

# The Korean Understanding of Popular Sovereignty in Constitutional Founding Experiences and Its Implication on the Korean Constitutional Court *en banc* Decision 2004Hunma554, 556, Oct. 21, 2004\*

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## Abstract

Article 1, paragraph 2 of the Korean Constitution enshrines the principle of popular sovereignty. In order to understand the meaning of popular sovereignty unique to the Korean context, an analysis of the discussions during the constitutional founding period would be necessary. This essay focuses on the discussion during the plenary sittings of the Constituent Assembly about the relationship between the principle of popular sovereignty and indirect presidential election system, which was a topic largely disregarded among the previous studies in the field of constitutional history. While thoroughly analyzing the legal and logical arguments posed by the members of the Constituent Assembly and the Constitution Drafting Committee, the political circumstances surrounding the constitution-making, which were of utmost priority for many of the members, are also considered as one of the features that affected the approval of Article 52 of the constitutional proposal stipulating indirect presidential election system. Finally, the implication of these discussions in 1948 on the Constitutional Court Decision in 2004, which relies on the understanding of popular sovereignty in ruling that the Special Act trying to relocate the administrative capital of Korea is unconstitutional, is analyzed. The implication is that various factors including constitutional importance of the matter and the opportunity of participation granted for the people must first be analyzed before concluding whether a certain means of collective decision is allowed under the principle of popular sovereignty.

KEYWORDS: popular sovereignty, Korean National Assembly, Constituent Assembly, Constitution Drafting Committee, indirect presidential election, constitutional custom, constitutional amendment

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## I. Introduction

The principle of popular sovereignty has affected worldwide constitutional founding experiences through its succession by modern constitutionalist theories. The Korean Constitution was no exception from this; Article 1, paragraph 2, which stipulates that “[t]he sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people”, was inserted in the first Constitution and remains until now without any textual changes. Constitutional developments of each country were affected by the principle of popular sovereignty that shares its origin, but with a slightly different concept of popular sovereignty reflecting each country’s distinct political and historical context. However, surprisingly few research aims to reveal the concept of popular sovereignty specific to the Korean context.<sup>1)</sup>

Stemming from this question, this essay analyzes how the concept of sovereignty was implemented into the Korean Constitution. To achieve this objective, the agenda that had involved thorough discussions of popular sovereignty among the plenary sessions of the Constituent Assembly in 1948, right before the enactment of the first Constitution, was selected. The discussions in the plenary sessions are appropriate as a means to approximate the collective understanding at that time because unlike individual voting, the open ground for discussion is an important area for rationalizing and persuading one’s own logic. The discussion mainly focuses on whether indirectly electing the president in the National Assembly goes against the principle of popular sovereignty. But in analyzing the discussions, enough attention must be given to the fact that constitutional discussions are not only about legal principles; they also

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1) For the few studies that explicitly dealt with the concept of popular sovereignty in the Korean context, see Gyung Chul Park, *Gungminjugwon, gungminui heonbeopjejeonggwollyeok geurigo gwanseupeonbeop* [Popular Sovereignty, the People’s Constituent Power, and Constitutional Custom], 13(2) CONST. L. 197, 197-235 (June 2007) (In Korean). See also Kyong Je Kim, *Gungminjugwone daehan ohae – Sinhaengjeongsudogeseolbeopwiheongyeoljeong(2004heonma554, 556 byeonghap)gwa gwallyeonhayeo* [Misunderstandings on Popular Sovereignty – In relation to the Constitutional Court Decision on the Special Act on the Establishment of the New Administrative Capital (2004Hunma 554 & 556, consol.)], 46(3) SEOUL L. J. 397, 397-436 (Sep. 2005) (In Korean).

reflect the political circumstances around a unique period of constitution-making. In light of the principle of popular sovereignty fleshed out through the discussions, some insights on the Korean Constitutional Court decision issued in 2004, in which the principle of popular sovereignty served as a basic premise for ruling the Special Act on the Establishment of the New Administrative Capital unconstitutional, thereby restraining the relocation of the capital of the country by constructing a new capital for administrative function in the Chungcheong Province.

This essay tries to clarify the concept of popular sovereignty, which is often confusingly used in different contexts with different meaning. This essay contributes to the interpretation of Article 1, paragraph 2 of the Korean Constitution through the *Korean* understanding of the principle of popular sovereignty, not through the general concept of it in modern constitutionalist theories. This will help shed some light to the additional meaning of Article 1, paragraph 2 reflecting the special course of development that the concept of popular sovereignty has passed through in Korea.

## II. Discussions on Indirect Presidential Election System in the Constituent Assembly

### 1. *Background of the Discussion*

The Korean Constituent Assembly, formed through the general election of the 1st National Assembly on May 10, 1948, established the Constitution Drafting Committee (hereinafter “the Committee”) by having 10 members of the National Assembly select 30 members of the Committee among the legislators. The Committee, in turn, selected 10 expert advisers who drafted the constitutional proposal along with the members. The drafted proposal was presented to the 17th plenary sitting, 1st session of the Korean Constituent Assembly on June 23, 1948.<sup>2)</sup> The constitutional proposal

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2) For detailed explanation about the organization of the Constitution Drafting Committee and the drafting of the constitutional proposal, see SU YONG KIM, GEONGUKWA HEONBEOP: HEONBEOMNONUIREUL TONGHAE BON DAEHANMINGUKGEONGUKSA [STATE-BUILDING AND

drafted by the Committee went through the first reading that consisted of question-and-answer sessions and open discussions (26~30 June 1948), the second reading that consisted of clause-by-clause discussions (1~7 July 1948), and the third reading that consisted of wording reviews (12 July 1948), which made it ready to be effective as the Constitution on 17 July 1948 as Chairman Syngman Rhee, signed and promulgated it.

