

【Special Features : The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

## **Korean Constitutional Court and Democracy**

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### Abstract

In Korea, the Constitution was amended in 1987 (generally referred to as the Constitution of the 6th Republic), heralding Korea's era of democratization. After the democratization, the Constitutional Court of Korea is working very actively and attracting attention globally.

In this article, the following topics are discussed: 1) The history of the constitutional review system after the founding of the Republic of Korea, 2) An overview of the present Constitutional Court, and 3) The problem of 'political judicialization' that has appeared in the court cases.

The Constitutional Court of Korea basically models the German Constitutional Court. However, unlike in Germany, there are some very Korean characteristics. From the viewpoint of its organization, the Korean Constitutional Court has nine judges who passed the exam for the legal profession. Three of the nine judges must be nominated by Parliament, three by Chief Justice of Supreme Court, and three by President. While this is believed to be in consideration of the separation of powers, in reality, the influence of the President is relatively significant.

From the viewpoint of its function, unlike the German Constitutional Court, the Constitutional Court of Korea has no authority for abstract normative control, and concrete normative control is done only for laws. The reason for no abstract normative control is that the Constitutional Court does not have to take a position over the Parliament. On the other hand, since the Constitutional Court's decision has the power to invalidate the law, it still has a significant influence on legislation. For this reason, the Constitutional Court has made judgments to allow room for legislative discretion by using various judgment methods called 'transformation decisions' in consideration to the legislature. However, its positive activities have created the phenomenon of 'politicization of justice' or 'judicialization of politics'.

It is examined in this article, how the Constitutional Court can be positioned for democracy and political processes through analysis of the role of the Constitutional Court from the relationship with the political sector.

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## Contents

- I. Introduction
- II. History
- III. Overview of the current Constitutional Court
  - 1. Function
    - (1) Nonconformity to Constitution (nonconformity decision)
    - (2) Limited Constitutionality and Limited Unconstitutionality
  - 2. The method for selecting Constitutional Court judges
- IV. Constitutional Court decisions and political issues
  - 1. A case of dispute over authority
  - 2. The case of party dissolution
  - 3. Impeachment
    - (1) The case of President Roh Moo-hyun
    - (2) The impeachment of President Park Geun-hye
    - (3) Public confidence as a basis for determining impeachment
- V. Conclusion

### **I. Introduction**

Since its establishment in 1948, the Republic of Korea has implemented a system of constitutional review. However, under dictatorship rule, this system did not function well. It was not until after the nation's democratization and the introduction of a new Constitutional Court system under the present Sixth Republic Constitution that constitutional review came to be actively used. Today, the Korean Constitutional Court is attracting attention as a representative example of the constitutional review system in Asia.

Activities by an active Constitutional Court are generally highly valued in Korea<sup>1</sup>, however, situations are also occurring that are forcing us to question how we should consider the position of the Constitutional Court within the nation, and consequently ask 'what is constitutionalism?' In particular, in recent years, the 'judicialization of politics' has become a theme frequently taken up in Korea. After presenting: 1) The history of the

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<sup>1</sup> According to an annual survey by JoongAng Ilbo, the Constitutional Court has been known for its position of the 'Most trusted State Organ'.

constitutional review system after the founding of the Republic of Korea, 2) An overview of the present Constitutional Court, and 3) The problem of ‘political judicialization’ that has appeared in court cases, this report examines what kind of position the Constitutional Court might have in a democracy.

## II. History

First, let us revisit the history of Korea’s constitutional court system.

A system of constitutional review was introduced at the time of the founding of the Republic of Korea in 1948. At the time of establishing the Constitution, there was a debate about the kind of constitutional review system that should be introduced. There were two schools of thought: adopting a constitutional review system through ordinary courts (from now on referred to as the American type) or adopting a system that authorized a Constitutional Committee that was separate from the regular court system (hereinafter referred to as the Continental type). In the end, the system that was established was chaired by the vice president and gave the Constitution Committee, consisting of five Supreme Court judges and five congressional members, the right to review the constitutionality of the law.

