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Korean Constitutional Court Standing at the Crossroads: Focusing on Real Cases and Variational Types of Decisions

JIBONG LIM*

I. INTRODUCTION

There is not a country in the world without some form of a Constitution. Constitutions necessarily protect fundamental rights by regulating potentially intrusive governmental powers. When governmental intrusion is unwarranted, Constitutional adjudication often serves an indispensable role as a safeguard to people's rights.

The Korean Constitutional Court, which is separate from the general courts, was established in 1988 to protect fundamental rights.¹ It was not, however, the first constitutional adjudication institution in Korea.² In the past, the Constitutional Committee and the Korean Supreme Court served this function, albeit ineffectively.³ Between 1948 and 1988, only ten cases received judicial review and only three laws were ruled unconstitutional.⁴

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1. James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 Am. J. Comp. L. 73, 75 (1992).

2. *Id.*

3. *Id.*

4. See DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 154-71 (IFES Korean Studies Series No. 2, 1990). For specific references to the ten cases, and other related information on the Korean Constitutional Court, see The Constitutional Court of Korea, The Ten Years of the Korean Constitutional Court, at <http://www.ccourt.go.kr> (last visited Apr. 21, 2002) [hereinafter Constitutional Court of Korea Website].

Fortunately, the present Korean Constitutional Court takes a more active role in developing constitutional law having declared many significant laws unconstitutional.⁵

The Korean Constitutional Court has been the target of antagonism from competing branches within the Korean government because of its "judicial activism."⁶ It has clashed not only with the Korean Legislative and Executive branches, but also with the Supreme Court over jurisdictional issues.⁷ Continuous conflict with the other branches of government threatens its continued development and, possibly, its very existence.⁸

This article explores why the Korean Constitutional Court is the target of criticism by the other branches of government and suggests a solution to resolve the conflict. This article compares the Korean Constitutional Court to both the United States Supreme Court and the German Federal Constitutional Court, for the Korean Court has adopted many attributes of these two systems.⁹ The histories of these two respective courts provide insight on how to resolve the conflicts facing the Korean Constitutional Court.

Solutions to the problems facing the Korean Constitutional Court, however, cannot be found solely by examining the history and development of the U.S. Supreme Court and the German Federal Constitutional Court. The Korean Court has its own distinct peculiarities as derived from Korean society and culture. To better understand the law of another culture, one must

5. West & Yoon, *supra* note 1, at 103-04. Since the Constitutional Court was established in Sept. 1988, it received 6,240 cases and, as of Nov. 30, 2000, disposed of 5,739 cases. Constitutional Court of Korea Website, *supra* note 4. Among the 5,739 cases, the Court decided 3,297 cases in the full bench by dismissing 2,156 cases in the screening process of small benches and concerned parties withdrew the other 239 cases. *Id.* Of 276 cases in which the constitutionality of law was reviewed, the court rendered 259 judgments on the merits. *Id.* Among those, sixty-five laws were declared unconstitutional either in whole or in part. *Id.* Thus, approximately twenty-five percent of these judgments resulted in the invalidation or partial repudiation of law. *Id.*

6. See Dai-Kwon Choi, *Hangug Hunbubjaepansoeu Jungchihag-Gujowa Gineunguer Jungsimuro* [The Politics of the Constitutional Court: Centering Around Its Structure and Function], 91 SEoul NAT'L U. JURISPRUDENCE 106, 106-07, 112-13, 115-16 (1993); see also Moon-Hyun Kim, *Hunbubjaepansowa Daebubwon Gwangei* [The Relationship between the Korean Constitutional Court and Korean Supreme Court], in HUNBUBJAEPANEUI IRONGWA SILJE [THEORY AND REALITY OF CONSTITUTIONAL ADJUDICATION] 79-107 (Bakyungsa 1993) [hereinafter Moon-Hyun Kim].

7. Moon-Hyun Kim, *supra* note 6, at 145, 154-56.

8. *Id.*

9. *Id.*

appreciate the systemic and substantive particularities of that culture. As long as the law remains a means for justice in accordance with a society's ideals, these ideals must become a part of the analysis.

Thus, a study of the Korean Constitutional Court requires an awareness that many aspects of Korean law are founded not only in Western ideals of egalitarianism and democracy, but in the deeply rooted Confucian tradition of hierarchy and authority.¹⁰ A comparison of the Eastern legal system to its Western influences requires a high degree of knowledge about the social, political and cultural differences between the two. Without this, the study is likely to result in judgments and conclusions based on irrelevant values.

II. HISTORICAL BACKGROUND

A. General Overview

Initially, the Korean legal system was similar to the Roman-German system of law.¹¹ As such, the Korean legal system can be classified as a system of civil law that was deeply influenced by other civil law countries.

During the Japanese occupation from 1910-1945, Koreans began to incorporate Western legal theories into their system.¹² While under Japanese control, Korea adopted the Japanese legal system, which was itself modeled after the German legal system.¹³ After Korea's emancipation from Japan, many Korean legal scholars focused their studies on the German legal system because it most closely resembled the system they had adopted.¹⁴

Eventually, however, the focus on Korean legal studies shifted and began to incorporate theories of the United States

10. See Byoung Ho Park, *Traditional Korean Society and Law*, 5 KOREAN J. COMP. L. 1, 3 (1977).

11. See G. RADBRUCH, *VORSCHULE DER RECHTSPHILOSOPHIE* 51 (1948).

12. See Park, *supra* note 10, at 1; Chongko Choi, *On the Reception of Western Law in Korea*, 9 KOREAN J. COMP. L. 141, 158-67 (1981). Some may disagree with this assertion, but note that Park uses moderate expressions, such as "in a sense" and "on a full scale." See Park, *supra* note 10, at 167 (providing an in-depth analysis).

13. See Chan Jin Kim, *Korean Attitudes Toward Law*, 10 PAC. RIM L. & POL'Y J. 1, 7-8 (2000).

14. Chongko Choi, *History of German-Korean Relationship Through Legal Science*, in 2 RECHT IN DEUTSCHLAND UND KOREA 83, 96-112 (1980).

legal system.¹⁵ This shift began when large numbers of U.S. educated Korean individuals returned home and contributed to the formation of the Korean Constitution.¹⁶ The presence of the U.S. military also seems to have had a profound effect on the development of the Constitution. During that period, Korea adopted the U.S. precedent-based system of judicial review.¹⁷ Since then, the effect of U.S. Constitutional law and that of other European civil law countries has continued to influence the Korean legal systems.¹⁸

The Korean Constitutional Court of the Sixth Republic of Korea (1987-present) adjudicates constitutional issues, much like the U.S. Supreme Court.¹⁹ In short, the present Korean Constitutional Court is a blend of the constitutional adjudication principles embodied in the institutions of Germany and the United States.

B. Influence of Korea's Historical and Political Background in the Adoption of the Constitutional Court System

Korea's historical and political background also played an important role in the development of the Constitutional Court

15. Hyo-Jeon Kim, *The Effect of American Judicial Review on Korea, in THE U.S. CONSTITUTION AND KOREAN CONSTITUTION* 339-40 (1989) [hereinafter Hyo-Jeon Kim].

16. See DONG SUH BARK, *THE AMERICAN-EDUCATED ELITE IN KOREAN SOCIETY: KOREA AND THE U.S.—A CENTURY OF COOPERATION* 263 (1984). The number of Koreans educated in the United States grew dramatically after the Korean War. *Id.*

17. S. KOREA CONST. art. 111, § 4; see also Hyo-Jeon Kim, *supra* note 15, at 339-40.

18. Hyo-Jeon Kim, *supra* note 15, at 144.

19. Up to now, Korea has had six republics with nine revisions of its constitutional laws. YOUNG-SUNG KWON, HUNBUBHAK WONLON [CONSTITUTIONAL LAW: A TEXTBOOK] 1144-46 (rev. ed. 1994). Within constitutional adjudication institutions, some changes occur along with the changes to the republic. *Id.* The First Republic had a Constitutional Committee, which was composed of the vice president (who served as its head), five supreme court judges and five congressmen. *Id.* The Committee's character was a blending of a constitutional court and political organization styles. *Id.* The Second Republic established a Korean Constitutional Court that mainly imitated the German Constitutional Court system. *Id.* It consisted of nine judges, of which three were selected each by the president, supreme court and senate. *Id.* The court itself, however, was not actually established, due to a military overthrow in 1961. *Id.* The Third Republic had an Impeachment Committee, which was composed of the chief justice of the supreme court (who served as head), three supreme court justices and five congressmen. *Id.* The Fourth and Fifth Republics also had a Constitutional Committee, but the selection of justices was different from the procedures of the First Republic and rather similar to those of the Constitutional Court of the Second Republic. *Id.* The Sixth Republic established the Korean Constitutional Court, which is nearly same with that of Second Republic in its composition except that the Senate has been changed to the National Assembly. *Id.*

system. During the public hearings for the 1980 Constitution, the majority supported implementation of the U.S. system of judicial review for the general court.²⁰ Some, however, called for a revival of the short-lived Constitutional Court of the Second Republic, and a few advocated the adoption of the Constitutional Committee.²¹ The return of the Constitutional Committee, in existence during the Fourth Republic from 1972-1980, was not a popular option because it did not make a single constitutionality decision during its term.²²

