NOTE: JUDICIAL ACTIVISM IN THE NEW CONSTITUTIONAL COURT OF KOREA

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I. INTRODUCTION

Over the last twelve years of its existence, the new Constitutional Court of Korea has shown itself to be an independent and active body. Its mandate, as construed from the Constitutional Court Act and Articles 111-113 of the Constitution, gives it expansive powers to provide a check on over-reaching governmental authority and to be a force for judicial activism. However, the Court faced a great degree of skepticism as it began its existence. Much of this skepticism was justified, given the role of previous constitutional courts/committees in Korea as mere rubber stamps for governmental action. The judiciary in Korea has not traditionally taken on an activist role. Judges, though well trained and highly qualified, are civil

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servants. They follow a well-defined career path to rise through the ranks of a rigidly hierarchical system that contains at least sixteen promotional steps.[1] This kind of hierarchical system does little to help cultivate ranks of independent and activist judges.

Additionally, though opinions of the Supreme Court have certainly had great influence on the lower courts, the Korean legal system has not emphasized the principle of *stare decisis.* According to Article 1 of the Korean Civil Code the sources of law are (in order of preference): statutes, customary law and principles of law. Judicial decisions are not even mentioned.[2] Yet despite the lack of a tradition of effective constitutional review in Korea, the new Constitutional Court has made great strides in establishing its own institutional identity and securing its legitimacy.

In this paper I will describe the history of weak systems of constitutional review and frequent revisions of the constitution in Korea in order to contextualize the present situation, and to illustrate the contrast between past and present. I will then describe the genesis and powers of the new Constitutional Court, and will conclude with an analysis of select decisions of the Court, using these decisions to illustrate how the Court has established itself as a champion of individual rights and a strong advocate of the rule of law.

II. HISTORICAL OVERVIEW

A. Judicial Review in the First Republic (1948-1960)

Article 81 of the Constitution of 1948 established the first system of judicial review in modern Korea, empowering a Constitutional Committee to review the constitutionality of statutes when such questions were a prerequisite to a trial. The Committee was composed of the Vice President, five members of the National Assembly and five Justices of the Supreme Court. The composition of the Committee, spanning all three branches of the government, addressed the concern that the judges of the time lacked experience in the fields of constitutional and administrative law.[3] The composition of the Committee also reflected the widespread distrust of

1. *See* Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea,* 22 S. ILL. U. L.J. 71, 77-78 (1997). *See also* Dae-Kyu Yoon, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 19-24 (1990).

2. *See* Ahn, *supra* note 1, at 78. *See also* Sang-Hyun Song, *Special Problems in Studying Korean Law,* in KOREAN LAW IN THE GLOBAL ECONOMY 177, 182-95 (Song, ed. 1996).

3. Sang Don Lee, *The Influence of U.S. Constitutional Doctrines on the Development of Korea's Governmental Structure,* 14 KOREAN J. COMP. L. 11, 16 (1986).

judges who had been subservient to the Japanese colonial authorities.[4] To an even greater extent, the composition of the Committee reflected a widespread distrust of law itself, which had often been applied arbitrarily during the Yi dynasty[5] and was later used as a means to advance the interests of an oppressive colonial administration.[6]

The Committee had the power to declare a statute unconstitutional upon the concurrence of two-thirds or more of its members. This two-thirds requirement for ruling a statute unconstitutional illustrates a strong presumption of constitutionality that has persisted under later systems of judicial review. Such a presumption, like the composition of the Committee, may reflect the general sentiment that the law had largely been applied arbitrarily under the Japanese colonial administration and thus it was better to defer to the popularly elected legislature.

The Committee reviewed only seven cases in its more than decade-long history. While perhaps it did not play an active enough role to be a major check on legislative and executive power, its decisions did make a contribution to the protection of individual rights in at least two cases. In cases concerning the Agricultural Land Reform Act and the Special Decree for Criminal Punishment Under Emergency, the Committee ruled that the right to be tried under the Constitution included the right to be tried before the Supreme Court. The Committee found these laws unconstitutional because they abridged the three levels of trial (by district, appellate and supreme courts) without giving final authority to the Supreme Court.[7]

B. Judicial Review in the Second Republic (1960-1961)

After the student revolution of April 19, 1960 and the fall of the regime of Syngman Rhee, a new constitution was drafted that created a Constitutional Court based on the German model. This Constitutional Court was different in many significant respects from the previous Constitutional Committee. While the requirement of a two-thirds majority to declare a statute unconstitutional was retained, the new Constitutional Court was designed to be a permanent and independent entity, as contrasted with the ad hoc and politically oriented Constitutional Committee. Additionally, the Court was to be composed only of members who were qualified as judges,

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4. Dae-Kyu Yoon, *Judicial Review in the Korean Political Context*, 17 KOREAN J. COMP. L. 133, 135 (1989).

5. *See* Yoon, *supra* note 1, at 16-20.

6. *See* Dae-Kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 PAC. RIM L. & POL'Y J. 395, 397 (1995).

7. Yoon, *supra* note 4, at 137-38.

with the President, the Supreme Court and the National Assembly each appointing three members.[8] The result of these changes was that the powers of the Court were greatly expanded and included the ability to review statutes in the abstract, without a *sub judice* case. Unfortunately, the potential of the Court for judicial activism and to act as a check on the legislative and executive branches never had a chance to be realized since the military coup led by Park Chung Hee on March 16, 1961 put an end to the Second Republic before the Court had even begun to function.[9]

C. Judicial Review in the Third Republic (1961-1972)

The government of President Park turned away from the German model and established an American-style system of judicial review. Under Article 102 of the Constitution of 1962, the Supreme Court was designated the final arbiter of the constitutionality of statutes and other governmental acts. Article 99 of the new Constitution provided that the Chief Justice of the Court was to be appointed by the President upon the recommendation of the Justice Recommendation Council (composed of four judges, two attorneys, one professor of law nominated by the President, the Minister of Justice and the Prosecutor General), and that the other Justices of the Court were to be appointed by the President upon the recommendation of the Chief Justice and with the consent of the Council.[10]

