

Constitutional Law and Adjudication of Korea*

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I. Introduction: Constitutional Development in Korea, 1948-Present

Until Korea experienced Japanese colonial rule from 1910 to 1945, it had a long history of monarchical dynasties whose governments and legal systems reflected the country's unique language and culture. After World War II, Korea regained independence but was soon divided into the political entities of South Korea and North Korea. After the US military government in Korea (USAMGIK) ruled the southern part of Korea from 1945 to 1948, a general election was held in May 1948 in the southern part of the peninsula to form the first National Assembly of the Republic of Korea. In July 1948, the National Assembly promulgated the nation's initial constitution, i.e., the Constitution of the First Republic of Korea, and elected Syngman Rhee as the nation's president. The Republic of Korea (also referred to as Korea or South Korea) was formally established in August 1948, and its constitutional law has undergone substantial changes since then.

As of 2023, Korea has revised its constitution nine times, most recently in 1987, when it adopted the Constitution of the Sixth Republic of Korea, which came into effect in February 1988. Further revision continues to be a topic of active discussion. The Constitutional Court of Korea (KCC), introduced by the 1987 constitutional revision, has brought crucial changes to Korea's constitutional law, in both theory and practice, through its

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jurisprudence. Over the years, the Korean constitutional system has become more democratic and protective of fundamental rights. The system has also weathered major challenges such as the impeachment of two presidents, Roh Moo-hyun in 2004 (overruled by the KCC) and Park Geun-hye in 2016-2017 (sustained by the KCC). This featured article on Korean constitutional law contains three parts. First, it provides an overview of constitutional developments from the adoption of the current constitution to the present day. Second, it examines the KCC's major decisions. Third, it explores some of the challenges and ongoing debates concerning Korea's constitutional law and system.

A. Historical Account of Constitutional Law in Korea, 1948-Present

Korea's current constitution was adopted in 1987 through a constitutional revision process in the National Assembly that was endorsed in a national referendum; it came into force in 1988.¹⁾ It embodies critical reforms pertaining to democracy, the protection of fundamental rights, and constitutional adjudication. Prior to these reforms, authoritarianism with wide powers exercised by the president defined several aspects of Korea's constitutional law and system. Governmental powers were heavily concentrated in the presidency, which often usurped powers from the National Assembly in areas like lawmaking and oversight. During this period, particularly under Presidents Park Chung-hee (1963-1979) and Chun Doo-hwan (1981-1988)—both of whom came to power through military coups d'état—, the protections of fundamental rights were lacking in law and its implementation.²⁾

Under authoritarian rule, a mixture of social and political dynamics

1) Korea's current constitution is interchangeably referred to as the "1987 Constitution" based on the year it was revised and the "1988 Constitution" based on the year it went into effect.

2) The constitutional revision did not result in immediate improvement in the protection of fundamental rights, which has improved incrementally in subsequent years through revisions of the relevant statutes and the decisions of the judicial courts and the KCC, which in turn have brought about changes in practice. Korea's civil society and journalism have contributed much to this process through, for example, legislative campaign and petitions, proactively seeking decisions from judicial courts and the KCC, and vigilant monitoring of government activities.

fomented popular demands for political and legal reform. Korea experienced government-led rapid economic growth and advancements in technology and information science, following the Korean War (1950-1953). This growth produced a highly educated citizenry that became increasingly critical of government policies and laws and the country's lack of democratic institutions. As Korea assumed an increasingly larger role in the global community, its citizens became exposed to international standards of human rights and justice that were higher than those at home. The vibrancy of the private sector contrasted starkly with the rigid authoritarianism of the government. Citizen discontent led to demands for increased democratization, the rule of law, and justice. These calls for change culminated in the June 1987 citizen movement, which ultimately produced the constitutional revision of 1987.

The 1987 constitutional revision made changes 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, with respect to democratization, the 1987 constitutional revision reintroduced direct election of the president (Constitution Article 67(1))³ and limited the presidency to a single five-year term (Constitution Articles 70 and 128(2)). The constitutional revision also increased citizen participation in other areas of governance. For example, it incorporated public hearings and legislative consent into the government appointment processes (Constitution Article 86(1))⁴ and moved governance closer to local constituencies by restoring the autonomy and lawmaking powers of local governments and assemblies (Constitution Articles 117 and 118) and enabling a voter initiative system for local ordinances and citizen-led recall mechanisms for local public officials (Constitution Articles 117 and 118).⁵ Overall, the 1987 constitutional revision fostered a culture of

3) Korea had previously provided for direct presidential elections, but it underwent a 15-year period of indirect presidential elections. Prior to the 1987 constitutional revision, the "indirect electoral college process was generally regarded as no more than a rubber-stamp" for the presidential choice made by the incumbent power groups. James M. West and Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1988 HARV. HUM. RTS. Y.B. 135.

4) See also Gukoebeob [National Assembly Act], art. 64, 65, and 65-2 (S. Kor.).

5) See also Jibangjachebeob [Local Autonomy Act], art. 19 and 25 (S. Kor.).

public participation in government decision-making and increased transparency in government administration. This same spirit also formed the backdrop to Korea's 2007 adoption of the jury system in criminal proceedings, which began to be implemented in 2008, in terms of citizen participation and transparency in judicial decision-making.

The 1987 constitutional revision's second set of reforms reset the balance of power between the executive and legislative branches of government. The current constitution clearly grants the National Assembly the authority to enact statutes while allowing the government⁶⁾ to submit legislative bills and the president to veto laws passed by the National Assembly plenary session in the process of enacting the statute (Constitution Articles 40 and 53(4)). Whereas government bills had previously accounted for the considerable bulk of Korean legislation in both volume and substance, since 1988 the National Assembly has gradually assumed the essential role in enacting statutes. The current constitution forbids the president from dissolving the National Assembly and makes it more difficult for the president to declare a state of emergency or to exercise emergency powers (Constitution Articles 76 and 77). It also subjects the executive branch to monitoring and annual auditing by the National Assembly (Constitution Article 61).

The third transformation introduced by the 1987 constitutional revision involved the protection of fundamental rights. The revision expanded the list of rights explicitly protected in the constitutional text. For example, a guaranteed minimum wage was introduced as one of a number of labor and social rights (Constitution Article 32(1)). 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 and political neutrality in election processes.

Fourth, the 1987 constitutional revision introduced constitutional adjudication by the KCC as an independent institution and the fourth branch of the government. Constitutional adjudication by the KCC has had widely resonating ramifications for the nation's separation of powers structure and the protection of fundamental rights, which have contributed

6) In the language of Korea's current constitution, the "government" in this context refers to the executive branch of government.

to further democratization of the political process and overall governance and protection of human rights. This aspect is discussed in further detail in the paragraphs below.

B. Constitutional Adjudication in Korea, 1988-Present

Fundamental constitutional rights in Korea have gained more substantial protection due to the fourth major reform embodied in the 1987 constitutional revision: the establishment of the KCC (Constitution Articles 111 to 113). The KCC has jurisdiction over determining the constitutionality of statutes upon request of the courts or in response to constitutional complaints filed by citizens (Constitution Article 111). The KCC also rules on constitutional challenges brought by citizens against government actions or inactions that infringe fundamental rights (Constitution Article 111).⁷⁾ In addition, the KCC has jurisdiction over the distribution of powers between government bodies, the dissolution of political parties at the request of the government, and impeachment petitions brought by the National Assembly against high-ranking officials, including the president (Constitution Article 111). Under Korea's previous constitutional regimes, various tribunals and committees had *de jure* power of constitutionality review but virtually no *de facto* power. For example, the Constitutional Council that existed during the Yushin constitutional period (1972-1980) was vested with the power to review the constitutionality of statutes but failed to exercise that power.⁸⁾ By contrast, the KCC has been proactive in shaping constitutional law through adjudication. In just over three decades from September 1988 to December 2022, the KCC decided 45,599 cases; it held government action to be unconstitutional in 1,062 instances, including 831 in which the KCC invalidated a statute.⁹⁾

The KCC has also played an important role in the pursuit of transitional

7) The KCC has only limited jurisdiction to review the constitutionality of administrative actions. The Supreme Court of Korea serves as the court of last resort for most challenges to administrative actions. See KCC, *Thirty Years of the Constitutional Court of Korea* 150-151 (2018).

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

9) Refer to the general statistics of the KCC at <https://english.ccourt.go.kr/site/eng/jurisdiction/caseLoadStatic.do>.

justice. In 1996, it decided a case that permitted the prosecution of two former presidents whose power stemmed from the 1979 military coup.¹⁰⁾ The KCC has also adjudicated two impeachment cases against the then-incumbent presidents. Whereas the KCC decided against impeaching then-incumbent president Roh Moo-hyun in May 2004,¹¹⁾ it upheld the impeachment of then-incumbent president Park Geun-hye in March 2017,¹²⁾ leading to an early presidential election in May of that year. President Park's impeachment was the result of several constitutional forces, including Korea's constitutional culture of participatory democracy.¹³⁾ The contribution of the KCC to increased protection of fundamental constitutional rights and to further democratization in Korea is analyzed in the next section, using core issues of constitutional law and major KCC decisions.