During the Third Republic of Korea (1963-1972) a movement began to change the judicial system. Extensive proposals were introduced to reform the entire judicial structure.²³ It was hoped that the reforms, including the restoration of judicial review, would result in a "consolidation of constitutionalism."²⁴ As the drafting of the constitutional amendment began, proposals influenced by the U.S. system were introduced to restore the power of judicial review to the Korean Supreme Court.²⁵ The resulting judicial structure, however, seemed to be more like the Japanese system.

The sitting Korean Supreme Court of the Third Republic was called on to review the constitutionality of the amendment.²⁶ Faced with the possibility of resolving highly controversial constitutional issues, the majority of the Korean Supreme Court Justices did not support the proposed expansion of their duties to include judicial review.²⁷ The Court was reluctant to acquiesce to the proposal that they should make constitutional determinations because most of the Justices were opposed to judicial activism. The Justices strongly objected to this active role of the judiciary found in common law systems.²⁸

Upon returning to Korea after studying in Europe, a number of influential Korean constitutional law scholars proposed a

20. YOON, *supra* note 4, at 168.

21. *Id.*

22. See Constitutional Court of Korea Website, *supra* note 4.

23. See Dae-Kyu Yoon, *New Developments in Korean Constitutionalism*, PAC. RIM L. & POL'Y J. 395, 407 (1995) [hereinafter Yoon, *New Developments*].

24. *Id.*

25. See West & Yoon, *supra* note 1, at 76.

26. *Id.*

27. *Id.* As Professor J. H. Merryman observed: "The tendency has been for the civil law judge to recoil from the responsibilities and opportunities of constitutional adjudication." JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 139 (2d. ed. 1985).

28. West & Yoon, *supra* note 1, at 77.

system of judicial review based on German models, which were examined as alternatives to the U.S. system.²⁹ These models were called the "constitutional court system."³⁰

In response to calls for increased democratic order and reform of judicial review procedures, the modern Constitutional Court system was adopted during the Sixth Republic in the 1988 Constitutional amendments. The Constitutional Court replaced the Constitutional Committee, which had been established during the Fourth Republic.³¹ The Korean government has not made the transcripts of the deliberations during the drafting of the amendment publicly available. Therefore, it is not known exactly why and how the Constitutional Court plan was adopted. What can be inferred as a result of the deliberations is that the Constitutional Court first adopted in the 1960 Constitution was restored. While it is still too early to make an accurate evaluation of this system, one can speculate that a more powerful Constitutional Court may be more suitable under the present political conditions.³²

Based upon available materials, it appears that the adoption of the Constitutional Court system was the result of a political compromise rather than a conclusion that the German Constitutional Court system is superior. Close scrutiny of Korean Constitutional Amendments 111, 112 and 113 reveal signs of a political deal wherein six representatives from the three political parties met and deliberated.³³ During the deliberations, the opposition party likely insisted on the Constitutional Court system due to the failure of the previous Constitutional Committee. The majority party appears to have agreed and compromised on the Constitutional Court system in exchange for concessions from the opposition party on other issues.

29. *Id.* Professor Cheol-Soo Kim at Seoul Nat'l University and Professor Young Huh at Yonsei University could be leading examples. *Id.*

30. *See generally id.*, at 74-77 (describing details on how the two alternatives, the American system and the German Constitutional Court system, were set forth in Korea).

31. *See Yoon, New Developments, supra* note 23, at 408-09.

32. In the past, the Constitutional Committee played a nominal role and existed more in name than reality. The ordinary court, given the job of judicial review under the 1962 Constitution, was overly politicized. *See generally* YOON, *supra* note 4 (providing details of the history of judicial review in Korea).

33. *See* S. KOREAN CONST. arts. 111-13.

III. POWER OF THE KOREAN CONSTITUTIONAL COURT

The organization and legal authority of the Korean Constitutional Court are generally enumerated in the Korean Constitution.³⁴ Article 111, Sections 2, 3 and 4, and Article 112 describe the Court's organization and composition.³⁵ Article 3, Section 1 and Article 113 discuss the authority of the Court.³⁶ In addition, the Constitutional Court Act passed in August of 1988, supplements and details the specifics of the organization and authority of the Court³⁷.

The organization of the Korean Constitutional Court is influenced by the U. S. judicial system.³⁸ The scope of the Court's legal authority, however, is more akin to the German Federal Constitutional Court system.³⁹

The current Korean Constitutional Court is more powerful than the Fourth and Fifth Republics' Constitutional Committee.⁴⁰

34. *Id.*

35. *Id.* This commentary does not deal with the organization and composition of Korean Constitutional Court, but focuses on the competence of Korean Constitutional Court to examine its role in the Korean Government.

36. S. KOREA CONST. art. 113.

37. Constitutional Court Act, arts. 3, 12 (1988) (amended 1997) (S. Korea). The Constitutional Court Act, established on August 5, 1988, consists of seventy-six articles and additional rules. *Id.* It is divided into five chapters: Ch. 1, General Provisions; Ch. 2, Organization; Ch. 3, General Decision Procedure; Ch. 4, Special Decision Procedure; and Ch. 5, Punitive Provisions. *Id.*

38. *See infra*, Part II.

39. *See infra*, Part II.

40. *See generally* Constitutional Court Act. The Constitution of the First Republic gave the power of concrete judicial review to the Constitutional Committee. *See* YOON, *supra* note 4, at 152-56. The Constitution of the Second Republic gave the Constitutional Court jurisdiction in controversies concerning the final interpretation of the Constitution, the unconstitutionality of legal provisions, jurisdictional disputes between governmental organizations, political party dissolution, and impeachment and election cases for the President, the Chief Justice and the Justices. *Id.* at 156-58. Under the Constitution of the Third Republic, the Impeachment Committee took charge of impeachment decisions and political party dissolution, and the general courts were given the power of judicial review of administrative ordinance regulations and election cases. KWON, *supra* note 19, at 96. The Constitution of the Fourth Republic established the Constitutional Committee, which had jurisdiction over concrete judicial review, the decision of impeachment and the decision of political party dissolution. YOON, *supra* note 4, at 164-67. The Constitution of the Fifth Republic gave the power of concrete judicial review, the decision of impeachment and the decision of political party dissolution, and the power of judicial review of administrative ordinances regulations and election cases were given to the general courts. *See id.* at 164-68. In the Fourth and Fifth Republics, the Supreme Court, however, could decide whether to forward the case to the Constitutional Committee in a concrete judicial review case, and this produced a negative result in that not even one case was filed during that period. *See id.*

The Court now has the power of judicial review and impeachment as well as the power to dissolve a political party, to solve jurisdictional disputes between governmental agencies and the power to resolve constitutional complaints.⁴¹

A. Concrete Judicial Review

1. Overview

According to German jurisprudence, there are two types of Constitutional cases reviewed by the Court: (1) concrete norm control or "*konkrete Normenkontrolle*" (deciding the constitutionality of an accepted norm brought to its attention through a case or conflict), and (2) abstract norm control or "*abstrakte Normenkontrolle*" (the Court on its own motion or by request chooses to review the constitutionality of an accepted norm).⁴²

The Constitution limits the right to request abstract norm control review to those situations expressly granted by the constitution or by law.⁴³ Concrete norm control, by comparison, is a form of judicial review similar to the U.S. system, in which adverse parties bring constitutional challenges before the Court.

