Democratic Legitimacy of Law and the Legislative Function of the Constitutional Adjudication in the Republic of Korea*

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Abstract

This article is an effort to analyze the legislative function of the constitutional adjudication in the Republic of Korea in light of the democratic legitimacy of law and legislation, and its further constitutional ramifications. First, this article discusses the concept of legitimacy of law and the legislation under a representative democracy, from traditional perspectives of proceduralism and functionalism. This article then moves to indicate that two of the core factors legitimating lawmaking from either proceduralist or functionalist theory are participation and interest representation. Based on such findings, this article analyzes democratic as well as constitutional legitimacy of the normatively legislative function assumed by the constitutionality review conducted by the Constitutional Court over the statute democratically enacted by the National Assembly, and the relationship between and the respective roles of the National Assembly and the Constitutional Court in legislation. In the conclusion, this article further deliberates upon constitutional ramifications of the legislative function of the constitutionality review over the statute conducted by the Constitutional Court, including those pertaining to the concept of justiciability and the extent of the binding force of the constitutional adjudication over the National Assembly's legislation.

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I. Introduction: Constitutional Adjudication in the Republic of Korea from the Legislative Perspective

The essence of the constitutionalism lies in that legislation is bound by the nation's constitution and that the powers of the government including the executive and adjudicative powers are governed by such law.[1] Since the establishment of popular sovereignty and constitutionalism, the constitution has gradually become directly applicable in and through adjudication. Like many other counterparts, under the current Constitution of the Republic of Korea, the legislative function of the nation is primarily exercised in the form of enactment of the statute and revision thereof by the National Assembly, the national legislature composed through direct democratic election, as well as administrative and judicial lawmaking. Further, under the separation of powers design of the current Constitution, the Constitutional Court of the Republic of Korea checks and controls such legislative function, to keep both the process and the substance of the legislative act in compliance with the Constitution. Specifically, control over the legislative process is effectively exercised by way of adjudication over disputes between and among the governmental institutions, while control over the legislative outcome including the statutes, executive orders and rules is primarily exercised by way of constitutionality review over a specific law or its provisions.

A system under the Constitution of the Republic of Korea through which a separate and independent constitutional institution reviews the constitutionality of the statute enacted by the legislative body and decides upon the validity thereof is grounded primarily upon the supremacy of the constitution or constitutional law, and the theories of separation of powers and limited government. Particularly, due to the expanding influence of the political parties, as there is an incrementally increasing need for checking strategic legislations by the legislative body and guaranteeing the supremacy of the Constitution, the function of the constitutionality review over the statute enacted by the legislative body as a checking and controlling device has a greater pertinence to both normative and structural integrity of the nation's law and legal system as a whole.[2] Indeed, in most of the constitutional democracies of

1) KUN YANG, LECTURES ON CONSTITUTIONAL LAW 23 (Bobmumsa Publishing Co., 2007) (available only in Korean).

2) TCHEOLSU KIM, CONSTITUTIONAL LAW 1441 (18th edition, Pakyoung Publishing Co., 2006) (available only in

modern times,[3] the constitutional adjudication by an adjudicative institution is one of the essential elements of a "constitutional state," together with the guarantee of fundamental rights, the adoption of representative democracy, the establishment of a written constitution and the implementation of the rule of law, which in turn consists of the separation of powers, superiority of the statute enacted by the legislature over administrative lawmaking, administration by and under the law, independence of the judiciary, and provision of legal remedy for the government's infringement of rights of the citizens.[4]

As a part of such a complex and multifaceted system that is to operate in an integrated, interrelated and coordinated fashion, the constitutional adjudication is designed, ultimately, to render various governmental functions be implemented in compliance with the nation's constitution.[5] Specifically, the constitutional adjudication checks the power of the government to secure the constitutionality of the legislative function of the National Assembly, the administrative function of the executive branch, and the adjudication of the judicial branch, while confirming the allocation of the powers between the national and the local governments and also among different branches of the government, thereby functioning to maintain the order and integrity of the law and legal system of the nation. In so doing, the constitutional adjudication including the constitutionality review simultaneously serves adjudicative, political, and legislative functions.[6]

Here, issues pertaining to the legislative nature or function of the constitutional adjudication become pertinent, irrespective of specific forms of the constitutional adjudication, as long as the constitutionality of a statute is reviewed in the form of adjudication.[7] Pursuant to the premise of representative democracy, when a statute or

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Korean).

3) For discussions of the relationship and relevance between constitutionalism and democracy, see generally Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUROPEAN JOURNAL OF PHILOSOPHY 2 (1995).

4) *Id*.

5) JONG-SUP CHONG, CONSTITUTIONAL LITIGATION 24 (4th edition, Pakyoung Publishing Co., 2006) (available only in Korean).

6) *Id*. at 8-18; TCHEOLSU KIM, *supra* note 2, at 1445-1446.

7) For general accounts of the constitutional control over the legislation and the relationship between the National Assembly and the Constitutional Court of the Republic of Korea, see, for example, Myung-Whan Pyo, *Obligation of the Legislature to Guarantee Fundamental Rights and the Constitutional Control thereon*, 11-2 KOREA CONSTITUTIONAL LAW ASSOCIATION JOURNAL 211 (2005) (available only in Korean); Jin-Wan Park, *The Relationship between the Constitutional Court and the National Assembly*, 11-2 KOREA CONSTITUTIONAL LAW ASSOCIATION

a provision thereof is in violation of the Constitution, the National Assembly is to assume the legislative function by enacting or revising such a provision or statute. Here, under the system of constitutionality review over the statute as it is in operation in the Republic of Korea, the constitutional adjudication may be triggered to invalidate a statute or to refuse the application thereof, upon the Constitutional Court's holding that the specific statute or its provisions are in violation of the higher law of constitution. Such a function assumed by the Constitutional Court in the form of adjudication over the constitutionality of a statute is equivalent, at the normative plain, to the enactment, revision and repealing of a statute or part of it which are normally to be conducted by the National Assembly.[8] Thus, adjudication by the Constitutional Court over the constitutionality of a statute may be perceived as normatively equivalent to the legislation by the National Assembly, the legislature.[9]

Although the current constitutionality review under the Constitution of the Republic of Korea and the Constitutional Court Act is primarily an adjudicative means to guarantee the Constitution against the enactment of an unconstitutional statute by the national legislature, i.e., the National Assembly,[10] the legislative function assumed by the adjudication over the constitutionality of a statute exercised by the Constitutional Court has significant further constitutional ramifications. In a

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JOURNAL 75 (2005) (available only in Korean); and Bok-Hyeon Nam, *The Relationship between the National Assembly's Legislation of the Statute and the Constitutional Court's Unconstitutionality Decision Practices*, 24 LAW AND SOCIETY 213 (2003) (available only in Korean).

