

Judicial Appointment in the Republic of Korea from Democracy Perspectives

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Abstract

This paper discusses the symbolic and actual role of the judiciary of the Republic of Korea in the nation's separation of powers structure from the perspective of constitutional democracy, by primarily analyzing the law and the system pertaining to the judicial appointment. The issue of judicial appointment has been discussed continuously and extensively both inside and outside the judiciary, due to its far-reaching constitutional ramifications in the representative democracy. In this vein, this paper first reviews the law and the system pertaining to the appointment of judges to the judicial courts at various levels in the Republic of Korea, with a focus on the appointment mechanism applicable to the Supreme Court. This paper then proceeds to analyze the judicial appointment mechanism particularly in light of the anticipated role of the judiciary in the current state of democracy in the nation. In this regard, the paper discusses some of the issues critically relevant to the judicial appointment mechanism, including the qualifications expected for the judges and the education therefor, the amount of workload and the size of the docket at the Supreme Court, and the appeals mechanism. The main part of the paper analyzes some of the reform measures as currently proposed and discussed, particularly in light of the role of the judiciary and the Supreme Court in a representative democracy.

I. Introduction

This paper discusses the symbolic and actual role of the judiciary of the Republic of Korea in the nation's separation of powers structure from the perspective of constitutional democracy, by primarily analyzing the law and the system pertaining to the judicial appointment. The issue of judicial appointment bears a particular significance from democracy perspectives in terms of the trust of and from the public in the judicial system and justice administration as a whole, which in turn is grounded upon fairness, expertise

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and independence of the judiciary both in actuality and as perceived. In this vein, this paper first reviews the law and the system pertaining to the appointment of judges to the judicial courts at various levels in the Republic of Korea, with a focus on the appointment mechanism applicable to the Supreme Court. This paper then proceeds to analyze the judicial appointment mechanism particularly in light of the anticipated role of the judiciary in the current state of democracy in the nation. In this regard, the paper discusses some of the issues critically relevant to the judicial appointment mechanism, including the qualifications expected for the judges and the education therefor, the amount of workload and the size of docket at the Supreme Court, and the appeals mechanism. The main part of the paper analyzes the current reform measures proposed from both inside and outside the court. These reform measures focus on democracy perspectives, particularly the role of the judiciary and the Supreme Court in a representative democracy.

South Korea's modern judicial system, initially established with the enactment of the Court Organization Act of 1895 (Law No. 1), has evolved over time reacting to various changes and challenges in the South Korean society. Facing increasing demand for reform for democratization from various sectors of the society including NGOs, the South Korean judiciary has made efforts to improve the judicial system since as early as 1960s. Notably, the establishment of the office of the Deputy Director General for Judicial Policy Research under that of the Minister of National Court Administration in March of 1990 initiated the system-wide consolidation and integration of the judicial policy studies.¹⁾

More recently, the Judicial Reform Committee, which was in operation from 2003 to 2004, comprehensively integrated the reform efforts over challenges to the judiciary and the judicial system. The Judicial Reform Committee consisted of twenty-one members representing various interest groups, such as the legal profession, politics, legislature, media, labor unions,

1) Such an effort on the Supreme Court's initiative and, in some cases, on the presidential initiative has continued through various committees established within the Supreme Court. The Commission for Judicial System Development and Globalization Committee (1993-1995), the Judicial Reform Promotion Committee (1999-2000), the Judiciary Development Plans for the Twenty-First Century (1999-2000), the Judicial Reform Committee (2003-2004), and the Presidential Committee on Judicial Reform (2005-2006) are representative examples.

business and NGO groups, and it presented specific reform proposals on five of the main issues as follows: (a) organization and function of the Supreme Court, for enhancing the authority of the Supreme Court as the nation's highest court; (b) judicial appointment system, for the institution of a system to appoint the judges among the attorneys with substantial work experience in order to meet the public's demand for trial by judges with broader understanding on the society; (c) legal education and attorney licensing system, for further heightened expertise and competitiveness at the global caliber; (d) citizen's participation in the judicial process, for lay participation in the trial process and particularly in the criminal adjudication process; and (e) public legal service and criminal procedure reform, for an efficient and fair legal system readily accessible to the public that would enable the protection of both the rights of the accused and the victims through criminal proceedings.²⁾

The issue of judicial appointment has been discussed continuously and extensively both inside and outside the judiciary, due to its far-reaching constitutional ramifications in the representative democracy. Especially subsequent to the appointment of five Justices to the Supreme Court in 2005, various organizations in the private sector have proactively been discussing publicly the issue of appropriate qualifications for the justices and the chief justice of the Supreme Court and seeking out diverse public opinions, while the South Korean judiciary has simultaneously made a continuing reform effort in this vein, as will be analyzed in the following parts of this article.

2) The Act on Establishment and Operation of the Professional Graduate School of Law (Law No. 8852) or so-called "Law School Act" was promulgated in 2007 and came into effect in 2008, under which the new graduate-level professional law schools are now in operation as of 2009. The ensuing legislation for the new system for the qualifications to obtain license to practice law in South Korea is currently on the way. Also, the Civil Participation in Criminal Trials Act (Law No. 8495) on lay participation in selected types of criminal cases was enacted in 2007 and came into effect in 2008.

II. Law and Practice of Judicial Appointment in the Republic of Korea

1. *Brief History of the South Korean Judiciary and the Judicial Appointment System*

The foundation for the Republic of Korea's judiciary was established when the Supreme Court replaced the *Chosun* High Court on October 11, 1945 under the USAMGIK (United States Army Military Government in Korea). The official history of the judiciary of the Republic of Korea is traced back to the appointment of Mr. Byung-Ro Kim as the inaugural Chief Justice and of five other Justices pursuant to the Constitution of the First Republic of Korea that came into effect on July 17, 1948. Whereas the judiciary as of 1948 consisted of the Supreme Court and three District Courts, the judiciary as of 2009 of the Republic of Korea consists of the Supreme Court, five High Courts, one Patent Court, eighteen District Courts, one Administrative Court, and one Family Court.^{3,4)} The basic three-tier system is composed of the District Courts, the High Courts and the Supreme Court. Other courts exercise specialized functions with the Patent Court positioned at the level of the High Court, and the Family Court and the Administrative Court positioned at the

3) The current constitution, i.e., the Constitution of the Sixth Republic of Korea, provides in Article 101, Section 2, that "[t]he courts comprise the Supreme Court, which is the highest court of the State, and the courts established at lower levels," and, in Article 102, Section 3, that "[t]he organization of the Supreme Court and lower courts shall be determined by law," thereby delegating the specific aspects of the court organization to the statutes. The Court Organization Act (Law No. 8794) in this vein establishes five types of lower courts under the Supreme Court, which are the High Court, the Patent Court, the District Court, the Family Court and the Administrative Court. The Act also provides that the branch courts and/or the municipal courts may be established under the District Courts as necessary.