41. S. KOREA CONST. art 8, § 4. This section prescribes that if a political party's purpose or activities are contrary to the fundamental democratic order, the party may be brought before the Constitutional Court in an action for its dissolution, and it shall be dissolved if the Constitutional Court so decides. *Id.*

42. Donald P. Komners, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 841 (1991). Concrete norm control is again divided into the general court type and the constitutional court type. *See id.* at 840. In the general court type, when the norm is determined unconstitutional, the court does not apply it to the pending case, nor does the court repeal the norm. *Id.* at 837-41. Rather, the norm continues to be effective until the legislature abrogates it. *Id.* Therefore, the norm is still in effect except with respect to the parties of the case; *Id.* In the meantime, in the constitutional court type, the norm that is declared unconstitutional loses its effect upon the declaration. *Id.*

43. *See id.* Abstract norm control is usually performed in a designated constitutional institution such as a constitutional court, which is completely independent of the general courts. *See id.* In France, *Conseil Constitutionnel* [Constitutional Council] does abstract norm control. *See* HENRY ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE* 310 (5th ed. 1986). It is a special judicial body that is charged with review of the constitutionality of legislation before its promulgation. *Id.* at 311. The Constitutional Council must pass on the constitutionality of so-called organic laws and the parliamentary rules of procedure. *Id.* It may be called upon to review the constitutionality of simple laws including laws approving the ratification of treaties, if such review is requested by the President of the Republic, the Prime Minister, the President of the Assembly, the President of the Senate or sixty deputies or sixty senators. *Id.*

This theory of judicial review was developed in the U.S. in the Supreme Court decision *Marbury v. Madison*.⁴⁴ The U.S. system of judicial review later influenced the legal systems of other countries, including Germany.⁴⁵

While the Korean judicial review system models the U.S. system, there are some evident German influences.⁴⁶ For example, as in Germany, a Korean law that is deemed unconstitutional is completely invalidated and is known as a “general effect decision.”⁴⁷ Similarly, the principle of *stare decisis* in the United States, where each constitutional decision creates a precedent to be followed in subsequent decisions, ultimately has the same effect as a general effect decision in Korea.⁴⁸

Alternatively, in cases where there was no need for the complete nullification of a law, the Koreans adopted the German legal theory of “variational decisions.”⁴⁹ A sudden declaration of nullity in these circumstances could undermine faith in the entire

44. *Marbury v. Madison*, 5 U.S. 138, 177-78 (1803). Although there is an opinion that article 3, section 2 (1) of the U.S. Constitution is the provisional foundation for judicial review of federal laws by the U.S. Supreme Court, the prevailing view states that all judicial review was established decisively by the Chief Justice Marshall's decision in *Marbury v. Madison*. See ROCCO. J. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 67 (2d ed. 1959).

45. *Id.* at 841.

46. See generally Seung Wha Chang, *The Role of Law in Economic Development and Adjustment Process: The Case of Korea*, 34 INT'L LAW 267, 276 (2000).

47. Kwon, *supra* note 19, at 1082-83. Article 47 of the Korean Constitutional Court Act states that a law or legal provision declared to be unconstitutional loses its effect. Constitutional Court Act, art. 47 (1988) (amended 1997) (S. Korea). The point of time when the provision loses its effect is different between Korea and Germany. In Germany, the unconstitutional provision becomes naturally void from the beginning by *ex-tunc Wirkung*. See Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichts—Gesetz, BVerfGG) [German Federal Constitutional Court Act] arts. 76-78, v. 11.8.1993 (BGBl. I S.1473). In Korea, however, the unconstitutional provision, unless a criminal law provision, loses its force from the day of ruling “against the Constitution.” See Constitutional Court Act, art. 47.

48. See TRESOLINI *supra* note 44, at 64-67. In the United States, the fact that general effect is not directly admitted is closely related to the logic of justification for judicial review. *Id.* Since the U.S. Constitution does not specifically authorize judicial review, the power of the Supreme Court to declare laws unconstitutional is implied from its general power to hear cases and controversies. See *id.* Thus, as a matter of pure logic, the Court's decision that an act of government is unconstitutional can only be relevant to the outcome of the case before the Court.

49. West & Yoon, *supra* note 1, at 99-100.

Constitution. Therefore, the temporary reservation of a nullity declaration may be used to protect legal stability.⁵⁰

The theory of variational decisions began in German common law. There are three types of variational decisions: (1) the Decision of Limited Constitutionality, (2) the Decision of Disagreement with the Constitution and (3) the Decision of Urging Legislation.⁵¹ A Decision of Limited Constitutionality allows a judge to avoid nullifying a law by broadly construing the Constitution.⁵² A Decision of Disagreement with the Constitution allows a judge to leave a legal norm found unconstitutional in force temporarily to avoid a legal vacuum.⁵³ The Decision of Urging Legislation allows a judge to announce that, even though a norm may be constitutional at the time of review, it may be held unconstitutional after the decision.⁵⁴ The judge, however, can only urge legislators to revise or replace the norm in order to prevent it from being declared unconstitutional in the future.⁵⁵

The variational types of decisions have no corresponding legal or constitutional provisions, so the Korean Constitutional Court adopted them through the precedent of the German Federal Constitutional Court.⁵⁶ The Korean Court uses variational decisions when faced with sensitive issues that could cause serious disruptions to economic or social order.⁵⁷

2. Application of Variational Decisions

As discussed above, there are three types of variational decisions: Decisions of Limited Constitutionality, Decisions of Disagreement with the Constitution and Decisions of Urging Legislation.⁵⁸ Each is used to avoid a constitutional crisis, but the resulting decisions have different effects.

50. See Korean Const. Ct., Res. of Apr. 2, 1990, 89 KCC Ga 113; see also Korean Const. Ct., Res. of Sept. 8, 1984, 1 KCCR 199.

51. KWON, *supra* note 19, at 1094.

52. *Id.* at 1097.

53. *Id.* at 1095.

54. *Id.* at 1097.

55. See Choi, *supra* note 6, at 166-67.

56. See West & Yoon, *supra* note 1, at 99.

57. See *id.* at 99-100.

58. KWON, *supra* note 19, at 1094.

a. Decisions of Limited Constitutionality

Recognizing that limited constitutional interpretations are common in many countries where theories of constitutional adjudication are firmly settled, the Korean Constitutional Court embraced the theory of Decisions of Limited Constitutionality.⁵⁹ Under this approach, the Court first assumes that a law is constitutional.⁶⁰ Then if the language of the law is vague or ambiguous, the law is construed to be in compliance with constitutional principles.⁶¹ As a result, the Korean Constitutional Court avoids completely nullifying a vague law based on the unconstitutionality of some its provisions.⁶² The Court reasons that this approach minimizes legal uncertainties and “unpleasant surprise”⁶³ that occur when positive and constitutional provisions are nullified along with unconstitutional provisions under a complete nullification approach.

An example of a Decision of Limited Constitutionality is the Court’s ruling on the National Security Act in 1990.⁶⁴ The Korean Constitutional Court interpreted the Act’s language broadly in order to find the Act constitutional.⁶⁵ Hence, the Court avoided a complete nullification of the Act by using a Decision of Limited Constitutionality. Specifically, in upholding the National Security Act, the Court reasoned that the words “praise,” “activity,” “alignment,” “other methods” and “benefiting” located in the “Praise and Encouragement Crime” article were open to many

59. See MYUNGSUN YOON & BYUNG-MOOK KIM, HUNBUBCHAEGERON [CONSTITUTIONAL SYSTEM THEORY] 36-37 (Seoul: Bubjisa, 1998); see also Korean Const. Ct. Res. of Feb. 25, 1992, 89 KCC Ga 104.

60. Korean Const. Ct., Res. of Feb. 25, 1992, 89 KCC Ga 104.

61. KWON, *supra* note 19, at 1098.

62. Korean Const. Ct., Res. of Feb. 25, 1992, 89 KCC Ga 104.

63. *Id.*

64. Korean Const. Ct., Res. of Apr. 2, 1990, 89 KCC Ga 113. Article 7, Section 1, of the National Security Act states that any person who praises, encourages, propagandizes, or aligns with an anti-state organization’s activities, the organization’s members and anyone who receives instruction from the organization and who possesses knowledge of endangering national security or threatening fundamental democratic order, or agitates for governmental overthrow, shall be punished by up to seven years imprisonment. Section 5 states that someone who produces, possesses, or transports or distributes materials for the purpose of committing acts outlined in Section 1, above, shall also be punished by a maximum of seven years in prison. National Security Act, art. 7, §§ 1, 5 (1988) (S. Korea).

65. Korean Const. Ct., Res. of Apr. 2, 1990, 89 KCC Ga 113.

interpretations.⁶⁶ Because the words had ambiguous meanings, the Court upheld the Act in its entirety.

