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## Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea, A

Jibong Lim

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# A COMPARATIVE STUDY OF THE CONSTITUTIONAL ADJUDICATION SYSTEMS OF THE U.S., GERMANY AND KOREA

*Jibong Lim\**

## I. INTRODUCTION

### *A. Constitutional Adjudication Systems*

The constitutional court is often called the last safeguard of the peoples' fundamental rights. To strengthen the protection of the peoples' rights, the Korean Constitutional Court (hereinafter KCC) was established in Korea in 1988, separate from the general courts. In the past, Korea had a so-called "Constitutional Committee" which seemingly imitated the French Constitutional Council. It was, however, a nominal constitutional institution where not even one case was filed under the constitution of the Fifth Republic (1981-1987).

Under the constitution of the Third Republic, the Korean Supreme Court carried out constitutional adjudication though it did not do so actively or meaningfully. The KCC, in contrast, has been very active, having settled by the end of January 1993, 1339 out of 1692 cases filed since its establishment.<sup>1</sup> The KCC has become the center of public interest, contributed much to the protection of the peoples' rights, and has been a force nurturing real constitutionalism in Korea. On the other hand, however, it has run into conflict with other existing governmental institutions, especially with the Korean Supreme Court on the question of jurisdiction, which do not welcome the reduction of their power brought on by the appearance of the KCC. Sometimes counterparts take a threatening attitude toward the very existence of the KCC.

I believe the time has come to evaluate the past achievements of the KCC and consider systematic reform measures for the KCC itself. By

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\* J.S.D. University of California, Berkeley, May 1999.

1. On the statistical data of the KCC's decisions, see Chong-Seo Kim, *Hunbubjaepanui Silsangye Daehan Tongkejeok Bunseok* [Statistical Analysis on the Activities of the Korean Constitutional Court], Hunbubjaepanui Ironkwa Silje [Theory and Reality of Constitutional Adjudication] 609, 611-20 (1993).

doing so we can consolidate its position, accelerate the speed of its development, and achieve thorough protection of the peoples' rights in the future.

### *B. Suitability of a Comparative Perspective and Methodology*

The constitutional adjudication system in Korea has been deeply influenced by the United States and Germany. There is no country in the world that does not have a Constitution, either written or unwritten. In many countries, so-called constitutional adjudication is based on constitutional law. Generally speaking, there are two types of constitutional adjudication institutions. One type establishes the Constitutional Court as a special court, while the other is the type in which constitutional adjudication is conducted by general courts, especially by the Supreme Court in the final instance, without other special courts. If we can say that Germany is the typical example of the former,<sup>2</sup> we can also say the U.S. is that of the latter.<sup>3</sup> In essence, Korea belongs to the former type because it has a Constitutional Court as a special court apart from the other general courts. However, the adoption of many features of both the U.S. and Germany has contributed to a mixed system.

For this reason, I will generally survey the constitutional adjudication systems in the U.S. and Germany individually. Next, I will explain the Korean system, introducing the features of each country that have affected Korea and how they have been adopted and exist in the Korean system. Based on this analysis, I will propose some reform measures. However, before this institutional comparison, I will explain the historical background of constitutional adjudication by examining federalism in each of the three countries.

Following the institutional comparison, I will trace the threads of independence and even the very existence of the constitutional adjudication institutions of the three countries. When the courts raised their inde-

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2. Unlike the U.S., in civil law countries, including Germany, it is thought that constitutional cases are not appropriate to be adjudicated by judges of general courts who are oriented only to civil and criminal adjudication based on literal interpretation of provisions and automatic application of law to the actual cases. Consequently, many civil law countries have established a constitutional court separate from general courts in jurisdiction and composition. See Mauro Cappelletti and John Clark Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1219-22 (1966); Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CAL. L.R. 1017, 1045-50 (1970); See generally MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 53-66 (1971).

3. The U.S. Supreme Court is not simply the highest general court for a final appeal in the American judicial system, but it actually also serves as a special court which takes exclusive charge of some constitutional cases. See, JOEL B. GROSSMAN & RICHARD S. WELLS, *CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING* 7-13 (2d ed. 1980).

pendent voices against the other branches of the government, they often responded by threatening the tenure of the judges. Finally, I will address this issue with some historical data in the section titled Constitutional Adjudication and Mutual Support of the Other Branches.

This comparison goes beyond "presenting descriptions of" those three systems "side by side with no particular end in view."<sup>4</sup> It is the comparison of specific systems incorporated with the social, cultural and political context of each country. With what social cultural and political context of Korea does the specific system of the U.S. or Germany coincide? From this standpoint, is the adoption of that system necessary and in some sense even desirable? Questions such as these reflect the real value of comparative study.<sup>5</sup>

## II. FEDERALISM AND CONSTITUTIONAL ADJUDICATION SYSTEM

In the U.S. and in Germany we can in a sense say that the constitutional adjudication institution has been developed as an arbitrator in dispute resolution between federal government and state government. On the contrary, Korea is a unitary state. The question that must be answered then is: what is and will be the main function of constitutional court in a unitary state like Korea?

### A. *The U.S. Supreme Court and Federalism*

#### 1. Framers and Federalism

In the confederation period, two schools of thought dominated the political debate. One group supported a prevalent national government and favored a judicial arbiter as a method of restraining the states. In contrast, those who opposed a strong national government supported a strong judicial system that would provide a capable protector of states' rights. The proposals made at the Philadelphia Convention empowered the federal judiciary, thus explaining the absence of states' rights or anti-Federalist opposition.<sup>6</sup> In the Philadelphia Convention, "the nationalists did not actually oppose the adoption of a judicial arbiter, but merely thought, as James Wilson later indicated, that a judicial check on the states would not be sufficient to maintain a strong central government."<sup>7</sup>

The legislative history of the first Judiciary Act, the state ratifying Conventions, and the Philadelphia Convention, provide evidence that the

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4. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* vii (1981).

5. On the comparative method as a scientific approach, see RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 39-43 (5th ed. 1991).

6. On historical background, see JOHN R. SCHMIDHAUSER, *THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957* 7 (1958).

7. See *id.* at 11.

framers clearly intended to empower the Supreme Court by assigning it the responsibility of supervising the federal system. The first Congress granted the Supreme Court the appellate jurisdiction necessary to adequately address the Court's responsibility. Many of the powers granted to the Supreme Court by Congress were founded on the idea of a federal judicial arbiter, this was accomplished because many of the state ratifying conventions understood and accepted this concept. The result of the 1786-1789 period is that both schools of thought had accepted the Supreme Court as the arbiter in federal-state relations.<sup>8</sup>

## 2. History of Federalism by the U.S. Supreme Court

Federalism in the U.S. has been developed primarily by the Supreme Court in the interpretations of the commerce clause and the 10th Amendment. The commerce clause contributed a basis for extending federal power, while the 10<sup>th</sup> Amendment contributed to the limitation of the extension of federal power and the protection of state power.

To date, there really have been many decisions on federal and state power.<sup>9</sup> The decisions have depended on the political and historical situations of the times, and are ample reflections of their economic backgrounds. As a whole, there have been two main streams in the decisions.

One stream expanded federal power. Its logic has mainly relied on the interpretation and application of the provision of Article 1, Section 8, Clause 3 of the U.S. Constitution. *McCulloch v. Maryland*<sup>10</sup> in 1819 is the starting point of this stream. Chief Justice Marshall enunciated the famous doctrine of implied powers interpreting the "necessary and proper" or coefficient clause of Article 1, Section 8 of the Constitution. With this case, he established a precedent on the expansion of federal power, as a whole, for the first time. The *Gibbons v. Ogden*<sup>11</sup> case in 1824 and *Brown v. Maryland*<sup>12</sup> in the Marshall Court also expand federal power. In *Gibbons*, the Court developed the doctrine of the continuous journey. The Court held that the commerce power of Congress applies to every aspect of commercial intercourse, including navigation and the power of Congress to regulate interstate commerce, reached into state territory. Under this doctrine, the commerce power extends to a steamship company operating within a State if some of the passengers and goods carried on its ship are on a journey that continues into another State. *Brown v. Mary-*

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8. *See id.* at 16-17.

9. I do not feel the necessity to analyze each case in detail. For more detailed information on these cases, *see* JOSEPH F. ZIMMERMAN, CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER 82-102 (1992); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 76-168 (7th ed. 1991).

10. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

11. *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 316 1 (1824).

12. *See* *Brown v. Maryland*, 25 U.S. (12 Wheat) 419 (1827).

land struck down a state law levying a fifty-dollar business tax on importers on the ground that the license interfered with foreign commerce.<sup>13</sup>

Marking 1871 as a turning point, after hesitancy during the Chase Court in the Daniel Ball case,<sup>14</sup> the Court interpreted the commerce clause broadly and declared the federal law constitutional that regulated the safety standards of the ships operating within the State boundary of Michigan. It said the ships were operated in an "intrastate part of an interstate journey."<sup>15</sup> This trend continued in *Swift & Co. v. United States*.<sup>16</sup> Justice Holmes developed the "current of commerce" rationale by interpreting the commerce clause. Under this theory, an activity could be regulated under the commerce power not because it had an effect on commerce, but rather, because the activity itself could be viewed as being "in" commerce or as being part of the "current of commerce."<sup>17</sup>

The Court packing plan of President Roosevelt did not come to pass because of powerful counterforce, but he came to have the Court he wanted after the Court's change of direction in 1937, and except for fairly short exceptional periods, it has basically confirmed the federal power on commerce regulation as an unlimited one until now. It may fairly be said that the 10th Amendment is not regarded any more as a stronghold of a power reserved to states. Instead, the Court began to adopt the commerce clause as the origin of independent federal powers.

