest possible extent while the governmental restriction of the rights should be limited as much as possible.<sup>86)</sup>

The Constitutional Court identified three “unique” reasons why the State’s involvement in expressive rights in particular should be far more restrained:

First, the constitutional values of freedom of speech and the press are so important that they should be secured for democratic constitutionalism. Second, speech and the press are an expression of an individual’s ideas and opinions to the others as a way of fulfilling his personality. Here no yardstick is absolute in judging which ideas or opinions are correct and valuable in a liberal democracy. The attempt of the State or the majority of people in society to tailor the ideas and opinions of people should be rejected and guarded against more than anything else under a liberal Constitution. Third, speech and the press are usually restricted in order to correct or prevent the harm from the speech and the press, and the governmental effort in this regard is justified and necessary. Nonetheless, the first mechanism, i.e., the competition of ideas, to deal with the speech-related harm exists before the government interferes. Accordingly, if the evils derived from speech and the press can be eliminated on their own through the competition of conflicting diverse ideas and views in society, the government’s intrusion should be minimal. This explains why the diversity of opinions and open debates are emphasized when free speech and press is discussed in a constitutional democracy.<sup>87)</sup>

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86) *Id.*

87) *Id.* The Constitutional Court’s comment on the “neutrality” principle relating to the government’s role in

The Court held that the “self-correcting” process in the marketplace of ideas should run its course before the State is allowed to take action to remove the harm from expressive activities.

Does every expression correct itself in the open and free trade in ideas? The Constitutional Court answered in the negative. The Court held that certain expression, once it is published, cannot be undone for its harm through its competition with other ideas, or its harm is so serious that society cannot wait for other ideas and expressions to neutralize the harm.<sup>88)</sup> This kind of expression, the Court stated, justifies the State’s interference before the self-correcting mechanism operates through the general marketplace rules.<sup>89)</sup>

The Constitutional Court applied its free-speech principle in determining whether the government can restrict obscenity without violating the Constitution:

Obscenity is a sexually blatant and undisguised expression that distorts human dignity or humanity. It only appeals to prurient interests and, if taken as a whole, does not possess any literary, artistic, scientific, or political value. Obscenity not only undermines the healthy societal morality on sex, but its harmful impact is also difficult to eliminate through the open competition of ideas. Accordingly, obscene expression, if strictly interpreted as suggested here, is not within the area of constitutionally protected speech or press.<sup>90)</sup>

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abridging speech echoes what the U.S. Supreme Court stated in 1974: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (citation omitted). *See also Texas v. Johnson*, 491 U.S. 397, 414 (1988) (“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

88) Here the Constitutional Court applies the “harm principle” in identifying obscenity as causing the type of injuries that will qualify as serious “harms” sufficient to justify regulation of speech. *See Rodney A. Smolla, Free Speech in an Open Society* 48-50 (1992).

89) Constitutional Court, 95 heonga 16, April 30, 1998.

90) *Id.* The Constitutional Court’s discussion of obscenity as an unprotected expression under the Constitution seems to borrow in part from the U.S. Supreme Court’s obscenity standard established in *Miller v. California*, 513 U.S. 15 (1973). Compare with the third prong of the *Miller* test, *Miller*, 513 U.S. at 24 (material may not be judged obscene unless it, “taken as a whole, lacks serious literary, artistic, political, or scientific value”).

On the other hand, the Constitutional Court said that “indecent” expression is not obscene. The Court termed indecency “vulgar and coarse expression” such as violent and cruel language or profanity as well as sexual speech but not “hard-core” pornography. Thus, the Court argued, the notion of indecency is so broad in its application and so vague in its meaning that it results in uncertainty among those who enforce or violate the indecency regulation.<sup>91)</sup>

The Constitutional Court conceded that there is a definite need to regulate “decadent pornography and excessively violent and brutal expression” to protect minors’ healthy mind and sentiments. The Court held, however, that laws passed for the protection of minors must not prevent access by adults to material that is constitutionally protected (not legally obscene) simply to prevent its possible exposure to children. “Even though the law restricts indecent expression,” the Court stated, “its target should be limited to juveniles and its methods should be narrowly tailored to prohibit the dissemination of the indecent material.” Otherwise, the Court warned that the law would clearly violate adults’ “right to know” because its total prohibition of the expression legally proper to the adults forces the adult material to conform with the adolescents’ standards.<sup>92)</sup> The Court was concerned that it would be “burning the house to roast the pig.”