At this time, in the explanatory memorandum to the 1948 South Korean Constitutional Assembly, it was explained that the courts were empowered to request a review of the constitutionality of the law, and the authority to conduct such a review was given to the Constitution Committee, a special review body that was separate to the court, to take into consideration the balance between judicial and legislative powers.

A Constitutional Court system that is similar to the present system, was subsequently introduced in the Second Republic (1960 Constitution) that was established after the April Revolution (4.19 Democratic Revolution) overthrew the Syngman Rhee regime. However, the Second Republic collapsed before this system was realized, and in the Third Republic (1962 Constitution) during which Park Chung-hee held power, an American constitutional review system was implemented. During the Fourth Republic (1972 Constitution) and the Fifth Republic (1980 Constitution) a Continental constitution committee system was adopted. A system in which constitutional review was conducted by the Constitutional Court was realized for the first time under the current 1987 Constitution (the Sixth

Republic). While the Constitution Committee was stipulated under the ‘Court’ chapter in the previous Constitution, the present Constitution has a separate chapter 6 on ‘Constitutional Court.’ Based on the 1987 Constitution, the Constitutional Court Act was promulgated on 5 May 1988.

This description may suggest that Korea's constitutional review system has undergone a considerable transition. Still, except for the Third Republic, the nation has continued to adopt a Continental constitutional review system. Further, Korea’s distinctive system for considering the constitutionality of laws separately from the constitutionality of orders, rules, and dispositions has been consistently followed since the establishment of the First Republic Constitution, including during the Third Republic.<sup>2</sup>

When the current Constitution of 1987 was established, there was a debate as to whether to give the power of constitutional review to the Supreme Court or to create a Constitutional Court. The reason why the German Constitutional Court system was chosen has not been clarified, but according to the compilation of the Constitutional Court, it was asserted that during the deliberations around the introduction of the Constitutional Appeal System, the German-type would guarantee the protection of human rights.<sup>3</sup>

Before 1987, the constitutional review system under dictatorships did not function. For this reason, even when the Constitutional Court came into being after the nation’s democratization, there was little hope for it to function well. However, the Constitutional Court had gained the trust of the public over time as an organization that contributed to democratization by determining that laws established under dictatorship rule were unconstitutional.

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<sup>2</sup> According to the 1987 Constitution, article 107 provides that:

(1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof.

(2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

Furthermore, even in the third republic, which adopted the US-style constitutional review system, the constitution provides that the constitutional review of law is separated from the review of orders, rules, and dispositions, as described in article 102 in the 1962 Constitution:

Article 102 When the constitutionality of a law is at issue in a trial, the Supreme Court shall have the power to make a final review of the constitutionality thereof.

(3) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.

In Korea, the constitution committees of the 1st, 4th, and 5th republics are also limited in terms of their authority to conduct a concrete review of norms, and an abstract review of norms was not permitted.

<sup>3</sup> *The First Ten Years of the Korean Constitutional Court 1988-1998* (Constitutional Court of Korea., Seoul 2001), p.17.

### III. Overview of the current Constitutional Court

#### 1. Function

What are the current functions of the Constitutional Court?

Article 111 (1) of the Constitution defines five powers: 1. Adjudication on the constitutionality of statutes, 2. Adjudication on impeachment, 3. Adjudication on the dissolution of a political party, 4. Adjudication on competence disputes, 5. Constitutional complaint. The first of these powers is the equivalent of the German ‘concrete review of norms’. There is no power to conduct an ‘abstract review of norms’, and the concrete review of norms can only be carried out against laws created by the National Assembly.

The absence of the power to conduct an abstract review of norms is thought to be in consideration of the legislative powers of the National Assembly under the separation of powers. On the other hand, the fact that the Constitutional Court can only conduct a concrete review of norms during a constitutional review of laws, and regular courts make decisions on orders and rules, constitutional review of laws is considered to be a different domain to that of ordinary judicial affairs. While distinguishing itself from ordinary judicial matters, when conducting a constitutional review of laws, the power of the Constitutional Court, which requires the existence of legal disputes to be subject to trial, can also be referred to as ‘political judiciary.’

