

〈특집: 아시아 민주주의 발전에서 헌법재판의 역할〉

## A Perspective on the Development of Constitutional Adjudication in Korea\*

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### Abstract

1. According to the Article 111 (2) of the Constitution, the Constitutional Court shall be composed of nine Justices qualified to be court judges. This qualification in Justice is very narrow. In spite of the Constitutional Court's establishment as an independent judicial organization, the limit of qualification is inconsistent in view of the Constitutional Adjudication's nature.
2. The Constitutional Court and the Supreme Court mutually maintain independent and horizontal relations. But the separation of jurisdictions leaves much room for jurisdictional disputes and the tension in the relationship between the National Assembly and the Constitutional Court is well expected.
3. The Constitutional Court may decide on the case as nonconforming to the constitution, unconstitutional in part, constitutional in part, as well as unconstitutional or constitutional. If the ordinary court and the Supreme Court do not accept modified decisions like decision of limited constitutionality, limited unconstitutionality, there could be a possibility of conflict. However, the Constitutional Court has decided that all of the different levels of judgments have binding powers, and it is only a matter of when such modified decisions should be given.

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## I. History of the Korean Constitutional Adjudication System

No major changes could be seen in the organization and the structure of the courts in the Korean judicial system. The courts were composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels since the Founding Constitution. The only slight changes were the nomination and selection process of the Chief Justice of the Supreme Court and the Supreme Court Justices.

Meanwhile, as constitutional litigation institution became diversified, the newly established Constitutional Court's stability and role was expected. The institution of adjudication on the constitutionality of statutes was modified with the change of the Republic : the Founding Constitution's Constitution Committee was then followed by the Constitutional Court of the 2nd Rep.'s Constitution, the Supreme Court of the 3rd Rep.'s Constitution, the Constitution of the 4th Rep. and the 5th Rep.'s Constitution Committee, and finally the Constitutional Court of the 6th Rep.'s Constitution, which followed the European constitution in the latter half of the 20th century.<sup>1)</sup>

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<sup>1)</sup> SUNG, NAK IN and etc., *Constitutional Litigation*, Bobmunsa, Korea, 2012, pp.34-45; SUNG, NAK IN, *History of Korean Constitutional Law*, Bobmunsa, Korea, 2012.

## II. General Provisions of the Constitutional Court

### 1. The Organization of the Constitutional Court

The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President (Constitution Article 111 Clause 2). Among the Justices, three shall be appointed from persons selected by the National Assembly, and three shall be appointed from persons nominated by the Chief Justice of the Supreme Court (Constitution Article 111 Clause 3). The president of the Constitutional Court shall be appointed by the President of the Republic from among the Justices with the consent of the National Assembly (Constitution Article 111 Clause 4).<sup>2)</sup>

**Independence of Justices :** The Justices shall adjudicate independently according to the Constitution and laws, guided by their consciences (Constitutional Court Act (CCA) Article 4).

**Qualifications of Justices :** The Justices shall be appointed from among those who are forty or more years of age and have held any of the following positions

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#### <sup>2)</sup> Appointment of Justices

The Justices shall be appointed by the President of the Republic. Among the Justices, three shall be elected by the National Assembly, and three shall be designated by the Chief Justice of the Supreme Court (CCA Article 6 clause 1).

The Justices shall be appointed, elected or designated after a Personnel Hearing held by the National Assembly. In this event, the President shall request a Personnel Hearing before he or she appoints the Justices (except the Justices who shall be elected by the National Assembly or designated by the Chief Justice of the Supreme Court) and the Chief Justice of the Supreme Court shall request a Personnel Hearing before he or she designates the Justices (Clause 2).

In the event the term of a Justice expires or a Justice approaches the retirement age, a successor shall be appointed no later than by the date of term expires or when the Justice reaches his or her retirement age (Clause 3).

When a vacancy occurs during the term of office of a Justice, his/her successor shall be appointed within 30 days from the date a vacancy occurs (Clause 4).

Notwithstanding paragraphs (3) and (4) of this Article, when the term of office of a Justice elected by the National Assembly expires or he/she reaches the retirement age, or a vacancy occurs during adjournment or recess of the National Assembly, the National Assembly shall elect his/her successor within 30 days after resuming of the session or the commencement of next session (Clause 5).

for fifteen or more years : *Provided*, that the periods of service of the person who has held two or more following positions shall be aggregated (CCA Article 5 clause 1) :

1. Judge, public prosecutor or attorney;
2. Person who is qualified as attorney, and has been engaged in legal affairs in a state agency, a state-owned or public enterprise, a government-invested institution or other corporation; or
3. Person who is qualified as attorney, and has held a position equal to or higher than assistant professor of law in an accredited college.

No person falling under any of the following shall be appointed Justice :

1. Person who is disqualified to serve as a public official under the pertinent laws and regulations;
2. Person who has been criminally sanctioned with a sentence of imprisonment without forced labor or more severe sentence; or
3. Person for whom five years have not yet passed since his or her dismissal resulting from impeachment (clause 2).

The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act (Constitution Article 112 Clause 1).<sup>3)</sup> The Justices of the Constitutional Court shall not join any political party, nor shall they participate in political activities (Constitution Article 112 Clause 2).<sup>4)</sup> No Justice of the Constitutional Court shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment (Constitution Article 112 Clause 3).<sup>5)</sup>

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<sup>3)</sup> Term of Justices

The term of Justices shall be six years and may be renewed (CCA Article 7 Clause 1). The retirement age of a Justice shall be sixty-five: *Provided*, That the retirement age of the President of the Constitutional Court shall be seventy (Clause 2).