8) For example, nullification of a statute by the Constitutional Court on the ground of its unconstitutionality has the effect equivalent to National Assembly's repealing of the statute. Also, the Constitutional Court's annulling part of a statute or a provision of a statute on the ground of its unconstitutionality or restricting the interpretation of a specific provision of the Constitution by way of the decision of limited constitutionality or limited unconstitutionality is equivalent to National Assembly's act of revising the relevant part of the statute or a provision thereof respectively. While the judiciary also conducts statutory interpretation within the limits of the Constitution, such statutory interpretation is limited to the construction and application of the applicable statute or its provisions in conformity with the Constitution and may not be extended to annulling a statute or the provisions thereof, whereas the Constitutional Court may strike out part of the meaning of the relevant statute or its provisions. In case of a decision of nonconformity to the constitution by the Constitutional Court along with the advice to National Assembly for statutory revision, such a decision results in the revision of the statute by the National Assembly. Further, the Constitutional Court's decision of unconstitutionality over legislative omission can be deemed to be equivalent to legislation as such a decision compels the enactment of a particular statute or a statutory provision.

9) JONG-SUP CHONG, *supra* note 5, at 10.

10) *Id.* at 11 ("[T]he essential nature of the constitutional adjudication lies in its adjudicative function [*translation by the author*].").

nation governed by the principle of people's sovereignty, as the legislative function of the nation is assumed by the legislative body that is based upon firm democratic legitimacy, any other governmental branch or constitutional institution that exercises the normatively equivalent legislative function should also secure democratic legitimacy on par with that of the legislature, should it stand in conformity with the principle of people's sovereignty.

Thus, the normatively legislative function assumed by the Constitutional Court in adjudication over the constitutionality of a statute requests in turn that the Constitutional Court and its adjudication in the constitutionality review cases secure democratic legitimacy as well as constitutional legitimacy. Hence, the adjudication over the constitutionality of a statute should possess the requisite democratic as well as constitutional legitimacy, and the Constitutional Court as an institution performing such normatively legislative function should also be endowed with democratic as well as constitutional legitimacy. The core issue concerning the democratic legitimacy of the constitutionality review over the statute in light of the legislative function of the constitutional adjudication lies in whether the judicial officers not elected as representatives by the sovereign constituents may justifiably decide the effect of the statute enacted by the National Assembly, which is constituted by way of democratic elections and whose allegiance is deemed to be to the nation rather than to specific constituencies, in light of the principles of democracy and separation of powers.

It should be noted at this point that the legislature consisting of democratically elected representatives might still enact the law that is in violation of the Constitution. In such a circumstance, such law should be controlled somehow with the binding force, by the decision of an institution that is independent of the legislative body. This is the core legitimizing factor of the review over the constitutionality of the statute enacted by the legislature, by way of adjudication. The democratic legitimacy of the constitutionality review over the statute through adjudication that essentially follows judicial proceedings by an independent institution is based upon the following grounds: (i) the principle of substantive democracy that is to guarantee the liberty and rights of the sovereign constituents, (ii) the higher norm that the majority rule does not suffice to determine in a justifiable fashion the liberty and rights of the sovereign constituents, (iii) the request from the constitutionalism that the nation's constitutional law should be implemented with the binding force as it provides for and regulates as the supreme law the liberty and

rights of the sovereign constituents, (iv) the command of popular sovereignty that the legislative power as the power of the national government should also be subjected to the constitution as the constitution is ordained and established by the constituents as the holder of the sovereignty, (v) the theory of limited power mandating that the act of the nation may be endowed with authority and legitimacy only when any and all acts of the nation are restricted within the limits of the constitution, (vi) the call from natural justice that no national institution may be permitted to check and control its own wrong, (vii) the doctrine of the separation of powers, and that (viii) the decision over the conformity to the constitution of an act of the nation should be conducted by an independent and essentially judicial institution with requisite expertise in a way that respects the precedents.

The following part of this article is an effort to analyze the legislative function of the constitutional adjudication in the Republic of Korea in light of the democratic legitimacy of law. First, this article will discuss the concept of legitimacy of the legislation under a representative democracy, from conventional perspectives of both proceduralism and functionalism. This article will then move to indicate that two of the core factors legitimating lawmaking from either proceduralist or functionalist theory are participation on one hand and interest representation on the other hand. Based on such findings, this article will analyze democratic legitimacy of the legislative function of the constitutionality review over the statute assumed by the Constitutional Court in the Republic of Korea to further deliberate upon constitutional ramifications of the legislative function of the constitutionality review over the statute.

II. Democratic Legitimacy of Law and the Legislative Function of the Constitutional Adjudication

1. Legitimacy of the Legislation in a Representative Democracy

The authority of law in a democratic state is grounded in an account of democratic political authority, i.e., the ways in which the decisions of a democratic majority legitimately govern dissenters who would rather prefer to pursue an alternative course of action but have been outvoted. There have been two conventional positions and perspectives assessing and analyzing the legitimacy of

law and legislation in light of democracy: proceduralism and functionalism. The liberal account of democracy as an application of more general principles of justice has largely evolved along two different lines: by perceiving democracy as the political branch of a more general ideal of equality, and by connecting democracy to ideals concerning public reason and the demand that power be justified to those against whom it is exercised.[11] Recently, based on the observation that articulations of the liberal view have failed to live up to the actual experience of democratic politics, Ronald Dworkin, for example, has sought a formulation of the idea that democracy is political equality, which abandons an emphasis on democratic procedures in favor of a broadly substantive conception that identifies democracy as the form of government "most likely to produce the substantive decisions and results that treat all members of the community with equal concern."[12] According to the liberalist view, the democratic process has no independent political value but serves the end of "improv[ing] the accuracy" of political decisions by making them more consistent with the demands of liberal equality.[13]

However, this places democratic decisionmaking, which is in the intuitive sense associated with elections and the majority rule, at the mercy of the substantive values. Yet, a counterintuitive possibility that democracy might constrain voting for equality's demands does not always burden the liberal theory. It is an acclaimed feature of liberalism that constitutionality review over the democratically promulgated statutes by an institution consisting of unelected officials — in the South Korean case, mainly the Constitutional Court — is justified, insofar as they enforce the fundamental rights of the minority against the tyranny of the majority. However, when this feature of the liberal view is emphasized, to the extent it

11) For general accounts and discussions of the idea of public reason from liberalist perspectives and its relevance to democratic authority, see, for examples, John Rawls, *The Idea of Public Reason Revisited*, 64 UNIVERSITY OF CHICAGO LAW REVIEW 765 (1997); and Robert P. George & Christopher Wolfe, *"Public Reason" and Reasons for Action by Public Authority: An Exchange of Views*, 42 AMERICAN JOURNAL OF JURISPRUDENCE 31 (1997). For a discussion for deference for National Assembly's legislation on this ground and for a system that will obligate a judicial court to present to the Constitutional Court sufficient prima facie reason for unconstitutionality of a statute or a provision thereof in order to request constitutionality review, see Boo-Ha Lee, *The Obligation to Present Ground for Unconstitutionality Upon Request for Constitutionality Review*, 34-3 PUBLIC LAW (Korean Public Law Association Journal) 273 (2006) (available only in Korean).

12) RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 184 (Harvard University Press, 2002).

13) *Id*. at 204.

encroaches on the majoritarian and procedural elements that dominate firsthand democratic understandings, the liberal ideal of political equality ceases to present a satisfying account of democracy or democratic legitimacy of law.

The second liberal approach connects democracy to liberal ideals concerning public reason and in particular to the idea that political power is never its own justification but must always be legitimated through arguments that are, in principle, acceptable to all citizens or constituents.[14] This approach appears, for example, in John Rawls's later work, as when he describes democracy as an attempt to "meet [the] condition" that political power must be justified in terms that all citizens "might endorse as consistent with their freedom and equality."[15] However, the connection between public justification and democracy is most clearly developed by Bruce Ackerman, who expressly seeks to "reconcile majoritarianism with the principles of liberal dialogue,"[16] that is, with the liberal demand for political legitimization on mutually acceptable terms. Ackerman's argument begins from a theorem that identifies four formal properties of collective decision procedures that are, together, logically equivalent to the majority rule.[17] Ackerman defends the legitimacy of each of these properties by reference to the liberal ideal of mutual public justification. Ackerman's argument that these properties express the liberal commitment to public reason and mutual justification amounts to a liberal explanation of the authority of democratic decisionmaking.

However, as Ackerman himself acknowledges, "[i]t is not the act of voting but

14) JOHN RAWLS, POLITICAL LIBERALISM 218 (Columbia University Press, 2005). Also, on this point, see generally, for examples, John Rawls, *The Idea of Public Reason Revisited*, 64 UNIVERSITY OF CHICAGO LAW REVIEW 765 (1997); and Robert P. George & Christopher Wolfe, *supra* note 11.

15) JOHN RAWLS, POLITICAL LIBERALISM, *supra* note 14, at 218. Rawls did not entirely abandon his earlier suggestion that democracy arises when substantive equality is applied to politics, and he continuously proposes that democracy gives all citizens "an equal share in the coercive political power that citizens exercise over one another by voting and in other ways." *Id.* at 217-218.

16) BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 277 (new edition, Yale University Press, 1981).

17) The conditions, as articulated by Ackerman, are (1) universal domain — that the decision rule specifies some collective choice for all possible sets of individual preferences, (2) anonymity — that the decision rule requires the same degree of support for enactment of a collective choice regardless of the identities of the individuals who support the choice, (3) outcome indifference — that the decision rule makes the degree of support necessary for an option to be chosen collectively the same for all alternatives, and (4) positive responsiveness — that the decision rule allows each individual to break a tie among the others by joining one side and carrying the collective choice with her or him. BRUCE ACKERMAN, *supra* note 16, at 278-283.

the act of dialogue that legitimates the use of power in a liberal state," and the majority rule "is only appropriate for collective choices between options of equivalent liberal legitimacy."[18] Thus, Ackerman's liberal justification of democratic authority applies only when the range of democratic politics is constrained according to antecedent liberal principles. The constraints are undoubtedly less restrictive than the constraints imposed by Dworkin's substantive account of democracy. However, the scope of liberal democracy on Ackerman's view remains narrower than the scope of actual democratic practice.

Thus, the liberal view of democracy denies that democracy in its common procedural sense can legitimately resolve deep disagreements about political principles or even justice, and it therefore contradicts the central place that democracy occupies in the experience of politics and political authority, as well as widespread perception thereon.[19] Instead, the liberal view marginalizes the democratic process to be employed only in the narrow range of cases in which liberal principles of justice produce indeterminate results. Rawls puts this point clearly when he says that "we submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system."[20] The liberal view has thus provided no answer to democracy's power to produce authoritative resolutions of deep political disagreements, which is crucial in seeking persuasive grounds for legitimacy of the legislation in terms of democracy.

On the other hand, the republican view of democracy reverses the basic structure of the liberal view. Where the liberal view holds that democratic political authority depends on antecedent and more fundamental political principles, the republican view proposes that democracy is a freestanding political value that contributes to political authority on its own. Where the liberal view concludes that democracy ultimately sounds in equality, the republican view concludes that it ultimately sounds in liberty, and in particular in the connection between individual and collective self-governance. The republican view proposes to explain democratic authority in terms of the consequences of engagement with the democratic political process, in terms of the influence that democratic politics aspires to have on the political attitudes of the

18) BRUCE ACKERMAN, *supra* note 16, at 297.

19) See JEREMY WALDRON, THE DIGNITY OF LEGISLATION (Cambridge University Press, 1999); JEREMY WALDRON, LAW AND DISAGREEMENT (new edition, Oxford University Press, 2001).

20) JOHN RAWLS, A THEORY OF JUSTICE 355 (new edition, Belknap Press, 2005).

persons who participate in it.[21)]

Nonetheless, the republican view of democracy does not seek to eliminate from political thought the ideals of equality that underlie the liberal view or to deny a connection between liberal ideals and political legitimacy. Indeed, proponents of the republican view may and commonly do accept that liberal principles may constrain the democratic process by, for example, insisting on the inviolability of certain fundamental rights. However, the contrast between the liberal and the republican views remains important in understanding the concept of democratic legitimacy of the legislation and the control on it by constitutional adjudication. Most broadly, the republican view, because it treats democracy as a freestanding political value, opens up the possibility that democracy may conflict with, and indeed outweigh, liberal political ideals.[22)] Further, the republican view opens up the possibility that constitutionality review by unelected officials through adjudication may be democratically justified even when it cannot be cast as protecting fundamental rights.