The essence of constitutionalism lies in that legislation on rights and obligations is bound by a nation's constitution and that the powers of the government, including legislative, executive and judicial powers, are governed by the provisions of the constitution. Since the establishment of popular sovereignty and constitutionalism, the Korean constitution has gradually become directly applicable in and through adjudication. As in many nations, under the current constitution of Korea, the legislative function of the nation is exercised primarily in the form of enactment of

10) Heonbeopjaepanso [Const. Ct.] Feb. 16, 1996, 96Hunga2 (S.Kor.) (Constitutionality of the Special Act on the May 18 Democratization Movement, etc.).

11) Heonbeopjaepanso [Const. Ct.] May 14, 2004, 2004Hunna1 (S. Kor.) (Impeachment of President Roh Moo-hyun).

12) Heonbeopjaepanso [Const. Ct.] Mar. 10, 2017, 2016Hunna1 (S.Kor.) (Impeachment of President Park Geun-hye). Both impeachment cases in notes 12 and 13 are discussed in greater detail below in section II-A.

13) Korea's constitutional culture of participatory democracy fostered the public's demand for impeachment, as epitomized by protests known as the candlelight vigil in 2016 and 2017. That popular mobilization bolstered the National Assembly's petition for impeachment, which led to the KCC decision in favor of impeachment in 2017. In addition to having an enormous impact inside Korea, the KCC has taken a leadership role in fostering communication among constitutional jurists from different jurisdictions. For a discussion of the KCC's work and achievement on this front, see Akiko Ejima, "The Influence of International Law on Constitutional Law" and Maartje de Visser, "Regional Judicial Cooperation and Dialogue in Asia", a paper presented and published at ICON-S Conference in July 2021 at www.icon-society.org/conference_paper/regional-judicial-cooperation-and-dialogue-in-asia/.

statutes and subsequent revisions thereof by the National Assembly as the designated legislative body, which is constituted through public elections held every four years, along with such lawmaking by the executive branch as executive orders and rulings by the judicial branch including the Supreme Court. On the other hand, under the separation of powers design of the current constitution, the KCC checks and controls the legislative function exercised primarily by the legislative branch as a means to protect the constitution itself and to keep both the process and substance of all legislation in compliance with the constitution as the founding document. Checks on the legislative process are effectively exercised by adjudication over disputes between governmental institutions, as in a case brought by, for example, an individual member of the National Assembly against the Speaker of the National Assembly. Checks on the substance of legislative outcomes in terms of its compliance with constitutional mandates are primarily conducted by way of the review over the constitutionality of a specific statute or its provision(s).

The system under the Korean constitution through which a separate and independent institution reviews the constitutionality of statutes enacted by the National Assembly is grounded primarily in the supremacy of the constitution and constitutional law, combined with the concept of the presumption of constitutionality of the statute and the theories of separation of powers and limited government. The review of the constitutionality of a statute, which helps ensure that the nation's overall political process primarily based on majority rule, including legislation, remains within constitutional bounds particularly for the protection of fundamental rights of all including minority, has greater pertinence to both the normative and structural integrity of the nation's legal system as a whole. Indeed, in most modern constitutional democracies, adjudication of constitutionality by an appropriate institution is an essential element of the state, together with the guarantee of fundamental rights, the adoption of representative democracy, the establishment of the constitution, and the implementation of the rule of law, which consists of the separation of powers, the superiority of statutes enacted by the legislature over administrative rulemaking, administration by and under the law, an independent judiciary, and the provision of legal remedies for any governmental infringement of the rights of citizens.

As a part of a complex and multifaceted system that is intended to operate in an integrated, interrelated, and coordinated fashion, constitutional adjudication is ultimately designed to ensure that a wide range of governmental functions are implemented in compliance with the nation's constitution. Specifically, constitutional adjudication limits the powers of government and ensures the constitutionality of legislative acts by the National Assembly, the administrative function of the executive branch, and the judgments rendered by the judicial branch, all while confirming the allocation of powers among the different branches of the government and between national and local governments. In so doing, constitutional adjudication both includes direct review of constitutionality and serves adjudicative, political and legislative functions.

Here, issues regarding the legislative nature or function of constitutional adjudication become particularly pertinent. Pursuant to the premise of Korea's representative democracy, when a statute or a provision thereof is in violation of the constitution, the National Assembly is to assume the legislative function by repealing or revising that statute or provision. Under the system of constitutionality review of statutes adopted in Korea, constitutional adjudication may be triggered to invalidate a statute or to halt the application thereof, upon the KCC's holding that a statute or its provision violates the nation's highest law. This function of the KCC is equivalent, on the normative plane, to the enactment, revision, and repealing of a statute or a part thereof, which are more conventionally conducted by the National Assembly. Thus, the adjudication by the KCC of the constitutionality of a statute may be perceived as normatively equivalent to legislation by the National Assembly.

Although the KCC's powers to review constitutionality under the constitution of Korea and the Constitutional Court Act are primarily adjudicative in nature in protecting against the enactment of an unconstitutional statute by the National Assembly and its enforcement by the executive branch, the legislative function assumed by the KCC's adjudication of the constitutionality of a statute has significant additional constitutional ramifications. In a nation governed by the principle of popular sovereignty, the legislative function of the people is assumed by a legislative body that is based on firm democratic legitimacy; thus, any other governmental branch or constitutional institution that exercises

normatively equivalent legislative functions should also have democratic legitimacy on a par with that of the legislature.

As a result, the normatively legislative function assumed by the KCC in assessing the constitutionality of a statute demands that the KCC and its decisions have both democratic and constitutional legitimacy. The core issue concerning the democratic legitimacy of the constitutionality review of statutes lies in whether the justices of the KCC who are not elected as representatives by the sovereign populace may justifiably decide the effect of a statute enacted by the National Assembly which is constituted through democratic elections, in light of the principles of democracy and separation of powers. It should be noted that a legislature consisting of democratically elected representatives might still enact a law deemed to be in violation of the constitution. In such a case, should the constitutionality of such a law be decided with binding force by an institution that is independent of the legislative body, this will serve the purpose of checks and balances under the principle of the separation of powers. This is the core legitimizing factor, particularly from the perspective of protection of minorities, of the KCC reviewing the constitutionality of a statute enacted by the National Assembly.

The democratic legitimacy of the constitutionality review of a statute by an independent government institution through adjudication that essentially follows judicial decision-making mechanisms and procedures is based on the following grounds: (a) the principle of substantive democracy that guarantees the liberty and rights of sovereign constituents; (b) the greater norm that majority rule does not suffice to determine in a justifiable fashion on all occasions the liberty and rights of the sovereign constituents, including particularly those of minorities; (c) the demand from constitutionalism that the nation's constitutional law be implemented with binding force as it provides for and regulates the liberty and rights of the sovereign constituents in its role as the supreme law; (d) the demand of popular sovereignty that the national government's legislative power should also be subjected to the constitution ordained and established by the sovereign constituents; (e) the theory of limited power, mandating that acts of the nation may be endowed with authority and legitimacy only when any and all acts of the nation are restricted within the limits of the constitution; (f) the call from natural justice that no national institution may

be justifiably permitted to check, control, or correct its own wrong; (g) the doctrine of separation of powers; and (h) the view that any decision regarding the conformity of an act to the constitution should be conducted by an independent institution with the requisite expertise and due process.

1. The Organization of the Korean Constitutional Court

The KCC has nine justices, including the president of the KCC (Constitution Article 111(2); Constitutional Court Act Articles 3 and 12(1)).¹⁴ All the KCC justices are appointed by or receive their commissions from the president of Korea (Constitution Article 111(2); Constitutional Court Act Article 6(1)). Of the nine justices, three are directly nominated and appointed by the president of Korea, three are elected by the National Assembly and then appointed by the president of Korea, and the last three are designated by the Chief Justice of the Supreme Court and then appointed by the president of Korea (Constitution Articles 111(2) and 111(3); Constitutional Court Act Article 6(1)).¹⁵ The president of the KCC is

14) In addition, the KCC has research officers and assistant research officers who conduct research on cases under the supervision of the KCC justices (Heonbeopjaepansobeob [Constitutional Court Act], art. 19 and 19-2 (S. Kor.)). Some of these individuals are recruited by way of secondment, typically for one or two years, from the judicial courts and the prosecutors' office (Heonbeopjaepansobeob [Constitutional Court Act], art. 19 para. 4 and para. 9 (S. Kor.)), while some are career officers who serve in these research capacities for a renewable 10-year term with an age limit of 60 (Heonbeopjaepansobeob [Constitutional Court Act], art. 19 para. 7 (S. Kor.)). Further, the Constitutional Research Institute was established in January 2011 as part of the KCC to support constitutional adjudication through research projects in areas relevant to constitutional adjudication on a long-term basis (Heonbeopjaepansobeob [Constitutional Court Act], art. 19-4 (S. Kor.)). The KCC is a member of the Venice Commission, an international organization of constitutional courts in various nations, and has actively participated in international or transnational activities, particularly in Asia. The KCC co-hosted the 5th Asian Conference of Constitutional Justices in Seoul in October 2007.