4) In South Korea, there exists the Constitutional Court established by and under the Constitution as an independent constitutional institution. The Constitutional Court retains jurisdiction over such constitutional issues as the constitutionality of the statute, impeachment, dissolution of a political party, constitutional petitions filed directly to the Constitutional Court, and jurisdictional conflicts involving State agencies and/or local governments. Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by National Assembly, and three are designated by the Chief Justice of the Supreme Court.

level of the District Court.⁵⁾ Except in military courts, the adjudication proceedings including hearings and judgment-rendering are presided by the judges qualified and appointed by and under the Constitution and the relevant statute. A trial is presided either by a single judge or a panel of three judges. For certain categories of relatively serious criminal offenses, trial by way of lay participation was introduced on a pilot program basis in January of 2008.⁶⁾ As of 2009, the number of judges in the Republic of Korea including the Chief Justice and the Justices of the Supreme Court and those in special service as, for example, the professors of the Judicial Research and Training Institute is approximately 2,300.

2. Qualifications Required for the Judges and the Justices

The Constitution of the Republic of Korea provides that the qualifications for judges shall be prescribed by the applicable statute. In accordance, the Court Organization Act (Law No. 8794, as most recently revised in 2007) currently mandates that the judges shall be appointed among those who have passed the national judicial examination and completed the two-year training program at the Judicial Research and Training Institute, or those who have obtained qualifications as attorneys-at-law (Article 42, Section 2, of the Act).

The Chief Justice and the Justices of the Supreme Court are appointed among those who are judges, public prosecutors, attorneys-at-law, licensed attorneys who are engaged in legal affairs at the state organs, local governments, public enterprises, state-financed institutions or other juristic persons, or licensed attorneys who serve as professors in the field of law at an

5) There is also other special court such as the martial court. The difference between martial court and non-martial court is that military officers who are not qualified as judges hear cases in martial court, whereas in non-martial court only judges may adjudicate cases under the Constitution and the Court Organization Act. However, the Supreme Court has the final appellate jurisdiction over all cases including those adjudicated in military trials.

6) As a means for citizen participation in the nation's judicial process, South Korea adopted a system of jury trial in 2008 for a limited type of criminal cases. The Civil Participation in Criminal Trials Act (Law No. 8495) that came into effect in January 2008 provides the statutory grounds for South Korea's unique jury system. The eligible defendant may request for a jury trial, however, the court may decide for a bench trial. In a jury trial, both the jury and the judge take part both in finding of facts and in determining legal issues.

accredited college or university (Article 42, Section 1, of the Act). The Justices and the Chief Justice should be of 40 years of age or older, and have an experience of 15 years or longer in one or more of the capacities mentioned above (Article 42, Section 1, of the Act). Former Chief Justices and other Justices predominantly served as judges at the lower courts prior to their appointment to the respective positions.

3. Court Organization and the Appointment of the Chief Justice, the Justices and other Judges in the Republic of Korea

The Supreme Court of the Republic of Korea is comprised of the Chief Justice and thirteen Justices including the Minister of National Court Administration (Article 102 of the Constitution, Articles 13 and 68 of the Court Organization Act). As the court of last resort, the Supreme Court hears appeals from judgments or rulings rendered by the High Courts, the Patent Court, and the appellate panels of the District Courts or the Family Court in civil, criminal, administrative, patent and domestic relations cases (Articles 11 and 14 of the Court Organization Act).⁷⁾ Under special circumstances, the Supreme Court hears appeals from the judgments rendered by the trial court

7) The jurisdiction of the Supreme Court is exercised at the Grand Bench or at the Petty Benches. The Grand Bench is convened with more than two-thirds of the Justices present, with the Chief Justice presiding. A Petty Bench is convened with four Justices. Currently, there are three Petty Benches at the Supreme Court. All judgments rendered by a Petty Bench should be made unanimously. For the case deliberated by the Grand Bench, the decisions are made on a majority basis. The Supreme Court cannot reverse the judgment of the lower court should the members of the Grand Bench be unable to reach a majority opinion. The Petty Benches rule most of the cases that are appealed to the Supreme Court. However, a case is referred to the Grand Bench in the event that a Petty Bench fails to reach a consensus of the decisions to be rendered or if the case falls under one of the following categories: (i) where it is deemed that any order, rule or regulation is in contravention of the Constitution; (ii) where it is deemed that any order, rule or regulation is contrary to the statute; (iii) where it is deemed necessary to modify the previous opinion of the Supreme Court on the interpretation and implementation of the Constitution, statutes, orders, rules or regulations; and (iv) where it is deemed that adjudication by a Petty Bench is not appropriate. When the grounds for appeal to the Supreme Court submitted by the appellant do not fall under such categories as are enumerated by the law, the Supreme Court is to dismiss the appeal without further examining the case. The reasons for dismissal need not to be stated. This is called discontinuation of adjudication. This is not applicable to criminal appeals.

of first instance. The Supreme Court also has the authority to review rulings rendered by the Korean Maritime Safety Tribunal, and has exclusive jurisdiction over the validity of the presidential or parliamentary election. The Supreme Court has the final authority to review and determine the constitutionality and the legality of executive orders, rules, regulations, and actions taken by administrative entities and agencies, although such authority is subject to possible changes under the currently deliberated constitutional reform. The Chief Justice of the Supreme Court exercises general control over judicial administrative affairs, and directs and supervises the officials concerned in regard thereof (Article 13 of the Court Organization Act). Judicial administration pertains to administrative management affairs including organization, human resources, budgets, accounting and facilities, which are necessary in operating the judiciary. The Chief Justice may delegate part of such authority to the Minister of National Court Administration (Articles 19 and 67 of the Court Organization Act).

The High Courts are currently located in five cities in Korea – Seoul, Busan, Daegu, Gwangju and Daejeon. Each High Court consists of a chief judge and other judges. As of 2009, approximately 290 judges serve at the high court level. In each High Court, there is an administration bureau for internal management and supervision of the court officials. High Courts hear appeals from judgments or rulings rendered either by a panel of three judges of the District Court or the Family Court, or by the Administrative Court; High Courts also hear appeals from judgments or rulings in civil cases rendered by a single judge of the District Court or its branch court when the amount in controversy exceeds 50 million Korean Won (appx. 54,000USD) (Articles 26-28 of the Court Organization Act). The jurisdiction of High Courts is exercised by a panel of three judges.

Supporting the court organization at the bottom of the triangle are 18 District Courts currently in operation across the nation (Articles 29-36 of the Court Organization Act). Each District Court consists of a chief judge and other judges. In each District Court, there is an administration bureau to handle administrative affairs. Branch court(s), family branch court(s) and/or municipal court(s)⁸⁾ may be established under the District Court. The District

8) The municipal courts exercise original jurisdiction over minor cases. There are currently

Courts or branch courts thereof retain original jurisdiction over civil and criminal cases. A single judge presides over a trial in general, whereas a panel of three judges sits for cases that are deemed of greater significance.⁹⁾ In addition, the District Courts have jurisdiction over appeals from the judgments or rulings rendered by a single judge of the District Court, the branch court or the municipal court, except for those which fall under the jurisdiction of the High Courts. This appellate jurisdiction is exercised by a panel of three judges, which is called an appellate panel and is distinguished from a trial panel of three judges.