Among the discussions in the Constitution Drafting Committee and the plenary sessions of the Constituent Assembly, studies in the field of constitutional history mostly focus on discussions about the form of government, especially regarding the conflict between those who prefer presidential system and those who prefer parliamentary system.<sup>3)</sup> But this was not the only point of conflict regarding the form of government; whether presidential elections must be done directly by the people or indirectly through the National Assembly was also one of the main agenda at least during the first reading. The constitutional proposal drafted by the Committee had Article 52 that stipulates indirect presidential election system and Article 55 that stipulates the timing of the election of the successor when the term of office for president and vice president expires,<sup>4)</sup> which were both incorporated into the 1948 Constitution as Articles 53 and 56 without any substantial changes.<sup>5)</sup>

Regarding why the Constitution Drafting Committee had chosen

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CONSTITUTION: THE HISTORY OF HOW THE REPUBLIC OF KOREA WAS FOUNDED ANALYZED THROUGH CONSTITUTIONAL DISCUSSIONS] 261-299 (2008) (In Korean).

3) HEE KYUNG SUH, DAEHANMINGUK HEONBEOBUI TANSANG: HANGUK HEONJEONGSA, MANMINGONGDONGHOESEO JEHEONKKAJI [THE BIRTH OF THE CONSTITUTION OF THE REPUBLIC OF KOREA: THE CONSTITUTIONAL HISTORY OF KOREA, FROM PEOPLES' ASSEMBLY TO THE ESTABLISHMENT OF THE CONSTITUTION] 313-358 (2012) (In Korean). Kim, *supra* note 2, at 302.

4) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1HOE JE17CHA GUKOEBONHOEU-HOEUIROK [MINUTES OF THE 17TH PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 7 (June 23, 1948) (In Korean), <http://likms.assembly.go.kr/record/mhs-60-010.do> (last visited Feb. 7, 2022). This essay uses the version of the minutes of the plenary sittings of the National Assembly provided by the Stenography Division, Proceedings Bureau of the National Assembly of the Republic of Korea. The Proceedings Bureau of the National Assembly is publicly providing the translated and databased minutes of the plenary sittings originally transcribed in Chinese characters, starting from the Constituent Assembly (1948-1950) and the Supreme Council for National Reconstruction (1961-1963).

5) DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], amended by Constitution no. 2, July 7, 1952, arts. 53 & 56 (S. Kor.).

indirect presidential election system, Jin-oh Yoo (hereinafter “Yoo”), the main expert adviser who led the discussion in the Committee, gave a rather *situational* explanation: “I think this system comes from the special political circumstances in the middle of an extremely eventful period that we are experiencing.”<sup>6)</sup> At the 7th meeting of the Committee on June 11, 1948, two members (Seok-gu Yun and Hun-gu Lee) did support direct election whereas one member (Jeong Heo) insisted on indirect election where the National Assembly elects the president instead of popular vote.<sup>7)</sup> Despite such debate, it is still not clear in detail what the “special political circumstances” Yoo mentioned refers to or how those circumstances lead to the choice of indirect presidential election system, because the debate during the 7th meeting presupposed parliamentary system instead of presidential system.<sup>8)</sup> Therefore, the reason behind the Constitution Drafting Committee’s choice of indirect election under presidential system is unclear.

The swiftness of changing the constitutional proposal from parliamentary to presidential system explains such absence of reasoning. Syngman Rhee, who was topping the poll among the potential presidential candidates,<sup>9)</sup> consistently pressured the Constitution Drafting Committee to adopt presidential system, presumptively because he would likely to become a president without substantial power under parliamentary system where the Korea Democratic Party is leading the National Assembly.<sup>10)</sup> Due

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6) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1HOE JE18CHA GUKOEBONHOEU-HOEUIROK [MINUTES OF THE 18TH PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 29 (June 26, 1948) (In Korean).

7) KIM, *supra* note 2, at 281.

8) *Daetongnyeong gukoeseo seongeo jeongbuneun naegakchaegimje* [The President Will be Elected by the National Assembly and the Government Will Adopt a Parliamentary System], Dong-A Ilbo, June 13, 1948, at 1 (In Korean) (“Out of 108 articles that were to be drafted, the Constitution Drafting Committee completed drafting 76 articles until 11th June. Contrary to the expectation that there will be heated debate on the form of government, the Committee unanimously agreed to adopt parliamentary system. Moreover, the presidential election will be done by the National Assembly, and the term of office will be five years.”).

9) *Chodae daetongnyeongeun nugu?* [Who Will be the First President?], Dong-A Ilbo, July 23, 1946, at 1 (In Korean); *Chodae daetongnyeongeun?* [The First President?], Chosun Ilbo, June 25, 1948, at 2 (In Korean).

10) KIM, *supra* note 2, at 256.

to such pressure from Syngman Rhee, there was a last-minute change on the constitutional proposal on the evening of 21st June, which was just two days before the presentation to the plenary sitting of the Constituent Assembly. Despite Yoo's concern that the change of the constitutional proposal to presidential system requires a holistic revision, it took literally half an hour for the members of the Committee, led by Jun-yeon Kim, to change the basis of the constitutional proposal from parliamentary to presidential system.<sup>11)</sup> From this, it can be deduced that there would not have been much time for the Constitution Drafting Committee to delve into the discussion on what would be more appropriate way to elect the president under presidential system. This may be the background of Yoo mentioning "special political circumstances" without defining it.

