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The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?

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This article describes the general situation of the Korean Constitutional Court at present and reforms in some aspects of it. According to the author, we can know the basic model of the Constitutional Court and the process of Constitutional Court adjudication and others. The author specialized in the reform of the Constitutional Court. The following is the summary about it.

A Introduction (Omitted)

B Adoption of a Constitutional European Model

1 The Road Not Taken

The Republic of Korea is not a federal state and the ordinary Korean courts, like the Japanese, are organized in a unitary system of three levels. 1) district courts and family courts of first instance; 2) high courts; 3) Supreme Court. Korea's history furnished a precedent for a Continental European type of Constitutional Court, for the Second Republic Constitution of June 15, 1960 had established such an organ.

2 The Constitutional Text and Its Implementation

The jurisdiction of the Court is defined in Article 111 of the constitution as encompassing five categories of actions: Questions of the constitutionality of laws upon request of the courts; Impeachment; Dissolution of political parties; Competence disputes between state organs; Constitutional petitions. According to some law provisions, the court is authorized to establish procedural and internal administrative regulations. Presently, the relationship between the new constitution, a Court and the Supreme Court is far from clear. The Constitutional Court has described its powers as "comparable to those of other Korean State authorities with the highest level of governmental authority." It has few adherents within the judicial branch or the powerful agencies of the executive branch.

3 The Jurisdiction of the Constitutional Court

The historical record of political instability in Korea affords little assurance that the Court will function in its present configuration long enough to develop a strong institutional identity, particularly in an environment in which the judiciary has long been subordinated to an authoritarian executive apparatus. The provisions of the Act defining the contours of the Constitutional court's authority to undertake judicial review of administrative action have attracted considerable attention. There exists a "horizontal" division of labor between the two institutions: the Constitutional Court has a strictly limited competence to adjudicate enumerated classes of questions, and all other matters fall under the general jurisdiction of the Supreme Court. The following let's talk about the five heads of constitutional court jurisdiction set out in the Constitution and the Act.

1) Impeachment

The impeachment procedure plainly is influenced by the FRG, however the recent amendments to the Korean Constitution did not incorporate into the text any explicit definition of the role of the constitutional Court in the impeachment procedure. With respect to the relation between impeachment and criminal prosecution, the Act provides that the Court may suspend an impeachment proceeding if a criminal action is pending.

2) Dissolution of political Parties

The Constitutional Court is empowered to decide whether a political party is subject to dissolution on the grounds that its objectives or activities are "contrary to the fundamental democratic order." IN Korea, the power of the Constitutional court to dissolve political parties has not been exercised and may remain unexercised for the foreseeable future, due to circumstances that raise other important constitutional considerations.

3) Review of the Constitutionality of Legislation

The core of the jurisdiction of the Constitutional Court is the power to adjudicate the constitutionality of statutes. Its power to review the constitutionality of legislation is both passive and relatively narrow. The Korean court does not engage in so-called "abstract judicial review". No role of similar prominence in resolving emergent disputes between the executive and legislative branches was accorded to the Korean Constitution* .1 Court.

4) Competence Disputes

Competence disputes on the national level are classified as those between or among four organs: the National Assembly, the Executive, the Courts and the Central Election

Management Committee. The Organstreit jurisdiction, unlike the other grants of power to the Korean Constitutional Court, does not necessarily involve a direct interpretation of the Constitution.

5) Constitutional Petitions

Petitions fall into two categories. Firstly, the Article 68(1) petition jurisdiction as defined above is available in situations where existing laws do not afford remedies through ordinary court processes for unconstitutional state action. Secondly, a party whose request that a civil or criminal court render a question to the Constitutional Court has been refused may renew the claim of unconstitutionality by immediate petition to the Constitutional Court. The two kinds of petition are quite distinct and the petition jurisdiction follows a German model.

Under these circumstances, the Constitutional petition thus far has been invoked most often in certain circumstances in which ordinary judicial review is unavailable C

The Process of Constitutional Adjudication

1 General Procedures

Oral proceedings are required in cases concerning impeachment, dissolution of political parties or competence disputes, and may be ordered by the Court in other cases. The limited function of the Court is to decide discrete questions of constitutionality framed in the form of a petition or of a request for judgment from one of the ordinary courts. The process of deliberation in the Constitutional Court differs considerably from the process of judicial review in a common law system, where the principles of adversarial presentation and party prosecution govern even in constitutional.

2 Form and Effect of Constitutional Court Judgments

The practice of the constitutional Court represents a significant departure from Korean Supreme Court practice in terms of the form and content of judgments on issues of great public concern. The act provides that each Justice participating in decision is obliged to express his or her opinion in the written text of the judgment. The following four forms of judgment have been accepted as the theoretical framework within which Constitutional Court judgments on the constitutionality of legislation are made: Unconstitutional; Inconsistent with the Constitution ; As yet constitutional ; Constitutional on condition of proper interpretation. This form of judgment is believed to promote legal stability, avoiding

any regulatory hiatus and assuring a proper deference by the Court to the representatives organs of the state. The Korean judiciary is weak due to the detachment characteristic of civil tradition systems, of the enforcement phase of judicial proceedings from the judgment process. By reducing the law's openness to arbitrary abuses and by enhancing its conformity to widely-held values, the Constitutional Court could gradually generate a new legitimacy for the legal system.

D Judgements of the Constitutional Court

This part includes two parts. 1) Judicial Review of Legislation and Constitutional Court Decisions. In the second part, the author talked about it from two aspects: Economics Rights Cases and Civil and Political Rights Cases.

E Conclusion

The period of its functioning has been too short to permit unqualified pronouncements on the Court's emerging role. The sorts of cases presented to the Court; depend on the preparedness of private attorneys to press constitutional claims and on the altitudes of judges throughout the hierarchy of courts. Now, the Courts face many difficult situations arising from inertia and conflict in the legislative branch. Meanwhile, the social forces which have been pushing for democratic reforms may perceive the Constitutional Court as the only available institutional channel for it.

The potential overload of the Korean legal process with hyper-political controversies is a serious problem for the Constitutional Court. Prior rules had not allowed legal norms to evolve into forms identified by the public with the democratic ideals expressed in the Constitution, therefore the Constitution was devoid of efficacy even as a legitimating device. Some incidents show that the Court must not only decide cases, it must persuade the addressees of its decisions -state functionaries, for the most part- that the legal order as a whole suffers when constitutional judgments are defied or circumvented.