

The Effect of Constitutional Review on the Legislature and the Executive branch for last 25 years in Korea*

Jong Ik Chon**

Abstract

The Constitutional Court has diligently performed its duty of controlling state power, realizing the principle of separation of power and protecting the basic right of the people for last 25 years. By subjecting legislative and executive actions to judicial review, the people who exercise state power have to constantly consider the constitutionality of their actions. Thus, the biggest influence of the Constitutional Court on the order of authority is that it has put every state action within the scope of constitutional order prior to any judicial review by the Constitutional Court. To guarantee the constitutionality of state power is to protect the basic rights of the people, and to assure that the Constitution remains its efficacy within the political system. Therefore, each and every state organ is able to perform its duty independently without interference to other branches within the framework provided by the Constitution. This is how state organs check one another, achieving balance in power.

KEY WORDS: Judicial review, Separation of powers, Legislature, Executive, Constitutional Court

Manuscript received: Apr. 19, 2015; review completed; May 26, 2015; accepted: June 10, 2015.

* This article is an updated and translated version of a part of the research paper for policy issues which was published by the Constitutional Court. See CONSTITUTIONAL COURT, HEONBEOBJAEPANSOE UIHAN HEONBEOBJAEPANI ULI SAHOEE MICHIN YEONGHYANG [THE EFFECT OF CONSTITUTIONAL REVIEW ON OUR SOCIETY] 294-322 (2010).

** Professor, Seoul National University School of Law

I. Introduction

In the modern Korean history, political institution started with a presidential system on 1948, which was later replaced by a parliamentary system. However, before the system became operational, an authoritarian presidential system under a military regime took over the country, during which the authority of the administrative and the legislative branch merged under the ruling party. Thus, the National Assembly could not function properly, and there was a vicious cycle of concentrating more power on the President.

As a result, basic rights enumerated in the Constitution were not adequately protected. The system established for the protection of peoples' rights from arbitrary actions of government, for example judicial review system, did not function properly. As governmental power turned into autocratic and despotic, even when basic rights were often violated, the means to control state power only had a position as a subordinate of governing powers.

The democratization movement of 1987 which was response to the violations of the basic rights for last two decades resulted in the revision of the Constitution. The main issue in the revision was adoption of direct presidential election system, but the new constitution also adopted various measures to protect peoples' basic rights and to guarantee separation of power. One example of such measure was the independent constitutional court system for judicial review. The main purpose of the adoption was the realization of the rule of law and protection of basic rights of people. But they also established the Constitutional Court to guarantee check and balance on other state organs, such as the legislative, administrative and judicial branches.

However, the president still continued to have excessive power in the new government system established in 1987. As the National Assembly divided into a self-righteous majority and a minority which resorted to extreme measures, the normal legislative process in the National Assembly was regularly disrupted. Added to the general tendency of administration specialized in many field of works, it led to an executive branch playing the

leading role in policy making.¹⁾ The concentration of power to the executive made the separation of power doctrine meaningless and the chance of the abuse of power of the executive has got bigger and bigger.²⁾ That is why the Constitutional Court has to continue its duty to control state power, making sure that there is check and balance, and to protect the basic rights of the people.

To consider the effect of the Constitutional Court on the legislature and the executive branch is to evaluate how much the Constitutional Court has performed the above duty. For this purpose, the author will divide the constitutional cases into legislative, and executive cases, and study the influence of the decisions on each branch of the government. The standard used in determining such influence is whether the constitutional review has provided check and balance for all the branches of the government performing their respective duties within the boundaries provided by the Constitution.

II. Effect on the National Assembly

1. *The Function of Legislation*

1) *Constitutional Review of Statute*

Constitutional review is by nature a means of controlling all kinds of state power, including the legislative, executive and judicial branches. However, usually, disputes within the executive branch are resolved through the ordinary judicial process. Hence, the need to control the executive branch through constitutional review is not particularly important. Only when ordinary control over the executive branch by the courts is inadequate shall constitutional adjudication be used. The disputes in people's daily lives are usually solved through judicial process, including

1) DAEGANMINGUK HUNBEOB [CONSTITUTION OF THE REPUBLIC OF KOREA] [hereinafter CONSTITUTION], art. 52 provides that Bills may be introduced by members of the National Assembly or by the Executive.

2) Lim Ji-Bong, *Hangugeseoui beobchijuui* [Rule of Law in Korea], 12 GONGBEOBHAGYEONGU [KOREA COMPARATIVE PUBLIC LAW ASSOCIATION JOURNAL] 13 (2011).

civil, criminal and administrative. Though the decisions made by ordinary courts can be subject to constitutional review, it is very exceptional.³⁾ However, judicial review over the legislation is not within the traditional judicial function. In the past, review on legislature, which has democratic legitimacy, was done only through periodic elections. However, with the widespread recognition that the Constitution is actually the supreme law of the land and all state actions should be subject to judicial review, judicial review over the legislature is the main function of the Constitutional Court.⁴⁾

The most basic function and authority of the National Assembly is to enact the statutes. The Constitutional Court controls unconstitutionality of statute through judicial review. When an act infringes upon a basic right guaranteed by the Constitution, or when it violates a principle or a rule of the Constitution, it means that the National Assembly violated the supreme law of the land when exercising its authority. Therefore, judicial review over the acts of the National Assembly is to put the main function of the legislature into the boundaries of the Constitution.

Since its establishment in 1988, the total number of acts declared unconstitutional until September 30, 2014 is 717.⁵⁾ Before its establishment,

3) Article 68 (1) of the Heonbeobjaepansobeob [Constitutional Court Act] excludes the ordinary courts' judgments from the subjects of the constitutional complaint. But the Constitutional Court said "To the extent that the provision is interpreted to exclude from constitutional challenge those judgments that enforce the laws struck down in whole or part by the Constitutional Court and thereby infringe upon people's basic rights, the provision in question should be unconstitutional. All government organs should be bound by the Constitution. Because Constitutional Adjudication is the judicial means to accomplish the task, all government power- including the judicial branch- must abide by the unconstitutionality decision of the Constitutional Court. The judgments that applied the laws previously invalidated by the Constitutional Court are opposite to the binding force of the decision and constitutional determination to give to the Constitutional Court the competence of judicial review. Thus, those judgments must be reviewed by the Constitutional Court, and Article 68 (1) of the Constitutional Court Act must be interpreted as such. In that scope, it is unconstitutional." See Constitutional Court [Const. Ct.], 1996Hun-Ma172-173, Dec. 24, 1997, (9-2 KCCR, 842). KCCR (Korean Constitutional Court Report) refers to the Hunbeob jaepanso palyejip.

4) Heo Young, *Heonbeobjaepangwa ibbeob* [Constitutional Adjudication and Legislation], 19 HEONBEOPNONCHONG [CONSTITUTIONAL LAW RESEARCH COLLECTION] 11-12 (2008).

5) According to the Constitutional Court website (www.court.go.kr, last visited October 27, 2014), the decisions rendered unconstitutional can be divided into the following

incidence in which an act is declared unconstitutional was very rare. The fact that there are a lot of laws declared unconstitutional, on one hand, means that the Constitutional Court performs its duty diligently, but on the other hand, the legislative branch does not function properly, thus enacting many unconstitutional acts. Nevertheless, it can be said that the National Assembly has diligently discussed about the constitutionality of an act before enacting or amending it, since the Constitutional Court started judicial review. Due to unconstitutional decisions of the Constitutional Court, the National Assembly became more prudent when making new statutes.⁶⁾ The judicial review of Constitutional Court has brought legislature into the boundaries of the Constitution.

2) *Judicial Review and the Separation of Power*

When the Constitutional Court performs judicial review, conflicts with the National Assembly are inevitable. In fact, for the past 25 years, the National Assembly has tried to restrain the influence of the Constitutional Court directly or indirectly through parliamentary inspection and budget deliberation. When the Constitutional Court continuously declared that certain laws legislated by the National Assembly unconstitutional, the democratic legitimacy of the Constitutional Court was questioned, and there were even discussions about the dangers of “judicialization of politics” or “dominance of judicial branch”.⁷⁾

categories. Constitutionality of law (constitutionality of statutes cases brought by ordinary courts) cases amount to 312 cases (238 unconstitutional cases, 56 unconformable to Constitution cases, 18 unconstitutional in certain context cases), a total of 267 with respect to Constitutional complaint based on article 68(2) of the Constitution (175 unconstitutional cases, 60 unconformable to Constitution cases, 32 unconstitutional in certain context cases), a total of 138 cases with respect to Constitutional complaint based on article 68(1) of the Constitution (80 unconstitutional cases, 39 unconformable to constitution cases, 19 unconstitutional in certain context cases).

