

Decision of the Korean Constitutional Court of Nonconformity of Statute with the Constitution and the Subsequent National Assembly Legislative Process in Korea's Constitutional Democracy*

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Abstract

The decision of nonconformity of the statute with the Constitution is a type of decision rendered by the Korean Constitutional Court, notwithstanding the silence of the Constitutional Court Act of Korea pertaining to such type of decision or the ground therefor. The Constitutional Court, by way of nonconformity decision, holds that the statutory provision at issue is not in conformity with the Constitution, without directly holding that the statutory provision is outright unconstitutional to become null and void upon issuance of the decision, out of deference to the lawmaking authority of National Assembly and, in certain situations, for the stability of law in its application. The holding of nonconformity decision of the Korean Constitutional Court varies in that the Constitutional Court either simply declares the nonconformity of the statutory provision with the Constitution, or renders the statutory provision at issue to be tentatively applicable through a designated date then lose effect, or yet stays the application of the statutory provision through a designated date with the possibility of its losing effect on a specific date should National Assembly fail to revise the statute by the time limit. The Korean Constitutional Court's nonconformity decision likewise urges National Assembly to revise the relevant statute in accordance with its holding and the stated grounds therefor often with designated time limit, shifting the burden to timely remove the declared unconstitutionality of the statute onto National Assembly. Whether and to which extent such recommendation or urging by the Constitutional Court to revise the statute binds National Assembly has yet to be determined and established, with such ensuing normative and institutional issues as the nonconformity decision's binding effect and retroactivity. A particularly complex challenge is observed in the case of National Assembly's failure to meet the designated time limit, although National Assembly has revised the relevant statutes in over 95% of such instances through the end of the session of the 20th National Assembly (2016-2020). The Korean Constitutional Court tends to render nonconformity decision primarily for the violation of constitutional principle of equality and for the failure to satisfy the individual

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constitutional provision's mandate or delegation to enact a statute, when the Constitutional Court deems that nonconformity decision is appropriate considering the totality of the relevant circumstances from the balancing point of view that the immediate nullification and removal of the statutory provision might cause "legal vacuum" leading to instability and undue confusion among relevant parties and the public, or that a decision of simple unconstitutionality might not appropriately or effectively remedy the unconstitutionality due to the unclear distinction between constitutionality and unconstitutionality. The Constitutional Court in nonconformity decision defers to National Assembly's lawmaking authority for further legislative alternatives in removing the unconstitutionality. The normative legislative function assumed by the Constitutional Court in its adjudication over the constitutionality of statute requests in turn that the Constitutional Court and its adjudication secure democratic legitimacy as well as constitutional legitimacy in its organization, function, procedure and substantive outcome. The Constitutional Court and National Assembly implement the Constitution of Korea as such in Korea's constitutional democracy by assuming respective functions in larger legislative process providing for and regulating the rights and obligations of the constituents. As such, nonconformity decision concerns the issue of and for the separation of powers in Korea's Constitution and constitutional democracy. In this vein, suggestions can be made both on normative and institutional planes to substantiate the "constitutional dialogues" or interactions between Korea's constitutional institutions for more substantiated and coordinated implementation of the Constitution along this process. Certain core relevant concepts and procedures such as the binding effect of nonconformity decision, the retroactive effect of nonconformity decision, the effect of the statute held to be not in conformity with the Constitution should National Assembly fail to meet the time limit for legislative revision as designated by the Constitutional Court in nonconformity decision, and fine-tuning of the ensuing National Assembly legislative process for statutory revision recommended by the Constitutional Court's nonconformity decision to introduce, for example, a separate calendar with automatically and regularly held expedited proceedings should be analyzed and integrated into the process of institutional interactions in a concerted way, for the implementation of the Constitution of Korea ultimately for more substantiated protection of constitutional rights.

KEYWORDS: Decision of Nonconformity of Statute with the Constitution, Constitutional Adjudication, Constitutional Court, National Assembly Legislative Process, Constitutional Dialogue

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I. Constitutional Adjudication in Korea's Constitutional Democracy and the Constitutional Court's Decision of Nonconformity with the Constitution

1. Constitutional Adjudication in Korea's Constitutional Democracy

1) Constitutional Political History of the Republic of Korea as the Context of Analysis

The Republic of Korea has sought its unique trajectory of constitutional democracy since the establishment of the Constitution of the Republic of Korea of 1948,¹⁾ the nation's inaugural constitution for a constitutional democracy and the republican form of government.²⁾ The nation in its earlier history of constitutional democracy experienced the government-led rapid economic growth with the establishment of infrastructure and large-scale investment in business sectors and technology, while recovering from

1) For a constitutional-political account with analytical perspectives of the history and process of establishing and developing Korea's Constitution, republican form of government and constitutional adjudication, refer to, *e.g.*, Constitutional Court of the Republic of Korea, THIRTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA (1988-2018) (2018); Presidential Comm. for Commemoration of One-Hundredth Year of March 1, 1919 Indep. Movement and the Interim Gov't of Korea, FROM MARCH 1, 1919 INDEPENDENCE MOVEMENT TO CANDLELIGHT REVOLUTION OF 2016-2017, INTERIM GOVERNMENT TO UNIFIED KOREAN PENINSULA (2019) (In Korean).; and Laurent Mayali & John Yoo (eds.), CURRENT ISSUES IN KOREAN LAW (2016).

2) Since the inaugural Constitution of the Republic of Korea was established in July of 1948, the Korean Constitution has been revised nine times, in 1952, 1954, June and November of 1960, 1962, 1969, 1972, 1980 and 1987. The constitutional revisions were often triggered by the intention to change the election system and the terms of office applicable to the then-incumbent President, yet the revisions incrementally proceeded in the direction of expanding fundamental rights protection. The most recent constitutional revision in 1987 that established the current 1988 Constitution introduced, inter alia, the institution of constitutional adjudication to be conducted by the Constitutional Court, vesting in the Constitutional Court the authority to review the constitutionality of the statute upon the motion of the judicial court either sua sponte or on the motion of the parties to the underlying lawsuit at judicial court (with the possibility of constitutional complaint to be filed by the parties to the underlying lawsuit with the Constitutional Court upon denial of the parties' motion by the judicial court), thereby setting forth intricate institutional and jurisdictional relationship and balance in the constitutionality review mechanism between judicial court and the Constitutional Court, which in turn pertains to the lawmaking function and authority of National Assembly.

the Korean War (1950-1953). On the other hand, Korea experienced a lapse in the substantiated protection of individual rights, diversity, socio-economic welfare and equality, and procedural fairness. The accumulated demand for democratization and for the rule of law epitomized by the request for direct election of the president³⁾ and ultimately for further civil rights protection and due process of law became salient in the June 1987 citizen movement, which enabled the ninth and most recent constitutional revision in 1987. The current constitution thereby established, i.e., the Constitution of the Sixth Republic of Korea, came into effect on February 25, 1988.

The 1988 Constitution, also referred to as the 1987 Constitution,⁴⁾ have witnessed democratic and peaceful transitions of regimes for over thirty years by now, while having served as the foundation for further democratization of the nation's political process both in substantive and procedural senses, for more substantial and substantive protection of fundamental rights, for the substantiation of market principles as balanced with social and economic justice, and for the incremental introduction and implementation of local autonomy and participatory democracy. The globalization and ensuing diversification have further influenced Korea's democratization process by raising the standards on, most notably, human rights protection and the guarantee of political rights encompassing freedom of expression.

2) *Constitutional Adjudication by the Constitutional Court in Korea*

The citizen democratization movement in Korea epitomized by the June 1987 citizen movement triggered Korea's most recent constitutional revision in 1987, which established the 1988 Constitution. The 1988

3) Korea provided for direct presidential election in its previous Constitution of the 3rd Republic of Korea. Then Korea underwent an approximately 15-year period of indirect presidential elections. Prior to the 1987 constitutional revision, the "indirect 'electoral college' process was generally regarded to be short of representing the will of the constituents." See James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 HARV. HUM. RTS. Y.B. 135 (1988).

4) The current Korean Constitution is interchangeably referred to as the '1987 Constitution' based on its year of revision process, and the '1988 Constitution' based on the year it came into effect.

Constitution re-adopted the direct election of the President, normalized the separation of powers structure among the branches of the government largely by empowering National Assembly in its legislative and auditing authorities and reducing the powers of the President such as the presidential power to dissolve National Assembly, introduced the institution of constitutional adjudication conducted by the Constitutional Court by newly establishing the Constitutional Court, revived the local autonomy under the local government system, and expanded the guarantee of the fundamental rights including the freedom of expression and other political rights.⁵⁾ Under the current Constitution of the Republic of Korea (1988-present), the nation's rule of law and democracy have been advanced, stabilized and maturing. Under the current Korean Constitution, the Constitutional Court is set forth to function as an independent constitutional institution with the authority to review the constitutionality of the statute, to resolve disputes among government institutions over respective functions and authorities, to dissolve political party, to impeach public officials including the President of the nation and the judges, and to decide on constitutional complaints filed by private parties. At local government level, the local governments have grown to have more autonomy in making policies and laws and have more proactively introduced direct participatory measures in ordinance-making

5) The 1988 Constitution of Korea re-instituted the direct presidential election system, and set forth the terms of the presidential office as a nonrenewable five-year term. The ninth constitutional revision also considerably expanded the degree and the purview of protection of fundamental rights, while adopting the general statutory reservation for restrictions on fundamental rights. To further note certain major elements of the 1988 Constitution relevant to the institution of the constitutional adjudication discussed in this paper, under the current Constitution, the authority and the function of the legislative branch have been substantiated to a considerable extent, particularly in its relationship to the executive branch. Under the 1988 Constitution, the President may no longer dissolve National Assembly, while National Assembly is newly vested with the authority for annual general audit with the preexisting authority for parliamentary inspection on particular matters of government. The independence of the judiciary on both institutional and functional planes has been maintained throughout Korea's constitutional political history, with the 1988 Constitution's addition of yet another layer of dimension to its relationship with the Constitutional Court, National Assembly and the government, in the intricate mechanism of constitutionality review over the statute.

procedures.⁶⁾

The 1987 constitutional revision made changes into the Korean Constitution most notably in four main areas: (1) democratization, (2) normalization of the relationship between the President and the legislature, (3) protection of fundamental rights, and (4) constitutional adjudication. First, the 1987 constitutional revision reintroduced direct election of the President⁷⁾ and limited presidency to a single nonrenewable five-year term.⁸⁾ The constitutional revision also advanced citizen participation in other realms of governance. For example, it incorporated public hearings and legislative consent into the government appointment processes.⁹⁾ It moved governance closer to local constituencies by restoring local autonomy system with the local governments and assemblies issuing rules and ordinances,¹⁰⁾ vicariously enabling a voter-initiative system for local ordinances and citizen-led recall mechanisms for local public officials.¹¹⁾ Overall, the 1987 revision fostered a culture of public participation in government decision-making, and this constitutional spirit formed the backdrop to Korea's adoption in 2007 of the jury system in criminal proceedings.

The 1987 constitutional revision's second set of reforms reset the balance of power between the executive and legislative branches of government. The Constitution clearly assigns National Assembly, i.e., Korea's legislature, the authority to make statutes, while allowing the government to submit statutory bills and the President to veto.¹²⁾ While government bills previously dominated Korea's statute-making both in volume and in substance, since 1988, National Assembly has manifestly assumed both *de*

6) Refer to the URL of the Constitutional Court of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/jurisdiction/adjuOnConsOfStatutes.do>.

7) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 67 para. 1 (S. Kor.).

8) *Id.* Art. 70 & Art. 128 para. 2.

9) *Id.* Art. 86 para. 1. *See also* Gukoebeob [National Assembly Act], Act No. 38, July 29, 1949, *amended by* Act No. 17066, Feb. 18, 2020, Art. 64 & Art. 65 & Art. 65-2 (S. Kor.).

10) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 117 & Art. 118 (S. Kor.).

11) *Id.* Art. 117 & Art. 118, *see also* Jibangjachebeob [Local Autonomy Act], Act No. 32, July 4, 1959, *amended by* Act No. 16057, Dec. 25, 2019, Art. 15 & Art. 20 (S. Kor.).

12) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 40 & Art. 53 para. 4 (S. Kor.).

jure and *de facto* function of enacting the statute.¹³⁾ The Constitution forbids the President from dissolving National Assembly and makes it more difficult for the President to declare a state of emergency.¹⁴⁾ It also subjects the executive branch to monitoring and auditing by National Assembly.¹⁵⁾ The third transformation introduced by the 1987 constitutional revision occurred in the protection of fundamental rights. The revision expanded the list of rights that are explicitly protected in the constitutional text. For example, a guaranteed minimum wage was introduced as part of the labor and social rights.¹⁶⁾ The spirit of the 1987 constitutional revision has also inspired the legislative protection of rights, such as statutory reforms to further protect freedom of expression.

Constitutional rights became to be substantively implemented and protected due to the fourth major reform embodied in the current Korean Constitution, which was the establishment of the Constitutional Court.¹⁷⁾ The Constitutional Court of Korea has jurisdiction to determine the constitutionality of statute upon the request of judicial court as the court files the request either on the motion of the parties or *sua sponte*.¹⁸⁾ The Constitutional Court also determines, in response to constitutional complaints from citizens, the constitutionality of statute at issue in litigation pending at the judicial court, and the constitutionality of government actions and inactions violating constitutional rights, with the exception of the decisions of the judicial court.¹⁹⁾ The Constitutional Court also has jurisdiction to determine the allocation of powers between various

13) For the legislative statistics of National Assembly indicating this aspect, refer to the URL of National Assembly of Korea at <https://likms.assembly.go.kr/bill/stat/statFinishBillSearch.do>.

14) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 76 & Art. 77 (S. Kor.).

15) *Id.* Art. 61.

16) *Id.* Art. 32 para. 1.

17) *Id.* Art. 111 & Art. 112 & Art. 113.

18) *Id.* Art. 111.