Although the republican approach to democracy rejects the idea that democratic authority must be an articulation of some substantive political value and insists instead that democracy is procedural in a fundamental way, the procedure at issue

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21) The republican view of democracy sets out from the idea that persons are free only insofar as they are governed by laws that they have given themselves. The challenge of freedom is therefore particularly stark when persons must live together with others, because the need to regulate the conduct of all constrains the conduct of each. As Robert Post states, "[t]he essential problematic of democracy … lies in the reconciliation of individual and collective autonomy." ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 7 (Harvard University Press, 1995). The republican view proposes that the democratic process, properly constructed and managed, transforms citizens from isolated individuals into members of a democratic sovereign, with which they identify and whose will they take as their own even when they have been outvoted. It proposes, adopting Post's language, that the participants in a well-functioning democratic process remain individually free because they take authorship of the collective choices that the process generates. Robert C. Post, *Democracy and Equality*, 1 LAW, CULTURE & HUMANITY 142 (2005). In particular, in order for democracy to reconcile individual and collective autonomy, i.e., in order for a democratic sovereign to come into being, the democratic process must be more than simply a mechanism for aggregating the instantaneous preferences of voters. In the specifically South Korean context, Jong-Sup Chong concludes that the legitimacy of a statute in a democracy comes from legality and legitimacy in both substance and procedure, and underscores participation of the citizens in the legislative process within the National Assembly and beyond. See Jong-Sup Chong, *Diagnosis of the Problems faced by the Legislative Process of the Republic of Korea and the Solutions thereto*, 6 LAW AND SOCIETY 6, 9-10, 17-27 (1992) (available only in Korean).

22) Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICHIGAN LAW REVIEW 1517, 1538 (1997) ("Approaches that attempt to maximize other kinds of equality of ideas or of persons are either implausible or inconsistent with the principle of collective self-governance [that is, democracy].").

cannot be a simple majority rule. This tradition emphasizing the deliberative process underscores that the sovereign will, i.e., the will of "the people," is not simply the instantaneous adding up of the immediate preferences of the citizenry taken severally.[23] The democratic sovereign cannot possibly arise out of a simple majoritarianism, at least not if democratic government is to make good on its promise to reconcile individual freedom with collective freedom by ensuring that even those who lose a vote take authorship of the collective decision. No simply aggregative procedure can possibly induce those whose preferences lose out to take ownership of collective decisions in a diverse and complex society. Nor can the practice of voting at regular terms, taken on its own, cure these shortcomings. A person may rationally retain minority preferences even in the face of the knowledge that most persons' preferences depart from hers or his, and the simple adding up of the majority's preferences cannot possibly engage her or him in a manner that gives her or him reason to accept, let alone authorize, the decision of the greater number.

The rise of a democratic sovereign, whose decisions command the allegiance even of dissenters, therefore requires more than just fair adding up of fixed and inviolate preferences. Republican theorists of democracy have elaborated this need for engagement in a variety of ways and at several levels of abstraction. They have identified the opportunities for political engagement on which democratic sovereignty depends and have explained how these forms of engagement induce persons to take authorship even of collective decisions that have gone against them: some by identifying the general conditions under which collective self-government is conceptually possible,[24] others by characterizing the general forms of political discourse on which widespread acceptance of democratic decision depends,[25] and still others by identifying the specific institutions and practices through which particular democracies have historically generated the political engagement that democratic sovereignty requires and the specific historical moments at which particular democratic sovereigns have appeared.[26]

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23) For example, see ALEXANDER M. BICKEL, THE MORALITY AND CONSENT 17 (new edition, Yale University Press, 1977) ("The people are something else than a majority registered on election day.").

24) JEB RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 163 (Yale University Press, 2001). See also Jong-Sup Chong, *supra* note 21, from this perspective.

25) BENJAMIN BARBER, Strong DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (University of California Press, 2004).

26) BRUCE ACKERMAN, WE THE PEOPLE, VOLUME I 1-2 (reprint edition, Foundation Press, 1993).

Rejecting simple majoritarianism in favor of engagement-encouraging methods of aggregation is a necessary part of the very idea of representative democracy and appears on the face of every such government. Insofar as elected officials are, as they inevitably must in some measure be, true representatives rather than mere delegates — entitled to vote their consciences rather than simply tracking the preferences of their constituents — governments cannot possibly achieve democratic legitimacy on the model of simple majoritarianism. No matter how much free play democratic representatives enjoy, the democratic sovereign must be the whole people and never just the government.[27] Representative democracy thus implicitly abandons the simple majoritarian view of democratic authority. It functions "not merely as a sharer of power, but as a generator of consent."[28] Representative democracy is the conclusion of an argument that simple majoritarianism cannot sustain democratic authority and that the democratic sovereign becomes realized by the complex processes that representative government necessarily involves. Moreover, actual representative democracies depart from simple majoritarianism in ways that promote forms of political engagement.[29][30]

Discussions presented in the preceding paragraphs lead to the following statements, as the context for further discussions in the following part of this paper. First, democracy has a broader scope than what is credited under liberal theories, and a republican as well as liberal approach is necessary in order to delve into the democratic legitimacy of law and the legislation and of the constitutional control

27) Akhil Reed Amar, *Of Sovereignty And Federalism*, 96 YALE LAW JOURNAL 1425, 1432-1466 (1987). Further, in the specific South Korean context, Jae-Hwang Chung diagnoses that insufficient representation of interests of the whole people, both actual and perceived, combined with the increased influence of the political parties over legislation and insufficient guarantee of the right to know as a fundamental right, is the primary ground for legislation by the South Korean National Assembly that lacks legitimacy and constitutionality. Jae-Hwang Chung, *Control over National Assembly's Inappropriate Legislation*, 6 LAW AND SOCIETY 33, 39-41 (1992) (available only in Korean).

28) ALEXANDER M. BICKEL, *supra* note 23, at 15.

29) Democracies may depart from simple majoritarianism and require engagement, at two levels — involving elected representatives, on the one hand, and the voting population, on the other — and democratic political systems differ with respect to which of these forms of engagement they promote. On this regard, refer to, for example, DENNIS C. MUELLER, PUBLIC CHOICE 98-105 (3rd edition, Cambridge University Press, 2003); and Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AMERICAN JOURNAL OF POLITICAL SCIENCE 27 (1979). See also Jong-Sup Chong, *supra* note 21, at 17-27, in this regard.

30) For discussions on the conceptual relationship between democracy and constitutionalism in this context, refer to KUN YANG, *supra* note 1, at 25.

thereupon. Second, this approach to democratic political authority as the ground for democratic legitimacy of law and the legislation emphasizes that the democratic process underwrites the development of a democratic sovereign and that individual citizens come, through participating in the democratic process, to take authorship of the sovereign's collective decisions in the name of law, including even those that they initially opposed. Third, the democratic process can function in this way only if it is more than a simple majority rule but instead involves, in one way or another, an intensive engagement among the participants. This engagement is fostered by political practices and institutions such as free expression and an independent press, and political parties. However, it also depends, at least in representative democracies, on more involved and complex mechanisms of preference aggregation, which encourage political engagement among the populace in choosing representatives or among representatives in forming policy or both.

