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# **Constitutionalism in Korea: past, present, and future**

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## **1. Introduction**

Constitutionalism is a doctrine that a government's authority is determined by a constitution. This nominal definition of constitutionalism lacks actual meaning. Because all states have constitutions, and all states are constitutional states. So many scholars define constitutionalism more prescriptively rather than descriptively. In this sense, constitutionalism is the principle that the authority of government derives from and is limited by a body of fundamental law. Constitutionalism is regarded as a crucial aspect of democratic governance as it provides a framework for the protection of individual rights, the separation of powers, and the rule of law.

Until the late 19<sup>th</sup> century Korea was under an absolute monarchy. The Korean Empire became a protectorate of Japan in 1905 and was formally annexed to Japan in 1910. The Japanese ruler implemented the civil law system and a nominal idea of constitutionalism in the Korean peninsula. Japanese rule over Korea ended in 1945 upon the surrender of Japan in World War II. The American military government ruled South Korea from 1945 to 1948. During that period South Koreans experienced the common law system and prescriptive constitutionalism. Real constitutionalism was finally introduced in Korea, however, unfortunately only in South Korea. The Founding Constitution of Korea was established on July 17, 1948.

Koreans suffered the Korean War from 1950 to 1953. After the War, Korea was one of the poorest countries in the world. Since then, Koreans have experienced a rapid social change and economic growth. Now, Korea is a member of the OECD and the G-20 major economies. As society changed dramatically, Korea has adopted nine constitutional amendments. With these amendments, Koreans experienced both presidential and parliamentary system. Also, Korea has adopted various kinds of constitutional adjudication system.

In this paper the Korean experience of the constitutional adjudication system will be overviewed. This may show the process of the development of constitutionalism in Korea. The future of constitutionalism in Korea will be mentioned at the last part.

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## **2. Constitutional adjudication system in Korea**

When the Founding Constitutional Bill of Korea was drafted, there was a dispute over the constitutional adjudication system. The nominee for the first Chief Justice of the Supreme Court argued the power of judicial review should belong to the ordinary courts. He worked as the head of Judicial Department of the US Military Government. However, scholars who oversaw drafting the Bill insisted it would be improper to adopt the American style judicial review system. They thought Korean judges' credibility suffered in their collaborating with the Japanese government during the colonial period. Also, at that time, many influential scholars studied law in Japan or Germany. So, the final version adopted the European style of constitutional adjudication system, the Constitutional Committee.

Since Korean lawyers were not familiar with judicial review, only six cases were referred to the Constitutional Committee from 1948 to 1961. The Committee rendered a decision of unconstitutionality in two cases in 1952. One of them was related to the right to trial. When the Korean War broke out, the President issued the Special Decree that adjudication of crimes which committed during the state of emergency was limited to the district court and no appeal allowed. The Constitutional Committee found that this Presidential Decree infringed the right to appeal and was unconstitutional. Korean people realized the Constitution was above the President who was a very strong leader.

The Student Revolution of April 1960 overthrew the first President Rhee's regime. The new Constitution adopted a parliamentary system and introduced the Constitutional Court. This new Court was designed following the German model. However, before the Constitutional Court was organized, the military coup broke out and the Constitutional Court Act became nullified. Although the Court could not be formed, it played an important role of reference in the formation of the current Constitutional Court.

After two-year military rule, Korea returned to a presidential system in 1962. The new Constitution introduced the American style judicial review. The new government assigned a high priority to economic development. Protection of human rights were forced to give way to economic prosperity. The executive branch led by the strong President was much more powerful than the Judicial branch. The Supreme Court failed to exercise its new power of judicial review. However, in 1971, the Supreme Court held the State Tort Liability Act which limited the government liability for damages of military personnel unconstitutional. This judgement invoked fury of the President since the Korean

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government was suffering fiscal pressure and it was impossible to fully compensate all military personnel who were dead or injured during the Korean War and the Vietnam War.

The President declared a state of national emergency in 1971 and suspended the Constitution. The Constitution was amended in 1972 and made the above Supreme Court's decision of unconstitutionality null and void. This new Constitution reintroduced the Constitutional Committee. This new Committee was designed to be a nominal agency. No review of the constitutionality of a statute has been made in this Committee.

The economy continued to flourish under the authoritarian rule. The Korean economy was rapidly grown in 1980s. The economic growth led to radical political and social transformations. A large constitutional revision was completed in 1987. It was the first time the amendment took place as a result of people's demand for a system in which they could freely choose their own government. Under this current Constitution, the Constitutional Court of Korea (CCK) was established and democracy in Korea has been fully realized.

### **3. The Development of Constitutionalism by the CCK**

#### **A. The Organization of the CCK**

The Constitutional Court Act was proclaimed in 1988 and the CCK was established. The CCK has jurisdictions of the adjudication on the constitutionality of statutes, impeachments, dissolution of a political party, competence disputes between government institutions or local governments, and constitutional complaints.

