
The Judicialization of Politics and the Independence of Constitutional Court

The Case of South Korea

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Since its establishment in 1988, the Constitutional Court of Korea (CCK) has been functioning as the final and the ultimate authority to interpret the constitution and adjudicate constitutional disputes in South Korea. The CCK emerged from a compromise between the former ruling party and the country's opposition parties. It was an attempt to secure a check and balance system against the arbitrary exercise of the executive branch's power during the period of authoritarian rule (and in parallel, the national legislature's having been incompetent in curbing the executive branch). Its design concentrates on protecting the fundamental rights of the citizen against unjust legislation of the majoritarian parliament forced through by the ruling party or the overzealous exercise of executive power.

The decision to establish the Constitutional Court inherits Kelsenian tradition. When the traditional threat of the ancient regime on citizens' rights and liberty was replaced by the new threat of democratically-elected fascist regimes that began to emerge in 1920s Europe, the idea of parliamentary sovereignty declined and the constitutionalism escalated. There was a growing need for institutions to protect fundamental rights and liberty against the authoritarian state. In response to the need, Hans Kelsen and Carl Schmitt proposed different solutions through the argument on

the guardian of the constitution.²¹³ Schmitt defined the character of democracy to be the identity of the ruler and the ruled. Schmitt contended that the president (executive), whose authority is to be combined with the constituent power, should be the guardian of the constitution. As he wrote in 1934, "The leader protects the law."²¹⁴ Kelsen's idea was to establish the constitutional court as the final authority to interpret the constitution through adjudication. The constitutional court would keep the balance among governmental powers and safeguard citizens' rights and liberty through judicial review.

It was only recently that the constitutional court, once believed to be "the least dangerous branch"²¹⁵, attained greater authority at an alarming rate. After the World War II, there emerged a phenomenon called judicialization of politics, which is "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies"²¹⁶. It has become increasingly prevalent worldwide, emerging out of Western and Southern Europe and later sprawling to post-communist states in Central and Eastern Europe. Since the end of the Cold War, judicialization of politics has spread to post-authoritarian regimes in Latin America, Asia, and sub-Saharan Africa²¹⁷.

²¹³ Lars Vinx, trans., *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).

²¹⁴ Carl Schmitt, "Der Führer schützt das Recht", *Deutsche Juristen-Zeitung*, no 39 (1934), 946

²¹⁵ Alexander M. Bickel, *The Least Dangerous Branch*. (New Haven: Yale University Press 1986).

²¹⁶ Ran Hirschl, "The Judicialization of Politics", in *The Oxford Handbook of Law and Politics*, ed. K. E. Whittington et al. (New York, NY: Oxford University Press, 2010), 119.

²¹⁷ Tate, C. N., and Vallinder, T. *The Global Expansion of Judicial Power*. (New York: New York University Press, 1995)

In modern democratic countries, the judiciary has expanded its realm of oversight from a passive locus for the interpretation and application of statutes to active functions of legislation²¹⁸. Though implemented in different political, legal and cultural contexts, this phenomenon has come with the emergence of the constitutional adjudication system. The rise of constitutional adjudication²¹⁹, whether by the U.S. Supreme Court or various European constitutional courts, has put pressure on political institutions to correspond to the constitution, and therefore, to be under the jurisdiction of the courts²²⁰.

There are three patterns of judicialization: limits on the authority of the legislative branch imposed by the judiciary, the participation of the courts in policymaking, and the courts' regulation of what constitutes permissible political activity²²¹. The first involves the courts' increasing influence on the legislature,

especially with the introduction of judicial review: the elected officials' legislative agendas are subject to review where the constitution is the supreme and fundamental law of the land. The second reflects the growing role of the courts as policymakers. Not only are there cases where public policies are made in the courts, but administrative review both before and after the judiciary weighs in also demonstrates the courts' substantial influence over the executive branch. This aspect of judicialization has become more and more prominent in modern welfare states and international tribunals since 1945. In the third pattern, the courts even come to regulate the conduct of political actors in electoral processes or in the executive branch taking charge of nationwide political decision-making. All of these roles influence other political actors to consider judicial reactions to their agendas more deeply than they had in the past.

Traditionally, discussions of judicialization focus on "the counter-majoritarian difficulty"²²². At the center of this debate is the process of judicial review, where unelected justices are able to nullify the duly-enacted legislation of elected officials by ruling it unconstitutional. For critics of these actions, it is considered illegitimate for the judiciary, which lacks democratic accountability, to intervene in the business of representative institutions. This tradition stems from the classical theories on separation of powers²²³. In the Lockean and Rousseauian tradition of parliamentary sovereignty, the authority to conduct a constitutional review

John A. Ferejohn and Pasquale Pasquino. "Rule of Democracy and Rule of Law," in *Democracy and the Rule of Law*, ed. J. M. Maravall et al. (Cambridge: Cambridge University Press, 2003) 242-260.