<sup>4)</sup> Prohibition of Justices' Participation in Politics : No Justice shall join a political party or participate in politics (CCA Article 9).

<sup>5)</sup> Guarantee of Justices' Status : No Justice shall be removed from his or her office against his or her own will unless he or she falls under any of the following :

The organization, function, and other necessary matters of the Constitutional Court shall be determined by Act (Constitution Article 113 Clause 3).

The Constitutional Research Institute which is a unique institution in Korea was established in 2011. The Constitutional Research Institute shall be established in the Constitutional Court for the purpose of carrying out the research on the constitutional law and constitutional adjudication and education for Constitution Research Officers, administration staff, etc (CCA Article 19-4 Clause). The Constitutional Research Institute shall be composed of less than 40 personnel, including its own President, who shall be appointed from Constitution Research Officer of the Constitutional Court or public official of Rank I in general service (Clause 2). Notwithstanding paragraph (2) of this Article, the President of the Constitutional Research Institute may be appointed as a public official in temporary position (Clause 3). Matters concerning the organization and operation of the Constitutional Research Institute shall be stipulated in the Constitutional Court Regulations (Clause 4).

Decisions of the Council of Justices shall be taken with the attendance of seven or more Justices and by the affirmative vote of a majority of the Justices president (Constitutional Court Act Article 16).

## 2. The Competence of the Constitutional Court

The Constitutional Court shall have jurisdiction over the following matters :

1. The constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between State agencies, between State agencies and local governments, and between local governments;
5. Constitutional complaint as prescribed by Act (Constitution Article 111 Clause 1).

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1. When an impeachment decision is rendered against him or her; or
  2. When he or she is criminally sanctioned with a sentence of imprisonment without forced labor or more severe sentence (CCA Article 8).

The Constitutional Court may establish regulations relating to its proceedings and internal discipline and regulations on administrative matters within the limits of Act (Constitution Article 113 Clause 2).

### 3. The Decision of the Constitutional Court

When the Constitutional Court makes a decision on the constitutionality of a law, a decision of impeachment, a decision of dissolution of a political party, or an affirmative decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required (Article 113 Clause 1).

### 4. Definition of Judgments on the Constitutionality of Law

According to the present Constitution, the Constitutional Court is established as a court separated from ordinary courts. Its function is to make post decisions on a case-by-case basis. When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof (Article 107 Clause 1). The Constitutional Court has jurisdiction over the constitutionality of a law upon the request of the courts (Article 111 Clause 1 Item 1). When the Constitutional Court makes a decision on the unconstitutionality of a law, the concurrence of six Justices or more is required (Article 113 Clause 1).<sup>6)</sup>

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<sup>6)</sup> Cf. SUNG, NAK IN, “A Perspective on Development of Constitutional Adjudication in Korea”, in *Rechtsreform in Deutschland und Korea im Vergleich*, Duncker & Humboldt : Berlin, 2006. 11.

### III. Constitutionality of a Law upon the Request of the Courts

#### 1. Court's Request for a Decision on the Unconstitutionality of a Law

##### (1) Definition

When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof (Article 107 Clause 1). This article demands for the courts to request for the Constitutional Court's decision on the constitutionality of a law when there is a possibility of the law being unconstitutional.

##### (2) Effect of Request for an Adjudication on the Constitutionality of Laws : Suspension of Court Proceedings

When an ordinary court requests to the Constitutional Court for an adjudication on the constitutionality of states, the proceedings of the ordinary court shall be suspended until the Constitutional Court makes a decision (Article 42 Clause 1). However, provided, that if the court deems urgent, the proceedings other than the final decision may be proceeded.

#### 2. Constitutional Court's Adjudication on the Constitutionality of Laws

Adjudication on the constitutionality of laws refers to the term in which the court requests a decision of the Constitutional Court when the constitutionality of a law is at issue in a trial, and the Constitutional Court judges according to the decision thereof (Article 107 Clause 1, Article 111 Clause 1 Item 1).

Although the current practice adopts a system in which the adjudication on the constitutionality of laws are ex post facto revised konkrete Normkontrolle, any statute or provision thereof decided as unconstitutional loses its effect (Constitutional Court Act Article 47 Clause 2). Although the Constitutional Court adopts a German system formality wise, the fact that it adopts konkrete Normkontrolle

system is what it makes a difference with the German *abstrakte Normkontrolle* system.

#### IV. The Types of Decisions of Adjudication on constitutionality of laws and their Effects

##### 1. Definition

There is no sufficient article within the Constitutional Court Act that mentions the types of decisions of adjudication on the constitutionality of law. “The Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional. Provided, that if it is deemed that the whole statute becomes unable to enforce due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute” (Constitutional Court Act Article 45). There is no controversy in recognizing the fact that two constitutional decision types exist (constitutional or unconstitutional), but there is controversy in recognizing whether there is a middle ground between the two types of decisions, such as a modified decision type, or in what form the decision order should be given. The categories of the types of decisions differ slightly between scholars and the Constitutional Court. In the casebook of the Constitutional Court, the decisions are categorized into dismissed by small benches, constitutional, declaration of non-unconstitutional, modified, unconstitutional, and unconstitutional in certain context. Modified decision types are categorized into unconformable to constitution, constitutional in certain context, urging legislation, unconstitutional in certain context.<sup>7)</sup>

Since the decision of dismissed by small benches is a decision made before the Constitutional Court decides upon the constitutionality of law during the main judgment, generally the decisions which are most at issue are constitutional, unconstitutional, and modified decision types. Constitutional decisions are further

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<sup>7)</sup> SUNG, NAK IN, Constitutional Law 12th edition, Bobmunsa, Korea, 2012, pp.1303-1329.



categorized into simple constitutional decision and declaration on non-unconstitutional decision. Apart from the simple unconstitutional decision, unconstitutional decisions are types of modified decision and will be covered under this subject.