## 2. Discussions During the 18th Plenary Sitting

The first reading of the constitutional proposal in the Constituent Assembly was conducted from the 18th plenary sitting (26 June 1948) to the 21st plenary sitting (30 June 1948), 1st session. During the first reading, whether the president must be elected through popular vote or by the National Assembly was discussed in relation to popular sovereignty. In particular, the debate centered around whether the National Assembly electing the president goes against the principle of popular sovereignty. Principle of popular sovereignty is found in Article 2 of the constitutional proposal, which states the following: "The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people."<sup>12)</sup>

Since the first reading consisted of question-and-answer sessions and open discussions, many members raised their concern about the National Assembly electing the president in the form of questions. The first question

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11) JUN-YEON KIM, *NAUI GIL [MY WAY]* 26-27 (1966) (In Korean). This book is an autobiographic memoir of Jun-yeon Kim, who was a member of both the Constituent Assembly (1st National Assembly) and the Constitution Drafting Committee, which contains his impressions on the Korean constitutional founding experiences.

12) This article was approved as Article 2 of the first Constitution of Korea and is still in place in the current Korean Constitution as Article 1, paragraph 2, without any single change in the text. See *DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION]* art. 1 para. 2 (S. Kor.).

regarding the relationship between the principle of popular sovereignty and indirect presidential election came from Jang-yeol Kim during the 18th plenary sitting (26 June 1948). In a written question, Jang-yeol Kim asked “why the president must be elected indirectly instead of a direct election, given that the people hold the sovereignty”, which is basically an inquiry regarding the logical relationship between Article 2 (principle of popular sovereignty) and Article 52 (indirect presidential election system) of the constitutional proposal. In response to this question, Sang-il Seo, who was also a member of the Constitution Drafting Committee, replied that principle of popular sovereignty does not necessarily mean that all elections must be conducted through a popular vote, referring to the presidential election system of the United States of America. According to Sang-il Seo, the United States of America, as the “most advanced democracy in the world”, has adopted indirect presidential system rather than resorting to popular vote.<sup>13)</sup>

The members of the Constituent Assembly were obviously yet to be satisfied with Sang-il Seo’s reply. On the very same day in the same plenary sitting, four members (Yun-won Park, Ok-hyeon Jo, Tae-uk Gwon, Tae-hui Gwon) together submitted their opinion about Article 52 of the constitutional proposal, which was that the presidential election by the National Assembly going against the spirit of Article 2 of the proposal, and that popular vote is a more valid way to conduct presidential elections. They demanded Yoo to explain why the president must be indirectly elected through the National Assembly. In response to such demand, Yoo specified his understanding of the principle of popular sovereignty spelled out in Article 2:

Article 2 does not require that all important decisions of the country be directly made by the people. If the structure of Article 2 were to be interpreted as such, referendum must be held in every single instance of lawmaking, and the people must be directly involved in every single instance of making important decisions for the country. On the contrary, the structure of Article 2 is that,

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13) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, *supra* note 6, at 7.

whereas in some cases the people directly exerts its sovereignty through referendum, in most cases, the people remains as a holder of sovereignty and sovereignty is exerted *through* [emphasis added] the people's will. So, the people has the power to make laws. But since it is impossible for the people to make every single law, the people's will is gathered through elections, which in turn makes laws. The same logic applies to presidential elections. In some cases, the people directly votes, but in other cases, the people's will votes. The National Assembly electing the president, therefore, does not go against the principle of popular sovereignty.<sup>14)</sup>

### 3. *Discussions During the 19th Plenary Sitting Through the 21st Plenary Sitting*

The questions regarding the relationship between the principle of popular sovereignty and indirect presidential election system continued in the next plenary sitting. Gu-sam Jeong raised the same issue that the National Assembly electing the president deviates from the principle that the people must vote for their own president and vice president. Yoo's reply to this was largely the same with his previous reply to the four members, except that he added the following: "Whether the president must be elected through popular vote or by the National Assembly is not necessarily a matter of where sovereignty belongs; it is a matter of how to control president's power regarding legislation".<sup>15)</sup>

The same topic emerged in the 20th plenary sitting, when Gi-yeol O made a speech against indirect presidential election system. The main reason he insisted that such system goes against democracy was that under the constitutional proposal, there is not much room for the National Assembly to keep the president in check, despite the huge authority of president. According to Gi-yeol O, "If we are to make the National Assembly elect the president, the articles to guarantee the National

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14) *Id.* at 28-29.

15) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1HOE JE19CHA GUKOEBONHOEU-HOEUIROK [MINUTES OF THE 19TH PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 4 (June 28, 1948) (In Korean).



Assembly to meddle in everything the president undertakes, must be added. [...] If we leave Article 52 as it is, that is undoubtedly ignoring thirty million people residing in this country".<sup>16)</sup> In essence, Gi-yeol O understands it contradictory that the constitutional proposal grants huge authority to the president while electing the president indirectly through the National Assembly.

This was one of the two reasons Jang-gil Won argued against the National Assembly electing the president. He divides the constitutional proposal into three parts: the first part containing general provisions and dealing with citizens' rights and duties, the second part dealing with the National Assembly, and the third part dealing with the Government and its composition. Jang-gil Won points out two inconsistencies, one practical and one logical, in the constitutional proposal. Focusing on the third part, the first practical inconsistency is between the almost absolute power of the government led by the head of government and the indirect presidential election system, given that such system makes the president at best a sub-agent of the people elected by the agents of the people. This comment is in line with Gi-yeol O's comment in the 20th plenary sitting. The second logical inconsistency is between the first part, which stipulates the principle that sovereignty and all state authority emanate from the people, and the second part, which makes the National Assembly elect the president and the vice president through a secret vote. This comment is in line with the previous comments by Jang-yeol Kim and four other members (Yun-won Park, Ok-hyeon Jo, Tae-uk Gwon, Tae-hui Gwon) during the 18th plenary sitting. Jang-gil Won finishes his statement by saying that he is unsure "whether the fundamental form of government is based on the people's power or on legislative and administrative power".<sup>17)</sup>

The last statement to highlight during the discussions in the first reading of the constitutional proposal is a statement by Jun-yeon Kim during the 21st plenary sitting. Like Sang-il Seo, Jun-yeon Kim was both a

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16) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1H0E JE20CHA GUKOEBONH0EUI-H0EUIROK [MINUTES OF THE 20TH PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 33 (June 29, 1948) (In Korean).

17) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1H0E JE21CHA GUKOEBONH0EUI-H0EUIROK [MINUTES OF THE 21ST PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 21 (June 30, 1948) (In Korean).

member of the National Assembly and a member of the Constitution Drafting Committee. He shares Yoo's opinion that the principle of popular sovereignty and indirect presidential election system does not necessarily contradict each other:

When we elected the National Assembly, thirty million of us, especially twenty million residing in the South, longed and demanded for the National Assembly to elect the president so that the government can be established. President elected by popular vote is not the only kind of president we can think of. The United States of America, for instance, does not elect the president by popular vote. Then, when electing 200 members of the National Assembly, our people was aware that these members have a responsibility to organize the government by electing the president. Considering the logicalness and the perception of our people, I would like to emphasize once again that the National Assembly electing the president in conclusion does not go against the principle of democracy.<sup>18)</sup>

#### *4. Summary of the Discussion*

In sum, regarding the relationship between the principle of popular sovereignty and indirect presidential election system, many members of the Constituent Assembly saw it as contradictory or incompatible (Jang-yeol Kim, Yun-won Park, Ok-hyeon Jo, Tae-uk Gwon, Tae-hui Gwon, Gu-sam Jeong, Gi-yeol O, Jang-gil Won). On the other hand, there were some members of the Constituent Assembly along with Yoo who perceived that the relationship was of a compatible nature (Sang-il Seo and Jun-yeon Kim). Those three who shared a view that the principle of popular sovereignty and indirect presidential election system are compatible were either a member or an expert advisor of the Constitution Drafting Committee.

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18) *Id.* at 28-29.

### III. Dissecting the Discussion

#### 1. *Diverse Approaches on Interpreting Article 2 of the Constitutional Proposal*

Except Gu-sam Jeong whose content of the question was revealed through Yoo's brief rephrasing, the arguments of those who believed that the principle of popular sovereignty and indirect presidential election system are contradictory or incompatible can be classified into two large categories. The classification is based on their respective approaches in interpreting the articles of the constitutional proposal. Under the first approach, a certain conclusion is deduced based on the interpretation of a separate provision. The second approach presupposes that there is no provision that exists independently from other provisions. Under this approach, more than one provision is analyzed simultaneously so that the meaning of each provision is understood in relation to other provisions in the constitutional proposal.

Jang-yeol Kim and the four members (Yun-won Park, Ok-hyeon Jo, Tae-uk Gwon, Tae-hui Gwon) in the 18th plenary sitting had made an argument based on the first approach, because their understanding relied solely on the interpretation of Article 2 that enshrines the principle of popular sovereignty. They had interpreted the text of Article 2 in that the principle of popular sovereignty does not allow decisions in a national level to be made indirectly through the National Assembly rather than directly by popular vote. In reaching such conclusion, they did not rely on any other provisions in the constitutional proposal; their interpretation directly came from the text of Article 2, which states that "the sovereignty [...] shall reside in the people".

In a different vein, Gi-yeol O in the 20th plenary sitting and Jang-gil Won in the 21st plenary sitting had interpreted Article 2 along with other articles in the constitutional proposal that provide for the power of the president, which can be classified as the second approach. Both members did not insist that indirect presidential election is in itself problematic in that it goes against the principle of popular sovereignty. Instead, they pointed out that the constitutional proposal grants "huge authority"

(Gi-yeol O) or “almost absolute power” (Jang-gil Won) to the president and the government. If the people cannot directly vote for the head of a state institution that enjoys such power, according to the two members, it goes against the principle of popular sovereignty. Following the very same logic, this also implies that if it were parliamentary system under which the president is granted at best a nominal authority, Gi-yeol O and Jang-gil Won would have had a different conclusion; they would have thought that the National Assembly electing the president and the principle of popular sovereignty are more than compatible.

To be precise, that Jang-gil Won’s statements follow the second approach is only true to the extent that he points to the practical inconsistency between the almost absolute power of the government led by the head of government and the indirect presidential election system. Regarding the logical inconsistency between the first and second part of the constitution, Jang-gil Won’s statements are more similar to the first approach, because the reasoning behind his statements solely relies on a specific textual interpretation of Article 2, just as the four members’ inquiry in the 18th plenary sitting.

The biggest difference between the two approaches in terms of interpreting Article 52 of the constitutional proposal is that whereas the first approach necessitates the conclusion that indirect presidential election system always goes against the principle of popular sovereignty, under the second approach, whether such system goes against the principle of popular sovereignty is conditional upon how much power is granted to the government and the president leading it. If the power of the government is relatively not so big compared to that of the National Assembly, indirect presidential election system might not be contradictory to the principle of popular sovereignty. On the other hand, if the power of the government is bigger than that of the National Assembly, indirectly electing the president is inconsistent with the principle of popular sovereignty. In essence, the second approach opens the possibility that if the decision is of a less important nature, the National Assembly may make the decision on behalf of people without violating the principle of popular sovereignty enshrined in one of the general provisions.