²¹⁸ *Ibid.*

²¹⁹ In this essay, *constitutional adjudication*, *judicial review*, and *constitutional review* are used interchangeably, with an intention to refer to the adjudication process by the constitutional court justices on the constitutionality of statutes. If found unconstitutional after constitutional adjudication, a statute is to be nullified and replaced by new legislation.

²²⁰ John A. Ferejohn and Pasquale Pasquino. "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice," in *Constitutional Justice East and West*, ed. W. Sadurski (The Hague: Kluwer Law International, 2002) 21-36

²²¹ John A. Ferejohn. "Judicializing Politics, Politicizing Law," *Law & Contemporary Problems*, 65(3), (2002): 41-68.

Hirschl, "The Judicialization of Politics."

²²² Bickel, "The Least Dangerous Branch," 16-23.

²²³ Ferejohn and Pasquino, "Rule of Democracy and Rule of Law," 242-260.

Tom Ginsburg, "The Constitutional Court and the Judicialization of Korean Politics," in *New courts in Asia*, ed. A. Harding, et al. (New York: Routledge, 2010).

belongs exclusively to the legislature. Thus the parliament, as the representative of the people, is the only branch that can legitimately exercise constitutional review, which thus in nature *a priori* and abstract. In light of the idea of parliamentary sovereignty, judicialization is undemocratic in that the judiciary exercises its power to thwart the will of democratically elected officials.

Similarly, the tradition of Montesquieuan separation of power also forms a basis for rejecting constitutional review by the judiciary. Montesquieu argued that governmental power should be separated horizontally and distributed among three branches: executive, legislative, and judicial. If the judiciary retains legislative and executive power, then power will be exercised arbitrarily over the life and liberty of the citizenry, resulting in despotism: judicial review, where the court intervenes the legislative and executive activity, is therefore seen to be in conflict with the exercise of democracy. Countries that inherited traditions of parliamentary sovereignty and Montesquieuan separation of powers adapted constitutional review according to their respective traditions. The Republic of Korea, as it transitioned from authoritarian rule to liberal democracy in the 1980s, adopted the Kelsenian model of the constitutional court based on the Montesquieuan tradition.

Even in the context of judicialization, however, guaranteeing judicial independence has been a more serious concern than the judiciary overstepping its authority to intervene against democratically-elected officials' legislation, when considering the focus of the institution on rights protection from its birth. The paradox lies, rather, in that the judicialization of politics also coincides with the undermining of judicial independence in the Korean case, resulting in

politicization of the CCK²²⁴. As the realm of jurisdiction expands into politics in the context of judicialization, the CCK is also subject to influence from politics. The very political nature of the CCK has opened a channel for political power to encroach upon the judiciary's independence. This manifests itself in both formal and informal ways, the latter of which are difficult to measure but pervasive within the judiciary at all levels.

In this paper, I examine whether the CCK is an independent guardian of liberal democratic constitutionalism that is free from political pressure. First, I explore the political and historical context in which the CCK was created, as well as its structure and function in Korean politics. In order to answer the first part of the question – if the CCK is independent – I examine the judicial independence of the CCK both on the *de jure* and the *de facto* level. I trace the career of CCK justices since their mandatory retirements in order to find out if political pressure has been exercised in any form. In addition, records of constitutional adjudication on the “purely” political cases I discuss provide insight into the politicization of the CCK. Finally, whether the CCK is a guardian of constitutional democracy or not is addressed by examining the court's role as a guardian of the constitution, specifically the role of the CCK in complementing Korea's liberal democracy.

Because South Korea is only a nascent democratic country, it is still in a precarious stage that occurs before the stabilization of constitutional democracy and the entrenchment of the role of constitutional institutions. Therefore, the case of the Constitutional Court of Korea offers valuable

²²⁴ Jongcheol Kim and Jonghyun Park. “Causes and Conditions for Sustainable Judicialization of Politics in Korea,” in *The Judicialization of Politics in Asia* ed, Dressel, B., (New York, NY: Routledge, 2012), 37.

insights into understanding possible threats to judicial independence in post-authoritarian societies. In addition, it will also provide grounds to evaluate the contribution of the constitutional court as an institution in modern democratic politics.

THE CONSTITUTIONAL COURT OF KOREA THE POLITICAL CONTEXT OF THE CONSTITUTIONALISM IN KOREA²²⁵: BEFORE THE 1987 CONSTITUTION

The first written constitution of Korea was promulgated in 1899 by the king, when the Joseon Dynasty changed its name to the Empire of Dai Han. During the Japanese colonial period (1910-1945), the provisional government of Korea—then in exile—embraced Western traditions of modern constitutionalism based on the principles of popular sovereignty, parliamentarianism, the separation of powers, fundamental rights and the rule of law. All were enshrined in émigré declarations on the future character of the Korean nation issued between 1919 and 1948. Yet these aspirational values had little impact on affairs in Korea proper until 1945, when the Japanese evacuated the country. Even then, these precepts fell short of reality with the formation of separate occupation zones trending towards authoritarian rule, whether aligned with “capitalist” or “communist” production systems, and the outbreak of full-scale civil war three years later.