The Chief Justice and the Justices of the Supreme Court are appointed by the President of the Republic and must be confirmed by National Assembly through the confirmation hearing (Article 104 of the Constitution, Article 41 of the Court Organization Act). For the appointment of the Justices, an Ad Hoc Advisory Committee for Nomination of Justices, which consists of six to eight persons from various disciplines mostly of law, is established within the Supreme Court. Currently, the applicable Supreme Court Rule (Rule No. 295; issued July 25, 2003) mandates that the above Advisory Committee should include the Chief Justice of the preceding term, the most senior Justice on the current bench at the Supreme Court, the Minister of the National Court Administration, the Minister of the Department of Justice, the chairperson of the Korean Bar Association, and the chairperson of the Korean Law Professors Association (Article 3 of the Rule), and vests the Chief Justice with discretion

101 municipal courts in South Korea (the Act on the Establishment and the Jurisdiction of the Judicial Courts, Law No. 8244). The municipal courts have jurisdiction over small claim cases in which the amount disputed does not exceed 20 million Korean Won (appx. 22,000USD) and misdemeanor cases in which the courts may impose penal detention for less than 30 days or a fine not exceeding 200,000 Korean Won (appx. 220USD) (the Rule on Limited Jurisdiction Case Adjudication, the Supreme Court Rule No. 1779).

9) A three-judge panel within the District Court hears cases that fall under the following: (i) in civil matters, cases involving the amount in controversy exceeding 100 million Korean Won (appx. 110,000USD) or incalculable, with the exception that the cases involving the claim for payment of checks or bills or the claim for repayment of loans are presided over by a single judge regardless of the amount in controversy; (ii) in criminal matters, cases with the possibility of sentences of death penalty, life imprisonment or imprisonment for a minimum of one year, with the exception that certain cases such as check counterfeiting and habitual use of violence are presided over by a single judge (the Rule on the Jurisdiction in Civil and Family Law Adjudication, the Supreme Court Rule No. 2163).

to appoint up to two additional members to the Committee as deemed necessary. Upon hearing the advisory opinion of the Committee, which is non-binding, the Chief Justice submits recommendations for the appointment of the Justices to the President. The confirmation hearing process at National Assembly for the appointment of the Justices as well as the Chief Justice was newly introduced in February 2002 under the National Assembly Act (Law No. 9129, as most recently revised in 2008) and the Confirmation Hearing Act (Law No. 8867, as most recently revised in 2008).

The judges other than the Chief Justice or the Justices of the Supreme Court are appointed by the Chief Justice with the consent of the Council of Supreme Court Justices (Article 104, Section 3, of the Constitution). The judges are assigned to their posts by the Chief Justice. The Judges Personnel Committee advises the Chief Justice in planning and coordinating personnel issues including the appointment of judges (Article 25-2 of the Court Organization Act). The Chief Justice may evaluate the performance of the individual judges and the outcome as such may be reflected in personnel management decisions (Article 44-2 of the Court Organization Act). When the Chief Justice is requested by another government agency to dispatch a judge, the Chief Justice may grant permission if it is deemed proper in light of the nature of service, should the judge consent to it (Article 50 of the Court Organization Act). Currently, judges are dispatched to National Assembly, the Constitutional Court, the Ministry of Unification, and the Ministry of Foreign Affairs and Trade.

The term of office of the Chief Justice is six years without the possibility of reappointment. The Justices of the Supreme Court also serve a six-year term and may serve multiple terms. Other judges have a ten-year term of service and, may be and mostly do get reappointed up to a certain point (Article 105 of the Constitution, Article 45 of the Court Organization Act). On the other hand, judges should leave office when they reach the retirement age, even if their terms of office are remaining. The Chief Justice is required to retire from office at the age of seventy, the Justices of the Supreme Court at sixty-five, and the judges of the lower courts at sixty-three (Article 45 of the Court Organization Act). Simultaneously, no judge shall be removed from office except either by impeachment or by a sentence of imprisonment or heavier, nor shall a judge be subject to suspension from office or to a reduction in remuneration or other unfavorable treatments except by disciplinary

measures (Article 106 of the Constitution). Should a Justice of the Supreme Court be unable to carry out the official duties due to grave mental disorder or physical impediment, the President of the Republic may order such a Justice to resign from office upon proposition as such of the Chief Justice; in the case of a judge of the lower court, the Chief Justice may order resignation from the office. The political activities of the judges, the Justices and the Chief Justice are restricted during their terms of office.¹⁰⁾ A judge is subject to disciplinary measures for a breach of duties or negligent performance of duties.¹¹⁾ The Judges Disciplinary Committee established within the Supreme Court decides disciplinary actions regarding judges (Article 48 of the Court Organization Act). A resolution of the Committee requires the quorum of majority of all the members and the consent of a majority of the members present.

III. Judicial Appointment in the Republic of Korea from Democracy Perspectives

1. Role of the Judiciary in South Korea's Constitutional Democracy, and the Judicial Appointment

The Constitution of the Republic of Korea grants the Supreme Court the final authority to interpret and apply the law (Article 101 of the Constitution). Under the constitutional democracy of the Republic of Korea that adopts a model of representative democracy, the legislature enacts the law. However, it is the responsibility of the judiciary rendering the black-letter laws live by providing the meaning to specific provisions of law as applied in actual cases

10) The judges may not acquire or retain membership of any political parties (Article 22 of the Political Party Act, Law No. 8881, as most recently revised in 2008). The judges may not participate or be engaged in election campaigns at public elections (Article 60 of the Public Election Act, Law No. 9466, as most recently revised in 2009).

11) Disciplinary measures are divided into the following three types: suspension from office, reduction in remuneration and reprimand. If a judge is submitted to suspension from office, performing of respective duties shall be suspended for not less than a month and not more than a year. During such period, salary is subject to suspension. If a judge is submitted to a reduction in remuneration, it can be cut by one-third for not less than a month and not more than a year. A reprimand should be in writing.

and controversies. The Supreme Court, under the South Korean judicial system, has the final authority thereof. Recently, various empirical resources indicate that increasingly more disagreements and disputes are settled by resorting to the adjudicatory process and institutions, and the judgment by and of the judiciary has in turn incrementally greater effect upon policy decisions in integrating diverse values and preferences in a growingly pluralistic society.¹²⁾

In this context, the Supreme Court of the Republic of Korea assumes a markedly significant role both in protecting the rights of the members of the community including minorities and in presenting directions towards the community when facing long-term policy choices. How to constitute the judiciary and especially the Supreme Court has thus a critically important symbolic and actual meaning in South Korea's representative democracy.¹³⁾ Specific issues directly concerned herewith include the qualifications for the judges, the Justices, and the Chief Justice, and the procedures applicable to the nomination and appointment of them. The key question addressed in South Korea in this regard pertains to whom to appoint as judges, Justices and Chief Justice who will represent and balance diverse values and perspectives of the pluralistic society, and how to design applicable systems so that this effort for diversity and balance can be institutionally guaranteed.