## 2. Modified Decisions

### (1) Definition

Ordinarily, the Constitutional Court makes a judgment of simple constitutional or simple unconstitutional decisions, but at times for reasons such as respecting the legislative rights of the National Assembly, securing the legal community, overcoming the confusing situation of legal gap and some other complicated constitutional situation, the Court needs to act flexibly and make a judgment of modified decisions.

The many versions of modified decisions include unconformable, request for legislation, limited constitutionality, limited unconstitutionality, partly unconstitutional, unconstitutional for application, et cetera.

The point at issue for modified decisions is not only whether they could be allowed, but it is also related to the form and structure of the decisions. Although the modified decisions of the Constitutional Court are inevitable, they must be ruled on a minimum level.

### (2) Unconformable Decision

#### 1) Definition

Even though there exists some unconstitutionality to a statute, in order to respect the legislative right of the National Assembly and to overcome the legal gap that would occur if the effect of the unconstitutional decision was immediate, the unconformable decision is ruled, and the effect of the statute is maintained for a certain amount of time. The ruling order of the unconformable decision is that “the law does not conform to the Constitution”, and that “the statute does not lose its effect until the legislator makes an amendment.”<sup>8)</sup>

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<sup>8)</sup> 88 *Hunga* 6, September 8, 1989.

## 2) Scope of the Unconformable Decision

The Constitutional Court can rule an unconformable decision for a whole statute, but can also rule for parts of a statute. There also exists a case in which an unconformable decision was ruled because of an amendment of a statute.

## 3) Effect of the Unconformable Decision

Just like the unconstitutional decision, the unconformable decision also has conclusiveness and legal effect.

First, temporary sustaining of the effect and obligation to make amendments: Unlike unconstitutional decisions, when an unconformable decision is ruled, the statute still conventionally exists for a certain period of time. Therefore the actions based upon the unconformable statutes still exist as a flawless action during this time. The nature of the unconformable decision is to respect the legislative rights and allow the legislators to maintain the constitutionality of the statute. This bestows upon the legislator the obligations to make amendments to the statute.

Second, the suspension of the application and procedure of the law: For unconformable decisions, the statute at issue is no longer applicable, and all the procedures of similar cases in courts and administrative agencies are to be suspended. This is because if the law is still applied, the unconstitutional scope of the law could be enlarged, and this will be against the rule of law. For simple unconstitutional decisions, the procedure is not suspended but is rather proceeded with the decision of the Constitutional Court, and this is what differentiates it from unconformable decisions. Since unconformable decisions are unconstitutional decisions in nature and have retrospective effects, the scope of the decision is the same as that of simple unconstitutional decisions. However, the definition and content cannot be the same. In other words, for unconstitutional decisions, the retrospective effect that is reflected upon on the relevant case will make the court to rule that the article is invalid, but for unconformable decisions (except for the ones that temporary application has been ordered), for the cases which are retrospectively affected, the decision of the legislator must be awaited for, and then the court's ruling will be given. This is fair because it is the nature of

unconformable decisions to authorize the legislator to create a constitutional situation.

Third, exceptional temporary application: Even though a certain law is conventionally still in existent, the application is suspended. This is done in accordance with the rule of superiority of the Constitution, and to maximize the security of law and the right of legislators. However, a legal gap that couldn't be overcome might occur by the unconformable decision and the suspension of application. In this cases, the exceptional temporary application of the law can be allowed. "When an unconstitutional situation does not arise in which a typical statute is temporary applied due to an unconstitutional decision, there could exist a possibility in which the unconstitutional statute needs to be temporarily applied until the legislator amend the statute. This time period allows the Constitutional Court to prevent the confusion and overcome the legal gap."

### (3) Decision Requesting Legislation

Although at the time of decision the law is constitutional, there is a possibility of the law to be unconstitutional in the future. This is why this particular decision requests the legislator to later amend the law or supplement the law.

### (4) Limited Constitutional Decision

#### 1) Definition

This decision refers to the case in which although the law partially includes unconstitutional areas, the law is interpreted in a constitutional way. The decision order is "...as long it is interpreted in such a way, the law is not unconstitutional." However, the protection of rights could be overlooked due to this decision. Therefore, this type of decision should be ruled with caution.

#### 2) Allowed Limit of Constitutional Analysis of the Law

"The constitutional analysis of the law has its basis on the Constitution's characteristic of being the top standard of rule and unity of the rule of law. When a law can be analyzed as being constitutional, it cannot be decided as being

unconstitutional and this has its roots in respecting the legislative rights and the division of power. Therefore, ordinarily, it is suitable to analyze the law as being constitutional as much as possible, but the analysis must also conform to the purpose of the law. In other words, the wording of the law must not be modified into something completely different. Also, the clear intention of the legislator in drawing up the statute, along with the purpose of the law in which the law cannot be interpreted in a wrongful way are also other limits to the analysis. This is because to deviate from this constitutional analysis results in the infringement of the rights of the legislator.”<sup>9)</sup>

### 3) Nature of Limited Constitutional Decision

The Constitutional Court interprets “limited constitutional decision as being partially unconstitutional in quality.”<sup>10)</sup>

### 4) Decision Order of Limited Constitutional Decision

The Constitutional Court rules that the purpose of the limited constitutional decision needs to be shown not only in the decision reasons, but also in the decision order.