19) *Id.* Due to such institutional arrangement, the Korean Constitutional Court consequentially has limited function in reviewing the constitutionality of administrative action, while the judicial court including the Supreme Court serving as the court of last resort decides most challenges to administrative actions. For a discussion on the Korean Constitutional Court's limited scope of constitutionality review concerning administrative actions, see CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA, *supra* note 1, 150-151.

government bodies and the dissolution of political parties upon request of the government, and to adjudicate upon National Assembly's petition to impeach certain high ranking public officials including the President.²⁰⁾

Under previous constitutional regimes in Korea, tribunals and committees had *de jure* power of constitutionality review, yet those tribunals or committees had virtually no *de facto* power. For example, the Constitutional Council that existed during the *Yushin* constitutional period (1972-1980) was vested with power to review the constitutionality of statutes but failed to exercise such power.²¹⁾ In contrast, the Constitutional Court since 1988 has been proactive in shaping constitutional law of the nation. Over the period of thirty years from September 1988 to August 2018, the Korean Constitutional Court decided 33,796 cases and held an act of government to be unconstitutional in 929 cases, including 589 in which it held a statute unconstitutional.²²⁾ The Korean Constitutional Court has further played an important role in transitional justice. For example, in 1996, it decided a case that permitted the prosecution of two former Presidents whose power stemmed from the 1979 military coup.²³⁾ The Constitutional Court also adjudicated two impeachment cases against incumbent Presidents in 2004 and 2017.²⁴⁾ Whereas the Constitutional Court decided against impeachment of Roh Moo-hyun in 2004,²⁵⁾ it upheld the impeachment of Park Geun-hye in 2017,²⁶⁾ leading to an early presidential election in 2017.²⁷⁾

20) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 111 (S. Kor.).

21) Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 J. COMP. L. 80, 85 (2008).

22) For the most recent statistics through November 2020, refer to the [Table] at the end of this paper. Refer also to the general statistics of the Constitutional Court of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

23) Constitutional Court [Const. Ct.], 96Hun-Ga2, Feb. 16, 1996 (8-1 KCCR, 51) (S. Kor.) (Constitutionality of the Special Act on the May 18 Democratization Movement, etc.).

24) See *infra* notes 25 & 26.

25) Constitutional Court [Const. Ct.], 2004Hun-Na1, May 14, 2004 (16-1 KCCR, 609) (S. Kor.) (Impeachment of President Roh Moo-hyun).

26) Constitutional Court [Const. Ct.], 2016Hun-Na1, Mar. 10, 2017 (29-1 KCCR, 1) (S. Kor.) (Impeachment of President Park Geun-hye).

27) President Park's impeachment was the outcome of several constitutional forces. Korea's constitutional culture of participatory democracy fostered the public's demand for

In more recent history of Korea, the most distinctive aspect in ongoing democratization movement is that most, if not all, of the citizens' demand for rights protection and further democratization is pursued by way of the institutional means of judicial litigations²⁸⁾ and constitutional adjudications, and of citizen law-making movement,²⁹⁾ based upon the proactive public discussions on the relevant issues.³⁰⁾ Ultimately, the ongoing challenge Korea has faced is the constitutional justification and the constitutionalization of principles of rights and justice.³¹⁾ The institution of constitutional adjudication has been playing a central and crucial role in this process, by setting forth the forum and channel for interactions between and among

impeachment, epitomized by the 'Candlelight Assembly' mass protests. That popular mobilization bolstered National Assembly's petition for impeachment in 2016, which led to the Constitutional Court decision of impeachment in 2017. In addition to having an enormous impact within Korea, the Korean Constitutional Court has taken a leadership role in fostering communication among constitutional jurists from different nations.

28) A good indicator of this point is the active use of litigation mechanism and process for minority shareholder derivative rights with the support of NGOs dedicated to cause-lawyering such as People's Solidarity for Participatory Democracy, particularly since 1990s.

29) The institutional aspects of and for such phenomenon include the mechanism and process to exercise the right to petition the government including National Assembly in its statute-making process under DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 26 (S. Kor.), and the voter-initiative mechanism in the process of enacting the local government ordinances under Jibangjachieob [Local Autonomy Act], Act No. 32, Jul. 4, 1959, *amended by* Act No. 16057, Dec. 25, 2019, Art. 15 & Art. 20 (S. Kor.).

30) Such inspiration for making and implementing changes through law and legal process widely shared across Korea came from the respect and trust of the public for the independence and institutional proficiency of the judiciary during the authoritarian regimes in the late 1960s through mid-1980s, and throughout Korea's constitutional political history since the establishment of the Republic of Korea in 1948. This trust was endowed onto the Constitutional Court and the constitutional adjudication to be conducted by the Constitutional Court at the establishment of the Constitutional Court by the current constitution in September 1988. Citizen groups have actively sought legislation of various statutes for the extensive and substantive protection of human rights while pursuing public-cause litigations with the support of cause-lawyering in such contexts as the lawsuits for countering unjustifiable eviction and for the protection and exercise of minority shareholder derivative rights. The Constitutional Court has in turn proactively served its function since 1988. Peaceful regime changes through regularly held public elections since the 1988 Constitution have further encouraged the Korean citizens to trust the law and legal system and thus to seek to express political ideas and to political and social changes by way of law and legal system.

31) *See supra* notes 23, 25 & 26 and accompanying texts.

constitutional institutions of National Assembly, the executive branch, the judicial court and the Constitutional Court. Particularly, the nonconformity decisions rendered by the Constitutional Court on statute's constitutionality with the recommendation for National Assembly statutory revision have served such function of channeling the dialogue between the constitutional institutions for implementation of the Constitution, while revealing the tension between the legislature, the judicial court and the Constitutional Court over the enactment and interpretation of statute concerning the retroactive effect of the nonconformity decision and ensuing legislation including the issue of legislative sequel.³²⁾

2. The Justification for and the Role of the Constitutional Adjudication by the Constitutional Court in Korea's Constitutional Democracy and Separation of Powers Structure

Since September 1988 through November 2020, the Constitutional Court of the Republic of Korea has entertained 41,356 cases including 9,379 cases for the review of constitutionality over the statute.³³⁾ During the period from its establishment on September 1, 1988 to November 30, 2020, the Constitutional Court of Korea heard 1,005 cases for the constitutionality review over the statute, 2 impeachment cases, 2 political party dissolution cases, 115 cases of competence disputes among governmental institutions, and 40,232 constitutional complaint cases; among 40,232 constitutional complaint cases, 31,858 cases were for the redress for the infringement on

32) On this point, refer to Kim, Seon-Taek, *The Role of Constitutional Court in Constitutional Dialogue – Korean Constitutional Justice Review, Is the Third Way Possible?*, 41-1 PUB. L. 33, 38-41 (2013) (S. Kor.).

33) The Constitution of the Sixth Republic of Korea (1988-present), in its Chapter 6 and particularly under Articles 111 to 113, establishes the Constitutional Court as an independent constitutional institution and vests therein the authority and jurisdiction for the adjudication on constitutionality of the statute, impeachment, dissolution of the political party, competence disputes between and among government institutions at national and/or local levels, and constitutional complaint. Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, amended by Act No. 17469, June 9, 2020 (S. Kor.) was enacted by National Assembly under the 1988 Constitution and came into effect on August 5, 1988, which has set forth the organizational matters, the procedures and the operations of the Constitutional Court.

the right due to the action or failure to act on the part of the government, and 8,374 cases were for the constitutionality review over the statute filed by private parties to underlying judicial action upon the judicial court's denial of the party motion for the request of constitutionality review to the Constitutional Court. Out of these cases, the Constitutional Court has held either the relevant statutes or statutory provisions unconstitutional in 777 cases.³⁴⁾ Through such proactive undertaking of its function, Korea's Constitutional Court has played a crucial role in further democratization and substantiation of rule of law and fundamental rights protection in Korea.³⁵⁾ Most notably, the issues discussed and determined by the Constitutional Court are by definition such matters of public nature³⁶⁾ actually and potentially affecting both public and private life of the citizens, from the constitutionality of criminal sanctioning of abortion³⁷⁾ to the dissolution of a political party³⁸⁾ to the impeachment of the nation's President.³⁹⁾ Also, some of the distinctive elements of institutional design pertaining to the Korean Constitutional Court have expedited its contribution to further democratization of Korea's constitutional political process: the visibility due to its relatively small docket size and limited jurisdiction on the value-laden issues, compared with the judiciary, has

34) Refer to the [Table] at the end of this paper. Refer also to the general statistics of the Constitutional Court of the Republic of Korea, at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

35) For an analysis on the contributions of the Constitutional Court to Korea's constitutional democracy as an institution, see, e.g., Kim, Ha-Yurl, *Hanguk heonbeopjaepanjedoui seonggwawa gwaje [The Accomplishments and Tasks of the Constitutional Court of Korea]*, 146(2) THE JUSTICE 94 (2015) (S. Kor.).

36) For an analysis of the legitimate function of the constitutional adjudication based upon the political nature of the constitutional adjudication in this vein, see Hahm Chaihark, *Heonbeopjaepaneui jeongchiseonge daehayeo—"heonbeobjeok daetwa" modereul wihan jeon [On the Political Nature of Constitutional Adjudication – A Proposal for a Dialogic Approach to Constitutionalism –]*, 16(3) KOREAN J. CONST. L. 613 (2010) (S. Kor.).

37) Constitutional Court [Const. Ct.], 2017Hun-Ba127, Apr. 11, 2019, (31-1 KCCR, 404) (S. Kor.) (Criminal Punishment of Abortion) (Criminal Punishment of Abortion).

38) Constitutional Court [Const. Ct.], 2013Hun-Da1, Dec. 19, 2014, (26-2 KCCR, 1) (S. Kor.) (Dissolution of the Unified Progressive Party).

39) Constitutional Court [Const. Ct.], 2004Hun-Na1, May. 14, 2004, (16-1 KCCR, 609) (S. Kor.) (Impeachment of President Roh Moo-hyun); and Constitutional Court [Const. Ct.], 2016Hun-Na1, Mar. 10, 2017, (29-1 KCCR, 1) (S. Kor.) (Impeachment of President Park Geun-hye).

both enabled and mandated many of the core institutional initiatives and reform measures supported by the shared trajectory of democratization based on accessibility, fairness, participation and citizen-monitoring.

At the outset of its operation, the Korean Constitutional Court faced accumulated demand for constitutionality review over the statute enacted under the auspices of the past regimes that had lacked effective institutional means to remedy legislation infringing civil liberties or the President usurping the function of legislation against National Assembly. At its initial phase, the Korean Constitutional Court also faced many cases of constitutional complaint challenging the constitutionality of the prosecutorial decision not to file criminal complaint.⁴⁰⁾ Although the number of cases filed with the Constitutional Court has incrementally increased overall, past the early phase where the Constitutional Court faced the accumulated demand for challenges to the legislation and the government actions, the docket size of the Constitutional Court has rather stabled in more recent years.⁴¹⁾ Also, the function of constitutionality review over the prosecutorial decision not to prosecute was removed to the High Court of the judiciary by the relevant statutory revision,⁴²⁾ thereby significantly relieving the workload of the Constitutional Court.⁴³⁾

With the stabilized docket size with the jurisdictions under which the issues of public concern are proactively discussed and decided, the citizenry and the expert groups have had more visibility and accessibility to monitor and analyze the operation of the Constitutional Court. This has also enabled immediate public responses along the procedures of the Constitutional Court's constitutional adjudication in highly contested cases concerning differing values and positions, concurrently stimulating debates

40) Refer to the [Table] at the end of this paper. Refer also to the general statistics of the Constitutional Court of the Republic of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

41) *Ibid.*

42) Hyongsa sosong beob [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, amended by Act No. 16924, Feb. 4, 2020, Art. 260 & Art. 264 (S. Kor.); Geomchalcheongbeob [Prosecutors' Office Act], Act No. 81, Dec. 20, 1949, amended by Act No. 16908, Feb. 4, 2020, Art. 10 (S. Kor.).

43) Refer to the [Table] at the end of this paper. Refer also to the general statistics of the Constitutional Court of the Republic of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

among the engaged public on diverse media supported by Korea's growingly protective freedom of expression law. Such proactive citizen engagement has been well observed in such cases concerning the traditional male family-head system,⁴⁴⁾ criminal sanctioning of abortion,⁴⁵⁾ adultery⁴⁶⁾ and conscientious objection to mandatory military service,⁴⁷⁾ restriction on night-time outdoor assembly and demonstration,⁴⁸⁾ dissolution of a political party,⁴⁹⁾ and impeachment of the nation's President.⁵⁰⁾ This requires that the qualifications for the justices of the Constitutional Court and their nomination process be closely analyzed in light of the intended purpose of insuring separation of powers and enhancing both constitutional and democratic legitimacy of the Constitutional Court and its decision-making through constitutional interpretation.⁵¹⁾

44) Constitutional Court [Const. Ct.], 2001Hun-Ga9, Feb. 3, 2005 (17-1 KCCR 1) (S. Kor.) (Male House Head ('*Hoju*') System).

45) Constitutional Court [Const. Ct.], 2017Hun-Ba127, Apr. 11, 2019 (31-1 KCCR 404) (S. Kor.) (Criminal Punishment of Abortion).

46) Constitutional Court [Const. Ct.], 2009Hun-Ba17, Feb. 26, 2015 (27-1 KCCR 20) (S. Kor.) (Criminal Punishment of Adultery).

47) Constitutional Court [Const. Ct.], 2011Hun-Ba379, June 28, 2018 (30-1 KCCR 370) (S. Kor.) (Mandatory Military Service with No Available Alternative Service Option for Conscientious Objectors). The Korean Constitutional Court previously addressed the issue of conscientious objection to military service in Constitutional Court [Const. Ct.], 2008Hun-Ga22, Aug. 30, 2011 (23-2 KCCR 174) (S. Kor.).

48) *See* Constitutional Court [Const. Ct.], 2011Hun-Ga29, Apr. 24, 2014 (26-1 KCCR 574) (S. Kor.) and Constitutional Court [Const. Ct.], 2008Hun-Ga25, Sept. 24, 2009 (21-2 KCCR 427) (S. Kor.) (Ban on Night-Time Outdoor Assembly and Demonstration). *See also* Constitutional Court [Const. Ct.], 2013Hun-Ba322, May 31, 2018 (30-1 KCCR 88) (S. Kor.) (Ban on Outdoor Assembly within 100 Meters of National Assembly Building).

49) *See* Constitutional Court [Const. Ct.], 2013Hun-Da1, Dec. 19, 2014 (26-2 KCCR 1) (S. Kor.) (Dissolution of the Unified Progressive Party).

50) Constitutional Court [Const. Ct.], 2004Hun-Na1, May 14, 2004 (16-1 KCCR 609) (S. Kor.) (Impeachment of President Roh Moo-hyun); and Constitutional Court [Const. Ct.], 2016Hun-Na1, Mar. 10, 2017 (29-1 KCCR 1) (S. Kor.) (Impeachment of President Park Geun-hye).