The *Jones & Laughlin* case<sup>18</sup> is the epochal example. In pre-1937 cases, the Court had insisted upon a "direct" and "logical" relationship between the intrastate activity being regulated and interstate commerce. Yet starting with this case, the Court substantially loosened the nexus required between the intrastate activity being regulated and interstate commerce. Because of the multi-state network of operations, the Court concluded a labor stoppage of the Pennsylvania intrastate manufacturing operations would have a substantial effect on interstate commerce.<sup>19</sup> Therefore, labor relations at the Pennsylvania plants could constitutionally be regulated by Congress.<sup>20</sup> The Court expressly declined to rely on the "current of commerce" theory. The Court indicated that "current of commerce" cases were merely particular, not exclusive, illustrations of the commerce power.<sup>21</sup> The court also rejected the manufacture-

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13. *See id.* at 425.

14. *See The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

15. *See id.* at 565.

16. *See Swift & Co. v. United States*, 196 U.S.375 (1905).

17. *See id.* at 399.

18. *See National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

19. *See id.* at 41.

20. *See id.* at 36.

21. *See id.*

commerce distinction.<sup>22</sup> The Court implied, though it did not expressly state, that the 10th Amendment would no longer act as an independent limitation on federal commerce clause powers.<sup>23</sup>

The Court maintained this approach in the interpretation and application of Civil Rights Act of 1964. The Heart of Atlanta Motel case<sup>24</sup> and the McClung case<sup>25</sup> are examples. Especially in the latter case, the Court upheld prohibition in the Civil Rights Act of 1964 of racial segregation in places of public accommodation by applying the Act to a restaurant that had no known out-of-state customers. There were some reactions against this stream, which are represented by the National Leagues of Cities case,<sup>26</sup> but the reaction was ended by the famous Garcia case<sup>27</sup> written by Justice Blackmun who has changed his opinion from that of the National Leagues of Cities case. This case sent shock waves through the States and local governments. The Court abandoned its functional standard and stressed that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" was not only unworkable but is inconsistent with established principles of federalism.<sup>28</sup> The concept of "political process" became the logical base.<sup>29</sup>

The other stream comprehends the decisions that restrict the expansion of federal powers, especially the powers of the Congress, and emphasizes the State power, mainly based on the 10th Amendment of the Constitution. It ironically started from the Marshall Court that basically supported the expansion of federal power. In *Willson v. The Black Bird Creek Marsh Co.*,<sup>30</sup> Marshall appeared to concede that a state (Delaware) could sometimes affect interstate commerce as an incidental consequence of the exercise of its "police powers."

Roger B. Taney became Marshall's successor as Chief Justice in 1835. He was a strong proponent of the rights of the States. Under his leadership, there was a reaction against the centralization of powers in the Congress that was expressed in decisions that can be labeled as "dual federalism." *Cooley v. The Board of Wardens of the Port of Philadelphia*<sup>31</sup> is famous for providing a new interpretation of the interstate commerce clause of the Constitution in 1851. The Court pointed out

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22. *See id.* at 40.

23. *See id.* at 30.

24. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

25. *See Katzenbach v. McClung* 379 U.S. 294 (1964).

26. *See National League of Cities v. Usery*, 426 U.S. 833 (1976).

27. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

28. *See id.* at 531. The established costs for state and local governments to comply with the federal labor standards in 1986 were approximately \$1.1 billion.

29. *See id.* at 557.

30. *See Willson v. The Black Bird Creek Marsh Co.*, 27 U.S. (Pet.) 244 (1829).

31. *See Cooley v. The Board of Wardens of the Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

that Congress has plenary power to regulate interstate and foreign commerce, but there were details of commerce of such a local nature that Congress might allow the details to be regulated by the States.<sup>32</sup> This was the so-called concept of "selective exclusiveness."

Chief Justice Taney's most famous decision was issued in 1857 in *Dred Scott v. Sanford*.<sup>33</sup> Taney ruled that Congress has no right to prohibit any citizen from owning slaves and that the grant of citizenship by a State to a Negro would not make him a citizen of the U.S. after the Civil War. The Salmon Chase Court invalidated eight federal laws during the Chief Justice's term of office. The Court declared the Legal Tender Acts unconstitutional in *Hepburn v. Griswold*.<sup>34</sup>

During the New Deal Crisis (1933-36), the Court invalidated many federal laws that were means of President Roosevelt's reform.<sup>35</sup> The most significant blow to the New Deal was delivered in the Carter Coal case. The case invalidated the Bituminous Coal Conservation Act of 1935 that set maximum hours and minimum wages for workers in coal mines, holding that it exceeded Congress' commerce power.<sup>36</sup> The Court said that the employer-employee relationship was a "local relation," and whatever evils currently characterized that relationship in the coal industries were all local evils over which the federal government has no legislative control.<sup>37</sup> These series of decisions made President Roosevelt design the court packing plan.<sup>38</sup>

During the 1970s, there was a big change in the composition of the U.S. Supreme Court where the Court showed signs of swinging to strong state power in several decisions.<sup>39</sup> This became clear in the *National League of Cities* case.<sup>40</sup> The Court, by a vote of five to four, struck down amendments to the Fair Labor Standards Act applying minimum wage and overtime pay provisions to non-supervisory employees of state and local governments on the ground the amendments violated the 10th Amendment and were a threat to the "separate and independent exis-

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32. See *id.* at 319. In this case, Pennsylvania required that all ships coming into a harbor must take on a pilot, who must be paid at a fixed rate, to ensure the safe entry of ships into the harbor. To this date, the Congress allows the States to regulate harbor pilots.

33. See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 405 (1857).

34. See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

35. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Railroad Retirement Board v. Alton R.R. Co.*, 295 U.S. 495 (1935); *Schechter Poultry Corp. v. United States*, 259 U.S. 459 (1935); *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

36. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936).

37. See *id.* at 308.

38. For details, see discussion *infra* Part IV.A.

39. See *Employees of Dept. of Public Health and Welfare v. Missouri*, 411 U.S. 279 (1973); *Fry v. United States*, 421 U.S. 542 (1975).

40. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).



tence" of these governments.<sup>41</sup>

After *Garcia*<sup>42</sup>, some limits still exist on Congress' commerce clause powers as the result of a landmark 1995 decision in *U.S. v. Lopez*.<sup>43</sup> In this case, the Court for the first time in 60 years invalidated a federal statute on the ground that it was beyond Congress' commerce power.<sup>44</sup> In a 5-4 vote, the Court struck down the Gun-Free School Zones Act of 1990 in which Congress made it a federal crime for any individual knowingly to possess a firearm at a place that the individual knew, or had reasonable cause to believe, was a school zone. The Court held that it is not enough that the activity being regulated merely affects interstate commerce. Instead, the activity must "substantially" affect interstate commerce.<sup>45</sup>

In summary, except for some exceptional periods, federal power has continuously expanded so much that we can say American constitutional history is comprised of the expanding federal powers. Now, doubts on whether a realm reserved by the 10th Amendment for the states really exists seem to be consistent with the expression, not "The United States of America" but "A United State of America."<sup>46</sup>

The various factors<sup>47</sup> that give logical justification to the expanding of federal power are increasing rapidly. From this standpoint, it may be a logical conclusion that there appears to be a big difference between the federalism of today's constitutional system and the federalism intended by the framers. With the Rehnquist Court's effort to recover state's power, some limitations on federal power are forecasted. However, for the long run, this will be just the temporary passing phase and the expanding of federal power might be the irrevocable tendency. In short, the power of U.S. Supreme Court as a final arbiter in Federal-State relations has been strong thus far.

## *B. The German Constitutional Court and Federalism*

### 1. Federalism in German Constitutional Law

The federal state system in German Constitutional Law divides the problems of the nation into federal government and states. It allows both systems to exercise their influence upon the other system. The medium

41. See *id.* at 845.

42. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

43. See *United States v. Lopez*, 514 U.S. 549 (1995).

44. See *id.* at 567. See also, WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 15-32 (9th ed. 1995).

45. See *United States v. Lopez*, 514 U.S. 549, 559 (1995).

46. See Potter Stewart, *Federalism: The National Government Versus The States*, IN *THE CONSTITUTION: THAT DELICATE BALANCE* 125 (W. Friendly & M. Elliott eds. 1984).

47. These include the problem of pollution, labor in the national level, education and professions, diplomacy, national defense and business transactions, all of which are traditionally original federal powers.

by which the states influence the federal government is the *Senat* (the Senate in Germany). States participate in the federal legislation and administration via the *Senat*.<sup>48</sup> Nevertheless, the *Senat* is not an organization that represents the states, rather is a federal organization.<sup>49</sup>

To the federal government, influencing the states is controlled by Article 28, Section 3 of the German Constitution, which provides for federal control, federal constraint and federal intervention. In terms of federal control,<sup>50</sup> the federal government supervises the state's execution of federal law. This control is restricted to the scope of legal suitability prescribed in Article 84, Section 3 of the German Constitution. When this is not enough, the federal government can use federal constraint. With consent of the federal senate, the federal government can take action to make the state perform its duty. And for its execution, the federal government has direct power over the states.<sup>51</sup> Lastly, the federal government has the traditional device of federal intervention when its basic order of free democracy becomes endangered.<sup>52</sup> The federal senate intervenes decisively here as well. For these reasons, the federal government and states are more closely connected than superficial observation might suggest, and more weight is given to the central government.

German Constitutional Law (*Grundgesetz*) has many other provisions on federalism. Among them, Article 84, Section 1 prescribes interaction between the *Senat* and the Federal Constitutional Court (*Vervassungsgericht*) in Germany. The execution of administrative action is entrusted to the states as their inherent duty. This is also true with the enforcement of federal laws.<sup>53</sup> In this case, federal government restricts control within the narrow scope of so-called legal suitability.<sup>54</sup> This enabled the *Senat* to increase its power over states through federal laws, because the Federal Constitutional Court held that *Senat*'s consent was required for federal laws governing matters falling within the basic responsibilities of the states.