### 5) Limited Unconstitutional Decision

The fact that the law at issue is analyzed in a constitutional way is the same as limited constitutional decision, but limited unconstitutional decision cannot be over analyzed into something unconstitutional. The decision order is “... as long as it is interpreted in such a way, the law can be unconstitutional.”<sup>11)</sup>

### 6) Partial Unconstitutional Decision

Among unconstitutional decisions, there could be a case in which the whole article of a law is not decided as being unconstitutional, but is rather partially

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<sup>9)</sup> 88 *Hunga* 5, July 14, 1989.

<sup>10)</sup> 89 *Hunga* 104, February 25, 1992.

<sup>11)</sup> 90 *Hunga* 23, June 26, 1992.

unconstitutional. The subject of partial invalidity can be a whole article of the law, or it could also be a specific part of the article, or it could be part of a clause.

There are two types of partial unconstitutional decisions<sup>12)</sup>, quantity partial unconstitutional decisions in which parts of an article of the unconstitutionally proclaimed law is deleted and quality partial unconstitutional decisions.<sup>13)</sup>

#### 7) Binding Effect of the Modified Decisions

While Germany's Federal Constitutional Court acknowledges the binding effect of the 'Constitutional Courts Decisions', our Constitutional Court Act Article 47 Clause 1 only prescribes "any decision that statutes are unconstitutional shall bind the ordinary courts, other state agencies and local governments", and therefore there is controversy as to whether modified decisions can be allowed, or whether there is any binding effect to the modified decisions.

Considering the special characteristic of the constitutional decisions, modified decisions have to be allowed. The opinion of the Supreme Court stating that the court sees limited unconstitutional decisions as a simple expression of opinion and ignores the decision should be rectified. The misunderstanding and complications construed between the Supreme Court and the Constitutional Court has contributed greatly to the Constitutional Court Act, especially since the management of the Constitutional Court system is lacking in experience. In the future, there is a need to prescribe an article pertaining to the modified decision and its effect.

## V. Constitutional complaint

### 1. Types and causes for request

#### (1) Constitutional Court Act Article 68-1

Any person who claims that his basic right which is guaranteed by the

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<sup>12)</sup> 92 *Hunma* 82, April 14, 1992.

<sup>13)</sup> 89 *Hunga* 97, May, 13, 1991.

Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court : *Provided*, that if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.

(2) Constitutional Court Act Article 68-2

If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected, the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.

2. Time Limit for request

A constitutional complaint under Article 68 (1) shall be filed within ninety days after the existence of the cause is known, and within one year after the cause occurs : *Provided*, that a constitutional complaint to be filed after taking prior relief processes provided by other laws, shall be filed within thirty days after the final decision in the processes is notified (Article 69 Clause 1).

The adjudication on a constitutional complaint under Article 68 (2) shall be filed within thirty days after a request for an adjudication on constitutionality of statutes is dismissed (Article 69 Clause 2).

3. Prior review

The President of the Constitutional Court may establish the Panels, each of which consists of three Justices in the Constitutional Court, and have a Panel take a prior review of a constitutional complaint (Article 72 Clause 1).

In case of any of the followings, the Panel shall dismiss a constitutional complaint with a decision of an unanimity (Clause 3) :

1) When a constitutional complaint is filed, without having exhausted all the relief processes provided by other laws, or against a judgment of the ordinary court;

2) When a constitutional complaint is filed after expiration of the time limit prescribed in Article 69;

3) When a constitutional complaint is filed without a counsel under Article 25; or

4) When a constitutional complaint is inadmissible and the inadmissibility cannot be corrected.

When a Panel cannot reach a decision of dismissal referred to in paragraph (3) with an unanimity, it shall transfer by a decision the constitutional complaint to the Full Bench. When a dismissal is not decided within thirty days after requesting the adjudication on constitutional complaint, it shall be deemed that a decision to transfer it to the Full Bench (hereinafter, “decision to transfer to the Full Bench”) is made (Clause 4).

The provisions of Articles 28, 31, 32 and 35 shall apply *mutatis mutandis* to the review of the Panels (Clause 5).

Matters necessary for the composition and operation of the Panels shall be provided by the Constitutional Court Rules (Clause 6).

When a Panel dismisses a constitutional complaint or decides to transfer it to the Full Bench, it shall notify it to the complainant or his counsel and the respondent within fourteen days from the day of decision. The same shall also apply to the case provided in the latter part of Article 72 (4) (Article 73 Clause 1).

When a constitutional complaint is transferred to the Full Bench under Article 72 (4), the President of the Constitutional Court shall notify it without delay to the following persons (Clause 2) :

1) The Minister of Justice; and

2) A Party to the case concerned who is not the complainant, in case of an adjudication on constitutional complaint under Article 68 (2).

#### 4. Presentation of Opinions by interested Agencies

State agencies or public organizations which are interested in an adjudication on a constitutional complaint, and the Minister of Justice may present to the Constitutional Court an amicus brief on the adjudication (Article 74 Clause 1).

When a constitutional complaint prescribed in Article 68 (2) is transferred to

the Full Bench, the provisions of Articles 27 (2) and 44 shall apply *mutatis mutandis* to it (Clause 2).

## 5. Decision of Upholding

A decision to uphold a constitutional complaint shall bind all the state agencies and the local governments (Article 75 Clause 1).

In upholding a constitutional complaint under Article 68 (1), the infringed basic rights and the exercise or non-exercise of governmental power by which the infringement has been caused, shall be specified in the holding of the decision of upholding (Clause 2).