The weak basis for Korean constitutionalism when independence came meant that the supreme law of the land underwent nine distinct reforms in a 60-year period from 1945. The constitution not only underwent relatively frequent reforms as a written and rigid constitution, but its content also underwent radical changes varying across the parliamentary government to the presidential system, and from the bicameral

parliament to the unicameral National Assembly. These reforms can be summarized as the repeated destruction of constitutional order and the subsequent movement to guard democratic constitutionalism²²⁶. The First Republic (1948-1960) amended the constitution twice, first to secure President Syngman Rhee’s reelection by changing electoral and parliamentary rules, and second to allow his reappointment. Both reform procedures violated the constitution.

The third reform came after the “4.19 Revolution” in 1960, which led to the resignation and exile of President Rhee following mass protests against his rigged reelection campaign. The third and fourth reforms aimed to restore the democratic constitutionalism under opposition leader Chang Myon by installing the first constitutional court and retroactively penalizing anti-democratic practices under Rhee. These efforts, however, were aborted by the “5.16” military coup d’état of President Park Chung-hee, which led to the fifth and the sixth reforms, leading to the imperial presidency of Park Chung-hee and the abolition of term limits. President Park continued to carry out the seventh reform in 1972, known as the October Revitalizing Reform, or the “Yushin Constitution” that suspended the previous constitution. The authoritarian era reached its peak with the imposition of martial law that year.

After President Park’s assassination in 1979, another military coup d’état followed, led by President Chun Doo-hwan, and saw the eighth reform, which also maintained the existence of a powerful presidency. Throughout the nine reforms and six republics, the Korean Constitution had been at the center of repeated battles between prolonged one-man rule and efforts to provision for a democratic constitution.

²²⁵ Kwon, Y. *Constitutional Theory*. (Seoul: Beopmunsa, 2010) (available only in Korean).

²²⁶ *Ibid.*, 100

THE 1987 CONSTITUTION AND THE CONSTITUTIONAL COURT OF KOREA²²⁷

The long period of authoritarian rule culminated in the “6.10 Democratic Revolution” in 1987. As a result of the “June Revolution,” the ninth Korean Constitution was adopted and the CCK was established, based upon popular sovereignty and liberal democracy as its fundamental ideologies. Eight representatives from the ruling party and the opposition parties drafted the document. Since these eight each represented one of the promising candidates for the upcoming Presidential election (including the eventual winner, the ruling party candidate Roh Tae-woo), the discussion was mainly concentrated on term limits and other restrictions on the power of the presidency. The reform was reviewed and approved by the special committee on constitutional reform in the National Assembly to be sent to a plebiscite that year, which ratified the new constitution with 93.1 percent of the votes cast in favor.

Considering Korea’s experience with authoritarianism and the distant, ephemeral democracy practiced by the provisional government in exile, it is not surprising that the eight delegates and the special committee decided to adopt the Kelsenian model of a constitutional court. In the special committee, there had been discussion on whether the Supreme Court or the constitutional court should exercise constitutional review. Both parties’ primary concern was to effectively protect citizens’ fundamental rights and liberty from unjust legislation or executive arbitrariness. It was the ruling party’s idea to

²²⁷ “Twenty years of the Constitutional Court of Korea,” The Constitutional Court Library, last modified 2008, http://library.ccourt.go.kr:8080/vlsvr/search/SearchViewC.jsp?barcode=VL00000282027&searchVal=search_empty&productCd=007. (available only in Korean).

insulate the Supreme Court from partisan politics and install a committee for constitutional adjudication, while the opposition parties insisted on the transfer of this authority to the Supreme Court. In the past, during the fifth reform of the constitution (in 1962), the government had in fact vested the Supreme Court with the authority to conduct judicial reviews. However, for twenty years the court’s authority to conduct a judicial review remained virtually dormant, with only two cases of statutes being ruled unconstitutional before the bench. Even after the constitutional committee was reinstated, the authoritarian regime restricted the right to judicial review only to the Supreme Court. At last, having been granted the condition to institutionalize constitutional complaints, the opposition parties agreed to install a constitutional court rather than transfer the power to the Supreme Court (The Constitutional Court of Korea, 2008).

Thus, not only was it a political decision to establish the CCK, but the decision also aimed to impact political actors and the democratic system through the CCK. The primary function that people expected of the CCK was restoring and honoring the liberal democratic constitutionalism the provisional government had imagined for the country in 1919, that successive presidents had breached by rigging elections, banning members of the opposition from running for office and using extrajudicial measures to suppress political activism. So, the CCK was born as the guardian of the constitution²²⁸. This role required the CCK, as a “fourth power,” to stay independent from the legislature, the executive, and even the rest of

²²⁸ Yi, Y. “Judicialization of Politics, is the Crisis of Democracy? Focusing on the Principle of Habermas’s Democratic Constitutional State Theory”. *Peace Studies*, 20(1) (2012): 71-103 (available only in Korean).

the judiciary.²²⁹ It was of less concern that the process of judicial review might be undemocratic than that the process of judicial review itself could remain independent from national politicking.