6) Chong Jong-Sup, *Hanguui minjuhwaesseoseo heonbeobjaepansowa gwonlyeog tongje* [*The Democratization of South Korea and Power Control by the Constitutional Court*], 42-1 SEOULDAEHAGGYO BEOBHAK [SEOUL L.J.] 65 (2001).

7) An example is the Relocation of the Capital City case. See Constitutional Court [Const. Ct.], 2004Hun-Ma554, etc., Oct. 21, 2004 (KCCR 1, 16-2(B)). The legitimacy of the Constitutional Court decision was questioned when the Court declared the unconstitutionality of an Act made by both the approval of majority and the minority party in the parliament. Kim Jong Seo, *Minjujuuijeog gwanjeomeseo bon heonbeobjaepanjado* [*A Critical*

However, the Constitutional Court continues to declare that it always has to have a position to respect discretion of the National Assembly in judicial review. In reviewing the statute, the Constitutional Court often decided that the acts were constitutional, based on the discretionary power of the National Assembly in legislation. As primary competence of legislation as concretization of constitution is vested to National Assembly, the Constitutional Court has to respect its discretionary competence.⁸⁾ For instance, the court has recognized that the National Assembly has wide discretion in deciding which acts constitute a crime, and which kinds and scope of punishment are suitable for the criminal activities. The Constitutional Court said that “our Constitution, following the basic principle of a modern democratic constitution, adopts a system of separation of power which divides the state power into legislative, judicial and executive branches, and guarantee check and balance between all the different branches of the government. According to article 40 of the Constitution, the legislative power shall be vested in the National Assembly, the representative organ of the people. In principle, legislation of criminal law is within the inherent authority of the National Assembly. The kinds and scope of punishment is decided according to the policies set up by the National Assembly, and should be respected by every government organs and citizen.”⁹⁾ The Constitutional Court has maintained this position until now.¹⁰⁾

Analysis of the Constitutional Review: A Democratic perspective], 54 MINJUBEOBHAG [DEMOCRATIC LEGAL STUDIES] 318-319 (2014).

8) Kim, Seon-Taek, *Gugga gineungchegyeeisseoseo heonbeobjaepansoui yeoghalgwa hangye* [The Constitutional Court -its Status and Limits within the State Functional System], 33-4 GONGBEOBYEONGU [PUBLIC LAW] 198 (2005).

9) Constitutional Court [Const. Ct], 90Hun-Ba24, Apr. 28, 1992, (KCCR 4, 225, 229).

10) See generally Constitutional Court [Const. Ct], 98Hun-Ba26, May 27, 1999, (KCCR 11-1, 622); Constitutional Court [Const. Ct], 2001Hun-Ka16, Nov. 29, 2002, (KCCR 13-2, 570); Constitutional Court [Const. Ct], 2004Hun-Ba77, July 27, 2006, (KCCR 18-2, 108); Constitutional Court [Const. Ct], 2006Hun-Ka9, July 26, 2007, (KCCR 19-2, 12). For example, the Constitutional Court said the following in the 2006Hun-Ka9 case. “In deciding which acts constitute a crime, and which kinds and scope of punishment are suitable for the criminal activities, one not only has to consider the nature of the act, and the protection of legal rights, but also has to take into consideration the history and culture of the society, the contemporary situation, the legal sentiment of the people, criminal policy for the prevention of crimes, etc. Law makers are given wide discretion in this area.”

With respect to laws granting benefits to the people, unlike laws limiting people's right or laws imposing new obligations on the people, law makers are given a wide discretion for legislation. The Constitutional Court stated that "With respect to laws granting benefits to citizens, law-makers have the authority to legislate those laws which, they have thought, are suitable, taking in account various circumstances, including legislative purpose, situation of the beneficiary, national budget and the ability to compensate, etc. Therefore, unless the contents of the enacted statues lack rationality significantly, the clauses cannot be seen as a violation of the Constitution."¹¹⁾ The same reasoning applies to social rights. With respect to the state's responsibility of guaranteeing right to a life worthy of human beings, the Constitutional Court decided that "when the question of whether the state has fulfilled its duty of guaranteeing all citizens a life worthy of human beings, the law is unconstitutional only when the state has done nothing to enact any laws protecting the livelihood of the people, or when the content of the law is significantly unreasonable that it clearly deviates from the scope of discretion given to the law-makers."¹²⁾

Furthermore, even in cases of deciding the violation of basic right, when it is related to, for instance, limitation on the freedom of occupation, such as imposing certain qualifications for an occupation, the Constitutional Court recognized wide discretion of legislature.¹³⁾ The Constitutional Court has

11) Constitutional Court [Const. Ct], 89Hun-Ma189, Dec. 23, 1993, (KCCR 5-2, 622, 640); Constitutional Court [Const. Ct], 2003Hun-Ba111, Jun. 24, 2004, (KCCR 16-1, 752).

12) Constitutional Court [Const. Ct], 94Hun-Ma33, May 29, 1997, (KCCR 9-1, 543). The Constitutional Court, in assuming that the right to a life worthy of human being (CONSTITUTION, art. 34(1)) has a different meaning for the legislative and executive branch, and for the Constitutional Court, decided that "for the legislative and executive branch, it means a guideline of conduct to ensure all citizens the right to enjoy a healthy and cultural life suited to their human dignity (one that exceeds the minimum level of living), taking into consideration national income, financial capacity of the state, state policy, etc. For the Constitutional Court, it operates as a controlling norm by which the Court examines the constitutionality of the actions of state institutions. The Court decides whether the legislative and executive branches have taken the minimum measures objectively required to ensure all citizens the right to a life worthy of human being."

13) *See generally* Constitutional Court [Const. Ct], 95Hun-Ma273, Apr. 24, 1997, (KCCR 9-1, 487, 494); Constitutional Court [Const. Ct], 97Hun-Ba88, Apr. 27, 2000, (KCCR 12-1, 495, 503); ; Constitutional Court [Const. Ct], 2005Hun-Ma997, Apr. 27, 2006, (KCCR 18-1(a), 586, 59).

maintained a consistent position, stating that “when law makers pass a law requiring certain qualifications for personnel working in a specialized field, law makers should enact the law by taking in account the purpose of adding such requirements. The decision of law makers shall be respected as long as the qualification requirement is not so unreasonable or unfair. Since law makers are given wide discretion when enacting statues requiring certain qualification, such laws cannot be considered unconstitutional unless the provisions of the law have no reasonable basis and when they are clearly arbitrary.”¹⁴⁾ The respects for the discretion of law makers are based on the principle of separation of power. The Constitutional Court provided an explanation as below:

“The principle of separation of power not only guarantees freedom through check and balance between state powers, it also divides the scope of independent activities and decision making amongst state organs by distributing different functions to each organs. The Constitution gives different roles to the Constitutional Court and the legislature. The National Assembly plays a pivotal role in forming the community through political decisions within the limits of the Constitution. The Constitutional Court, on the other hand, draws a line with respect to the discretionary power of the National Assembly. In other words, The National Assembly has a comprehensive, proactive, and formative function by materializing and realizing the Constitution through its legislative activities, while the Constitutional Court has a partial, ex post and regulatory function through constitutional adjudication concerning a very limited number of subject matter due to the limits inherent to its judicial characteristic.”¹⁵⁾

Therefore, in cases where the National Assembly limits certain basic rights in accordance with article 37(2) of the Constitution, when it is

14) Constitutional Court [Const. Ct], 2003Hun-Ma422, May 31, 2007, (KCCR 19-1, 629, 645).