51) The Constitutional Court of Korea consists of nine justices, including the President of the Constitutional Court (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 111 para. 2 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 3 & Art. 12 para. 1 (S. Kor.)). All justices are appointed by the President of the Republic of Korea (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 111 para. 2 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act],

This issue lies at the core of the justified function of the Constitutional Court and its limits by way of the functions of other constitutional institutions most importantly including National Assembly's statute-making authority, for the implementation of the Constitution.⁵²⁾ The Court's

Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 6 para. 1 (S. Kor.)). However, of the nine justices, while three are directly nominated and appointed by the President of the Republic of Korea, three are elected by National Assembly and then appointed by the nation's President, and the last three are designated by the Chief Justice of the Supreme Court and then appointed by the nation's President (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 111 paras. 2 & 3 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 6 para. 1 (S. Kor.)). The President of the Constitutional Court is appointed among the justices of the Constitutional Court by the nation's President, subject to the appointment hearing and then the consent of National Assembly (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 111 para. 4 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 6 para. 2 & Art. 12 para. 2 (S. Kor.)). The justices serve a renewable six-year term of office (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 112 para. 1 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 7 para. 1 (S. Kor.)), during which they may not be involuntarily removed from office other than for the reasons enumerated in the Constitution and the Constitutional Court Act, which are the impeachment and the criminal conviction with the sentence of imprisonment without labor or severer sentence (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 112 para. 3 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 8 (S. Kor.)). Age limits of seventy years of age for the President of the Constitutional Court and sixty-five for other justices also apply (Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 7 para. 2 (S. Kor.)). Justices are prohibited from having political party membership or participating in political activities (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 112 para. 2 (S. Kor.); Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, *amended by* Act No. 17469, June 9, 2020, Art. 9 (S. Kor.)). In March 2018, President Moon submitted his administration's constitutional revision bill to National Assembly on, among other issues, the mechanism of appointing the justices of the Constitutional Court, although President Moon's constitutional revision bill of 2018 was aborted in National Assembly. For a research analyzing the democratic legitimacy of the Korean Constitutional Court in its functional, institutional, organizational, substantive and supplemental aspects, see Heo, Wan-Jung, *Demokratische Legitimation des Verfassungsgerichts*, 18(3) KOREAN J. CONST. L. 559 (2012) (S. Kor.) (available in the Korean language with the abstract in German).

52) For an analysis of the relationship between the Constitutional Court and National Assembly in light of justification for the Constitutional Court's authority and function as part of legislative process in larger context, see Zin-Wan Park, *Heonbeobjaepansowa gukeowaeui gwangye-gyubeombanbokgeumji* – [Relationship between the Constitutional Court and the National Assembly – Ban on Legislative Sequel –], 11(2) KOREAN J. CONST. L. 75, 81-83 (2005) (S. Kor.).

visibility due to relatively small docket size and its jurisdiction limited to political and value-laden issues have also enabled a more proactive introduction and implementation of institutional initiatives and reforms. Such examples include the mandatory representation by licensed attorney with the state-appointed counsel system in all cases of the Constitutional Court when a party is a private person as opposed to government institution,⁵³⁾ and the proactive use of expert testimonies and briefs by the Constitutional Court. At institutional level, the Constitutional Court has taken its constitutionally vested function seriously and proactively, all the more because of the tension and competition with the judicial court.⁵⁴⁾

The unique institutional designs under the current Korean Constitution that actively involves the executive branch in National Assembly's legislative process and also mandatorily engages the judicial court in the Constitutional Court's constitutionality review over statute⁵⁵⁾ add more depth and complexity in such institutional interactions between and among the constitutional actors pertaining to the nonconformity decision rendered by the Constitutional Court as the constitutional remedy in Korea. The above features and situations together explain the distinctive aspects of the Korean Constitutional Court in its interactions with the judicial court particularly in its nonconformity decisions that also concern National

53) Heonbeobjaepansobeob [Constitutional Court Act], Act No. 4017, Sept. 1, 1988, amended by Act No. 17469, June 9, 2020, Art. 25 para. 3 & Art. 70 (S. Kor.).

54) In the system of constitutionality review over the statute in Korea, judicial court serves a pivotal function in asking the Constitutional Court to review the statute's constitutionality, as the judicial court, either on party's motion or on its own motion, is exclusively to file request for constitutionality review over the statutory provision at issue in pending litigation whose constitutionality will materially affect the outcome of the case. The party may file a constitutional complaint with the Constitutional Court for constitutionality review over such statute only upon the judicial court's rejection of party's motion to request the above constitutionality review. Further, the decision of the judicial court is not to be the subject matter of the constitutionality review by the Constitutional Court. For an analysis relevant to this point particularly in the context of the Constitutional Court's decision of nonconformity with the constitution, refer to Cho, So-Young, Heonbeopbulhapchigyeljeonggwa gaeseonipbeobeui hyeonsiljeok munjee gwanhan bipanjeok geomto [A Critical Study on the "Unconformable to Constitution" Decision and a Time Limit for Revision], 14(4) PUB. L. J. 115, 129-130, 135-136 (2013) (S. Kor.).

55) See *supra* note 54. For an analysis of this feature as the judicial courts' decision-making on the constitutionality of the statute at issue, see Song, Ki-Choon, *Beobwoneui heonbeobjaepan* [Constitutional Adjudication By the Court], 15(1) PUB. L. J. 127 (2014) (S. Kor.).

Assembly and the executive branch for ensuing legislation, thus affecting the interactions between and among the constitutional institutions in Korea's constitutional democracy. There is much room to enhance the productivity of such "constitutional dialogue"⁵⁶⁾ in Korea by fine-tuning legal norms and provisions applicable to the legitimacy and the effect of nonconformity decision by Korea's Constitutional Court on one hand, and, on the other hand, by increasing the responsiveness of National Assembly normatively and procedurally by, for examples, statutorily addressing the permissibility of "legislative sequel"⁵⁷⁾ and introducing a corrections calendar with time limit or expedited legislative process to National Assembly for those statutes held unconstitutional, not in conformity with the constitution, or conditionally unconstitutional, by the Constitutional Court, to be followed by ensuing legislative revisions by National Assembly.⁵⁸⁾

56) The expression of "constitutional dialogue" is cited from Mark Tushnet, *Dialogue and Constitutional Duty*, (Harvard Pub. Law Working Paper No. 12-10, 2012) (Available at SSRN: <https://ssrn.com/abstract=2026555>), and used in this paper in the meaning as defined and discussed in the same. For research analyzing the role of the Korean Constitutional Court in the "constitutional dialogue" as understood as such in the Korean context, refer to Yang, Jeong-Yun, *Daehwajeok Sabeobsimsawa Banbogipbeob [Dialogic Judiciary Review and Reiterated Legislation]*, 72 KOREA U. L. REV. 177 (2014) (S. Kor.); and Kim, Seon-Taek Kim, *supra* note 32. For an analysis of the legitimate function of the constitutional adjudication based upon the political nature of the constitutional adjudication in this context, *see* Hahm Chaihark, *supra* note 36.

57) The expression of "legislative sequel" is cited from Mark Tushnet *supra* note 56, and used in this paper in the meaning as defined and discussed in the same. For research analyzing this concept and feature in the Korean context, refer to Yang, Jeong-Yun, *supra* note 56; and Kim, Seon-Taek, *supra* note 32, at 38-41.

58) Further democratization of the organization of the Constitutional Court by expanding or diversifying the qualifications required for the justices of the Constitutional Court, particularly as compared with the corresponding case for judicial court, is crucial in the constitutional interactions in this regard in Korea. The jurisdictional tension between judicial court and the Constitutional Court in Korea under the current Constitution and relevant statutes also plays an important role in this interactions in Korea, and deserves further analysis.

II. Constitutional Court Decision of Nonconformity with the Constitution and Ensuing National Assembly Statutory Revision in Korea's Constitutional Democracy

1. *Relevant Statistics and Patterns Pertaining to the Korean Constitutional Court's Nonconformity Decisions*

During the period from the establishment of the Constitutional Court of Korea in September 1988 through November 2020, the Constitutional Court entertained 9,379 cases (approximately 22.68%) for constitutionality review over the statute, out of 41,356 cases filed with the Constitutional Court during the same period of time.⁵⁹⁾ Among these, in 185 cases, the Constitutional Court held that the statutory provisions at issue were not in conformity with the Constitution.⁶⁰⁾ The decision of nonconformity of the statute with the Constitution rendered by the Korean Constitutional Court is a type of decision of unconstitutionality⁶¹⁾ that the Court has been issuing in practice, notwithstanding the silence of the Constitutional Court Act (Act No. 17469) on such type of decision or the ground therefor. The Korean Constitutional Court, by rendering nonconformity decision, holds that the statutory provision at issue is not in conformity with the Constitution, without directly holding that the statutory provision is outright unconstitutional to immediately become null and void, out of deference for the statute-making authority of National Assembly, although the Constitutional Court has reached the conclusion on the merit that the statute at issue is not constitutional.⁶²⁾ Such nonconformity decision does not immediately deprive the statutory provision at issue of its statutory

59) Refer to the [Table] at the end of this paper. Refer also to the general statistics of the Constitutional Court of the Republic of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

60) *Ibid.*

61) CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA, *supra* note 1, at 96-99, 125-126; Cho, So-Young, *supra* note 54, at 117; and Kim Si-Cheol, *Uri wiheonbeopryulsimpanjedowa heonbeopjaepanso gyeoljeongeui hyoryeok [Adjudication System on the Constitutionality of Statutes and Effects of the Constitutional Court Decisions in Korea]*, 90 THE JUSTICE 5, 49 (2006) (S. Kor.).

62) CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA, *supra* note 1, at 96-9 126.

force, while declaring that the statutory provision does not conform to the Constitution.

The holding of nonconformity decision of the Korean Constitutional Court varies in that the Constitutional Court either simply declares the nonconformity of the statutory provision at issue with the Constitution, or renders the statutory provision to be tentatively applicable through a designated date then lose effect, or yet stays the application of the statutory provision through a designated date with the possibility of its losing effect on a specific date should National Assembly fail to revise the statute by the designated time limit. The Korean Constitutional Court's nonconformity decision likewise urges National Assembly to revise the relevant statute in accordance with its holding and the stated grounds therefor often with designated time limit, shifting the burden to timely remove the declared unconstitutionality of the statute onto National Assembly. Whether and to which extent such recommendation or urging by the Constitutional Court for statutory revision binds National Assembly has yet to be determined and established with such ensuing normative and institutional issues as binding effect and retroactivity with a particularly complex challenge in the case of National Assembly's failure to meet the designated time limit, although National Assembly has revised the relevant statutes in over 95% of such instances through the end of the session of the 20th National Assembly (2016-2020).

The nonconformity decision by the Korean Constitutional Court bears special significance in the legislative process of National Assembly, for the nonconformity decision urges National Assembly to timely revise the relevant statute in accordance with the stated grounds for the holding of nonconformity decision as the decision practically puts a stay on the application of the relevant statutory provision or mandates tentative application of the statutory provision at issue by all constitutional institutions.⁶³⁾ Often in rendering the nonconformity decision either with tentative application or stay of application of the statutory provision at issue, the Korean Constitutional Court recommends or urges National

63) Cho, So-Young, *supra* note 54, at 117; Kim, Ha-Yur, *Heonbeopbulhapchi gyeoljeongui sayuwa hyoryeok* [*The Cause and Effect of Unconformity Judgement*], 128 THE JUSTICE 154 (2012) (S. Kor.).

Assembly to revise the statute to remedy the declared unconstitutionality by a specific date or during a specific period of time, upon passage of such time limit the statutory provision at issue is to lose its statutory effect.⁶⁴⁾ As National Assembly is vested with the plenary authority to enact statute under Article 40 of the Korean Constitution, when a statutory provision is held not to be in conformity with the Constitution by the Constitutional Court, such state of nonconformity may also be removed or remedied by the ensuing revision of the relevant statute by National Assembly, as in all other instances. Whether and to which extent the Constitutional Court's recommendation for statutory revision in accordance with its nonconformity decision binds National Assembly has yet to be determined and established, which becomes more complicated and challenging when National Assembly fails, inadvertently or intentionally, to meet the designated time limit for recommended statutory revision. The Constitutional Court has taken the position that the question of which specific statutory revision to be made by choosing among diverse possible alternative legislative means that may remove the declared

64) Taking the most representative and symbolic example, in its decision rendered in 2009, the Constitutional Court held the statutory provision of *Jibhoe mit siwie gwanhan beobryul* [Assembly and Demonstration Act], Act No. 1245, amended by Act. No. 8424, May 11, 2007 to be not in conformity with the Constitution, with the recommendation to National Assembly to revise the statutory provision in conformity with the holding of the Constitutional Court decision. The Constitutional Court held part of Articles 10 and 23(1) of *Jibhoe mit siwie gwanhan beobryul* [Assembly and Demonstration Act], Act No. 1245, amended by Act. No. 8424, May 11, 2007 prohibiting the assembly at night time to be unconstitutional in that the constitutional and unconstitutional parts were not clearly distinguishable and the demarcation thereof should be conducted by the legislator. The Constitutional Court rendered on September 24, 2009, a nonconformity decision, and simultaneously determined that the provisions at issue should remain to be applicable until the revision thereof by the National Assembly on or before June 30, 2010 (Constitutional Court [Const. Ct.], 2008Hun-Ga25, Sept. 24, 2009, (21-2 KCCR 427) (S. Kor.)). National Assembly failed to revise the statutory provisions by the above time limit, and the statutory provisions thereby lost its statutory force as of July 1, 2010. In the subsequent decision rendered in March 2014, the Constitutional Court, on the same provisions of *Jibhoe mit siwie gwanhan beobryul* [Assembly and Demonstration Act], Act No. 1245, amended by Act. No. 8424, May 11, 2007, yet on the part pertaining to the demonstration, rendered a decision of limited unconstitutionality, held that Articles 10 and 23(3) of the Act to be unconstitutional should they be applied to the demonstrations conducted during the time period from after the sunset through 24 o'clock of the same day (Constitutional Court [Const. Ct.], 2010Hun-Ga2, Mar. 27, 2014, (26-1 KCCR 324) (S. Kor.)).

unconstitutionality falls within the discretion of National Assembly.⁶⁵⁾

An analysis of 185 cases where the Korean Constitutional Court rendered the nonconformity decisions for the period from September 1988 when the Korean Constitutional Court was established under the current Korean Constitution through November 30, 2020⁶⁶⁾ indicates that the Korean Constitutional Court tended to render nonconformity decisions in certain types of cases. More distinctive groups of such cases include those pertaining to the statutory provisions infringing the principle of equality and the legislative inaction on the part of National Assembly in violation of the mandate to enact statute under individual provisions of the Constitution, particularly when the Constitutional Court found an exceptional situation to tentatively maintain the statutory effect of the provisions at issue notwithstanding declared unconstitutionality considering the totality of the circumstances to prevent “legal vacuum” or nonexistence of applicable law that would cause undue confusion and instability of law, or when the Constitutional Court deemed that the immediate nullification of the statutory provision at issue might not remedy the state of unconstitutionality.⁶⁷⁾

First, the Korean Constitutional Court has indicated the tendency to render the decision of nonconformity instead of holding the statutory provision at issue outright unconstitutional, in the cases where the statutory provision at issue violates or comes short of satisfying the principle of equality.⁶⁸⁾ When the judicial court requests the Constitutional

65) Constitutional Court [Const. Ct.], 95Hun-Ga13, Mar. 27, 1997, (9-2 KCCR, 1) (S. Kor.).