The validity of the Constitutional Court’s decision is defined by the Constitutional Court Act as being broadly binding to all state agencies. For this reason, it can be said that the Constitutional Court recognizes that the Constitution has persuasive authority over all state institutions that extends beyond the separation of power. However, the members of the Constitutional Court are not directly chosen by the public. In this respect, the Constitutional Court has customarily created a judgment style that emphasizes the discretionary powers of the legislature in examining the laws created by the National Assembly, as representatives of the people. This judgment style is called ‘modified decisions’. There are currently three forms of this style, which are described as follows<sup>4</sup>:

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<sup>4</sup> Ibid, pp.87-93.

### **(1) Nonconformity to Constitution (nonconformity decision)**

In several cases, the Constitutional Court stated that there is a general need for ‘nonconformity decisions’ because a simple choice between unconstitutionality and constitutionality prevents the Court from taking a flexible and resilient approach to a reasonable interpretation of the laws that regulate the complex social phenomena; it may cause the vacuum in or confusion about the law, destabilizing the legal system; and it can restrict the legislature’s policy-making privilege. The Court made it clear that this nonconformity decision is simply a mutated form of the decision of unconstitutionality provided in Article 47 (1)<sup>5</sup> of the Constitutional Court Act; and, therefore, naturally has the binding force on all other state institutions.

This is not a simple declaration of nonconformity to the Constitution, but one that gives provisional legal effects to the unconstitutional statute until the legislature cures its defect in accordance with the Court’s decision.

### **(2) Limited Constitutionality and Limited Unconstitutionality**

The Constitutional Court issues a decision of limited constitutionality, using the expression ‘[the law] is not unconstitutional as interpreted,’ and in the decision of limited unconstitutionality, using the form ‘[the law] is not constitutional as interpreted’. The Court explained that, although the statute in question had unconstitutional aspects, if it could also be interpreted in ways consistent with the Constitution, the Court could deliver “the decision of constitutionality/un-constitutionality as interpreted or applied” as could be naturally be derived from the doctrine of preference for constitutionality in statutory interpretation<sup>6</sup>. Specifically, in expressing his concurring opinion of this case, the first President Cho Kyu-kwang elaborated that if the text and the legislative intent of the statute have room for both the decisions of constitutionality and unconstitutionality, the Court must choose the preferred, constitutional version of the statutory interpretation. In doing so, the Court can use both ‘unconstitutional as interpreted’ and ‘constitutional as interpreted’ as proper forms. As the two forms are different only in expression but the same in essence and for all practical purposes, the choice between them is merely a

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<sup>5</sup> Constitutional Court Act, Art.47 (1): Any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments.

<sup>6</sup> CC 1989.7.21, 89 Hun-Ma38.

matter of choosing the appropriate means.

In any of these methods of decision making, the Constitutional Court may take the legislative power of the National Assembly into consideration, urge the legislature to reconsider, rather than invalidate laws enacted by the National Assembly, or interpret the content of the laws in a way that conforms to the Constitution. However, since these methods of decision making are not stipulated in the Constitutional Court Act, but rather are methods developed by the Constitutional Court itself, there is criticism that using such methods is, in itself, illegal.

## **2. The method for selecting Constitutional Court judges**

Nine judges conduct a Constitutional Court trial. Under the Constitution, the President appoints nine judges. Among them, the National Assembly and the chief of the Supreme Court each nominate three members, taking into account the separation of power. However, among the three members nominated by the National Assembly, one is recommended by the ruling party, one by the opposition party, and one is by recommendation of the ruling and opposition party by consensual decision. Further, the Chief of the Supreme Court, who nominates three judges, is to be appointed by the President upon the consent of the National Assembly.<sup>7</sup> Given these constraints, it is said that presidential influence on the overall nomination process is substantial. In addition, although the term of a Constitutional Court judge is six-years, with the possibility of re-appointment, since most judges resign at the end of their six-year term, if the President of the same party were to continue for more than two terms (the term of the President is five years), the Constitutional Court might strongly reflect the influence of that party.

Currently, all candidate judges are to appear before a National Assembly hearing. This is important in terms of giving democratic legitimacy to their appointments. However, there is the problem that these hearings may be used as a political dispute tool, with actual cases where candidates have been subjected to harsh interrogation over their political position and consequently declined their nomination.