THE STRUCTURE AND THE FUNCTION OF THE CONSTITUTIONAL COURT OF KOREA

The Constitutional Court Act stipulates that the CCK is to be comprised of nine justices among those who have qualification for the judge (Article 3 and Article 5). To secure political impartiality and guarantee the CCK's function as the guardian of the constitution, three governmental branches – the President, the National Assembly, and the Chief Justice of the Supreme Court – jointly organize the membership of the CCK. The National Assembly elects three justices, the chief justice appoints three additional justices, and the incumbent president appoints three more (Article 6). Then the National Assembly holds personnel hearings for the six Justices appointed by the other two branches. The president also appoints the chief justice of the CCK. Each justice serves a six-year term, and can serve consecutive terms under the conditions as prescribed (Article 112) until reaching the mandatory retirement age of 70.

The concern for judicial independence is illustrated in the relatively comprehensive authority of the CCK compared to its counterparts in other

democratic countries²³⁰. The Korean Constitution endows the constitutional court with the authority to adjudicate political controversies. Article 111 (1) of the constitution stipulates the jurisdiction of the CCK²³¹: constitutional review upon the request of the courts; adjudication on impeachment; dissolution of political parties; competence disputes between state agencies, between state agencies and local governments, and between local governments; and constitutional complaints (*Heonbeopsowon*). The constitutional complaint is a direct channel through which an individual can request constitutional review to protect his or her fundamental rights from the exercise of state power. Except for the constitutional complaint, all four categories of constitutional adjudication are “political” in that the political disputes are settled through the judicial process. Since 1988, the Constitutional Court of Korea has been actively exercising its role in politics, conducting 877 judicial reviews, one impeachment case, two cases on the dissolution of political parties, 86 competency disputes, and 27,247 constitutional complaints²³².

THE JUDICIALIZATION OF KOREAN POLITICS

In Korean politics, the CCK possesses “political jurisdiction,” meaning it is neither a purely political entity nor a wholly apolitical

²²⁹ The relationship between the CCK and the Supreme Court is described as horizontal and parallel. The justices in the CCK are treated as their counterparts in the Supreme Court are. Both institutions share the authority to conduct judicial review, with the CCK adjudicating constitutional review on the statutes, and the Supreme Court left in charge of reviewing administrative decrees and regulations (Kwon, 2010, p. 1131).

²³⁰ Kim and Park, “Causes and Conditions for Sustainable Judicialization of Politics in Korea” 39

²³¹ The Constitution of the Republic of Korea <http://www.law.go.kr/lsEflInfoP.do?lsiSeq=61603#> (in Korean)

<http://www.law.go.kr/lsInfoP.do?lsiSeq=61603&urlMode=engLsInfoR&viewCls=engLsInfoR>

²³² The Constitutional Court Act, <http://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=111952#0000> (in Korean)

http://elaw.klri.re.kr/kor_service/lawView.do?lang=ENG&hseq=33354 (in English)

body²³³. This imbues its constitutional adjudication with the function of forming political realities. The CCK has been inherently “political,” born from the contested democratization process of the late 1980s and designed primarily to guard liberal democratic constitutionalism from partisan ambitions. All of the three patterns of judicialization – constitutional review, policymaking, and intervention on “mega-politics” – are observed in the actions of the CCK²³⁴. And it has become a central political actor in resolving political controversies. Exemplary cases include the constitutional review of the Special Act on the May 18th Democratization Movement, the Relocation of the Capital City Case, and the Dissolution of the Unified Progressive Party. And it is this trend of judicialization that has undermined *de facto* judicial independence of the CCK, if not its *de jure* judicial independence.

DE JURE INDEPENDENCE OF THE CONSTITUTIONAL COURT OF KOREA

Judicial independence is achieved when both the court and its judges are independent. Its theoretical roots originate from the theories of the separation of powers, upon which “the structure and the operation of the judiciary is separated and independent from the legislative and the executive”²³⁵. Judicial independence is based on the existence of an independent and autonomous court, and the independence of the justices. In that sense, the CCK’s judicial independence at *de jure* level is well secured.

The Korean Constitution prescribes the independence of the court from the legislative and executive institutions by stipulating that “judicial power shall be vested in courts composed of judges” (Article 101 (1)). The constitution also recognizes the

courts’ autonomy, in Articles 102 and 108, which define the court’s authority to establish “regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court.” The organization and the operation of the court are autonomous within the scope of the Constitutional Court Act. This does not mean that the court is subject to legislative institutions; rather, it is interpreted that the court enjoys autonomy which cannot be infringed upon.

The independence of the justices in the CCK is also safeguarded by the constitution. Ginsburg and Melton (2014) suggest that the component of *de jure* independence is a statement of judicial independence, judicial tenure, selection procedure, removal procedure, limited removal conditions, and salary insulation. Except for the guarantee of tenure, the Korean Constitution prescribes all of these components. Article 103 of the constitution guarantees the *ex-officio* independence of justices – *Sachliche Unabhängigkeit* – when it articulates, “judges shall rule independently according to their conscience and in conformity with the Constitution and laws.” Thus, the constitution enshrines the right and duty of the nine justices to be subject only to their consciences, the Constitution, and the laws. They must be independent from any external pressures including the influence of the government, the higher court, the order of the chief justice, the litigants, and any social or political power. The qualification and the status of the justices are also defined in Article 106 (1) of the constitution: “No judge shall be removed from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment, nor shall he be suspended from office, have his salary reduced, or suffer any other unfavorable treatment except by disciplinary action.”