15) Certain qualifications must be met for an individual to be appointed a justice of the KCC. An appointee must be licensed to practice law, be at least 40 years old, and have served for 15 or more years in any of the following positions or offices: (a) judge, prosecutor, or attorney-at-law; (b) a position or office engaged in legal affairs on behalf of a governmental agency, national or public enterprise, government-supported institution, or other corporation; or (c) a position or office of an assistant professor of law or higher at an accredited university or college (DAEHANMINKUK HUNBOEB [CONSTITUTION], art. 111 para. 2 (S. Kor.); Heonbeopjaepansobeob [Constitutional Court Act], art. 5 para. 1 (S. Kor.)).

appointed from among nine justices by the president of Korea, subject to the consent of the National Assembly after an appointment hearing (Constitution Article 111(4); Constitutional Court Act Articles 6(2) and 12(2)).

Justices serve renewable six-year terms of office (Constitution Article 112(1); Constitutional Court Act Article 7(1)), during which they may not be involuntarily removed other than for the following reasons enumerated in the Constitution and the Constitutional Court Act: impeachment or criminal conviction with a sentence of imprisonment without labor or a more severe sentence (Constitution Article 112(3); Constitutional Court Act Article 8). Age limits (70 for the president of the KCC and 65 for the other justices) also apply (Constitutional Court Act Article 7(2)). Justices are prohibited from having a political party membership or participating in political activities (Constitution Article 112(2); Constitutional Court Act Article 9), for political neutrality.

2. The Jurisdictions of the Korean Constitutional Court

The KCC is vested under the Constitution and the Constitutional Court Act with jurisdiction over the following matters: reviewing the constitutionality of a statute or one or more of its provisions, constitutional complaints, competence disputes between government institutions or agencies, impeachment, and the dissolution of a political party (Constitution Article 111(1); Constitutional Court Act Article 2).

a. Review of the Constitutionality of a Statute

The KCC has jurisdiction over reviews of the constitutionality of a statute (Constitution Article 111(1)(i); Constitutional Court Act Article 2(i)). From the establishment of the KCC in September 1988 through December 2022, judicial courts filed 1,089 cases with the KCC to request its constitutionality review over the relevant statutes, out of 47,271 cases filed with the KCC over that period.¹⁶⁾ When the issue of whether a statute or a

¹⁶⁾ Refer to the case statistics of the KCC at <https://english.court.go.kr/site/eng/jurisdiction/caseLoadStatic.do>.

specific statutory provision as the applicable law in a case pending in a judicial court is unconstitutional is material to the holding of that case, the original court, either by request of any of the parties or *sua sponte*, may request a review by the KCC of the constitutionality of the relevant statute or statutory provision (Constitutional Court Act Article 41). An individual party's motion for a judicial court to request a constitutionality review by the KCC should specify, in addition to the identities of the parties and the case number, the statute or provision thereof that the moving party or parties interpret to be unconstitutional, the grounds for such interpretation, and any other necessary materials as may be requested (Constitutional Court Act Articles 41(2) and 43). A judicial court's decision on a party's motion to request a KCC review of constitutionality is final and not subject to appeal (Constitutional Court Act Article 41(4)).

Any judicial court at any level may request a constitutionality review by the KCC; however, when a judicial court other than the Supreme Court makes such a request, it should go through the Supreme Court of Korea (Constitutional Court Act Article 41(5)). When a judicial court requests the KCC to review the constitutionality of a statute, the proceedings of the original case at that judicial court are suspended or stayed until the KCC rules on the constitutionality of the statute (Constitutional Court Act Article 42(1)). However, should the judicial court deem a matter to be urgent, all proceedings except for rendering the final decision may continue (proviso of the Constitutional Court Act Article 42(1)). The parties to the original case at the judicial court and the Minister of Justice may submit to the KCC an *amicus curiae* brief on the issue of whether the statute or the provision thereof is in fact unconstitutional (Constitutional Court Act Article 44).

The KCC may dismiss a request for constitutionality review on procedural grounds; otherwise, it will adjudicate on the merits and review the constitutionality of the statute or provision(s) at issue. The KCC will decide either that the statute or its provision(s) are unconstitutional or that the presumption of constitutionality remains intact. The KCC is limited to reviewing and deciding on the constitutionality of the challenged provision(s) (Constitutional Court Act Article 45). However, in exceptional cases, even when the constitutionality of only a specific provision or provisions is challenged, if the KCC determines that a statute is unenforceable in its entirety due to the unconstitutionality of such

provision(s), it may hold the entire statute to be unconstitutional (proviso of the Constitutional Court Act Article 45).

Any statute or provisions thereof held to be unconstitutional by the KCC shall lose effect as of the day the decision is rendered (Constitutional Court Act Article 47(2)). Should the statute or provisions thereof concern criminal penalties, however, the loss of effect is retroactive (proviso of the Constitutional Court Act Article 47(2)); in this case, the affected parties may file for a retrial of their criminal convictions (Constitutional Court Act Article 47(3)). A decision that a statute or specific provisions thereof are unconstitutional shall bind all judicial courts, other national institutions and agencies, and local governments (Constitutional Court Act Article 47(1)).

Other than determining whether statutes or provisions thereof are unconstitutional or constitutional, although not expressly set forth in and by the language of the Constitutional Court Act, the KCC has also decided to the effect that statutes or provisions thereof are constitutional in part, unconstitutional in part, or nonconforming to the constitution. In the last case, the KCC has rendered such decisions of nonconformity of statute with the constitution often with the recommendation for the National Assembly for statutory revision, designating a specific date as the time limit for such revision.¹⁷⁾

b. Adjudication of Constitutional Complaints

The KCC has the jurisdiction to hear and decide on cases based on a constitutional complaint. Under the constitutional complaint system set forth in Korea's Constitution and Constitutional Court Act, anyone whose constitutionally guaranteed basic rights have been infringed by the

17) This practice has been criticized by judicial courts which have taken the position that a decision of partial or conditional constitutionality or unconstitutionality or nonconformity with the constitution does not bind judicial courts as such a decision indicates no more than a suggested approach to statutory interpretation on the part of the KCC. Relatedly, for an analysis of nonconformity decisions by the KCC, particularly from the perspective of National Assembly legislation, see Woo-Young Rhee, *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*, 20(1) J. KOREAN L. 1-55 (2021).

government through either action or inaction may file a constitutional complaint with the KCC for redress. In the other four types of cases over which the KCC has jurisdiction—reviewing the constitutionality of statutes, impeachment, competence disputes, and political party dissolution—the claimant is a government institution, such as a judicial court, the National Assembly, or the executive branch or one of its agencies. However, in constitutional complaint cases, claimants are private parties, as this provision seeks to relieve such persons from the infringement or violation of their basic rights. As such, constitutional complaints comprise the largest number and greatest proportion of all cases that the KCC has entertained since 1988.¹⁸⁾ For this reason, in constitutional complaint cases, representation by counsel licensed to practice law is required, which in turn mandates the applicable government- or KCC-appointed counsel system (Constitutional Court Act Articles 25(3) and 70(1)).

There are two different types of constitutional complaints, the causes for which also differ. The two types of constitutional complaints, with the causes or grounds thereof, are set forth in Articles 68(1) and 68(2) of the Constitutional Court Act, respectively. Under Article 68(1) of the Constitutional Court Act, any person who alleges that her or his basic right, as guaranteed by the constitution, has been infringed or violated by the exercise of or by a failure to exercise governmental power may file a constitutional complaint with the KCC, except against the judgment of a judicial court. However, before filing a constitutional complaint, an individual should exhaust any and all possible proceedings that may provide relief; otherwise, the constitutional complaint will be dismissed. Examples of grounds for filing a constitutional complaint under Article 68(1) are the National Assembly's failure to enact a statute that is mandated by the Constitution and the enactment of a statute that directly infringes upon people's basic rights. A constitutional complaint under Article 68(1) of the Constitutional Court Act should be filed within 90 days after the existence of the cause is known or within one year after the cause occurs, provided that, should a constitutional complaint be filed after other relief has unsuccessfully been sought, that complaint should be filed within 30

18) Refer to the case statistics of the KCC at <https://english.ccourt.go.kr/site/eng/jurisdiction/caseLoadStatic.do>.

days after notification of the final decision in that proceeding (Constitutional Court Act Article 69(1)).