During the Third Republic the abstract review of legislation was abandoned in favor of an American-style "case or controversy" procedure.[11] Though the activist spirit of the Warren Court of the time seems to have provided some inspiration to those shaping the powers of judicial review in the Third Republic, judicial activism remained more of an ideal than a practical reality.[12]

Only once during the Third Republic did the Supreme Court declare statutes unconstitutional. On June 22, 1971 provisions of two statutes were struck down: a revision of Article 59(1) of the Judiciary Organization Act by an eleven to five majority, and Article 2(1) of the Government Tort Liability Act by a nine to seven majority. Article 2(1) of the Government Tort Liability Act provided that if a member of the armed forces was killed during combat, drill or other duty his family was entitled only to a military

8. JOHN KIE-CHIANG OH, KOREA DEMOCRACY ON TRIAL 76 (1968).

9. *See* Yoon, *supra* note 4, at 138-40.

10. *See* Yoon, *supra* note 4, at 141; Oh, *supra* note 8, at 160-61.

11. On the presence of American advisors in drafting the 1962 Constitution *see* Gisbert Flanz, *Korea and Vietnam: Two Constitutional Experiments*, 42 ST. JOHN'S L. REV. 18-37 (1967).

12. Ahn, *supra* note 1, at 87.

pension and could not bring a tort action against the government in a civil court. The revision of Article 59(1) of the Judiciary Organization Act raised the requirement for ruling a statute unconstitutional to a two-thirds majority of the Court. Article 59(1) was revised solely to ensure that the Court would not overturn Article 2(1) of the Government Tort Liability Act. The Court ruled that Article 59(1) was unconstitutional because, due to the principle of separation of powers enunciated in the Constitution, an exception to the majority rule in deciding cases could only be made by revising the Constitution itself. Thus, the Court held that it could rule upon the constitutionality of Article 2(1) of the Government Tort Liability Act by a simple majority vote. The Court held that this provision was unconstitutional because it violated the equal protection guarantee provided in the Constitution.[13]

This decision showed the ability of the Supreme Court to take on an activist role and become a champion of individual rights and the rule of law. In the political climate of the time, however, the Government was not ready for such an activist Court. The will to create a powerful and active judiciary was present, but the institutional support to maintain it was not. The Court's ruling, along with the strong showing of Kim Dae Jung and the New Democratic Party in the 1971 elections, the withdrawal of large numbers of American soldiers and an economic slowdown, was one of the factors behind Park Chung Hee's Yushin Reforms in October 1972.[14]

D. Judicial Review in the Fourth Republic (1972-1980)

The promulgation of the Yushin Constitution in November 1972 marked the beginning of the Fourth Republic. This new Constitution deprived the courts of the power of judicial review by giving the sole jurisdiction to rule upon the constitutionality of statutes to a Constitutional Committee. This Committee was to be a standing body with three members appointed by the President, three by the National Assembly and three by the Chief Justice of the Supreme Court. When Justices were up for

13. *See* Ahn, *supra* note 1, at 9; Lawrence W. Beer, *Constitutionalism and Rights in Japan and Korea*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 251 (Louis Henkin and Albert J. Rosenthal, eds. 1990); Lee, *supra* note 3, at 21-23; Kun Yang, *Judicial Review and Social Change in the Korean Democratization Process*, 41 AM. J. COMP. L. 1, 1-2 (1993); Yoon, *supra* note 1, at 408.

14. *See* Beer, *supra* note 13, at 251; CARTER J. ECKERT ET AL., KOREA OLD AND NEW: A HISTORY 363-65 (1990); Gregory Henderson, *Constitutional Changes from the First to the Sixth Republics: 1948-1987*, in POLITICAL CHANGE IN SOUTH KOREA 33 (Young W. Kihl and Ilpyong J. Kim, eds. 1988); James B. Palais, *'Democracy' in South Korea, 1948-72*, in WITHOUT PARALLEL: THE AMERICAN-KOREAN RELATIONSHIP SINCE 1945 341-46 (Frank Baldwin, ed. 1974).

reappointment under the new Constitution, the nine Justices who had ruled that Article 2(1) of the Government Tort Liability Act was unconstitutional were all rejected. This method of dealing with a judicial decision unpalatable to the Government further illustrates the triumph of authority over law that has been a strong presence in Korean regimes both ancient and modern.[15]

The Committee was not empowered to review the constitutionality of laws on its own initiative. Rather, it had to wait for the Supreme Court to refer to it a question for adjudication. Though the Committee was a standing body, it never had the opportunity to review the constitutionality of even a single statute because the Supreme Court never requested the Committee to do so. This lack of any independent review of constitutional questions is not surprising given the extreme state of political affairs at the time. This period was largely defined by President Park's increasing consolidation of power, and it seems likely that the role of the Committee was purposely limited to prevent it from providing a legitimate check on Park's growing authoritarianism.

E. Judicial Review in the Fifth Republic (1980-1987)

The Fourth Republic came to an abrupt end with the assassination of Park on October 26, 1979. Major General Chun Doo Hwan then assumed power after a coup on December 12. A new Constitution was enacted in October 1980. This new Constitution retained the Constitutional Committee, and as in the Fourth Republic, it did not review a single statute.

III. THE SIXTH REPUBLIC AND THE CREATION OF A NEW CONSTITUTIONAL COURT

During the summer of 1987 there were massive demonstrations for democratization. These demonstrations gained widespread popular support and were a clear signal to the Chun regime that the demands for a direct presidential election had to be addressed. With little choice, Chun's handpicked successor, Roh Tae Woo, announced his eight-point plan for reform. Foremost among these reforms was the call for an amended constitution that would promote democratization and institute a direct

15. *See generally* PYONG-CHOON HAHM, THE KOREAN POLITICAL TRADITION AND LAW (1967); Yoon, *supra* note 4, 5-20.

system of presidential election.[16]

This mass social movement for democratization also produced the climate necessary for the introduction of a strong system of judicial review, through which the freedoms enunciated in the new Constitution could be both protected and amplified. Previously, judges in Korea had lacked the institutional framework within which they could press for social change. The new Constitution and the Court's implementing legislation, the Constitutional Court Act, provide that basic framework, ensuring that judicial activism can proceed from a base of institutional stability rather than being subject to ever-changing political whims. This stability means that judicial activism can be a normal and constant element of the judicial process instead of the work of a few brave mavericks. A closer look at the powers and structure of the Court will illustrate this point.