In holding that the Act was constitutional, the Korean Constitutional Court may have caused negative effects in other areas of Korean politics and criminal justice. First, the Court's decision allows arbitrary application of the Act by law enforcement authorities.⁶⁷ Second, the Court's broad interpretation has far-reaching consequences to the rights of freedom of speech, education and the arts. Finally, the Court's broad interpretation allows criminal punishment to be extended to cases where there is no clear danger to the nation's security, existence or fundamental democratic order.⁶⁸

While the Court's decision appears to conflict with Korea's Constitution and legislative policy, the Court believed that complete nullification was a worse option because it could have potentially caused a legal vacuum and disorder.⁶⁹ In addition, the war between North and South Korea was factored into the Court's decision. The importance of constitutional consistency in the face of political unrest tipped the balance in favor of a broad interpretation of the Act and a decision to uphold its constitutionality.⁷⁰ The Court found that the preamble of the Constitution allowed the Court to uphold laws with vague and potentially unconstitutional terms or provisions when they do not threaten Korea's very existence, national security or fundamental democratic order.⁷¹

Another application of the Decision of Limited Constitutionality surely would have led to a better result. By narrowly interpreting the Constitution to define and interpret vague provisions of Article 7, Section 1 and Section 5 of the National Security Act, the Court could have resolved constitutional inconsistencies without completely nullifying the law.⁷² This approach would preserve substantial individual

66. *Id.* See also National Security Act, art. 7, § 1 (1988) (S. Korea).

67. *Id.*

68. Korean Const. Ct., Res. of Apr. 2, 1990, 89 KCC Ga 113.

69. See Constitutional Court of Korea Website, *supra* note 4.

70. *See id.*

71. See S. KOREA CONST. art. 37, § 2 which states that the citizens' freedoms and rights may be restricted by law only when necessitated by concerns for either national security, maintaining law and order or for the public's welfare. Even if such restrictions are imposed, they shall not violate essential aspects of the citizens' freedoms or rights. *Id.*

72. Korean Const. Ct., Dec. of Apr. 2, 1990, 2 KCCR 49.

freedoms, delineate permitted acts from prohibited acts and limit law enforcement agencies' use of discretion.⁷³ In addition, limiting the scope of punishment by defining ambiguous language of the Act would leave no room for violation of the principle of *nulla poena sine lege* (no punishment without legitimacy, or, without law, there is no punishment).⁷⁴

Applying a new interpretation of the theory of the Decision of Limited Constitutionality, which alters the Act but does not completely nullify it, will accomplish the twin Constitutional goals of protecting national security and pursuing a peaceful unification based on a fundamental democratic order. Thus, this interpretation should be imposed.

b. Decisions of Disagreement with the Constitution and Decisions of Urging Legislation

Similar to the Court's application of Decisions of Limited Constitutionality, the Court uses both Decisions of Disagreement with the Constitution and Decisions of Urging Legislation when it holds a law unconstitutional but believes immediate nullification of the law could lead to legal instability.⁷⁵ A Decision of Disagreement with the Constitution temporarily enables the continued enforcement of a law. A simultaneous Decision of Urging Legislation announces to the legislature the likelihood that the provision will be found unconstitutional in the future and urges the legislature to revise the unconstitutional part.⁷⁶ Exercising the option to delay nullification of the law also serves to preserve a separation of powers, allowing the Court to interpret the Constitution while not infringing on the legislature's right to pass laws.⁷⁷ As illustrated by the Korean Constitutional Court's analysis of the National Security Act, the Court here again is able to balance diverse political, economic and social ideals when rendering an opinion on a law's constitutionality.⁷⁸

For example, upon judicial review of the constitutionality of Article 33 and Article 34 of the Congressman Election Act, the

73. See *id.*

74. Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?* 15 B.U. INT'L L.J. 125, 144-45 (1997).

75. Korean Const. Ct., Res. of Sept. 8, 1989, 88 KCC Ga 6.

76. *Id.*

77. See S. KOREA CONST. arts. 51-65.

78. Cho, *supra* note 74, at 144-45.

Court rendered both a Decision of Disagreement with the Constitution and a Decision of Urging Legislation.⁷⁹ The Court reasoned that Article 33, which prescribes that candidates deposit a high amount of trust money when running in an election, and Article 34, which reverts the trust money back to the National Treasury, violate the principle of free election by limiting the chance of a nonpartisan candidacy.⁸⁰ Restricting the nonpartisan candidates' access to trust money had the effect of forcing them to join a party.⁸¹ This is inconsistent with the principle of free election.⁸² Similarly, the Court held that the articles were incompatible with the principle of sovereignty, which gives electorates a right to recommend a candidate.⁸³ Finally, the articles are unconstitutional because they violate Article 24 of the Constitution by infringing upon the public's suffrage.⁸⁴ Accordingly, Articles 33 and 34 violate the principle of fairness embodied in the Constitution by allowing political parties to monopolize the nomination of candidates and blocking nonpartisan candidates' participation in elections.⁸⁵

As required by Article 47, Section 2 of the Korean Constitutional Court Act, a ruling from the Constitutional Court that the Articles 33 and 34 were unconstitutional would have rendered the provisions ineffective from the moment of the ruling.⁸⁶ The Korean Constitutional Court, however, rendered a variational decision. They concluded that the Decision of Disagreement with the Constitution was allowed for the continued application of Articles 33 and 34 until May 31, 1991, at which time Congress was to revise the provisions.⁸⁷

79. Korean Const. Ct., Res. of Sept. 8, 1989, 88 KCC Ga 6. The Korean Constitutional Court held that Articles 33 and 34 of the Congressman Election Act, which was revised March 17, 1988 as Korean Code 4003, do not comply with the Constitution and that the provisions will nonetheless continue to be effective until they are required to be revised on May 31, 1991. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Korean Const. Court Act, art. 47, § 2. This provision says that a law which is declared unconstitutional shall become ineffective from the day of its declaration. Provisions of the penal code, however, become ineffective retroactively. *Id.*

87. Korean Const. Ct., Res. of Sept. 8, 1984, 1 KCCR 199.

The Court's application of a variational decision was an effective way to balance current political and constitutional concerns. First, the Court's decision acknowledged the independence of Congress as an organ of representation.⁸⁸ It respected the constitutional principle of separation of powers, which states that repeals and revision of laws are to be completed by the legislature.⁸⁹ Moreover, other provisions of the Congressman Election Act are dependent on Articles 33 and 34 to operate.⁹⁰ It was necessary for Congress to redraft these provisions before Articles 33 and 34 were removed.

Second, it appears that using a variational decision regarding the constitutionality of the Election Act, rather than completely nullifying it, ensured the homogeneity of Congressional members by ensuring equality in the election process.⁹¹ The 13th Congress, elected in the general election of April 26, 1988, was composed of members who were elected under the prior trust money system of Articles 33 and 34.⁹² If the Korean Constitutional Court declared the trust money system unconstitutional, the provisions would lose effect immediately. As a result, subsequently elected or reelected members of Congress would not be restricted by the trust money provision as their peers were. Thus, in order to preserve equality in the election method of the 13th Congress, Articles 33 and Article 34 were enforced until the election was over.⁹³

3. Value of Variational Decisions

The two exemplary cases discussed in Sections 1 and 2 *infra* both involve politically sensitive issues. The dictatorial government in Korea enacted the National Security Act, effective during the 1960s-1980s, which acted as a form of "Korean McCarthyism" by disposing of political rivals by labeling them as communists.⁹⁴ It was misused by the military regime as a legal basis to justify surveillance and suppression of democratic groups

88. *Id.*

89. *See* S. KOREA CONST. arts. 51-65.

90. *See e.g.*, Congressman Election Act, art. 33 (2) (1988) (S. Korea) (affecting arts. 197 and 198).