Article 68(2) of the Constitutional Court Act provides a proceeding for an individual who has asked a judicial court to request a KCC review of the constitutionality of a statute or provision(s) thereof in her or his own case pending at that judicial court but has had that request denied by the judicial court. At that point, such an individual may file a constitutional complaint directly with the KCC, asking the KCC to review the constitutionality of the statute or its provision(s). A constitutional complaint under Article 68(2) of the Constitutional Court Act should be filed within 30 days after the judicial court has denied the request to refer the issue to the KCC.

When a constitutional complaint is filed, a panel consisting of three KCC justices conducts a preliminary review or screening (Constitutional Court Act Article 72(1)). The panel determines whether a constitutional complaint should be heard by the full bench on the merits or should be dismissed for failure to meet any of the following statutory requisites set forth in the Constitutional Court Act: exhaustion of all available relief proceedings provided by other laws, avoiding challenges to the final decision of a judicial court, time limits applicable for filing, or appointment of counsel or a request for the appointment of government- or KCC-appointed counsel (Constitutional Court Act Article 72(3)). Should the panel fail to reach a unanimous decision to dismiss within 30 days, the case is transferred to the full bench (Constitutional Court Act Article 72(4)).

It should be noted that, although a constitutional complaint may not be filed against the final decision or judgment of a judicial court, relief may be sought by filing a constitutional complaint against the decision of a judicial court when that judicial court has applied a statute or statutory provisions that the KCC has previously held to be unconstitutional. Government agencies or public organizations that have an interest in the adjudication of a constitutional complaint and the Minister of Justice may submit *amicus curiae* briefs pertaining to such adjudication (Constitutional Court Act Article 74(1)).

After reviewing a constitutional complaint case on its merits, the KCC either rejects or upholds the complaint. A decision upholding a complaint shall bind all judicial courts and all other government institutions and agencies at both the national and local government levels (Constitutional

Court Act Article 75(1)). In the final decision upholding a constitutional complaint under Article 68(1) of the Constitutional Court Act, the KCC is to specify (a) the right infringed or violated and (b) the exercise of or failure to exercise governmental power that was the cause thereof (Constitutional Court Act Article 75(2)). In this case, the KCC may reverse the government action previously taken or hold the failure to exercise a particular government power to be unconstitutional (Constitutional Court Act Article 75(3)). In addition, should the KCC find that the cause of the infringement of rights was statutory, the KCC may hold the relevant statute(s) or statutory provision(s) to be unconstitutional (Constitutional Court Act Article 75(5)). Should the KCC uphold a constitutional complaint of failure to exercise governmental power, the respondent is required to take action in accordance with the KCC's decision (Constitutional Court Act Article 75(4)).

If a KCC decision upholding a constitutional complaint under Article 68(2) of the Constitutional Court Act holds a statute or statutory provisions unconstitutional, such statute or statutory provisions shall lose legal effect from the day on which the decision is rendered. There is an exception: when a statute or statutory provisions setting forth criminal penalties are held to be unconstitutional, they shall lose legal effect retrospectively (Constitutional Court Act Articles 45, 47 and 75(6)). When a constitutional complaint under Article 68(2) of the Constitutional Court Act is upheld, parties previously convicted or with the final decision rendered under the relevant provisions may request a retrial (Constitutional Court Act Article 75(7)).

c. Adjudication on Impeachment

The KCC has jurisdiction over impeachment proceedings against certain high-ranking public officials, as set forth in the Korean constitution and relevant statutes, should the National Assembly pass a resolution and file a request with the KCC for impeachment (Constitution Article 111(1)(ii); Constitutional Court Act Article 48). The National Assembly may pass a resolution to impeach certain public officials on the ground that they have violated the constitution or a statute in conducting their official duties or responsibilities. These public officials are the president, the prime minister,

members of the State Council or ministers of the executive, KCC justices, judges and justices of the judiciary, commissioners of the National Election Commission, the chair and commissioners of the Board of Audit and Inspection, and other public officials as designated by relevant statutes (Constitution Article 65; Constitutional Court Act Article 48). The KCC has heard three impeachment cases in its history, as of January 2023. The first was against President Roh Moo-hyun in 2004; in this case, the KCC decided against impeaching him.¹⁹⁾ The second case involved President Park Geun-hye in 2016 through 2017; in this case the KCC did impeach her.²⁰⁾ The third impeachment case involved a high-ranking judge of the judiciary in 2021, in which case the KCC dismissed the case as the judge had retired prior to the National Assembly impeachment resolution.²¹⁾ In pursuance of the impeachment decision by the KCC against President Park, in March 2017, President Park stepped down, and a presidential election was held in May 2017, in which President Moon Jae-in was elected.

After a National Assembly resolution to impeach, the chair of National Assembly Legislation and Judiciary Committee files *ex officio* a request for an impeachment proceeding with the KCC by submitting an authentic copy of the written resolution of the National Assembly (Constitutional Court Act Article 49). The public official against whom the impeachment proceeding request is filed with the KCC is suspended from carrying out any official acts until the KCC renders a decision thereupon (Constitutional Court Act Article 50). Should the KCC find that a valid ground for impeachment exists, the KCC renders a decision to remove the public official from office; such official may not hold any public office for five years after the date of the impeachment decision (Constitutional Court Act Articles 53(1) and 54(2)). The decision to impeach a public official by the KCC does not affect the civil or criminal liability of that official (Constitutional Court Act Article 54(1)).

19) Heonbeopjaepanso [Const. Ct.], May 14, 2004, 2004Hunna1 (S. Kor) (Impeachment of President Roh Moo-hyun).

20) Heonbeopjaepanso [Const. Ct.], Mar. 10, 2017, 2016Hunna1 (S. Kor) (Impeachment of President Park Geun-hye).

21) Heonbeopjaepanso [Const. Ct.], Oct. 28, 2021, 2021Hunna1 (S. Kor) (Impeachment of a Judge).

d. Adjudication on Dissolution of a Political Party

The KCC has the jurisdiction to dissolve a political party upon request by the government (Constitution Article 8(4); Constitutional Court Act Articles 2(iii) and 55). Should the objectives or activities of a political party be contrary to the basic order of democracy, the executive branch of the government may file a request with the KCC to dissolve that party (Constitution Article 8(4); Constitutional Court Act Articles 2(iii) and 55), after a mandatory deliberation of the State Council on the matter (Constitution Article 89; Constitutional Court Act Article 55). When a request for adjudication of the dissolution of a political party is filed with the KCC, the KCC notifies the National Assembly and the National Election Commission of that fact and serves a copy of the request on the political party that is the respondent (Constitutional Court Act Article 58(1)).

If the KCC decides a political party to be dissolved, that party shall be dissolved (Constitutional Court Act Article 59).²²⁾ There is no appeal available. The KCC shall serve an authentic copy of the written decision ordering dissolution on the executive branch of the government and a duplicate on the National Assembly and the National Election Commission (Constitutional Court Act Article 58(2)). A decision of the KCC ordering the dissolution of a political party is executed by the National Election Commission, pursuant to the Political Party Act (Constitutional Court Act Article 60). The National Election Commission is to cancel registration of the political party and announce such step to the public. The assets of a dissolved political party revert to the national treasury. It is prohibited to form a substitute party or a party that has the same or similar principles as those of the dissolved political party. No political party is permitted to use the name of the dissolved political party. In 2014, the KCC dissolved the Unified Progressive Party (UPP) and removed its legislators from the National Assembly, which is the only political party dissolution decision

22) There has been one such case in the history of Korean constitutional adjudication in which a political party was dissolved by KCC decision. Heonbeopjaepanso [Const. Ct.], Dec. 19, 2014, 2013Hunda1 (S. Kor.) (Dissolution of Political Party).

rendered by the KCC as of January 2023.²³⁾

e. Adjudication on Competence Dispute between Governmental Institutions or Agencies

The KCC has jurisdiction over competence disputes between governmental institutions and agencies at both the national and local levels (Constitution Article 111(1)(iv); Constitutional Court Act Articles 2(iv) and 61(1)). Of the 47,271 cases filed with the KCC as of December 2022, 122 (approximately 0.26%) have involved competence disputes.²⁴⁾ A governmental institution or agency may file a request for adjudication on competence with the KCC if the respondent's action or inaction, of which the existence or scope of competence is in dispute or controversy, allegedly infringes or is clearly in danger of infringing on the rights or authorities conferred to the claimant by the constitution or relevant statute (Constitutional Court Act Article 61(2)). A request for adjudication of a competence dispute should be filed with the KCC within 60 days after the existence of the cause becomes known to the claimant or within 180 days after the cause occurs (Constitutional Court Act Article 63(1)).