A. Powers of the Court

Article 111 of the new Constitution established the Court, and along with the Constitutional Court Act, defined the scope of its powers. These powers include jurisdiction over the following matters: (1) the constitutionality of legislation (upon the request of the courts); (2) cases of impeachment of the President, Supreme Court Justices and other high officials; (3) the dissolution of political parties; (4) conflicts over intragovernmental jurisdiction; and (5) petitions relating to the Constitution (as prescribed by law). The jurisdiction to review the constitutionality of administrative decrees and regulations remains with the Supreme Court.[17]

In theory, these powers put the judiciary on an equal plane with the legislative and executive branches. All of these powers enable the Court to strike a balance between the powers of the other branches. Jurisdiction over impeachment gives the Court a restraining power over the excesses of government officials and suggests that at least in theory no official, no matter how powerful, is above the law. Jurisdiction over the dissolution of political parties gives the Court power over the legislative branch akin to its impeachment power over executive branch officials. These two jurisdictional powers have yet to be exercised by the Court, so it remains to be seen how the Court might fulfill its mandate in this regard.

The power to adjudicate questions of intragovernmental jurisdiction is also important in that it establishes the Court as the arbiter of power

16. *See* Eckert et al., *supra* note 14, at 380-84; JOHN KIE-CHIANG OH, KOREAN POLITICS: THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT 87-102 (1999).

17. S. KOREA CONST. art. 107(2).

conflicts between the various organs of the other branches of government. This power of the Court also gives it a role in upholding the constitutionally mandated principle of local autonomy.[18]

The power to review the constitutionality of laws is the basic power of any system of constitutional adjudication. While this review provides a necessary check on the unrestrained power of the legislative branch, it does not afford the Court the maximum leeway to take on an activist role because it still must wait for constitutional questions to be referred to it. Unlike the German system of abstract judicial review ("Abstrakte Normenkontrolle"), where not just the courts but also the other branches of the government can refer constitutional questions for final adjudication, under the Korean system only the courts have this power. Thus, compared with the German Federal Constitutional Court, the Korean Constitutional Court is far more reliant on the rest of the judiciary to define its role.[19]

However, referral from a lower court is not the only way for a constitutional question to reach the Court. In addition to the lower courts' new power to refer questions of constitutionality to the Court, the system of direct citizen petition, or constitutional complaint, gives the Court great potential for independence and judicial activism, and marks what is perhaps the most significant change from the previous systems of constitutional adjudication in Korea. Under Article 68(1) of the Constitutional Court Act, any person whose constitutional rights have been infringed upon due to the exercise or non-exercise of governmental power may petition the Court for relief, provided all other remedies have been exhausted (an exception to the requirement of exhausting all other remedies is made for cases that contain significant constitutional issues). Article 68(2) of the Constitutional Court Act provides an additional avenue for direct constitutional complaint. Article 68(2) provides that a party to an ordinary court proceeding can have recourse to the Court for a final judgment on a law's constitutionality when his motion to refer the issue to the Court was denied by the court of original jurisdiction.

To handle the extremely large number of constitutional complaint cases brought before it, the Court utilizes a small bench, composed of three Justices, to determine whether the complaint will be heard by the entire Court. A unanimous judgment of the small bench is required to reject a constitutional complaint. Requiring a unanimous judgment to reject a

18. *Id.*, art. 117.

19. *See* James M. West and Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?* 40 AM. J. COMP. L. 73, 90 (1992); Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea*, 6 TULSA J. COMP. & INT'L L. 123 (1999).

complaint ensures that meritorious petitions will not be denied a fair hearing before the full bench.

Previous constitutional courts and committees were at best passive institutions. When, as in the past, the judiciary lacked complete independence, the constitutional court/committee was largely impotent. Forced to wait for the Supreme Court to refer to them questions of constitutionality, the previous constitutional courts were unable to champion judicial activism. The system of direct petitions gives the new Constitutional Court added legitimacy in that it opens up a new avenue for direct citizen participation in the political process and prevents any one institution from being the exclusive "gatekeeper" to constitutional review.

This direct process of constitutional complaint, because it is only available where a constitutional right is infringed upon due to the exercise or non-exercise of governmental power, opens up the question of what is to be considered state action. In this regard, the Court has taken an expansive view. In a 1992 case, the Court ruled that the proposal of Seoul National University to eliminate Japanese as a subject on its entrance exam amounted to state action, even though the proposal had not yet been implemented, because such a change would have profound effects on the entire nation.[20] Though the petitioner's claim was defeated on the merits, it is significant that the Court recognized that they had standing to file a constitutional complaint. This case illustrates the Court's willingness to be an active body rather than a passive one. This decision, with its expansive definition of what constitutes state action, gives the Court the maximum flexibility and power to take on an activist role. The Court, in this decision, expressed its interest in being more than merely a check on unrestrained government power. Going beyond that important but more limited role, the Court here carves out a place for itself to use its power of constitutional review to further broader goals of public policy.

In a 1993 case, the Court declared that even the indirect involvement of government officials is enough to constitute state action. In this case, government interference with Korea First Bank forced the Kukje Group, a major conglomerate, to collapse.[21] The Court's decision to consider this indirect involvement state action illustrates its acknowledgment that state action is more than just explicit, direct government actions and decrees. Furthermore, this decision illustrates that the Court is not naïve about the political realities of government operation. The willingness to look beyond

20. 92 HunMa 68, 4 KCCR 659 (Oct. 1, 1992). For abstracts of this and other Constitutional Court cases, *see* the Constitutional Court web site <http://www.ccourt.go.kr>.