91. Korean Const. Ct., Res. of Sept. 8, 1989, 88 KCC Ga 6.

92. *Id.*

93. *See id.*

94. *See generally* Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J. INT'L L. 1, 28 (1994).

and their activities.⁹⁵ Articles 33 and 34 of the Congress Election Act, discussed in Section 2, above, involved extremely politically sensitive issues. The articles restricted nonpartisan candidacy with excessively large trust fund deposit requirements.⁹⁶ Despite the criticisms of these variational decisions, the Korean Constitutional Court used variational decisions in both cases to avoid a constitutional crisis.⁹⁷

The Court used variational decisions for a variety of reasons. First, the Court employed variational decisions in order to respect the dignity and power of Congress as a law-making and law-revising organ in accordance with the constitutional principle of separation of power.⁹⁸ Employing Decisions of Disagreement with the Constitution and Decisions of Urging Legislation allows harmony and unification in constitutional interpretation by giving Congress an opportunity to revise laws, rather than nullifying them.⁹⁹ Consequently, the power to create law is maintained where it constitutionally belongs—with the legislature.¹⁰⁰

Second, variational decisions are necessary to prevent a legal vacuum, which can result from a complete and sudden abrogation of a law. Thus, variational decisions efficiently preserve legal stability¹⁰¹ by allowing the Court to preserve the constitutional parts of a law, while at the same time eliminating those sections that are in violation.¹⁰²

Third, the Court, using the theory of the Decisions of Limited Constitutionality, asserts that constitutional analysis should begin with the presumption that all laws are constitutional.¹⁰³

95. *Id.* at 29-30; see also James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y J. 85, 140-41 (1997).

96. Korean Const. Ct., Res. of Sept. 8, 1984, 1 KCCR 199.

97. See Korean Const. Ct., Res. of Apr. 2, 1990, 89 KCC Ga 113; see also Korean Const. Ct., Res. of Sept. 8, 1984, 1 KCCR 199.

98. S. KOREA CONST. arts. 51-65; see also Korean Const. Ct., Res. of Sept. 8, 1989, KCC Ga 6, at 259. The Court stated, "This is to pay regard to the dignity of the Congress and guarantee its essential function as the organ of representation. It is compatible with the constitutional principle of separation of power that the repeal and revision of a law is done by the legislative power as a general rule." (Translation by Jibong Lim.) *Id.*

99. Korean Const. Ct., Res. of Sept. 8, 1989, KCC Ga 6, at 260. By employing variational decisions "the Court can finally get the unified and harmonious interpretation that is appropriate to the nature of the constitutional adjudication." Translation by Jibong Lim.) *Id.*

100. S. Korea Const. arts. 51-65.

101. KWON, *supra* note 19, at 1166-67.

102. See *id.* at 1094.

103. See Korean Const. Ct., Res. of Feb. 25, 1992, 89 KCC Ga 104, at 104.

Accordingly, laws should be preserved, if possible.¹⁰⁴ If the language employed in a law is ambiguous, the Court should interpret it in a way that avoids nullifying the law.¹⁰⁵ In the application of a Decision of Limited Constitutionality, the Court should balance the effect of completely invalidating a law versus using a variational decision. The Court should only use a variational decision if the disadvantage from complete abrogation outweighs its advantage.

Fourth, variational decisions are used in cases involving politically or economically sensitive issues. Allowing the Court to render a variational decision gives it the opportunity to avoid a drastic extreme—killing a law. While invalidating a law may be advantageous to some political or economic interests, it may, on the other hand, frustrate other interests. Consequently, the interest groups negatively affected by the decision often become antagonistic toward the Court, undermining its already precarious authority. Furthermore, these hostile interest groups could forge alliances with government officials already displeased with the Court's judicial activism and ultimately threaten the Court's future.

To encourage the development of the Court's constitutional jurisprudence and secure its existence, variational decisions must be allowed. Since the Court has only been in existence for fourteen years, allowing flexibility in constitutional decision-making increases the chances that the Court will exist long enough to solidify its authority.

B. Constitutional Court Procedure

1. Overview

The Korean Constitution adopted a variation of the German constitutional complaint system.¹⁰⁶ Article 68, Section 1, of the Korean Constitutional Court Act allows a person to file a complaint in the Korean Constitutional Court when a public authority infringes upon that person's constitutional rights.¹⁰⁷ Despite protests by many Korean constitutional scholars, the

104. *See id.*

105. *See id.*

106. S. Korean Const. art. 111, § 1 (5).

107. Korean Const. Court Act art. 68, § 1.

Korean variation of the constitutional complaint system, unlike the German model, does not allow reconsideration of any court decision that was based on the Constitution.¹⁰⁸ This rule is unfair and inefficient. For example, a person injured by an administrative agency's acts would be barred from filing a complaint if a court has already ruled on the agency's act in another matter. Furthermore, the bar on reviewing constitutional decisions creates conflict between the general courts, the Supreme Court and the Constitutional Court because constitutional decisions rendered by the general courts are not reviewable by any court of higher jurisdiction.¹⁰⁹

The remaining elements of the constitutional complaint system are nearly the same as those of Germany. For instance, in both countries a complainant must exhaust all available judicial remedies before filing a constitutional complaint.¹¹⁰ Likewise, the Korean Constitutional Court requires a showing of self-relatedness, directness and presentness of the infringed right before a constitutional complaint may be filed.¹¹¹ In both countries, a short statute of limitations is set on claims to encourage legal certainty. The limitations period begins running at the time the individual realizes the infringement, and lasts sixty days in Korea and one month in Germany.¹¹²

108. Korean Const. Court Act art. 68, § 2. One difference between filing a constitutional complaint in Germany and Korea is that a German constitutional complaint may be filed to challenge a particular court decision. Volker Frey, *Characteristic Features of German Criminal Proceedings—An Alternative to the Criminal Procedure Law of the United States?*, 21 LOY. L.A. INT'L & COMP. L. REV. 591, 595 (1999).

109. Choi, *supra* note 6, at 106, 115-16 (1993). It is said that such a abnormal provisional exemption was enacted through the Supreme Court's lobby to the legislators, *see id.* at 112-13.

110. *See* ABRAHAM, *supra* note 43, at 180; Korean Const. Court Act, art. 68, § 1. Art. 68 of the Constitutional Court Act allows the Constitutional Court to follow the doctrine of exhaustion of other judicial remedies. *Id.* In the United States, the doctrine appears to be adopted in state court level. "[T]he state court of last resort has jurisdiction in a particular action, provided that all remedies have been duly exhausted." ABRAHAM, *supra* note 43, at 180.

111. Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 501, 506 (1987).

112. Korean Const. Court Act, art. 69 (requiring the complainant to file the constitutional complaint within sixty days after knowledge of the infringement).

2. Challenge to the Judicial Scriveners Act

Article 4, Section 1(2) of the Judicial Scrivener's Act provided that the qualifying examination to be a judicial scrivener (Scrivener's Examination) was to be administered by the Korean Supreme Court at regular intervals.¹¹³ The Act also provided that the Supreme Court had jurisdiction over its enforcement.¹¹⁴ In spite of these provisions, the enforcement regulation left the decision to the discretion of the Chief of the Office of Court Administration (COCA) to determine whether and when to hold the examination.¹¹⁵

The Korean Constitutional Court reviewed the constitutionality of the Judicial Scrivener's Act in 1990.¹¹⁶ An applicant to the Scrivener's Examination filed a constitutional complaint against COCA. The complaint alleged that the delegation of power in the enforcement regulation of the Act violated the applicant's rights of equal protection and freedom of occupation.¹¹⁷ The applicant's complaint alleged that the right to take the Scrivener's Examination, granted in Article 4, Section 1(2) of the Act, was superior to the Act's enforcement regulation.¹¹⁸ In essence, the applicant argued that the power of Supreme Court was superior to COCA.

In a previous adjudication, COCA held that the applicant's argument was defective because it violated Article 3, Section 1 of the enforcement regulation, which gave the power to review the constitutionality of decrees, regulations or actions to the Supreme Court.¹¹⁹ COCA's interpretation allowed for the delegation of the Scrivener's Examination to COCA. Furthermore, COCA held that under Article 107, Section 2, of the Korean Constitution, the Constitutional Court only had review power when the constitutionality or legality of administrative decrees, regulations or actions was at issue.¹²⁰

The Constitutional Court did not agree with this interpretation. Instead the Court interpreted Article 107, Section

113. Judicial Scrivener's Act, art. 4 (Apr. 3, 1954) (S. Korea).

114. *Id.* at art. 3, § 1.

115. *Id.* at art. 4.

116. Korean Const. Ct., Dec. of Oct. 15, 1990, 89 KCC Ma 178.

117. *Id.*

118. *Id.*

119. *Id.*

120. S. KOREAN CONST. art. 107, § 2.

2 to mean that in a case where the constitutionality of a decree or regulation is a prerequisite to a judgment, the Supreme Court *can* review its constitutionality without having it certified by the Constitutional Court.¹²¹ The jurisdiction of the Supreme Court, however, is not exclusive. Because Article 111, Section 1(1)¹²² of the Constitution gives the power to review the constitutionality of a law to the Constitutional Court, it follows that the jurisdiction for judicial review of decrees and regulations, which are subordinate laws, extend also to the Constitutional Court. This coexistent jurisdiction is especially relevant to constitutional complaints premised on the infringement of fundamental civil rights by the government.¹²³ COCA erred when it found that the Constitution limited the Constitutional Court's jurisdiction to hear disputes to only laws that may be constitutional violations.¹²⁴ Hence, constitutional complaints involving decrees, regulations or actions that infringe on a basic civil right are not limited to the Supreme Court's jurisdiction.