In the case referred to in paragraph (2), the Constitutional Court may revoke the exercise of governmental power which infringes basic rights or confirm that the non-exercise thereof is unconstitutional (Clause 3).

When the Constitutional Court makes a decision to uphold a constitutional complaint against the non-exercise of governmental power, the respondent shall take a new action in accordance with such decision (Clause 4).

In the case referred to in paragraph (2), when the Constitutional Court deems that the exercise or non-exercise of governmental power is caused by unconstitutional laws or provisions thereof, it may declare in the decision of upholding that the laws or provisions are unconstitutional (Clause 5).

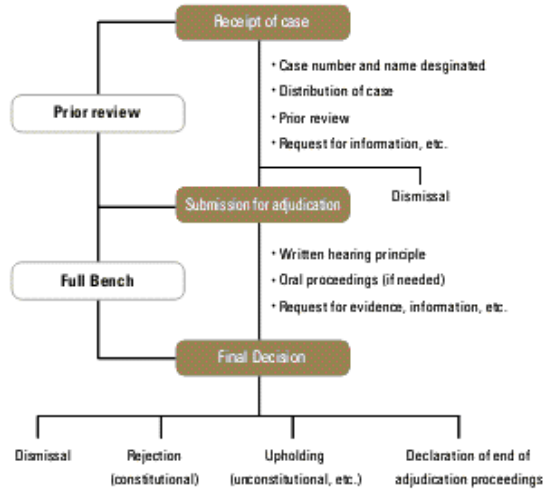
In the case, referred to in paragraph (5) and when a constitutional complaint prescribed in Article 68 (2) is upheld, the provisions of Articles 45 and 47 shall apply *mutatis mutandis* to such cases (Clause 6).

When a constitutional complaint prescribed in Article 68 (2) is upheld, and when a case concerned in an ordinary court involving the constitutional complaint has been already decided by final judgment, the party may request a retrial of the case before the court (Clause 7).

In the retrial referred to in paragraph (7), the provisions of the Criminal Procedure Act shall apply *mutatis mutandis* to criminal cases, and those of the Civil Procedure Act to other cases (Clause 8).



**Flowchart of Constitutional Complaint Procedure**



## VI. Adjudication on Competence Disputes

### 1. Causes for Request

When any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments, a state agency or a local government concerned may request to the Constitutional Court an adjudication on competence dispute (Article 61 Clause 1).

The request for adjudication referred to in paragraph (1) may be allowed only when an action or omission by the defendant infringes or is in obvious danger of infringing upon the plaintiff's competence granted by the Constitution or laws (Clause 2).

### 2. Classification of Adjudication on Competence Dispute

The adjudication on competence dispute shall be classified as follows (Article 62) :

1) Adjudication on competence dispute between state agencies : Adjudication on

competence dispute between the National Assembly, the Executive, ordinary courts and the National Election Commission;

2) Adjudication on competence dispute between a state agency and a local government :

- (a) Adjudication on competence dispute between the Executive and the Special Metropolitan City, Metropolitan City or Province; and
- (b) Adjudication on competence dispute between the Executive and the City/County or District which is a local government (hereinafter referred to as a “Self-governing District”).

3) Adjudication on competence dispute between local governments :

- (a) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province;
- (b) Adjudication on competence dispute between the City/County or Self-governing District; and
- (c) Adjudication on competence dispute between the Special Metropolitan City, Metropolitan City or Province and the City, County or Self-governing District.

When a competence dispute relates to the affairs of a local government concerning education, science or art under Article 2 of the Local Educational Self-Governance Act, the Superintendent of the Board of Education shall be the party referred to in paragraph (1) 2 and 3 (Clause 2).

## 2. Time Limit for Request

The adjudication on competence dispute shall be requested within sixty days after the existence of the cause is known, and within one hundred eighty days after the cause occurs (Article 63 Clause 1).

The period as referred to in paragraph (1) shall be a peremptory period (Clause 2).

## 3. Matters to be Stated on Written Request (Article 64)

The written request for adjudication on competence dispute shall include the following matters :

- 1) Indication of the plaintiff or the institution whereto the plaintiff belongs, and the person who pursues the proceeding or counsel;
- 2) Indication of the defendant;
- 3) Action or omission by the defendant, which is the object of the adjudication;
- 4) Reasons for the request; and
- 5) Other necessary matters.

#### 4. Provisional Remedies

The Constitutional Court may, upon receiving a request for adjudication on competence dispute, make *ex officio* or upon a motion by the plaintiff a decision to suspend the effect of an action taken by the defendant which is the object of the adjudication until the pronouncement of the final decision (Article 65).

#### 5. Decision and Effect of Decision

The Constitutional Court shall decide as to the existence or scope of the competence of a state agency or a local government (Article 66 Clause 1).

In the case as referred to in paragraph (1), the Constitutional Court may cancel an action of the defendant which is the cause of the competence dispute or may confirm the invalidity of the action, and when the Constitutional Court has rendered a decision on admitting the request for adjudication against an omission, the defendant shall take a disposition in pursuance of the purport of decision (Clause 2).

The decision on competence dispute by the Constitutional Court shall bind all state agencies and local governments (Article 67 Clause 1).

The decision to revoke an action of a state agency or a local government shall not alter the effect which has already been given to the person whom the action is directed against (Clause 2).