21. 89 HunMa 31, 5-2 KCCR 87 (July 29, 1993).

narrowly defined notions of state action, to examine the actual context of that action, is an essential prerequisite for an activist Court. This point is doubly true in Korea, where the line between government action and private action is often blurred. The dissolution of Kukje was seemingly brought about by a private bank, but the Court here recognized that the bank was "an institution through which unconstitutional public power [was] exercised"[22] by the President and the Minister of Finance.

One important issue that has faced the Constitutional Court since its inception is its relationship with the Supreme Court. Viewed together with the Supreme Court and the lower courts, the Constitutional Court forms a powerful third branch of the government. However, at the same time, the Constitutional Court is largely outside of the hierarchy of the Supreme Court and the lower courts. In fact, the organizational chart of the judiciary on the Korean Supreme Court web site does not even include the Constitutional Court.[23] Additionally, it is easy to see how the Supreme Court could be threatened by the creation of the Constitutional Court and view it as a usurpation of its power.

While the Supreme Court has the power to decide which cases get referred to the Constitutional Court, this by no means gives the Supreme Court total control over the Constitutional Court's docket, since a very large percentage of the cases adjudicated by the Constitutional Court come to it by way of direct constitutional complaints. On the other hand, the Supreme Court has considerable ability to set the tone for the Constitutional Court since it gets to nominate three out of the nine Constitutional Court Justices.

However, one important change from previous systems of constitutional review ensures that the new Constitutional Court will have a greater degree of independence from the Supreme Court. Article 41 of the Constitutional Court Act gives the lower courts, not just the Supreme Court, the power to refer constitutional questions to the Constitutional Court. This change widens the channels through which constitutional questions can reach the Court. By contrast, during the Fourth and Fifth Republics, when the Supreme Court had the sole authority to refer constitutional questions to the Constitutional Committee, of eleven cases involving constitutional issues brought before the Supreme Court not one was referred to the Committee.[24]

It should also be noted that the Supreme Court remains a court of last resort, since the Constitutional Court is, for the most part, precluded by

22. *Id.*
23. <http://www.scourt.go.kr/english/courts.html>.
24. Yang, *supra* note 13, at 4.

Article 68(1) of the Constitutional Court Act from ruling on the constitutionality of judicial decisions in a constitutional complaint. However, the Constitutional Court carved out an important exception to this restriction in a 1997 case involving the Supreme Court's disregard of a prior Constitutional Court ruling.[25]

In 1995 the Constitutional Court had ruled that Article 23(4) of the Income Tax Act was "limitedly unconstitutional" (i.e., the statute was valid but would be considered unconstitutional if interpreted as delegating to the executive certain legislative powers). The petitioner in the 1997 case sought the invalidation of a tax imposed on him based on Article 23(4) but the Supreme Court refused to invalidate the tax, holding that the decision of the Constitutional Court was not binding upon it. The petitioner then filed a constitutional complaint, arguing that the exclusion of ordinary court decisions from review in a constitutional complaint was unconstitutional. The Constitutional Court ruled that the exclusion was unconstitutional in regard to judicial decisions, which sought to apply statutes the Court had already ruled unconstitutional. Essentially, the Constitutional Court was clarifying its position vis-à-vis the Supreme Court by holding that the Supreme Court is bound by its rulings. A literal interpretation of Article 68(1) of the Constitutional Court Act would have made a mockery of the Constitutional Court's powers by allowing the Supreme Court to disregard the Constitutional Court's prior rulings on the unconstitutionality of statutes. This would have given the Supreme Court, not the Constitutional Court, the true final say over the constitutionality of legislation. Though characterized by some observers as a mere "spat" between the two courts,[26] it was actually nothing less than the Constitutional Court ensuring its ability to exercise its constitutionally mandated powers.

The Constitutional Court had earlier interpreted its own jurisdictional powers broadly in a constitutional complaint regarding licensing procedures for judicial scriveners ("sabopsosa") enacted by the Supreme Court. Article 107(2) of the Constitution gives the Supreme Court jurisdiction to review the constitutionality of regulations it has enacted when the determination of constitutionality is a prerequisite to a judgment in a pending court case. However, the Constitutional Court ruled that its jurisdiction under Article 111(1)(i) of the Constitution to review the constitutionality of legislation passed by the National Assembly also extended to decrees and regulations promulgated under enabling legislation enacted by the Assembly. Thus, the Constitutional Court held that under

25. 96 HunMa 172, 5-2 KCCR 842 (Dec. 24, 1997).
26. Editorial, *Constitutional Review Spat*, THE KOREA HERALD, December 30, 1997.

certain circumstances it had the power to review the constitutionality of regulations promulgated by the Supreme Court. The Constitutional Court held that this extension of its jurisdiction was necessary to ensure the proper degree of uniformity in interpretation of the Constitution.[27]

Another important point about the Court's powers is that, as in previous systems of constitutional review, there remains a strong presumption of constitutionality. This presumption of constitutionality, perhaps the product of a long-standing tradition of deference to authority, is hard-wired into the system by Article 113 of the Constitution, which requires the concurrence of at least six of the nine Justices before a statute is to be declared unconstitutional (though in cases concerning intragovernmental jurisdiction a simple majority is sufficient). This requirement of a two-thirds majority, while illustrating a great degree of deference to the legislature, has not in itself proved burdensome to the Court as it strives to uphold its mandate as a protector of constitutional rights.