1) Proceduralism: Legitimacy of Law and Lawmaking through Process

What basic properties of lawmaking by the legislature legitimize the authority of a democratic regime to coerce its citizens by means of law? As discussed above in general terms, this question has been answered by two different kinds of justificatory theories of democracy. The first kind can be described as proceduralist theories. Proceduralist theories emphasize the value that may be derived from the very process of citizens participating in their government. Proceduralist justifications of democracy thus locate the value of the form of government not in the quality of the substantive legislation it generates, but rather in the inherent fairness or justice of its system of substantial and equal participation in legislation by the governed.

Proceduralist theories of democracy treat the very act of individual control of or consent to the process of government — the very act of individual participation in the process of government in some way — as morally valuable. They value the process of democracy, because it allows individual participation. Proceduralist theories differ from one another according to the ways in which each believes participation to be morally valuable. Some may see participation as valuable in itself, as an expression or necessary corollary of fundamental moral principles. Others may see participation as valuable because of the positive influences the very process of participatory government is likely to have on individuals or on society at large. Rousseau saw the majority rule as a mechanism by which the majority, faced with a

dissenter, could force her or him to be free.[31] Part of what he meant was that the process of participating in democratic deliberation could teach the individual to abandon her or his private will and adopt a concern for the common good.

2) Functionalism: Legitimacy of Law and Lawmaking through Outcome

The second kind of democratic justificatory theory for the legitimacy of democratic lawmaking can be described as functionalist theories. Functionalist theories focus on the quality of the substantive governance provided by democracy. They hold that democracy, because of its characteristic aggregation of diverse interests and viewpoints in the decisionmaking process, is at least the best possible way to produce the best substantive rules to govern society. They posit that objectively better decisions are more likely to be generated by a form of government that takes into account the interests and opinions of all of its citizens, like democracy, than by a form of government that restricts participation to, for example, a privileged few.

In functionalist view, a democratic government can be valued because it generates legislation through a process of reasoned deliberation and negotiation among a wide variety of viewpoints and interests, thus increasing the likelihood that its laws will serve the common good.[32] The basic reasons why democracy is thought to function well as substantive government to produce decisions and laws of high quality are intertwined with and dependent upon one another. They are that democracy allocates decisionmaking power to those most interested in the decisions; that it allows a diversity of interests to assert themselves in government; that it permits the participation of the most suitable decisionmakers in government; and that it produces decisions through a process of reasoned deliberation. Each of these reasons, like proceduralist theories, relies upon the participatory nature of democracy.

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31) JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 25 (Willmoore Kendall ed. & trans., 1954).

32) For a discussion on the effect of proceduralism upon legislative deliberation that is succinct yet on point, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 78-81 (Foundation Press, 2000).

3) Participation and Interest Representation as Legitimating Factors in Lawmaking

Proceduralism and functionalism discussed in the preceding paragraphs should not be seen as mutually exclusive. Ultimately, in one sense, with respect to the democratic legitimacy of law promulgated by the legislature, both proceduralism and functionalism are procedural or process-based theories of legitimacy. That is, although the goals of each theory are different, the theories share a focus on the decisionmaking processes used to reach those goals. Functionalism cares about outcome or the substantive quality of government decisions including lawmaking, however, only in a general sense. Functionalism does not assess the democratic legitimacy of a particular decision or statute by asking whether the substantive outcome of that decision is good or bad. Such teleological assessment is the project of moral theories. Rather, functionalism, like proceduralism, measures the democratic legitimacy of a particular decision according to the process that was used to produce it, in the sense that a functionalist democrat would consider a law produced by representatives in a deliberative body who have been elected by universal suffrage at the regularly held election to be a democratically legitimate law. Functionalism, like proceduralism, is thus concerned with whether the processes of decisionmaking are legitimate. Its difference from proceduralism lies in the reasons why it believes a certain kind of process to be legitimate, that is, reasons having to do with the quality of the decisions or statutes which that kind of process tends to produce.

Thus, both proceduralist and functionalist theories of democracy, especially with respect to the legitimacy of law and lawmaking, value the individuals' participation in government, and see the participation of the governed in lawmaking as the core value animating democratic legitimacy of law. Proceduralists value participation for its own sake, holding that the ability of the governed to participate in government decisionmaking gives expression to fundamental values or serves important ends. Functionalists value participation because they believe that a participatory process of decisionmaking generates decisions that are substantively better than those that would be generated by a process of decisionmaking by fiat. Yet, in a system of representative government just like the one we have in the Republic of Korea, most citizens participate in the government by voting for representatives who then convene and make laws for common good and interest, not legally bound by the

particular wishes of the constituents constituting their own regional districts.[33] How does this square with the emphasis placed by both proceduralist and functionalist strains of democratic theory upon participatory government?

In representative democracy, the principle of participation is implemented by proxy. The values served by participation in this sense are preserved by the fact that everyone may participate in deciding who will represent them and in replacing those people if they do not represent well. From a proceduralist standpoint, legitimacy of law and the legislation in a system of representative democracy is achieved in part because citizens have the ability to freely choose their legislators and to replace them periodically by holding elections. This mechanism of electoral control provides an incentive for legislators to act in accordance with citizens' wishes to enact the sorts of laws that citizens want enacted. It is a matter of continuing controversy whether legislative representatives should be guided primarily by the preferences or wishes of their constituents, by the best interest of their constituents as judged by the representatives, by the good of the nation as a whole, or by some combination of these standards. Regardless of how elected representatives ideally should act on behalf of their constituents, however, the democratic system of electoral control ensures that the people have the ability to replace legislators.[34] This fact of electoral control means that the laws produced by the elected legislators can be said to have been created through a system of citizen participation. Such electoral coercion is important on a functionalist view as well, in that functionalism, like proceduralism, relies upon a close correspondence between the actions of the legislative representatives and the viewpoints and interests of their constituents.

Besides electoral control, another important, related aspect of representative democracy that allows the electorate to control or consent to legislation is the representation of the interests, or the interest representation through interest congruity between the representatives and their constituents. Part of the point of democratically electing legislative representatives is not simply to provide an

33) Article 46 of the Constitution and Sections 24 and 114-2 of the National Assembly Act of the Republic of Korea particularly pertain to this aspect of the nature of the representation and the status of the representatives in the Republic of Korea.