## VII. Adjudication on impeachment

### 1. Institution of Impeachment (Article 48)

If a public official who falls under any of the following violates the Constitution or laws in the course of execution of his or her services, the National Assembly may pass a resolution on the institution of impeachment as prescribed in the Constitution and the National Assembly Act :

- 1) President of the Republic, Prime Minister, Members of the State Council or Ministers;
- 2) Justices of the Constitutional Court, judges or Commissioners of the National Election Commission;
- 3) Chairman and Commissioners of the Board of Audit and Inspection; or
- 4) Other public officials as prescribed by relevant laws.

### 2. Impeachment Prosecutor (Article 49)

For the adjudication on impeachment, the Chairperson of the Legislation and Justice Committee of the National Assembly shall be the impeachment prosecutor (Clause 1).

The impeachment prosecutor shall request adjudication by presenting to the Constitutional Court an authentic copy of the written resolution of the institution of impeachment, and may examine the accused person in the oral proceedings (Clause 1).

### 3. Suspension of Exercise of Power (Article 50)

No person against whom a resolution of institution of impeachment is passed shall exercise his or her power until the Constitutional Court makes a decision thereon.

### 4. Suspension of Impeachment Proceeding (Article 51)

When a criminal proceeding is under way for the same cause as in the request

for impeachment against the accused person, the Full Bench may suspend the proceeding of impeachment.

#### 5. Non-Attendance of Party (Article 52)

If a party fails to attend on the hearing date, a new date shall be fixed (Clause 1).

If the party fails to attend even on the refixed date, the examination against the party shall be allowed without his or her attendance (Clause 2).

#### 6. Decision and Effect of Decision

When a request for impeachment is upheld, the Constitutional Court shall pronounce a decision that the accused person be removed from the public office (Article 53 Clause 1).

If the accused person has been already removed from the public office before the pronouncement of the decision, the Constitutional Court shall reject the request for impeachment (Clause 2).

The decision of impeachment shall not exempt the accused person from the civil or criminal liabilities (Article 54 Clause 1).

Any person who is removed by the decision of impeachment shall not be a public official until five years have passed from the date on which the decision is pronounced (Clause 2).

### VIII. Adjudication on dissolution of the political party

#### 1. Request for Adjudication on Dissolution of a Political Party

If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may request to the Constitutional Court, upon a deliberation of the State Council, an adjudication on dissolution of the political party (Article 55).

The written request for adjudication on dissolution of a political party shall

include the following matters (Article 56) :

- 1) Indication of the political party requested to be dissolved; and
- 2) Bases of the request.

## 2. Provisional Remedies

The Constitutional Court may, upon receiving a request for adjudication on dissolution of a political party, make *ex officio* or upon a motion of the plaintiff or a decision to suspend the activities of the defendant until the pronouncement of the final decision (Article 57).

## 3. Notification of Request, etc.

When an adjudication on dissolution of a political party is requested, a decision on the provisional remedies is rendered, or the adjudication is brought to an end, the President of the Constitutional Court shall notify the facts to the National Assembly and the National Election Commission (Article 58 Clause 1).

The written decision ordering dissolution of a political party shall also be served, in addition to the defendant, on the National Assembly, the Executive and the National Election Commission (Clause 2).

## 4. Effect of Decision

When a decision ordering dissolution of a political party is pronounced, the political party shall be dissolved (Article 59).

## 5. Execution of Decision

The decision of the Constitutional Court ordering dissolution of a political party shall be executed by the National Election Commission in accordance with the Political Parties Act (Article 60).

## IX. Some suggestions for the Development on Constitutional Adjudication

### 1. Reflection of the Pluralistic Social Phenomenon on Constitutional Adjudication through the Expansion of Constitutional Justice's Qualification

According to the Article 111 (2) of the Constitution, the Constitutional Court shall be composed of nine Justices qualified to be court judges. This qualification in Justice is very narrow. In spite of the Constitutional Court's establishment as an independent judicial organization, the limit of qualification is inconsistent in view of the Constitutional Adjudication's nature.

It would be advisable to examine the foreign systems and cases. In Japan, members of Supreme Court, which controls both constitutional adjudication and ordinary adjudication similar to the one used in the 3rd Republic of Korea, can include law professors as a member of Justices without exception. In France, members of Conseil Constitutionnel, which is distinguished from ordinary court, can consist of not only law professors but also human rights activists, former members of Parliament participate as Constitutional Justices without justice qualification. In case of Germany, law professors, especially professors of public law (Constitutional law) can be included. Recently, professor Voßkuhle, the dean of the School of Law at Freiburg, took office as president of the Constitutional Court. From this point of view, the Constitutional Justices should be selected from various backgrounds, including scholarly field.

However, the Justices of the Constitutional Court are always filled with judges who have had long experience in the court, except one of nine Justices of the Constitutional Court who was a prosecutor.

Moreover, compared to the appointment of Supreme Court Justices which includes proper procedures (recommendation from the Recommendation Committee on the Supreme Court Justices candidate), the appointment of Constitutional Court Justices by the Chief Justice of the Supreme Court has no limitations.

Furthermore, with respect to the Supreme Court Justices, the appointment of the

justices by President based on the recommendation of the Chief Justice is followed by the consent of the National Assembly. However, such procedural matter, namely the consent of the National Assembly is not included in the appointment of the Constitutional Court Justices.

These problems should be considered thoroughly, and needs to be rectified during the amendment of the constitution.

## 2. Constitutional Court's Organizational Character Establishment of the Korean Constitutional Research Institute

One of the Constitutional Court's organizational institutions is the Constitutional Research Institute which was newly established in 2011. The Constitutional Research Institute shall be established as an in house organ of the Constitutional Court for the purpose of carrying out the research on the constitutional law and constitutional adjudication.