C. Jurisdictional Disputes among Governmental Agencies

In February 1995, the Constitutional Court decided its first case involving a jurisdictional dispute between the Chairman of the Congress and the members of Congress.¹²⁵ The facts of the case stated that, on July 14, 1990, the House held its 150th plenary session with all 245 congresspersons in attendance.¹²⁶ The Vice Chairman, acting as proxy for the Chairman, declared the opening of the session and presented twenty-six bills *en bloc*.¹²⁷ He announced his intention to alternate the presentation of investigation reports and oral proposals with printed matters.¹²⁸ The Vice Chairman stated he would pass a resolution with numbers one through twenty-three as the report and proposal, and numbers twenty-four and twenty-five as revised, for the other parts as the original bill.¹²⁹ He then asked if there were any

121. 2 Korean Const. Ct. 365, 89 Hun Ma 178 (1990).

122. S. KOREAN CONST. art 111, § 1 (prescribing that the Constitutional Court shall adjudicate the unconstitutionality of law upon the request of the courts).

123. 2 Korean Const. Ct. 365, 89 Hun Ma 178 (1990).

124. *Id.*

125. Korean Const. Ct., Dec. of Feb. 23, 1995, 90 KCC Ra 1.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

objections.¹³⁰ As soon as a Congress member from the majority party answered that there were no objections, the Vice Chairman proclaimed the passage of the bills, and the meeting was adjourned.¹³¹

The Congresspersons applied for a decision of jurisdictional dispute against the Chairman of the House on September 12, 1990.¹³² In their suit, a coalition of Congress members from the first opposition party and nonpartisan representatives alleged that their right to participate in the 150th plenary session was violated due to an irregular procedure in passing the bills.¹³³

In deciding the case, the Court first examined whether or not members of the opposition party and nonpartisan representatives had standing to bring the dispute.¹³⁴ The Court focused on Article 111, Section 1, of the Constitution, which states, "The Constitutional Court shall adjudicate the following matters. . .disputes involving jurisdiction between national agencies and local governments."¹³⁵ The main objective of Article 111, Section 1 is to protect constitutional order by maintaining checks and balances between political agencies. The Court achieves this balance by defining the limits of power granted to each agency.¹³⁶ Article 62, Section 1(1) specifically grants the Court the power to resolve "jurisdictional dispute decisions between the Congress, the Executive, the Judicature and the Central Election Management Committee."¹³⁷ The Court interpreted this to mean that they are granted jurisdiction to hear disputes among only these bodies.¹³⁸ As a result, the Court could not make a decision on whether other parties had standing to bring a jurisdictional challenge.¹³⁹

Consequently, governmental agencies that are not enumerated in Article 62, Section (1), cannot be a party to a jurisdictional dispute, even though they may exercise

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. S. KOREA CONST. art. 111, § 1.

136. See Gavin Healy, *Judicial Activism in the New Constitutional Court of Korea*, 14 COLUM. J. ASIAN L. 213, 213, 219 (2000).

137. Constitutional Court Act, art. 62, § 1(1).

138. Korean Const. Ct., Dec. of Feb. 23, 1995, 90 KCC Ra 1.

139. *Id.*

governmental powers. Furthermore, disputes regarding jurisdiction within the enumerated agencies are not within the jurisdiction of the Constitutional Court. As a result, Congress may only be a party to a jurisdictional dispute between itself and either the Executive, Judicature or the Central Management Committee. Members of Congress individually or in a group, as a negotiating body, do not have the power to file jurisdictional complaints in their individual capacities, even if several members file suit as a group.

Alternatively, the coalition argued that, like the Chairman of the Congress, Congresspersons' grant of power is expressly provided for in the Constitution and the House Act; thus, they can properly bring a jurisdictional complaint in their individual capacities.¹⁴⁰ The Court determined, however, that various rights, including the right to discuss and vote on legislation, are granted to members of Congress in the course of the legislative process only and individual opinions of a member of Congress do not represent the opinion of Congress itself.¹⁴¹ Accordingly, the Court concluded that members of Congress, whether individually or as a negotiating body, do not have standing to bring a jurisdictional challenge.¹⁴²

Finally, while Article 111, Section 1, of the Constitution empowers the Court to initiate impeachment proceedings and to dissolve political parties,¹⁴³ the Constitutional Court's narrow interpretation of Article 62, Section (1) reduced the eligibility of those who could have standing to bring a jurisdictional dispute under the Constitution.

IV. THE FUTURE OF THE KOREAN CONSTITUTIONAL COURT

Due to its historically weak foundation, the Constitutional Court's existence is in jeopardy. Yet, the court's role in the Korean legal system is just beginning to develop. In light of its significant role in protecting the constitutional rights of the Korean people, the Court should not be abandoned. Instead, efforts should be directed at solving the perceived problems of the Court.

140. *Id.*

141. *Id.* (citing to Korean Const. Ct. Res. of Feb. 23, 1995, 90 KCC Ra 1).

142. *Id.*

143. *See* S. KOREA CONST. art. 111, §§ 1(2)-(3).

A. Issues Affecting the Future of the Korean Constitutional Court

1. The Korean Government Does Not Have a Division of Power Between National and Local Government

a. Overview

Korea's political system is a unitary system of government, meaning one political body holds all national ruling power, and its court system is unitary as well.¹⁴⁴ Theoretically, each court can set national legal policy. Thus, courts are not confronted with the need to harmonize conflicting constitutional interpretations or disparate enforcement of local laws. This system is considerably different from the U.S. and German legal systems upon which the Korean Constitutional Court is modeled.

The U.S. and German high courts have developed as arbiters in disputes between federal and state governments.¹⁴⁵ Since that function is not required of the Constitutional Court in Korea, the need for the court has faced significant challenges, which are difficult to combat.¹⁴⁶

b. United States Court System

The U.S. Supreme Court is the final adjudicator for disputes affecting the relationship between federal and state governments. This role has been exemplified in Court decisions based on the Doctrine of Federalism, which holds that certain legislative functions are reserved specifically to the States. This doctrine has developed mainly through the Supreme Court's interpretation of the commerce clause, necessary and proper clause and supremacy clause of the U.S. Constitution.¹⁴⁷ These constitutional clauses simultaneously grant expansive federal powers and place

144. See Healey, *supra* note 136, at 225.

145. See generally, Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea*, 6 TULSA J. COMP. & INT'L L. 123, 125-33 (1999) (citing *Brown v. Maryland*, 25 U.S. (12 Wheat) 419 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 316 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).).

146. See generally JOHN R. SCHMIDHAUSER, *THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957* (1958) (describing the history of U.S. Supreme Court as a final arbiter between federal and state government).

147. See Lim, *supra* note 145, at 126 (discussing *Brown*, 25 U.S. (12 Wheat) 419; *Gibbons*, 22 U.S. (9 Wheat) 316; *McCulloch*, 17 U.S. (4 Wheat) 316).

restrictions on those powers.¹⁴⁸ Numerous Supreme Court decisions have interpreted the Constitution in a way that specifically demarcate federal and state powers.¹⁴⁹ Both the county's history and its changing political climate are reflected in such decisions.¹⁵⁰

The Supreme Court's Federalism decisions have followed two patterns. At first, the Supreme Court expanded federal powers by broadly interpreting the language of Article 1, Section 8, Clause 3 of the U.S. Constitution (also known as the "Commerce Clause").¹⁵¹

Currently, Supreme Court decisions seek to halt the expansion of any new federal powers, while also narrowing the scope of powers previously granted. This curtailment of federal powers is especially true with regard to the power of Congress. Supreme Court decisions based on Federalism rely heavily on the sovereignty of the States as described in the Tenth Amendment.¹⁵² Ironically, the earliest constructions of the Commerce Clause followed this interpretation. In *Wilson v. Black Bird Creek Marsh Co.*, Chief Justice Marshall interpreted a Delaware State statute to allow the state law to have an effect on interstate commerce, which has traditionally been controlled by federal power. Marshall found that the Delaware law did not exceed the state's authority, as long as the law only affected commerce through an incidental consequence of the state's exercise of its "police powers."¹⁵³ Today, the Supreme Court, led by Chief Justice Rehnquist, is returning to this view, resulting in a broader grant of state power and a simultaneous narrowing of federal power.¹⁵⁴ Therefore, the

148. *Id.*

149. *Id.*; see also JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM—THE GROWTH OF NATIONAL POWER 82-102 (1992); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW—CASES, COMMENTS, QUESTIONS 76-168 (7th ed. 1991).