15) The Constitutional Court made the following ruling: “Both the Constitutional Court and legislature are bound by the Constitution. However, the binding nature of the Constitution on both institutions is different. For the legislative branch, the Constitution acts as a guideline and limit to its action. With respect to the Constitutional Court, the Constitution is a controlling norm (adjudication rule), which is used as a standard in examining the constitutionality of actions by other state institutions.” See Constitutional Court [Const. Ct], 90Hun-Ma110, Jan. 16, 1997, (KCCR 9-1, 90, 115).

recognized that the National Assembly has discretionary power with respect to the means, contents, degree and scope of limiting the basic rights, the rule against excessive restriction does not apply, since the National Assembly has performed its suitable function and role as an elected organ of the people through the democratic process.¹⁶⁾

The Constitutional Court shows the respect to legislature's discretion through developing so-called "modified forms of holdings". Article 45 of the Constitutional Court Act provides that the Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional. The type of judgment on constitutionality, which this clause provides, seems to be a "simple" ruling of unconstitutionality or constitutionality. But the Constitutional Court has long departed from the choice of alternatives between full acceptance and rejection. Trying to avoid rulings of unconstitutionality which invalidate the statute, the Constitutional Court has sought to develop so-called "modified forms of holdings" such as limited constitutional, partially unconstitutional and nonconformity decisions with the constitution. By the limited constitutional or unconstitutional decisions, a decision on the constitutionality of a provision or statute is taken not in absolute terms, but in relation to a particular interpretation of the provision at issue. In the limited constitutional decision, the Court declares that the provision is constitutional only in so far as it can be interpreted in a certain way that is consistent with the Constitution. In the limited unconstitutional decision, the Court declares that only a certain interpretation of the law is unconstitutional. Only the interpretation that has been declared unconstitutional can no longer be used in the ordinary courts. In this way, despite some unconstitutional elements, the law remains formally unchanged and effective. Furthermore, in case there is a possibility for law makers to eliminate the unconstitutional elements in the law, the Constitutional Court renders an unconformable to Constitution decision. When this decision is rendered, the provision or statute at issue remains in effect formally until it is abolished or amended by the legislators pursuant to the mentioned reasons of unconstitutionality in the decision. The legislators should be obligated to affirmatively cure the

16) CHONG JONG-SUP, HEONBEOBHAGWONLON [THE PRINCIPLES OF CONSTITUTIONAL STUDIES] 383 (9th ed., 2014).

unconstitutionality of the statute. Such unconformable to Constitution decision is also based on the Constitutional Court's respect towards legislature's power.

Judicial review on the legislative act of the National Assembly is not only done through deciding the constitutionality of the enacted statute, but also by reviewing the constitutionality of the situations when the National Assembly has been negligent in its legislative obligation. However, whether to enact a law is the most fundamental authority of the National Assembly, and review or inspection by other branches of the government should be done only in exceptional cases. Therefore, judicial review by the Constitutional Court on legislative omission is recognized in very restrictive terms. The Constitutional Court stated that "legislative omission becomes a subject of judicial review, either when the National Assembly has not taken any step to perform its obligation even when the Constitution has clearly mandated legislature with the duty to enact certain laws for the protection of basic rights, or when the legislature has taken no effort to enact laws even when a clear legislative obligation is recognized by the interpretation of the Constitution for the protection of an individual's right."¹⁷⁾ This Constitutional Court's position can be explained by the fact that, until now, the Court declared the legislative omission unconstitutional in only one case.¹⁸⁾

17) Constitutional Court [Const. Ct], 89Hun-Ma2, Dec. 29, 1994, (KCCR 6-2, 395, 405).

18) *Id.* The United States Army Military Government in Korea issued an order No. 75 on May 7, 1946, article 2 of which expropriated the properties of all private railroad companies, including those of the Chosun Railroads. Daehan Credit Union Federation owned 67,166 shares of the stocks of Chosun Railroads and requested compensation pursuant to the Order. On February 11, 1961, the Minister of Transportation requested registration of all shareholders of the expropriated private railroad companies. The successor to Daehan Credit Union Federation, the National Agricultural Cooperative Federation completed the registration. On October 20, 1961, the Federation transferred 59,176 shares of stocks and related compensation right to a third party. The Order was abolished by the Act on Repealing the Unification of Korean Chosun Railroads Order. The third party then sued the Republic of Korea to affirm the right to request compensation on December 30, 1961, and won the suit. However, the Korean government has refused the compensation for reasons that there is no legal basis for calculation and payment of the compensation. The complainant received the stocks and related compensation right from that third party and requested compensation to the state. When the request was turned down, the complainant filed a constitutional complaint on January 11, 1989, challenging the legislative omission to enact the necessary laws providing

2. Control Power on Government's Action

The National Assembly, on one hand, has the position of a legislative organ according to the distribution of function, and on the other hand, due to separation of power, functions as an organ regulating the power of the government by reviewing the government's actions. The National Assembly, as the representative of the people, has traditionally controlled the power of the executive branch of the government. Particularly, nowadays, with the position of the National Assembly as a legislative organ being less emphasized, the function of the National Assembly in controlling executive power has become more important. Our Constitution has also reinforced the National Assembly's authority in controlling executive power by giving the National Assembly the power to investigate specific matters or general matters of state affairs (article 61), and requiring the Prime Minister or members of the State Council or government delegates to attend meetings of the National Assembly or its committees and report on the state administration or deliver opinions and answer question (article 62).

In order to implement its duty of checking and reviewing government actions, the National Assembly has to be fully capable of collecting and analyzing data concerning governing management. Under the authoritarian regime, the majority party controlled over the National Assembly as a means of governing. The minority party was oppressed, and the National Assembly was in fact turned into a dormant institution. This phenomenon continued even after the 1987 democratization, with the ruling party monopolizing the National Assembly while the minority party used violence to stop the influence of the ruling party. The citizens became skeptical about the paralyzed the National Assembly. Especially, severe disputes between the political parties made it difficult for the legislature to collect data and investigate the government's actions.

Through the adjudication of competence dispute, the Constitutional Court opened up the possibility of solving disputes within the National

compensation for the expropriation of the private railroads. See CONSTITUTIONAL COURT OF KOREA, TWENTY YEARS OF THE CONSTITUTIONAL COURT OF KOREA 365-366 (2008).

Assembly through a legal mechanism. This allowed the National Assembly to return to its original position and function of reviewing state affairs. Though the Article 62 (1) (i) of the Constitutional Court Act defines adjudication of competence dispute between state organs as “adjudication of competence dispute between the National Assembly, the Executive, ordinary courts and the National Election Commission”, the Constitutional Court does not interpret this as an exhaustive list, and stated that “whether an organ is classified as a state organ depends on a comprehensive consideration, including whether the organ has been established by the Constitution and given independent authority by the Constitution and statute, whether there is an appropriate organ or means to settle a competence dispute with other state organs established by the Constitution.”¹⁹⁾ As such, the National Assembly and the executive branch, but it is also open independent state organs such as the Speaker of The National Assembly, the Vice-Speaker, member of National Assembly and etc can request to the Constitutional Court as adjudication on competence dispute. In cases of “parliamentary railroading” (passing of a bill arbitrarily by the ruling party without consensus from the minority party), the dispute can be settled through a competence dispute between the Speaker of National Assembly and a member of National Assembly, thus opening a way for legally settling the dispute in the Constitutional Court.

There is some limitation to the function of the Constitutional Court in this area. Some examples include: (1) when the President appointed acting Premier and the Chairman of the Board of Audit and Inspection without the National Assembly’s consent²⁰⁾ and some members of the National Assembly filed for an adjudication of the competence disputes against the President, the Constitutional Court did not decide on the merits of the case, stating that the Court did not recognize a suit brought by a third party. (2) When members of the opposition party filed for an adjudication of competence dispute, claiming that the government negotiated with foreign

19) Constitutional Court [Const. Ct], 96Hun-Ra2, July 16, 1997, (KCCR 9-2, 154, 163).

20) Constitutional Court [Const. Ct], 98Hun-Ra1, July 14, 1998, (KCCR 10-2); Constitutional Court [Const. Ct], 98Hun-Ra2, July 14, 1998, (KCCR 10-2, 39). Article 86 (1) and 98 (2) of the CONSTITUTION provide that the Prime Minister and the Chairman of the Board of Audit and Inspection shall be appointed by the President with the consent of the National Assembly.

countries in WTO with respect to the import of rice without the National Assembly's approval, the Court dismissed the case based on the same reason stated above.²¹⁾ When the ruling party controls the majority of the seats in the National Assembly, such decisions make it difficult for the minority party to represent the National Assembly to continue checking and balancing the powers of the executive branch.

Furthermore, in cases of disputes between the majority and the minority party in the National Assembly, with problems such as "parliamentary railroading", thus violating the deliberation and voting rights of a member of the National Assembly, the Constitutional Court has stated that "unless the legislative procedure stipulated in the Constitution has clearly been violated, the act of passing a legislation is not considered invalid."²²⁾ In similar cases, the Court also ruled that "in respecting the discretion of the National Assembly, the Constitutional Court shall only verify the existence of the violation of authority. However, the issue of constitutionality or unconstitutionality arising out of the violation of authority shall be left to the respondent."²³⁾ By making such decisions, flaws in the legislative procedure cannot be remedied properly.²⁴⁾

3. *Organization and Operation of the National Assembly*

According to the principle of separation of power, state power has to be divided, and the divided authorities have to maintain check and balance, performing their respective function. In principle, each branch is allowed to exercise their delegated authorities without interference from other state organs. Thus, each organ is guaranteed to freely exercise its power. The

21) Constitutional Court [Const. Ct], 2005Hun-Ra8, July 26, 2007, (KCCR 19-2, 26).