²³³ Kwon, “Constitutional Theory” p.1116

²³⁴ Ferejohn, 2002; Hirschl, 2010

²³⁵ Kwon, 2010, p.1067

DE FACTO INDEPENDENCE OF THE CONSTITUTIONAL COURT OF KOREA

Despite the *de jure* independence of the CCK, the practice of the law is often discrepant from the prescriptions of the law, leaving the independence of the CCK at stake on a *de facto* level. As Ginsburg and Melton (2014) have argued, *de jure* judicial independence has turned out to be largely ineffective in securing *de facto* judicial independence. Chavez (2010) delineates the types of pressures exercised against *de facto* judicial independence. Regarding judicial independence as one of the pillars supporting the rule of law, she articulates that informal practices, as well as *de jure* institutions, restrict judicial autonomy and independence. Such informal practices include noncooperation by entities refusing to abide by the court's decision, and retaliation by withholding funds or threatening incumbency²³⁶.

In the case of the CCK, *de jure* institutions have not necessarily maintained judicial independence. However, practices that have harmed the *de facto* judicial independence of the CCK show different aspects than noncooperation and retaliation. Harm results from the stipulation of the CCK's binding power vis-à-vis all governmental institutions as defined by Article 47 of the Constitutional Court Act. Retaliation through financial means is also impossible due to the constitutional prescription of the judges' salaries and incumbencies. Rather, the threat to the independence of the CCK can be analyzed by examining the internal and external pressures exercised on it. Specifically, the independence of the CCK has often been infringed upon by internal pressures within

²³⁶ Georg Vanberg, "Establishing and Maintaining Judicial Independence". in *The Oxford Handbook of Law and Politics* ed. K. E. Whittington, et al. (New York, NY: Oxford University Press. 2010)

the court's hierarchy and external pressures from political actors.

The hierarchical pressure within the court is the main threat to its judicial independence. Studies in Korean legal sociology have identified the distinct legal culture of "the privilege of former office"²³⁷. It refers to the custom that the judges and the prosecutors grant the request of lawyers who have recently retired from the court and the prosecutor's office. This privilege is one of the main reasons that judicial officers become lawyers after their retirement: they record exceptionally high rates of winning trials by utilizing their close connections to the incumbent justices in order to personally influence the decision. Their personal connections to the judiciary constitute a form of "social capital"²³⁸, bringing considerable pecuniary remunerations to those lawyers. The high rate of retirement of judges and prosecutors at an early age, and their greater chances of winning cases right after retirement, is strong evidence for the existence of this "invisible" yet quite pernicious privilege²³⁹.

This "privilege" also greatly influences the future career of the incumbent judicial officers within the court. They are under pressure to maintain amicable relationships with their colleagues and senior officials if they are to be regarded as a successful lawyer after retirement. Since they are likely to encounter their colleagues and senior officials even after retirement, and since the personal relationship will affect their efficacy as a

²³⁷ Kim, J. "Judicial independence and the necessity for judicial reform focused on judicial democratization: The case of Korea". *Kangwon Law Review*, 41(1), (2014): 137-184 (available only in Korean).

²³⁸ Lee, Y. H. "Legal Professionals' Corruptions and the Downside of Social Capital in South Korea," *Korean Journal of Criminology*, 18(2), (2006): 441-458 (available only in Korean).

²³⁹ Kim, 2014, p.104

lawyer arguing before the bench, these personal relationships and hierarchies within the court system have a profound impact on the officers' conduct. In fact, looking at a snapshot of data from 2000 to 2004, among lawyers, 89.8 percent of retired judges and 75 percent of former prosecutors practiced legal services in the same jurisdiction they had previously practiced law in²⁴⁰.

The justices of the CCK face the same pressure. There have been a total of 46 justices who have served in the CCK. Except for the nine incumbent justices, the career path of the other 37 former CCK justices shows that the "privilege" system exercises the same pressure on their professional independence as it does among other judges. In fact, their official retirement turns out to be far from their last: only six justices have ever retired at the regular retirement age. Another 31 former justices retired under the age limit. The number of the former CCK justices who actually "retired" is just nine. Twenty-six former justices chose to pursue careers as lawyers, politicians or law professors. Among them, private law firms hired sixteen former CCK justices. They continue to provide their legal knowledge and experience to the law firms as lawyers. As in the case of the ordinary court judges and prosecutors, the CCK justices continue their legal career as lawyers. And it places the CCK justices under the influence of other institutions within the judiciary.