German Constitutional Law lays emphasis on state rather than federal government in the work division of judicial power.<sup>55</sup> The Constitution provides for federal supreme courts, including federal constitutional

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48. Ch. IV, art. 50 GG.

49. On the character of the German Federal Senate, see KONRAD HEESE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER :BUNDESREPUBLIC Deutschland [Basic Principles of German Constitutional Law] 166-75 (Heidelberg: C.F. Müller Juristischer Verlag, 1984).

50. On the scope of federal control, see M. Bullinger, *Der Anwendungsbereich der Bundesaufsicht* [Scope of Federal Control] 83 AÖR 279, 282-96 (1958).

51. Ch. II, art. 37 GG.

52. *Id.* at ch. VIII, art. 91.

53. *Id.* at art. 83.

54. *Id.* at art. 84 (3).

55. *Id.* at ch. IX, art. 92.

courts that mainly address final decisions. The federal government can establish federal courts for the protection of commercial rights and military affairs. The remaining courts are state courts. State courts can exercise federal judicial power pursuant to Article 96, Section 5 of the Constitution. However, almost all of the substantive and procedural laws applied by the court, in addition to organizational laws that include regulations of judges, are primarily federal laws today. Therefore, judicial independence and other principles that form standards of decisions are developed by the precedents of the federal constitutional court and the other federal supreme courts. In this area, state courts have no power.

## 2. Federal Government-Friendly and Federal Constitutional Court

The doctrine of federal government-friendly is the unwritten constitutional doctrine that regulates German federalism.<sup>56</sup> Under this doctrine, Constitutional Law not only requires the federal government and states to perform their constitutional duties but also requires the states to incessantly pursue and build up a good neighborly relationship of federal government hostile attitude (*Gegeneinander*) can be unconstitutional even though state action is based on formal positive law.

It is the Federal Constitutional Court that gives basic significance to the federal state system in Constitutional Law. According to the Court's opinion, constitutional duties that are stipulated expressly in the text and specific supplementary duties of states to federal government and of federal government to states derive from this doctrine. In addition, this doctrine gives basis to the specific limitations of the powers that are granted to the federal government and states by the Constitution as well as specific limitation on procedure. When a federal government or state does not respect these duties and limitations, the action becomes unconstitutional.<sup>57</sup> Though the power of dispute resolution is given to the Federal Constitutional Court, misgivings do in fact exist.

The doctrine of federal government-friendly seems to be improper as a standard decision for federal disputes when this dispute is not a true federal dispute, but a dispute between political lines that is resolved by constitutional adjudication under the name of federal dispute.<sup>58</sup> In this occasion, demanding loyalty or at least friendly attitude to the federal

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56. See KONRAD HEESE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER :BUNDESREPUBLIC Deutschland [Basic Principles of German Constitutional Law] 168 (Hee-Yol Kay trans., Seoul: Sam-Young Sa, 1987). For details on this doctrine, see H.W. BAYER, DIEBUNDESTREUE (1961); Gebh Müller, *Bundestreue in Bundesstaat, in FÜHRUNG UND BILDUNG IN DER HEUTIGEN WELT* [GUIDANCE AND FORMATION IN THE WORLD OF TODAY] 213-216 (1964).

57. On the cases to which this doctrine is applied, see BVerfGE 12, 205; BVerfGE 13, 54.

58. This is evident especially in BVerfGE 6, 309-28 (Konkordat case), 8 122-47 (Volksbefragung case) and 12, 205-22 (Fernseh case).

government is not an appropriate response to this dispute. This is because democratic order in Constitutional Law is clearly premising the conflicts among various political lines. The federal Constitutional Court does not have the competence in this type of political decision despite the fact the decision of the Constitutional Court cannot be separated from a political factor. This is the functional limitation of the Constitutional Court.

The power of the German Federal Constitutional Court as a final arbiter in federal relations was not as strong as the U.S. Supreme Court. Geographically, Germany has fewer states than the U.S., and the power distribution between federal and states has not proven to be problematic as a result of the constitutional doctrine of federal government-friendly.

### *C. The Korean Constitutional Court and Judicial Activism*

#### 1. Korea as a Unitary State

Korea has not adopted a federal system, rather is based on the unitary system of government. In the unitary form, one central government wields supreme power over all territorial divisions within the nation. Provinces, cities, and other political units owe their creation and continued existence to the central government, and they possess only such powers as the central government grants to them. The central government can make broad or limited delegation of powers to lower levels of government. Unitary governments are the most common form in the world, and subnational governments are viewed primarily as administrative subdivisions to carry out national policies. Commonly, the central government prescribes in minute detail the policies to be implemented and the procedures to be followed. Since the lower level units are subject to continuous supervision and control, the unitary organization is able to achieve a degree of national homogeneity, provide uniformity of policy and administration, and concentrate power swiftly and completely in time of war.

The major disadvantage of a unitary system may be its inflexibility. Identical policies and methods are applied to all local conditions regardless of their applicability in specific areas.

#### 2. Historical and Political Background

As Korea has never adopted the federal state system, the role of final arbiter in federal-state relations cannot be applied to the Korean Constitutional Court. Then, what is the necessity and main role of the Constitutional Court in Korea? Surveying the political and social background in its creation can supply us with an answer.

During the public hearings for the 1980 Constitution, the majority advocated a judicial review system by the courts, namely, the American system. While some called for revival of the short-lived Constitutional Court of the Second Republic, few supported the adoption of the Constitutional Committee. This seemed to have been due to the disappointing

performance of the Committee under the Fourth Republic (1972-1980) which, though a permanent organ, did not make a single decision on constitutionality.

In a new move of the times to usher into a more democratic order which is usually referred to as the "June 29 Declaration," a far-reaching amendment was undertaken to introduce reforms across the board. The Constitutional Court first adopted judicial review in the 1960 Constitution, and has since been reinstated. It is much too soon to make an assessment, but an amplified Constitutional Court may be the most suitable under prevailing conditions.<sup>59</sup> Since the government authorities have not officially released the deliberation records for the amendment, it is not known in detail why and how the Constitutional Court plan was adopted.

However, based on the materials and records of journals at that time, we can say that it was the outcome of political compromise without deep knowledge of the system. At that time, revision of the Constitution was the object of a political deal. The six representatives of three political parties gathered what Koreans called a six member petit committee, and deliberated the revision. In the course of this deliberation, the opposition party insisted on the Constitutional Court system, disappointed at the Constitutional Committee system, and the Majority party admitted it getting concession from the opposition party on other issues. There was no deep knowledge and close examination of the Constitutional Court system represented by the German Federal Constitutional Court.

Be that as it may, the Korean Constitutional Court has done better than was expected. In Korea, where a federal system is not adopted, the main role of the Constitutional Court is not a final arbiter in federal-state relations, but to directly protect the constitutional rights of the people by the interpretation of the Constitution under the unitary state system. Federalism does not play a significant role.

### III. INSTITUTIONAL COMPARISON

#### A. *The Composition of Constitutional Adjudication Institutions in the U.S., Germany and Korea*

##### 1. The U.S.<sup>60</sup>

##### a. Organization of the U.S. Supreme Court

The most dazzling jewel in the judicial crown of the U.S. is the re-

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59. The erstwhile Constitution Committee was more in name than in reality. The ordinary court which was given the job of judicial review under the 1962 Constitution was overly politicized. For more detail of the history of judicial review in Korea, see DAE-KYU LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 151-70 (1990). Yoon,

60. On the composition of the U.S. Supreme Court, see LAWRENCE BAUM, THE SUPREME COURT 25-32 (2d ed. 1981); W. H. REHNQUIST, THE SUPREME COURT 253-75 (1987); R.W. GALLOWAY, *The Rich and The Poor*, in SUPREME COURT HISTORY (1982).

vered and often controversial U.S. Supreme Court. It is the sole court mentioned specifically in Article III or in any part of the Constitution. All other federal courts have been created by statute.<sup>61</sup> In the U.S., constitutional questions are brought up as a subject matter of general civil, criminal and administrative cases and judged together with the accompanying issues of the case. Thus eventually, Constitutional Law comes to work as a judicial norm in all kinds of courts.

It is therefore false to say that the U.S. Supreme Court is the only institution of constitutional adjudication. The Supreme Court, more precisely, has the right of final authoritative interpretation. In this research, however, I will compare constitutional adjudication institutions at the highest level, so I will restrict its scope to the U.S. Supreme Court.<sup>62</sup> In the U.S. Supreme Court, there are no special inner organizations or procedural regulations concerning judicial review. The Supreme Court simply administers the process of judicial review according to the provisions that prescribe its jurisdiction and its general procedures.<sup>63</sup>

#### b. Fixed Number of Judges and their Tenure of Office

The Supreme Court of the U.S. is composed of one Chief Justice and eight Associate Justices.<sup>64</sup> Ranging from five to eight Justices in the first eighty years of its history, the Court has remained at nine ever since the first term of President Grant in 1869.<sup>65</sup> This odd number makes it unlikely that tie votes will occur. When a tie vote does occur, the decision of the lower court from which appeal has been taken to the Supreme Court is affirmed.<sup>66</sup>

61. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 177 (5th ed. 1986).

62. We frequently put the Supreme Courts of Korea and the U.S. at the same level when referring to their power and procedural statutes. This false approach derived not only from the methodological mistake, but also from the lack of understanding of the judicial organization of the U.S.