The decision of the KCC in adjudication on competence disputes concerns the existence or scope of the competence or authority of the parties, which are government institutions or agencies at either the national or local levels (Constitutional Court Act Article 66(1)). The KCC may nullify an action of the respondent or confirm the invalidity of the respondent action that led to the competence dispute (Constitutional Court Act Article 66(2)). When the KCC upholds a claimant's request in a competence dispute case on the ground of inaction of or omission by the respondent, the respondent shall take a disposition in pursuance of the KCC decision (Constitutional Court Act Article 66(2)). The decision of the KCC in a competence dispute adjudication shall bind all state institutions and agencies and local governments (Constitutional Court Act Article 67(1)).

23) Heonbeopjaepanso [Const. Ct.], Dec. 19, 2014, 2013Hunda1 (S. Kor.) (Dissolution of Political Party). See also *infra* notes 40, 41 and 42 and accompanying text.

24) Refer to the case statistics of the KCC at <https://english.court.go.kr/site/eng/jurisdiction/caseLoadStatic.do>.

However, a KCC decision in a competence dispute case that nullifies an action of a state institution or agency or local government shall not alter the effect that has already been given to a person pursuant to such action (Constitutional Court Act Article 67(2)).

II. Core Constitutional Law Issues in Korea and Major Decisions of the Korean Constitutional Court

The KCC is widely viewed as an active body that has generated a large amount of landmark precedents. While a full survey of the KCC precedents is beyond the scope of this article, this section highlights major developments in the different areas of KCC jurisprudence, from the constitutional law perspective.²⁵⁾

A. Calibrating Power under the Separation of Powers: Review of Constitutionality, Transitional Justice, and Impeachment

Since its establishment in 1988, the KCC has decided numerous cases that have calibrated the powers of respective branches of government, with significant ramifications for how the separation of powers is structured in Korea and for the protection of fundamental rights. Helping to define the KCC's relationship to the political branches of government, its very first ruling struck down a law that granted immunity to the government against provisional attachment of property in civil cases.²⁶⁾ The KCC held that it was unconstitutional to give the government special treatment in this regard. In doing so, the KCC demonstrated that it would not shrink from striking down unconstitutional legislation. In fact, the KCC has sometimes been quite bold in expansively interpreting its powers to strike down government actions. For example, President Roh Moo-hyun had pledged during the 2003 election campaign to move the administrative functions of

25) For a public survey covering a larger number of landmark KCC decisions, see *supra* note 8, *Thirty Years of the Constitutional Court of Korea*.

26) Heonbeopjaepanso [Const. Ct.], Jan. 25, 1989, 88Hunga7 (S. Kor.) (Prohibition on Injunction against Government in Litigation Claiming Property Right).

the capital from Seoul to the southern Chungcheong region, and the National Assembly subsequently passed a statute to that effect. In 2004, the KCC invalidated that statute on the ground that it violated Korea's unwritten customary constitution.²⁷⁾ The notion that the KCC can identify and enforce customary constitutional provisions remains controversial in Korean constitutional jurisprudence. According to the KCC, relocation of the capital involves overriding the customary constitution and thus requires approval through a national referendum, as it would if the written constitution were being revised.

The KCC has not limited itself to blocking unconstitutional acts by the other branches. Over the years, the KCC has ruled that not only governmental action but also governmental inaction can violate the constitution. In 1994, the KCC held for the first time that a legislative omission was unconstitutional, ruling that the National Assembly violated its constitutional duties by failing to enact a statute to compensate parties for private railway properties that had been expropriated by the US military government in Korea in 1946.²⁸⁾ Administrative omissions can also violate the constitution, according to KCC rulings. In 2011, the KCC ruled that the failure of the Minister of Foreign Affairs to take steps to resolve conflicts between Korea and Japan concerning claims for compensation of World War II-era Korean "comfort women" was unconstitutional.²⁹⁾

The KCC's jurisdiction and constitutional responsibility for hearing impeachment petitions brought by the National Assembly place the KCC squarely in the middle of inter-branch conflict between the legislative and executive or judicial branches. The first impeachment case heard by the KCC was against President Roh Moo-hyun in 2004; it ultimately decided against impeachment.³⁰⁾ Although the KCC found *inter alia* that President Roh had indeed breached his obligation to maintain political neutrality in

27) Heonbeopjaepanso [Const. Ct.], Oct. 21, 2004, 2004Hunma554 (S. Kor.) (Special Act for Relocation of the Capital City).

28) Heonbeopjaepanso [Const. Ct.], Dec. 29, 1994, 89Hunma2 (S. Kor.) (Failure of Government to Enact Law for Compensation for the Harm Incurred during Japanese Colonial Rule).

29) Heonbeopjaepanso [Const. Ct.], Aug. 30, 2011, 2006Hunma 788 (S. Kor.) (Failure of Government to Take Administrative Measures for Compensation from Government of Japan).

30) *supra* notes 12 and 20.

public elections, it concluded that such legal violation was not sufficiently grave to justify impeachment in light of the important obligations and duties of the president under Korea's constitution. By contrast, the KCC concluded in 2017 that President Park Geun-hye's violations of presidential obligations, including her failure to respect and implement the constitutional order and rule of law, were sufficiently grave to warrant her impeachment.³¹⁾

The KCC has also facilitated transitional justice by tackling the legacy of the authoritarian Yushin period (1972-1980). Exercising the power to review the constitutionality of government actions from decades earlier, the KCC ruled that presidential emergency decrees from the 1970s violated constitutionally protected fundamental rights because the decrees were not proportionate means for achieving a legitimate government purpose.³²⁾ In condemning the emergency orders, the KCC contributed to the nation's process of healing from authoritarian rule. The KCC also upheld a special National Assembly statute that permitted the prosecution of two former presidents, Chun Doo-hwan and Roh Tae-woo, and others who had obtained political power through the 1979 military coup, even though the normal statutory limitations period had expired.³³⁾ The KCC came within one vote of finding that the special legislation violated the constitutional ban on *ex post facto* laws.³⁴⁾ Ultimately, Presidents Chun and Roh were found guilty and subsequently in 1997 pardoned by President Kim Young-sam (1993-1998) at the prompting of President-elect Kim Dae-jung (1998-2003) on the grounds of seeking reconciliation and harmony for Korea's future.

31) *supra* notes 13 and 21.

32) Heonbeopjaepanso [Const. Ct.], Mar. 21, 2013, 2010Hunba132 (S. Kor.) (President's Emergency Measures Criminally Punishing Criticism of the Constitution).

33) Heonbeopjaepanso [Const. Ct.], Feb. 16, 1996, 96Hunga2 & 96Hunba7 & 96Hunba13 (consol.) (S. Kor.) (Constitutionality of the Special Act on the May 18 Democratization Movement, etc.).

34) *Id.* In a separate case, the KCC also ruled that a statute confiscating property rewarded for collaboration with Japan during Japanese colonial rule was exceptional; it did not violate the constitution's ban on retroactive legislation because it could be justified. Heonbeopjaepanso [Const. Ct.], Mar. 31, 2011, 2008Hunba141 (S. Kor.) (Confiscation of Property Awarded for Pro-Japanese Collaboration).

*B. Supporting Deliberative Democracy and the System of Representation:
Public Elections, Political Parties, and Free Expression*

Another major area of KCC precedents concerns deliberative democracy, the political process, and the system of representation. The KCC has decided crucial cases addressing voting, elections, and political parties.³⁵⁾ In a landmark case from 2000, the KCC struck down a statutory provision that required an excessive monetary deposit from candidates for the National Assembly and set strict limits on recovering those deposits.³⁶⁾ The KCC held that the excessive nature of these conditions infringed on the right to hold public office, the right to equality, and voters' freedom of choice. The KCC also took issue with a statutory provision that allocated proportional representation seats in the National Assembly among political parties based on the vote share of each party in general elections for electoral district representatives. The KCC held that this system was unconstitutional insofar as it denied voters an opportunity to directly vote for their preferred political party in determining proportional representation, which might not be the same preference as in their electoral district elections.³⁷⁾

In addition to safeguarding fair and free elections, the KCC has promoted deliberative democracy by ruling that the rights of opposition political parties were violated when the Speaker of the National Assembly failed to provide them proper notice about a planned legislative session, thus undermining their participation in legislative deliberation.³⁸⁾ Not all of the KCC's decisions pertaining to deliberative democracy, however, have

35) For an analysis of the KCC decisions on public elections and political parties, see Woo-Young Rhee, *Judicial Review of the Public Election Law in the Republic of Korea*, 23(4) *NEW ASIA* 48, 48-78 (2016).

36) Heonbeopjaepanso [Const. Ct.], July 19, 2001, 2000Hunma91 (S. Kor.) ('One Person Two Votes' in Public Elections for District and Proportional Representation).

37) *Id.* For another major voting rights case, see Heonbeopjaepanso [Const. Ct.], July 24, 2014, 2009Hunma256 (S. Kor.) (Restriction on the Voting Right and Right to Referendum of Overseas Electors) which declared unconstitutional a statute restricting the voting rights of Korean nationals residing abroad.