More recently, a political issue arose when President Moon Jae-in appointed two judges without waiting for a hearing report, which has led to the alarming speculation that the

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<sup>7</sup> The 1987 Constitution, Article 104, Article 1

Constitutional Court will become nothing more than a subordinate agency of the executive office.<sup>8</sup>

#### **IV. Constitutional Court decisions and political issues**

Above, I have touched on the Constitutional Court's consideration of the legislative power of the National Assembly and political issues relating to the appointment of a judge. However, the authority of the Constitutional Court, as envisaged by the Korean Constitution, possesses a very close relationship with politics. For this reason, in recent years, problems such as the 'judicialization of politics' have become a topic of discussion. Below, we will look at some representative cases.

##### **1. A case of dispute over authority**

This case involves a dispute over authority raised by opposition lawmakers regarding the revision procedures for the Draft Law Relating to Media at the second plenary session of the 283rd National Assembly (extraordinary session) on 22 July 2009 under the Lee Myung-bak administration (Act on the Freedom of Newspapers, etc. and Guarantee of their Functions, the said partial revised Broadcasting Act and the proposed partial revisions to the Act on Internet Multimedia Broadcasting Business).<sup>9</sup> The outline of the case is as follows.

The government and the ruling party held that the integration of broadcasting and communications must improve broad and unbalanced regulations that do not conform to the rapidly changing media environment due to technological development and submitted a bill that would remove the clause that prohibited the concurrent operation of newspaper and broadcast businesses, and newspapers and large companies from holding terrestrial broadcast shares. In response, opposition parties, broadcasters, and labor unions strongly opposed this revision, arguing that it was intended to curb criticism of the administration by the broadcasters and aimed at the control of the broadcasters by the three major newspaper companies and large conglomerates close to the Lee Myung-bak administration. Their

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<sup>8</sup> Chosun Online 2019/4/20 [http://www.chosunonline.com/site/data/html\\_dir/2019/04/20/2019042080007.html](http://www.chosunonline.com/site/data/html_dir/2019/04/20/2019042080007.html) [accession date: May 3, 2019]

<sup>9</sup> 21-2(B) KCCR 14, 2009 Hun-Ra8/9/10 (consolidated), October 29, 2009. English summary of the decision: [http://search.ccourt.go.kr/xmlFile/0/010400/2009/pdf/e2009r8\\_1.pdf](http://search.ccourt.go.kr/xmlFile/0/010400/2009/pdf/e2009r8_1.pdf) [accession date: March 31, 2020]

opposition resulted in fierce and ongoing trading of insults that escalated into a brawl. Finally, the Speaker of the National Assembly attempted to use his authority to table the Bill in the plenary session. Still, the opposition members blocked the entrance, preventing the Speaker from entering the plenary hall. The Speaker consequently delegated the proceedings to the Vice-Speaker. The Vice-Speaker used the authority of the Speaker and declared that Bill would be tabled at once, that the examination report and the Bill explanation, would replace the minutes and meeting materials, and that no questioning or debates would be held. The ballot was to be held electronically, and the result displayed on an electronic board. However, in the decision relating to the amendment of the broadcast law proposed by the ruling Grand National Party, after the Vice-Speaker declared the end of the ballot the following figures were recorded: National Assembly Members: 294 people, Members Present: 145 people, Members in Favor: 142 people, Members in Opposition: 0 people, Members Abstained: 3 people. In response to this outcome, the Vice Speaker referred the said Broadcasting Act to a revote, saying that “the bill proposed by Kang, Seung-kyu and other 168 assemblymen shall be voted again, [and] it will be revoted because of the failure of a vote due to the lack of presence quorum.”<sup>10</sup> A second ballot was held, and on this occasion, the voting board showed 150 approval votes, zero opposite votes, and three abstention votes, out of an enrollment of 294 members and the presence of 153 members of the National Assembly.<sup>11</sup> In this way, the Bill was passed, as were several others.

On the other hand, concerning the series of procedures, opposition lawmakers filed a lawsuit in the Constitutional Court seeking confirmation of the invalidation of the law on the grounds that their right to ballot had been violated by the government for reasons including: the Speaker cannot authorize the tabling of an item; the proceedings carried out by the Vice-Speaker, which did not allow for explanations and debate, violated appropriate procedure; and the verdict of the draft amendments violated the principle of not deliberating the same measure twice.