63. On the jurisdiction and adjudication procedures and their provisions, see discussion *infra* Part III.A.1-2.

64. Art.1. of the Judiciary and Judicial Procedure.

65. See ABRAHAM, *supra* note 61, at 177. The Court has continued with nine Justices since 1869. Prior to this time, its membership was fixed by Congress, and comprised five in 1789, six in 1790, seven in 1807, nine in 1837, ten in 1863, and eight in 1866. Recently there has not been a big argument about the number of Justices in the U.S. Supreme Court, but rather some arguments concerning the desirable number of judges at the federal appellate court level. Compare Stephen Reinhardt, *Too Few Judges, Too many Cases*, A.B.A. J., Jan. 1993, at 52 (insisting upon expansion of the numbers) with Gerald B. Tjoflat, *More Judges, Less Justice*, ABA. J., July 1993, at 70-73 (objecting to a numerical increase for several reasons).

66. The Justices in the U.S. Supreme Court try, under this circumstance, try to persuade the last justice to come to their side to formulate a majority opinion. See, BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* (1979).

Tenure of the Justices is not fixed, thus they can hold an office for life, unless they are removed due to impeachment or conviction.<sup>67</sup> Therefore, mandatory retirement at a certain age does not exist. Only under certain circumstances can Justices retire of their own will. In this situation, the Justice is paid as much as the amount of their retirement pension calculated after their retirement.<sup>68</sup> Detailed provisions concerning the retirement of the justices are found in Articles 371 to 376 of the Judiciary and Judicial Procedure Act. Essential to the independence of the judiciary is the security of tenure, particularly in the case of appointed judges.<sup>69</sup> The splendid rhetoric, "judicial independence," would be mocked and derided without the armor of "a long term of office, preferably life, adequate remuneration, and stringent constitutional and/or statutory safeguards against removal."<sup>70</sup> There is no promotional or rotational appointment system of the United States Supreme Court.

### c. Selection of Justices and their Qualifications

#### (1) Appointment of Justices

"The President shall nominate, and, by and with the advice and consent of the senate, shall appoint Justices of the Supreme Court."<sup>71</sup> When

67. See ABRAHAM, *supra* note 61 at 44. "In accordance with constitutional requirements, impeachment for 'Treason, Bribery, or other high Crimes and Misdemeanors' may be [initiated] by a simple majority of the members of the House of Representatives, there being a quorum on the floor. Trial is then held in the Senate, which may convict by a vote of two-thirds of the members of the Senate present and voting, if a quorum is present." *Id.*

68. The revision of the retirement statute was the inducement for the early retirement: "Partly to enable aging jurists to step down from the bench with dignity, and concurrently to render their replacement with younger personnel more palatable, Congress enacted a vastly improved retirement statute in 1937." See *supra* note 48, at 42. Under the provisions of this retirement statute, federal judges may retire on full pay at the age of seventy after having served ten years on the bench, or at sixty-five after having served fifteen years. See *id.* at 42-43. However, physical disability was the waiver for the requirements: "These requirements are waived in the presence of physical disability, in which case retirement pay is computed in accordance with length of service." *Id.* at 43. A more accurate description than retirement is to "enter inactive status," subject to temporary calls to duty at the discretion of the Chief Justice of the Court. *Id.* at 42.

69. Life tenure would provide "that independent spirit in the judges...essential to the faithful performance of so arduous a duty." Charles J. Cooper, *The Federal Judiciary, Life Tenure, and Self-Government*, 4 Cornell J. L. & Pub. Pol'y 500, 501 (1995) (quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Besides, "Life tenure would place the judges 'in a situation altogether unprecedented in a free country,' rendering them independent in the fullest sense of the word. There is no power above them, to control any of their decisions." *Id.* (quoting *Brutus*, N.Y. J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 407, 418 (Herbert J. Storing ed., 1981)).

70. See ABRAHAM, *supra* note 61, at 41.

71. See U.S. CONST. art. II, § 2, cl. 2.

the office of Chief Justice is vacant, the President may appoint a Chief Justice among the existing Justices filling that vacancy with a new Justice, or can appoint a new Chief Justice directly from the outside. The latter has been the common choice.<sup>72</sup>

The formal legal procedure for the appointment of Justices is as follows: Presidential nomination, Judiciary Committee's decision on whether or not to transmit it to the plenary session, majority approval in the plenary session of the Senate, and Presidential appointment.

First, the President designates and proclaims a justice nominee and notifies the Senate.<sup>73</sup> The Senate Judiciary Committee decides whether or not to approve the nominee. If the committee disapproves after screening the fitness of the nominee, the nomination is rejected. If the committee approves, it is transmitted to the plenary session. The Senate decides by majority vote whether or not to confirm. While the legal process of appointing Justices is comparatively simple, gaining legitimacy for appointments is not. Ensuring democratic values in appointments is achieved by understanding the doctrine of democracy and demonstrating the level of American democracy. This effort is made through a hearing,<sup>74</sup> testimony, and investigation, which is done during the approval procedure but can be made outside of these official procedures as well.

Efforts outside of the official process are usually made by so-called unofficial participants. These unofficial participants are generally divided into three groups. The first consists of the American Bar Association (ABA)<sup>75</sup> and legal professional groups, the second consists of interest groups and pressure groups outside of law circles, and the last is comprised of the Justices of the U.S. Supreme Court themselves. These unofficial participants are involved in the whole process of judicial appointments in diverse ways.

First, the President not only listens to the opinion of staff and law officers who assist him in the White House, but also refers to the infor-

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72. For statistical material, see COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, *THE SUPREME COURT OF THE UNITED STATES: ITS BEGINNINGS & ITS JUSTICES 1790-1991* 278-81 (1992).

73. See STEPHEN L. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 117 (5th ed. 1993). Wasby explains that "some presidents appear to have had few expectations of their nominees, but others have placed justices on the Court to do a specific job." He enumerates as examples of the latter Justice Thurgood Marshall by President Lyndon Johnson, and Chief Justice Warren Burger by President Nixon. See *id.* at 117-21.

74. There are controversies on whether the hearing in the Senate undermines the Court's credibility. See Stephen J. Wermiel, *Appointment Controversies and the Supreme Court*, 84 NW. U. L. REV. 1033, 1034-36 (1990).

75. In the ABA's work for this, confidentiality is said to be very important. About its actual operation, see Joan M. Hall, *The Role of the ABA Standing Committee on the Federal Judiciary*, 84 NW. U. L. REV. 980, 981-82 (1990).



mation and materials that are collected by the FBI and the opinions of politicians. These sources are used in various ways based on the style of the President. Once a nominee is designated and proclaimed by the President, various kinds of citizens' groups and pressure groups that have an interest in the appointment develop lobbying activities to voice their opinions.

At this stage, the Standing Committee of the Federal Judiciary, affiliated with the ABA, also launches a comprehensive evaluation operation of the nominee.<sup>76</sup> It collects extensive data for judging the fitness of the nominee and brings out the results of its analysis in its opinion. Even though there have been differences according to the President's political style and methods of dealing with the Senate, ABA opinions have been influential in the President's nominee withdrawal<sup>77</sup> and the Senate's approval procedures. Because these procedures present themselves as a living example of democracy in practice, they show various aspects of how political powers are arranged and what the political situations are at a given time. Therefore, the appointment procedure cannot be fixed in a definite form, and is arguably complicated.<sup>78</sup> Nonetheless, all of these procedures can be summarized as an effort to have a sincere Justice for the people. The U.S. method of judicial appointment is becoming a good model for securing legitimacy and democratic justification in composing constitutional adjudication institutions.

## (2) Qualifications

The U.S. Constitution says nothing about qualifications of the justices. To date, around forty of the Justices had not had a legal professional career at the time of their appointment, although all the Justices had been lawyers. In the past, political figures were appointed as Chief Justice and Justices, but since the 1970s, there has been a tendency for these positions to be filled by judges of the lower courts. Many of the Justices come from distinguished families. More recently, more of them have come from prestigious schools such as Harvard, Yale and Columbia.<sup>79</sup>

Ultimately, we can say that qualifications of the Justices actually become clear during the nomination procedure by the President and approval procedure by the Senate. No legal qualifications exist; rather factual democratic procedure dominates the appointment procedure. Each

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76. *See id.* at 982.

77. *See* WASBY, *supra* note 73, at 106-10.

78. Political parties play an important role in these procedures. When the President is of one party and the Senate majority is of the other party, Justice appointments must be a compromise between the two parties.

79. *See*, COMMISSION ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, *supra* note 72, at 222-38.

Justice's own sense of value and view of life exert a large influence upon his or her adjudication.<sup>80</sup>

## 2. Germany<sup>81</sup>

### a. Organization of the Federal Constitutional Court

The Federal Constitutional Court (*Bundesverfassungsgericht*) in Germany consists of two independent chambers (*Senat*), with each *Senat* is composed of eight judges.<sup>82</sup> Because these two *Senat*, named "*Erster Senat*" and "*Zweite Senat*", stand in a independent relationship with each other, they cannot exchange members and the judge of one *Senat* cannot execute the work of the other *Senat* as a proxy. For this reason the Federal Constitutional Court (hereinafter FCC) is also referred to as "twin courts" (*Zwillinggericht*).<sup>83</sup>

The head and vice head of the FCC should each belong to one Senate, becoming the chief judge of each *Senat*.<sup>84</sup> Each *Senat* takes charge of certain subjects as laid down in Article 14 of the Federal Constitutional Court Code (FCCC) and they adjust subjects between the two *Senat* by decision of the entire assembly (*Plenum*), where the two *Senat* take seats together. This decision does not take effect until the next term of the court in principle.<sup>85</sup> When there is any doubt as to which *Senat* has competence in a specific procedure, the question is decided by a committee composed of the head, vice head, and four judges who are appointed by the two *Senat* for one term of the court. In case of a tie, the chief of the committee shall decide the issue.<sup>86</sup>

As stated above, each *Senat* takes charge of different subjects, based

80. We can understand the fact that the outcome of the Supreme Court's adjudication is decided by the arrangements of conservative, neutral, and radical power in the Supreme Court. See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, in IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? 98, 133-135 (Robert A. Licht ed., 1993).