Much harder to evaluate is the system whereby the Court can make various degrees of rulings other than an absolute ruling of unconstitutionality. In addition to ruling a law unconstitutional (which, according to Article 47(2) of the Constitutional Court Act, renders the law immediately null and void),[28] the Court also has the ability to rule that a law is "unconformable to the Constitution," meaning that the Court recognizes the unconstitutionality of the law but requests that the National Assembly revise the law within a specified period of time; the existing law would remain effective until it is revised. The Court also has the power to rule that a law is "unconstitutional in certain context" (i.e. a particular way of interpreting the law is unconstitutional, though other interpretations might not be) or "constitutional in certain context" (i.e. the reverse of "unconstitutional in certain context" — the law will be considered constitutional only if interpreted in a designated manner).

Does this system give the Court greater leeway to take on an activist role or does it impair the Court's ability to rule decisively on controversial issues? Perhaps the power to rule a statute limitedly unconstitutional gives the Court the ability to pay lip service to public opinion in the wake of a controversial ruling, while leaving the status quo basically unchanged. Also

27. 89 HunMa 178, 2 KCCR 365 (Oct. 15, 1990).

28. Article 47(2) of the Constitutional Court Act prohibits retroactive application of the ruling of unconstitutionality. However, the Court has interpreted this provision liberally, holding that petitioners who successfully challenge the constitutionality of a law should get a legal remedy through retroactive application. In addition, the Court has held that a law declared unconstitutional should be considered retroactively nullified in a pending case in which the law is material to the decision. 92 HunKa 10, 5-1 KCCR 226 (May 13, 1993).

of great importance is the question of how a ruling of limited unconstitutionality is to be given effect. This is an area where perhaps there is a danger that the Court can give excessive deference to the executive branch by leaving to it the question of how to enforce the law so as to comply with the Constitution. "Constitutional in a certain context" seems like the strongest of the three rulings in that it takes the least amount of power away from the Court, yet it remains to be seen whether these rulings give the Court greater flexibility in its activist role or merely act as escape valves for the Court to get out of making rulings that might result in unpleasant political repercussions. These rulings certainly provide a way for Justices concerned about their reappointment to try to adhere to principles without stepping on too many toes. There is a danger that a ruling of limited constitutionality might allow political concerns to co-opt judicial independence. If this danger becomes manifest, it raises the specter of the rule of law being trumped by the authority of temporal political figures.[29]

Despite the leeway the above rulings give the Court to avoid direct confrontation with the legislative and executive branches, the Justices of the Court have hardly shied away from confrontation with one another. The requirement in the Supreme Court of the Third Republic for each Justice who participated in a decision to write his own opinion was revived in Article 36 of the current Constitutional Court Act.[30] Thus far, dissenting opinions have been abundant. While perhaps representing an extreme case, Justice Byun Jeong Soo, nominated to the Court by opposition parties, illustrated this trend during the Court's first term by being in the minority in over eighty percent of the decisions in which he participated.[31]

The Korean Constitutional Court is more akin to the German Federal Constitutional Court than to the United States Supreme Court, since both the Korean and German judiciaries provide for separate courts for constitutional adjudication. However, unlike the German Federal Constitutional Court and the United States Supreme Court, the Korean Constitutional Court operates within a system of a unitary central government that controls all of the provincial divisions of the nation. Thus, it has not had to deal with the constraints on its power that would be inherent in a federalist system.[32]

In the absence of the need for an institution to act as an arbiter of federal-state relations, the question arises as to what is the rationale for

29. Justice Byun Jeong Soo raised some of these concerns in a criticism of some other Justices' opinions that Article 13-2 of the Labor Dispute Adjustment Act was limitedly unconstitutional. *See* 89 HunKa 103 (reprinted in Song, *supra* note 2, at 1416-18).

30. Ahn, *supra* note 1, at 80.

31. *Id.*, at 80-81.

32. Lim, *supra* note 19, at 125-33.

having a separate Constitutional Court. While partial explanations include the desire to have a stronger institution than the previous constitutional committees and the desire to create an institution with a greater degree of independence than the Supreme Court, the Constitutional Court's genesis was based primarily on political expediency. Instead of arising as the result of an intensive analysis of possible constitutional adjudication systems, the decision to create a separate Constitutional Court was based on a compromise between the ruling and opposition parties at the time of the drafting of the current Constitution. The opposition party, disappointed with the performance of the Constitutional Committee during the Fourth and Fifth Republics, made concessions to the ruling party on other issues in order to ensure the creation of what it thought could be a more independent and effective institution of constitutional adjudication. [33]

B. Composition and Structure of the Court

Article 111 of the Constitution also sets forth the composition of the Court. The President has the power to appoint the nine justices, but of those Justices three are appointed from candidates nominated by the National Assembly and three are appointed from candidates nominated by the Chief Justice of the Supreme Court. Additionally, Article 111(4) of the Constitution provides that the president of the Court is to be appointed by the President from among the Justices with the consent of the Assembly.[34] Nomination and appointment are limited to individuals qualified as judges, which means they all must have passed the state judicial examination.[35] Article 5 of the Constitutional Court Act lays down the additional requirements that the Justices must be more than forty years of age and must have served as judges, prosecutors or attorneys for more than fifteen years. Of the first nine Justices appointed to the Court, eight were formerly judges (including one former Justice of the Supreme Court), while one was a senior public prosecutor. Seven of the Justices had retired from the judiciary and were in private practice at the time of their appointment.[36] The present Justices also include eight former judges and one former prosecutor. Three

33. *Id.*, at 134.

34. As in the U.S., this confirmation process usually involves an intensive scrutiny of the nominees' careers and opinions. *See* "Lawmakers Grill Constitutional Court Justice Nominees at Hearing," THE KOREA TIMES, September 6, 2000; Editorial, "A Questionable Choice," CHOSUN ILBO ENGLISH EDITION, September 6, 2000 (available at <http://www.chosun.com>).