66) In further detail, the Korean Constitutional Court rendered 80 nonconformity decisions in the constitutionality review proceeding as narrowly defined, and 105 nonconformity decisions in the constitutionality review on constitutional complaint, in the period from September 1988 through November 2020. Refer to the [Table] at the end of this paper. Refer also to the general statistics of the Constitutional Court of the Republic of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

67) For an analysis of the pattern of nonconformity decisions rendered by the Korean Constitutional Court in cases concerning equality and right to freedom in comparison, see Cho, So-Young, *supra* note 54, at 129. For a general analysis of the equality and equal protection in constitutional adjudication context, see Ilhyung Lee, *Korean Perception(s) of Equality and Equal Protection*, 31 B.C. INT'L & COMP. L. REV. 53 (2008).

68) See Cho, So-Young, *supra* note 54, at 130; and Kim Si-Cheol, *supra* note 61, at 49-51. For example, in Constitutional Court [Const. Ct.], 88Hun-Ga6, Sept. 8, 1989, (1 KCCR 199) (S.

Court for constitutionality review on the ground of violation of equality principle in that the statutory provision benefiting certain groups of beneficiaries unconstitutionally excludes the individuals or the group of individuals who are the parties to the underlying action pending at judicial court, in this category of cases, a decision of simple unconstitutionality by the Constitutional Court would deprive even the existing beneficiaries of the benefits in the entirety by removing the statutory force of the provision at issue. The Constitutional Court tends to render in such circumstances nonconformity decision in order to affirm and declare that the statutory provision at issue is unconstitutional in violation of the constitutional principle of equality yet with the recommendation to National Assembly to revise the relevant statute to remove such declared unconstitutionality.

There have been opposing positions as to whether such Constitutional Court recommendation for National Assembly's revision of the relevant statute in accordance with the nonconformity decision binds or obligates the legislator to remove such declared unconstitutionality. Some argue that such recommendation for legislative revision does not obligate National Assembly as it is part of the grounds for holding and not of the holding itself,⁶⁹⁾ while some argue that the recommendation for legislative revision

Kor.), a decision on Gukoeuiwonseongeobeob [National Assembly Election Act], Act No. 17, Dec. 23, 1948, *repealed by* Act No. 4739, Mar. 16, 1994 (S. Kor.), which was the initial nonconformity decision rendered by the Korean Constitutional Court where the Constitutional Court reviewed the constitutionality of the provisions of the Act (Gukoeuiwonseongeobeob [National Assembly Election Act], Act No. 17, Dec. 23, 1948, *repealed by* Act No. 4739, Mar. 16, 1994, Art. 33 & Art. 34 (S. Kor.)) obligating deposit fund as a prerequisite for candidacy at National Assembly election, with the return rate in proportion to the ratio in terms of valid votes obtained at the election by respective candidates, the Constitutional Court held that the distinction in the amount of deposit between the party and non-party candidates and the applicable standard for the reversion of deposit fund to national treasury set forth at one-third of the valid votes at the election to be not in conformity with the Constitution's mandate of equality, the right to participate in politics and the principle of publicly-financed public election. The Constitutional Court held in this initial nonconformity decision that the effect of the statutory provisions at issue should be maintained until the revision thereof by National Assembly in due course of time, and that these statutory provisions should also apply to any re-election to be held prior to such revision, on the stated grounds of deference to the legislative authority of National Assembly and the consistency and stability of law.

69) See, e.g., CHONG JONG-SUP, HEONBEOPAGWOLLON [CONSTITUTIONAL LAW] 1443 (12th ed. 2018) (S. Kor.).

of the nonconformity decision obligates National Assembly as such recommendation unambiguously indicates the Constitutional Court's intention to provide an opportunity for National Assembly to choose among various possible legislative alternatives out of deference to legislative authority of National Assembly while the Constitutional Court may render a simple unconstitutionality decision.⁷⁰⁾ In order to meet the intended recommendation for legislative revision in these situations, National Assembly should revise the relevant statute to enlarge the classification of beneficiaries so that the parties to the underlying judicial action will be included and thus benefited, although the legislator should be and is left with ample alternatives in removing the unconstitutionality by revising the statute in conformity with the holding and the grounds therefor of the nonconformity decision and the principle of equality under the plenary authority of legislation vested therein by Article 40 of the Constitution.

Second, the Korean Constitutional Court has indicated the tendency to render the nonconformity decision where National Assembly has failed to satisfy the mandate or delegation of the individual constitutional provisions to enact a statute.⁷¹⁾ In such instances of legislative inaction or failure to enact, a decision of simple unconstitutionality may not remove the unconstitutionality, and the sole option for the Constitutional Court to remedy such unconstitutionality is to declare that such state of failure on the part of the legislator to enact the statute mandated by the Constitution is unconstitutional, with the recommendation to the legislator to enact the statute. This category of cases most clearly indicates the significance and the function of the constitutional adjudication in Korea as the remedial interaction between and among the constitutional institutions in the larger legislative process as a whole, while the actual cases falling into this category are not abundant.

One good example is the decision of the Constitutional Court issued in 2004 pertaining to the right to assistance of counsel for which the

70) See, e.g., SUNG NAK-IN ET AL., HEONBEOBSOSONGNON [CONSTITUTIONAL LITIGATION] 379 (18th ed. 2018) (S. Kor.).

71) See, e.g., Constitutional Court [Const. Ct.], 2002Hun-Ba104, Mar. 25, 2004 (16-1 KCCR 386) (S. Kor.). On this point, refer to Kim Si-Cheol, *supra* note 61, at 49-51.

Constitutional Court found constitutional mandate of enactment of statute for implementing such constitutional fundamental right, in the context of the mechanism for review over the legality of the detention through arrest warrant by the judicial court of habeas corpus nature. The Constitutional Court was requested to review the constitutionality of the failure to enact a statute or a statutory provision for the criminal defendant against whom a criminal complaint was filed after the defendant had requested the judicial court to review the legality of arrest warrant and of detention yet prior to the judicial court's review thus depriving the defendant of the standing for such judicial review under the then-existing system of Criminal Procedure Act.⁷²⁾ In the underlying judicial action, the criminal defendant filed a request for judicial court's review over the legality of detention prior to filing of the criminal complaint, yet, the prosecution filed criminal complaint prior to the judicial court's hearing in this proceeding. The Constitutional Court reached the conclusion that legislative inaction or failure to enact on the part of National Assembly of a statutory provision applicable to this exact situation was unconstitutional, despite other statutory procedures and measures available to practically similar effect under the Criminal Procedure Act to the defendant subsequent to the prosecution's filing of criminal complaint.

The Constitutional Court determined that the Korean Constitution mandates National Assembly to enact a statute or statutory provision for the implementation of the constitutional right to assistance of counsel of Article 12 of the Constitution so that all relevant individuals should be able to have the opportunity of judicial court's review over the legality of detention in criminal proceeding along the procedure established by the statute, and, as such, held the failure of National Assembly to enact the statute to be applicable in all relevant situations to be unconstitutional. For a decision of simple unconstitutionality was not able to remedy the state of unconstitutionality in such instance of legislative inaction, the Constitutional Court rendered the nonconformity decision urging National Assembly to enact the statute or revise the Criminal Procedure Act to remove the declared unconstitutionality.⁷³⁾ National Assembly thereupon

72) Constitutional Court [Const. Ct.], 2002Hun-Ba104, Mar. 25, 2004 (16-1 KCCR 386) (S. Kor.).

73) *Ibid.*

revised the Criminal Procedure Act in the relevant part so that the criminal defendant in all phases of criminal procedure regardless of the prosecution's filing of criminal complaint or the relevant timing thereof became eligible to request judicial court's review over the legality of detention without having to separately request other similar proceedings. Further, in 2005, in the spirit of the above Constitutional Court decision, a separate statute of the Habeas Corpus Act of Korea⁷⁴⁾ was subsequently enacted by National Assembly to guarantee the right to obtain judicial court review over the legality of detention in all detentions caused under public law beyond the limited context of criminal proceeding covered by the Criminal Procedure Act. This process as a whole indicates how the constitutional adjudication triggers and activates the constitutional dialogues and functions as the remedial mechanism for interactions among the constitutional institutions in the process of making and revising the law in the direction of supplementing the representative democracy in Korea.

Third, the Korean Constitutional Court has indicated the tendency to render the decision of nonconformity of the statute with the Constitution in the instances particularly where it deems nonconformity decision is more appropriate under the totality of circumstances from the balancing point of view, while the Court concludes that the statutory provision at issue is in violation of the Constitution.⁷⁵⁾ This category may differ, though with certain intersections, from the first category concerning the breach of equality principle, in that this category primarily concerns the right to

74) *Insinbohobeop* [Habeas Corpus Act], Act No. 8724, Jun. 22, 2008, amended by Act No. 14972, Oct. 31, 2007 (S. Kor.).

75) On this point, see Cho So-Young, *supra* note 54, at 128; and Kim Si-Cheol, *supra* note 61, at 49-51. In Constitutional Court [Const. Ct.], 2012Hun-Ma190, etc (consol.), Oct. 30, 2014 (26-2 KCCR 668) (S. Kor.), the Constitutional Court held *Gongjikkeongeobeob* [Public Official Election Act], Act No. 4739, Mar. 16, 1994, amended by Act No. 11374, Feb. 29, 2012 (S. Kor.) to be not in conformity with the Constitution, to the extent it permitted the difference between the least and the most populous electoral districts in public election (Table 1 of *Gongjikkeongeobeob* [Public Official Election Act], Act No. 4739, Mar. 16, 1994, amended by Act No. 11374, Feb. 29, 2012 (S. Kor.), corresponding to Article 25(2) of the Act) beyond 33 1/3 %. The Constitutional Court also held that the existing statute should remain applicable until the revision thereof by National Assembly to avoid legal vacuum that might be caused by the nullification thereof due to a simple unconstitutionality decision, and recommended that National Assembly should revise the statute in accordance with the holding of this decision by December 31, 2015.

freedom. In the case of a statute or a statutory provision infringing the right to freedom, the Constitutional Court may remedy the unconstitutionality by, in principle, removing the infringement upon freedom imposed by the statute or statutory provision. However, the Korean Constitutional Court has rendered the nonconformity decision in certain of such cases upon considering the totality of the circumstances from the balancing point of view, (a) where the Court deems that the immediate nullification and removal of the statutory provision at issue might cause “legal vacuum” or nonexistence of applicable law leading to the exceptional confusion and instability among the relevant parties and the public,⁷⁶⁾ and (b) where the Court decides that a decision of simple unconstitutionality might not appropriately or effectively remedy the unconstitutionality due to the unclear distinction between constitutionality and unconstitutionality involved in the case at issue, intending to defer to the legislative authority of National Assembly for more legislative alternatives on the part of National Assembly in removing the unconstitutionality, from the perspectives of separation of powers and principle of democracy.⁷⁷⁾

76) Constitutional Court [Const. Ct.], 97Hun-Ba26, Oct. 21, 1999 (11-2 KCCR 383) (S. Kor.) and Constitutional Court [Const. Ct.], 98Hun-Ba70, May 27, 1999 (11-1 KCCR 633) (S. Kor.) are good examples of such instances. For an analysis on this issue, see Kim, Ha-Yurl, *supra* note 35, at 106. In Constitutional Court [Const. Ct.], 2014Hun-Ga9, Sept. 29, 2016 (28-2 KCCR 276) (S. Kor.), in which the Constitutional Court reviewed the constitutionality of the admissions procedure for mental institutions under Jeongsinbogenbeob [Mental Health Act], Act No. 5133, Dec. 30, 1995, amended by Act No. 11005, Aug. 4, 2011 (S. Kor.), the Act (Article 24 of the Mental Health Act) set forth the admissions procedure for mental institutions due to mental illness for the period of up to six months under which the admission was to be approved by the consent of two guardians and the diagnosis by one physician. The Constitutional Court held such procedure to be in violation of the Constitution on the ground that the admissions procedure under the statutory provision at issue did not meet the constitutional requirement of due process and violated the constitutional guarantee of bodily freedom, as the admissions to mental institution would be equivalent to custody and the maximum length of admission was set at a long term of up to six months. The Constitutional Court rendered a nonconformity decision in order to avoid ‘vacuum’ of applicable law.

77) Constitutional Court [Const. Ct.], 88Hun-Ga6, Sept. 8, 1989 (1 KCCR 199) (S. Kor.) and Constitutional Court [Const. Ct.], 92Hun-Ba49, July 29, 1994 (6-2 KCCR 64) (S. Kor.) are good examples of such instances. For an analysis on this issue, see Zin-Wan Park, *supra* note 52, at 76, 87. In Constitutional Court [Const. Ct.], 89Hun-Ma214, 90Hun-Ba16, 97Hun-Ba78 (consol.), Dec. 24, 1998 (10-2 KCCR 927) (S. Kor.), in which the compensation for the real property owner concerning statutory restrictions on usage and development under the Dosigyehoekbeob [City Planning Act], Act No. 2291, Jan. 19, 1971, amended by Act No. 2435,

2. Justification for Nonconformity Decision by the Korean Constitutional Court and its Idiosyncratic Aspects

The Constitutional Court of Korea has the jurisdiction over the constitutional adjudication of the constitutionality review over the statute (Article 111(1)(i) of the Constitution; Article 2(i) of the Constitutional Court Act). When the issue of whether a statute or its specific provision as the applicable law in a pending case at the judicial court is unconstitutional is material to the outcome of such pending judicial case, the original court, either on motion of any of the parties or on its own motion, may request review by the Constitutional Court over the constitutionality of the statute or its provision (Article 41 of the Constitutional Court Act). When the judicial court requests the Constitutional Court to review the constitutionality of the statute, the proceedings of the original or underlying case pending at judicial court are stayed, until the Constitutional Court renders its decision upon the constitutionality of the statute (Article 42(1) of the Constitutional Court Act). The party who moved to the judicial court to request the constitutionality review over the statute applicable to the party's own underlying case pending at that judicial court, should the judicial court deny such motion, then may file a constitutional complaint directly with the Constitutional Court requesting the Constitutional Court to review the constitutionality of the same statute (Article 68(2) of the Constitutional Court Act).