34) The Constitutional Court of the Republic of Korea has also consistently underscored this aspect of the election in, for examples, the following decisions: 16-1 KCCR 468, 2002 Hun-Ma 411, March 25, 2004; 14-1 KCCR 211, 2000 Hun-Ma 283, March 28, 2002; 7-1 KCCR 722, 91 Hun-Ma 67, May 25, 1995; and 4-2 KCCR 15, 93 Hun-Ga 4, July 29, 1994.

incentive for them to act in ways the constituents find satisfactory and to replace them if they fail to do so, but also to allow people to elect representatives likely to look out for their constituents' interests even aside from the coercive force of the polls.[35] Thus, the idea of interest representation in this sense is incorporated within a proceduralist theory of democracy. The idea of interest representation reflects a faith not only in the power of electoral coercion, but also in the power of electoral affinity.

In this regard of interest representation, it should be noted that a crucial difference between proceduralist and functionalist theories of democracy is that functionalist theories require the legislators at critical moments to exercise their own independent judgement, at least partially unfettered by the expressed wishes of their constituents. This is necessary to actuate the deliberation component of deliberative democracy, as legislators strictly bound by the wishes of their constituents cannot engage in the process of negotiation, compromise and persuasion required to produce reasoned legislation. Functionalist theories of democracy thus require that a legislator, while representing the distinct interests and viewpoints that comprise the particular contribution of her or his constituents, to act as her or his constituents would act if presented with all of the information and opposing arguments available to the legislator. A legislator, who is similarly situated to her or his constituents sharing a body of common interests with them, can strike a balance between responsiveness and independence. To the functionalist defender of democracy, the interest representative in this sense is thus close to the ideal legislator, as such a legislator brings to the legislative process both a commitment to the distinct interests of her or his constituency and an openness to persuasion, reason and compromise during the deliberation process.

2. Democratic Legitimacy of the Legislative Function of the Constitutionality Review over the Statute conducted by the Constitutional Court

Whether we view democratic legislation by the legislature from a proceduralist or from a functionalist angle, such lawmaking is legitimatized because it is legislation by participation rather than by fiat, and it is legislation where interests of the

35) On this point, refer to, inter alia, Article 46 of the Constitution and Sections 24 and 114-2 of the National Assembly Act of the Republic of Korea.

constituents are represented. Compared with democratic lawmaking in the National Assembly, we tend to characterize the functionally and normatively adjudicative lawmaking or the legislative function of the constitutional adjudication in particular as nonparticipatory and thus nondemocratic. Thus, we tend to look elsewhere to justify the latter than democratic legitimacy. The result is an uneasy tension between institutions such as the legislation by the National Assembly, judicial interpretation of the statutes by various courts, and the constitutionality review over the statutes by the Constitutional Court.[36)]

However, this approach might ignore two of the features that would help us understand the legislative function of the constitutional adjudication in light of the similar sort of legitimacy to a significant degree present in the legislation by the National Assembly. The first is that the decisions reached through the constitutional adjudication are to a great extent the products not of the unilateral decree of a panel of justices, but rather of a process of participation and debates among the parties to the case, especially in those cases triggered by constitutional complaints, which may restrict the decisional options available to the Constitutional Court. The second feature is that the prospectively binding nature of the outcome of the constitutionality review as constitutional adjudication is tied to the degree in which the parties and institutions who participated in the creation of those rules represented the interests and rights of those who will be bound by them. In this sense, the parties to precedential cases thus can be said to serve as interest representatives of potential subsequent litigants in a similar way that we expect the elected legislators to serve as

36) Although discussed in a wider context than the one adopted in this article, John Hart Ely's perception of the role of the judicial review provides an invaluably pertinent insight in understanding the relationship between the legislation and the constitutionality review over it by an independent constitutional institution, in terms of democratic as well as constitutional justification of the normatively legislative function of the constitutionality review over the statute that was enacted in a democratic fashion. Ely argues that the most defensible approach for judicial review in a democratic society is a representation-reinforcing role. This approach to judicial review is an "antitrust" as opposed to a regulatory orientation. Rather than dictate substantive results, it intervenes only when the "market," i.e., the political market, is systematically malfunctioning. According to Ely, the political market is failing, and therefore "undeserving of trust, when (i) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (ii) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102-103 (Harvard University, 1980).

interest representatives of their constituents.[37)]

Statutes — and, in this regard, also the Constitution — as commands of a sovereign, seem to demand a process of making particular decisions within their purview that is concrete and unchanging. However, statutes — and the Constitution in this context as well — are not self-interpreting, and, inevitably, their language presents ambiguities, gaps that must be filled through the process of reasoning that also operates in legislative lawmaking. This process can generate the same conditions of legitimacy in statutory and constitutional cases in constitutional adjudication as in the legislation by the National Assembly: conditions of participatory decisionmaking and interest representation. Viewed through the lens of adjudication as representation, the constitutionality review over a statute by the Constitutional Court might not seem quite so problematic an antithesis to democratic government.

Understanding constitutional adjudication as representation suggests that how to apply the Constitution is something of a democratic choice after all. The implications of this suggestion are double-folded. First, under this view, the constitutionality review by the Constitutional Court is not much susceptible to the politics of particular justices as it might seem, and the constitutional adjudication is not ultimately a matter of rule by judicial fiat. At the same time, understanding the constitutionality review this way shifts the question of the countermajoritarian difficulty to the higher level, as it forces us to face the tension between a supposedly immutable meta-democratic constitution on one hand and a primarily democratic procedure for determining what the Constitution means on the other hand. Then, the trouble is no longer the seemingly apparent anomaly of allowing nonelected justices the power to invalidate majoritarian statutes. Instead, the trouble has become the practice of subjecting the Constitution, which is a document of meta-democratic commitment that supposedly is immune to the vagaries of simply majoritarian democracy, to interpretation by a process that is itself significantly democratic. Adjudication as representation might thus be seen as a challenge to the constitutional supremacy. However, subjecting the Constitution to interpretation through a normatively democratic process of participation by those affected is at least a preferable alternative to interpretation at the unfettered discretion of a panel of

37) On this point, see R.L. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 BOSTON UNIVERSITY LAW REVIEW 807, 816-817 (1977).

justices.