81. For more on the composition of *Verfassungsgericht* in Germany, see GRUNDGESER (1994); K. Schlaich, *Das Bundesverfassungsgericht in VERFASSUNGSGERICHTSBARKEIT IN WESTEUROPA* [CONSTITUTIONAL ADJUDICATION POWER IN WEST EUROPE] 24-38 (C. Starck & A. Weber ed., 1985); E. BEND AND E. KLEIN, *LEHRBUCH DES VERFASSUNGSPROZERECHT* [TEXTBOOK OF CONSTITUTIONAL PROCEDURE ACT] 36-42 (1991); C. PESTALOZZA, *VERFASSUNGSPROZERECHT* 32-38 (1982); H. Simon, *Verfassungsgerichtsbarkeit in HANDBUCH DES VERFASSUNGSRECHTS* 1254-67 (E. Benda, et al. eds., 1983); T. MAUNZ, ET AL., *BUNDESVERFASSUNGSGERICHTSGESETZ* [FEDERAL CONSTITUTIONAL COURT ACT] art. 1-16 (1990).

82. See Art.2 BVerfGE.

83. See David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1826-27 (1988).

84. See Art.9, § 1 FCCC; Art.15 § 1 FCCC.

85. See *id.* at art.14, § 4 FCCC.

86. See *id.* at art.14, § 5 FCCC.

on a strict doctrine of independence. In some sense each *Senat* fulfills the function of one whole FCC. Therefore, when one *Senat* adjudicates a particular case, the other *Senat* may not readjudicate that case. In case one *Senat* wants to have a different legal interpretation from that of the other *Senat*, a Plenary Judgment (*Plenarentscheidung*) rendered by both *Senats* sitting together is employed to resolve the difference. This serves as a device for the unity of FCC's judgment.

#### b. Quorum and Tenure of Judges

While each *Senat* is composed of eight judges, the FCC consists of sixteen judges. The tenure of office of each judge is twelve years, and they are automatically retired upon reaching a certain age limit even if it is before the completion of their term of office. The age limit is the last day of the judge's sixty-eighth year of age.<sup>87</sup> The judge shall not be able to be reappointed. Even though a judge's term of office is completed, a predecessor shall retain his office until a successor is appointed.<sup>88</sup> In case a judge withdraws from his office due to his death, age limit, discharge, etc., the legislature, which selects the retiree, has to select the successor. The term of the successor is not the residuary term, rather twelve years from his selection.<sup>89</sup>

#### c. Selection, Qualifications, and Appointment of Judges

##### (1) Qualifications of the Judges

To be selected as a judge of the FCC, one should meet certain conditions. First, one should be more than forty years old. Second, one should have eligibility for Congress and express one's intention to be a judge to the FCC in writing. Third, one should satisfy the qualification ordained in the German Judiciary Act. The qualifications are granted to law professors<sup>90</sup> and persons who graduated from a college of law and passed the National Exam. This blocks participation of specialists who lack judicial qualifications.<sup>91</sup> Fourth, three judges in each *Senat* should be selected

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87. See DONALD KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* 87 (1976).

88. See art. 4, §§ 1-4.

89. See *id.* at art. 5, § 3.

90. See Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935, 952 (1982). In Germany, the position of law professor is very high while Germans have antipathy to the judicial offices. "It has fallen upon the German university community, not the German judiciary, to expound on the interstices of the code, to interpret ambiguities, to fill the lacunae," and "the great names of the common law are those of judges, but the great names of civil law are those of scholars." *Id.*

91. See Clark, *supra* note 83, at 1827. In the detailed explanation on the FCC in his famous book, Kommers shows the statistics that through 1972 the immediate previous job of the judges appointed were as follows: judge (41%), civil servant (28%), legislator (17%), law

from Federal Supreme Court judges,<sup>92</sup> and in this case the judges should have a judicial career for at least three years in a federal court.<sup>93</sup> Prevalent in the composition of the FCC is active participation by law professors. A majority of the German law professors pass the National Exam and gain admission to the bar.

### (2) Drawing up the List of Candidates

The Minister of Justice should finish drawing up two lists of eligible candidates a week prior to the selection date.<sup>94</sup> One list is a name of all the federal highest court's judges<sup>95</sup> who are eligible to be an FCC judge. The other is a list of candidates who are recommended by negotiating bodies (*Fraktionen*) in Congress and the federal and state governments. In the case that a successor is not selected at the expiration of predecessor's office and not selected within a legal term before the expiration, the FCC should recommend a candidate upon the request of the most senior member of the Judge Selecting Committee. In this case, if one judge is to be selected, three candidates should be recommended and if more than two judges are needed, a double number of candidates should be recommended.<sup>96</sup>

### (3) Selection and Appointment

Sixteen judges are selected. Eight judges are selected by the Senate (*Bundesrat*) and eight judges are selected by the Congress (*Bundestag*).<sup>97</sup> Senate and Congress are not limited to the list of the recommended names. The *Bundestag* appoints the "Judge Selection Committee" which consists of twelve congressmen selected according to the proportion of the number of congressman in each *Fraktion* determined by the d'Hont method of calculation. This committee selects eight judges. A judge should gain more than eight votes. It is a kind of indirect election.<sup>98</sup>

The committee carries out its duties under its own decision and re-

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professor (11%), and attorney (2%). There have been arguments on the issue that judiciary qualification is laid down as a qualification to become a judge of the FCC from its enactment.

92. "The remaining five members may also come from federal judgeships or be Volljuristen in other careers." See Clark *supra* note 83, at 1827.

93. See art. 2, § 3 FCCC.

94. See *id.* at art.8.

95. This includes: Federal Civil & Criminal Highest Labor Court, Federal Administrative Court, Federal Taxation Court, Federal Labor Court, and Federal Society Court.

96. See art.7(a) FCCC.

97. About the relationship between the FCC and Bundestag, see Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 501, 522-24 (1987).

98. See art.6, §§ 1-2 FCCC.

sponsibility. German basic law (*Grundgesetz*) does not lay down this sort of indirect election method, but the FCCC does. This indirect election method encounters criticism that the Judge Selection Committee does not really consist of appropriate figures as expected and the opinion of small political parties is neglected by adopting the d'Hondt calculation method. *Bundesrat* selects eight judges with more than a two-third consent of voters.<sup>99</sup>

The *Bundesrat* and *Bundestag* alternate choosing the president and vice president of the FCC among the judges.<sup>100</sup> The provision that demands the consent of greater than two-thirds consent of the voters in judge elections has the positive aspect that it contributes to the protection of the minority like the opposition party and further meets the needs of democratic justification demanded in the composition of the constitutional court. On the other hand, it also has a negative aspect in that it can induce political conflict. There were some arguments over the method of judge selection in *Bundesrat* when the revision of *Grundgesetz* was discussed.

The person elected by the *Bundesrat* or *Bundestag* is appointed by the President.<sup>101</sup> The judge has to take an oath prescribed in law at the time of his appointment.<sup>102</sup> By this appointment, the candidate eventually acquires the position of a judge in the FCC, and the term of office starts from this day.

#### (4) Prohibition of Holding Other Offices at the Same Time

A judge of the FCC cannot belong to the *Bundesrat*, *Bundestag*, or federal government. Nor can he belong to the equivalent constitutional organization at the State (*Land*) level. Additionally, other offices cannot be held, regardless of whether they are public or private, with the exception of law professor.

### 3. Korea

#### (1) Influence of the U.S.

Generally speaking, at the time the U.S. Constitution began to have an effect on Korea, the American-educated elite came back to Korea and began to contribute to the formulation of Korean Constitutional Law. Due to the numerous Koreans that have studied in the U.S.,<sup>103</sup> the transplanta-

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99. See *id.* at art.7. See also Clark, *supra* note 83, at 1828. According to Prof. Clark, the German legislature plays a dominant role in the selection of FCC judges, and it is justified because "it bestows democratic legitimacy on the selection process and on the judges themselves, and second, the best qualified jurists for constitutional adjudication are chosen." *Id.*

100. See art.9, § 1 FCCC.

101. See *id.* at art.10.

102. See *id.* at art.11.

103. See, Dong Suh Bark, *The American-Educated Elite in Korean Society in KOREA AND*

tion of the U.S. system into Korea cannot be neglected. We can say, however, that the most profound effect on Korean Constitutional Law came from the American military regime.<sup>104</sup> The effect of U.S. Constitutional Law and its precedents have been continued, either directly from the U.S. or indirectly via European countries. In the realm of constitutional adjudication institutions, the effect up with the changes in the Korean Constitutional Law provisions.<sup>105</sup> The present Korean Constitution (Sixth Republic, 1987-present) has the Korean Constitutional Court as its constitutional adjudication institution, which can be said to have been created to some degree under the influence of the U.S.

First, in staffing the judiciary, the fixed number of judges and the general organization, the Korean Constitution says, "the Constitutional Court shall be composed of nine adjudicators."<sup>106</sup> Unlike the German system, the Court is not divided into chambers, rather more closely resembles the United States with nine Justices. However, to nullify a legal norm in Korea more than six judges should assent, so the meaning of the number "9" is different from the U.S. in forming the Court's opinion.<sup>107</sup> The number has been changed from 11 (first republic) to nine in Korea, and the organization has never been divided into different chambers. A possible explanation is to centralized the competence in a unified com-

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U.S.: A CENTURY OF COOPERATION 263, 265-67 (1984).

104. Just after the emancipation from Japan, the American military was stationed in South Korea from 1945 to 1948, and they affected deeply the formation of the Korean legal system, including Korean Constitutional Law, by making and implementing military laws and ordinances which were based on the U.S. legal system. See TCHEOLSU KIM, HANKUKHUNBUBSA [History of Korean Constitution] 55-66 (1989).