35. On the recruitment and training of judges *see* Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303 (1993).

36. West and Yoon, *supra* note 19, at 79-80.

of the present Justices also have experience in private practice.[37]

While the requirements for appointment laid down in Article 5 of the Constitutional Court Act ensure that the Justices of the Court will be experienced and seasoned professionals, there is no provision made for allowing law professors to serve on the court since most law professors in Korea have not passed the state judicial examination.[38] The presence of law professors might give the Court an even greater degree of esteem and legitimacy. Even more importantly, the presence of law professors might give the Court a much greater degree of independence since the professors have pursued their careers outside of the rigid hierarchy of the judicial bureaucracy. While becoming a lawyer in Korea involves undergoing a rigorous selection process,[39] thus ensuring a high degree of expertise in the judiciary and the legal profession as a whole, the small number of qualified lawyers in Korea[40] and the fact that they must all attend a single two-year training institute[41] leads to the danger that the judiciary will become an insular and overly-fraternal system. Additionally, as noted previously, the recruitment and promotion of judges in Korea falls within the paradigm of a civil service personnel system. This kind of hierarchical system may exacerbate the conservatism and passiveness of the judiciary, stymieing independence and judicial activism.[42] The Constitutional Court, though somewhat removed from this rigid hierarchy, is not entirely removed from its influence since almost all of the Justices once served as judges in the lower courts.

Article 112 of the Constitution provides that the term of office for the Justices of the Court is six years, although they may be reappointed. Additionally, Article 7(2) of the Constitutional Court Act lays down a mandatory retirement age of sixty-five (seventy in the case of the president of the Court). Justices must retire at this age even if they reach it before the completion of their term in office. Though Article 112(3) of the Constitution

37. *See* the Constitutional Court website, *supra* note 20. *See also* "Confirmation Hearing Opens on Constitutional Court Head," THE KOREA TIMES, September 5, 2000; "Yun Y.C. Named President of Constitutional Court," THE KOREA HERALD, August 24, 2000.

38. As of 1993, only four law professors were qualified as lawyers in Korea. Yang, *supra* note 35, at 306; Lim, *supra* note 19, at 146.

39. In 1990, for example, only 2.6% of the applicants passed the bar examination. *See* Yang, *supra* note 35, at 305.

40. As of July 28, 2000, there were 4,197 qualified lawyers in Korea. The population of South Korea is approximately 45 million. *See* the web site of the Korean Supreme Court, <http://www.scourt.go.kr/english/proceed.html>.

41. Yang, *supra* note 35, at 308. For more information on the Judicial Research and Training Institute, *see also* the website of the Korean Supreme Court, <http://www.scourt.go.kr/english/admin.html>.

42. Yang, *supra* note 35, at 313.

provides that no Justice is to be expelled except by impeachment or conviction for a serious crime, the limited term of the Justices might still represent a challenge to the independence of the Court. However, one factor that helps to mitigate against this concern is the reduction in the presidential term of office from seven years to five years (with no possibility of reelection).[43] This reduction in the President's term of office ensures that the Justices will not face reappointment by the same President that initially appointed them. While this system prevents the Justices from being "beholden" to the President that had appointed them, it does not insulate them completely from the vagaries of political whim.

Much depends upon the ability of the National Assembly to be a strong, independent body rather than an institution under the thumb of an "imperial presidentialist"[44] system. A strong opposition party in the Assembly can help to ensure that the legislative branch is not merely a tool of the executive and will be able to nominate Justices with an independent and activist spirit.[45] Yet this too is subject to the ups and downs of the political process. A system of life tenure for Justices would give the Court a far greater degree of independence.

IV. ANALYSIS OF SELECT DECISIONS

Both in principle and in practice the new Court is quite different from its predecessors. From the standpoint of the sheer number of cases it has reviewed, the Court has exceeded all expectations and been extremely active. As of September 30, 2000, 6,097 cases have been filed with the Court, and in 311 of those, it has ruled laws unconstitutional or limitedly constitutional.[46] Beyond mere statistics, a further analysis of some selected decisions of the Court will show that its potential for judicial activism has in many ways been successfully realized.

Despite the relatively ambiguous nature of its position vis-à-vis the Supreme Court, the Constitutional Court has succeeded in carving out a niche for itself as an independent and activist institution. The Constitutional Court has interpreted its mandate broadly. It has consequently pursued broader interpretations of the law than the Supreme Court, which has traditionally been conservative and viewed the preservation of social order

43. S. KOREA CONST. art. 70.

44. *See* Yoon, *supra* note 4, at 177-78.

45. *See* Ahn, *supra* note 1, at 101. *See also* James M. West and Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 HARVARD HUMAN RIGHTS Y.B. 135, 165 (1988).

46. *See* the Constitutional Court web site, *supra* note 20.

as more important than securing individual rights. As the cases discussed in this section will illustrate, the Constitutional Court, though in many ways isolated from the rest of the judiciary, nevertheless has proven its own relevancy and shown that it is not under the thumb of the Supreme Court. These cases will also show that the Constitutional Court has lived up to its ambitious mandate, becoming an effective advocate for the rule of law in Korea.

A. National Security Law and Criminal Procedure

The National Security Law was enacted in 1948 in response to the communist threat from North Korea and the Rhee government's desire to suppress leftist movements.[47] The Law has been frequently criticized as a means through which authoritarian rulers have been able to stifle democratic opposition.[48] Though the Law has been amended several times and enforced with varying degrees of vigor, it remains in place today.

The Law's constitutionality was first challenged in the Court in 1990.[49] The Court feared that the Law was vague and overly broad and thus had the potential to be applied arbitrarily. Ultimately, the Court ruled eight to one that the Law was constitutional, but only on the condition that Articles 7(1) and 7(5) of the Law, making it a criminal offense to praise, encourage or sympathize with an anti-state organization, would be interpreted to apply only to activity that endangered the security of the state or the democratic order (the "gravity of evil" test). In his dissenting opinion, Justice Byun Jeong Soo argued that an even stronger limitation should apply. The National Assembly later amended the Law to comply with the Court's decision.[50]

While this appears to be a positive result, the Court's decision illustrates some of the weaknesses of the ruling of limited constitutionality. Perhaps because the Court was still in its infancy, many were at a loss as to how to interpret the ruling. The end result was that the Court's decision had little effect on the enforcement practices of prosecutors and the police.[51] This decision might also reflect the Court's reluctance to deal aggressively

47. *See generally* Oh, *supra* note 16, at 36-37.