38) Heonbeopjaepanso [Const. Ct.], July 16, 1997, 96Hunra2 (S. Kor.) (Legislative Railroad against Members of Opposition Party).

come to the defense of opposition parties. Korea's constitution grants the KCC the power to dissolve a political party if the "purposes or activities of a political party are contrary to the fundamental democratic order" (Constitution Article 8(4)).³⁹⁾ In 2014, the KCC exercised this power for the first and thus far only time.⁴⁰⁾ It dissolved the Unified Progressive Party (UPP) and removed its legislators of both proportional and electoral district representatives from the National Assembly. The KCC reasoned that dissolution of a political party is justified if, first, the party poses a concrete danger of causing a substantial threat to the fundamental democratic order and, second, dissolution is a proportionate response to that threat. In concluding that dissolution of the UPP was warranted, the KCC considered, among other things, the fact that the UPP's leaders had plotted to commit treason and sought to bring the socialist governing approaches of North Korea to South Korea.⁴¹⁾

The KCC has also protected freedom of expression as a foundational building block for deliberative democracy. It has struck down several statutory provisions that restricted freedom of speech,⁴²⁾ along with statutory provisions that set strict limits on the time, place, and manner of

39) DAEHANMINKUK HEONBEOB [CONSTITUTION] art. 8 para. 4 (S. Kor.).

40) Heonbeopjaepanso [Const. Ct.], Dec. 19, 2014, 2013Hunda1 (S. Kor.) (Dissolution of Political Party). See also *supra* notes 23 and 24 and accompanying text.

41) Some critics have charged that this decision might unduly restrict freedom of assembly and freedom to express dissenting political viewpoints. See Associated Press, *South Korea court orders breakup of 'pro-North' leftwing party*, THE GUARDIAN (Dec. 19, 2014), <https://perma.cc/7PMG-QSD9>.

42) For example, in Heonbeopjaepanso [Const. Ct.], Dec. 29, 2011, 2007Hunma1001 (S. Kor.) (Prohibition on Election Campaign via the Internet), the KCC struck down a statute that prohibited certain forms of political speech on the internet 180 days prior to public elections. In Heonbeopjaepanso [Const. Ct.], Dec. 28, 2010, 2008Hunba157 (S. Kor.) (Act of Spreading False Information via the Internet), the KCC declared unconstitutional a statute that punished spreading false information on the internet for the purpose of harming the public good because the notion of harming the public good was too vague. The KCC had previously declared unconstitutional a statute that granted the government broad power to order internet service providers to "refuse, suspend, or restrict" communications that it deemed subversive; Heonbeopjaepanso [Const. Ct.], June 27, 2002, 99Hunma480 (S. Kor.) (Ban on Subversive Communication on the Internet). In Heonbeopjaepanso [Const. Ct.], Oct. 4, 1996, 93Hunga13 (S. Kor.) (Prior Inspection of Motion Pictures), the KCC held that it was unconstitutional to require all motion pictures to be inspected by the government's Public Performance Ethics Committee before they could be shown to the public.

exercising freedom of assembly.⁴³⁾ In some cases, however, the KCC has rejected claims that freedom of expression had been violated. For example, in a series of cases, the KCC held that restrictions on certain public servants' ability to participate in labor unions did not excessively restrict their freedom of expression.⁴⁴⁾

C. Protecting Personal Liberty: Self-Determination, Privacy, Right to Freedom, and Due Process in Criminal Procedure

The KCC has played a crucial role in protecting personal liberties in Korea. It has handed down major decisions on various aspects of personal liberty including self-determination, privacy, and physical freedom especially in criminal proceedings, as well as freedom of expression as indicated in the preceding paragraph. Korea previously had a statute requiring users of internet forums or message boards to verify their real identities online, thus foreclosing the possibility of anonymous participation. The KCC held in 2012 that, except for limited time periods in public election contexts, this law violated the individual right of self-determination regarding private information.⁴⁵⁾ In 2021, the KCC held unconstitutional the part of the public election law requiring verification of real identities for those expressing themselves on online bulletin boards during the public election campaign period.⁴⁶⁾ In a case in 2016, the KCC ruled that a statute allowing involuntary hospitalization of mentally ill

43) Heonbeopjaepanso [Const. Ct.], Apr. 24, 2014, 2011Hunga29 (S. Kor.) (Ban on Nighttime Outdoor Assembly and Demonstration); Heonbeopjaepanso [Const. Ct.], Sep. 24, 2009, 2008Hunga25 (S. Kor.) (Ban on Nighttime Outdoor Assembly); Heonbeopjaepanso [Const. Ct.], May 31, 2018, 2013Hunba322 (S. Kor.) (Ban on Outdoor Assembly within 100 Meters of National Assembly Building).

44) Heonbeopjaepanso [Const. Ct.], Oct. 27, 2005, 2003Hunba50 (S. Kor.) (Prohibition of Labor Union Activity of Public Officials); Heonbeopjaepanso [Const. Ct.], Aug. 30, 2007, 2003Hunba51 (S. Kor.) (Prohibition of Labor Union Activity of Public Officials); Heonbeopjaepanso [Const. Ct.], Apr. 28, 1992, 90Hunba27 (S. Kor.) (Prohibition of Labor Union Activity of Public Officials).

45) Heonbeopjaepanso [Const. Ct.], Aug. 23, 2012, 2010Hunma47 (S. Kor.) (Real-Name Identity Verification System on the Internet).

46) Heonbeopjaepanso [Const. Ct.], Jan. 28, 2021, 2018Hunma456 & 2020Hunma 406 & 2018Hunga16 (consol.) (S. Kor.) (Real-Name Identity Verification for Online Expression during Public Election Campaign Period).

patients lacked sufficient procedural safeguards and thus violated patients' rights to physical freedom.⁴⁷⁾ The KCC also ruled in 2015 that the criminal punishment of adultery violated the rights to sexual self-determination, secrecy, and privacy.⁴⁸⁾ In April 2019, the KCC reversed its earlier decisions to strike down Korea's criminal prohibition of abortion as violating women's right of self-determination.⁴⁹⁾

Criminal investigation and punishment can be legitimate reasons for restricting an individual's personal liberty, but human rights require that such restrictions be carefully determined. The KCC has developed a considerable body of precedents regarding when such restrictions are unconstitutional. It has deemed a variety of statutory provisions to be violations of criminal defendants' rights, concerning, e.g., the scope of arrest warrants,⁵⁰⁾ restrictions on access to assistance of counsel⁵¹⁾ and prosecutorial evidence,⁵²⁾ and authorization of an investigative agency to request location-tracing data from telecommunications companies.⁵³⁾ The KCC has also ruled that the police violated the rights of crime suspects when the police granted journalists permission to take and release photographs of a handcuffed suspect under interrogation in a police

47) Heonbeopjaepanso [Const. Ct.], Sep. 29, 2016, 2014Hunga9 (Involuntary Hospitalization of Mentally Disabled Patient) (S. Kor.).

48) Heonbeopjaepanso [Const. Ct.], Feb. 26, 2015, 2009Hunba17 (S. Kor.) (Criminal Punishment of Adultery). For another major KCC decision concerning privacy, *see* the 2001 case in which the KCC ruled that regulations concerning lavatories at police detention facilities violated individuals' right to privacy because they lacked sufficient covers to shield users from being viewed by others (Heonbeopjaepanso [Const. Ct.], July 19, 2001, 2000Hunma546 (S. Kor.) (Installation of Lavatories at Police Detention Facilities)). Relatedly, *see* also Heonbeopjaepanso [Const. Ct.], Dec. 24, 1998, 89Hunma214 (S. Kor.) (Restriction on Real Property by Designation of Green Belt), in which the KCC protected the right of citizens to make decisions concerning private property.

49) Heonbeopjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hunba127 (S. Kor.) (Criminal Punishment of Abortion).

50) Heonbeopjaepanso [Const. Ct.], Dec. 24, 1992, 92Hunga8 (S. Kor.) (Restriction on Acquittal notwithstanding Non-Guilty Judgment at Trial upon Prosecution's Felony).

51) Heonbeopjaepanso [Const. Ct.], Aug. 29, 2013, 2011Hunma122 (S. Kor.) (Assistance of Counsel).

52) Heonbeopjaepanso [Const. Ct.], Nov. 27, 1997, 94Hunma60 (S. Kor.) (Prosecution's Denial to Defense Counsel of Access to Criminal Investigation Record).

53) Heonbeopjaepanso [Const. Ct.], June 28, 2018, 2012Hunma191 (S. Kor.) (Use of Location-Tracing Data by Investigative Agency).

station.⁵⁴⁾ It held that granting such permission infringed criminal suspects' right to personality.