The Constitutional Court concluded : “Indecent expression, unlike obscenity, is protected by the freedom of speech and the press. It possesses certain redeeming social values. And we fear that the complete prohibition of indecent expression will violate the essential aspect of freedom of expression unless an important reason exists for the prohibition under exceptional circumstances.”<sup>93)</sup> In short, the regulation of indecency under the Publishing Companies Act <sup>94)</sup> failed to meet both the “substantive” (too overbroad) and “definitional” (too vague) precision requirements of the free speech jurisprudence.

#### *H. “Right to Know” and Access to Information Evolving from Freedom of Expression*

The Constitutional Court’s recognition of the “right to know” as emanating from

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91) *Id.*

92) *Id.*

93) *Id.*

94) Act No. 904 (1961), last amended by Act No. 5659 (1999).

freedom of speech and the press has contributed to changing Korea to “a transparent, open nation” from “a closed, secretive one.”<sup>95)</sup> The right to know is necessary to a democratic society in promoting individual and social values such as self-fulfillment, search for truth, participation in political decision-making, and balancing of stability with change.

The Constitutional Court noted the “checking value” aspect of the right to know in making the government responsive to people.<sup>96)</sup> In this connection, the Court four years earlier had discussed access to governmental information as part of the right to know: “The right to know should be broadly accepted if the requester is concerned with the requested information and the release of the information is not harmful to public interest. We are of the opinion that it is indisputable that public information must be mandatorily released to those who have a direct interest in it.”<sup>97)</sup>

The Constitutional Court in another important right-to-know case affirmed that a sufficient guarantee of access to information makes freedom of speech and the press a reality. Interestingly, the Court drew upon the U.N. Universal Declaration of Human Rights of 1948 as well as the Constitution of Korea for its conclusion that the right to know is “naturally included in the freedom of expression.”

The Court also placed the right to know under the rubric of the right to liberty and the right to petition. The right to liberty, the Court said, meant “not to be impeded by the government in obtaining access to, collecting, and using information.”<sup>98)</sup> The right of petition is the right for citizens to petition the government to eliminate restrictions on informational access. If release of the requested records “would not conflict with the fundamental rights of those concerned or violate the national security, maintenance of law and order, and public welfare interest,” the Court held, disclosure of the records

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95) Jong-Sup Chong, *supra* note 28, at 246.

96) Constitutional Court, 89 heonga 104, Feb. 25, 1992. The “checking value” of citizens’ access to public records in a democracy, Columbia University law professor Vicent Blasi noted in 1977, is because one of the most efficient checks on government inefficiency or corruption is the public’s right to access government information. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 Am. B. Found. Res. J. 522, 529 (1977).

97) Constitutional Court, 88 heonma 22, Sept. 4, 1988. This was the first case in which the Constitutional Court had recognized access to government records as part of the “right to know” under the Constitution in Korea. Professor Chong Jong-sup called the 1988 decision of the Constitutional Court on the right to know in Korea “rightly epoch-making.” Jong-Sup Chong, *supra* note 28, at 247.

98) *Id.*

would be a “faithful” execution of the government’s duty to guarantee the basic constitutional rights of its citizens.<sup>99)</sup>

In May 1998, the Election Act<sup>100)</sup> provisions that prohibit the news media from publishing their opinion polls during the campaign period were the focus of the Constitutional Court case.<sup>101)</sup> Although the issues involved in the case did not result from a dispute over access to government records, the court opinion in the Election Act case attests vividly to how freedom of speech and the press, along with freedom of information, is balanced with other competing sociopolitical interests. Especially Justice Yi Yong- mo’s forceful dissenting opinion in the Constitutional Court’s decision illuminates the still fomenting process of a free speech jurisprudence in Korean constitutional law.