But still, what is important enough to necessitate popular vote and what is not so important that the National Assembly’s decision suffices, remains

a controversial issue. For instance, Yoo had placed lawmaking process and presidential election in the same level in terms of importance, as apparent in the analogy he used in explaining that indirect presidential election system does not necessarily violate the principle of sovereignty: "So, the people has the power to make laws. But since it is impossible for the people to make every single law, the people's will is gathered through elections, which in turn makes laws. The *same logic* [emphasis added] applies to presidential elections".<sup>19)</sup> Therefore, under the second approach, the main criteria for determining the scope of collective decisions that require popular vote is whether the subject of decision is important enough or not. Yoo basically considered both lawmaking and electing the president not important enough to be decided through popular vote. On the contrary, Gi-yeol O and Jang-gil Won thought that electing the president is important enough to necessitate popular vote, focusing on the huge presidential authority given by the constitutional proposal.

In sum, under the second approach, one can say that the indirect presidential election system is either compatible with the principle of popular sovereignty or against such principle depending on how important one considers the issue of who will become the president. And in assessing the importance of the issue, how much constitutional authority is given to the president would be one of the determining factors.

## 2. *The Meaning of Constitution-Making: Legal Principle vs. Political Tool*

In the end, Article 52 of the constitutional proposal was approved as Article 53 of the first Constitution of Korea. The last motion calling for substantive changes to Article 52 of the constitutional proposal came from Jong-nam Park during the 26th plenary sitting, 1st session of the Constituent Assembly. Jong-nam Park proposed an amendment to Article 52 that the president must be elected by popular vote, mainly because of the possibility that the people might not consider the president as a credible actor, which in turn leads to weakening of the government and loss of momentum in pursuing governmental policies. He emphasized that this is

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19) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, *supra* note 6, at 28-29.

especially detrimental during the period of instability that the country is now facing.<sup>20)</sup> Despite Jong-nam Park's attempt for persuasion, this motion was rejected, with 16 members voted in favor of, and 132 members voted against.<sup>21)</sup> The National Assembly, as a result, adopted Article 52 of the constitutional proposal into Article 53 of the first Constitution of Korea without making any change to the text of the original article in the proposal.

From this result, one may deduce a conclusion that toward the end of the readings of the constitutional proposal, most of the members of the Constituent Assembly were gradually more persuaded by the members of the Constitution Drafting Committee and started to think that indirect presidential election system and the principle of popular sovereignty are not necessarily contradictory. However, it is hasty to conclude as such because the theoretical debate about the relationship between indirect presidential system and the principle of popular sovereignty was not the only factor of consideration. The adoption of Article 52 of the constitutional proposal was not solely dependent on whether indirect presidential election system goes against the principle of popular sovereignty or not. In fact, as Hee Kyung Seo points out, there was an underlying, more fundamental debate about the meaning of constitution-making, mainly the conflict between speed and accuracy.<sup>22)</sup>

In fact, this is one of the classic debates among constitutional theorists which had impacted worldwide constitutional founding experiences regarding the inclusion of a provision to ensure the perpetuality of the constitution, from the French and Norwegian Constitutions to Indian jurisprudence.<sup>23)</sup> Kelsen also took a position in this debate, according to Klein, that although a constitution can attempt to perpetuate itself, such

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20) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1HOE JE26CHA GUKOEBONHOEUJ-HOEUIROK [MINUTES OF THE 26TH PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 4-5 (July 6, 1948) (In Korean).

21) *Id.* at 6.

22) SUH, *supra* note 3, at 305.

23) 1958 CONST. art. 89 (Fr.) ("The republican form of government cannot be amended."); 1912 CONST. art. 121 (Nor.) ("Amendments to the constitution shall never contradict the principles of the Constitution and shall be limited to modifications which shall not be repugnant to the spirit of the Constitution."); *Golak Nath v. State of Pundjab*, AIR 1967 SC 1.

attempts are meaningless.<sup>24)</sup> On the contrary, Schmitt maintained the position that the constitution can certainly protect itself and that any such clause is valid. Klein interprets Schmitt in that the principles which are off-limits are those which form the real core of the constitution, which can only be changed by the *pouvoir constituant*, that is the people themselves.<sup>25)</sup> In essence, constitutional theorists had a strikingly diverse understanding on whether the constitution is an eternal document with a spirit that is unchangeable, or a document that is open to constant change due to the loss of efficacy.

During the 20th plenary sitting, 1st session of the Constituent Assembly, Sang-hun Gwak insisted “to stop any legal and theoretical discussions about the constitution” and “to quickly make a constitution that gives absolute authority to the president” because “the fastest way to achieve a completely independent, unified country is to give absolute power to the president.” He considered the long discussions on the constitutional proposal as a scheme of those with “rebellious” motives.<sup>26)</sup> For Sang-hun Gwak, time was the most important factor to consider, to which Jung-gi Kim responded by showing his grief: “I feel sad for the general atmosphere here is to approve of the articles without any discussion, taking it granted that the constitution is to save our country”.<sup>27)</sup>

Mun-won Lee, in the 21st plenary sitting, classified those who focus on speed into “legal principlists” and those who focus on accuracy into “situationalists”:

I, as a representative of the people, question what should be the basic attitude toward the constitution. Between legal principlism and situationalism, I argue for the former, because the constitution is an eternal and everlasting code of the country, and it is possible to resolve situational issues secondarily. Considering this, I am

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24) Claude Klein, *The Eternal Constitution – Contrasting Hans Kelsen and Carl Schmitt*, in HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION 61, 63-65 (Dan Diner & Michael Stolleis eds., 1999).