Any statute or provisions thereof held to be unconstitutional by the Constitutional Court shall lose the statutory effect, beginning on the day

Dec. 30, 1972 (S. Kor.) was at issue, the Constitutional Court held the statutory provision (Article 21 of the City Planning Act) to be constitutional with respect to the designation of zones with the ban on certain usage and development therein in light of the nature of property right under DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] Art. 23 (S. Kor.); however, it held such provision to be not in conformity with the Constitution to the extent that it failed to include the compensation provision for the individuals entitled thereto, in light of proportionality principle. The Constitutional Court went on to hold that the validity of the statutory provisions should remain until National Assembly would make legislative revision in pursuance of the decision of the Constitutional Court, particularly in the situation where many alternative means for statutory revision to obtain the same legislative goal exist, in deference to the legislative authority of National Assembly.

such decision is rendered by the Constitutional Court (Article 47(2) of the Constitutional Court Act). Should the statute or the provisions thereof concern criminal penalties, however, such statute or provisions thereof shall lose the effect retroactively (proviso of Article 47(2) of the Constitutional Court Act); in this case, the relevant parties may file a case for retrial with respect to the previous criminal conviction based upon the statute or the provisions thereof held unconstitutional by the Constitutional Court (Article 47(3) of the Constitutional Court Act). A decision that a statute or specific statutory provisions are unconstitutional shall bind all judicial courts as well as other state institutions and agencies and local governments (Article 47(1) of the Constitutional Court Act). Other than the decision that the statute or the provisions thereof are unconstitutional or constitutional as expressly set forth in and by the language of the provisions of the Constitutional Court Act, Korea's Constitutional Court has also decided in practice as the holding of the case that the statute or the provisions thereof at issue are constitutional in part or conditionally constitutional, unconstitutional in part or conditionally unconstitutional, or nonconforming to the Constitution.⁷⁸⁾ Such practice has been criticized by the judicial court, as the judiciary has argued that such decision of conditional constitutionality or unconstitutionality or nonconformity with the Constitution does not bind the judicial court for such decision indicates no more than a suggested way of statutory interpretation on the part of the Constitutional Court.⁷⁹⁾

Both the Constitution and the Constitutional Court Act (Act No. 17469) of Korea are silent as to the decision of nonconformity of the statute with the Constitution to be rendered by the Constitutional Court upon constitutionality review, unlike ample express language therein for the

78) For a research critically analyzing such practice as established by the Korean Constitutional Court and the binding effect of such decisions, refer to Lee, Dong-Hoon, *Heonbeopjaepaneseo byeonhyeonggyeoljeongui gisongnyeok* [The Binding Power on the Modification Decisions of the Constitutional Court], 17(2) PUB. L. J. 109 (2016) (S. Kor.).

79) On this issue, refer to *Id.*, at 119-128; Kim, Ha-Yurl, *supra* note 35, at 102-104, 111; Heo, Wan Jung, *Die Bindungswirkung der verfassungsgerichtlichen Entscheidung und die Entscheidungsgründe*, 399 Hum. Rts & Just. 20 (2009) (S. Kor.) (article available in the Korean language with the abstract in German); and Park Jinwoo, *Heonbeobbulhapchigyeljeonge daehan bipanjeog geomto* [A Critical Study on the "Unconformable to Constitution" Decision], 35 L. REV. 1, 16-18 (2009) (S. Kor.).

decision of simple unconstitutionality or constitutionality. As such, in the earlier history of the constitutional adjudication in Korea, there were extensive debates with respect to the permissibility and the effect of the decision of nonconformity and the grounds therefor.⁸⁰⁾ The Korean Constitutional Court has consistently taken the position since the introduction of the constitutional adjudication system in Korea in 1988 that the Constitutional Court's decision holding to the effect that the statutory provision is unconstitutional may take varied or modified forms beyond the decision of simple unconstitutionality, including the decision of conditional unconstitutionality, conditional constitutionality and nonconformity of the statute; also, the Constitutional Court has taken the position that all forms of unconstitutionality decision including the decision of nonconformity have the binding effect.⁸¹⁾

When a statutory provision is not in conformity with the Constitution to the extent that the presumption of constitutionality of the statute may not be sustained, such statutory provision should be held and declared to be unconstitutional, in order to guarantee the Constitution as the highest law of the nation.⁸²⁾ The nonconformity decision may only be rendered as an exception as one form of modified unconstitutionality decision, only upon a justifying constitutional ground. Whereas Germany does have a statutory ground for the Constitutional Court's issuance of nonconformity decision, Korea does not have such statutory or legal grounds thereof, which has invoked persistent debates as to the permissibility of the Constitutional Court's issuance of nonconformity decision. This has also been much debated in the process of discussions for possible constitutional revision and for the revision of relevant statutes. The Constitutional Court decided on such issues of permissibility and binding effect of the nonconformity decision justifying both, most notably in 2012.⁸³⁾

80) See Park Jinwoo, *supra* note 79; and Kim Si-Cheol, *supra* note 61.

81) Constitutional Court [Const. Ct.], 95Hun-Ga13, Mar. 27, 1997 (9-2 KCCR 1) (S. Kor.). On this point, refer to Cho, So-Young, *supra* note 54, at 130; Kim Si-Cheol, *supra* note 61, at 51-52; and Myung-Woong Lee, *Hanjeongwiheongyeoljeongui hyoryeok [Effect of Limited Unconstitutionality Decision of the Constitutional Court]*, 43(6) GOSHIGYE MONTHLY L. J. 151 (1998) (S. Kor.).

82) For discussion on this point, see Zin-Wan Park, *supra* note 52, at 87, 110.

83) Constitutional Court [Const. Ct.], 2011Hun-Ba117, Dec. 27, 2012 (24-2 KCCR 387) (S.

As the context for further analysis, the core idiosyncratic characteristics of the system of constitutionality review over the statute of Korea's institution of constitutional adjudication from the comparative perspective include the following. First, the specific provisions of the statute or the statutes in the entirety after they come into effect are reviewed upon request by the judicial court or the parties as designated by law, and, as such, the constitutionality review system of Korea has the nature of the *ex post* control over specific statutory norms; Second, the constitutionality of the statute or the statutory provision is reviewed by and through the adjudicatory process of judicial nature. Korea's constitutionality review system as conducted by the Constitutional Court examines whether or not a specific statutory provision is in conformity with the higher norm of the constitutional law.⁸⁴⁾ As such, the Constitution of Korea sets forth an institution of constitutionality review over the statute by the Constitutional Court as the institution of norm control to review and decide the constitutionality of specific statutory provisions after such provisions come into effect and become applicable to the specific dispute pending and being adjudicated at judicial court. Such characteristic nature is shared by the constitutional adjudication upon filing of the constitutional complaint by the Korean Constitutional Court under Article 111(1)(v) of the Constitution, which is in its nature a type of constitutionality review over the statute.⁸⁵⁾

The Korean Constitution also provides to the effect that the Constitutional Court may not initiate the constitutionality review proceeding on its own motion, and, instead, mandates that the constitutionality review proceeding shall be initiated by the request of the judicial court in which the case is pending where the statute or the statutory provision whose constitutionality is material and challenged as the applicable law in the pending case (Article 41 of the Constitutional Court

Kor.).

84) DAEHANMINKUK HUNBEOB [HUNBEOB][CONSTITUTION] (S. Kor.) provides in its Article 107(1) that, "[w]hen the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof", and, in its Article 111(1)(i) that the "Constitutional Court shall have jurisdiction over the constitutionality of a [statute] upon the request of the court."

85) Constitutional Court [Const. Ct.], 94Hun-Ba37, Apr. 29, 1999 (11-1 KCCR 289) (S. Kor.).

Act). Further, in the case of the constitutional adjudication to review the constitutionality of statute through constitutional complaint, such constitutional complaint may be filed with the Constitutional Court by the parties to a pending judicial case under Article 68(2) of the Constitutional Court Act, only when the parties to the case pending at judicial court filed a motion with the presiding judicial court to request the Constitutional Court for the judicial review over constitutionality of the applicable statute in that pending case yet the presiding judicial court denies such a motion.

Next, the constitutionality review proceeding of Korea is the institution of reviewing and determining the constitutionality of the statute or the statutory provisions through adjudicatory proceeding and function. As such, this institution is an idiosyncratic aspect of the separation of powers structure of Korea, and the decision on the merits in the Korean Constitutional Court's constitutionality review is a process of reaching the conclusion through syllogism with the abstract review standard and the specific object of adjudication.⁸⁶⁾ In Korea's constitutionality review proceeding, the Constitutional Court exercises the authority to bindingly interpret the objective meaning of the Constitution; yet the issue of how to interpret the statute whose constitutionality is challenged is not in itself an issue at the constitutional level. As such, even when the Constitutional Court interprets the statute as necessary in the process of constitutionality review, this is perceived as the provisional specification of the object of adjudication rather than the judicially binding authoritative interpretation of such statute. Under the Korean Constitution, the judiciary and the Constitutional Court are co-equal branches of government in Korea's separation of powers structure, and the institution of the constitutionality review in Korea under the Korean Constitution is set forth by design in

86) The Korean Constitutional Court determines whether a specific statute or statutory provision is constitutional or unconstitutional in light of the Constitution where a statute or statutory provision is the object of constitutionality review. The purview of the effect of such judicial conclusion or decision-making is the issue belonging to the next phase. From a comparative point of view, to such a conclusion of adjudicatory nature, certain constitutional systems endow general effect directly applicable to all cases such as those of Germany and Austria; while other constitutional systems such as that of the United States perceive such a conclusion to be the law of the case in the immediate case, with indirect effect on other cases through the doctrine of the precedents.

such a way as the judicial court and the Constitutional Court should both serve respective functions for the operation of the constitutionality review mechanism, which makes the remedial interactions among the constitutional institutions to redress statutory shortcoming in Korea more complex.

The institution of constitutionality review over the statute in Korea under the Korean Constitution is grounded upon certain rudimentary principles as follows. First, the statute enacted by National Assembly is presumed to be constitutional in principle. Second, the constitutionality review proceeding is a type of interlocutory proceeding that consists of a unitary judicial dispute resolution process with respect to the pending case⁸⁷⁾ where the constitutionality of the statute as the applicable law in the pending case⁸⁸⁾ which is the object of adjudication at the constitutionality review is material.⁸⁹⁾ As such, the Constitutional Court reviews the constitutionality of the statute at issue only when determining the constitutionality of the statute is necessary for the judicial decision-making of the underlying case pending at judicial court and to the extent necessary.

87) For the initiation of the constitutionality review proceeding at the Constitutional Court, a live judicial case should be currently pending at judicial court, where the statute whose constitutionality is to be decided should apply in order to decide such pending case. Such requirement demands that the judicial case should be pending, not merely at the time when the request is made by the judicial court to the Constitutional Court, but through the time of rendering the decision by the Constitutional Court on the constitutionality of the statute. THE CONSTITUTIONAL COURT OF KOREA, *supra* note 1, at 96-99, 125-126.

88) The statute, in order for the Constitutional Court to decide its constitutionality through the constitutionality review proceeding, should be the applicable law in the underlying judicial case that is pending at the judicial court. In criminal case, the constitutionality review proceeding may not be initiated unless a criminal complaint is filed with the criminal court; also, even when the statute is indicated in the criminal complaint filed with the criminal court, unless the judicial court actually applies the statute in the underlying case, the constitutionality of such statute may not be determined by the Constitutional Court by way of constitutionality review proceeding at the Constitutional Court. Constitutional Court [Const. Ct.], 89Hun-Ma240, Jan. 16, 1997 (9-1 KCCR 45) (S. Kor.).

89) By definition of materiality, the outcome of the underlying case should be different depending on whether the statute is constitutional or unconstitutional. The Constitutional Court has expressly indicated that the prerequisite for the constitutionality review proceeding at the Constitutional Court is not satisfied should the decision on the constitutionality of the statute be unnecessary for determining the underlying case, even if it is manifest that the statute is applicable in the underlying case. Constitutional Court [Const. Ct.], 2000Hun-Ba30, June 28, 2001 (13-1 KCCR 1326) (S. Kor.).

Should the judicial court be able to decide the pending case without having to apply the statute that the judicial court perceives as unconstitutional, then the premise or preliminary requirements for initiating the proceeding of constitutionality review by the Constitutional Court is deemed to be unsatisfied.⁹⁰⁾ Another characteristic aspect or element of the Korean system of the constitutionality review, with respect to the binding effect of the decision of the Constitutional Court and its legal ground particularly in the case of constitutionality review proceeding, is that the law of Korea on this point provides the general effect binding all constitutional institutions including judicial court only for the Constitutional Court's decision that holds certain statute or statutory provision to be unconstitutional (Articles 47(1) and 47(2) of the Constitutional Court Act). Also, the effect of the decision of the Constitutional Court in the constitutionality review proceeding is provided in the statute and not in the Constitution.⁹¹⁾

In the constitutionality review system and proceeding of Korea, as indicated above, there should be an underlying case pending at the judicial court in which the statute whose constitutionality is challenged at the Constitutional Court is the applicable law and the constitutionality of such statute is material in deciding the underlying judicial case; and the request for the Constitutional Court to decide the constitutionality of such statute should be made in the lawful manner, in order for the Constitutional Court may entertain the case in the constitutionality review proceeding to decide the constitutionality of the statute. Otherwise, even when the constitutionality of a statute is challenged *ex ante* as a general issue or out of public concern, the Constitutional Court proceeding may not be

90) The Korean Constitutional Court deems the request for constitutionality review to be dismissed when a request therefor is made without satisfying the premise that the constitutionality of the statute at issue is material in deciding the underlying case pending at the judicial court, for the constitutionality review over such a statute in such a case is the abstract control over the norm as opposed to the control over specific norm. Constitutional Court [Const. Ct.], 97Hun-Ga4, Sept. 25, 1997 (9-2 KCCR 332) (S. Kor.).