The case before the Constitutional Court involved the People’s New Party and other petitioners’ argument that Article 108 of the Election Act on prohibition of survey results violated their right to know and the news media’s freedom of the press and that it infringed the citizens’ right to vote. The provision, the petitioners claimed, prevents access to information that is crucial to people in selecting their candidates for election.<sup>102)</sup>

The Constitutional Court, in an 8-1 decision, upheld the prohibition of releasing the opinion survey results for a certain period before the election date.<sup>103)</sup> Referring to the “bandwagon effect” and “underdog effect” of the opinion surveys on elections, the Court stated:

[They] are feared to mislead the real intent of people and to undermine the fairness of the elections. Moreover, as the election day approaches, the negative effect of the announced public polls will be maximized. Especially when the unfair or inaccurate opinion polls are published, there is a high possibility that it may damage the fairness of the elections conclusively. On the other hand, the likelihood of the polls results’ being

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99) *Id.*

100) Act No. 4739 (1994), last amended by Act No. 6388 (2001).

101) Constitutional Court, 97 heonma 362, 394 (consolidated), May 28, 1998.

102) *Id.*

103) *Id.*



responded or corrected in good time is getting slimmer.<sup>104)</sup>

The Constitutional Court also ruled that the prohibition period for opinion polls was not an overbroad restraint on freedom of expression and the right to know under the Constitution. The Court found the statutory provision a necessary and reasonable restriction due to Korea's "social environment" relating to opinion surveys and the need to ensure fair elections.<sup>105)</sup>

In the sole dissenting opinion, Justice Yi Yong-mo was broadly critical of the majority's decision, finding it erroneous not only for failing to fully understand the constitutional and technological issues involved in the case but also for not recognizing the anachronism of the Election Act's proscription against publication of public polls.

Noting that elections are the "most important" means to find a consensus of the public, Justice Yi said publication of the opinion surveys is important to citizens as well as to the political parties and their candidates in identifying public opinion during the election period. The polls provision of the Election Act criminalizes dissemination of the information which Justice Yi said "contains the valuable political contents protected by the Constitution." Banning the political information contradicts the "absolute" principle of the Constitution on the right to know and freedom of expression, according to Justice Yi.<sup>106)</sup>

Justice Yi criticized the Court for holding mistakenly that the polls regulation would advance efficiently the asserted government interest in ensuring fair elections. The ban on publication of the survey results, he argued, "does not fit in with the age of globalization and informationalization" and in the process skews reality. Justice Yi wondered aloud whether the Court's thinking was out of sync with the Internet's ability to overcome the traditional governmental control of communication. Citing the Internet and satellite broadcasting as good examples, he pointed out that people are able to access a great amount of information so quickly through various communication media beyond the State control.

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104) *Id.* The Korean Constitutional Court's decision stands in stark contrast to the Canadian Supreme Court's invalidation in 1998 of a similar election statute on grounds that the law was an unjustifiable infringement of freedom of expression under the Canadian Charter of Rights and Freedom. *See Thomson Newspapers Co. v. Canada* [1998] 1 S.C.R. 877.

105) *Id.*

106) *Id.*

About the Internet's enormous impact on informational access, Justice Yi observed: "The explosive supply of the Internet makes it possible to provide not only the results of the opinion surveys we want to know but also those of the surveys which lack in fairness and objectivity. And regulation of this kind of information is technologically impossible." Consequently, he held, the Election Act provision restricts newspapers and the broadcasting media within Korea, but it cannot apply to the foreign news media and the Internet in Korea and abroad. Justice Yi saw a distinct possibility that poll results could be posted on the World Wide Web by anyone who wished to make the survey results public. While the legislative objective of the prohibition might be sound, he concluded, the restriction was inappropriate and unreasonable as a means to attain its stated objective.<sup>107)</sup>

### *I. Access to Government Meetings Not an Absolute Right*

While "[g]enerally speaking, legal hotlines for the news media receive more inquiries regarding access to meetings than any other area of communications law" in the United States,<sup>108)</sup> access to government proceedings has rarely been a front-line issue for the Korean press and the public for years. Few court decisions in Korea have directly addressed whether freedom of the press and speech encompasses the public's general right of access to government meetings. In this context, the June 29, 2000, ruling of the Constitutional Court<sup>109)</sup> was a threshold event in the "sunshine law" history in Korea because it has highlighted assiduous judicial soul-searching about citizens' right to know through attendance in government proceedings.