1) *Judicial Appointment and Democracy*

The Constitution of the Republic of Korea prescribes as one of the ultimate goals in the nation's separation of powers structure the political neutrality and independence of the judiciary. The Constitution in this vein has chosen a design under which democratic legitimacy of the judiciary is indirectly

12) Jong-Chul Kim, *Meaning and the Limits of Judicialization of Politics*, 33-3 KOREAN PUBLIC LAW RESEARCH (2005) [available only in Korean]; JUDICIAL STATISTICS, available at <http://eng.scourt.go.kr/eng/resources/statistics.jsp>.

13) See, e.g., Beverley M. McLachlin, *The Charter: A New Role for the Judiciary?*, 29 ALTA. L. REV. 540 (1991); Beverley M. McLachlin, *The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?*, 39 U.N.B. L.J. 43 (1990); Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301 (1990); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1 (1986); and Johan Steyn, *The Case for a Supreme Court*, 118 L. Q. REV. 382 (2002).

secured through the involvement of National Assembly and the President of the Republic, as opposed to a possible alternative of constituting the judiciary directly through public election. An institutional choice as such has remained unchanged since the inaugural constitution. The current Constitution mandates, however, in order to enhance democratic legitimacy in constituting the judiciary, that an advisory committee should be formed with individuals from various sectors of the society for the nomination of the Justices and the Chief Justice at the Supreme Court and other judges at lower courts.

Democratic legitimacy of a constitutional institution is not guaranteed merely by regularly held public elections. The indispensable role of the judiciary in constitutional democracy is assumed on the basis of fairness and expertise as well as constitutional legitimacy of the judiciary that ultimately heightens and intensifies trust and confidence of the public in the judiciary. However, in today's pluralistic society as observed in South Korea, disputes and controversies demanding judicial determination are becoming more complex and multifaceted as they concern such various issues as political power and social structure, religion and value choices, culture and environment. At the same time, a tendency to resort to judicial decisions for resolution of disputes and controversies is increasing. Such change further emphasizes the legitimacy aspect of the judiciary. Particularly, as the impact of the judicial decisions especially through the institution of constitutionality review upon political domain's policymaking governed by representation system based upon majority rule grows in South Korea, conventional criticisms on judicial appointment system in light of the role of the judiciary in a democracy are more pertinently raised in that judicial power lacking sufficient democratic legitimacy might abort the decisions reached through democratic political process under majority rule.¹⁴⁾

In light of such phenomenon in the current South Korean society that's becoming increasingly pluralistic where members of the community growingly tend to resort to the judicial system for the resolution of disputes caused by differences in values and perspectives, heightening expertise, fairness, neutrality, and independence of the court and the judiciary as a

14) For further discussion on this issue, refer to Jong-Chul Kim, *Meaning and the Limits of Judicialization of Politics*, 33-3 KOREAN PUB. L. RES. 237 (2005) [available only in Korean].

whole would not suffice, and democratic legitimacy in the organization and the operation of the judiciary is indispensably requested. Thus, some have suggested that the judges and Justices be selected through public election. However, as pointed out in many of the individual States in the United States where such electoral systems are in place, the election of the judges and justices might significantly impair political neutrality and independence of the judiciary vis-à-vis political branches of the government, thus ample caution is due before any such attempt is to be made.¹⁵⁾

Currently, as a means to fortify the non-direct vesting of democratic legitimacy in the judiciary, an ad hoc committee for nomination of Justices of the Supreme Court is formed for each such nomination with members of diverse backgrounds and qualifications, and a confirmation hearing at National Assembly is mandated for the appointment of the Chief Justice and the Justices of the Supreme Court (Article 104 of the Constitution). Some additional suggestions are being made in this regard, including the one for national referendum on the appointment of the members of the nation's highest court at the next general election immediately following such appointment, as in Japan. Other examples include providing more authority in the nomination process for the Chief Justice and the Justices at the Supreme Court for the advisory committee for nomination under the Supreme Court Rule. Also, some suggest that the representatives of the judges of the lower courts be included as the members of the above nomination committee, while others suggest that the qualifications and disciplines of the members of the nomination committee who are included on mandatory basis be further diversified.

The Judicial Reform Committee presented a comprehensive reform proposal for judicial appointment in February of 2004, for more substantial authority of the nomination committee, broader exchange of opinions between the nomination committee and the public, wider sharing of information through disclosure of nomination committee's decision-making process, and more balanced exercise of the authorities between the Chief Justice and the President through multiple nomination on the part of the Chief

15) On this issue, refer to Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

Justice. As part of the ongoing deliberation for a significant range of constitutional amendment within the political branches and across the public domain in South Korea, possible reform of the institutions pertaining to the judicial appointment is seriously discussed in the light of democracy and democratic legitimacy.

2) *Communications between the Court and the Public, Public Participation in Judicial Proceedings, and Communications within the Judiciary*

In order to secure and maintain democratic legitimacy in a representative democracy, an institution should have in place a method and channel of communication through which it hears the wills and wishes of the represented and the public may acquire pertinent information as to its activities beyond the phase of the institution's organization. In South Korea, especially since late 1980s, various citizen groups have been active in non-governmental sectors and the value of citizen participation in functions of the government sectors has been increasingly appreciated and emphasized. The rapid development of information technologies is also contributing to certain idiosyncratic aspects of South Korean democracy, underscoring citizen monitoring over governmental activities through disclosure of information and direct citizen participation in governmental activities. An effort to secure democratic legitimacy for the judiciary has also been made both inside and outside the judiciary.

In this vein, communications between the court and the public and communications within the courts are both important. The South Korean judiciary including the Supreme Court has been directly communicating with the public through various channels including the courts' official websites since 2005. The official URL of the Republic of Korea's Supreme Court currently has approximately 70,000 visitors every day. Also, courts at respective levels have operated a "Citizen Judicial Monitoring System" since 2003, and a system through which they offer policy information and hear opinions and reactions thereon called PCRM (Policy Customer Relationship Management) since 2006.

Such demand for continuous court-public communications and for public participation in judicial activities has started to affect the actual trial procedures of the court. Through the activities of the Judicial Reform Committee, the jury system started to be publicly discussed in South Korea,

and National Assembly enacted the Citizen Participation in Criminal Participation Act on June 2007 (Law No. 8495) based on the discussion over a long period of time. This so-called Korean-style jury system is in place as of January 2008 for the limited scope of criminal cases, and it is hard to meaningfully analyze its actual operation due to its very short history in operation.¹⁶⁾ However, direct citizen participation in trial procedures has contributed to refreshing the public of the effort for heightened democratic legitimacy of the activities of the judiciary, thereby raising public's trust and respect in and for the judiciary.