The KCC has in recent years been more protective of freedom of conscience. Reversing a decision from seven years earlier, the KCC held in 2018 that the Military Service Act was unconstitutional insofar as it did not offer conscientious objectors a form of service as an alternative to mandatory military service.⁵⁵⁾ Without an alternative service option, conscientious objectors were subject to imprisonment for a year and a half and subsequently suffered disadvantages such as restrictions on public employment. The KCC ruled that, although the public interests of national security and fairness in the assignment of military duties were significantly important, the limitation on freedom of conscience was not a proportionate means for promoting those interests.

D. Implementing Equal Protection and Supporting Diversity in a Global Community

The KCC has decided cases concerning various forms of discrimination in Korean society. In addition to equality rights, these cases have often implicated other constitutional rights. The KCC has demonstrated that it will subject certain forms of discrimination to a proportionality analysis. For example, the KCC has applied proportionality analysis to gender discrimination.⁵⁶⁾ In 1999, it struck down a statute that awarded discharged soldiers extra points in their examinations for civil service positions.⁵⁷⁾

54) Heonbeopjaepanso [Const. Ct.], Mar. 27, 2014, 2012Hunma652 (S. Kor.) (Taking and Releasing Photograph of Handcuffed Suspect during Police Interrogation at Police Station).

55) Heonbeopjaepanso [Const. Ct.], June 28, 2018, 2011Hunba379 (S. Kor.) (Mandatory Military Service with No Available Alternative Service Option for Conscientious Objectors). Compare this decision with a preceding KCC decision in which the KCC previously addressed the issue of conscientious objection to military service in Heonbeopjaepanso [Const. Ct.], Aug. 30, 2011, 2008Hunga22 (S. Kor.) (Conscientious Objection to Mandatory Military Service based on Religious Belief).

56) DAEHANMINKUK HUNBEOB [CONSTITUTION] art. 11 (S. Kor.) prohibits "discrimination in political, economic, social or cultural life on account of sex, religion or social status." In addition, it contains provisions that prohibit gender discrimination specifically in the contexts of employment (art. 32) and family life (art. 36).

57) Heonbeopjaepanso [Const. Ct.], Dec. 23, 1999, 98Hunma363 (S. Kor.) (Addition of

While acknowledging that the government has a valid interest in supporting veterans through social policies, it held that the point system's differential treatment was not proportionately related to that goal and thus violated the equality rights of both women and men who could not serve in the military due to disability. Importantly, the KCC found impermissible gender discrimination even though the statute indirectly discriminated against women. The point system had a disproportionate impact on women because women are not subject to mandatory military service and thus much less likely than men to have veteran status. The KCC also held that the point system impermissibly infringed on the fundamental right to hold public office. In another landmark gender discrimination case, the KCC invalidated in 2005 a statute codifying the traditional head of household (*hoju*) system of family registration.⁵⁸⁾ Under this explicitly patriarchal system, every family was defined by law as having a male head of household, and this position was passed down, with very limited exceptions, to direct male descendants.⁵⁹⁾ In declaring that this system did not conform with the constitution, the KCC introduced far-reaching changes to gender dynamics across Korean society.⁶⁰⁾

Gender is not the only ground of discrimination that prompts KCC proportionality analysis. As noted above, the invalidated policy that favored discharged soldiers discriminated the bases of both disability and gender. Another more straightforward case of disability discrimination involved the government's support of the visually impaired. Several cases have addressed the constitutionality of a statute providing that only the visually impaired can be licensed to work as massage therapists.⁶¹⁾ In 2017,

Extra Points for Discharged Soldiers in Civil Examinations for Public Service).

58) Heonbeopjaepanso [Const. Ct.], Feb. 3, 2005, 2001Hunga9 (S. Kor.) (Male House Head ('Hoju') System).

59) *Id.*

60) For other major cases in which the KCC declared that family law regulations violated gender equality, see Heonbeopjaepanso [Const. Ct.], July 16, 1997, 95Hunga6 (S. Kor.) (Ban on Same-Surname-Same-Origin Marriage), which held that the prohibition of marriage between women and men who share the same surname and patrilineal line violates constitutional protections of gender equality, dignity, and the pursuit of happiness; and Heonbeopjaepanso [Const. Ct.], Dec. 22, 2005, 2003Hunga5 (S. Kor.) (Compulsory Use of One's Father's Surname and Origin of Surname), which held that requiring children to use their birth-father's surname violates constitutional protections of dignity and gender equality.

the KCC upheld this restriction against alleged violations of the right to an occupation and right to equality of those who are not visually impaired.⁶² The KCC held the statute to be proportionately related to the goal of promoting the welfare of the visually impaired. Age is among the other grounds of discrimination that have prompted the KCC to apply proportionality analysis. In 2008, it carried out such an analysis and held that age restrictions on a particular civil service position violated the rights to equal protection, to pursue a vocation, and to hold public office.⁶³

The KCC has not always applied proportionality analysis in discrimination cases. In some instances, it has instead deferred to the legislature by evaluating whether the impugned legislation was arbitrary.⁶⁴ For example, the KCC took a deferential approach in upholding an anti-corruption law against complaints that the statute discriminated against journalists and private school teachers by including them within the law's definition of "public officials."⁶⁵ The KCC has also applied this lenient test of arbitrariness in repeatedly rejecting claims that the criminalization of same-sex sexual intimacy between military personnel violates equality rights based on sexual orientation.⁶⁶ At the opposite extreme, the KCC has sometimes found unconstitutional discrimination without applying proportionality analysis. For example, it held that a labor law concerning

61) Heonbeobjaepanso [Const. Ct.], May 25, 2006, 2003Hunma715 (S. Kor.) (Monopoly of Vocation of Massage Therapists by Visually Disabled Person); Heonbeobjaepanso [Const. Ct.], Oct. 30, 2008, 2006Hunma1098 (S. Kor.); Hunbeobjaepanso [Const. Ct.], July 29, 2010, 2008Hunma664, 665, 666, 667, 668, 669, 670, 671, 673, 674, 675 & 2009Hunma 583, 644 (consol.) (S. Kor.); Hunbeobjaepanso [Const. Ct.], June 27, 2013, 2011Hunga39 (S. Kor.); Hunbeobjaepanso [Const. Ct.], Dec. 28, 2017, 2017Hunga15 (S. Kor.).

62) Hunbeobjaepanso [Const. Ct.], December 28, 2017, 2017Hunga15 (S. Kor.) (Monopoly of Vocation of Massage Therapists by Visually Disabled Persons).

63) Hunbeobjaepanso [Const. Ct.], May 29, 2008, 2007Hunma1105 (S. Kor.) (Age Limit in Civil Service Examination).

64) The KCC has yet to clearly explain its criteria for determining when claims of discrimination trigger proportionality analysis; see Il-hyung Lee, *Korean Perception(s) of Equality and Equal Protection*, 31 B.C. INT'L & COMP. L. REV. 53, 57 (2008).

65) Hunbeobjaepanso [Const. Ct.], July 28, 2016, 2015Hunma236 (S. Kor.) (Constitutionality of Anti-Corruption Law of the Prohibition on Improper Solicitation and Graft Act).

66) E.g., Hunbeobjaepanso [Const. Ct.], July 28, 2016, 2012Hunba258 (S. Kor.) (Military Criminal Act Prescribing Punishment by Imprisonment for "Other Indecent Conduct").

the government's foreign trainee system was unconstitutional because there was no rational basis for its differential treatment of foreign trainees.⁶⁷⁾

III. The Road Ahead: Challenges to the Law and the System of Korea's Constitution

A. Challenges to Reform Governmental Structures and Institutions

Korea's constitution establishes a presidential system in which the president is elected for a nonrenewable five-year term. There is no office of vice president, but the president nominates and appoints a prime minister with an appointment hearing and the consent of the National Assembly. Such current governmental structure was developed in the wake of the 1987 citizen democratization movement to prevent prolonged authoritarian rule and abuse of presidential powers of the kind previously long experienced in Korea. The nonrenewable presidential term has certainly contributed to peaceful regime changes every five years—if not sooner, as was the case following President Park Geun-hye's impeachment in 2017. The nonrenewable presidential term has also contributed to a more balanced relationship among the various branches of government, most noticeably in the relationship between the president and the National Assembly.

Despite the benefits of the current system, there has been considerable debate over two proposed alternatives. The first is a presidential system with a once-renewable four-year term in place of the current limit of a single nonrenewable term of five years. Proponents of this reform link the potential abuse of presidential powers primarily to the adequacy of checks on presidential power rather than the duration of the presidency. They argue that a president who cannot run for reelection has diminished incentives to listen to constituents and develop public policies to earn their support. This proposal also has the possible merit of coordinating the presidential term with the four-year term of the National Assembly. President Moon Jae-in submitted during his presidency a constitutional

67) Hunbeobjaepanso [Const. Ct.], Aug. 30, 2007, 2004Hunma670 (S. Kor.) (Labor Ministry Regulation Infringing Labor Rights of Foreign Trainees of Industrial Technology).

revision bill incorporating this reform to the National Assembly in March 2018, but the bill failed to proceed in the legislature and was accordingly discarded.