In this case, the Constitutional Court did not recognize the invalidation of the promulgation of the draft law. Five out of nine judges recognized the illegality of the violation of the principle of not deliberating the same measure twice. Still, they did not

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<sup>10</sup> Ibid, p. 354.

<sup>11</sup> Ibid,

reach the number necessary for determining unconstitutionality (six out of nine). In addition, although they acknowledged that the rights of the claimants to deliberate and vote had been violated, it was deemed that there was no problem with the act of declaring the promulgation itself, and the establishment of the law promulgated on this occasion was considered valid.

There has been an argument among the media and citizens, both supporting and opposing the decision. In particular, many commentators and intellectuals took the ‘dual stance’ of the Constitutional Court – where it found that the act was illegal, but not severe enough to invalidate the promulgation – as a significant problem and coined the term ‘judicialization of politics’.

One of the by-products of the National Assembly’s rivalry, which is represented by this case, is the National Assembly Advancement Act. The National Assembly Advancement Act is the general name for the National Assembly Act revisions that took place in 2012. Before this, the Speaker of the National Assembly designated the period for committee examination of items, and if this examination did not end within the set period, the Speaker had the authority to refer it to another committee immediately after the designated period or to submit it to the plenary session. However, due to the confrontation between the government and the opposition over matters including the proposed Budget, the US-ROK FTA and the case discussed above, the government used its authority to table the Bills, which in turn triggered a violent response. Consequently, in the May 2012 amendment of the National Assembly Act, the powers of the Speaker to exercise his or her ‘official authority’ to fast track the tabling of legislation were limited to: 1) the event of a natural disaster; 2) the event of war, incident or similar situation that triggers a national emergency; or 3) any other situation where the Speaker and the representatives of the factions agree (noting that even in the case of 1) or 2), consultation between the Speaker and the representatives of the factions is necessary). The amendment provided that in order to be designated as an ‘expedited processing case’, a motion by a majority and approval by three-fifths of National Assembly members would be required.

Similarly, introduced under the ‘National Assembly Advancement Act’ was an ‘unlimited debate’ (filibuster) system. This meant that the Speaker was required to permit an unlimited debate if a request form signed by one-third or more of the registered members was submitted for a matter assigned to the plenary session (however, the number

of statements allowed was only one per member). In order to conclude an unlimited debate by decision required the submission of a closing motion by more than one-third of the registered members and a vote by secret ballot 24 hours after submission of the closing motion. The secret ballot required the approval by more than three-fifths of registered members.

This revision was a pledge by the ruling Saenuri Party during its election campaign, and it was made with the agreement of the ruling and opposition parties. The result, however, was the creation of a situation in which deliberation within the National Assembly stalled, and it became challenging to re-amend the National Assembly Act itself. Consequently, the view arose that this issue could not be resolved by anything other than the Constitutional Court.<sup>12</sup> Under such circumstances, on 30 January 2015, 19 members of the *Saenuri* Party claimed that “the provisions of the National Assembly Act violated the deliberation and voting rights of the National Assembly members” and filed for a Constitutional Court trial against the Speaker of the National Assembly and the chairman of the Planning and Finance Committee over a dispute of authority. However, for reasons including the exceeding of the prosecution period, the case was dismissed.<sup>13</sup>

## 2. The case of party dissolution

The Korean Constitution contains a provision for the dissolution of a political party, stating that “if the purposes or activities of a political party are contrary to the democratic basic order, the Government may bring an action for its dissolution in the Constitutional Court, and the political party may be dissolved by decision of the Constitutional Court”.<sup>14</sup> There is controversy within Korea regarding the understanding of this clause. While there is a view that it is the influence of the German *Streitbare Demokratie* (Fortified Democracy), there is also a view that the Constitutional Court conducts a review to prevent the government from arbitrarily disbanding political parties, as had happened under past