91) Germany provides general binding effect for all decisions rendered by the Federal Constitutional Court, in the form of the statute (Article 31 of the Federal Constitutional Court Act of Germany); whereas Austria endows general binding effect only for the decision of unconstitutionality rendered by the Austrian Constitutional Court, in the form of the Constitution (Articles 140(5) and 140(7) of the Constitution of Austria).

triggered.⁹²⁾ As such, the constitutionality review proceeding in Korea is designed to be an institution to control the norm of specific provision of law, while the statute enacted by National Assembly is presumed to be constitutional. Thus, the request by judicial court for the Constitutional Court to review and determine the constitutionality of a statute to be applicable in the pending case when such constitutionality decision is material in determining the underlying case with the notion of presumption of constitutionality of the statute functions to determine and limit the object of the adjudication and the purview of the review in the Constitutional Court's constitutionality review over the statute. This is an important point in discussing the binding effect of the Constitutional Court's nonconformity decision or its decision of conditional unconstitutionality, especially when it is discussed whether such decisions have the binding effect on the judicial court's statutory interpretation in immediate or subsequent cases.⁹³⁾ This in turn affects the institution and the operation of the interactions between and among the constitutional institutions of National Assembly, the executive branch, the judicial court and the Constitutional Court,⁹⁴⁾ under the design and reality of separation of powers in Korea, particularly as a remedial measure to supplement any shortcoming in enactment of the statute by National Assembly, or, the "constitutional dialogue"⁹⁵⁾ in larger legislative process in Korea.⁹⁶⁾

92) Constitutional Court [Const. Ct.], 95Hun-Ba41, Aug. 29, 1996 (8-2 KCCR 107) (S. Kor.); and Constitutional Court [Const. Ct.], 96Hun-Ba12, Nov. 27, 1997 (9-2 KCCR 607) (S. Kor.).

93) For an analysis of the binding effect of the decisions of the Constitutional Court, see Heo, Wan Jung, *supra* note 79.

94) The government as well as 10 or more members of National Assembly and the standing committees of National Assembly may introduce a legislative bill to National Assembly in order to enact a statute in Korea (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 52 (S. Kor.)).

95) The expression of "constitutional dialogue" is cited from Mark Tushnet, *supra* note 56, and used in this paper in the meaning as defined and discussed in the same.

96) In Constitutional Court [Const. Ct.], 2014Hun-Ma340, July 30, 2015 (27-2 KCCR 370) (S. Kor.), in which the Constitutional Court reviewed the constitutionality of the uniform length of time period for record-keeping of the identity of those convicted for sexual offense by use of filming device in Seongpongnyeokbeomjoeui cheobeol deunge gwanhan teungnyebeop [Special Act on Punishment of Sexual Offense], Act No. 10258, Apr. 15, 2010, amended by Act No. 11556, Dec. 18, 2012 (S. Kor.), the Act (Article 42(1) of the Special Act on Punishment of Sexual Offense) provided that the identity of those convicted for sexual offense

3. Binding Effect and Retroactivity of Nonconformity Decision of the Korean Constitutional Court and the Ensuing National Assembly Legislation

The core issues pertaining to the effect of the decision of nonconformity of the statute with the Constitution as rendered by the Korean Constitutional Court include the following: (a) no immediate nullification and the remaining force of the statutory provision at issue that is held to be unconstitutional, and the obligation of the legislator to revise the law, (b) the prohibition on application of the unconstitutional statute in principle and the stay of the underlying action pending in the judicial court, and (c) the provisional application of the unconstitutional statute or statutory provision.

First, in nonconformity decision, the statute at issue maintains its statutory force for the time being notwithstanding its declared unconstitutionality, whereas the decision of simple unconstitutionality immediately nullifies the statute or statutory provision upon issuance of such decision. The Constitutional Court makes this judgment call on the ground that, in certain circumstances of statutory unconstitutionality, the unconstitutionality decision in itself may not remedy the unconstitutionality by removing the unconstitutional statutory provisions, while the legislator is in the position of remedying such unconstitutional state through statutory revision, in light of the principles of separation of powers and representative democracy.⁹⁷⁾

As such, the decision of nonconformity accompanies the ensuing function of the legislator to remove the unconstitutionality within a

by use of filming device under Articles 14(1) and 15 of the Act should be kept in official criminal record for the period of twenty years from the initial date of registration. The Constitutional Court held that the statutory provisions setting forth the uniform length of time period for record-keeping with no differentiating sexual offenses was not in conformity with the Constitution in violation of proportionality principle. The Constitutional Court also held that the existing provisions should remain valid and applicable until the statutory revision of National Assembly by December 31, 2016, deferring to the discretion of National Assembly for choosing among various alternative legislative means in removing the unconstitutionality of the provisions at issue.

97) Zin-Wan Park, *supra* note 52, at 110.

reasonable time period encompassing specifically designated time period, by revising the statute at issue in accordance with the decision of the Constitutional Court. The statutory provisions remain in the statutory text without being deleted for a certain designated time period past the issuance of nonconformity decision, thereby being provisionally applicable through the designated time limit. There exists no legal, constitutional or statutory, provision in express language on these points in Korea. This should itself be resolved by way of legislative revision or enactment, although the judicial court has largely respected the Constitutional Court's nonconformity decision in acknowledging the general effect of such decision in subsequent litigations where the judicial court would apply the same statutory provision,⁹⁸⁾ and, in the case of criminal statute, the prosecution has also largely respected the nonconformity decision by not pursuing criminal charges on the ground of such statute.

Second, the decision of nonconformity of the statute with the Constitution is a type of unconstitutionality decision as it affirms and declares the unconstitutional nature of the statute at issue. Therefore, unless the Constitutional Court holds that the statute should tentatively remain in effect and continue to apply as an exception, the statute at issue may not apply in the underlying case, and the judicial court should stay the proceeding in the underlying case until there is the revision of the statute as recommended by the Constitutional Court.⁹⁹⁾ This is to provide the parties to the underlying action with the opportunity to benefit from the revision of the statute in the pending case.

Third, in certain instances, the Constitutional Court has held that, as an exception to the general principle concerning the effect of unconstitutionality decision, the statute at issue should remain to be applicable tentatively between the point of issuance of nonconformity decision and the revision of the statute by National Assembly.¹⁰⁰⁾ The

98) Supreme Court [S. Ct.], 90Da5450, June 11, 1991 (S. Kor.).

99) Constitutional Court [Const. Ct.], 92Hun-Ma49, July 29, 1994 (S. Kor.). On this point, see Heo, Wan Jung, *supra* note 79; and Kim Si-Cheol, *supra* note 61, at 51.

100) The initial instance the Korean Constitutional Court took this form of nonconformity decision with the tentative application of the statute at issue is Constitutional Court [Const. Ct.], 92Hun-Ga11, Sept. 28, 1995 (7-2 KCCR 264) (S. Kor.).

Constitutional Court should expressly state to this effect should the statute remain to be tentatively applicable for the time period designated by the Constitutional Court. One of the representative and symbolic examples is the Constitutional Court's decision in 2009 on the constitutionality of the statute of the Assembly and Demonstration Act (Act No. 8424) criminally sanctioning assembly held at night time.¹⁰¹⁾ In reviewing the constitutionality of the statute prohibiting the night-time assembly and demonstration that had long been extensively debated in light of the freedom of expression, the Constitutional Court in 2009 held the statutory provisions of the Assembly and Demonstration Act to be not in conformity with the Constitution, with the recommendation to National Assembly to revise the relevant provisions in accordance with the Constitutional Court decision. The Constitutional Court held part of Articles 10 and 23(1) of the Assembly and Demonstration Act prohibiting the assembly at night time to be unconstitutional in that the constitutional part and the unconstitutional part of the above provisions were not clearly distinguishable and it would be desirable that the clear demarcation thereof would be conducted by the legislator. On this ground, the Constitutional Court rendered on September 24, 2009, the decision of nonconformity with the Constitution, and simultaneously determined that the provisions at issue should remain to be applicable until the revision thereof by National Assembly to be made on or before June 30, 2010, while the statutory provisions at issue would lose its force as the statute as of July 1, 2010.¹⁰²⁾

Yet, National Assembly failed to revise the statutory provisions as recommended by the Constitutional Court in this decision by the designated time limit of June 30, 2010, and the statutory provisions thereby lost statutory force as of July 1, 2010. Relatedly, in the subsequent accompanying decision rendered in March 2014, the Constitutional Court, on the same provisions of the Assembly and Demonstration Act¹⁰³⁾ yet on

101) Jibhoe mit siwie gwanhan beoblyul [Assembly and Demonstration Act], Act No. 8424, May 11, 2007 (S. Kor.).

102) Constitutional Court [Const. Ct.], 2008Hun-Ga25, Sept. 24, 2009 (21 KCCR, 427) (S. Kor.).

103) Jibhoe mit siwie gwanhan beoblyul [Assembly and Demonstration Act], Act No. 8424, May 11, 2007 (S. Kor.).

the different part thereof pertaining to demonstration vis-à-vis assembly, rendered the decision of conditional or limited unconstitutionality, holding that Articles 10 and 23(3) of the Assembly and Demonstration Act are unconstitutional should they be applicable to the demonstrations conducted during the time period from after the sunset through 24 o'clock of the same day.¹⁰⁴⁾ Subsequently, the Korean Supreme Court held that the statutory provisions of the Assembly and Demonstration Act limiting the freedom of assembly had been nullified and lost their statutory force retroactively in pursuance of the proviso of Article 47(2) of the Constitutional Court Act, for such provisions at issue contained the criminal sanctions for violating the statutory requirements.¹⁰⁵⁾ Thus, those who had previously been punished for holding or participating in night-time assembly or demonstration under the nullified statutory provisions became eligible to request new trial.

With respect to the effect of the Constitutional Court decision of nonconformity of the statute with the Constitution, it has constantly been debated whether such decision should have the effect of retrospective overruling or should apply retroactively.¹⁰⁶⁾ This has to do with the issue of whether the nonconformity decision is to apply retroactively should National Assembly fail to revise the statute at issue.¹⁰⁷⁾ This issue becomes further complicated when the Constitutional Court sets forth the specific time limit for legislative revision¹⁰⁸⁾ either in the holding or in the part

104) Constitutional Court [Const. Ct.], 2010Hun-Ga2, Mar. 27, 2014 (26 KCCR, 324) (S. Kor.).

105) Supreme Court [S. Ct.], 2008Do7562, June 23, 2011 (S. Kor.).

106) For analysis on this point, see JANG, JIN-SOOK, *Heonbeopbulhapchigyeljeongeui sogeuphyowa geu jeokyeongbeomwui* [The Effect of Retroactivity of the Decision that is not consistent with the Constitution and its Application Scope], 26 SUNGKYUNKWAN L. REV. 39 (2014) (S. Kor.); and Cho, So-Young, *supra* note 54, at 129-130.

107) On this issue, refer to Lee, In-ho & Oh, Su-jeong, *Heonbeopbulhapchigyeljeonge ttareun ipbeopgaeseonuimuui ihaenghyeonhwang bunseokgwa bipan* [An Analysis of Legal Amendment by a Decision of Constitutional Nonconformity], 12 CHUNG-ANG L. REV. 45 (2010) (S. Kor.).

108) During the period the 20th National Assembly was in session (2016-2020), the Constitutional Court held 48 statutory provisions to be unconstitutional and 46 not in conformity with the Constitution; the 20th National Assembly failed to revise the statute at issue held to be unconstitutional or not in conformity with the Constitution in 22 of such cases. Among these 22 cases, no bill to revise the statute at issue was submitted at all in 8 cases. Statistics indicates that, since the establishment of the Constitutional Court in 1988, the

stating the reasoning of the decision.¹⁰⁹⁾ When a statute is held unconstitutional, such statute is thereby being declared to be void in principle under Korea's constitutional adjudication system, and the statute becomes null on and from the date of the unconstitutionality decision. Yet, the Constitutional Court renders nonconformity decision with recommendation of legislative revision often with certain time limit, in exceptional cases where a simple unconstitutionality decision might cause legal vacuum or confusion, or the legal stability mandates such state of application of unconstitutional statute for the time being upon balancing between the provisional application of unconstitutional statute against the nonexistence of applicable statute.

The ramification is that, past the time limit set forth by the Constitutional Court in its nonconformity decision, under the decision of the Constitutional Court, the state of unconstitutionality to be caused by prolonged application of unconstitutional statute may not be further justified by the merits and demand of legal stability. Hence, should National Assembly fail to cure the unconstitutionality through legislative revision of the statute at issue past the time limit set by the Constitutional Court's nonconformity decision, the statute immediately becomes void.¹¹⁰⁾ Such inaction or failure to enact on the part of National Assembly is to be subject to the constitutional complaint of Article 68(1) of the Constitutional Court Act.¹¹¹⁾ When National Assembly does revise the statute at issue in pursuance of the nonconformity decision, then the retroactive effect of such

rate of ensuing National Assembly statutory revision subsequent to nonconformity decision curing declared nonconformity is 95.9% in overall 165 cases, while the comparable rate for the Constitutional Court's unconstitutionality decision is 96.8% in overall 419 cases. For those cases the Constitutional Court held the relevant statutory provision at issue to be not in conformity with the Constitution, overall, National Assembly has failed in 7 cases to revise the relevant statute in time, i.e., by the date or time limit designated by the Constitutional Court. Refer to NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA BUREAU OF LEGISLATIVE AFFAIRS, THE 20TH NATIONAL ASSEMBLY REPORT ON REVISION OF THE STATUTE HELD TO BE UNCONSTITUTIONAL OR NOT IN CONFORMITY WITH THE CONSTITUTION 14, 16-17, 79-80 (2020) (S. Kor.).

109) *Id.*, particularly at 58-64. See also, Nam, Bok-Hyeon, *Die Fristensetzung für den Gesetzgeber bei der Unvereinbarkeit-Entscheidung und das Ausser-Kraft-Treten des betreffenden Gesetzes bei ihrem Ablauf*, 11 PUB. L. J. 31 (2010) (S. Kor.) (article available in the Korean language with the abstract in German).

110) For a critical analysis on this point with suggestions for changes, see *Id.*

111) For further analysis on this point, see Cho, So-Young, *supra* note 54, at 130.

revised statute is the effect of retroactively restoring the state of constitutionality of the statute through the legislative revision. As such, the purview of retroactive applicability of the revised statute should be the same as the retroactive applicability of the statute in the case of simple unconstitutionality decision.¹¹²⁾

As to the retroactive application of the decision of unconstitutionality in the underlying case, the Supreme Court has maintained the position that the Constitutional Court decision holding the statute unconstitutional applies to all cases currently and subsequently pending at judicial court where the statute at issue is applicable and material even without the request for constitutionality review filed with the Constitutional Court, and not merely to the underlying action itself or the cases where either the parties' motion for the judicial court's request of constitutionality review or the judicial court's request for constitutionality review filed prior to the rendition of the Constitutional Court decision of nonconformity concerning the underlying action.¹¹³⁾ However, on the other hand, the Constitutional Court has consistently maintained its position that the decision of nonconformity does not retroactively apply to the underlying action.¹¹⁴⁾

The Supreme Court has indicated the grounds for the retroactive application of the decision of nonconformity in the underlying action as follows: First, the reason for requesting the constitutionality review is to stay the underlying action and to be able to avoid application of the statute at issue should such statute be held unconstitutional. Second, Article 107(1) of the Constitution reasonably reads to the effect that the Constitutional Court's decision of unconstitutionality is applicable in the underlying case as it presupposes the stay of the underlying action so that the statute held to be unconstitutional should not apply in determining the underlying case, whereas the decision of unconstitutionality does not apply retroactively generally as a matter of principle. Should the retroactive application of the

112) Constitutional Court [Const. Ct.], 96Hun-Ba95, Jan. 27, 2000 (12 KCCR, 16) (S. Kor.). For critical analysis on this point, see JANG, JIN-SOOK, *supra* note 106; and Nam, Bok-Hyeon, *supra* note 109.