External pressure from political actors is another factor that disturbs the judicial independence of the CCK. Pursuing a career in politics is the second most popular post-CCK career for justices after going into private practice. Among 37 retired justices, 13.5 percent of them were elected or appointed as politicians. The majority of them became members of the National Assembly, and one of them was appointed as the

Chairman of the Board of Audit and Inspection. These justices have had to run for election or find a politician, in either the legislature or in the executive branch, who will appoint them to office. The fact that their position after retirement depends on the goodwill of such politicians exerts pressure on these judges while in office.

The trend of judicialization in Korean politics exacerbates these aforementioned problems by strengthening the cohesion between the CCK and partisan politics. The impact of political pressure on constitutional adjudication is apparent in the cases of the CCK. The CCK has refrained from delivering rulings dissonant from the political aims of the ruling party. This tendency is intensified when the ruling party is the majority in the National Assembly, or as the political majority is ascertained through elections²⁴¹.

Among many cases, three constitutional adjudication cases most clearly illustrate the impact of judicialization on the independence of the CCK. The first case is the constitutional review on the Special Act on the May 18th Democratization Movement²⁴². During the process of democratization, one of the worst excesses committed against the citizens of the republic was the "Kwangju Uprising" of 1980, when the military carried out a large-scale massacre in that eponymous Korean city by deploying special airborne units against protesters. The core figures of military authority at the time, including the former President Chun Doo-hwan, were on trial for treason in relation to

²⁴¹ Park, J. (2009). Constitutional adjudication and policy-making – a positive analysis of constitutional policy-making for dissolving the counter-majoritarian difficulty. Ph.D. dissertation, Seoul National University of Korea (available only in Korean).

²⁴² 96Hun-Ka2, February 16, 1996
(The Special Act on the May Democratization Movement, etc. Case)

²⁴⁰ Lee, 2006

this as well as the 1979 putsch. However, before the inauguration of Kim Young-sam as president of the first civilian government in the republic, the CCK ruled that it was unconstitutional to penalize those litigants because the statute of limitations for treason had expired. The National Assembly in 1995 then passed the Special Act as *ex post facto* legislation. Thus, the case became the subject of constitutional adjudication again, specifically on the questions of whether retrospective punishment is constitutional, if this constitutional adjudication violates the prohibition against double jeopardy, and if the successful coup d'état could be subject to punishment. But with the cessation of the former constitutional adjudication process under the government of Roh Tae-woo, a former general and colleague of Chun, the CCK did grant the constitutionality of penalizing the leaders of the coup d'état and the repressive reaction to the Kwangju Uprising.

The second case includes the constitutional review on the Relocation of the Capital City.²⁴³ It was President Roh Moo-hyun's core election pledge to move the capital from Seoul to Sejong, to better balance regional development. The pledge led him to win the Presidential election in 2003, drawing vast amount of vote from the proposed new capital area, whose voters have traditionally constituted a swing-voting bloc between conservative and progressive parties. The CCK again followed the political stance of the ruling party in the National Assembly, which opposed the move from Seoul. Another factor that influenced the CCK's decision was the change in the public's policy preference to being against relocation. Justice Kim Young-il even cited the result of the public poll during the sentencing. The CCK declared the

²⁴³ 2004Hun-Ma554 et al., October 21, 2004 (Relocation of the Nation's Capital Case)

proposed move to be unconstitutional based on the rationale that Seoul's status as capital of Korea for over 600 years constituted a "customary constitution" which compels it to be the national capital. With that rationale, it also acknowledged the constitutional effect of the "customary constitution" to be the same as that of the written constitution. Therefore, amending the customary constitution to move the capital would require a national referendum based on Article 130 of the Constitution. The citation of a "customary constitution" and public polling in defense of the organized opposition to the move suggested that appearances, rather than the absolute legality of the proposed move, influenced deliberations.

The third case is the recent decision on the dissolution of the Unified Progressive Party²⁴⁴. It marks the first and so-far the only dissolution of a democratically elected party in the liberal democratic era of Korean politics, with only a few parallel cases in the history of constitutionalism worldwide (such as the dissolution of the Communist Party of the German Federal Republic in 1956 on the grounds that the organization maintained ties to the East German security services.) In Korea, the far-left Unified Progressive Party (UPP) became the subject of dissolution proceedings for allegedly promoting pro-DPRK ideology and plotting treason, specifically alleged plans for sabotaging infrastructure if the North attacked. As the only modern nation divided exclusively by political ideology into rival states, the entrenched enmity between the two Koreas constitutes the essence of each one's national identity in opposition to the other's political system²⁴⁵. Following the arrest of several UPP

²⁴⁴ 2013Hun-Da1, 2014.

²⁴⁵ Justine Guichard, "The judicial politics of enmity. A case study of the constitutional court of Korea's jurisprudence since 1988". *Columbia*

members on treason charges, the CCK dissolved the UPP at the end of 2014 on the grounds that its ideology and activities posed a serious threat to South Korea's existence as a liberal democracy. The UPP's five sitting legislators lost their membership in the National Assembly as a result of the 8-1 ruling. The one dissenter, Justice Kim Yi-su, argued that the treason charges against some of its members did not merit the forced dissolution of the entire organization – citing the aforementioned West German case as a precedent since it led to persecution of real and alleged communist sympathizers, both officially and unofficially.²⁴⁶ The other eight justices' rationale for ordering the UPP's dissolution was based on a controversial interpretation of “militant democracy (streitbare Demokratie)” in Korean law²⁴⁷. The Constitution's Article 8 (4) states:

If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court in the formation of the political will.