105. So far Korea has had six republics and nine revisions of its Constitutional Law. In constitutional adjudication institutions, there have been some changes occurring side by side with the changes of republic. The first republic had a Constitutional Committee, which was composed of the Vice President (head), Five Supreme Court judges, and five Congressmen. Its character was a combination of a constitutional court and political organization styles. The second republic established a Korean Constitutional Court that mainly imitated the German Constitutional Court system. It consisted of nine judges who were selected three each by the President, Supreme Court and the Senate. In actuality the Court itself, however, was not established due to the military overthrow in 1961. The third republic had an Impeachment Committee, which was composed of the Chief Justice of the Supreme Court (head), three Justices of Supreme Court and five Congressmen. The fourth and fifth republic had a Constitutional Committee again, but the way of justice selection was different from that of the first republic and rather similar to that of the Constitutional Court of the second republic. The sixth republic established the Korean Constitutional Court, which is nearly same with that of second republic in the way of composition, except that the Senate is changed to the National Assembly. See YOUNG-SUNG KWON, HUNBUBHAK WONLON [CONSTITUTIONAL LAW: A TEXTBOOK] 1144-46 (Rev. ed., 1994).

106. S. KOREA CONST. Art 111, § 2.

107. ABRAHAM, *supra* note 61, at 177.

mittee or court and to enhance its power and dignity.

Second, the right of appointment is given to the President like the U.S. and Germany, but the selecting process is different from those two countries and, at least, closer to that of the U.S. in that a special non-standing committee, like Judge Selection Committee in Germany, is not established for the nomination. Basically, the nine judges are nominated three each by the President, National Assembly and Chief Justice of the Supreme Court.<sup>108</sup>

Third, the KCC has only a single head like the U.S. and does not have a vice-head like Germany. The head has the same rights as the other Justices in the adjudication process. He represents the whole court and directs the Court's administration. He should be appointed not by the Assemblies (Germany) but by the President (the U.S.). However, he should be appointed from among the judges and he is the only one who should get the concurrence of the National Assembly in appointment.<sup>109</sup> At this point we can say that in appointing the Justices the power of the President is excessively large and outside of the Assembly's adequate control in Korea.

## (2) Influence of Germany

Korean law has been generally associated with the Roman-German legal family *Gustav Radbruch* (1878-1949), one of the twentieth century's leading figures in legal philosophy. Radbruch introduced in one of his books an important theme for research in legal sociology—the reception of Roman law in Korea.<sup>110</sup> Generally speaking, the Korean legal system can be classified as belonging to the civil law family, which has been deeply affected by Germany. We can enumerate many reasons for this, especially historical background. In some aspects, Korea began its reception of western law on a full scale during the Japanese invasion period (1910-1945).<sup>111</sup>

At the time the Japanese legal system was the German system. The German legal system could be adopted indirectly to Korea via Japan. Many legal scholars have studied law in Germany, for many reasons.<sup>112</sup> In

108. "Of the adjudicators [referred] to in Sec.2., three shall be selected from among persons chosen by the National Assembly, with the remaining three to be selected by the Chief Justice." S. KOREA CONST. Art 111, § 2.

109. "The head of the Constitutional Court shall be appointed by the President from among the adjudicators with the concurrence of the National Assembly." *Id.* at Art 111, § 4.

110. G. RADBRUCH, *VORSCHULE DER RECHTSPHILOSOPHIE* 51 (1948).

111. There can be many refutations, but pay attention to the expressions, "in a sense" and "on a full scale." See Byoung Ho Park, *Traditional Korean Society and Law* 5 KOREAN J. COMP. L. 1, 3-26 (1977); Chongko Choi, *On the Reception of Western Law in Korea*, 9 KOREAN J. OF COMP. L. 141, 158-67 (1981).

112. See Chongko Choi, *History of German-Korean Relationship Through Legal Science*,

the area of constitutional adjudication institutions, the effect of Germany was not so large as compared to the U.S. in the beginning. However, from the adoption of the so-called "Constitutional Court" system in the second republic of Korea many German factors have been imported into the Korean system.

First, in the organization of the judiciary, Korea has the KCC beside the general court system that is headed by Korean Supreme Court. Therefore, the Constitutional Court in Korea is a kind of special court like the one in Germany.<sup>113</sup> It makes final decisions in constitutional disputes. Thus in constitutional matters, by and large, it can be the highest court. However, there are some jurisdictional conflicts between the Korean Constitutional Court and the Korean Supreme Court caused by the partial adoption of the German system.<sup>114</sup>

Second, in the tenure of judges, Korea has both tenure and age limits like Germany, even though its specific number is different. The tenure office of judge is six years<sup>115</sup> (twelve years in Germany) and the age limit is sixty-five for Justices and seventy for the Chief Justice.<sup>116</sup> As in Germany, Justices are automatically retired upon reaching the age limit even though it is before the completion of their term of office. The difference is that they can be re-appointed, unlike Germany.

Third, qualifications of the Korean Justices are specified in relatively detailed legal and constitutional provisions which are very similar to those of Germany. The Justices should have qualifications to be a judicial officer<sup>117</sup> and are appointed among persons who are more than forty years old and who have worked more than fifteen years in one of the following jobs: Judge, public prosecutor, lawyer, legal work in a national organization (national and public corporations government-invested corporation) with lawyer's license, and law professors at an accredited law school with a lawyer's license.<sup>118</sup> The biggest difference with Germany lies in the

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2 RECHT IN DEUTSCHLAND UND KOREA 83, 96-112 (1980).

113. There is, however, a refutation that the classification of the constitutional adjudication system into special court type and general court type is meaningless. In the case of the U.S., although the U.S. Supreme Court is the head of the general court, it is not merely a court of final appeal but, functionally understanding, a constitutional court because it admits a very limited number of cases, which contain important constitutional issues, from federal appellate court and state supreme courts. In this sense it is not too much to say that the U.S. Supreme court is also a sort of special court. See Dai-Kwon Choi, *The Politics of the Constitutional Court: Centering Around its Structure and Function*, 91 SEOUL NATIONAL UNIVERSITY JURISPRUDENCE 106, 115-116 (1993).

114. See discussion *infra* Part III.C.

115. See S. KOREA CONST. art.112, § 1.

116. See art.7 KCCC.

117. See S. KOREA CONST. art. 111 § 2.

118. See art.5. § 1 KCCC.



point that in spite of being a law professor one should also have lawyer's license<sup>119</sup> to become a Justice. This means that a law professor, even with many years of teaching and research experience, cannot become a Justice unless he passes the national judicial examination. Therefore, in the composition of the KCC, law professors' participation cannot be found at all so far. Most Korean law professors do not take the national judicial exam.<sup>120</sup> There are many arguments over legal reform on this point.<sup>121</sup>

Fourth, a Justice cannot hold other offices during the tenure as in Germany. He or she cannot serve concurrently as a congressman, civil servant or consultant executive in a corporation or private organization, and cannot manage his own business for profit.<sup>122</sup>

### *B. The Competence of Constitutional Adjudication Institutions in these Three Countries*

#### 1. The U.S.<sup>123</sup>

##### a. Selection of Cases through Appeal and Certiorari

The U.S. Supreme Court has an exclusive first instance jurisdiction over a conflict between two or more States, and has a non-exclusive first instance jurisdiction over litigation in which a foreign ambassador is a party and conflicts between the United States and a state. With the exception of these limitations, the Supreme Court has appellate jurisdiction.<sup>124</sup> The appellate jurisdiction has relatively more importance and actually more cases than the other. The interpretation and application of the Constitution is judged mostly in appellate cases.

Concerning judicial review, there are occasions when the constitu-

119. The lawyer's license is granted to the person who has completed a two year training program at the Judicial Research and Training Institute (JRTI) of the Supreme Court after passing the national judicial exam in Korea. The Lawyer Act provides for the qualifications of lawyers as follows, "Any person who is a national of the Republic of Korea and who falls under any of the following Subparagraphs shall be qualified as a lawyer: 1. Person who has passed the Judicial Examination and completed the required course of the Judicial Research and Training Institute; and 2. Person who has the qualifications for judge or public prosecutor." Lawyer Act, art. 4.

120. See Chang Soo Yang, *The Judiciary in Contemporary Society: Korea*, 25 CASE W. RES. J. INT'L L. 303, 306 (1993). "Nearly all students in Korea who want to be a law professor prefer to study abroad after graduation rather than enter JRTI (Judicial Research and Training Institute) for the apprenticeship and apply for the national bar examination.... Only four university professors are qualified as a lawyer." *Id.*

121. See discussion *infra* Part III.C.

122. Art.14 KCCC.

123. For more on the competence of the U.S. Supreme Court, see generally G.R. STONE, ET AL., *CONSTITUTIONAL LAW* 111-123 (1986); BAUM *supra* note 60, at 25-32; REHNQUIST *supra* note 60, at 253-56.

124. See 28 U.S.C. § 1251 (1994).

tionality of laws and ordinances is reviewed under appellate jurisdiction by the litigant's appeal and directly reviewed under the certiorari issued to a U.S. Court of Appeals or State Supreme Court upon the litigant's application.<sup>125</sup> Issuing of a writ of certiorari is subject to the discretion of the U.S. Supreme Court. The court that reviewing the certiorari should send all the records of the litigation to the U.S. Supreme Court. In this judicial review, the court does not necessarily review only whether the norm (law, administrative order etc.) is unconstitutional or not. The Supreme Court may reach a final decision in the case or may remand to a lower court which will reach a final decision in the light of the Supreme Court decision on the question of the constitutional law raised. The unconstitutionality of an administrative order and administrative measure is reviewable as well.