The CCK is composed of nine justices. They are appointed by the president of the Republic. Among them, three justices are appointed from lawyers selected by the National Assembly and three are appointed from lawyers nominated by the Chief Justice of the Supreme Court. The term of office is six years and may be reappointed. A retirement of age is 70. When the CCK announces a decision of the unconstitutionality of a law, impeachment, or dissolution of a political party or an affirmative decision regarding the constitutional complaint, six or more of nine votes are required.

The CCK received 48,488 cases until May 31, 2023. The Court decided 46,854 cases, among which 29,658 cases (63%) were dismissed by small benches of the Court. Among the 16,027 decisions held by the full bench, the Court decided in favor of complainants in 2,026 decisions, at least in part, of the law or public action in question: 730 unconstitutionality, 306 unconformability to the constitution,

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70 unconstitutionality in certain contexts, 28 constitutionality in certain contexts, and 892 nullity of the public action.

## **B. Expanding Role of the CCK**

Before 1987, Koreans had endured a series of dictatorships for about 40 years. These authoritarian governments produced many laws and decrees that violated basic rights; some were unquestionably unconstitutional. Ironically, this provided a favorable milieu for the newborn Court: Koreans embraced the CCK because of its significant role in eliminating these regulations and protecting their freedoms.

During its first decade (1988–1998), in addition to striking down laws that infringed on people's fundamental rights, the CCK voided all statutes giving the president unlimited power to issue certain decrees. During the 1960s to 1980s, Korean presidents administered many decrees concerning matters that rightfully belonged to the National Assembly; the court decisions improved the balance of power between the president and the National Assembly. Furthermore, the CCK invalidated several election laws. In 1994, for example, the Court took issue with the Presidential Election Act, which prohibited election campaigns<sup>1</sup>. This and similar rulings facilitated fairer and freer elections; and in 1997, the opposition leader Kim Dae-jung won the presidential election as the first liberal candidate in Korea. Koreans have since witnessed several peaceful regime changes, an undeniable indicator of a functioning democracy.

During its second decade (1998–2008), the CCK handed down several decisions affecting foundational issues of democracy. In 2002, it ruled that the ban on "improper communication" on the internet violated the Constitution<sup>2</sup>. This ruling increased the exchange of information via the internet and made Korean society more open. In 2005, the CCK found the patriarchal family registration system unconstitutional<sup>3</sup>. Given the male-oriented Korean culture and strong opposition of the Korean Confucians, this was a courageous decision.

During its third decade (2008–2018), the CCK became the most trusted institution in Korea. The Court addressed almost all major issues of Korean society, settling various socio-political conflicts. In 2013, for instance, when relations between North and South Korea led to the brink of war, the Unified

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<sup>1</sup> Constitutional Court, 93Hun-Ka4 et al., July 29, 1994.

<sup>2</sup> Constitutional Court, 99Hun-Ma480, June 27, 2002.

<sup>3</sup> Constitutional Court, 2001Hun-Ka9–15, Feb. 3, 2005.

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Progressive Party (UPP) leaders were arrested for plotting treason. This controversy polarized Korean society. When the CCT disbanded the UPP, in part because the party's objectives and activities violated the basic democratic order of South Korea<sup>4</sup>, the majority of people supported this decision, which resolved the social and political dispute.

Currently (2019-2023), the CCK has tried to strengthen economic and social rights. For example, in 2020, the Court found that a provision of presidential decree restricting the eligibility to apply for activity support allowances for persons with disabilities does not conform to the Constitution<sup>5</sup>. In 2023, the Court decided that a provision of the Act on *Promotion of the Transportation Convenience of Mobility Disadvantaged Persons* does not confirm to the Constitution because it provided safety criteria for wheelchair restraint systems in special means of transportation based solely on standard wheelchairs<sup>6</sup>.

Also, for the past 10 years, the CCK has expanded the fundamental rights of Koreans by interpreting the Constitution in a more human-rights-friendly way, even overruling some well-established precedents. In 2015, it declared that punishing adultery as a crime was unconstitutional<sup>7</sup>. In 2018, the Court found that the code denying conscientious objectors alternative options to military service was incompatible with the Constitution<sup>8</sup>. It also ruled against a statutory ban on outdoor assemblies in the vicinity of the National Assembly<sup>9</sup> and court buildings<sup>10</sup>. In 2019, the Court ruled that the abortion ban was unconstitutional and ordered the law needs to be revised<sup>11</sup>.

Most importantly, the 2017 impeachment ruling against President Park was a landmark decision establishing the power of Korea's democratic constitution over authoritarianism<sup>12</sup>. A Washington Post columnist wrote "South Korea shows the world how democracy is done." He continued: "The Court's

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<sup>4</sup> Constitutional Court, 2013Hun-Da1, Dec. 19, 2014.

<sup>5</sup> Constitutional Court, 2017Hun-Ka22 et al., Dec. 23, 2020.

<sup>6</sup> Constitutional Court, 2019Hun-Ma1234, May 25, 2023.

<sup>7</sup> Constitutional Court, 2009Hun-Ba17 et al., Feb. 26, 2015.