South Korean law continues to define “treason” rather broadly, on the grounds that the state of war between the republic and the North has never formally concluded – simply expressing support for the North's politics has led to prosecutions. The article has been interpreted as the realization of “militant

democracy” advocated by Karl Loewenstein and Karl Manheim²⁴⁸. The majority opinion of law professors and constitutional scholars, is that the article should be restrictively applied only to exceptional cases where democracy is about to be destroyed and obliterated by the actions of a subversive party – i.e., one that clearly intends to function within a liberal democratic system only to the end of destroying and replacing it²⁴⁹. The CCK arguably stretched the interpretation of this article since there was no clear and present danger proven against the republic²⁵⁰. This was substantiated by the fact that a number of the treason charges, and sentences that came with them, were either reduced or dropped due to a lack of evidence.

JUSTIFICATION FOR THE EXISTENCE OF THE CONSTITUTIONAL COURT

As Richard Posner²⁵¹ claims, the constitutional court is an inherently political institution. Tom Ginsburg²⁵² also contended that the design of the constitutional court resulted from the political actors' attempts to insure their interests under new constitutional norms. Contrary to such skepticism that the constitutional courts could be swayed by partisan politics, it is better for a democratic regime to have a constitutional court established²⁵³. In fact, their role is not just limited to amending setbacks in democracy, but extends to complete democracy as one of its quintessential parts.

To begin with, constitutional courts supplement the flaws in democracy. The legislative and executive branches are proven

University Academic Commons, (2014).
<http://dx.doi.org/10.7916/D8R78CBB>.

²⁴⁶ The party, while banned, essentially reformed itself in 1968 under a new name and a more permissible West German political environment, retaining many formerly banned members.

²⁴⁷ 2013Hun-Da1, 2014, p.112

²⁴⁸ Kwon, 2010, p.83

²⁴⁹ Kwon, 2010, 86; Lim, 2015, 3.

²⁵⁰ Lim, 2015, 2.

²⁵¹ Posner, R. “The Supreme Court”. *Harvard Law Review*, 119(1), (2005), 28-102.

²⁵² Ginsburg. “Judicial Review in New Democracies”.

²⁵³ Park, 2009, 51-57.

to be fallible in modern democratic history, with the everlasting possibility of abusing their authority. This is where the constitutional court works. When the legislative and the executive fail to comply with democratic decision-making processes, the constitutional court can ideally resolve the chaos independent from partisan political interests. Presenting the concept of “counter-democracy,” Pierre Rosanvallon²⁵⁴ has emphasized the constitutional court’s contribution to democracy in three aspects. First, the judiciary provides reasonable explanation for its decisions through systemic procedures based on facts and causal relationships. Moreover, the judiciary is obliged to make decisions and provide answers to raised questions, hence eliminating uncertainty in society and closely binding the community. Finally, the court is analogous to a “theater”²⁵⁵ where the societal controversies become clear in light of fundamental governing principles, and at the same time, where society reflects upon itself. John Ferejohn and Larry Kramer²⁵⁶ also echo the involvement of the constitutional court in enhancing democracy. Since the courts take decisive action when the political system is “fragmented, indecisive, or gridlocked,” it is what people resort to when their political leaders fail to yield decisive action²⁵⁷. Additionally, the judicial intervention forces political officials to expect judicial proceedings.

In the same vein, the constitutional court safeguards fundamental rights from

²⁵⁴ Pierre Rosanvallon, *Counter-Democracy. Politics in an Age of Distrust*, trans. A. Goldhammer, (Cambridge: Cambridge University Press, 2008)

²⁵⁵ *Ibid* p.237

²⁵⁶ John A. Ferejohn, and Larry D. Kramer, “Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,” *New York University Law Review*, 77(4), (2002): 962-1039.

²⁵⁷ *Ibid*. 249.

abusive governmental power, thus realizing the ideals of liberal democracy and human rights. Steven Croley considered constitutionalism to be a remedy for defects inherent in majoritarian rule. Individuals possess the rights “against the majority, which is to say, against encroachment by majoritarian power”²⁵⁸. John Ferejohn and Pasquale Pasquino (2002) also acknowledged that the constitutional court protects constitutional values. He thought that the actions of the constitutional court would guarantee that “the legislation and administrative actions do not encroach on constitutional values” by upholding the hierarchy of norms²⁵⁹.

Further, the constitutional court completes democracy. The activity of the constitutional court does not produce counter-majoritarian opinions, because the constitutional court is designed to participate in politics from the beginning. It constitutes a part of the democratic policy-making process and therefore its activity strengthens and expands democracy. Additionally, the constitutional court protects the constitution as the pre-commitment of the polity. This pre-commitment is beneficial to democracy as it promotes liberty in politics and ultimately the popular sovereignty.