25) *Id.* at 65-67.

26) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, *supra* note 16, at 8.

27) *Id.* at 29.

regretful for this National Assembly's bias towards situationalism. [...] I believe that there must be some fundamental principles that would not be affected by the changes in situation.<sup>28)</sup>

Mun-won Lee's classification of the attitude toward constitution-making is based on different understanding on the role constitution must play. Both Jung-gi Kim and Mun-won Lee emphasized the eternity of the constitution, believing that the constitution must establish some unchangeable, fundamental characteristics of the country. On the other hand, those who supported the presidential system understood the constitution as a provisional solution to deal with the immediate political problems that the country was facing. Jeong-hui Seo, for example, intentionally uses the word "formal" in describing the nature of open discussions and readings on the constitutional proposal, because nobody in the National Assembly can know which system between presidential and parliamentary will be better without experiencing any of the two systems.<sup>29)</sup> This led Jeong-hui Seo to try to frame what would be a subject of *discussion* into the subject of *belief*; he emphasized the meaninglessness of a role as a *legislator*, while emphasizing the necessity of a role as a *believer*.<sup>30)</sup> Such attitude was prevalent among the Speakers of the National Assembly as well. For example, Syngman Rhee, the Speaker, has stated the following during the first day of the second reading of the constitutional proposal:

The first thing the fellow members of the National Assembly must consider, is not who speaks more eloquently or whose opinion is more noble and proper. The utmost priority must rather be showing that we, acting as one entity without discussions or scuffles, have the capacity to constitute a government by establishing a constitution in a few days. [...] I urge the members to weigh the gravity and urgency of the issue at hand. [...] Even if some provisions are unsatisfactory for some members, I believe that democracy is also about solving urgent matters in an urgent

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28) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, *supra* note 17, at 7.

29) *Id.* at 15.

30) SUH, *supra* note 3, at 309.



manner.<sup>31)</sup>

In essence, Syngman Rhee and those who supported presidential system (Sang-hun Gwak, Jeong-hui Seo) are emphasizing that the politics is always a matter of choice under a time restraint, and democracy is no exception from this. On the contrary, the members who supported parliamentary system (Jung-gi Kim, Mun-won Lee) emphasized that the constitution, distinct from ordinary legislation, must contain fundamental principles that would not be affected by constantly changing circumstances. But the general atmosphere of the National Assembly was already geared toward the former attitude, which Mun-won Lee calls “situationalism”.

### *3. Implication on the Discussion on the Principle of Popular Sovereignty*

Going back to the discussion on the principle of popular sovereignty, the approval of Article 52 of the constitutional proposal does not mean that most of the National Assembly members were persuaded by the explanation of the members of the Constitution Drafting Committee that the principle of popular sovereignty and indirect presidential election system are compatible. Rather, the approval was possible due to the prevalent atmosphere in the Constituent Assembly that prioritizes the need for fast establishment of the constitution, which makes the principle of popular sovereignty a less important factor to consider. In a similar vein, Seung Woo Lee states that while he understands the inevitability of indirect election for the first president due to the urgent need to establish the government, it was nonetheless against constitutional theory to prescribe indirect presidential system in the Constitution; such inevitability could have been resolved through choosing direct presidential election system and at the same time inserting an article in the Addenda which states that the first president will be elected through the secret vote in the National Assembly.<sup>32)</sup>

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31) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, JE1HOE JE22CHA GUKOEBONHOEU-HOEUIROK [MINUTES OF THE 22ND PLENARY SITTING, 1ST SESSION OF THE CONSTITUENT ASSEMBLY] 7-8 (July 1, 1948) (In Korean).

32) Seung Woo Lee, *Geongukeonbeobui naeyonggwa jeongdangseong* [Contents and Legitimacy

In fact, not only the approval of Article 52 by the majority of the National Assembly, but also Yoo's opinion on the compatibility of indirect presidential election system and the principle of popular sovereignty is partly reliant on situationalism. While he logically explains that electing the president, just as lawmaking, can be done indirectly through the National Assembly, there is insufficient explanation on why presidential election is must be placed in the same level with lawmaking in terms of importance. This absence of logical link is provided through Yoo's *situational* attitude; despite the huge constitutional authority given to the president, electing the president is relatively less important in comparison to the approval of the constitutional proposal.

The "special political circumstances" that Yoo mentioned as the reason behind the Constitution Drafting Committee's choice of indirect presidential election, as aforementioned,<sup>33)</sup> now becomes clear. The phrase referred to the urgent need to constitute the government before anything else, and the fast approval of the constitutional proposal must have been set as an utmost priority to achieve such objective. Although Yoo's draft constitution was based on parliamentary system at first and he kept insisting on parliamentary system during the Constitution Drafting Committee meetings,<sup>34)</sup> from the point he agreed to change the constitutional proposal into the one based on presidential system, he seems to have put more weight on the urgent political circumstances that the country was facing.

#### 4. Summary

The first approach on Article 2 considers the decision of who will become the president as always necessitating popular vote, regardless of how much constitutional authority is provided to the president. In contrast, the second approach on Article 2 leaves the possibility that if the president is not very powerful, as in parliamentary system, the principle of popular sovereignty also allows indirect presidential election. This means that for

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of the First Constitution of Korea (1948)], 40(4) PUBLIC L. 63, 72 (June 2012) (In Korean).

33) THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KOREA, *supra* note 6, at 29.

34) KIM, *supra* note 2, at 225, 296.

those who takes the first approach, indirect presidential election is a *deviation* from the principle of popular sovereignty due to a more urgent practical need of establishing the government, whereas for those who takes the second approach, indirect presidential election can be conducted *even under* the principle of popular sovereignty, depending on how much power is given to the president.