113) Supreme Court [S. Ct.], 90Da5450, June 11, 1991 (S. Kor.); and subsequent decisions to the same effect.

114) Constitutional Court [Const. Ct.], 2015Hun-Ma365, Apr. 28, 2015 (S. Kor.).

nonconformity decision be denied, this in turn leads to the denial of satisfaction of the prerequisite that the constitutionality of the applicable statute should be material or would mandate different decision in the underlying action.¹¹⁵⁾

The Constitutional Court contests on the ground that the retroactive application of the decision of nonconformity might infringe legal stability.¹¹⁶⁾ However, such position of denying retroactive application of nonconformity decision in the underlying action for the sake of legal stability is not persuasive in that the only party whose legal stability might be thereby prejudiced would be the non-moving party in the underlying action of civil or administrative nature. Any such concern of potential prejudice of legal instability on the part of non-moving party may in most, if not all, instances be balanced off by the manifest benefits on the part of the moving party who may avoid application of unconstitutional statute in the underlying action. Further, from the perspective of constitutional policy, the retroactive application of nonconformity decision should be acknowledged in the underlying action in order to avoid or reduce the chilling effect on the citizen's willingness of making use of the institution of constitutional adjudication to obtain the Constitutional Court decision on the constitutionality of the statute particularly of the administrative nature. The institution of the constitutionality review over the statute by the Constitutional Court in Korea is in its nature a mechanism and proceeding to substantively guarantee the constitutionality of the legislation or the enactment of the statute by National Assembly. As such, Korea's constitutionality review system as part of the constitutional adjudication is to review and determine whether or not the legislation by National Assembly is in conformity with the Constitution, rather than controlling the unconstitutional state that might be caused by the interpretation of the statute or the application of the unconstitutional statute by the judicial court.¹¹⁷⁾ The discussion on the effect of the decision of the Constitutional

115) For an analysis of this issue from the perspective of the judicial court as the institution having to apply the statute through the legislative revision following the nonconformity decision of the Constitutional Court, *see* Cho, So-Young, *supra* note 54, at 135-136.

116) *Id.*, at 135.

117) For further analysis supporting this position, refer to Zin-Wan Park, *supra* note 52, at

Court should proceed in light of the checks-and-balances structure among government institutions and also the interactions among different constitutional institutions of Korea in the entirety.

4. Nonconformity Decision Recommending Statutory Revision as the Mechanism for Interactions among Constitutional Institutions for the Implementation of the Constitution in Korea's Legislative Process and Constitutional Democracy

The essence of 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.¹¹⁸⁾ 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 constitutional law, and the belief in separation of powers and limited government for the protection of fundamental rights. As such, the constitutional adjudication system of Korea including the constitutionality review system has been effectively serving the role of implementing and protecting the Constitution and the constitutionalism in Korea. To note, due to the legislative process of Korea that engages the authority and role of the executive branch and to the expanding influence of the political parties in legislation, there is an incrementally increasing need for checking the substantive justifiability and constitutionality of the legislation and guaranteeing the supremacy of the Constitution. The constitutionality review by a separate independent institution over the statute enacted by the legislative branch in this regard functions as a device to check the constitutionality of the nation's overall political process including the legislation, and has a greater pertinence to both normative and structural integrity of the nation's law and legal system as a whole.

The constitutional adjudication by an adjudicative institution and

87-89 (S. Kor.).

118) *Id.* at 75-76.

through an adjudicative mechanism or process is one of the essential elements of a constitutional state in a modern constitutional democracy, together with the guarantee of fundamental rights, the adoption of representative democracy, and the implementation of rule of law, which in turn consists of 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. As 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. Specifically, the constitutional adjudication checks the powers of the government to secure the constitutionality of the legislative function of National Assembly, the administrative function of the executive branch, and the adjudication of the judicial branch, while confirming the allocation of powers between the national and local governments and also among the different branches of government, thereby functioning to maintain the order and the integrity of the law and the legal system of the nation. In so doing, the constitutional adjudication including the constitutionality review simultaneously and concurrently serves adjudicative, political, and legislative functions.

Here, issues pertaining to the legislative nature or function of the constitutional adjudication become pertinent, irrespective of specific forms of constitutional adjudication, as long as the constitutionality of a statute is reviewed in the form of adjudication. Pursuant to the premise of Korea's representative democracy, when a statute or a provision thereof is in violation of the Constitution, National Assembly is to assume the legislative function by repealing thus revising such a provision or statute. Here, under the system of constitutionality review over the statute as it is in operation in Korea, the constitutional adjudication may be triggered to invalidate a statute or to refute the application thereof, upon the Constitutional Court's holding that the specific statute or its provisions are in violation of the higher law of the nation's Constitution. Such a function assumed by the Constitutional Court in the form of adjudication over the constitutionality of a statute is equivalent, on normative plane, to the enactment, revision

and repealing of a statute or part thereof which are more conventionally and in principle to be conducted by National Assembly. Thus, the adjudication by Korea's Constitutional Court over the constitutionality of statute may be perceived as normatively equivalent to the legislation by National Assembly, i.e., Korea's legislature.

Although the current constitutionality review under the Constitution of the Republic of Korea and the Constitutional Court Act (Act No. 17469) is primarily an adjudicative means to guarantee the Constitution against the enactment of an unconstitutional statute by the legislature, i.e., National Assembly, the legislative function assumed by the adjudication over the constitutionality of statute exercised by the Constitutional Court has significant further constitutional ramifications for Korea's separation of powers structure and fundamental rights protection. In a 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 the adjudication over the constitutionality of statute requests in turn that the Constitutional Court and its adjudication in the constitutionality review cases secure democratic legitimacy as well as constitutional legitimacy, which directly concerns the organization, decision-making mechanism and independence of the Court encompassing the issues of qualification of the justices and their terms of office and permissible and desirable public responsiveness, etc.

Since its establishment in September 1988 under the current Constitution of Korea, the Korean Constitutional Court has served an undeniable role in democratization of the nation's political process overall and in more substantive protection of fundamental rights guaranteed by the Constitution, through its institutional competence and political neutrality, and by its persuasive reasoning in proactive decision-making.¹¹⁹⁾ Particularly in its efforts to establish and fine-tune the standards of review in the constitutionality review over the statute and to expand standing for the competence dispute adjudication to the cases where individual

members of National Assembly challenge the validity of the statute for lack of procedural requirements for expansion of fundamental rights protection and enhancement of the legitimacy and quality of legislation, the Constitutional Court of the Republic of Korea has palpably contributed to the democratization of the nation's political process and to the further substantive guarantee of fundamental rights. At the same time, the Korean Constitutional Court faces challenges in various dimensions. Challenges to the Constitutional Court have had to do with, for examples, its organization including the issues of qualification of justices and their appointment mechanism,¹²⁰⁾ its jurisdictional relationship with the judicial court,¹²¹⁾ its authority to render certain types of decisions with ramifications for such decisions' binding effect on subsequent statutory interpretation or decision-making by the judicial court,¹²²⁾ and demand for further clarifying and fine-tuning the standards of review for constitutionality review.¹²³⁾

First, there have been well-grounded demands and requests for diversification or expansion of the qualifications required for the justices of the Constitutional Court. The most persuasive ground therefor has directly to do with the ground for justification of the existence and the function of the Constitutional Court as an independent constitutional institution of the government that reviews the constitutionality of the statute enacted by National Assembly with its democratic legitimacy from the nation's elaborately designed public election system based upon majority rule. Notwithstanding constitutional as well as democratic justification for the legislative function of the constitutionality review conducted by the Constitutional Court in Korea, should we take as appropriate to the system

119) See, e.g., Kim, Ha-Yurl, *supra* note 35, at 97-102.

120) On this point, refer to Park, Sung-Duc, *Ipbeopgwongwa heonbeopjaepangwon-ui johwajeok gwangye jeongnib-eul wihan sogo* [*The Ways to Strike a Balance between the National Assembly's Power of Legislation and the Constitutional Court's Jurisdiction over the Constitutionality of the Statutes*], 12 PUB. L. REV. 227, 262 (2011) (S. Kor.).

121) On this point, refer to Heo, Wan Jung, *supra* note 79; and Si-Cheol Kim, *supra* note 61, at 51.

122) On this point, refer to Yang, Jeong-Yun, *Daehwajeok sabeopsimsawa banbog-ipbeop* [*Dialogic Judiciary Review and Reiterated Legislation*], 72 KOREA UNIV. L. REV. 177 (2014) (S. Kor.).

123) For discussions and analysis on the challenges to the Constitutional Court, see, e.g., Kim, Ha-Yurl, *supra* note 35, at 104-111; and Cho, So-Young, *supra* note 54, at 139-140.

of constitutional democracy the role of the constitutionality review conducted by the Constitutional Court in relieving and correcting potential defects in the political process including the legislative process operated by the majority rule particularly for the protection of the rights and the interests of the individuals belonging to minority groups, expansion of the qualifications for the justices so that more diverse perspectives and positions may be represented in the constitutionality review process will further justify the system of constitutionality review in Korea.¹²⁴⁾

Second, the jurisdictional relationship between the Constitutional Court and the judicial court, particularly the Supreme Court, needs to be further clarified at the constitutional and statutory levels.¹²⁵⁾ The Constitutional Court and the Supreme Court are to maintain independence from each other in terms of jurisdiction, organization and operation. The Constitutional Court Act (Act No. 17469) expressly excludes the judgment of the judicial court from the constitutional complaint adjudication under the Act (Article 68(1) of the Constitutional Court Act). However, the language of the Korean Constitution in this regard is not clear and there has been certain tension between the Constitutional Court and the Supreme Court particularly over the Constitutional Court's jurisdiction over the adjudication on constitutional complaint or the Constitutional Court's jurisdiction to review the judgment of the judicial court under Article 68(1) of the Constitutional Court Act.

Third, there have been challenges to the authority of the Constitutional Court to render "modified decisions" of limited or conditional constitutionality, limited or conditional unconstitutionality, and nonconformity of the statute with the Constitution.¹²⁶⁾ Whereas neither the Constitution nor the statute including the Constitutional Court Act (Act No. 17469) expressly sets forth the ground for such types or forms of decisions, the Korean Constitutional Court has rendered such forms of decisions in

124) For discussions on the organization of the Constitutional Court in this vein, see Yang, Jeong-Yun, *supra* note 122, at 180-185, 197-201; and Park, Sung-Duc, *supra* note 120, at 262.

125) On this point, refer generally to Lee, Dong-Hoon, *supra* note 78; and Heo, Wan Jung, *supra* note 79.

126) On this point, refer generally to Park Jinwoo, *supra* note 79, at 16-18.

abundance¹²⁷⁾ through its history of over thirty years. At the heart of this debate has been the binding force of such modified decisions particularly upon the judicial court in subsequent statutory interpretation or decision-making. The Supreme Court has been in the position that the plenary judicial power vested in the judicial court presupposes the judicial court's authority and power to interpret the statute, and that the modified decisions by the Constitutional Court on the constitutionality of the statute may only suggest to the judicial court one of the possible ways of statutory interpretation in judicial court's decision-making in subsequent cases. The Constitutional Court, on the other hand, has been in the position that judicial court's authority and power of statutory interpretation presupposes the validity and the constitutionality of the statute to be interpreted, and that the modified decisions represent deference to National Assembly on the part of the Constitutional Court which is germane to the presumption of constitutionality of statute, separation of powers, and representative democracy. In the long term, while the Constitutional Court is to issue nonconformity decisions judiciously out of prudence, it would be desirable to introduce a statutory ground for modified decisions to the Constitutional Court Act through the revision of Article 45 and other relevant provisions thereof.¹²⁸⁾

III. Suggestions for Changes in National Assembly Legislative Process Following Constitutional Court Decision of Nonconformity, to Substantiate “Constitutional Dialogues” of Constitutional Institutions for the Implementation of the Constitution in Korea’s Constitutional Democracy

The decision-making of the Constitutional Court of Korea in the

127) Refer to the general statistics of the Constitutional Court of the Republic of Korea at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

128) Legislative bills intended as such had been submitted to National Assembly in multiple occasions during as early as the 18th National Assembly (2008-2012), yet were discarded by the closure of the session.

constitutionality review proceeding has a unique significance and serves idiosyncratic functions in Korea's constitutional democracy, particularly as a remedial mechanism of constitutional interactions between and among different constitutional institutions of National Assembly, the Constitutional Court, the judicial court, and, in the Korean constitutional political process, the executive branch,¹²⁹⁾ particularly in addressing and remedying shortcomings in legislation or enactment of the statute. The Constitutional Court's decision-making and its decisions in the constitutionality review proceeding function to establish the constitutional limitations on the legislative activity that serve as the premise of the underlying litigation, and also to determine the effect of the statute applicable in the underlying litigation. First, the decision of the Constitutional Court in constitutionality review proceeding establishes the constitutional limitation upon the legislative activity that is the premise of the underlying litigation. When the Constitutional Court interprets the statute that is the object of the constitutional review proceeding, such interpretation by the Constitutional Court does not bind the judicial court in the judicial court's interpretation of the same statute as merely a provisional kind. However, the interpretation of the constitutional provisions by the Constitutional Court in the process of constitutionality review is judicially binding authoritative interpretation that supplements the intent of the legislator, and, as such, it substantively establishes the constitutional limits on the legislative activity or the legislation in Korea.