Considering the specialty of Constitutional Adjudication, the Constitutional Research Institute's existence is not discussed but its existence still is controversial because there is no precedent for it from outside the country, as well as within.

I hope that the Constitutional Research Institute does not engage only in foreign legislation research, and that it opens up a new chapter in research and training.

## 3. Reestablishment of Constitutional Status between the Constitutional Court and the Supreme Court

The Constitutional Court and the Supreme Court mutually maintain independent and horizontal relations. But the separation of jurisdictions leaves much room for jurisdictional disputes and the tension in the relationship between the National Assembly and the Constitutional Court is well expected.

According to Constitutional Court Act, judgment of the court is excluded in the constitutional complaint's object. If judgment of the court is included in the constitutional complaint's object, there is a strong possibility that the Constitutional Court will come into conflict with the Supreme Court.

However, both the Constitutional Court and the Supreme Court are the last



bastions for the protection of fundamental rights of the people. In this regard, it is not important for people to define what kind of power each institution has, but it is important to fulfill its constitutional mission in order to guarantee the fundamental rights of the citizens to the maximum.

According to the constitution system, ordinary courts and Constitutional Court exist in parallel. Therefore, it is true that their function and the role is not clear.

After all, the two institutions should maintain mutually beneficial cooperative relationship through the theory and the legal precedent. In fact, the Justices of the Constitutional Court have been appointed from persons nominated by the Chief Justice of the Supreme Court and also judges have been sent as Constitution Research Officers.

Unless there are substantive enactments like Germany, cooperative relationship of Conseil constitutionnel and Conseil d'État, Cour de cassation in France will serve as a good reference.

#### 4. Binding Powers of Modified Decisions, Prevention of Modified Decisions Abuse

The Constitutional Court may decide on the case as nonconforming to the constitution, unconstitutional in part, constitutional in part, as well as unconstitutional or constitutional.

If the ordinary court and the Supreme Court do not accept modified decisions like decision of limited constitutionality, limited unconstitutionality, there could be a possibility of conflict.

However, the Constitutional Court has decided that all of the different levels of judgments have binding powers, and it is only a matter of when such modified decisions should be given.

Decisions of limited unconstitutionality are justified as inevitable products of constitutional review because of the limit of legislative terminological skill. So they have the same binding force as a simple decision of unconstitutionality.

However, the Supreme Court refused to accept limited unconstitutionality decisions as binding. The Supreme Court characterized the decision as merely one

of the possible interpretations of the law. It insists that it should have the exclusive power of statutory interpretation and application.

According to the Article 107 (1) of the Constitution, the ordinary courts' power of statutory interpretation presupposes the validity of the statute being interpreted. Its validity is conditional upon the Constitutional Court's finding of its constitutionality. The ordinary courts' power of statutory interpretation cannot be a basis of denial to the binding force of limited unconstitutionality.

The misunderstanding and the conflict between the Supreme Court and the Constitutional Court began with the lack of experience in the application in the Constitutional Adjudication system. Therefore, modified decision and its effect should be expressly stipulated in the text. The abuse of modified decision can cause evasion of Constitutional Adjudication, judicial opportunism and lose its authority. The Constitutional Court itself should make every effort to remove these concerns.

Although the decision forms of the Constitutional Court reflects its special characteristic, excessive rulings of modified decisions will eventually bring about avoidance of constitutional trials, unfairness of the judicial system, lack of objectivity in constitutional analysis, and this can cause the downfall of the reliance and authority of the constitutional decisions. Therefore precaution must be taken when modified decisions are made. Considering the fact that modified decisions such as limited constitutional decisions or limited unconstitutional decisions are recently indifferently treated by the court, the Constitutional Court must put in an effort to remove such worries.

##### 5. The Permissibility of Constitutional Complaint against the Judgement of Ordinary Court

According to the existing Constitution, the Supreme Court and the Constitutional Court maintain independent and horizontal relationship. The Constitutional Court Act excludes the judgement of ordinary courts (including the Supreme Court) from being the subject of constitutional complaint. But if it includes ordinary court's judgement, we cannot exclude the possibility of triggering a conflict. In case of

allowing the constitutional complaint against the judgement of ordinary court, the Constitutional Court may hold the highest court, similar to the practice in Germany.

As the Constitutional Court decides properly, it goes without saying that it would be ideal to allow constitutional complaint against the judgement of an ordinary court. However, I cannot but say that the Constitutional Court adhere to the letters : “petitions relating to the constitution as prescribed by law” (the Constitution article 111, clause 1, and issue 5), especially ‘by law’.

The letter ‘by law’ is nothing but merely modifies ‘petitions relating the constitution’. We are not to understand that the restriction of ‘essence of the constitutional complaint’ could be prescribed by law. It means “be prescribed by law” because the Constitution cannot prescribe all of the meaning and content.

If that is the case, we need to focus on the essence of constitutional complaint. Constitutional complaint is the system whereby “any person who claims that his/her basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file constitutional complaint” (Constitutional Court Act article 68 clause 1). Judicial judgement could violate the basic right in Constitutional Law, and is ‘an exercise or non-exercise of governmental power’. Therefore, we concisely conclude that the prohibition of constitutional complaint on judicial judgement (according to Constitutional Court Act article 68 clause 1) is against the essence of constitutional complaint.

## 6. The Necessity for Compensating the Defect of Legal Representative Principle

Prohibition of a constitutional claim merely on the basis of lawyer’s fee is not desirable. It is feared that the access to justice is hindered due to excessive legal fee monopolized by a few lawyers. We need to consider that the Legal Representative Principle is adopted in the civil procedure, not in the constitutional complaint in Germany.