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<sup>12</sup> See for example: Chosun Ilbo Online Edition chosun.com 31 October 2015 Editorial, the Constitutional Court, the National Assembly Advancement Act, and the Constitutional Appeal Decision – what can we gauge from this? [http://news.chosun.com/site/data/html\\_dir/2015/10/29/2015102904826.html?Dep0=twitter&d=2015102904826](http://news.chosun.com/site/data/html_dir/2015/10/29/2015102904826.html?Dep0=twitter&d=2015102904826) [accession date: March 30, 2020]

<sup>13</sup> 2015 Hun-Ra1, May 26, 2016. English summary of the decision: [http://search.ccourt.go.kr/xmlFile/0/010400/2016/pdf/e2015r1\\_1.pdf](http://search.ccourt.go.kr/xmlFile/0/010400/2016/pdf/e2015r1_1.pdf) [accession date: March 30, 2020]

<sup>14</sup> The 1987 Constitution, Article 8, Paragraph 4.

dictatorships. Under the 1987 Constitution, there had been no case of party dissolution until 2014, when the Unified Progressive Party was dissolved by the Constitutional Court, a decision that attracted significant attention<sup>15</sup>. The direct cause of the case was that during an emergency, the National Assembly members of the Unified Progressive Party had conspired with North Korea to destroy state-owned facilities in South Korea. Members of the party were arrested and prosecuted for the crimes of plotting insurgency and civil unrest, and violations of the National Security Act. In this case, it became a question of whether the activities of their group could be viewed as the activities of the Unified Progressive Party itself. The Constitutional Court found that three members of the National Assembly were present at a secret meeting and that many other attendees were leading members of the Party.

Further, one member in a key position within the Unified Progressive Party actively advocated their assertions of innocence. However, based on the fact that the participants at the meeting were nominated as candidates for public office, the Constitutional Court concluded that the sabotage plot was indeed the activity of the Unified Progress Party. Furthermore, the concept of ‘progressive democracy,’ which was contained within the mission statement of the Unified Progress Party, was regarded as contrary to the fundamental democratic order, as it was considered an idea of a socialist state based on a class-like world view that denied national sovereignty. The Unified Progress Party was subsequently dissolved by the decision of the Constitutional Court, a decision that also disqualified five National Assembly members from the legislature (including regional representatives).

Following this Constitutional Court decision, these National Assembly members were found guilty by the Supreme Court under the criminal code for violation of the National Security Act. However, the charge associated with the crime of plotting insurgency was not recognized.<sup>16</sup> Consequently, many voiced doubt about the decision of the Constitutional Court, and despite no clear stipulation regarding the divestment of office for the National Assembly members, the Party was dissolved, and the National Assembly qualifications were revoked from five members, including those who were district elected members, acts

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<sup>15</sup> 2013 Hun-Da1, Dec.19, 2014. English translation of the decision: [http://search.court.go.kr/xmlFile/0/010400/2014//pdf/e2013d1\\_2.pdf](http://search.court.go.kr/xmlFile/0/010400/2014//pdf/e2013d1_2.pdf). [accession date: March 30, 2020]

<sup>16</sup> The Supreme Court Verdict, Jan. 2, 2015, 2014. do 10978

which drew criticism.

### 3. Impeachment

“The President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act” may be subject to impeachment.<sup>17</sup> There have been two cases in which the Constitutional Court examined impeachment under the 1987 Constitution. The cases of President Roh Moo-hyun in 2004 and President Park Geun-hye in 2017 are the two examples of impeachment targeting the nation’s president.

#### (1) The case of President Roh Moo-hyun<sup>18</sup>

The main reasons for the impeachment of President Roh Moo-hyun were the facts that the president had acted in favor of his political party before the National Assembly election, and that he made remarks to disrespect the constitutional institutions, which amounted to a breach of the order of the national laws. Article 9 of the Act on the Election of Public Officials and the Prevention of Election Malpractices (hereinafter ‘The Public Officials Election Act’) at that time provided that

A public official or a person who is required to maintain political neutrality (including an agency or organization) shall not exercise any unreasonable influence over the election or perform any act likely to have an effect on the election.

At a press conference before the National Assembly elections, President Roh Moo-hyun made multiple statements indicating that he supported the ruling party at the time, ‘The Yeollin Uri Party’, including: “I expect that the people overwhelmingly support the Uri Party”, and “I would like to do anything that is legal if it may lead to the votes for the Uri Party”<sup>19</sup>, which were deemed to have violated the Public Officials Election Act. Also, the President expressed regret over the decisions of the National Election Commission (which

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<sup>17</sup> The 1987 Constitution, Article 65.