22) Constitutional Court [Const. Ct], 96Hun-Ra2, Jul. 16, 1997, (KCCR 9-2, 154, 163).

23) Constitutional Court [Const. Ct], 2009Hun-Ra8, Oct.29, 2009, (KCCR 21-2(b), 14, 80).

24) In the 2009Hun-Ra8 case, the Constitutional Court decided that the promulgation of Newspaper Act and the Broadcasting Act by the Speaker violated the right to review and to vote of the members of the National Assembly. However, the Court dismissed the competence dispute raised by members of the National Assembly, who argued that the inaction of the Speaker to restore the right to review and to vote with respect to the Acts aforementioned violated their right to review and to vote. *See* Constitutional Court [Const. Ct], 2009Hun-Ra12, Nov. 25, 2010, (KCCR 170, 2038).

National Assembly is also allowed to autonomously determine its organization, activity and internal matters without interference from other state organs. The National Assembly's autonomy is seen as natural in accordance with the principle of separation of power. The National Assembly's autonomy is precondition for guaranteeing the effectiveness of the National Assembly's function in legislation, finance, control over other government branches, etc. Instances of the National Assembly's autonomy include legislation of National Assembly Regulations (Article 64 (1) of the Constitution), protection of the status of the member (Article 44, 45 and Article 62 (2), (3), (4) of the Constitution). In particular, the Constitution specifically stipulates a decision of reviewing the qualification of a National Assembly member, or expelling a member of the National Assembly shall not be brought to the Court.

When the Constitutional Court is performing a judicial review on the legislative activities of the National Assembly, the Court has to respect the National Assembly's autonomy. Since disputes relating to the organization and operation of the National Assembly lies within the autonomy of the legislative branch, the Constitutional Court has shown deep respect to the National Assembly when adjudicating a competence dispute in this area.

When deciding whether the voting procedure in the appointment of the Prime Minister was valid, the Constitutional Court has decided that, when the rules and regulations of the National Assembly is not clear as to the legitimacy of the voting procedure in the appointment process, the decision on how to solve the conflicts surrounding the voting procedure lies within the scope of autonomy of the National Assembly. Hence, the competence of final decision with respect to the voting procedure lies in the Speaker of the National Assembly, the representative of the legislative branch who is given a comprehensive authority and responsibility concerning the progress of the proceedings in the National Assembly. The Constitutional Court decided that "the authority of the Speaker over the proceedings is a form of autonomy under the National Assembly. The Speaker's act of counting the votes when there is a lot of dispute with respect to the bill, and not declaring the result of the votes does not in itself constitute a clear violation of the Constitution and the laws. Other state organs must respect such a result."²⁵⁾

25) Constitutional Court [Const. Ct], 98Hun-Ra3, July 14, 1998, (KCCR 10-2, 74, 84).

Furthermore, with respect to an action by the Speaker of the National Assembly in making a member resign in the Health and Welfare committee against his/her will, and reinstating him/her in the Environment and Labor committee, the Constitutional Court, in a competence dispute suit brought by the congressman, decided that “the National Assembly has the authority concerning its internal organization without interference of other organ. From such a view, the action of making a member to resign and reinstating him/her in other committee is fundamentally an action of the National Assembly reorganizing itself. Therefore, unless the measure is clearly in violation of the Constitution or the other Acts, the Constitutional Court shall not immediately come to the conclusion that the action was unconstitutional.”²⁶⁾

The autonomy of the National Assembly must be respected with consideration of the principle of separation of power. However, under the principle of rule of law, all state organs are bound by the Constitution and the laws. The Constitutional Court has been explicit with its position that when the legislative procedure or the decision-making process is clearly violating the Constitution or the law, the Court will step in.²⁷⁾ But in the needs of control of legislative procedure and respect of the National Assembly’s autonomy, there are many criticism about appropriateness of the Court’s decisions.²⁸⁾

III. Effect on the President and the Executive Branch

1. Authority of the President

During the long-term military authoritarian regime, there was a lack in separation of power because power was concentrated on the President. Such tendency still exists today. As such, the Prime Minister appointed by the President and the various administrative branches are unable to play

26) Constitutional Court [Const. Ct], 2002Hun-Ra1, Oct. 30, 2003 (KCCR 15-2(b), 17, 33).

27) Constitutional Court [Const. Ct], 96Hun-Ra2, Jul. 16, 1997, (KCCR 9-2, 154, 165).

28) Kim Ha-Yurl, *Hangug heonbeobjaepanjedoui seonggwawa gwaje* [The Accomplishments and Tasks of the Constitutional Court of Korea] 146-2 THE JUSTICE 101 (2015).

any important role in policy making, while the President still exercises immense power over state affairs. Therefore, for the establishment of a constitutional order of power, and separation of power, constitutional review on the President's exercise of power is very important.

The best example of constitutional review on the President's exercise of power is the adjudication on impeachment. The adjudication on impeachment procedure guarantees the legitimacy of the Constitution by making public officials legally responsible when he/she commit an act which is in violation of the Constitution. Article 65 of the Constitution stipulates the impeachment process for high ranking officials in the administrative and judicial branches when there is a violation of the Constitution or the law. Such provision prevents high ranking officials from violating the Constitution and law. It also provides a way of removing the authority of a state organ which is delegated by the people when the organ misuses its power, thus violating the Constitution and the law. Government officials, including the President, are subject to impeachment under article 65 of the Constitution. The significance of the provision is stated by the Constitutional Court as below:

"Even with respect to the President who has been directly elected by the people and thus have democratic legitimacy, the President can be removed for the protection of constitutional order. The Constitution considers the significant political chaos arising out of impeachment as an unavoidable democratic cost for the protection of a liberal democratic social order. Impeachment of the President is the realization of the rule of law, showing that everyone is bound by law, and that even a person possessing immense state power is not above the law."²⁹⁾

The Constitutional Court has stated that the power of the President must be exercised within the boundaries of the Constitution. The Court has consistently held this view when adjudicating individual acts by the President. In the past, in the study of public law, certain governmental measures were seen as prerogative actions of President, and they were excluded from judicial review due to its political nature. Measure following a president's political decision was considered as these. For instance,

29) Constitutional Court [Const. Ct], 2004Hun-Na1, May 14, (KCCR 16-1, 609, 632).

during the authoritarian regime in the past, a president's authority of declaring national emergency was used as a means of maintaining the regime, seriously infringing upon the basic rights of the people. However, there was no judicial review with respect to such measures before establishment of the Constitutional Court.³⁰⁾

The Constitutional Court made sure such a history would not repeat itself by clarifying that certain strict requirements must be satisfied before the President declares a state of emergency. When the Court was asked to review the constitutionality of the Emergency Financial Economic Order on the Use of Real Name during Financial Transactions and on the issue of Confidentiality, the Court recognized the concept of "prerogative action of president" and stated that it will respect the measures with highly political decisions. The Order stated above falls into such a category. However, the Court also explained that "even a prerogative action of president following a highly political decision is subject to judicial review if it directly infringes upon the basic right of the people. An Emergency Financial Economic Order has the same effect compared to a statute, and thus must be bound by the Constitution."³¹⁾ The position of the Constitutional Court puts a break to the bad custom of justifying a president's *ultra vires* act on the grounds that it is prerogative action of president.³²⁾

The President, as the head of state, has the power with respect to diplomatic matters. According to article 73 of the Constitution, the

30) The Constitutional Court decided that the Presidential Emergency Decree No. 1, 2 and 9, invoking Article 53 of the Constitution of 1972, which prohibited any act of denial, rejection, distortion or slander of the Constitution, any act of speech, suggestion, petition for revising or repealing the Constitution and any act of fabrication and distribution of rumors and tried any person who violated the Decrees by court-martial for punishment are unconstitutional. See Constitutional Court [Const. Ct], 2010Hun-Ba70, Mar. 21, 2014, (KCCR 25-1, 180)

31) Constitutional Court [Const. Ct], 93Hun-Ma186, Feb. 29, 1996, (KCCR 8-1, 111, 116).

32) With respect to the National Assembly's decision to dispatch troops overseas, the Constitutional Court stated that it will refrain from constitutional review. In the case related to the sending of troops to Iraq, the Constitutional Court ruled that the decision to dispatch troops overseas requires the political determination by the President and the National Assembly, and as long as the decision has been made according to the procedures stipulated in the Constitution and the Acts, the Constitutional Court shall respect the decision by those institutions. Due to the nature of the case, the Constitutional Court can only access to limited data. As such, the Court should refrain from deciding merely based on judicial standard. Constitutional Court [Const. Ct], 2003Hun-Ma814, Apr. 29, 2004, (KCCR 16-1, 601).