At issue in the case were the National Assembly Act<sup>110)</sup> and the Act on Inspection and Investigation of State Affairs.<sup>111)</sup> The Citizens' Coalition for Economic Justice and the Citizens' Coalition for Monitoring of Inspection of Government Offices petitioned

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107) *Id.* For a debate on the inexorable impact of the Internet on the voluntary agreement among the major U.S. networks not to release exit poll data until the polls close, see Richard Morin, *Is the Exit Poll on Its Way Out?: The Rush to Release Results Jeopardizes a Valuable Journalistic Tool*, Washington Post Nat' Wkly. Ed., March 6, 2000, at 34; Daniel Schorr, *Exit Polling: Why Gag the Media?*, Christian Science Monitor, March 10, 2000, at 11.

108) John D. Zelezny, *Communications Law: Liberties, Restraints, and the Modern Media* 207 (3d ed. 2001).

109) Constitutional Court, 98 heonma 443 & 99 heonma 583 (consolidated), June 29, 2000.

110) Act No. 4010 (1988), last amended by Act No. 6266 (2000).

111) Act No. 4011 (1988), last amended by Act No. 6267 (2000).

the Constitutional Court to determine whether they were denied, in violation of their constitutional rights, access to a National Assembly budget subcommittee meeting and to the National Assembly's inspections of state administration, respectively.

The Constitution's guarantee of open parliamentary meetings, the Constitutional Court held, stems from citizens' democratic demand that the National Assembly operate according to the will of the people by disclosing the Assembly's deliberations and the Assembly members' activities to the public. "Only when the National Assembly's debates or its policy-making process is open to the public," the Court stated, "the citizens, who are the sovereign of our nation, not only can form political opinions and participate in politics; they also can supervise and criticize the Assembly's lawmaking activities. Further, access to parliamentary proceedings ensures fairness in the proceedings and acts as an antiseptic against political collusions and corruption."<sup>112)</sup>

The mandatory openness of the National Assembly's plenary session is implemented through attendance by the public, through the news media's unrestricted reporting, or through publication of the minutes of the proceedings, according to the Constitutional Court. Noting that the constitutional provision on open parliamentary meetings also applies to committee meetings of the Assembly, the Court said the openness requirement is "not absolute" and the meetings may be closed to the public.<sup>113)</sup> The Court pointed out that even when the committee meetings are open to the public, the committee chairman may not want the public in on the meetings for a justifiable cause. But the chairman's authority to bar individuals from the meetings is not unqualified. The policy justifications for the open parliamentary proceedings posit that the chairman may choose closed committee meetings only when he must maintain order to resolve the space constraints of the meeting room or make the meetings proceed in an orderly fashion.<sup>114)</sup>

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112) Constitutional Court, 98 heonma 443 & 99 heonma 583 (consolidated), June 29, 2000. In this light, one U.S. media law scholar's comments on American experience with access to government records especially are instructive: "While our FOI [Freedom of Information] laws, both federal and state, have certainly helped ferret out an occasional instance of corruption by an isolated government official, I don't believe there is widespread corruption among our public officials. Maybe our FOI laws are the reason." Sandra F. Chance, *Freedom of Information in Emerging Democracies*, Media Law Notes, Summer 2000, at 5.

113) *Id.*

114) *Id.*

On the other hand, the Constitutional Court asserted that the committee chairman should be accorded wide latitude, out of respect for the National Assembly's autonomy, in judging whether there is a maintenance-of-order necessity of excluding the public from his committee meetings. If the subcommittee meetings in which professionalism and efficiency are an overriding concern are open to the public, the Court stated, the subcommittee's "substantive" discussions or conclusions most likely will be influenced by the subcommittee members' political posturing, and the subcommittee hardly can reach a political consensus immune from social pressures.<sup>115)</sup>

The Special Budget Settlement Committee's Subcommittee on Coordination of Figures in question cannot reveal its process to government agencies or parties who have a vested interest in budget deliberations. The subcommittee meetings are closed "by tradition" to secure an uninhibited and adequate deliberation of the budget bill among subcommittee members, the Constitution Court stated. Further, when a certain item is transferred from a standing committee to its subcommittee, the subcommittee's deliberation is secret as a matter of procedure under the standing committee's "resolution" or the "understanding" of the entire committee members. Thus, the subcommittee's decision to close its meetings does not overstep the National Assembly's independent authority to conduct its business under the Constitution.<sup>116)</sup>