<sup>18</sup> 16-1 KCCR 609, 2004 Hun-Na1, May 14, 2004. English translation of the decision: [http://search.court.go.kr/ths/pr/eng\\_pr0101\\_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=12077&eventNo=2004%ED%97%8C%EB%82%981&pubFlag=0&cId=010400](http://search.court.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=12077&eventNo=2004%ED%97%8C%EB%82%981&pubFlag=0&cId=010400) [accession date:2020/3/30]

<sup>19</sup> Ibid. p161.

is a constitutionally stipulated body) that required the compliance of electoral neutrality obligations to such presidential speeches, and he further denigrated the current election law as the ‘vestige of the era of the government-power-interfered elections.’<sup>20</sup> These comments were considered to have violated Article 40 of the Constitution, which provides that legislative power shall be vested in the National Assembly, and Articles 66 and 69, which stipulate the President's obligation to comply with the Constitution.

In this decision, the criteria for the president’s impeachment trial were explicitly stated. That is, “a decision to remove the President from office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.”<sup>21</sup> As mentioned above, this decision for impeachment, which was the first impeachment case, cites the essence of the impeachment and gives a reasonably detailed explanation for determining the adjudication. Concerning impeachment, the purpose and the function of the impeachment process are to reinforce “the normative power of the Constitution by holding certain public officials legally responsible for their violation of the Constitution in exercising their official duties.”<sup>22</sup> In particular, the fact that a president, who is directly elected by the people, can also be subject to the preservation of the Constitution demonstrated that even the “political chaos that may be caused by a decision to remove the President from office should be deemed as an inevitable cost of democracy in order for the national community to protect the basic order of free democracy.”<sup>23</sup>

In this decision, the Constitutional Court acknowledged that the law had been violated. However, it was considered that the question of whether there was a ‘grave violation of law’ or whether the ‘dismissal was justifiable’ should be determined through balancing the degree of the negative impact on or the harm to the constitutional order caused by the violation of law and the effect to be caused by the removal of the respondent from office. In this case, it was not considered a ‘grave’ violation of law sufficient to justify the removal of a public official from office, and the President was therefore not dismissed.

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<sup>20</sup> Ibid. p173.

<sup>21</sup> Ibid. p.182.

<sup>22</sup> Ibid. p.159.

<sup>23</sup> Ibid.

## **(2) The impeachment of President Park Geun-hye<sup>25</sup>**

In this case, which became worldwide news, the President was accused of having leaked official secrets to friends and allowed them to intervene in government affairs and the hiring of staff. It was further alleged that they also benefitted financially from the business world.

Here, although many unconstitutional and illegal acts were explicitly indicated, the main reason for dismissal is cited as having betrayed the people's trust through these acts. Three contributing reasons are cited for this betrayal of confidence: that the violation of the law was grave, that Park violated the President's obligation to serve the public interest, and that Park's will to safeguard the Constitution was not recognized.

Following a close examination, in this case, all eight judges (of the nine, the chief judge resigned during the trial) unanimously decided to remove the President, concluding that;

...the respondent's acts of violating the Constitution and law are a betrayal of the people's confidence, and should be deemed grave violations of the law unpardonable from the perspective of protecting the Constitution. Since the negative impact and influence on the constitutional order brought about by the respondent's violations of the law are serious, we believe that the benefits of protecting the Constitution by removing the respondent from office overwhelmingly outweigh the national loss that would be incurred by the removal of the President.<sup>26</sup>

## **(3) Public confidence as a basis for determining impeachment**

In the case of President Roh Moo-hyun, the Constitutional Court presents 'the balance between "the seriousness of the violation of the law" and "the effect of a dismissal decision"' as the standard for dismissing the President. The latter is considered to be tied to "direct democratic legitimacy" and "the public interest in continuity of performance of

<sup>24</sup> Ibid. p.180.