President has the authority to conclude and ratify treaties. Therefore, judicial review with respect to treaties is the most important control mechanism on the President's power concerning diplomatic matters. Since treaties are governed by international law, there is a question as to whether it is possible to perform constitutional review on treaties after they have been concluded. However, article 6 (1) states that Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws. Since the Constitutional Court performs judicial review on domestic laws, it should be concluded that the Court can perform constitutional review on treaties having the same effect as domestic laws.³³⁾ The Court stated that a treaty defining a certain act as a crime or one that increases punishment of a criminal activity has the same effect as a domestic law doing so. Therefore, when some clauses of the treaty increase punishment for customs violations, it cannot be said that punishment of the criminal activity is done without a statute. The Constitutional Court decided that just because the Marrakesh Agreement for the establishment of WTO increases penalty for criminal activities, it does not necessary mean a violation of the principle of *nulla poena nullum crimen sine lege*.³⁴⁾ Moreover, with respect to the ROK-US Administrative Agreement, the Court stated that despite the name "agreement" which makes some to believe that the National Assembly's approval is not needed, the agreement is related to the position of foreign armies, and legislative matters such as the criminal and civil jurisdiction concerning US soldiers, and hence, the treaty requires the National Assembly's approval and it is subject to judicial review.³⁵⁾

33) In a case disputing the constitutionality of the State Compensation Act, the Constitutional Court ruled that, "article 111(1)(i) of the Constitution, article 41(1) of the Constitutional Court Rules, article 111(1)(v) of the Constitution, and article 68(2) and article 41(1) of the Constitutional Court Rules clearly state that the subject of constitutional review is an Act. There is no doubt that the Act means a formal legislation passed by the National Assembly. Therefore, a treaty with the same effect as a formal legislation shall be included as a subject for constitutional review." Constitutional Court [Const. Ct], 95Hun-Ba3, Dec. 28, 1995, (KCCR 7-2, 841, 846).

34) Constitutional Court [Const. Ct], 97Hun-Ba65, Nov. 26, 1998, (KCCR 10-2, 685, 699).

35) Constitutional Court [Const. Ct], 97Hun-Ka14, Apr. 29, 1999, (KCCR 11-1, 273, 282).

2. *The Relation between Executive Power and Legislative Power*

According to the principle of separation of power, the National Assembly enacts statutes, while the President and the Executive branch implement them. However, the enacted statutes are unable to regulate everything. That is why the executive branch takes measures to materialize the purpose of the statute when implementing it. However, when the statute is over-dependent on the executive branch with respect to making the act more concrete, the legislative power of the National Assembly could be violated by the executive branch, or the people's basic right could be violated due to administrative convenience (the phenomenon whereby the administration tries to perform its duty in a manner convenient for itself).

The legal principle of requiring clarity and the principle on the prohibition of delegating comprehensive mandate are the two principles required to prevent the executive branch from infringing on the National Assembly's power. By stipulating in clear terms within the legislation, not only is the act able to provide the people regulated by the act with a standard for future action, the person implementing the law is also given an objective guidelines, thus preventing discriminatory or arbitrary interpretation of the act. Thus, in order to protect people's confidence and to maintain legal stability, statutes should be enacted with unambiguous terms. This is the legal principle of requiring clarity.³⁶⁾ The clarity of the law is closely related with an objective implementation of the law. The ambiguity of the law means that the standard of application of the law by the judicial and administrative branches is unclear. If the law delegates certain power to the Executive, it has to clearly stipulate the purpose, content and scope of delegating the mandate so that an objective standard is presented in order to avoid arbitrary application of the law by the administrative branch. This also allows the people to foresee the actions of the Executive.³⁷⁾ Furthermore, the ambiguity within the criminal law will allow judges to arbitrarily decide as to which action constitutes a crime. This is against the principle of *nulla poena nullum crimen sine lege* for the

36) Constitutional Court [Const. Ct], 90Hun-Ba27, Apr. 28, 1992, (KCCR 4, 255).

37) Constitutional Court [Const. Ct], 2003Hun-Ba35, July 15, 2004, (KCCR 16-2(a), 77).

protection of people's freedom and right.³⁸⁾ The principle of requiring clarity³⁹⁾ functions to avoid discriminatory and arbitrary interpretation of the legislation by the people executing the law.⁴⁰⁾ The Constitutional Court has used this principle as a standard for judicial review, preventing the administrative branch from having excessive power,⁴¹⁾ and guaranteeing that there is separation of power between the legislative and executive branches of the government.⁴²⁾

Not all acts are required to have the same standard of clarity. The standard of clarity might differ according to the characteristics, uniqueness, and legislative background of the act or a provision of the law. Laws imposing obligation require a higher standard of clarity compared to laws granting benefits. Criminal laws governed by the principle of *nulla poena nullum crimen sine lege* require a higher standard of clarity compared to other general laws.⁴³⁾ The standard is lower if the subject of regulation is diverse, or if it continuously changes. Determining the clarity of the law depends not only on that particular provision, but the law should be

38) Constitutional Court [Const. Ct], 93Hun-Ba65, Dec. 26, 1996, (KCCR 8-2, 785); Constitutional Court [Const. Ct], 99Hun-Ka4, Feb. 24, 2000, (KCCR 12-1, 98).

39) Constitutional Court [Const. Ct], 2002Hun-Ba47, July 15, 2004, (KCCR 16-2(a), 43).

40) Constitutional Court [Const. Ct], 99Hun-Ba34, June 28, 2001, (KCCR 13-1, 1255).

41) More than 100 Constitutional Court decisions are related to the issue of clarity. The first was Constitutional Court [Const. Ct], 88Hun-Ka13, Dec. 22, 1989, (KCCR 1, 357).

42) "An Act is a general and abstract norm, applied to everyone and every individual case which satisfy the requirements stated in the Act. It is impossible to stipulate in a concrete and descriptive manner with respect to every situation arising out of people's daily lives. The use of an abstract and general concept, or an open-ended concept which accommodates the changing social phenomena is inevitable. An Act stipulated in an overly concrete manner becomes too rigid to satisfy the various demands arising out of the modern and complicated everyday relationship. On the other hand, an overly vague Act limits individual freedom since the people is unable to foresee the consequence of their actions. Law makers can use less concrete legal concepts so that the Executive is able to implement various tasks, and deal with the changing reality by considering the unique quality of each circumstance. The Act can be made clear through the interpretation of the Act. Therefore, as long as the executive branch and the courts are able to form an objective standard (without arbitrariness) from the Act, the use of an unclear concept is not in violation of the principle of clarity." Constitutional Court [Const. Ct], 2003Hun-Ba35, July 15, 2004, (KCCR 16-2(a), 77).

43) Constitutional Court [Const. Ct], 98Hun-Ba37, Feb. 24, 2000, (KCCR 12-1, 169, 179); Constitutional Court [Const. Ct], 2000Hun-Ba57, July 18, 2002, (KCCR 14-2, 1, 16).

interpreted holistically.⁴⁴⁾

Furthermore, the Constitutional Court has given a standard concerning the scope and limit on delegating mandate. This is the principle on the prohibition of delegating comprehensive mandate to the Executive. Article 75 of the Constitution states that “The President may issue presidential decrees concerning matters delegated to him by Act with the scope specifically defined and also matters necessary to enforce Act.” This provision stipulates not only the need for a delegated legislation, but also its scope and limit. Delegated legislation is only allowed in matters limited by concreteness and specificity. Delegating legislative power in a general and comprehensive manner is equivalent to delegating *carte blanche* authority to the Executive. This is against the principle of the rule of law, and might lead to the executive branch arbitrarily implementing the law and infringing upon the basic right of the people. Therefore, even if the people are unable to foresee all the contents stipulated in future presidential decrees, the basic elements on the content and scope of the presidential decree should be regulated in the legislation, so that anyone could foresee the basic outline of the content which will be included in the presidential decree.⁴⁵⁾

This principle is important because the people expect the National Assembly, as the people’s representative, to perform its function of policy making and legislating laws in the form of an act, instead of delegating this duty to the executive or judicial branches of the government which are supposed to implement those enacted laws.⁴⁶⁾ It can thus be seen that the Constitutional Court has clearly drawn a line between the legislative and executive branches of the government, realizing the division of function between them.

3. Control over Administrative Action

Executive legislation such as order, rule, etc., and administrative action

44) Constitutional Court [Const. Ct], 97Hun-Ba73, Sept. 16, 1999, (KCCR 11-2, 285, 300).

45) Constitutional Court [Const. Ct], 2002Hun-Ba2, Sept. 19, 2002, (KCCR 14-2, 331, 336).