As communications between the court and the public and the citizen participation in judicial proceedings are to further democratize the judiciary from outside the court, fortifying democratic elements from within the judiciary is equally important towards the same goal. The South Korean judiciary has endeavored for institutional changes especially since early 1990s. In 1995, the Judicial Conference was initially organized at respective levels of courts under the Supreme Court Rule i.e., the "Rule on the Establishment and Operation of Judicial Conference" (Supreme Court Rule No. 1334). Subsequently, in July 1994, Article 9-2 of the Court Organization Act was added as a statutory ground for the Judicial Conference. The Judicial Conference serves as a forum where judges may exchange opinions and concerns and a channel to deliver such opinions and concerns to the decision-making process. Thus, the Judicial Conference assumes an advisory function or is given authority for resolution over the decision-making of the chief judge of the respective courts upon administrative policy matters. Also, development of information technologies has critically contributed to the democratization within the judiciary. An internal electronic communications system that was first established in 1998 and is currently called Court-Net has most effectively enabled sharing of information and timely discussions on important policies

16) During the one-year period of January 2008 through January 2009 since the inception of the jury system in South Korea, among approximately 2,500 of potential cases (i.e., those cases where the defense could request or could have requested jury trial), the defense requested jury trial in 249 cases or less than 10% of the possible cases. Among 249 cases where the defense requested jury trial during the above period of time, the court decided not to provide a jury trial in 61 cases (24.5% denial rate). See Judicial Statistics, the Supreme Court of the Republic of Korea (<http://eng.scourt.go.kr/eng/resources/statistics.jsp>).

of court-wide interest.

2. Issues and Concerns Relevant to the Judicial Appointment from Democracy Perspectives, as Currently at Issue in South Korea

1) Large Dockets of the Court

South Korean courts at practically all levels, including the Supreme Court, have an overwhelmingly large size of workload or are faced with excessive number of cases.¹⁷⁾ This in turn significantly weakens the role of the Supreme Court as the court of law and of last resort. At the appellate level, notwithstanding the requirements set for the appeal, appellate review over issues of facts has not been effectively demarcated from that over issues of law, and the Supreme Court's more than large docket has resulted in review over predominant majority of cases by the Petty Benches vis-à-vis the Grand Bench, which in turn has led to lack of clarity and consistency in its constructions of law. Excessively large dockets considerably impair the function of the court and especially of the Supreme Court, regardless of the stance on the role of the highest court of a nation one may take of whether the Supreme Court is expected to focus on redressing and correcting the individual flaws in the lower courts' judgments for purposes of better individual remedies, or to focus on forming and building consistent precedents on statutory construction over matters of community-wide importance for purposes of presenting policies, for the ability to effectively manage and resolve as many cases as possible within a limited amount of time then gets unduly and excessively underscored as the essential qualities expected for the members of the Supreme Court as well as the lower courts.

Possible ways to cure this problem have been suggested in largely two directions: first by relieving the workload of the courts, for example, by

17) In 2008, the District Courts with 1,910 judges in eighteen facilities across the nation heard approximately 18,243,000 cases; the High Courts with 303 judges in five facilities across the nation heard approximately 43,000 cases; and the Supreme Court with the Chief Justice and thirteen Justices including the Minister of the Office of National Court Administration, and also with 80 research judges, heard approximately 31,000 cases. See Judicial Statistics, the Supreme Court of the Republic of Korea (<http://eng.scourt.go.kr/eng/resources/statistics.jsp>); The 2008 Introductory Book of the Supreme Court of Korea.pdf (available at <http://eng.scourt.go.kr/eng/resources.jsp>).

limiting the appeal to the Supreme Court; alternatively, although not in a mutually exclusive sense, by increasing the capacity of the institution in charge of the docket, for example, by creating a new appellate division at the High Court level or by increasing the number of the Supreme Court Justices.¹⁸⁾ As pointed out in the preceding paragraph, in a larger context of the role of the judiciary and especially of the nation's highest court from democracy perspectives, excessive workload prioritizes the function of effectively processing most number of cases as the major function of the Supreme Court, thus ultimately requiring that the Supreme Court be composed of efficient and experienced experts as opposed to those with expertise in various relevant fields or sectors of the community.

2) Hierarchically Career-Oriented Judicial Appointment System

In South Korea, judges are appointed without having to have any previous experience in the practice of law; instead, until now, judges are typically appointed among those who have passed the national bar examinations and have subsequently finished the two-year training period at the government institution of Judicial Training and Research Institute established under the Supreme Court (Article 42, Section 2, of the Court Organization Act). Thus, judges in South Korea begin to acquire and build their experiences and expertise in law subsequent to their appointment to the judicial position possibly and typically at relatively young age. This landscape is soon to be changed as South Korea adopted a graduate-level professional law school system in 2009 and the legislative process is on the way for a new examination system applicable to the graduates from such law schools in order to be licensed to practice law and to be appointed as the judges. Since the establishment of the South Korean judiciary under the first ROK Constitution over sixty years ago, the judges have been appointed to their initial position as such at the age of thirty or younger,¹⁹⁾ and then subsequently appointed to

18) For further explanation and discussions on this issue, refer to Korea Civil Procedure Law Association, JUDICIAL POLICY ON THE APPELLATE PROCEEDINGS REFORM (The Office of National Court Administration, 2009) [available only in Korean]; Moon-Hyuck Ho, *Purpose of Appeal to the Highest Court and the Measures to Reduce Workload of the Appellate Court*, CIV. PROC., Vol. 9, No. 2 (2005) [available only in Korean]; and Seok-Sun Lee, *Function of the Appellate Proceedings and the Issues accompanying Limits on Appeals*, 157 HUM. RTS. & JUST. 118 (1989) [available only in Korean].

various judgeship positions along the hierarchy. Along such hierarchy, a judge takes on the position initially as an associate judge on a three-judge panel at the District Court, then a single judge at the District Court, an associate judge on a three-judge panel at the High Court, a presiding judge on a three-judge panel at the District Court, a presiding judge on a three-judge panel at the High Court, the chief judge of the District Court, the chief judge of the High Court, and then the Justice of the Supreme Court. As the hierarchical continuum proceeds, the available positions decrease in number, thus the positions for the judges along the above hierarchy form a shape of the pyramid.