#### b. Legal Effect of the Decision Declaring Unconstitutionality

##### (1) The Function of Substantially General Effect

When a law is judged to be unconstitutional by the U.S. Supreme Court, the law is not invalidated in general but only in the particular case. In other words, the judgment of the Court has just an individual effect. As the U.S., however, has the principle of *stare decisis*, it reaches nearly the same result as having a general effect. Of course, this does not mean that the effect an unconstitutional ruling in the U.S. is completely the same as that of other countries in which an unconstitutional ruling has a general effect. In the countries where the unconstitutional ruling has a general effect under concrete judicial review, after the ruling, the unconstitutional law is repealed and the constitutional court ceases to have further occasion to review that law again.

In the U.S., however, the unconstitutional law is not completely repealed, so in the event of another review based on a different case there is room for changing the previous position (constitutional ruling). In the U.S., the general effect, which is not directly admitted is closely related to the logic of justification for judicial review. Because the U.S. Constitution does not specifically authorize judicial review, the power of the Supreme Court to declare law unconstitutional is implied from its general power to hear "cases and controversies." Thus, as a matter of pure logic, the Court's decision that an act of government is unconstitutional can only be relevant to the outcome of the case before the Court. At any rate, in substance, they reach the same result as having a general effect.<sup>126</sup>

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125. See 28 U.S.C. §§ 1254, 1257 (1994).

126. See Dai-Kwon Choi, *supra* note 113, at 115-316 (estimating that concentrated and non-concentrated types coincide with each other).

## (2) Natural Nullity from the Beginning (*ex-tunc Wirkung*)

When a lower law is inconsistent with a higher law, it is absolutely void. Therefore, the unconstitutional law is naturally void from the beginning. This is based on the idea that judicial review itself does not produce the effect of nullity, but is no more than a confirmatory declaration of nullity on what is null from the beginning. This understanding has traditionally stood firm, yet depending on the nature of the case there is also the idea that "natural nullity" cannot always be abstractly applied without regard to the concrete effect on particular parties.

Because the U.S. Supreme Court only decides specific cases and does not issue general declaration of unconstitutionality, the doctrine of nullity from the beginning has an odd application in American constitutional law. In the context of the particular case it is deciding, the Court will treat any law it declares unconstitutional in that case as null from the beginning for those parties in their case, but not necessarily as null from the beginning in its earlier applications to other persons before the current litigation arose. Thus the Court will sometimes hold that its current declaration that a law is unconstitutional may not be retroactively applied to earlier applications of that law about which litigation has been completed.

### 2. Germany

Article 13 of the FCCC imparts a vast range of powers to the FCC, but Article 93 of the German *Grundgesetz* enumerates the competence of the FCC in a concrete way as well. Therefore, we can conclusively say that the FCC has jurisdiction over the cases that the *Grundgesetz* enumerates. The interpretation of constitutional law provisions and legal provisions about competence of the FCC, however, is conducted by the FCC in the long run, so the authority to decide concrete competence is given to the FCC itself.

#### a. Abstract Judicial Review

German Constitutional Law provides for abstract judicial review by FCC; the FCC decides "in case of differences of opinion or doubts on the formal and material compatibility of federal law or state law with this Constitution, or on the compatibility of state law with other federal law, at the request of the federal government, state government, or of one third of the *Bundestag* members."<sup>127</sup> The subject of abstract judicial review consists of all legal norms. It includes laws properly passed by municipalities or other types of corporate bodies,<sup>128</sup> but it should, by all means, be laws that are promulgated.<sup>129</sup>

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127. See Art.93, § 1, Nr.2 GG.

128. See Zeidler, *supra* note 97, at 505.

129. It does not have to be in force, however. If it is after promulgation, it becomes the

Judicial review falls under the jurisdiction of the *Erste Senat* of the FCC. In the event federal law is against the Constitutional law (*Grundgesetz*) or State law (*Landesrecht*) is against Constitutional law or federal law, the judicially reviewed federal law or state law is declared void (*nichtig*). This decision is made by the consent of more than half of the present judges when more than six of the eight judges are present.<sup>130</sup> It binds all of the constitutional organizations, courts, and administrative organs. The legal provisions that are declared void have no effect from the beginning.<sup>131</sup> In the occasion where it cannot be void in nature from the beginning- e.g., domains of law concerning taxation and finance, realms of continuous benefit administration, the FCC may hold its decision to be in force only prospectively. These kinds of exceptions are admitted on a large scale, but criminal cases are not among the categories in which unconstitutionality can be prospective only.<sup>132</sup>

Practically, the party that makes request for abstract judicial review is, many times, either the political opposition in the *Bundestag* or a state government governed by the opposition party. German commentators point out only the political disputes that were unsuccessfully resolved in the *Bundestag* are brought to the FCC for abstract judicial review. According to Wolfgang Zeidler, a former Chief Justices of German FCC, the abstract judicial review has ran into criticism because it "forces the FCC to decide the constitutionality of a legal norm without access to sufficient information regarding the implementation of the norm or its implications."<sup>133</sup>

#### b. Concrete Judicial Review

German Constitutional Law provides for concrete judicial review by FCC: "Where a court considers that a statute on whose validity the court's decision depends is unconstitutional, the proceedings have to be stayed, and a decision has to be obtained from ... the FCC where this Constitution is held to be violated."<sup>134</sup> Therefore, the applicant is not the litigants but rather the court. To certify the question of compatibility, the court must be sure of the unconstitutionality of that norm, because if there exists any possibility to interpret the norm conforming with the Constitution, the court should do so instead. In this meaning each court has the competence of investigation (*Prüfungskompetenz*) that is distinct from the competence of rejection (*Verwerfungskompetenz*). The court is not af-

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subject of review regardless it is in force or not.

130. See art. 15 § 2 FCCC.

131. It is so-called "ex-tunc Wirkung." Art.79 § 1 FCCC.

132. See art. 79 § 1 FCCC.

133. Zeidler, *supra* note 97, at 505.

134. See art. 100, § 1.

fectured by the litigants' pleas that allege the nullity of the norm.<sup>135</sup>

The *Bundestag* may seek concrete as well as abstract judicial review, and further the FCCC bestows that opportunity on concerned litigants as well.<sup>136</sup> In addition, the FCC can demand a reply to some legal questions from the Federal Supreme Court (*oberster Gerichtshof des Bundes*) and State Supreme Court (*oberster Landesgericht*). These questions are how the Supreme Courts have interpreted the Constitution on the disputed matter so far, how the Courts have applied the disputed provisions and the nature of the legal issues raised in the litigation.<sup>137</sup>

There are two different types of nullity that are declared by the Court in a judicial review, including abstract judicial review as stated before. The first is "nullity" (incompatibility), which is the typical type discussed so far. This legal effect is based on the traditional German doctrine that states that a norm, which violates a higher norm, is void *ex ipso* and *ex tunc*. The law also provides the FCC with the opportunity to nullify other particular provisions of the same law as long as these are incompatible with the Constitution for the same reasons.

The second type is partial nullity. There scarcely is a need for the complete nullification of a law or other legal norm. Even an individual legal provision need not always be wholly proclaimed unconstitutional and void. Restrictions on judicial review may result from particular constitutional procedures. In the context of concrete judicial review, the limited range of the introduced issues may restrict the Court's ability to invalidate an entire law.<sup>138</sup> The FCC may get to the conclusion that only part of a linguistically divisible provision is unconstitutional. Partial nullity may be invoked in the case of a requirement not specifically mentioned in a particular law, or with respect to a particular application of the law.<sup>139</sup>

### c. Constitutional Complaint

The constitutional complaint (*Verfassungsbeschwerde*) can be lodged on three occasions. First, when a concerned person applies for the FCC's review on the decisions by the *Bundestag* pertaining to the validity of elections and the loss of congressional membership,<sup>140</sup> Second, when a self-governing body apply for the FCC's review insisting a federal law or a state law infringe autonomy written in Article 28, Section 2 of the *Grundgesetz*.<sup>141</sup> Third, when any person applies for the FCC's review

135. See art. 81(A) FCCC.

136. See art. 82 §§ 1, 3 FCCC.

137. See *id.* at § 4.

138. Those are often more clearly specified by FCCC.

139. See Zeidler, *supra* note 97, at 508-509.

140. See art. 41 GG.

141. See art. 93, §1 (4)(B) GG.

asserting a violation by a public authority of either basic rights or certain other constitutional rights.<sup>142</sup> The third occasion is the most typical. The constitutional complaint can be lodged against any act of public authority such as measures taken by administrative agencies and court decisions.<sup>143</sup> From the statistics, this remedy accounts for over 90% of the FCC's caseload.<sup>144</sup>

However, the complainant must have exhausted all other available judicial remedies before filing a constitutional complaint. Available legal recourse must be exhausted prior to any such review by the FCC.<sup>145</sup> A constitutional complaint lodged directly against a law or legal norm is only admissible if certain restrictive conditions are met,<sup>146</sup> but they are very exceptional occasions. Above all, the complainant himself or herself must "presently" and "directly" be affected by the law.<sup>147</sup>

Moreover, the Court increasingly requires that it must not be reasonable for the complainant to first seek relief by following the ordinary recourse of law.<sup>148</sup> The claim of constitutional complaint starts with the presentation of a claiming document and the period of claim is one month.<sup>149</sup>

There are two types of judgments. One is rejection judgment, the other is admission judgment. In the case of the latter, the judges should specify what provision of the *Grundgesetz* is violated and what kind of feasancess and omissions violate the provision of the *Grundgesetz*. When the constitutional complaint on a decision of the Administration or the judicature is admitted, the FCC revokes the decision. When the constitutional complaint on a legal provision is admitted, the FCC declares the invalidity of the provision.<sup>150</sup> The force of an invalidity declaration of a legal provision is same as that of a judicial review.<sup>151</sup>

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142. See *id.* at §1.