Likewise, the Constitutional Court ruled that the parliamentary inspection of the administration is subject to non-disclosure under law, and thus the inspection can be conducted behind closed doors, unless otherwise "resolved" by the National Assembly committee involved. The refusal to admit the petitioners to the lawmakers' inspection of the government offices for the maintenance of order was not the kind of abuse of parliamentary discretion that warrants the Constitutional Court's involvement.<sup>117)</sup>

In their strong dissent, three justices of the Constitutional Court took issue with the majority's interpretation of the "maintenance of order" justification and with the Court's unwarranted deference to the National Assembly's autonomous decision on its proceedings. Justices Yi Yong-mo and Ha Kyong-chol argued that the refusal to allow the public to the parliamentary inspections of state affairs exceeded the proper grounds relating to limited space and the need to preserve order during the inspections. The

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115) *Id.*

116) *Id.*

117) *Id.*

closure of the inspections was precipitated by the inspecting lawmakers' concern about their "excessive psychological pressure" from the civic organizations' reviews of the lawmakers' performance, according to the justices.

In his separate, lengthy dissent, Justice Kim Yong-il argued that the petitioners' "right to know (right to attend the National Assembly proceedings)" was violated when the Assembly's subcommittee on budget numbers and the Assembly's inspection of administrative agencies were closed to the public. He elaborated on the constitutional dimension of the public's right to attend parliamentary sessions:

[C]itizens' right to attend the National Assembly proceedings is not an ordinary right to be derived from the open proceedings only, but a fundamental right guaranteed as their right to know under the Constitution. The right to know means the citizens' freedom and right to collect information they need to participate in national politics in a democracy, to promote free development of individuality, and to secure life worthy of human beings .... When Article 1(2) (people as sovereign of the nation), Article 21 (freedom of expression), Article 41(1) (National Assembly representing citizens), and Article 50(1) (public sessions of National Assembly) are read collectively, gathering necessary knowledge and information through attendance in open proceedings of the National Assembly may be viewed as a basic right guaranteed for the citizens as part of their right to know.<sup>118)</sup>

Insofar as the right to attend the National Assembly meetings is guaranteed as the citizens' right to know, Justice Kim stated, the restriction on the right must meet its constitutional and statutory standards. While the legislators' determination of the presence (or absence) of the prerequisites for the restriction deserves judicial deference, the restriction is unacceptable when it is clearly arbitrary and without reasonable grounds.<sup>119)</sup>

Justice Kim was disturbed by the majority of the Constitutional Court's argument that the Court should respect the National Assembly's independent power to make

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118) *Id.* (Kim Yong-il, J., dissenting) (citations omitted).

119) *Id.*

legislative decisions. He warned:

The autonomous authority of the National Assembly does not go so far as to allow the Assembly to close its meetings to the public as it pleases, while ignoring the constitutional and statutory rules on open meetings and the requisites for closed proceedings. Even if it does so, the majority's way of deferring to the National Assembly in legislative proceedings will only eviscerate the constitutional and democratic significance of citizens' right to attend the Assembly proceedings.<sup>120)</sup>

Equally dismaying to Justice Kim was the National Assembly's selective exclusion of civic organizations from attendance in the Assembly's inspection of the administrative offices. Noting that the civic organizations' monitoring of the inspection was not disruptive, he asserted that the civic organizations were entitled to observe and evaluate the inspection for the general public:

Behind the establishment and activities of the coalition of civic organizations [in Korea] are the trend of the times toward civic communities' push for political participation to serve as a complement to a representative democracy and the citizens' realistic conclusion that the National Assembly does not represent public opinion fully. From this perspective, selectively denying the civic organizations attendance in the National Assembly's inspection proceedings merely because of a [possible] injury to the political standing and reputation of the inspectors from the organizations' published evaluations of their work amounts to rejection of the civic organizations' criticism of the lawmakers' inspection of administrative agencies. This rejection stems from disregard of the constitutional principle of opening legislative sessions to the public, which enables citizens to monitor and review the legislative activities. Even though the civic organizations' review [of the National Assembly's inspection] is feared to create side effects to a certain degree, that kind of negative impact of the open inspections should be left up to