It is important to note that since the discussions in the Constituent Assembly does not exist in a political vacuum, some statements by the members of the Constituent Assembly must not be read apart from the political circumstances at hand. Of course, there were members who considered the constitution as the “eternal and everlasting code”, who argued that the fundamental principles of the constitution must not be affected by political circumstances. But most of the members of the Constituent Assembly maintained a consensus that the urgent need to establish the government should be prioritized, to which Yoo was not an exception.

The understanding of the members of the Constituent Assembly on the principle of popular sovereignty, analyzed in relation to indirect presidential system, is still relevant in analyzing the Korean Constitutional Court decisions published decades later. In fact, since its establishment, the Constitution Court has made many decisions that directly or indirectly deal with the meaning of the principle of popular sovereignty stipulated in Article 1, paragraph 2 of the current Constitution. Among them, the one that sparked the biggest social controversy was the decision on whether an act for the transfer of administrative capital was constitutional or not. In the next section, this decision will be analyzed in relation to the discussions in the Constituent Assembly.

#### **IV. Implication on the Constitutional Court Decision 2004Hunma554, 556, Oct. 21, 2004**

##### *1. Background of the Decision*

As one of his 2003 campaign pledge, President Moo-Hyun Roh promised to relocate the administrative capital from Seoul to one of the

cities in the Chungcheong Province, the objective of which was to solve the problems arising from too much concentration on Seoul and the resulting regional imbalance. Accordingly, President Roh proposed the Special Act on the Establishment of the New Administrative Capital (hereinafter “the Special Act”) on October 21, 2003, which was approved by the National Assembly on December 29, 2003, with 167 votes for, 13 votes against, and 14 votes abstaining.<sup>35)</sup>

As the Special Act went in force on April 17, 2004, 169 people from various professions from the members of the Seoul City Council to university professors and government employees, filed a petition with the Constitutional Court against the Special Act. The main argument of the petitioners was that the relocation of the administrative capital is constitutional only when it is approved through referendum, which the Special Act did not go through. The Constitutional Court, based on the interpretation of the principle of popular sovereignty, largely upheld this argument and ruled the Special Act unconstitutional in its decision on October 21, 2004,<sup>36)</sup> thereby restraining the relocation of the capital of the country by constructing a new capital for administrative function in the Chungcheong Province.

## 2. *Decision in Pertinent Part*

The Constitutional Court first demonstrated that even in states with written constitution, constitutional custom can also be recognized as a means to regulate the areas not explicitly set out in the written constitution, because “it is impossible to completely provide without omission for all constitutional law matters in the written constitution, and, in addition, the Constitution pursues succinctness and implication as the basic law of the nation”. If certain strict requirements are fulfilled, a practice retains constitutional custom status. One of such constitutional custom, according

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35) Sinhaengjeongsudouigeonseoreurwihanteukbyeoljochibeob [Special Act on the Establishment of the New Administrative Capital] (S. Kor.), *invalidated by* Hunbeobjaepanso [Const. Ct.], Oct. 21, 2004, 2004Hunma554 & 556 (consol.) (Hungong 98, 1095) (S. Kor.).

36) Hunbeobjaepanso [Const. Ct.], Oct. 21, 2004, 2004Hunma554 & 556 (consol.) (Hungong 98, 1095) (S. Kor.).

to the Constitutional Court, is the proposition that the capital city of Korea is Seoul.

The Constitutional Court then interprets the principle of popular sovereignty as requiring that the people be able to *directly* establish constitutional custom: “as the citizens of the Republic of Korea are the holders of the sovereignty of the Republic of Korea and of the highest authority to establish the constitution, the citizens not only participate in the establishment and the revision of the written constitution, but also may directly form as necessary constitutional law matters that are not included in the text of the written constitution, in the form of customs”. From this, the Court deduces the conclusion that “the customary constitutional law should be deemed as the expression of intent of the constitutional determination of the citizens as the holders of sovereignty, like the written constitution, and, should also be deemed to have the same force as that of the written constitution [...] [a]s such, the formation of the constitutional norm through customs is one aspect of the exercise of the people’s sovereignty”.

### 3. *Analysis of the Decision*

This decision can be analyzed through the Constituent Assembly’s understanding on the scope of collective decisions that require popular vote according to the principle of popular sovereignty enshrined in Article 2 of the constitutional proposal, which is currently Article 1, paragraph 2 of the Korean Constitution. Without referring to the discussions in the Constituent Assembly, Kyong Je Kim points out the logical weakness of this decision, especially the part where the Constitutional Court stated, the people “not only participate in the establishment and the revision of the written constitution, but also may directly form as necessary constitutional law matters that are not included in the text of the written constitution, in the form of customs”. Kyong Je Kim sees it contradictory that on the one hand, establishment and the revision of the written constitution requires a mere “participation” of the people, but on the other hand, establishment of the constitutional custom requires “direct formation” by the people.<sup>37)</sup>

Kyong Je Kim’s analysis presupposes that there are various degrees of participation. Whereas conducting popular vote for every single

constitutional provision subject to establishment or amendment would be the most *direct* way of participation, electing the members of the National Assembly through popular vote and letting the members establish or amend the constitutional provisions would also suffice as participation of the people, albeit in an *indirect* way. The established or amended provisions, of course, can be subject to popular vote before they are promulgated in order to ensure *more* directness, as the Korean Constitution stipulates.