This system has been effective in resolving the exponentially increasing workload with limited human and financial resources. Also, this system provides benefits of stability and predictability to a certain extent for those both inside and outside the court. However, such a system has caused the serious phenomenon of involuntary early retirement of experienced judges as the number of available positions along the upward hierarchy diminishes: on average, a judge in South Korea retires from her or his judicial position in less than twenty years of service from the initial appointment. In addition to the loss of judicial expertise accompanying such early retirement, as these retired judges go into private practice, the seemingly close ties between such retired judges now in private practice and the judges remaining on the bench in the public's eyes have impaired the public's trust in the integrity and fairness of the judicial functions. Also, as judges are appointed at relatively young ages and begin to serve as associate judges on the three-judge panel with the presiding judge who is more experienced as well as at higher position along the judicial hierarchy, they tend to form at least seemingly a master-apprentice relationship, although the Court Organization Act through the revision of July 1994 does not acknowledge higher or lower ranks among the judges with the exception of the Supreme Court Justices and the Chief Justice vis-à-vis other judges at the lower courts. Such master-apprentice relationship might injure

19) As of 2008, the average age of newly appointed judges was 29.0 years of age; for a period from 1990 to present, the average age of newly appointed judges is approximately 30 years of age. The Office of National Court Administration, *PAST, PRESENT AND FUTURE OF THE JUDICIARY*, Judicial Development Fund Inc, December 2008, at 249 [*available only in Korean*].

the judicial independence especially in the eyes of the public. This tendency has been exacerbated under the current judicial appointment system along the hierarchical continuum that repeatedly penetrates different tiers of courts.

Beginning in 1998, the South Korean judiciary appoints some judges among the individuals with certain legal experiences, and the Office of National Court Administration has recently announced that up to fifty percent of the newly appointed judges will be appointed among the individuals with prior experiences in law by the year 2012. Such a change may entail changes in standards and requirements for judicial appointment, as diverse aspects related to a candidate's judicial work performance such as moral characters as well as legal expertise may be evaluated over the period of work experience prior to the individual's appointment as a judge. Such possible diversification of evaluation standards is and should be the essential characteristic should this change actually occur. On the other hand, an ample caution is due for the above suggested change, as South Korea lacks a rich pool of individuals with substantial legal experiences,²⁰⁾ which is the most important prerequisite for the above system change to work.

3) Standards Applicable to Judges' Performance Evaluation and Judicial Personnel Decisions

All organizations need certain standards for personnel decisions applicable to their members. Standards for performance evaluation and personnel decisions are particularly important for the judiciary especially from democracy perspectives, as such standards have considerable symbolic and actual relevance on the independence of the judiciary and affect the stability and predictability internal to the institution. In a sense, should an established set of standards accurately and persuasively indicate the transfer from the current position to the next one, such standards may contribute to the independence of individual judges' performance of judicial responsibilities and hence the independence of the judiciary as a whole. In South Korea, as the

20) South Korea has 17.6 individuals who are licensed to practice law out of 100,000 as of 2008. The U.S. has 376.3 out of 100,000 as of 2006; Germany has 154.6 out of 100,000 as of 2004; and France has 72.8 out of 100,000 as of 2004. The Office of National Court Administration, *supra* note 19, at 251 [*available only in Korean*].

judges are rotated around various positions repeatedly through different tiers of courts along the structure of courts of first instance and courts of appeal, among those initially appointed as judges in the same year, part of them are rotated to higher positions sooner than others. Previously, through 1970s, such an order was determined by the respective ages of those individuals initially appointed as judges in the same year. In 1979, the order began to be set according to the individuals' performance at the national bar examinations, which remained unchanged throughout their legal career within the judiciary. This system was in place through 2005, although such system had been criticized for rigidity and unfairness and for the failure to reflect the actual performance of the individuals as judges. In 2005, a new system for performance evaluation and personnel decisions was introduced based on various opinions gathered between 2003 and 2005.

Under the current standard, the previous standard based on the performance at the bar examinations and during the judicial training course applies for the first ten years following the initial appointment, while personnel decisions subsequent thereto are based upon the evaluation of the individual judges in their performance of obligations and responsibilities at the bench by the judges superior to them in rank and position. The current performance evaluation system was first established through the revision of the Court Organization Act in July 1994 as the number of judges considerably increased. The system came to actual use in 1995 under the Supreme Court Rule of the "Rule on Judges' Judicial Performance Evaluation" (Supreme Court Rule No. 2244). Notwithstanding the merits in terms of fairness and predictability, there has been a long-standing criticism that such an evaluation system exacerbates the hierarchical relationship among the judges. Currently, other elements such as individuals' regional or geographical preferences and fairness among judges with approximately same experiences at the bench are simultaneously considered for various personnel decisions.

4) Context of Discussing South Korea's Judicial Appointment System from Democracy Perspectives

The judicial appointment system in South Korea as discussed above has evolved in bifurcated yet related directions: it has developed to increase stability and predictability internal to the judiciary, ultimately for the sake of independence of the judiciary; also, it has sought to optimize the efficiency in

managing and resolving an exponentially increasing number of cases with limited human and financial resources. The independence of the judiciary is one of the core values that set the foundation for the role of the judiciary in a representative democracy, and therefore should never be compromised to changing environments. The system of judicial appointment should likewise be analyzed and reformed ultimately to better maintain and heighten judicial independence. Efficiency in case management and dispute resolution, on the other hand, is one of the two pillars that support the trust of the public in the judiciary, while the other one is just and trustworthy decision-making on the part of the court both in form and substance.

As indicated above, the judicial appointment system in South Korea faces such challenges as the early retirement of judges whose positions are rotated along a continuum of hierarchy that penetrates different tiers of trial and appellate courts, potentially entailing waste of judicial resources and resulting in bureaucratization among the judges that undermines the trust of the public in judicial fairness and independence. Also, costly position changes and rotations in a large scale occurring each year are unavoidable under the current system. Based on the analysis of current issues and concerns as such, the Supreme Court of the Republic of Korea has taken on the mission to reform judicial appointment system. For such reform efforts, an evaluation of the current situations under the current system cannot suffice, however; much effort is also due for understanding the current and upcoming changes of environment where the judiciary will function. Such environmental changes as contextual changes include the following.

First, South Korea, in March 2009, launched a new legal education system of the graduate-level professional law school system. Now, the task of educating and rearing the future judges, prosecutors and attorneys will be primarily conducted in and by the private domain as opposed to the government domain, with ensuing changes in priorities in terms of qualifications expected for the judges. Also, under the new system, the number of individuals licensed to practice law will greatly increase which will dilute the perception of ranks within the legal community. Furthermore, judges, prosecutors and attorneys alike now have the educational backgrounds in more diverse disciplines than before, and the average age at which individuals become licensed to practice law will go up.

Second, the increase in the number of judges over recent years and over

the years to come should be taken into account seriously. As of August 2008, the number of judges across the nation was 2,352. The applicable law in this regard of the Act on the Number of Judges at Respective Courts (Law No. 8412, as enacted in 2007) and the applicable Rule (Supreme Court Rule No. 2222) provide that the number of judges will increase to 2,844 by the year 2010. The gradually increasing number of judges insinuates that the cost of repositioning or transferring judges each year in a large scale as conducted throughout South Korea's judicial history will become further burdensome. Also, mandating such numerous judges to handle all diverse types of cases regardless of their idiosyncratic qualifications or backgrounds would inevitably cause inefficiency. In such a context, a more efficient and perhaps fairer way would be allocating judges to the suitable cases pursuant to their qualifications and expertise for the resolution of such cases.