46) Constitutional Court [Const. Ct], 93Hun-Ba14, Oct. 31, 1996, October 31, (KCCR 8-2, 422, 433).

such as measure could themselves violate the basic right of the people. Article 107 (2) of the Constitution states that “The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or measures, when their constitutionality or legality is at issue in a trial.” Article 111 (1)(v) of the Constitution stipulates that “the Constitutional Court shall have jurisdiction over the Constitutional complaint as prescribed by Act”, while Article 68 (1) of the Constitutional Court rule states that a person whose basic right has been violated through an exercise or non-exercise of governmental power can request for constitutional complaint. An example of action / inaction referred above is governmental action, and since determining the existence of violation of right is a determination on the constitutionality of the action, it can be said that constitutional complaint is a judicial review of governmental action. By delegating the duty of judicial review of governmental action to both the Constitutional Court and the regular courts, law makers excluded the decision of regular courts from constitutional complaint in article 68 (1) of the Constitutional Court rule, unless complainant has exhausted all the remedies. Thus, remedy for an alleged violation of right due to governmental action first lies with the ordinary courts.

Therefore, with judicial decisions excluded from constitutional complaint, and with the application of the principle of supplementation, it is difficult to have administrative complaint with respect to many administrative measures. Constitutional review over a specific execution of law by the administration is done towards certain governmental actions not subject to administrative adjudication.⁴⁷⁾ On the other hand, constitutional adjudication indirectly affects governmental action through administrative law. Constitutional adjudication has made the Constitution a standard for trials, with the Constitution permeating into administrative law.

47) With respect to constitutional review of administrative measures confirmed by courts (original administrative measures), in Constitutional Court [Const. Ct], 91Hun-Ma98 etc., May 28, 1998, (KCCR 10-1, 660, 671), the Constitutional Court decided that “an original administrative measure can be subject to constitutional review only when the court decision which made its decision with respect to the administrative measure was vacated in exceptional circumstances. In case the court decision is not cancelled, original administrative measures cannot be subject to constitutional review.”

Administrative law serves to materialize the objective of the Constitution. Furthermore, administrative law has a closer relationship with the Constitution compared with any other laws since it controls state power in accordance with the rule of law. In that sense, administration law is an extension of the Constitution, and constitutional adjudication functions to guarantee the realization of the constitution's purpose.⁴⁸⁾ Hence, various legal principles of administrative law have been developed with the influence of the decisions made by the Constitutional Court. Thus, the Constitutional Court is able to indirectly review governmental actions.

On the other hand, executive legislation such as an order or a rule is an act of public power. Since the challenge against an order or a rule is not recognized as a subject of complaint in regular courts according to the interpretation of the administrative litigation law, and since there is no other remedy, the provisory clause of article 68 (1) of the Constitutional Court Act⁴⁹⁾ does not apply, thus making it a subject for constitutional complaint without waiting for its execution as long as it infringes upon the basic right directly.⁵⁰⁾ The Constitution delegates the power to review the constitutionality and legality of an order or a rule to the Supreme Court. However, such lawsuits have been recognized in a very limited scope. Since there is no other procedure to argue the illegality and/or unconstitutionality of an order and/or a rule, judicial review by the Supreme Court is limited.⁵¹⁾ Therefore, with respect to an order or a rule, it can be said that constitutional review is possible only when the Constitutional Court steps in.

4. *The President and the Prime Minister*

Though the basic structure of the government institutes is a presidential

48) Hong Jun-Hyung, *Heonbeobjaepangwa haengjeongbeob* [Constitutional Adjudication and Administrative Law], 19 HEONBOPNONCHONG [CONSTITUTIONAL LAW RESEARCH COLLECTION] 168 (2008).

49) "If any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes."

50) Constitutional Court [Const. Ct], 94Hun-Ma52, Jun. 26, 1997, (KCCR 9-1, 659, 667-668).

51) Supreme Court [S. Ct], 95Nu8003, Sept. 20, 1996; Supreme Court [S. Ct], 2003Mu23, Oct. 9, 2003; Supreme Court [S. Ct], 2005Du2506, Sept. 22, 2006.

system, the Constitution also includes a Prime Minister within the executive branch. That is why there could be some problems with respect to the Prime Minister's status and function. Since the President requires the National Assembly's approval when appointing the Prime Minister, in some cases, it is possible to delegate the Prime Minister with substantive authority, similar to a two-tier government.

Article 86 (2) of the Constitution states that "the Prime Minister shall assist the President and shall direct the Executive Ministries under order of the President." Based on this provision, the Constitutional Court rendered a decision concerning the Prime Minister as below:

"The fact that the President is the supreme and final decision maker in exercising executive power under the Constitution, and that the Prime Minister has the authority to recommend members of the State Council and heads of Executive Ministries (article 87 (1) and article 94 of the Constitution), and that the Prime Minister has the authority to countersign presidential documents (article 82 of the Constitution), all show that the Prime Minister has a function of restraining the exercise of power by the President. However, the reason we have a Prime Minister within the administrative branch even when the Constitution is modeled after a Presidential system is because we do not have a vice president. Therefore, in times of emergency, the country needs an agent to act on behalf of the President. Furthermore, the Prime Minister assists the President in exercising general control over state affairs, thus increasing the efficiency of the Presidential system. Moreover, added to the fact that the President has the authority to dismiss the Prime Minister with any legal limitations, the main function of the Prime Minister is to be an assisting organ to the President."⁵²⁾

In this sense, the Korean Prime Minister who is a government official appointed by the President is different from the Prime Minister in a parliamentary government system who is elected by the Parliament as the head of the executive branch. The President remains as the head of state even when he/she delegates some controlling power to the Prime

52) Constitutional Court [Const. Ct], 89Hun-Ma86, Apr. 28, 1994, (KCCR 6-1, 371, 389-390).

Minister.⁵³⁾ The Constitutional Court case above is significant in that it confirmed the status of the President and Prime Minister in the Constitution. However, there is some criticism that this does not stop the President from having excessive power.

IV. Effect on Other Governmental Structure and Order

1. Election

The saying “there is no democracy without election” shows the significance of an election process in realizing the democracy. The election which is held periodically compels officials in the government to observe the will of the people. This makes it possible for the people to reflect their political views to the government policy, thus becoming a means of realizing the sovereignty of the people. Furthermore, election grants legitimacy to the political authority, and it also gives the opportunity for a minority party to become the ruling party. Thus, election can be said as the essence of democracy.⁵⁴⁾

In many instances, the Constitutional Court’s decision makes sure that the election system has contributed in reflecting the people’s will on government authority. The Constitutional Court established a limitation with respect to the variation of population, and decided that any election law violating such limitation as unconstitutional. The Constitutional Court stated that the principle of equal election means the following two things. (1) Quantitative equality, in that everyone is given one vote (one man, one vote), thus rejecting a multiple voting system. (2) Qualitative equality, in that the value of a person’s vote (one vote, one value) is equal in contributing to the result of the election. The Constitutional Court emphasized that when determining an electoral district in the election of National Assembly members, the principle of population proportionality shall be the most important standard, and at the same time stated that the limitation is 60% population variations (4:1) of the average population of other electoral

53) CHONG, *supra* note 16, at 1337.

54) KAY HEE YOL, HEONBEOBHAG (SANG) [CONSTITUTIONAL STUDY (A)] 303 (2005).

districts.⁵⁵⁾ But the Constitutional Court, in subsequent decisions, imposed stricter limitations, stating that the limitation should be 50% population variations (3:1), then 33% population variations (2:1).⁵⁶⁾

With respect to the case of deciding on the electoral district for members of the municipal assembly and the provincial assembly, the Constitutional Court took into account three factors before making its decision: (1) the principle of population proportion as the most important element in realizing the qualitative equality of the votes, (2) local representative of a district or a province as exceptional circumstances, and (3) the severe population variations between big cities and small rural villages due to urbanization. The Constitutional Court decided that the most appropriate limitation is 60% population variations (4:1) of the average population, thus reaffirming its former position.⁵⁷⁾ Legislatures have a wide discretion concerning the determination of an electoral district. However, even when the realization of a 1:1 principle is difficult, legislatures are only justified to take into account those unavoidable elements in determining electoral districts.⁵⁸⁾ By setting a standard for population variation of 2:1 and giving law makers the chance to modify their decision with respect to determining the electoral district, the Constitutional Court showed respect to the legislative branch by not applying the standard(2:1) in actual cases.⁵⁹⁾

Another problem related to the determination of electoral district is the issue of gerrymandering. The Constitutional Court has stated that “in determining electoral districts, one has to take into account the social, geographical, historical, economical, administrative ties of the districts, and unless there is some special unavoidable circumstance, the adjoining areas shall form one electoral district.” Without special unavoidable circumstance, in case two separate / non-adjoining areas are made into an electorate

55) Constitutional Court [Const. Ct], 95Hun-Ma224, Dec. 27, 1995, (KCCR 7-2, 760).