<sup>8</sup> Constitutional Court, 2011Hun-Ba379, June 28, 2018.

<sup>9</sup> Constitutional Court, 2013Hun-Ba322 et al., May 31, 2018.

<sup>10</sup> Constitutional Court, 2018Hun-Ba137, July 26, 2018.

<sup>11</sup> Constitutional Court, 2017Hun-Ba127, Apr. 11, 2019.

<sup>12</sup> Constitutional Court, 2016Hun-Na1, Mar. 10, 2017.

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act of institutional defiance is especially remarkable when you consider that democracy in South Korea is mere 30 years old.”<sup>13</sup>

#### **4. Challenges and Future Tasks**

When the CCK was created in 1987, few expected the Court to establish itself so quickly as a powerful institution. The Court immediately asserted its authority by eliminating many unconstitutional laws, and the widespread support of the people then allowed the Court to expand its judicial oversight. To date, the CCK has struck down almost all the undemocratic relics of Korea's past authoritarian regimes while expanding fundamental rights for Koreans.

However, as the CCK proved itself as the most important and influential institution of the Republic, the CCK has encountered more criticisms from the political circle, the media, and people who do not find implications of the CCK's decisions readily acceptable. Also, the executive and legislative branches have tried to keep the CCK in check. As of now, the CCK enjoys strong support from most people. This popularity makes the CCK maintain its independence and neutrality.

It is also important to note that there is a big rivalry between the CCK and the Supreme Court of Korea. They have different and separate jurisdictions. They are independent from each other in every aspect. The CCK and the Supreme Court are in a tense relation in cases where the two highest courts have different conclusions on the same issue. While this tension causes unnecessary inconvenience for public, the rivalry between the two institutions is serving as a motivation for more decisions favorable to human rights.

The CCK has been trying to enhance the social and economic rights of people. The implementation of environmental rights is another big task of the CCK. Budgetary support from the government is necessary to broaden the protection of the social and economic rights. The care and protection of the environment are a shared responsibility of three powers of the State: administrative, legislative, and judicial power. Since the CCK lacks appropriate expertise in financial affairs and budgetary priorities, it needs assistance from the government. However, it is not easy for the CCK to attract enough support from the government.

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<sup>13</sup> <https://www.washingtonpost.com/news/democracy-post/wp/2017/03/10/south-korea-shows-the-world-how-democracy-is-done/>

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The constitutional globalization is another goal of the CCK. Korea became an official member state of *the European Commission for Democracy through Law*, better known as the Venice Commission, in 2006. The CCK took the initiative to create *the Association of Asian Constitutional Courts and Equivalent Institutions* (AACC) to develop democracy and realize the principle of the rule of law, as well as to protect basic human rights in Asia. In 2007, the Preparatory Committee of the AACC was established at the 5th Conference of Asian Constitutional Court Judges in Seoul. From 2008 to 2010, four preparatory meetings for the AACC were held in Seoul. In 2010, the Jakarta Declaration on the Establishment of the AACC was adopted. In 2012, the CCK hosted the Inaugural Congress of the AACC in Seoul. The Venice Commission strongly supported the establishment of the AACC throughout the whole process.

In 2016, a consensus was achieved among members of the AACC to establish a Secretariat for Research and Development (SRD) in Seoul. The AACC's objectives are the protection of human rights, the guarantee of democracy, the implementation of the rule of law, the independence of constitutional courts and the cooperation and exchanges of experiences and information among members. The AACC SRD plays a vital role in the achievement of these goals and acts as a channel of communication of AACC member institutions.

Asia is an only continent which has no regional court of human rights. The CCK started studying possibility of the creation of the Asian Court of Human Rights. The CCK wanted to get support from the *World Conference on Constitutional Justice* (WCCJ) on this study. In 2014, just in time, the 3rd Congress of the WCCJ was held in Seoul. With the substantial assistance of the Venice Commission, the Seoul Communique was adopted at the 3rd Congress of the WCCJ. In this Communique, the participants encouraged participating Asian Courts to promote discussions on the possibility of establishing an Asian Human Rights Court based on international human rights norms. An Asian human rights court will be a historical monument to enhancement of protection of human rights in Asia. Because of tremendous diversity in Asia, it will take a significant time and effort to establish a regional human rights court in Asia. However, well begun is half done.

## **5. Conclusion**

The Constitutionalism in Korea has been established firmly and irreversibly. The *Economic Intelligence Unit* rated South Korea a "full democracy" in 2022. According to the *Economist Democracy Index* of 2022, there are only 24 countries which enjoy full democracy among 167

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countries and territories. In Asia there are only 3 states which rated as full democracy: Japan, Taiwan, and South Korea.

In this globalized world, we all share the same idea of human rights and rule of law. However, it is regrettable that most people in the world do not enjoy full democracy. Korea has been achieving real democracy in a relatively short period of time. This experience may be a good reference for countries which try to build a democratic nation under real constitutionalism. The more countries become a full democratic nation, the more peaceful this world becomes.