150. See *Lim*, *supra* note 145, at 126 (discussing *Brown*, 25 U.S. (12 Wheat) 419; *Gibbons*, 22 U.S. (9 Wheat) 316; *McCulloch*, 17 U.S. (4 Wheat) 316).

151. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *NLRB v. Jones & McLaughlin Steel Corp.*, 301 U.S. 1 (1937); and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

152. See generally *San Antonio Metro. Transit Auth.*, 469 U.S. 528; *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Katzenbach v. McClung* 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

153. See *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (1 Pet.) 245 (1829).

154. See *United States v. Lopez*, 514 U.S. 549 (1995).

U.S. Supreme Court is the final arbiter in relationships between federal and state governments.

c. German Court System

German constitutional law (*Grundgesetz*) is also based on the Doctrine of Federalism. The role of the German Federal Constitutional Court is influenced by the doctrine of Federal Government-Friendly, a doctrine that regulates Federalism.¹⁵⁵ This unwritten doctrine requires the federal and state governments to perform their specific constitutional duties, while also obligating the states to cooperative relationships with the federal government.¹⁵⁶

In addition to interpreting other types of Constitutional issues, the German Constitutional Court adjudicates disputes over the power of the federal and state governments.¹⁵⁷ The Court's decisions are based on the text of the constitution and interpretations of the language.¹⁵⁸ Its power to influence national law, however, is not exclusive. Rather, the national legislative power is shared among the German Constitutional Court, federal government and state government.¹⁵⁹ With the permission of the Constitutional Court, the German Senate (*Senat*) approves the substance of laws affecting the States.¹⁶⁰ Administrative actions and enforcement of federal law are duties entrusted to the states.¹⁶¹ The power of the federal government is limited based on "legal suitability."¹⁶²

In sum, the German Federal Constitutional Court's power over national policy is weaker than that of the U.S. Supreme Court. Because Germany is smaller in both the number of states and the physical territory it covers, the distribution of power between the federal and state governments is not problematic.

155. See KONRAD HEESE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK [Basic Principles of German Constitutional Law] 168 (Hee-Yol Kay trans., Seoul: Sam-Young Sa, 1987).

156. *Id.*

157. *Id.* at 166-67.

158. *Id.*

159. *Id.* at 153-65

160. *Id.*

161. HESSE, *supra* note 155, at 166-67. For legal suitability, the federal law should be interpreted in a harmonious way with state laws as much as possible without any significant conflicts between them.

162. *Id.*

The doctrine of Federal Government-Friendly also lessens the conflict between the two legislative bodies.

d. Korean Court System

As mentioned *infra*, Korea is not a federal system but rather a unitary legal system. Under the Korean unitary system the courts are organized in three levels that are similar to the legal system in Japan.¹⁶³ Each level has separate original jurisdictional and appellate review powers.

The first level contains the district courts and family courts of first instance. The courts are subdivided into single-judge and collegiate trial divisions, which also include appellate divisions.¹⁶⁴ The second level consists of high courts, which hear appeals *de novo* from administrative agency decisions and from collegiate divisions of district courts.¹⁶⁵ The third level is composed of the Supreme Court, which hears appeals from high courts and appellate divisions of district and family courts, and exceptional appeals from courts of first instance.¹⁶⁶ Because Korea has a unitary legal court system, the Constitutional Court is not concerned with federal-state conflicts.

Under the Korean legal system the main role of the Constitutional Court is not to be a final arbiter in federal-state conflicts, but to protect the individual constitutional rights of the Korean people. As a result, the Korean Constitutional Court plays a more limited and less powerful role in the Korean political and legal systems. Unlike the high courts of other federal-state countries, the Korean Constitutional Court does not make decisions involving the power of the government. This distinction effectively limits the legitimacy of the Korean Constitutional Court and is an important reason why the Court's future is in jeopardy.

2. Pressure from the Other Branches of Government

Other branches of government often threaten the Korean Constitutional Court's existence. The absence of historical precedent in case law often undermines the legitimacy of the

163. West & Yoon, *supra* note 1, at 76.

164. *Id.*

165. *Id.*

166. *Id.* at 67.

Court's decisions. If the Korean Constitutional Court invalidates legal norms created by Congress or administrative agencies, the Court risks losing the support of those and other government bodies. Compared to other high courts, the Korean Constitutional Court is heavily impacted by political pressure.

A rare example of political influence over a Constitutional Court occurred when United States President Franklin D. Roosevelt tried to affect the decisions of the Supreme Court regarding his "New Deal Policy." Roosevelt, along with a liberal Democratic majority in Congress, enacted a series of new social programs to stimulate the economy.¹⁶⁷ The Supreme Court struck the programs, ruling that Congress had exceeded the limits of its Commerce powers.¹⁶⁸

Frustrated by his inability to implement the New Deal programs, Roosevelt devised a "court packing" scheme to change the makeup of the Court and make it more favorable to his policies.¹⁶⁹ Roosevelt sent a bill to Congress that would have allowed him to appoint an additional justice to the Supreme Court for every sitting justice who was over seventy years of age.¹⁷⁰ He reasoned, at least publicly, that the Court was overloaded and needed the additional justices to keep up with its heavy caseload.¹⁷¹ Before Congress voted on the bill, the Supreme Court upheld both state and federal New Deal regulations in two surprising decisions.¹⁷²

Another example of political pressure on a constitutional court occurred in Nazi Germany.¹⁷³ While in control, Adolf Hitler exercised almost unlimited power over the composition of the Judiciary, including the appointment of the justices and the length of their terms.¹⁷⁴ Not surprisingly, judges who did not comply with Hitler's prerogatives were expelled from the judiciary.¹⁷⁵ As a

167. See Ellis Katz, *The U.S. Supreme Court and the Integration of American Federalism*, FEDERALISM AND SUPREME COURTS 35, 42 (Edmond Orban & Bruylan Bruxelles eds., 1991).

168. *Id.* at 40-44.

169. *Id.*

170. *Id.* at 42.

171. *Id.* at 42-43.

172. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

173. See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 293-94 (Deborah Lucas Schneidef trans., Harvard Univ. Press 1991).

174. *Id.* at 294.

175. *Id.*

result, the Court acted as a subordinate agency to validate the laws and regulations of Hitler, not as an independent body charged with the duty of protecting fundamental individual rights.¹⁷⁶

Legal precedent also restricted the Justices' ability to reverse laws implemented by the Nazi regime. The Weimar Court was unwilling to punish Nazis, including Hitler, because of the political Nazi principle, "whatever benefits the people is right."¹⁷⁷ Five years before the Nazis seized power, the highest courts in the land had adopted this as a legal principle.¹⁷⁸

The political theory of legal positivism also influenced the German Justices during this period.¹⁷⁹ Legal positivism requires judges to separate law and morality when reaching decisions. Hiding behind this theory, judges were able to rationalize and validate the inhumane and unjust Nazi laws.¹⁸⁰

In Korea, political influence over the Judiciary has an even more damning effect than the examples discussed above. During the tenure of The Third Republic, the Korean Constitutional Court had judicial review powers resembling the power granted to the U.S. Supreme Court. The Korean Constitution also provided that the President could appoint Supreme Court Justices, as long as a justice completed his guaranteed six-year tenure and the Chief Justice received approval from a majority of the Council for the Recommendation of Justices.¹⁸¹

Pursuant to its grant of power in the Constitution, the Court accepted appellate review of the State Damage Redress Act of 1971. At issue was the constitutionality of Article 2, Section 1 of the Act, which did not give public servicemen the right to legal redress because they were eligible for compensation under accident indemnities and survivor pension plans.¹⁸² The Court's ruling that the Act violated the Equal Protection Clause of the Constitution led to the "Judiciary Crisis of 1970."¹⁸³ The decision expanded the scope of State liability.¹⁸⁴ It was the only time a

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. S. KOREAN CONST. art. 99, § 2 (Third Republic).