48. *See generally* Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?* 15 B.U. INT'L L.J. 125 (1997). *See also* MARCIA GREENBERG AND HELET MERKLING, BROKEN PROMISES, UNFULFILLED DREAMS: HUMAN RIGHTS AND DEMOCRACY IN SOUTH KOREA 11-18 (1992).

49. 89 HunKa 113, 2 KCCR 49 (April 2, 1990). *See also* "Crackdown in a 'Freer' Korea Puzzles Opposition," THE NEW YORK TIMES, August 3, 1990.

50. West and Yoon, *supra* note 19, at 107.

51. Yang, *supra* note 13, at 7.

with such a politically sensitive issue. The ruling of limited constitutionality gave the Court a way to express its disapproval of the Law without advocating its complete nullification. However, before condemning the Court for being timid, it is important to remember that the Court was still trying to define its role at the time. As a young institution, the Court was taking baby steps; it still, as of then, lacked the institutional stability and confidence to make such a bold ruling as to declare the entire Law unconstitutional. Even if the Court had been brave enough to attempt to dismantle the Law, it is far from certain whether the government would have complied with such a ruling. Rather than cast its own power and legitimacy into doubt, the Court was wise to err on the side of caution.

The Court showed its continued willingness to monitor the government's enforcement of the National Security Law in a 1992 case involving an extended detention period for an alleged violator of the Law.[52] In this decision, the Court balanced the government's interest in maintaining national security against the need to guarantee the fundamental rights of the individual, and found that the extended detention period was unjustified.

The Court further showed itself to be an advocate for the rights of the accused in a 1996 case in which the constitutionality of the Special Law for the Punishment of Antinational Activists was challenged.[53] This law was found to be unconstitutional partly because of its vagueness and partly because it violated the principle of proportionality in its excessive punishment. Perhaps most importantly however, this law was ruled unconstitutional because it did not allow the defendant an opportunity to appear in court and testify on his own behalf. The Court found this to be a serious violation of the presumption of innocence, the right to a fair trial, and the principle of due process. The Court had also cited the principles of due process and the presumption of innocence in an earlier case in which a teacher indicted for violating the National Security Law was fired from his job before trial.[54]

B. Censorship and Freedom of the Press

The Court has shown even greater willingness to realize its potential for judicial activism in the area of censorship and freedom of the press. In April 1991 the Court ruled unanimously that Article 764 of the Civil Code was unconstitutional if interpreted to include a coerced written apology

52. 90 HunMa 82, 4 KCCR 194 (April 14, 1992).
53. 95 HunKa 5, 8-1 KCCR 1 (January 25, 1996).
54. 93 HunKa 3, 6-2 KCCR 1 (July 29, 1994).

published in a newspaper.[55] This provision authorized courts adjudicating defamation claims to order the defaming party to publish an apology in addition to, or in lieu of, monetary damages. In this case, a monthly magazine owned by the Dong-A Ilbo had been ordered by a civil district court to publish an apology to the plaintiff in her defamation suit in addition to paying damages. Ruling on the Dong-A Ilbo's constitutional complaint against the district court's judgment, the Constitutional Court held that such a coerced public apology infringed upon the freedom of conscience and the right to integrity of personality guaranteed by Article 19 Constitution.[56] The Court found it especially hard to justify Article 764 given the less restrictive alternatives available to restore reputation, such as publication of a corrective retraction (the right of reply to an incorrect factual statement is still guaranteed by Korean press laws).[57] The Court, in examining the alternatives to a coerced public apology, also looked to the practices of other countries and noted that only in Japan was this practice recognized, and even there it had been subject to strong challenges.[58]

This case is also significant because it is the Court's first ruling that refers directly to the International Covenant on Civil and Political Rights, which Korea ratified in 1990, in the review of a domestic law.[59] According to Article 6(1) of the Constitution, the Covenant, as a treaty, should have the same effect as domestic laws.[60] In referring to the Covenant, the Court expressed its willingness to draw on sources beyond the Constitution to justify its protection of fundamental rights.

The Court has also taken a strong stand against government-sponsored censorship. In a 1996 case the Court ruled that the pre-censoring of movies by the Public Performance Ethics Committee, a de facto

55. 89 HunMa 160, 3 KCCR 149 (April 1, 1991). *See also* Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, CARDOZO J. INT'L & COMP. L. 205 (2000).

56. Suk Tae Lee, *South Korea: Implementation and Application of Human Rights Covenants*, 14 MICH. J. INT'L L. 705, 735 (1993).

57. *See* Kyu Ho Youm, *Right of Reply Under Korean Press Law: A Statutory and Judicial Perspective*, 41 AM. J. COMP. L. 49 (1993). *See also* Youm, *Libel Law and the Press: U.S. and South Korea Compared*, 13 UCLA PAC. BASIN L.J. 231, 255 (1995); Jae-Jin Lee, *Freedom of the Press and Right of Reply Under the Contemporary Korean Libel Laws: A Comparative Analysis*, 16 UCLA PAC. BASIN L.J. 155 (1998); Youm, *South Korea: Press Laws in Transition*, 22 COLUM. HUM. RTS. L. REV. 401, 419-26 (1991).

58. *See* Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 26-27 (1994). *See also* Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT'L L.J. 53, 68-70 (1990).

59. Lee, *supra* note 56, at 735-36.

60. *Id.*, at 712-14.

governmental body, was unconstitutional.[61] The Court here held that free expression in film was protected by Article 21(1) of the Constitution, which provides for freedom of speech, and Article 22(1), which provides for freedom of learning and the arts.

Additionally, the Court ruled in a 1998 case that the provisions of Article 5-2 of the Registration of Publishing Companies and Printing Offices Act pertaining to indecency were unconstitutional.[62] The Court here held that the meaning of indecency had not yet been adequately defined by the society as a whole, and thus there was a danger that the freedom of expression would be arbitrarily limited by what remained a largely ambiguous concept.