Here, it is useful to note that there are at least a few reasons for which the practices necessary for constructing a democratic sovereign also open up deficits in democratic legitimacy, that is, departures from the sovereign will. First, democratic deficits can arise because the very same procedures needed to generate a sovereign will are open to manipulation and abuse by special interests. These procedures encourage political engagement by requiring deliberation and compromise among both citizens and elected officials. At the popular level, a candidate cannot get elected out of a single-member district unless she or he can persuade a broad coalition of voters, with initially very different preferences, to join together in support of her or his campaign. Also, at the representative level, a legislator cannot enact a bill into law unless she or he can persuade a broad coalition of legislators who may be controlled by different political parties, to join together in support of her or his proposal. Such deliberation and compromise is necessary for democratic sovereignty. However, persons who have no interest in deliberation or compromise, who refuse to engage others politically, can use the same inertial institutions and processes that generally foster coalition building and political engagement to block proposals around which the sovereign will could coalesce under slightly different factual circumstances and institutional arrangements. This is a familiar form of distortion in democratic politics, at both the popular and representative levels.[38)]

In this context, review over the constitutionality of the statute that is performed by the Constitutional Court involves a group of people who seemingly enjoy no democratic legitimacy — certainly no democratic legitimacy to impose their preferences on citizens generally — but who nevertheless thwart the policies of democratic branches of government. This type of constitutionality review, after all, invalidates democratically enacted laws. Here, the liberal defense against charges that judicial review is antidemocratic proposes that constitutionality review enforces

38) To predicate in a more specific fashion, at the popular level, a well-organized faction of citizens that requires candidates to see some issue its way as a condition of its support can, if the balance of allegiance among the remaining citizenry renders the faction's support essential to electoral success, control policy on this issue and in effect remove it from democratic deliberation. At the representative level, a determined faction that gains control of a key legislative committee or sub-committee can similarly impose its preferences without regard to the preferences of others, in a way that once again removes issues from democratic deliberation. Democratic deficits that arise when special interests subvert the democratic process are practically important as they plague republican theories of democracy that raise the democratic process itself into a condition of democratic authority.

the limits of democratic authority against overreaching by the democratic branches of government. Constitutionality review of this type thus prevents the political branches of government from imposing illiberal policies, specifically from violating fundamental rights to equal treatment and to individual liberties, in ways that they have no legitimate authority to do.

As Dworkin says, on this theory, the practice of constitutionality review of this type "assumes that the majority has no right to act unjustly, to abuse the power it holds by serving its own interests at the expense of a minority's rights."[39] Dworkin states: "[J]udicial review rests on a qualification to the principle of majority rule — the qualification that the majority can be forced to be just, against its will."[40] Thus, the liberal theory in principle justifies constitutionality review of all matters that invoke liberal ideals of equality and liberty,[41] and places the Constitutional Court in a competitive rather than a cooperative relationship with the more straightforwardly democratic branches of government. Yet, it should also be noted that, if a subject is suited to adjudicative resolution on the liberal view, then it must involve fundamental rights, in which case it is beyond the authority of democratic politics.

An alternative theory of democratic legitimacy of the constitutionality review conducted by the Constitutional Court over the statute enacted by the legislature observes that, because a statute is hard to revise once it is passed, laws that are governing us would not and could not be enacted today, and that some of these laws not only could not be reenacted but also do not fit within our whole legal landscape. It observes, in other words, that, the statute may, and on some occasions inevitably does, suffer democratic deficits of the very sorts that the republican account of democratic sovereignty articulates, and that constitutionality review over this type of statutes can help address these democratic deficits, not by irreversibly striking down such laws and replacing them with the alternatives approvable by the Constitutional Court, which would repeat the failures of the liberal view, but rather by triggering the democratic engagement that the status quo lacks, by intervening in the political process in ways that induce the legislature to reconsider statutes that are out of date, out of phase, or ill-adapted to the legal topography.[42] This democratic approach to

39) RONALD DWORKIN, A MATTER OF PRINCIPLE 111 (reprint edition, Harvard University Press, 1986).

40) *Id.*

41) RONALD DWORKIN, SOVEREIGN VIRTUE, *supra* note 12, at 204.

42) On this view, see generally ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (Belknap Press, 1992).

constitutionality review over statute therefore avoids the claims that cast doubt on the liberal view. Its account of the consequences of constitutionality review over statute that there should be a reciprocal act between the Constitutional Court and the National Assembly all in the service of democratic engagement avoids the implication that the Constitutional Court should take over entirely any area of law that it touches. Thus, the democratic theory places constitutionality review over statutes by the Constitutional Court inside rather than outside the democratic political process and casts it as completing rather than limiting democracy.

III. Closing Remarks: Constitutional Ramifications of the Legislative Function of the Constitutionality Review by the Constitutional Court

As discussed in the preceding paragraphs, the constitutional adjudication conducted by the Constitutional Court should and may by its nature be justified in terms of democratic as well as constitutional legitimacy. The mandates of the Constitution is the intentions and wishes of the sovereign constituents, thus the constitutional adjudication as a means to confirm and implement such should be justified based upon the people in the entirety, reflecting diverse perspectives and values. As long as we adopt a system of constitutionality review by an independent constitutional institution, such as the Constitutional Court in the South Korean case, it is unavoidable that in certain circumstances the Constitutional Court holds a statute or its provisions unconstitutional, notwithstanding the fact that such statute or statutory provisions are the outcome produced through ample deliberation by the National Assembly, the legislature, including the conformity to the Constitution thereof along adequate legislative proceedings. In these cases, the constitutional interpretation by the National Assembly in a sense clashes with the constitutional interpretation by the Constitutional Court.

At the same time, as far as the Constitution adopts the system of constitutional adjudication by the independent constitutional institution of the Constitutional Court, the interpretation of the Constitution by the Constitutional Court is final with its binding force, and the interpretation of the Constitution by the National Assembly involved during the legislative process may not preempt that performed by the Constitutional Court in the constitutional adjudication. Yet, the question of whether

or not or just how far the Constitutional Court's decision of unconstitutionality binds the legislative power of the National Assembly remains as an open question.[43] At least, should the Constitutional Court lack democratic legitimacy, the notion of constitutionalism standing alone would not be persuasive as the ground for justifying the priority of the Constitutional Court's interpretation of the Constitution over that of the National Assembly with strong democratic legitimacy, in light of the principles of democracy or sovereignty of the people. Constitutionalism serves as the primary justifying factor for the constitutional adjudication by a separate constitutional institution independent of the legislative body, yet, at the same time, this entire enterprise has its core existential value precisely because it functions in and for democracy.

Considering such legislative function of the constitutionality review conducted by the Constitutional Court and the relationship between the National Assembly and the Constitutional Court involved therein, it becomes an urgent request to secure a normative ground for democratic legitimacy of the constitutional adjudication. At the same time, however, it is important to note that such a nature from a functionalist perspective is not a free pass to politicize the constitutional adjudication by de-judicializing the constitutional adjudication. The legislative nature and function of the constitutionality review over the statute conducted by the independent constitutional institution of the Constitutional Court should not be overly emphasized to the extent that it enshrines the Constitutional Court as an overarching legislator, thereby stifling democracy by replacing the democratically constituted National Assembly with the Constitutional Court. More than anything else, it should be noted that even when the constitutional adjudication reviewing the constitutionality of the statute assumes the normatively legislative function, the constitutional adjudication still primarily serves the judicial function by way of adjudicative forum.