The second alternative to the current system involves the adoption of a mixed presidential-parliamentary system, in which the prime minister is not nominated or appointed by the president but is instead either nominated or elected by the National Assembly. Under this proposal, the prime minister, and thus indirectly the National Assembly, would in turn have greater influence over the selection and removal of government ministers. Preference for this alternative is one reason why President Moon's 2018 constitutional revision proposal failed to garner sufficient support in the National Assembly. There has been very little discussion of moving toward a full parliamentary system due to a lack of popular support. Proponents of the mixed presidential-parliamentary system argue that the only legitimate alternative to the current presidential system in terms of more balanced government powers and ultimately the protection of fundamental rights is one that further shifts powers from the president to the legislature. They argue that such an institutional arrangement would foster cooperation and responsible behavior in the Korean politics. These debates over alternatives to the current presidential system show no signs of waning.

B. Challenges to the System of Public Election and Representative Democracy

Several interrelated issues feature in the ongoing debate over reform of Korea's legislative structure. First, there has been constant debate over whether the nation should move from a unicameral to a bicameral legislature. Except for a brief period from 1960 to 1961, Korea has always had a single legislative chamber. Unicameralism contributes to expedient lawmaking as proposed legislation needs to be reviewed in only one house.⁶⁸⁾ This was particularly important in Korea's early history, when the

68) Other aspects of institutional design, combined with practice and data, also contribute to legislative expediency in Korea, with certain side effects. For example, the standing committees of Korea's National Assembly—a unicameral legislature with the concentrated

nation needed to establish or reconstruct virtually every institution of government, industry and society, following the Korean War (1950-1953). Now that Korea has a more mature legal system in a rapidly diversifying society, some commentators have suggested that bicameralism is preferable because it would promote more robust deliberation from more diverse perspectives on legislation.⁶⁹⁾ In addition, in contemplating the potential reunification of South Korea with North Korea, a bicameral legislature may be more suitable for a possible federal system of government at least as a provisional system design. The current unicameral system fosters an environment where intense lobbying is targeted at a small number of lawmakers in the standing committees of a single legislative house. Adopting bicameralism might help to address this concentration of power and lobbying in regard to legislation. Some commentators worry, however, that even the unicameral National Assembly has become deadlocked too often and that a bicameral system would heighten the risk of deadlock, particularly in a divided government.⁷⁰⁾

Other commentators support maintaining unicameralism and instead reforming the composition of the legislature to enhance its representativeness, most notably by increasing the amount of proportional representation. Korea's National Assembly currently consists of 253 members elected directly from electoral districts and 47 members elected through a party-list proportional representation system. One proposal is to increase the percentage of proportional representation seats.⁷¹⁾ In 2019, the

authority and the explicit obligation to review all bills and pass, modify, or reject them—play a critical role in screening and streamlining bills more than intended, at least partly due to the exponentially increased number of bills submitted to the National Assembly. In addition and relatedly, the budgets for all branches of government in Korea are prepared and submitted by the executive branch to the National Assembly for its review and determination.

69) In this regard, to promote deliberation, statutory rules currently render legislative bills referable simultaneously to two standing committees for debate, if deemed necessary, as well as to the committee of the whole; *see* Gukhoebeob [National Assembly Act], art. 63, 63-2 (S. Kor.).

70) *See* Jeon Jin Young, *Issues on Implementing Assembly's Bicameral System*, NATIONAL ASSEMBLY RESEARCH SERVICE REPORT No. 1369 (October 24, 2017), <https://www.nars.go.kr/eng/report/view.do?page=121&cmsCode=CM0136&categoryId=all&searchType=TITLE&searchKeyword=&brdSeq=21967>.

71) *See* Kim Jong Gap, *Agendas on Assemblymen Election Districts and Proportional Election System*, NATIONAL ASSEMBLY RESEARCH SERVICE REPORT No. 1366 (October 17, 2017), <https://www.>

National Assembly revised the Public Official Election Act to change the method of distributing proportional representation seats by adopting a partial mixed-member proportional representation system modeled to some extent on the German system; it was used for the general election held on April 15, 2020,⁷²⁾ and is currently subject to reform discussions.

Another topic of debate is devolution of power to local governments. During his successful election campaign in 2017, President Moon Jae-in pledged as a candidate to seek constitutional revisions that would transfer governmental powers from national to local authorities. His administration subsequently announced directives and guidelines for decentralization over a five-year period. Shortly thereafter, the National Assembly formed a special committee to examine a variety of decentralization proposals on matters such as expanding the lawmaking and taxation powers of local governments and redesigning institutions to facilitate local government input on national legislation.⁷³⁾

There have also been proposals to revise the constitution to enlarge the role of direct democracy. The constitution currently allows the president to submit important “policies of diplomacy, national defense, unification, and other matters relating to the national destiny” to a national referendum (Constitution Article 72).⁷⁴⁾ Revision of the constitution itself must also be approved by national referendum (Constitution Article 130).⁷⁵⁾ In recent years, there have been growing calls to expand direct democracy by allowing voter initiation of legislation in statute-making and establishing a voter-initiated recall system for elected public officials including members of the National Assembly. At the local government level, laws already permit voter initiatives for enacting local ordinances and recalling local officials.⁷⁶⁾ While multiple bills have been submitted to the National

nars.go.kr/eng/report/view.do?page=121&cmsCode=CM0136&categoryId=all&searchType=TITLE&searchKeyword=&brdSeq=21964.

72) Gongjikkeongeobeob [Public Official Election Act] (S. Kor.).

73) This committee was also tasked with addressing the issue of expanding fundamental rights.

74) The KCC has held that the president should not conduct a national referendum for the purpose of seeking a vote of confidence; Hunbeobjaepanso [Const. Ct.], May 14, 2004, 2004Hunna 1 (S. Kor.) (Impeachment of President Roh Moo-hyun).

75) DAEHANMINKUK HUNBEOB [CONSTITUTION] art. 130 (S. Kor.).

Assembly in recent years to adopt a voter initiative legislation system in the National Assembly and a recall system for members of that body, these bills have all been rejected on the ground that such systems would violate the constitutional doctrines of exclusive statute-making authority vested in the National Assembly and of nonbinding delegation. Thus, expansion of direct democracy at the national level in Korea would appear to require constitutional revision after further reflection and discussions.

C. Challenges to Expand the Protection of Fundamental Rights

Recent conversations about constitutional revision in Korea in terms of fundamental rights protection, including those reflected in the constitutional revision bill advanced by President Moon Jae-in in March 2018, seek to expand and clarify constitutional protections for fundamental rights. The proposed revisions would have made explicit that certain fundamental rights are constitutionally protected for all persons regardless of their nationality or residency status. These inalienable rights included the rights to human dignity, pursuit of happiness, equality, life, general freedom, privacy, conscience, religion, and expression. However, the revisions would continue to limit the applicability of other rights to only Korean nationals. This category of rights included social rights such as the rights to a vocation, property, and education and social welfare, along with rights having to do with national defense and the economy. The 2018 constitutional revision bill also sought to strengthen labor rights, especially those of public officials, and to add explicit rights protections that would apply under special circumstances such as natural disasters or national crises. Although the National Assembly did not pass that particular constitutional revision bill, the relevant proposals and issues continue to be

76) See Jibangjacheob [Local Autonomy Act] (S. Kor.). Discussions on developing a national recall system in Korea have also been inspired and influenced by the UK's Recall of Members of Parliament Act of 2015 (An Act to Make Provision about the Recall of Members of the House of Commons; and for Connected Purposes; 2015 c. 25). For a historical account of Korea's direct democracy measures as incorporated into its system of local autonomy, see Woo-Young Rhee, *Recently Introduced Measures of Direct and Participatory Democracy and Their Constitutional Ramifications in the Republic of Korea*, 4 NATIONAL TAIWAN UNIVERSITY. L. REV. 41 (2009).

discussed and may resurface in one form or another.

IV. Conclusion

The Korean constitutional system has undergone significant changes in the more than seven decades since the Republic of Korea was founded in 1948. The 1987 constitutional revision was a watershed that brought about democratization and increased protection of constitutional rights. Since the KCC was established in 1988 through this 1987 constitutional revision, its decisions have been instrumental in furthering the ideals of democratization and respect for fundamental rights, although that progress has not been linear. As to the future, there is lively ongoing debate over potential constitutional reforms⁷⁷⁾ aimed at ensuring that both the structural elements and the rights protections of the Korean constitutional law and system will continue to meet the needs and conditions of a society that has changed profoundly over the last 70 years.

77) For the constitutional reform discussion around the 25th anniversary of the current Constitution of the Republic of Korea, see Woo-Young Rhee, *Constitutionalism and the Discussion of Constitutional Revision in the Republic of Korea in the First Decade of the Twenty-First Century*, 42 HONG KONG. L. J. 43 (2012).