In addition, the qualifications expected for the judges and the judiciary as a whole expand, as the civil sector in South Korea matures and stabilizes, the technologies for communications and information-sharing rapidly develop, the disputes and controversies increasingly resort to judicial resolution under the value of rule of law, and the cases of transnational attribute increase. Such tendencies in turn require that the judiciary be capable of confronting and dealing with such challenges, by securing human resources with appropriate expertise and rich relevant experience.

3. Constitutional Ramifications of the Judicial Appointment in the Republic of Korea and Current Reform Discussions in Democracy Perspectives

In a representative democracy dedicated to fundamental rights protection for minority as well as majority members of the community that simultaneously is growingly becoming pluralistic, the government institution vested with judicial function vis-à-vis political branches of government that operates under the majority rule faces the following tasks. First, it should be able to strike balance among diverse values and preferences across the community and to reflect such balance in its judgment based upon fairness and legal expertise. Such quality and capability have increasing significance as the impact of the judicial decision-making on the community's policy choices continuously expands. Second, it should guarantee both in form and

substance the fundamental rights protection for all individuals including minorities. These tasks for the judiciary and especially for the nation's highest court in turn explain the core qualities and qualifications expected for its members.

First of all, the Supreme Court, along with the Constitutional Court, should be able to timely form and present through its judicial decision-making process such policies comprehensively balancing diverse values and perspectives that exist in the community. This does not merely require inclusion of the individuals from more diversified disciplines of law as its members; rather, this goal may be achieved by constituting the institution with those individuals actually capable of representing and balancing diverse values and preferences. Also, under the separation of powers structure of the Republic of Korea which is the key institutional mechanism for implementing its constitutional democracy, the members of the nation's highest court should be equipped with the expertise and courage for the check-and-control over the political branches of government. The checks and balances the South Korea's separation of powers structure seeks can be achieved only when the judiciary is capable of actively checking the legislative and executive branches by producing judgments based on a balance between diverse values including those held by minorities, as well as on legal expertise and fairness. In South Korea's representative democracy, the interests and preferences of the majority are reflected and protected through the legislation and the execution of policies of National Assembly and the executive branch, which are constituted through public elections under majority rule. This mandates the judiciary to guarantee the rights and the freedom of the minority members of the community as well as those of the majority under the separation of powers structure of the nation's Constitution. The demand as such is ubiquitous, yet particularly conspicuous in the areas of labor, environment, and protection of minorities including women.

With the above as an ultimate goal, an effort to reduce the workload of the Supreme Court by possibly limiting the appeal to the Supreme Court and by creating an appellate division within the High Court is also currently under discussion. Such an effort, if successful, will further increase the possibility that the Supreme Court, as the highest court of the nation, may assume more of balancing and policy-presenting function than that of correcting mistakes of the lower courts in individual cases. Furthermore, as a context of discussing

the reformation of judicial appointment system, the dissemination of currently much concentrated powers and the delegation of authorities within the judiciary, mostly from the Supreme Court or the Office of National Court Administration within the Supreme Court to the respective administrative bureaus or the chief judges of the High Courts, should also be noted.²¹⁾ Such dissemination and delegation of administrative authorities significantly considers (a) specific judicial proceedings, (b) personnel decisions,²²⁾ and (c) budget-related matters,²³⁾ within each of respective courts at respective levels.

1) *Judicial Appointment System in General, from Democracy Perspectives*

As discussed above, South Korea's current system of judicial appointment

21) The Office of National Court Administration established under the Supreme Court has continuously made an effort to disseminate and delegate administrative authorities previously concentrated in the Supreme Court. For example, audit on judicial performance relevant to court and judicial administration including the number of cases each judge adjudicates per year is now conducted at the level of High Court since 2006, while such audit was previously conducted by the Supreme Court until 2005. Further, the Office of National Court Administration is currently preparing a system change so that the Supreme Court will only present directions for the operation of judicial systems and proceedings while detailed rules applicable in specific cases will be formed and established at the level of each court through discussions among the judges and other members belonging to that specific court.

22) Currently, under Article 104, Section 3, of the Constitution and Article 41, Section 3, of the Court Organization Act (Law No. 8794), judges other than the Justices and the Chief Justice of the Supreme Court are appointed by the Chief Justice with the advice and consent of the Conference of the Supreme Court Justices. However, as the Supreme Court plans to recruit by 2010 up to fifty percent of newly appointed judges among those with previous legal experience including the prosecutors and the practicing attorneys, the opinions of the chief judges of the courts with applicable jurisdiction on the capability and moral character of such candidates may have a decisive impact on the appointment decisions. Also, authority to make personnel decisions on transfer to different positions or dispatch to non-court government institutions can be delegated to the level of respective High Courts from the Supreme Court even without constitutional or statutory revisions.

23) In terms of decision-making authority over budget-related matters, considerable delegation of authority has already been in place on the initiative of the Office of National Court Administration. However, in certain areas, for example, of asset procurement and facilities construction, 95% and 100%, respectively, of relevant decision-making authority is reserved by the Office of National Court Administration. The Office of National Court Administration, *supra* note 19, at 267-268 [*available only in Korean*]. Much caution is required in delegating authority relevant to judicial budget. However, to the extent the efficient yet strict management and control is practicable, further delegation of authority for budget-related decisions to the High Court level would be consistent to the effort for democratization within the judiciary.

can be summarily explained as the one under which the judges largely move along a continuum of positions as previously and conventionally set following their initial appointment at young ages with no previous legal experience. Such a system can be and has indeed been fairly efficient in managing and resolving a great and further increasing number of cases with limited human and financial resources. However, such a system causes an involuntary early retirement of judges with experience suitable for resolving complex and specialized disputes that have been further complicated recently due to differing values and preferences. Now a change is due for a system under which the judges at least in part are appointed among the individuals with expertise and experience and, once appointed, the judges continue to serve through retirement age. An institutional device to efficiently prevent involuntary early retirement of experienced judges will also contribute to judicial decision-making based on expertise, thereby increasing the trust of the public in the judiciary as a whole.

The above reform is not amenable to the system of positioning judges through a continuum of posts that penetrates different tiers of trial and appellate courts that as a whole forms the structure of a pyramid. Thus, through reform, we can perhaps appoint judges to the level of first instance court and to the appellate level separately, or we can enlarge the term of office for the judge at the court of first instance so that any judge will begin to serve at the appellate level close to the retirement age. Additionally, further financial resources should be secured in order to recruit individuals with appropriate expertise and experience. Also, in order to avoid bureaucratization of and among the judges and to prevent involuntary early retirement of experienced judges, some of the fundamental changes may precede, under which trials are presided by a single judge or by a panel of judges with equivalent judicial experiences to the extent possible, as opposed to a panel of multiple judges with vastly differing judicial experiences, as in the latter case it is prone to entail bureaucratization.