Combining this insight with the earlier discussions, the members of the Constituent Assembly, especially those who took the second approach in interpreting Article 2 of the constitutional proposal, understood that the principle of popular sovereignty may or may not require popular vote on electing the president depending on how much constitutional power was granted to the president. To add one more layer to this, I suggest that the compatibility of indirect presidential system with the principle of popular sovereignty also depends on how much opportunity for participation is open to the people, for example whether there is a power for the people to make a final say about the president elected by the National Assembly. Therefore, it cannot easily be concluded whether the principle of popular sovereignty allows the National Assembly to elect the president or not. Before making a tentative conclusion on this issue, a careful examination of (i) how much power the constitution gives to the president and (ii) how much opportunity the constitution grants to the people to influence or even overturn the decision by the National Assembly is required. Different diagnosis on these two questions may render different conclusion on the question regarding the relationship between the principle of popular sovereignty and indirect presidential election system.

Likewise, I suggest that the principle of popular sovereignty does not necessarily mean that the people must be able to directly form constitutional customs. Just as the people “participate” in establishing and

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37) Kyong Je Kim, *Gungminjugwone daehan ohae – Sinhaengjeongsudogeonseolbeop wiheongyeoljeong*(2004heonma554, 556 byeonghap)gwa gwallyeonhayeo [Misunderstandings on Popular Sovereignty – In relation to the Constitutional Court Decision on the Special Act on the Establishment of the New Administrative Capital (2004Hunma 554 & 556, consol.)], 46(3) SEOUL L. J. 397, 414-415 (Sep. 2005) (In Korean).

revising the formal code of the Constitution, it does not go against the principle of popular sovereignty for the people to “participate” in determining the content of constitutional norms in a way less direct than firsthand formation of constitutional customs. In fact, popular participation can be achieved in various degrees, from directly voting to determine the existence of a particular constitutional custom at the one end, to making objections to the legislation that goes against constitutional custom at the other end. It is a matter of choice to select, among these two ends, a minimum level of participation necessary under the principle of popular sovereignty. Although the discussions in the Constituent Assembly does not render a definite answer to the level of participation required under the principle of popular sovereignty, such indeterminacy is itself meaningful in that it highlights the need for holistic analysis of the constitution and the following legal system in order to determine the level of popular participation required for a certain collective decision.

In fact, the dissenting opinion from Judge Hyo-sook Jeon made an argument in line with this conclusion. According to her, “we should consider the degree of the constitutional importance of the location of the nation’s capital”. She concludes that under the current constitutional theory of constitutionalism and the welfare state, “this can hardly be deemed as either a fundamental matter of the constitution or a matter that should be determined directly by the citizens under the principle of people’s sovereignty”. Here, she considered the “constitutional importance” of the decision in determining whether the decision at issue requires direct participation by the people under the principle of popular sovereignty. Such statement can be interpreted in that because the constitutional custom at issue contains a matter with relatively low constitutional importance, it does not go against the principle of popular sovereignty to amend constitutional custom without going through popular vote.

Judge Hyo-sook Jeon also adds that, “the citizens may always exercise the authority to revise the constitution to include in text such constitutional law matter existing in the form of a custom through their representatives and by way of national referendum, thereby endowing the force of the written constitution.” Although this statement was originally made to explain the hierarchy between the written constitution and constitutional custom, it also has some implications on the meaning of popular

sovereignty. I suggest that because the people has the power to incorporate the constitutional norms into the written constitution, there is no need to recognize the people's power to directly form constitutional custom under the principle of popular sovereignty.

## V. Conclusion

The understanding of the relationship between the principle of popular sovereignty and indirect presidential election system, that appears in the first reading of the Constituent Assembly, can be categorized by two criteria. First, there were members of the Constituent Assembly who saw the relationship as contradictory or incompatible, whereas those who also belonged to the Constitution Drafting Committee saw the relationship as of a compatible nature. Second, there were members who took the first approach that reveals the meaning of Article 2 independently from other constitutional provisions, whereas some members interpreted the same article through the second approach, in relation to other constitutional provisions that lay out how much power is given to the president. The distinct feature of second approach comes from that whether indirect presidential election system goes against the principle of popular sovereignty is condition upon how much power is granted to the government and the president leading it. But it must also be noted that since the discussions in the Constituent Assembly does not exist in a political vacuum, there was one more consideration on top of any legal or logical arguments: the political circumstances surrounding the uniqueness of constitution-making, namely the urgent need to establish the government by passing the constitutional proposal as fast as they could.

Although this discussion occurred decades ago, the different layers of understanding of the principle of popular sovereignty have an implication on the Constitutional Court Decision in 2004, which was about the relocation of Korea's administrative capital from Seoul to the city in the Chungcheong Province. The decision ruled that the principle of popular sovereignty requires the people to directly form constitutional custom. But considering the discussions in the Constituent Assembly, a careful examination on how much constitutional importance the constitutional



custom at issue has, and how much opportunity is legally guaranteed for the people to object to the National Assembly's decision that goes against the constitutional custom, must be done before rendering any conclusion on the relationship between the principle of popular sovereignty and the method of establishing constitutional custom. To answer the question posed at the beginning, the Korean understanding of popular sovereignty is inextricable from the question of what would be the most appropriate means in reaching a certain collective decision. Although the concept of popular sovereignty appeared in the Constituent Assembly mainly in relation to presidential election, the frame of the discussions can also be applied to other kinds of collective decision as well, namely determining the content of constitutional customs. Under the principle of popular sovereignty, the power to make decisions for the country ultimately resides in the people. But the significance of such decisions and the amount of legally guaranteed opportunity for the people to intervene or overturn such decisions, will determine how such power must be exercised to satisfy the requirements of the principle of popular sovereignty enshrined in Article 1, paragraph 2 of the Korean Constitution.