Under the traditional notion of a government ruled by the law prior to the advent of the constitutional law as the highest law of the nation, such a notion of a law-governed nation was based upon the superiority of the enacted law or the legislative body over the executive power, and the lawmaking power of the legislature played

43) On this issue, there have been ample discussions since the reestablishment of the Constitutional Court in the Republic of Korea in 1988. See, for example, Bok-Hyeon Nam, *The Limited Unconstitutionality Decision and Its Binding Force*, 14 LAW AND SOCIETY 115 (1997) (available only in Korean); and Jae-Hwang Chung, *The Limited Unconstitutionality Decision by the Constitutional Court*, 3 LAW AND SOCIETY 27 (1990) (available only in Korean).

the most significant part in the adequate and permissible act of the government. As a corollary, the execution of and the adjudication under such enacted laws were bound by the legislation within such lawmaking power of the legislature. However, as the values concerning the rights and the liberty under the concept of natural law have gradually become guaranteed in and under the written constitution, the conventional standoff between the natural right and the positive right has incrementally disappeared, thereby subjecting the notion of parliamentary or legislative sovereignty to the notion of constitutionalism. Thus, the legislators are bound by the constitutional law and the constitutional law stands as the highest norm in the structure of the law of a nation. This nature of the constitutional law as the highest positive law of a nation has in turn established the superiority of the constitutional law, and the modern states have turned from the nations ruled by parliamentary laws to the nations governed by the constitutional law.

Under the notion of constitutional state, the Constitutional Court or its equivalent institution thereby binds and controls the exercise of the legislative power by the legislature. The Constitutional Court, as a result, indirectly assumes at least part of the substantive role of the legislator, through adjudication over the constitutionality of the statute enacted by the legislative body. Yet, again, this does not mean that the Constitutional Court may or should be substituted for the legislature in the name of a constitutional state. Constitutional law even in a constitutional state remains to function as the norm that sets the boundaries and the limits of the governmental powers and ordains and declares the fundamental rights of the people. Constitutional law as such remains to be incomplete, abstract and open and is subject to the construction, thereby enabling the community it binds to adapt itself to the changing conditions and circumstances, while establishing a more specific legal order under the mandates of the constitution is primarily left for the legislature that is endowed with democratic legitimacy. This assigns the Constitutional Court and the National Assembly unique functions and arenas respectively, also in the mechanism of constitutional adjudication as a whole. Should the Constitutional Court discern and determine unilaterally and unequivocally the precise content and meaning of the Constitution disregarding the characteristics of the Constitution as the highest and abstract norm, the Constitution would lose its vitality from its openness and abstractness, while, at the same time, such an institutional design would deprive the legislature of its legislative formative power thus subduing the National Assembly under the Constitutional Court.

Notwithstanding the legislative nature of the constitutional adjudication over the constitutionality of the statute, the National Assembly is to be guaranteed therefore, to retain and exercise the legislative formative power, and the control over legislation through the constitutional adjudication should be restricted within the limits of the legislative formative power of the National Assembly. Here, it should also be noted that the legislative formative power of the legislature and its limits are not set by the decisions of the Constitutional Court, but, instead, are grounded upon and determined by the nature of the matter that has become the object of the legislation, within the purview of the constitutional law.[44] Thus, despite the legislative nature of the constitutional adjudication, its limits are clear, and such delineation to a certain extent imbues life into the notions of people's sovereignty and democracy, and also enables the mechanism of democratic legitimacy of the acts of the nation to properly function. The relationship between the constitutional adjudication by the Constitutional Court and the legislative power of the National Assembly understood as such may serve consistently and effectively when faced with more specific challenges pertaining to, for examples, the extent of the binding power of the unconstitutionality decision of the Constitutional Court over the National Assembly in its legislation on the identical or relevant matters, the appropriate balance between the independent constitutional institutions or governmental branches including the matter of judicial activism and self-restraint, the permissibility of special forms of decisions in the constitutionality review by the Constitutional Court over the statute such as limited constitutionality or limited unconstitutionality decisions, and the extent of their binding force over the National Assembly's legislation.

Ultimately, the proper role and institutionally permitted powers of the National Assembly and the Constitutional Court in their functionally legislative role should be understood both as and in the context of the process in which the Constitution adjusts and harmonizes the society's diverse and multifaceted interests, perspectives and positions.[45] Constitutionalism that permits, adopts and implements a pluralist allocation of powers for legislation seeks to represent diverse interests, wishes and positions through legislation. The concern of the Constitution lies in the possibility of extracting an agreement out of such diversified interests, wishes and positions, which may be deemed to be legitimate therefore persuasive even by the dissenters. In this

44) JONG-SUP CHONG, *supra* note 5, at 13.

45) This view is also presented by Jin-Wan Park, *supra* note 7, at 75, 82.

process, the primary role of the National Assembly is to take initiatives in recognizing diverse political segments and powers within the community from a pluralist perspective and to determine whether to set for procedures by law to adjust their interests, wishes and positions, whereas the primary role of the Constitutional Court is to review and assess whether the outcome of such adjustment by the legislature is justified by and under the Constitution.[46] Thus, ultimately, discussions over the legislative function of the constitutional adjudication and the relationship between the constitutional institutions engaged in this process should be analyzed in the context of the implementation of the Constitution. Among different characteristics and functions of the constitutional law, its nature as the outcome of political compromises is implemented by and through the National Assembly as the legislature, while its nature as the regulatory norms is implemented by and through the constitutional adjudication conducted by the Constitutional Court, under the structural design of the Constitution of the Republic of Korea. What is the basic premise and the ultimate goal at the same time is that the National Assembly and the Constitutional Court are both bound by the constitutional law of the Republic of Korea.

KEY WORDS: Constitutional Adjudication, Constitutionality Review over the Statute, Legislative Function of the Constitutional Adjudication, Legislative Function of the Constitutionality Review over the Statute, Relationship between the National Assembly and the Constitutional Court in Legislation

46) For an analysis in this context of the perception upon the legitimacy of the decisions rendered by the Constitutional Court, with a focus on the perception held by the members of the National Assembly, see Jong Ik Chon, *Perception of Legitimacy of the Constitutional Court Decisions*, 19 LAW AND SOCIETY 213 (2000) (available only in Korean).