2) Standards and Requirements for the Appointment of the Justices and the Chief Justice of the Supreme Court in Democracy Perspectives

With respect to the standards and requirements for appointing the Justices and the Chief Justice of the Supreme Court, various citizen groups as well as the judiciary itself have actively been engaged in open discussions especially

since 2000. One of the good examples as such is the People's Solidarity for Participatory Democracy's proposal²⁴⁾ in 2003 which suggested the applicable standards to the appointment of five Justices upcoming that year. The standards for appointment and qualifications for the members of the nation's highest court suggested and demanded by various citizen groups are as follows.

First of all, it has been most actively and constantly urged that the individual Justices and the Chief Justice represent diverse values and perspectives across the community. As democracy matures with accompanying expansion of liberty and equality, the South Korean society is rapidly becoming more pluralistic with increasing diversification of political, social, cultural and moral values. The impact of the decision of the Supreme Court and the Constitutional Court upon the policy decisions and choices within the community has considerably expanded. Such changes significantly direct the role of the nation's highest court in the South Korean democracy, which in turn mandates to institutionally require the ability and willingness to balance such diverse values and preferences as the essential qualities for the members of the highest court. In this vein, in light of the role of the judiciary in a representative democracy, the ability to understand and apply the perspectives of the minorities in matters concerning their rights and interests is particularly highly demanded under theories of representation.

Other important aspects requested by various civil sectors in appointing the members of the highest court include (a) diverse paths or disciplines the individual members of the highest court have experienced prior to the appointment to the Supreme Court, as, currently, the Supreme Court as well as the Constitutional Court consists of the individuals almost without exception who previously served as the judges within the court system; (b)

24) People's Solidarity for Participatory Democracy is one of the representative non-governmental organizations in South Korea with approximately 8,000 members pursuing citizen movements for participatory democracy and the expansion of human rights. Established in September of 1994 by approximately 200 citizens under the name of citizen solidarity for participatory democracy and human rights, PSPD has newly introduced various means of citizen activities such as legislative and judicial watchdog projects, i.e., systemized monitoring and analysis of legislative and judicial records from diversified perspectives under varied standards, which have enabled disclosure and oversight, thereby publicly stimulating changes through criticism, public discussion and participation.

willingness and courage to seek reform both inside the judiciary and towards the other branches of government; (c) fairness and creativity as well as expertise in law and various other fields for the resolution of complex disputes; and (d) moral character of each of the individual members at the highest court of the highest caliber for the public trust in the performance of their judicial affairs.

Discussions on the standards and qualifications for the members of the judiciary and especially of the highest court have gradually been reflected in the appointment of the members of the Supreme Court and the Constitutional Court, which has initiated changes in the tendency of such institutions particularly in those cases crucially concerning diverse values and perspectives especially on minority issues. The decision of the Supreme Court issued on July 21, 2005 (2002Da1178, 2002Da13850, as consolidated) that granted women as well as men the status as the members of traditional family clan indicates the effort of the Supreme Court to reflect the demand for gender equality from within the Korean society and such case may be seen as the example of the Supreme Court overcoming the conventional stance previously maintained by the judiciary.

IV. Concluding Remarks

The highest court of a nation should assume the role both of presenting to the public the balanced stance of the judiciary in such cases involving diverse values and preferences and particularly of those of minorities on one hand, and of correcting mistakes in lower court judgments on the other hand. However, the primary concern of the Supreme Court as the highest court of the nation in a democracy is more than correcting individual mistakes in lower court judgments. In South Korea, many of the recent judicial reform efforts have been geared toward reducing the docket or the caseload of the Supreme Court so that the Supreme Court can concentrate on its primary concern in a democracy of the system-wide corrective action. Such task or concern in turn has bifurcated issues of bridging the gap between law and society on one hand and protecting democracy on the other. The nation's highest court, including South Korea's Supreme Court, is charged with both of these jobs simultaneously, and, in most cases, they are complementary. In

light of the increasing recognition of judicial review of the constitutionality of statutes²⁵⁾ and of minority rights protection from pluralistic stance, the role of the nation's highest court of preserving democracy has further grown in significance.

Viewing the issue of judicial appointment particularly from democracy perspectives, a key historical and empirical lesson from the past is that the people, even through their elected representatives, can destroy democracy and human rights. Especially since the experience of massacre and grave intrusion on human rights during and after World War II, all of us have learned that human rights are the core of substantive democracy.²⁶⁾ Without proper protection for human rights, there can be no democracy and no justification for democracy. The protection of human rights, which should indispensably include the rights of every individual and every minority group, cannot be left solely in the hands of the legislature and the executive in the name of elected representatives, which, by their nature, reflect majority opinions choices. As a corollary, under the current government organization and separation of powers structure in the Republic of Korea, the question of the judicial branch's role in a democracy clearly arises. It is in this context that the issue of judicial appointment is taken seriously in this article as a way of determining how we constitute our judiciary, which in turn greatly affects what role the judiciary assumes and how it functions in our representative democracy.

Various empirical resources and statistics indicate that, in the current South Korean society with increasingly pluralistic characteristics, the phenomenon of legalizing political and value-choice questions incrementally becomes common. In this context, the question of how the judges should deal with such problems that contain and entail legal implications becomes critically important, for the answer thereto, as intertwined with the question of

25) Although South Korea has the Constitutional Court as an independent constitutional institution on par with the Supreme Court and the constitutionality review system through constitutional adjudication by the Constitutional Court, the judiciary serves a material role in the constitutionality review process, and the recent underscoring of the constitutionality review over the statute further emphasizes the role of the judiciary for protecting fundamental rights and democracy itself in a representative democracy.

26) See also AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2008).

qualifications for the judges and the appropriate criteria for evaluating the judges who write the judicial opinions, largely determines the criteria for developing the law and further provides a basis for formulating a system of interpretation of all legal texts. This question ultimately leads us to the issue of the appropriate role of the judiciary and especially the role of the nation's highest court in a representative democracy. Hence the issue of judicial appointment bears critical constitutional relevance and significance in democracy perspectives.

Representative democracy as the South Korean Constitution establishes presupposes and requires many elements, such as constitutionalism, legislative supremacy, and human rights. Also, there exist preconditions for realizing the judicial role discussed in preceding paragraphs, such as the independence of the judiciary, judicial impartiality, fairness and expertise, and public's trust in the judiciary and the operation of the judicial system. The effort to reform the system of judicial appointment currently ongoing inside and outside the court in the Republic of Korea will bring the nation's judiciary as a whole one step closer to the much anticipated role of the judiciary in the democracy that the nation's Constitution establishes.

KEY WORDS: judicial appointment, role of the judiciary in democracy, role of the Supreme Court in democracy

Manuscript received: Oct. 16, 2009; review completed: Dec. 2, 2009; accepted: Dec. 10, 2009.