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120) *Id.*

the citizens' political judgment.<sup>121)</sup>

#### IV. Discussion and Analysis

The statues on freedom of expression in Korea are rarely an accurate barometer to measure how vigorously or timidly Koreans exercise their right to free expression. Judicial activism or passivism, or both, often conveyed through constitutional litigation of expressive rights is crucial for assessing the status of freedom of speech and the press in Korea. Law professor Pnina Lahav of Boston University offers a cogent proposition: "A court within any democracy, given a healthy and substantive commitment to free speech, can protect the press by conventional methods of statutory interpretation. Indeed, even with a formal constitution and judicial review, the bulk of the judicial work is in interpreting rather than invalidating statutes."<sup>122)</sup>

The steady expansion of freedom of speech and the press under the Constitution of Korea is due in large part to the emergence of constitutionalism characterized by an independent judiciary in general and by an active Constitutional Court in particular. The growing assertiveness of the Korean courts is testimony to the functioning operation of the separation-of-powers principle in Korea. In marking the tenth year of its operation, the Constitutional Court stated in 1998:

As constitutional litigation has taken root and been revitalized, it has enabled constitutional rule to be realized in every sphere in which the official authority of the State is exercised. Thus, the educational impact of constitutional litigation on government agencies, especially on

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121) *Id.* Although Justice Kim does not refer to John Milton in *Areopagitica*, his opinion alludes to Milton on "political energy" essential to "an energetic, adaptive, vibrant society," which Korea strives to be as a functioning democracy. As Vincent Blasi, professor of civil liberties at Columbia Law School, eloquently noted, Milton "valued strength of will, acuteness of perception, ingenuity, self-discipline, engagement, breadth of vision, perseverance; he detested rigidity, stasis, withdrawal, timidity, small-mindedness, indecision, laziness, deference to authority.... [W]hile 'errors in a good government and in a bad are equally almost incident,' what distinguishes a wise ruler is the ability to perceive and correct errors, to accept criticism and to change.... [A]dvice from private citizens can contribute to the process of governmental adaptation and self-correction." Vincent Blasi, *Milton Areopagitica and the Modern First Amendment* 18, 19 (1995) (quoting John Milton).

122) *Id.*

lawmakers, is that the National Assembly has been given a moment to take more care in enacting new laws and to reconsider the constitutionality of those on the books.<sup>123)</sup>

The Constitutional Court's vigorous use of judicial review deserves credit for institutionalizing free speech and press as a permanent fixture of Korean democracy. As illuminated by a number of Constitutional Court rulings on freedom of expression as a right during the past decade, the Court's surprisingly liberal understanding of free expression is buttressed by the formal commitment of the Constitution of 1987, which reflects the "rule of law"<sup>124)</sup> that Koreans pushed hard for during their "people's power" revolution in mid-1987.

The Constitutional Court's distinction between the "concepts" and "conceptions"<sup>125)</sup> of free expression in the democratic body politic of Korea is unquestionable. The Court's recognition of the "preferred position" theory on press freedom is an excellent example. It is further illustrated by the unmistakable shift from the authoritarian press theory to a libertarian theory in Korea's constitutional law when the Court held unconstitutional prior restraint on the press when administrative agencies use it to prohibit expression on the basis of its contents.

The Constitution Court's effort to differentiate licensing from registration with respect to periodicals is based upon a logical application of the Court's definition of the "essential" meaning of press freedom under the Constitution. The "internal essence" of press freedom is to protect the contents of expression published by the press. If a regulation such as periodical registration does not directly affect the contents of the

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123) The Constitutional Court, *supra* note 12, at 203. See also Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 Pac. Rim L. & Pol'y J. 395, 410 (1995) (noting that the active role of the Constitutional Court "has greatly contributed to changing public and bureaucratic attitudes toward the constitution and toward the powers of government").

124) For a thoughtful discussion of the "rule of law" in Korea since 1988, see Joon-Hyung Hong, *The Rule of Law and Its Acceptance in Asia: A View from Korea*, in *The Rule of Law: Perspectives from the Pacific Rim* 145, 150-53 (2000). For a recent discussion of the nexus between the rule of law and freedom of expression in Korea, see Kyu Ho Youm, *Freedom of Communication: A Rule-of-Law Perspective* (2000) (paper presented at the annual convention of the Association for Education in Journalism and Mass Communication, Phoenix, Ariz.) (on file with author).