56) Constitutional Court [Const. Ct], 2000Hun-Ma92 etc., Oct. 25, 2001, (KCCR 13-2, 502).

57) Constitutional Court [Const. Ct], 2005Hun-Ma985, Mar. 29, 2007, (KCCR 19-1, 287).

58) Jung Tae-Ho, *Seongeogwon mich piseongeogwonui bojanggwa baljeon* [Protecting and Guaranteeing the right to vote and the eligibility to run for elections], 19 HEONBOPNONCHONG [CONSTITUTIONAL LAW RESEARCH COLLECTION] 704 (2008).

59) At last, the Constitutional Court decided unconstitutional the statutes of the Election Act for electoral district applying the 2:1 standard. Constitutional Court [Const. Ct], 2012Hun-Ma190 etc., Oct. 30, 2014, (KCCR 26-2(a), 668).

district, which does not include an area situated in between the two, then such an act is an arbitrary deviation from the scope of discretion, which is a violation of the Constitution.⁶⁰⁾ Therefore, in case voters from a certain district lose their opportunity to participate in the political process due to an arbitrary electorate district delimitation, or when it is proven that the candidate supported by the voters who has the likelihood of being elected has been deliberately deprived of the opportunity, and when it is obvious that there is intention to discriminate the voters in the district and there is substantial effect of discrimination, i.e. when there is gerrymandering, the electorate district delimitation by law makers is a deviation from legislative discretion, thus constituting a constitutional violation. The Constitutional Court has been consistent with this position.⁶¹⁾

Other important Constitutional decision that brought dramatic changes to the structure of political party through election system reform is the unconstitutional decision of the system of proportional representation without voting for the political party. The Constitutional Court ruled that, under the election system allowing one vote per person and adopting the seat allocation for proportional representatives in the National Assembly, when a person votes for a party nominee in the electoral district, his or her vote contributes to the election of the district member of the National Assembly as well as to the allocation of seats for the proportional representatives. On the other hand, a vote for an independent in the electoral district is only counted for the election of the district Assembly member, and has no value in the allocation of seats for proportional representatives. Hence, there arises the problem of inequality in the value of a vote. When a person votes for an independent because the party of one's choice did not nominate a candidate in the electoral district, he or she is forced to suffer inequality in the value of his or her vote. This is unreasonable discrimination of voters who support independent candidates, and it

60) Constitutional Court [Const. Ct], 95Hun-Ma224 etc., Dec. 27, 1995, (KCCR 7-2, 760, 788-789).

61) Constitutional Court [Const. Ct], 96Hun-Ma54, Nov. 26, 1998, (KCCR 10-2, 742, 748); Constitutional Court [Const. Ct], 96Hun-Ma74 etc., Nov. 26, 1998, (KCCR 10-2, 764, 775); Constitutional Court [Const. Ct], 2000Hun-Ma92, Oct. 25, 2001 (KCCR 13-2, 511).

violates the principle of equality in election.⁶²⁾ With the decision, the system of one person two votes was implemented, and as a result, representatives from the progressive “Democratic Labor party” were elected into the National Assembly, bringing changes to the political landscape.

This series of Constitutional cases⁶³⁾ with respect to the election system is significant in that they reflected the political will of the people by correcting any distortions in the voting system, thus establishing the rightful meaning of voting within the democratic system.

2. *The System of Public Officials*

In the past, the people of power used to attack and oppress anyone who was opposed them, and they mobilized public officials in the National Intelligence Service, police department, courts, prosecutor office, etc., repeatedly exerting influence over them. The bias political activities taken by government officials frequently happened during the process of starting of a new administration office by the ruling party, especially during election seasons. Therefore, proper establishment of a public official’s status and role is important in preventing abuse of power and realizing the rule of law. Based on such historical experiences, article 7 of the Constitution was made, which states that “(1) All public officials shall be servants of the entire people and shall be responsible for the people. (2) The status and political impartiality of public officials shall be guaranteed as prescribed by Act.”

The Constitutional Court ruled that the status and responsibility of state organs, which act as servants of the people, can be seen as crystallized through the “neutrality obligation of state organs during election system.” It further stipulated that state organs have to act in a neutral manner with

62) Constitutional Court [Const. Ct], 2000Hun-Ma91, (KCCR 13-2, 77).

63) There are many constitutional cases relating to the right to vote, including restrictions on candidates through deposits, restrictions on election campaigns, etc. For example, the Constitutional Court decided that the Article 18(1) (2) of Act on the Election of Public Officials which limits the right to vote of prisoners is unconstitutional because of violation of principle of universal and equal election. *See* Constitutional Court [Const. Ct], 2012Hun-Ma409, Jan. 28, 2014. These cases are more related to the right to vote and the eligibility to run for elections, and thus will not be discussed in this paper.

respect to the competition between political parties. Thus, state organs cannot use their influence and authority to affect the free competition of political parties, favoring one particular party / candidate over another. The term “public officials”, in a narrow sense, refer to government employees, but in a broader sense, it refers to political government officials serving the state through active political activities, such as the President, the Prime Minister, State Ministers, Provincial Mayors, District Mayors, County Magistrates, District Leaders, etc.). By using the function and influence of the office, public officials can adversely affect the formation of people’s political will, besides distorting the competition between political parties. This is especially true when influence is arbitrarily exerted by the government or the execution organs of municipal governments. Therefore, the Constitutional Court emphasized that the political neutrality of the President, leaders of municipal governments, etc. is much more needed than ordinary government officials.⁶⁴⁾ Such a decision is significant in that it substantially realized the notion of political neutrality enshrined in the Constitution.

Furthermore, the Constitutional Court stated that the system of public officials must be one that stays away from a spoil system (the practice where a political party gives government positions to its supporters after winning an election), prevents interruption and confusion of state function during the change of regime, and guarantees the independence and continuity of the execution of public service. The Court ruled the public official system is a constitutional system by stating that “Public officials shall not show loyalty to a particular party or a superiors, but instead, as public servant for the people, they should perform their duties according to the law, not only for the protection of people’s rights, but also for the political stability of the nation.”⁶⁵⁾

An important element constituting the public official system is the merit system. Since it is required of public officials to maintain their political neutrality and their ability to perform their duty efficiently, the appointment of public officials should be based on the merit system, with

64) Constitutional Court [Const. Ct], 2004Hun-Na1, May 14, 2004, (KCCR 16-1, 609, 634-636).

65) Constitutional Court [Const. Ct], 95Hun-Ba48, Apr. 24, 1997, (KCCR 9-1, 435, 442-443).

the applicants' ability, expertise, aptitude, character as the standard. Therefore, the election of public officials based on their religion, gender, social status, regional affiliation, instead of their ability, is a violation of the people's right to appoint public officials.⁶⁶⁾ Based on this reasoning, when deciding on the constitutionality of incentive schemes in public official appointment examinations, the Constitutional Court decided whether the measure was a violation of equality and the people's right to become public officials.⁶⁷⁾

Moreover, the Constitution provides special protection to the status of governmental officials. Their status is guaranteed (no dismissal without just cause) so as to assure that they can continue to be servants of the people. Public officials are unable to maintain political neutrality if their status changes according to which party is ruling the government. Thus, public officials are not to be dismissed or given any disadvantage based on reasons other than their implementing of official duties. The Constitutional Court has always understood how important it is to protect the status of public officials. Hence, in the case of post restrictions on the retirement age, the Constitutional Court based its judgment on the principle of the protection of trust, and decided that the measure was unconstitutional.⁶⁸⁾

The decisions of the Constitutional Court guarantee that public officials can perform their duties despite the change of regime, and prevents political parties to use public officials to their advantage. Therefore, it would be hard to challenge the fact that the Constitutional Court has contributed in maintaining the political neutrality of government actions.

66) Constitutional Court [Const. Ct], 98Hun-Ma363, Dec. 23, 1999, (KCCR 11-2, 770, 797-798).

67) Constitutional Court [Const. Ct], 2000Hun-Ma25, Feb. 22, 2001, (KCCR 13-1, 386); ; Constitutional Court [Const. Ct], 2003Hun-Ma30, Sept. 25, 2003, (KCCR 15-2(a), 501); ; Constitutional Court [Const. Ct], 2001Hun-Ma882, Mar. 25, 2004, (KCCR 16-1, 441); Constitutional Court [Const. Ct], 2002Hun-Ma152, Dec. 22, 2005, (KCCR 17-2, 741).