C. Family Law

The Court's growing judicial activism has also manifested itself in its role as a strong advocate for women's rights. This role can be seen in the Court's decision upholding the constitutionality of Article 241 of the Criminal Code, a provision that subjected a person guilty of adultery to a jail term of up to two years.[63] The Court here balanced the constitutional guarantees of individual autonomy with the need to maintain social ethics and public welfare. The Court ruled that the criminal prohibition and punishment of adultery was not an unreasonable infringement on core individual rights, given the prohibition's legitimate purpose of maintaining secure family relations. The Court also ruled that the prohibition did not constitute a violation of the principle of equal protection since it applied without regard to gender. The criminal prohibition of adultery is important to women's economic rights because in Korea's fault based system of divorce[64] it provides a useful means by which a divorcing wife can secure alimony from her husband.[65]

The Court also displayed a progressive spirit in its decision overturning the prohibition of marriage between people of the same surname.[66] This prohibition, laid down in Article 809(1) of the Civil Code,

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61. 93 HunKa 13, 8-2 KCCR 212 (Oct. 4, 1996). For reactions to the Court's decision, *see* Editorial, "Problems with Movie Reviews," CHOSUN ILBO ENGLISH EDITION, October 15, 1996.

62. 95 HunKa 16, 10-1 KCCR 327 (April 30, 1998).

63. 89 HunMa 82, 2 KCCR 306 (Sep. 10, 1990).

64. Mi-Kyung Cho, *Korea: The 1990 Family Law Reform and the Improvement of the Status of Women*, 33 U. LOUISVILLE J. FAM. L. 431, 439 (1995).

65. *See* Ahn, *supra* note 1, at 106. *See also* Keum Sook Choi, *Rise in the Legal Right of Korean Women*, in Song, *supra* note 2, at 1431, 1434.

66. 95 HunKa 6, 9-2 KCCR 1 (July 16, 1997).

had in fact existed since at least the 17th century.[67] Feminists and family law experts had successfully pressured the National Assembly to grant periodic amnesties to legalize marriages that otherwise would have been in violation of the ban,[68] but their efforts to repeal the law were stymied by the vehement opposition of Confucianists.[69] The Court ruled that the prohibition of same surname marriages, unlike the prohibition of adultery, did not fall within the category of restricting an individual's rights in order to uphold morality or the social order. The Court held that the prohibition was in violation of the Constitution because it infringed upon the freedom to pursue happiness. Additionally, the Court recognized the absurdity of this long-standing prohibition in light of the fact that so many people in Korea share such a small number of surnames.[70] It is interesting to note that the Court went beyond a strictly legal analysis of the issue and probed the practical reality of the situation, conducting open meetings to solicit the views of interested parties, including Confucian groups, biologists and women's rights activists.[71]

V. CONCLUSION

The ability of the Court to establish its independence and legitimacy is so important because the legitimacy of the Court reflects the legitimacy of the Constitution itself. If the Court is not a strong advocate for upholding constitutional principles, then the supremacy of the rule of law will be cast into doubt. Though some of the Court's decisions reflect a progressive and activist spirit, these individual decisions are less important than the Court's overall efficacy. The Court may not always come to the "right" conclusions, but it is essential that the Court reach these conclusions independent of partisan interference. If these decisions are important for the future of the Court, it is in the fact that they reflect a Court that is quickly establishing itself as an independent and activist institution.

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67. See MARTINA DEUCHLER, THE CONFUCIAN TRANSFORMATION OF KOREA 238-39 (1992). According to other sources the same surname marriage prohibition dates back as far as the fifteenth century, *see* Erin Cho, *Caught in Confucius' Shadow: The Struggle for Women's Legal Equality in South Korea*, 12 COLUM. J. ASIAN L. 125, 173 (1998); or the fourteenth century, *see* "Changing Name," WASHINGTON POST, July 16, 1997.

68. *See* "South Korea Ends a Taboo, Strikes Blow for True Love," THE CHRISTIAN SCIENCE MONITOR, August 4, 1997.

69. *See* Cho, *supra* note 64, at 437. *See also* Rosa Kim, *The Legacy of Institutionalized Gender Inequality in South Korea: The Family Law*, 14 B.C. THIRD WORLD L.J. 145, 153-55 (1994).

70. *See* "Lifting Ban on Same-Name Marriage Welcomed; Law Should Serve to Guarantee the Dignity and Happiness of Individuals," THE KOREA HERALD, August 29, 1997.

71. *See* "Court to Rule on Banning Same-Surname Marriages," THE KOREA HERALD, July 16, 1997.

Thus far, during the first two terms of the Court's existence (1988-2000), its role has been to right the wrongs of the past by striking down undemocratic laws promulgated by the previous dictatorial regimes. The Court has carried out this role with a large measure of success. Now, as democratic institutions in Korea mature, the Court will have to evolve and take on a new role consistent with the new shape of government and society. Beginning this year, with the inauguration of a new president of the Court marking the commencement of the Court's third term, the task facing the Court is to amplify its role and enact positive change that helps to shape and regulate the economic, political and social framework of the nation.[72]

The Court has an important role to play in ensuring that the ambitious democratic principles of the Constitution are fully realized. Conversely, the success of the Court is also dependent upon the success of Korea's other democratic institutions. It is important that the rest of the judiciary and the other branches of the government are willing to swallow the bitter pill of occasionally unpopular Court decisions. As past constitutional review institutions were granted great power in theory but little in actual practice, the Court is only powerful to the extent that the rest of the government is willing to let it do its job without undue interference. The government's track record in this regard is not perfect, but it is a vast improvement upon the past.

72. *See* Bokhyun Nam, *Hunbopjaepanso je3gi jaepanbuaegae paranda* [*Expectations for the Third Term of the Constitutional Court*], BOMRYUL SHINMUN [LAW TIMES], October 19, 2000.