Second, the decision of the Constitutional Court in constitutionality review proceeding determines the effect of the statute applicable in the underlying litigation pending at the judicial court. In the constitutionality review proceeding, the Constitutional Court of Korea is strictly limited to review and determine the constitutionality of the statute that is the

129) The government as well as ten or more members of National Assembly and the standing committees of National Assembly may introduce a legislative bill to National Assembly in order to enact a statute in Korea (DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 52 (S. Kor.)). The government has proactively exercised such authority and function in the statutory legislation in Korea. For the statistics indicating this, refer to the URL of National Assembly at <https://likms.assembly.go.kr/bill/stat/statFinishBillSearch.do>.

applicable law in the underlying case, as such review by the Constitutional Court may only be initiated upon request of the judicial court where the underlying case is pending. In light of the provision of Article 107(1) of the Constitution,¹³⁰⁾ (a) the decision of constitutionality or the decision holding the statute constitutional by the Constitutional Court in constitutionality review proceeding means that the statute is applicable in the underlying judicial case as such statute is not in breach of the Constitution, and (b) the decision of unconstitutionality or the decision holding the statute unconstitutional means that the judicial court may not apply such statute in the underlying case as such statute is in violation of the Constitution. However, notwithstanding the effect of the Constitutional Court's decision of unconstitutionality to render the statute null and void, thereby at normative level such decision should have the identical effect to that of deleting the language of the statutory provision, National Assembly is not prohibited from subsequently enacting similar or practically same statute. Further, the established practice of the Korean Constitutional Court of rendering the decision of nonconformity of the statute with the Constitution and the decision of limited or conditional unconstitutionality other than the decisions of simple unconstitutionality or constitutionality with no supporting textual provisions either in the Constitution or the statute has created more structurally and conceptually complicated issues with respect to the binding effect of such decision of the Constitutional Court in the subsequent cases in the judicial court.

In the case of the decision of constitutionality, the Constitutional Court holds that the statute that has been the object of the constitutional adjudication is not in violation of the Constitution and that the statute shall be continuously presumed to be constitutional.¹³¹⁾ To compare, the Constitutional Court Act of Germany provides that the adjudication of the Federal Constitutional Court of Germany binds all federal and local constitutional institutions including the judicial courts and administrative

130) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 107 para. 1 (S. Kor.) provides that "[w]hen the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof."

131) For the relevant statistics, refer to the [Table] at the end of this paper, and also to the general statistics of the Constitutional Court of Korea, at <http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>.

agencies (Article 31(1) of the Constitutional Court Act of Germany). As such, the decision of constitutionality of the Federal Constitutional Court of Germany is also interpreted to be binding on all federal and local constitutional institutions. On the other hand, in the case of Korea, whereas the decision of constitutionality of the Korean Constitutional Court unequivocally means in light of the intent of Article 107(1) of the Constitution¹³²⁾ that the statute that has been the object of the constitutionality review may be applicable in the underlying judicial action, there is no provision of law in express language that provides the general binding effect of the Constitutional Court's decision of constitutionality. Article 47(1) of the Constitutional Court Act (Act No. 17469) provides that the decision of unconstitutionality by the Constitutional Court shall bind all constitutional institutions including the judicial courts and local governments, and Article 47(2) provides that the statute or the statutory provision that is held to be unconstitutional by the Constitutional Court shall lose its statutory force as of the date of such decision of unconstitutionality. On this point, the Korean Constitutional Court has taken the position that the decision of constitutionality does not have the general binding effect yet such constitutionality decision does have the authority of and as the precedent in light of Article 23 of the Constitutional Court Act¹³³⁾ that requires the consent of six or more Justices out of nine in

132) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] Art. 107 para. 1 (S. Kor.) provides that "[w]hen the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof."

133) Heonbeopjaepansobeob [Constitutional Court Act of Korea], Act No. 4017, Aug. 5, 1988, amended by Act No. 17469, June. 9, 2020, Art. 23 (S. Kor.) provides as follows:

Article 23 (Quorum for Adjudication) (1) The full bench shall try a case with the attendance of seven or more Justices.

(2) The full bench shall make a decision on a case with the affirmative vote of majority of Justices participating in the final trial: Provided, That the affirmative vote of six or more Justices is required, in cases falling under any of following subparagraphs:

1. Where it makes a decision of acceptance on the constitutionality of a law, impeachment, dissolution of a political party or acceptance of a constitutional complaint;
2. Where it modifies an opinion on the interpretation and application of the Constitution or laws previously declared by the Constitutional Court.

order to change the precedent of the Constitutional Court.¹³⁴⁾

As the statute enacted by National Assembly is presumed to be constitutional under the principle of constitutional representative democracy in Korea, and the decision of constitutionality by the Constitutional Court as the outcome of the constitutionality review proceeding does not in express language generally bind all constitutional institutions including the judicial courts, the decision of constitutionality by the Constitutional Court of Korea is different from the decision of unconstitutionality that does have the formative effect of binding all constitutional institutions including the judicial courts (Article 47(1) of the Constitutional Court Act). While the decision of unconstitutionality denies the statutory force of the statute that is the object of the constitutionality review, the decision of constitutionality indicates that the Constitutional Court reaffirms the constitutionality of the statute which has already been presumed since its enactment. Yet, even if the decision of constitutionality does not have general binding effect under express textual language, it does have the authority as the precedent. Therefore, it is expected that the judicial court will be more serious and careful in determining whether to grant the parties' motion for judicial court to file the request for constitutionality review with the Constitutional Court, should the

134) For example, in the constitutionality review proceeding challenging the constitutionality of Hyongbeob [Criminal Act], Act No. 293, Sept. 18, 1953, Art. 241 (S. Kor.) that criminally punished the adultery, the Korean Constitutional Court rendered a decision holding the statute constitutional (Constitutional Court [Const. Ct.], 89Hun-Ma82, Sept. 10, 1990 (S. Kor.)); and, in the subsequent constitutionality review proceeding challenging the constitutionality of the same statutory provision punishing adultery brought to the Constitutional Court for the second time, the Constitutional Court held the statutory provision to be constitutional, citing the previous decision of 1990 (89Hun-Ma82) as the precedent (Constitutional Court [Const. Ct.], 90Hun-Ga70, Mar. 11, 1993 (5 KCCR, 18) (S. Kor.)). The Constitutional Court held the same statutory provision to be constitutional for the third time in 2001 and the fourth time in 2008, in the constitutionality review proceedings on the same statutory provision (Constitutional Court [Const. Ct.], 2000Hun-Ba60, Oct. 25, 2001 (13 KCCR, 480) (S. Kor.); and Constitutional Court [Const. Ct.], 2007Hun-Ga17, Oct. 30, 2008 (20 KCCR, 696) (S. Kor.)). Eventually, the provision criminally punishing adultery of the Criminal Act of Korea was held to be unconstitutional by the Constitutional Court in the fifth constitutionality review proceeding (Constitutional Court [Const. Ct.], 2009Hun-Ba17, Feb. 26, 2015 (27 KCCR, 20) (S. Kor.)), and the crime of adultery was abolished in Korea as Article 241 of the Criminal Act became null and void by the above 2015 Constitutional Court decision of unconstitutionality.

constitutionality of the same statutory provision that was previously held to be constitutional become an issue in the subsequent judicial case. This has to be analyzed in the larger context as the changes in the standard of review for constitutionality of the statute such as the changes in values in the community are the very grounds for enacting the law of the Constitution written in the intentionally abstract and open language.

Next, in the case of the decision of unconstitutionality, the Constitutional Court holds that it has reached the conclusion of judicial nature upon reviewing the constitutionality of the statute as requested by the judicial court that the statutory provision that is the object of constitutional adjudication has incurred unconstitutional situation upon adjudicating on the merits as to the unconstitutionality of the statutory provision whose constitutionality is material in determining the underlying case. The decision of unconstitutionality by the Korean Constitutional Court binds all constitutional institutions of Korea including the judicial courts and the local governments (Article 47(1) of the Constitutional Court Act), and the statute that is held to be unconstitutional by the Constitutional Court loses its statutory force as of the date of the decision of unconstitutionality. Further, the statutory provisions of criminal sanctions shall lose the statutory force retroactively (Article 47(2) of the Constitutional Court Act). It should be noted again here that, for the purview of the decision of unconstitutionality should and does coincide with the object of the constitutionality review adjudication, the Constitutional Court may only hold unconstitutional such statutory provision that is the applicable law in the underlying judicial action and material in determining the underlying judicial action, and only if requested by the judicial court (Article 45 of the Constitutional Court Act¹³⁵). When the Constitutional Court holds that only part of the statutory provision is unconstitutional, the rest of the statutory provision maintains the statutory force,¹³⁶ which is also

135) Heonbeopjaepansobeob [Constitutional Court Act of Korea], Act No. 4017, Aug. 5, 1988, amended by Act No. 17469, June. 9, 2020, Art. 45 (S. Kor.) provides that “[t]he Constitutional Court shall decide only whether or not the requested Act or any provision of the Act is unconstitutional: Provided, That if it is deemed that the whole provisions of the Act are unable to enforce due to a decision on unconstitutionality of some provisions, a decision on unconstitutionality may be made on the whole Act.”

136) Constitutional Court [Const. Ct.], 94Hun-Ba1, Dec. 26, 1996 (8 KCCR, 808) (S. Kor.).

supported by the doctrine of presumption of constitutionality of the statute. Yet, should the Constitutional Court determine that the statute in its entirety may not be implemented due to the unconstitutionality of the statute or statutory provision at issue, then the Constitutional Court may hold the statute in its entirety to be unconstitutional (Article 45 of the Constitutional Court Act).¹³⁷⁾

With respect to the issue of whether the request for constitutionality review may subsequently and repeatedly be made following the Constitutional Court's decision holding the statute constitutional, the decision of unconstitutionality of the Constitutional Court does have the general binding effect under Article 47 of the Constitutional Court Act¹³⁸⁾ which completely removes the statutory force of such provision held to be unconstitutional. Therefore, the judicial court may not request the Constitutional Court for the constitutionality review over the statute that has been held unconstitutional by the Constitutional Court.¹³⁹⁾ On a

137) Heonbeopjaepansobeob [Constitutional Court Act of Korea], Act No. 4017, Aug. 5, 1988, *amended by* Act No. 17469, June. 9, 2020, Art. 45 (S. Kor.), including its proviso, provides that "[t]he Constitutional Court shall decide only whether or not the requested Act or any provision of the Act is unconstitutional: Provided, That if it is deemed that the whole provisions of the Act are unable to enforce due to a decision on unconstitutionality of some provisions, a decision on unconstitutionality may be made on the whole Act."

138) Heonbeopjaepansobeob [Constitutional Court Act of Korea], Act No. 4017, Aug. 5, 1988, *amended by* Act No. 17469, June. 9, 2020, Art. 47 (S. Kor.) provides as follows:

Article 47 (Effect of Decision on Unconstitutionality) (1) Any decision that an Act is unconstitutional shall be binding upon courts, and other state agencies and local governments.

(2) Any Act or provisions thereof decided as unconstitutional shall lose effect from the date on which such decision is made.

(3) Notwithstanding paragraph (2), Acts or provisions regarding criminal punishments shall lose effect retrospectively: Provided, That where a decision of constitutionality has previously been made in a case to which any of such Acts or provisions apply, such Acts or provisions shall lose effect retrospectively on the following day of the date on which such decision was made.

(4) In cases falling under paragraph (3), a re-adjudication may be requested with respect to a conviction based on the law or provisions thereof decided as unconstitutional.

(5) The Criminal Procedure Act shall apply *mutatis mutandis* to re-adjudications as referred to in paragraph (4).

139) Constitutional Court [Const. Ct.], 89Hun-Ga86, Sept. 29, 1989 (1 KCCR, 284) (S. Kor.).

separate note, however, subsequent to the Constitutional Court's decision in constitutionality review proceeding holding the statutory provision unconstitutional thereby removing the statutory force of the statutory provision which has been the object of the constitutionality review, notwithstanding and in the face of such decision of unconstitutionality, National Assembly may reenact similar or substantively identical law or legislative sequel with no limitations under the principles of representative democracy and the parliamentary lawmaking of the Korean Constitution. As yet, with respect to the constitutionality review over the reenactment or legislative sequel, there is no legal provision in express language or established legal position in Korea, on, for examples, the permissibility of the request for constitutionality review or the review standard applicable thereto.

Many of the challenges to Korea's constitutional adjudication system and particularly its constitutionality review system concern lack or nonexistence of legal provisions in express language on the relevant issues. This should be remedied primarily by appropriate legislation. Further, from the perspective of the constitutional adjudication system as the constitutional remedial mechanism to activate remedial interactions among the relevant constitutional institutions and actors, certain institutional measures or mechanisms may be introduced to further such interactions. One example would be possible introduction of a separate calendar such as the corrections calendar to the legislative process of National Assembly,¹⁴⁰⁾ under which the statutory revision process, upon Constitutional Court's rendering of the decision of unconstitutionality of the statute with the Constitution, would proceed in expedited manner along regularly and automatically held proceedings with certain special requirements for quorum and a minimum number of mandatory sessions. Also, either simultaneously or alternatively, the Constitutional Court may issue a provisional measure to be taken until the statutory revision by National

140) An alternative mechanism sharing the same goal of expedited legislative revision by National Assembly by allowing the Constitutional Court to indicate the provisional measures to be taken should National Assembly fail to revise the statute in accordance with the holding of nonconformity decision by designated time as part of nonconformity decision is presented in Park, Sung-Duc, *supra* note 120, at 263.

Assembly, as part of its nonconformity decision urging National Assembly statutory revision by certain date, should National Assembly fail to make recommended statutory revisions in accordance with the holding of nonconformity decision by the designated time limit. Such discussion itself should proceed in light of and in the context of Korea's constitutional democracy, in the direction of further activating the interactions among the constitutional institutions under Korea's unique separation of powers structure to supplement the political process in Korea's representative democracy for the implementation of the Constitution, which will ultimately contribute to the further substantiated protection of constitutional rights.

Table. Case Statistics of the Constitutional Court of Korea (September 1988–November 2020)

Type	Total	Constitutionality of Statutes ¹	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint			
						Sub total	§68 I	§68 II	
Filed	41,356	1,005	2	2	115	40,232	31,858	8,374	
Settled	40,065	955	2	2	110	38,996	31,084	7,912	
Dismissed by Panel	24,295					24,295	19,762	4,533	
Decided by Full Bench	Unconstitutional ²	655	294				361	113	248
	Nonconformity ³	260	80				180	75	105
	Conditionally Unconstitutional ⁴	70	18				52	20	32
	Conditionally Constitutional ⁵	28	7				21		21
	Constitutional	2,818	359				2,459	4	2,455
	Upheld ⁶	787		1	1	19	766	766	
	Rejected	7,981		1		27	7,953	7,953	
	Dismissed	2,111	73		1	45	1,992	1,609	383
	Other	10					10	8	2
	Withdrawn	1,050	124			19	907	774	133
Pending	1,291	50			5	1,236	774	462	

Source: the URL of the Constitutional Court of the Republic of Korea (<http://english.court.go.kr/cckhome/engNew/jurisdiction/caseLoadStatic/caseLoadStatic.do>)