68) Constitutional Court [Const. Ct], 89Hun-Ma32, Dec. 18, 1989, (KCCR 1, 343); Constitutional Court [Const. Ct], 91Hun-Ba15, Apr. 28, 1994, (KCCR 6-1, 317); Constitutional Court [Const. Ct], 99Hun-Ma112, Dec. 14, 2000 (KCCR 12-2, 399).

3. The Autonomy of Local Government

The protection of local government's autonomy has been stipulated in the Constitution since 1984. The Local Autonomy Law was enacted in 1949, and the district Assembly was formed. However, the system of local autonomy was not operational since the dissolution of district Assembly in 1961. The Constitution of 1972 and 1980 all included provisions concerning local autonomy, but the existence of a suspension rule in the supplementary provision left the provision concerning local autonomy without any legal effect. Such supplementary provision no longer exists in the current Constitution, thus allowing the system of local autonomy to be implemented.

The system of local autonomy is one that better protects the people's right. It also allows democracy to be realized more closely with the people's lives. Moreover, it divides the power between the local government and the central government, preventing concentration of power on the central government. The system of local autonomy did not work in the past partly because the central government concentrated and abused its power. In order to prevent such situation, the Constitutional Court must guarantee the rights / authority of local governments, and realize the separation of power between the central government and the local government.

In order to realize the system of local autonomy, the existence and structure of local governments must be protected. Such a system cannot be realized if it is abolished, thus putting local governments as subordinate organizations of the central government. However, this does not guarantee the existence of every individual local government. Article 117 (2) of the Constitution states that "the types of local governments shall be determined by Act", without stipulating the types of local governments and the structures thereof in the Constitution. These matters are left to law makers. Therefore, the system of local autonomy in the Constitution does not guarantee the existence of a particular local government. The dissolution, succession and annexation of local governments are allowed under the Constitution. The Constitutional Court ruled that "the Constitution only guarantees the general autonomous administration undertaken by local governments, not the existence of a particular local government. Therefore, the dissolution, succession and annexation of local governments are done in

accordance with the given law".⁶⁹⁾

One case illustrates the Constitutional Court's position with respect to this issue. Law makers passed the Jeju Island Special Law. The law reorganized Jeju island as a local autonomous entity, combining the cities of Jeju, North Jeju, Seokyupo and South Jeju into 2 cities. It also contained provisions concerning the appointment of the Mayor. The Constitutional Court, when deciding on the constitutionality of this law, ruled that whether to continue recognizing a special municipality, a province, a city, etc. as an autonomous district lies within the discretionary scope of law makers.⁷⁰⁾

In order to protect the system of local autonomy, local governments must be able to perform their duties without intervention from central government. Local governments not only perform their inherent duties, they also perform duties designated by the State, while the central government oversees such undertaking. However, supervision involving a large scope of matters can undermine the essence of local autonomy. Thus, the central government is allowed to do illegality inspection, instead of a general inspection. In a case concerning competence dispute between Seoul city and the Minister of Security and Public Administration, the Constitutional Court ruled that "when carrying out inspection on local governments, the central government should focus on the legality of the measure. Arbitrary inspection by the central government will undermine the system of local autonomy, Thus, before the Minister of Security and Public Administration carry out any inspection, there must be a violation of a certain Act, or there must be at least some reasonable grounds for such illegality. Furthermore, the scope of inspection must be specific."⁷¹⁾ The Constitutional Court came to the conclusion that the joint inspection done by the central government was a violation on the local government's right on self autonomy.

As discussed above, the system of local autonomy is a way to realize

69) Constitutional Court [Const. Ct], 94Hun-Ma175, Mar. 23, 1995, (KCCR 7-1, 438, 452).

70) Constitutional Court [Const. Ct], 2005Hun-Ma1190, Apr. 27, 2006, (KCCR 18-1(a), 652, 659).

71) Constitutional Court [Const. Ct], 2006Hun-Ra6, May 28, 2009, (KCCR 21-1(b), 418, 431).

democracy. However, since a measure by a local government also constitutes a government act, there is a danger that such measure violates the people's basic right. Therefore, controlling the power of local governments is also an important function of the Constitutional Court. The Constitution provides local governments with the right to legislate, as stipulated in article 117 (1), which states that "Local governments shall deal with administrative matters pertaining to the welfare of local residents, manage properties, and may enact provisions relating to local autonomy, within the limit of Acts and subordinate statute." This allows local districts to legislate under their own responsibility. It also helps flexible legislation by reducing the gap between law makers and the people, besides revitalizing local communities through the discussion of law makings. Local legislation is an important part of expressing political will of a local community.⁷²⁾ In this light, judicial review by the Constitutional Court on local ordinance is a good way to control local government's power.

The Constitutional Court, from an early stage, has subjected local ordinances to judicial review. "An action of government power" within article 68 (1) of the Constitutional Court Act includes legislative act, and since an ordinance enacted by local legislation is binding upon an unspecified number of the general public, legislation of ordinance is seen as a legislative act, and thus subject to judicial review.⁷³⁾ Hence, it is possible for the Constitutional Court to decide that an ordinance is unconstitutional without the ordinance being implemented if it violates the people's basic rights directly.

On the other hand, local law makers are elected by community members, and as such, the local Assembly has democratic legitimacy and authority to enact local laws, which makes it undesirable to excessively limit local law maker's power to legislate. Thus, even though the Constitutional Court should perform judicial review on issues related to the people's basic right, strict limitation on the legislative power of the local community is against the system of local autonomy. The Constitutional Court decided as follow: when local law makers enact ordinance regulating people's right and obligation, they must be mandated by an Act, but "the

72) CHONG, *supra* note 16, at 994.

73) Constitutional Court [Const. Ct], 92Hun-Ma216, Dec. 29, 1994, (KCCR 6-2, 451, 457).

mandate does not have to be as concrete in its scope. A general mandate is sufficient for the enactment of an ordinance."⁷⁴⁾

The Constitutional Court's decision is made based on two considerations: the need to revitalize local governments and the need to prevent abuse of the power. The decisions led to a realization of the system of local autonomy, which is evidenced by the increasing number of disputes concerning authority between local governments. There were only 9 cases by 1998. However, as many as 82 cases were submitted to the Constitutional Court till September 30, 2014.⁷⁵⁾ The increasing number of competence dispute adjudication is proof that the system of local autonomy is operational nowadays.

V. Conclusion

The Constitutional Court has diligently performed its duty of controlling state power, realizing the principle of separation of power and protecting the basic right of the people for last 25 years. By subjecting legislative and executive actions to judicial review, the people who exercise state power have to constantly consider the constitutionality of their actions. Thus, the biggest influence of the Constitutional Court on the order of authority is that it has put every state action within the scope of constitutional order prior to any judicial review by the Constitutional Court. To guarantee the constitutionality of state power is to protect the basic rights of the people, and to assure that the Constitution remains its efficacy within the political system. Therefore, each and every state organ is able to perform its duty independently without interference to other branches within the framework provided by the Constitution. This is how state organs check one another, achieving balance in power.

The Constitutional Court has some limitations in making impact to the authority structure of the legislative and the executive branch. Part of the reasons to such limitation is due to some institutional defect of

74) Constitutional Court [Const. Ct], 92Hun-Ma264, Apr. 20, 1995, (KCCR 7-1, 564).

75) Constitutional Court homepage (www.court.go.kr). Cases registered and adjudicated till September 30, 2014.

constitutional review system, such as the fact that Supreme Court decisions are not subject to judicial review, the fact that judicial review with respect to order or rule of executive is done by the Supreme Court instead of the Constitutional Court, etc. However, it is also an undeniable fact that separation of power was not properly realized due to the inconsistent decisions by the Constitutional Court. Part of the problem has been solved with the Constitutional Court changing its position.

The constitutional review system, in Korea, was introduced in 1948. However, full-scale constitutional review actually began when the current Constitutional Court was established in September 1988. Due to the activities of the Constitutional Court, the basic rights of people have been more completely protected. The freedom and rights of people of Korea have been guaranteed with equal status to advanced countries and democratic political system has been stably established. So, it is estimated that Korea is the most successful country in Asia to settle into a constitutional adjudication system. In the process of development of democracy and the rule of law in various parts of society including social, political and economic sectors, many important constitutional issues have been brought to the Constitutional Court. This means that the role of the Constitution and its normative power as a standard for resolving social and political disputes have been gaining extra importance. This also reflects the fact that the Constitutional Court has received tremendous support from the people since its foundation, as the survey results annually conducted by a media company demonstrates. The majority view concerning the changes in the country brought about by judicial reviews has been very positive. After 25 years of establishing the Constitutional Court, we should not be satisfied with the result merely by comparing it to the result of the past. An evaluation on the Constitutional Court in the future will very much depend on detailed decisions addressing the many tasks not yet performed by the Constitutional Court.