<sup>25</sup> 2016 Hun-Na1. English translation of the decision:

[http://search.ccourt.go.kr/ths/pr/eng\\_pr0101\\_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=48728&eventNo=2016%ED%97%8C%EB%82%981&pubFlag=0&cId=010400](http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=48728&eventNo=2016%ED%97%8C%EB%82%981&pubFlag=0&cId=010400)

<sup>26</sup> Ibid. p.63.

presidential duties”.<sup>27</sup> This standard has also been followed in the case of President Park Geun-hye. However, it should be noted here that the relationship between the president and the people in the two cases was very different. In the case of President Roh Moo-hyun, many of the people were sympathetic to him. The effect of a dismissal decision for a president who possesses both a serious violation of the law and direct democratic legitimacy is, for the people who support the president, a symmetrical argument that can be considered reliable. However, the people’s stance towards the case of President Park Geun-hye was different. It was a situation in which the majority of people wished the president to step down before impeachment proceedings had commenced. It is said that under the current Constitution, in which the incumbent president is not allowed to resign directly, impeachment is the only possible means for removing a president. Under these circumstances, it can be said that the above two concepts did not become counterbalancing forces for President Park Geun-hye, as had been the case for President Roh Moo-hyun.

In this aspect, looking once again at the Constitutional Court in the Roh Moo-hyun case, one may question whether the seriousness of the violation of the law and the effect of a dismissal decision always, in fact, stand in opposing positions in terms of balance. The Constitutional Court stated that;

... A grave violation of the law from the viewpoint of protection of the Constitution [is]... an act that threatens the basic order of free democracy that is an affirmative act against the fundamental principles constituting the principles of the rule of law and a democratic state, [and that] ‘act of betrayal of the public’s trust’ is inclusive of other patterns of the act than a ‘violation of law significant from the standpoint of protection of the Constitution.’<sup>28</sup>

Of the above two points, the issue of ‘the public’s trust,’ that is, ‘direct democratic legitimacy,’ relates to the effect of a dismissal decision. However, considering that an ‘act of betrayal of the public’s trust’ is deemed to be an extension of ‘an act that threatens the basic order of free democracy’, what can be the final standard for dismissal is whether or not there was a ‘betrayal of the public’s trust’. Of course, this must be premised on the existence of a violation of the Constitution or other acts as defined in Article 65 (1) of the Constitution. In this sense, it may be fair to say that impeachment is not a political

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<sup>27</sup> Supra. Footnote 18, p.181.

<sup>28</sup> Ibid. p.181-182.

responsibility but a legal responsibility. However, as the final deciding criterion, ‘betrayal of the public’s trust’ is a highly political issue, determining whether or not to dismiss is intertwined with an element of political judgment.

## V. Conclusion

The Constitutional Court is considered to be, in principle, within the domain of the judiciary as one wing of the separation of powers in Korea. However, as political issues are regularly brought to the Constitutional Court, a phenomenon called ‘judicialization of politics’ has occurred. This kind of problem is not only emerging in Korea but also in many countries with constitutional courts. Particularly in the case of the Korean Constitutional Court, which possesses the powers of party dissolution and impeachment, confronting political issues is what was originally intended under the Constitution, and therefore ‘judicialization of politics’ can perhaps be considered a natural consequence.

The role of the Constitutional Court is primarily to defend constitutionalism. However, democracy is included in the basic principles of the Constitution. What can be seen from the party dissolution and impeachment cases is a system in which the Constitutional Court – the Guardian of the Constitution – must set foot into the substance of democracy.

Why has such strong Constitutional Court authority been maintained? This is due to the existence of public trust in the Constitutional Court. In the democratized Korea, the Constitutional Court has maintained its status as the ‘most trusted state organ in Korea’. The judicialization of politics may be viewed as being highly trusted by the political sector also. However, the judicialization of politics also leads to the politicization of the judiciary, and there is a risk that trust in the neutrality of the Constitutional Court will be lost. This risk, in conjunction with the demand for the democratic legitimacy of the appointment of judges, is an important issue.

In a country with a constitutional democracy, the extent to which institutions other than the political sector can answer the central question ‘what the democracy envisaged by the Constitution is’ is a fundamental issue to be considered within the context of the relationship between democracy and the Constitutional Court.