125) For a succinct discussion of the fundamental distinction between "concepts" and "conceptions" in constitutional interpretation as Ronald Dworkin proposed in *Taking Rights Seriously*, see Christopher Wolfe, *The Rise of Modern Judicial Review* 329-30 (1994).



media's publication, it is not censorship or licensing under the Constitution. Restraint through the facilities requirement under the Periodical Act also justifies this perspective.

The Constitutional Court's sensible distinction between obscenity and indecency showcases the Court's insights on the problems inherent to content regulation. The judicial definition of obscenity has been refined over the years, even though it is still evolving. The Court's painstaking discussion of why obscenity is outside the protection of the Constitution while indecency is within signifies how far the Korean judiciary has come in its readiness to tackle the ever complex issues. Particularly, the Court's decision to recognize adults' right of access to indecent material while denying it to minors demonstrates a sophisticated understanding of how extensively or narrowly sexual material can be constitutionally prohibited. And the Court's reasoning follows the American standards on obscenity which have developed during the past 40 years.

So far, the Constitutional Court has yet to rule directly on freedom of expression in cyberspace.<sup>126)</sup> It is a matter of time for the Court to confront Internet law issues because a number of lower court decisions have arisen from libel, privacy, and obscenity claims. Justice Yi Yong-mo's dissenting opinion is noteworthy for its lucid analysis of the Internet's impact on the government's traditional regulation of the "old" media. It is one of the more informed discussions engaged in by a Korean jurist about new-communication law issues which defy the conventional approach of weighing the governmental interest in regulating expression against the media's interest in disseminating messages. Justice Yi's forceful dissent foreshadows a useful paradigm on freedom of expression in a new millennium in which the Internet will be a fact of life for everyone in Korea.

## V. Conclusion

The constitutional guarantee of freedom of expression carries a more practical meaning for Koreans than ever before. The Constitutional Court's dynamic role in

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126) In a March 2001 case involving an Internet advertising agency, the Constitutional Court, rejecting the agency's petition for review of the National Assembly's failure to act on Article 82-3 of the Elections Act on election campaigns by computer networks, reasoned: "Regardless of whether the statutory regulations of election campaigns or advertising agency via the Internet are wanting in details and too restrictive, the petitioner is not allowed to request a constitutional review of the legislature's nonperformance itself on grounds that no related action was taken." The Constitutional Court, 2000 heonma 37, March 21, 2001.

providing a constitutional framework for Koreans' right to free expression has been a guiding light to the Supreme Court of Korea and lower courts when they adjudicate media cases.

The Constitutional Court has been bolder and more innovative than any other court to interpret the free expression clause of the Constitution with a libertarian mind-set. The Court, in the course of reviewing the Periodicals Act and other related statutes, has established several significant constitutional theories and tests for press freedom. On the whole, the constitutional review of various direct and indirect statutes on the Korean press has resulted in an enhanced freedom of expression.

Notable changes have been made in liberalizing the Periodicals Act, the National Security Act, the Military Secrets Protection Act,<sup>127)</sup> and the Film Promotion Act,<sup>128)</sup> The Constitutional Court's decisions on the "right to know" has led the National Assembly to enact several reform-oriented statutes including the Act on Disclosure of Information by Public Agencies (Public Information Disclosure Act),<sup>129)</sup> the Act on Protection of Personal Information Maintained by Public Agencies (Personal Information Act),<sup>130)</sup> and the Administrative Procedures Act.<sup>131)</sup>

But the Constitutional Court's decisions on the National Security Act define the seemingly ingrained cold-war value judgments of many Korean jurists in ruling on governmental efforts to restrict expression for security interests. The Court tends to be least independent of, and most deferential to, the Korean government's claims when national security is asserted. "Judicial passivism" guides the Court in dealing with politically sensitive cases. The government's claim of a security threat from North Korea especially "can deal a knock-out blow to the main institutional safeguards against government abuse: independence of the courts, due process of law, freedom of the press, and open government."<sup>132)</sup>

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127) Act No. 4616 (1993).

128) Act No. 5929 (1999), last amended by Act No. 6186 (2000).

129) Act No. 5242 (1996).

130) Act No. 4734 (1994), last amended by Act No. 5715 (1999).

131) Act No. 5241 (1996), last amended by Act No. 5809 (1999).

132) Sandra Coliver, *Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, in *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* 13 (Sandra Coliver et al. eds., 1999).