## 7. The Necessity for Re-Establishment of Relation between the Constitutional Court, the National Assembly and the Executive Branch

The Constitutional Court needs to be conservative in deciding the unconstitutionality of a statute to respect the legislative branch as much as possible. In this respect, the Constitutional Court respects legislative Power with the modified forms of decisions, even with the lack of basis in the Constitution and the law. The typical transformation decision (modified decision) for respecting legislative power is a ‘decision of unconstitutable to constitution’. Even with an unconstitutional statute, the Constitutional Court makes a decision of unconstitutable to constitution while making a decision of “urge for legislation” that urges the legislators to revise the unconstitutional law. The Constitutional Court also shows respect to the legislation by making ‘the decision of limited constitutionality’ and ‘the decision of limited unconstitutionality’. Problems may arise when the National Assembly ignores ‘the decisions of unconstitutionality’ or ‘the modified decisions’.

On the other hand, if the National Assembly is not stable enough and becomes overly dependant on the Constitutional Court, the people might become sceptic about representative democracy. In other words, ‘the competence dispute’ and ‘the constitutional complaint’ on legislative proceedings would cause public distrust towards the legislature.

## 8. Concerns over Juristocracy

As constitutional adjudication becomes invigorated, the Executive Branch and the National Assembly tend to bring the issue forward to the court, instead of being faithful with their own duties. In such cases, there are some positive points in enhancing the “rule of law”. However, the National Assembly and the executive branch is urged to be more cautious due to the concern that juristocracy triggers skepticism about representative democracy, which forms the basis of modern constitutionalism.

## 9. Authorities for Constitutional Revision

When the time for the revision of the constitution arrives, the Constitutional Court may be given three authorities. These are also authorities of the Conseil Constitutionnel in France.

First, the Constitutional Court can be empowered to carry out the trial of presidential election which is now within the jurisdiction of the Supreme Court.

Second, it is necessary that the Constitutional Court give advice about the constitutional matters in advance. When the president of the Republic issues the emergency power, it is reasonable to have the Constitutional Court to give its advice in advance, deciding on the matter whether the measure meets the requirements of the constitution.

Lastly, the Constitutional Court should be the definitive institution to confirm the vacancy of the president of the Republic. Since there is no regulation stated in the constitution, the Constitutional Court should be the definitive institution to confirm the vacancy of the president

## Case Statistics of the Constitutional Court of Korea As of April 30, 2012

Type	Total	Constitutionality of law <sup>1)</sup>	Impeachment	Dissolution of a political party	Competence dispute	Constitutional Complaint			
						Sub total	§68 I	§68 II	
Filed	22294	782	1		77	21434	17908	3526	
Settled	21403	748	1		72	20582	17366	3216	
Dismissed by small benches	10298					10298	8959	1339	
Decided by full bench	Unconstitutional <sup>2)</sup>	449	223			226	69	157	
	Unconformable to Constitution <sup>3)</sup>	142	54			88	32	56	
	Unconstitutional, in certain context <sup>4)</sup>	59	15			44	17	27	
	Constitutional, in certain context <sup>5)</sup>	28	7			21		21	
	Constitutional	1614	272				1342	4	1338
	Annulled <sup>6)</sup>	397				16	381	381	
	Rejected	6165		1		19	6145	6145	
	Dismissed	1556	59			26	1471	1261	210
	Miscellaneous	6					6	5	1
Withdrawn	689	118			11	560	493	67	
Pending	891	34			5	852	542	310	

- 1) This type of “Constitutionality of Law” case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.
- 2) “Unconstitutional” : Used in Constitutionality of Laws cases.
- 3) “Unconformable to Constitution” : This conclusion means the Court acknowledges a law’s unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.
- 4) “Unconstitutional, in certain context” : In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.
- 5) “Constitutional, in certain context” : This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of “Unconstitutional, in certain context”. Both are regarded as decisions of “partially unconstitutional”.
- 6) “Annulled” : This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.

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〈국문초록〉

## 증권 관련 집단소송법에 따른 절차의 특징

成樂寅\*

1948년 대한민국헌법이 제정된 이래 1987년 헌법은 아홉 번째 개정헌법이다. 그간 헌법재판기관의 변천사를 보면, 제1공화국 헌법위원회, 제2공화국 헌법재판소, 제3공화국 대법원, 제4공화국과 제5공화국의 헌법위원회 제도를 거쳤다. 하지만 제2공화국의 헌법재판소는 1961년 5.16 군사쿠데타로 인하여 설치되지도 못했다. 그 이후 1971년의 국가배상법 제2조 제1항 단서의 군인과 군무원에 대한 이중배상금지조항에 대한 위헌결정이 유일한 위헌결정이었다.

1987년 헌법에서 헌법재판소가 도입된 이래 헌법재판소는 수많은 위헌법률결정, 헌법소원 인용, 권한쟁의 인용 등을 통해서 국민 속에 각인되어 왔다. 하지만 수도 이전특별법 위헌결정에서 보여준 바와 같이 정치권으로부터 거센 비판을 받기도 했다. 또한 변형결정으로 인하여 대법원과의 갈등도 일어났다. 그럼에도 헌법재판소는 대한민국 민주주의를 상징하는 기관으로 확고하게 자리 잡았다.

주제어: 대한민국, 헌법재판소, 헌법, 위헌법률심판, 헌법소원심판, 탄핵심판, 권한쟁의심판, 위헌정당해산심판, 헌법재판소의 결정, 변형결정, 위헌불선언결정, 한정합헌결정, 한정위헌결정, 헌법불합치결정

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