182. State Damage Redress Act, art. 2, § 1 (1971) (S. Korea).

183. Korean Supreme Ct., Dec. of June 22, 1971, 70 Da 1010.

184. *Id.*

legislative act was held unconstitutional in the ten years of the Court's operation.

President Park's anger at the Court's action pressured many justices into retirement, leading to more than half of the Justices being replaced.¹⁸⁵ This political influence by the President could have resulted in making judges reluctant to hold a law unconstitutional. As a result of the court's decision, judicial independence no longer exists in Korea. Due to his fear of more assertive courts in the future, President Park removed the final authority of judicial review from the courts, passing a new Constitution the following year.¹⁸⁶

3. Power Struggle with the Korean Supreme Court

Conflicts over the Constitutional Court's power occurred not only with the other branches of government, but also within the Korean Judicature, as the Constitutional Court is separate from the general courts.¹⁸⁷ Prior to the creation of the Constitutional Court the Supreme Court was the highest court of the Judicature.¹⁸⁸ When the Constitutional Court was assembled, the power of the Supreme Court was reduced.

The existence of the two courts created a power struggle. Each court insisted it had the final power to review legal norms.¹⁸⁹ Due to this conflict, Korea faced the need to establish rules defining the jurisdiction of each court. The challenge to the Judicial Scrivener exam, discussed in Section III above, was one case that clarified the scope of the Supreme Court's jurisdiction. This case held that while the power of final judicial review is with the Korean Constitutional Court, the power to make decisions regarding administrative rules and orders belongs to the Korean Supreme Court.¹⁹⁰ The decision to separate the power of judicial review, established in this case, resulted in discord among the Korean Judicature and threatened the status of the Constitutional Court.¹⁹¹

185. CHANG-MIN LEE, SEOSOMOONESEO SEOCHODONG GGAJI [FROM SEOSOMOON TO SEOCHODONG] 191-96 (Seoul: Hankook-Ilbo Publishing Co. 1993).

186. See S. KOREAN CONST. art. 99, § 2 (Third Republic).

187. See *id.*

188. West & Yoon, *supra* note 1, at 81.

189. See generally Moon-Hyun Kim, *supra* note 6, at 79.

190. Korean Const. Ct., Dec. of Oct. 15, 1990, 89 KCC Ma 178.

191. *Id.*

Further complicating the relationship between the Korean Constitutional Court and Supreme Court is the authority of the Chief Justice of the Supreme Court to nominate three justices to the Constitutional Court.¹⁹² The Supreme Court also controls the administration of promotions and transfers of judges at the lower levels of the judiciary.¹⁹³ Further, the Supreme Court supervises the Judicial Research and Training Institute, an institution with a statutory monopoly over advanced practical training of all Korean judges, prosecutors and licensed lawyers.¹⁹⁴

This has led many judges to regard the Korean Supreme Court as being the more powerful court, although the Constitutional Court arguably has broader jurisdiction to render decisions.¹⁹⁵ The Constitutional Court's powers have been described as "comparable to those of other Korean national authorities with the highest level of governmental authority."¹⁹⁶ Hence, the Chief Justice of the Constitutional Court is not subordinate to the leaders of other branches of the judiciary or government. Realistically though, the Constitutional Court has few allies within the judicial branch or among the powerful agencies of the executive branch.¹⁹⁷ Consequently, Korean bureaucrats, along with the majority of judges and prosecutors, continue to regard the Korean Supreme Court as more significant than the Korean Constitutional Court.¹⁹⁸

B. Proposals for the Stable and Continuous Development of the Korean Constitutional Court

As discussed above, the Korean Constitutional Court adopted many attributes of both the German and U.S. high court systems. Accordingly, the Court's organization and empowerment are similar to that of the high courts in Germany and the United States. Additionally, the courts of all three countries experience the threat of political influences.

192. West & Yoon, *supra* note 1, at 81.

193. *Id.*

194. *See id.* at 77-82 (describing the position of maximalist and minimalist assessments of the role of the Constitutional Court).

195. *See id.* at 82.

196. *Id.* at 81.

197. West & Yoon, *supra* note 1, at 81.

198. *Id.*

The role of constitutional adjudication in Korea, however, is different than in Germany and the United States. Because Korea has a unitary legal system, the Constitutional Court's decisions have limited significance. While the U.S. Supreme Court and German Constitutional Court are the final arbiters in federal-state relations, the Korean Constitutional Court only can render decisions regarding the constitutional rights of individuals. Hence, proposals for reform must be made with an eye toward this sole function of the Korean Constitutional Court.

First, while there are several possible solutions to some of the problems of the Korean Constitutional Court, those who bring reform proposals must keep in mind that the Court will never have the power of a federalist court system. Ultimately, this will always limit the power of the Court. During future reforms of the Constitutional Court system, more care should be exercised before adopting attributes of other national legal systems. The adoption of the current Constitutional Court was done recklessly, without considering if it was suitable for a unitary legal system.

Second, implementing variational decisions for use during concrete judicial review can lessen the antagonism of other government branches. For instance, the Decision of Limited Constitutionality enables the Constitutional Court to avoid completely nullifying a law by reading the law to restrictively conform to the Constitution. Additionally, Decisions of Disagreement with the Constitution allow judges to acknowledge the temporary force of a law to prevent a legal vacuum and chaos, despite the admission of the law's unconstitutionality. Moreover, the Decision of Urging Legislation warns Congress that even though the law at issue is constitutional at this time, it is likely to be unconstitutional in the future.

In sum, variational decisions give Congress and the Executive time to revise laws and regulations to comply with the Constitution. This allows the Court to make decisions while still recognizing and respecting the independence of the other branches of government.

Furthermore, variational decisions protect the Court from public hostility. Constitutional adjudication often involves sensitive political and economic interests. Without the ability to render variational decisions, the Constitutional Court would be limited to the two extremes of either finding a law constitutional or nullifying the law as unconstitutional. There will always be disagreement regarding the Court's decision. Limited to only two

types of decisions, the Court will continue to polarize the country because every decision would necessarily deny an interest while supporting another interest. When a group's political or economic interests are denied, the group will grow antipathetic toward the Constitutional Court and ultimately may withdraw support altogether. Moreover, the disenfranchised groups will align together to challenge the validity of the Court. This could be fatal to the existence of the Constitutional Court. Thus, variational decisions enable the Constitutional Court to circumvent potentially disastrous public attacks.

Third, reform efforts should aggressively address the Court's jurisdictional conflicts with the Supreme Court. During the Third Republic, the Supreme Court had broad powers of judicial review. Because the power of review was vested in the general courts, there was hope that the courts' would harmonize constitutional doctrine.¹⁹⁹ The results, however, fell short of expectations.²⁰⁰ Due to fear of politicizing the judiciary, the Supreme Court maintained a policy of judicial restraint and frequently reversed the lower court's holdings. One can argue that the Supreme Court was negligent in performing its duties at this time.

The Constitutional Court, in contrast, strongly exerts its powers, as directed by the Constitution. The Court tries to strike a balance between the need to avoid politicization of the court and the need for uniform constitutional adjudication, a function abandoned by the Supreme Court under the previous legal system. The Supreme Court should support these efforts.

Finally, because of the nature of constitutional adjudication, with its unique background, principles and techniques, it is prudent to distinguish it from other fields of adjudication. As is done in the German legal system, the Constitutional Court should be given exclusive jurisdiction over constitutional questions, including review of administrative rules and orders, rather than sharing the power with the general courts. This would eliminate further disagreement among the courts as to which court can make constitutional decisions, and would also serve to harmonize constitutional interpretation.

199. Yoon, *New Developments*, *supra* note 23, at 407.

200. *Id.* at 404-06.

V. CONCLUSION

The Korean Constitutional Court has greatly contributed to changing the citizens' perception of the Constitution and government. The Court publicly scrutinizes powers that previously seemed to go unchecked. The new role of the Court is the result of a revamped legal system and a modern form of judicial activism.

Previously, authoritarian politics and lack of constitutional decisions limited constitutional scholarship to mere dogmatism. Now, lively discussions of constitutional issues have brought new life to Korean public law. Constitutional decisions have become one of the most important sources of this law.

The Korean Constitutional Court is performing a great service for Korean society. By protecting individual rights, scrutinizing law enforcement and demystifying constitutional theories, the Court is becoming an important element of Korean society, and thus, it should be protected from attacks by other government branches and hostile groups. Legal and institutional mechanisms that secure its existence and continuous development must be developed immediately.