DOES THE CCK GUARD THE LIBERAL DEMOCRATIC CONSTITUTION?

The Constitutional Court of Korea has maintained its significant status in Korean politics, overcoming the counter-majoritarian problem and struggling to secure judicial independence from partisan political pressures. The judicialization of Korean

²⁵⁸ Steven P. Croley, “The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law,” *University of Chicago Law Review*, 62, 689-790. (1995), 704.

²⁵⁹ John Ferejohn and Pasquale Pasquino (2002), 251.

politics has opened the door to the possibility of the CCK expanding its influence into politics and subjecting itself to further pressures from political actors, its own internal hierarchy, and the informal patronage networks characteristic of the functioning of the Korean judiciary as a whole. As a result, the politico-historical context and the recent tendency toward judicialization both provide reason to be concerned about the CCK's independence. Unfortunately, however, *de facto* judicial independence has not and is not guaranteed as thoroughly as *de jure* judicial independence has been.

Still, these setbacks are not enough to completely frustrate the CCK in functioning as a guardian of the liberal democratic constitutionalism. Institutional remedies have been designed to insulate the Korean political system from possible overreach and partisanship by the CCK. Those countermeasures comprise of three categories, as corresponding to three most frequently raised criticisms: measures to countervail the lack of democratic accountability, complements for judicial independence, and ultimately, systemic means to improve the state of Korean democracy.

First, the legal design of the CCK targets the difficulty in alleviating counter-majoritarian trends by facilitating public understanding and their acceptance of its decision. One way to do so is the opening of more trials to the public. Article 34 of the Korean Constitution stipulates that the CCK must disclose the oral pleadings of the adjudication and the pronouncement of the decision, unless it is a paper hearing and deliberation.²⁶⁰ In addition, the Court Organization Act enumerates when the CCK can decide not to open the trial, namely “if it

²⁶⁰ The CCK can convene litigants to the court and hold a face-to-face trial or just review the submitted documents and internally make decisions.

might endanger the national security, public peace, and order or good public moral, it may be decided that the trial be closed to the public” according to Article 57. That is, constitutional adjudication is held to be public in principle, and the CCK ought to present reasons when it decides to close the courtroom. It is incumbent upon the CCK to invite the public into the judicial arena. The benefit of a public trial is improved awareness on the constitutional discourse and the augmented duty of the justices to present the logic behind their decisions. In this way the CCK remains as “the pure form of the public reason”²⁶¹.

Second, the demand of the CCK to exert binding power over the legislative branch in its rulings on laws restores judicial independence. Once the CCK declares a law or bill to be unconstitutional, other state agencies and local governments are liable to legislate alternatives (Article 47). Likewise, if the CCK accepts the constitutional complaint requested by an individual, state agencies and local governments' offices are obliged to take measures to follow the decision (Article 75). This binding power impacts the future actions of state agencies. These additional *de jure* supports parallelize the judicial power with the legislative authority.

Third, the CCK has a unique method of sentencing that improves its ability to counter majoritarian tendencies. Based on the principle of public trial, the CCK is supposed to disclose details of the sentencing process as well as the proceedings of trials. The information on the sentencing includes controversial issues, the court's answer for the issues, legal reasoning for the answer, logical explanation for the reasoning, and most importantly, dissenting opinions. When drafting a sentence, each individual justice identifies themselves in the reasoning and opinion. That is, every justice has the right to

²⁶¹ Ferejohn & Pasquino, 2002, p.9

articulate their viewpoint on the document if they hold different opinion from the majority decision. Their reasoning will be recorded as the dissenting opinion and fully publicized. Thus, not only does the minority opinion enjoy the right to voice itself, but it also opens the possibility for the public to examine the logical soundness of every opinion, however unpopular the minority view on it is. The principle of public trial, institutional support for judicial independence, and the publication of dissenting opinions all formulate the public forum for open discussion and communal deliberation. These characteristics are what make the constitutional court a deliberative institution²⁶².

CONCLUSION

Born in the chaotic process of Korean democratization and raised in the environment of growing judicialization, the Constitutional Court of Korea is both a symbolic and actual guardian of liberal democratic constitutionalism. The writers of the Constitution, who desired liberal democracy and democratic constitutionalism with the political purpose of guarding the basic rights and democracy itself, establish it. Although the political context of South Korea's post-authoritarian regime meant that the CCK came into being under heavy pressure from internal and external forces, *de jure* and institutional measures designed to guard the independence of the CCK have enabled it to fulfill its role of guarding liberal democratic constitutionalism. Many challenges remain, though, and are likely to develop further in a negative direction without action being taken – particularly the institution's responsiveness to the siren songs of patronage, careerism and the fickle nature of public opinion. The case of the CCK illuminates the constitutional court's role in improving the liberal democratic system of

post-authoritarian countries, even if a balance between the CCK and the republic's founding principles in theory, and Korean liberal democracy in practice has yet to be struck.

²⁶² Ferejohn and Pasquino, 2002