143. See Zeidler, *supra* note 97, at 506.

144. See SCHLESINGER ET AL., *supra* note 5, at 376.

145. It is so-called the exhaustion of the other legal remedies doctrine. See *id.* at 376-77.

146. See Zeidler, *supra* note 97, at 506. In the event that the character of dispute has a general meaning (*allgemeine Bedeutung*), and in the event if an applicant goes by way of the other legal remedies an important and irrecoverable damage (*schwerer und unabwendbarer Nachteil*) would be produced to the applicant. See Art. 90, §2 FCCC.

147. The self-relatedness, directness and presentness of the right are very important prerequisites for seeking the constitutional complaint, which are formulated by the FCC's previous precedents. See Zeidler, *supra* note 97, at 506

148. See *Id.* at 506.

149. See art. 93, § 1 FCCC.

150. Revoking the decision of the Administration and the judicature, the judges declare the invalidity of the legal provision as well upon which the decision is based, if the invalidity of the decision is caused by the unconstitutionality of the very legal provision.

151. See art. 95, §3, art. 79, art. 31, Sec § 2 FCCC.

#### d. The Other Competencies

Additionally, the FCC has competence over the jurisdictional disputes between governmental organizations,<sup>152</sup> the decision of political party dissolution,<sup>153</sup> the decision of impeachment,<sup>154</sup> the decision of losing basic right,<sup>155</sup> federal litigation,<sup>156</sup> and election cases and demurrer on the *Bundestag's* disqualification decision of its member.<sup>157</sup> However, the number of decisions by the FCC made on these cases is not large, so these competence have less actual importance than the judicial review and constitutional complaint competence stated in detail above.

### 3. Korea

#### a. Influence of the U.S.

The competencies of constitutional institutions in Korea have been changed by revisions of the relevant Constitutional and legal provisions in each Republic.<sup>158</sup> Under the present Constitution, the KCC has the most kinds of competencies, which include the constitutionality of a statute upon the request of the courts, impeachment, dissolution of a political party, disputes over jurisdiction among state agencies and local govern-

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152. See art. 93 § 1(1) GG; art. 63 FCCC.

153. See art. 21 § 2 GG; art. 43, § 2, art. 45 FCCC.

154. See art. 61 § 1, art. 42, § 2, art. 98, § 2, art. 58 GG; art. 4, 50-52, 57, 59 FCCC.

155. See art. 18 GG; art. 37, 39-40 FCCC.

156. See art. 93, § 1(3), art. 84, § 2, art. 93, § 1(4), art. 13(8) GG; art. 13(7), art. 68-72 FCCC.

157. See art. 48, § 1 FCCC.

158. To paraphrase, the Constitution of the first republic gave the competence of concrete judicial review to the Constitutional Committee. The Constitution of the second republic gave the Constitutional Court jurisdiction over the final interpretation of the Constitution, judgment on the unconstitutionality of a legal provision, jurisdictional disputes between governmental organizations, the decision of a political party dissolution, the decision of impeachment and election cases for the President, the Chief Justice and the Justices. Under the Constitution of the third republic the Impeachment Committee took the charge of the decision of impeachment, and the decision of political party dissolution, and the concrete judicial review belonged to the competence of general courts. The Constitution of the fourth republic established the Constitutional Committee, which had jurisdiction over concrete judicial review, the decision of impeachment and the decision of political party dissolution. The Constitution of the fifth republic gave the competence on the concrete judicial review, the decision of impeachment and the decision of political party dissolution, and the competence on judicial review of administrative ordinances regulations and election cases were given to the general courts. However, in the fourth and fifth republics, the Supreme Court could decide whether to forward the case to the Constitutional Committee or not in a concrete judicial review case, and it produced a bad result that not even one case was filed during that period. See YOUNG-SUNG KWON, *supra* note 105, at 1144-46.

ment and constitutional complaints as prescribed by statute.<sup>159</sup>

Among these competencies, concrete judicial review is the very thing that has been directly affected by the U.S. Concrete judicial review is the only and representative competence of constitutional adjudication which has continuously existed since the first republic in Korea. Actually, when enacting the Korean Constitution of the first republic, provisions on concrete judicial review were adopted that had been present since its drafting-stage without an objection.<sup>160</sup> When we think that the device of judicial review is the invention of the U.S. Supreme Court built up by the precedent of *Marbury v. Madison* (1803)<sup>161</sup> and spread to the other countries including Germany in the early twentieth century, the influence of the U.S. experience becomes more understandable.

Even though Korea has received some elements of judicial review from Germany, it can be said that in a wide sense these factors were originally modeled on the U.S., even if received via Germany. Among the factors, some have been transformed into the Germanized style. Admitting the general effect over the individual effect as the force of ruling "against the Constitution" can be offered as a typical example. Of course, Korea admits the general effect like Germany,<sup>162</sup> but, as stated before, because of the principle of *stare decisis* in the U.S., the U.S. reaches nearly the same result as having a general effect when we see it on the whole.<sup>163</sup>

#### b. Influence of Germany

The fact that the present Korean Constitution adopts the "Constitutional Court" system means in a sense that it begins to follow the model of the German "Constitutional Court" system in many aspects. The most obvious example is KCC's competence rather than its composition.<sup>164</sup>

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159. See S. KOREAN CONST. Art. 111, § 1.

160. See generally, Hyo-Jeon Kim, *The Effect of American Judicial Review to Korea, in THE U.S. CONSTITUTION AND KOREAN CONSTITUTION* 339-40 (1989).

161. See generally, R. J. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 67 (1959). Even though there is an opinion that art. 3. § 2, cl. 1 is the provisional foundation for the judicial review on the federal laws by the Federal Supreme Court, so-called national judicial review, the prevailing opinion states that all kinds of judicial reviews were established decisively by the Chief Justice Marshall's decision in the *Marbury v. Madison* case.

162. See art. 47 KCCC. A law or legal provision declared to be unconstitutional loses its force. However, the point of time when the provision loses its force is different between Korea and Germany. In Germany the unconstitutional provision becomes naturally void from the beginning (*ex-tunc Wirkung*). In Korea the unconstitutional provision, unless being criminal law provision, loses its force from the day of ruling unconstitutional. See art. 47 § 2 FCCC.

163. See discussion *supra*, Part III.A 1.

164. In the composition of the Court, we can say that the U.S. had a greater effect than



Except for abstract judicial review, the present Korean Constitution has adopted nearly all the competence of German Constitutional Court.

The KCC does not have the competence of abstract judicial review, but rather, as stated before, concrete judicial review competence which was originally affected by the United States. However, in the type of decision after judicial review, Germany had a direct influence on Korea, through the so-called variational type of decision. In the event there is no need for the complete nullification of a law or a provision, it need not always be proclaimed entirely unconstitutional and void. Where a sudden declaration of nullity is likely to damage legal stability, the temporary reservation of a nullity declaration can be a better solution. For these events, some kinds of variational type of decisions are invented through the German precedents, which are the decision of restricted constitutionality, the decision of disagreement with the constitution and the decision of urging legislation.

Employing the decision of restricted constitutionality, the judge can avoid the nullity declaration by interpreting the norm restrictively so as to bring it into conformity with the constitution. The decision of disagreement with the constitution means that even though admitting the unconstitutionality of the norm, the judge acknowledges its temporary force in order to prevent a legal vacuum and chaos. The decision of urging legislation announces that, although the norm is constitutional at the time of review, it is likely to be unconstitutional in the future in such a decision. The judge can urge the legislators to revise or replace the norm in order to prevent unconstitutionality in the future.<sup>165</sup> On these types of decisions there are no legal or constitutional provisions, but the KCC adopted them from the practice of the FCC.

Second, the present Korean Constitution has adopted the German constitutional complaint system for the first time.<sup>166</sup> Article 68, Section 1 of the KCCC says that a person who has had his constitutional rights infringed by any act or omission of public authority, "except for a court's decision," can lodge a constitutional complaint to the KCC. The only different point from the German system for constitutional complaint is that Korea has excluded a court's decision from the subject of constitutional complaint. This part of the KCCC is criticized by many legal scholars because it reduces the efficiency of the entire constitutional complaint system in that a court's decision concerning an act of administrative agencies may indirectly prevent the injured person from lodging a constitutional complaint even on the act of administrative agencies. Further, it induces conflicts in the ranking of courts between the KCC and general

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Germany. See discussion *supra*, Part III.C.

165. See YOUNG-SUNG KWON, *supra* note 158 at 1166-67.

166. See S. KOREA CONST. art. 111 § 1, cl. 5.

courts, especially the Supreme Court, by making the general court's decision free from the KCC's judging.<sup>167</sup>

The other elements of constitutional complaint are nearly the same as those of Germany. Before filing a constitutional complaint, the complainant should have exhausted other available judicial remedies.<sup>168</sup> The KCC adopted the self-relatedness, directness and presentness of the infringed right as prerequisites for seeking the constitutional complaint from German precedents.<sup>169</sup>

The period of claim, when the complainant can apply for the complaint, is restricted to a short period in the interest of legal stability, but the length of time is different. The period is sixty days in Korea and one month in Germany after knowing of the infringement.<sup>170</sup>

The decision of impeachment, political party dissolution and the settlement of jurisdictional disputes among national agencies and local government are nearly the same as those of Germany because they are directly imported from Germany. A clear difference is their quorum in deciding the Court's opinion. The quorum is six for impeachment and dissolution of political party, and the majority of present judges who are more than seven.<sup>171</sup>

### *C. Proposals for the desirable institutional reform of constitutional court system in Korea*

So far, we surveyed the constitutional adjudication system of the U.S. and Germany, and analyzed the effect of both countries on Korea. Generally speaking, Korea has adopted many technical factors from Germany, mainly based on the idea of American judicial review. Daring to try an evaluation of the current situation of Korean adjudication system, it can be said that it has worked well up to now. However, it also has some problems that need reform in some parts.

First, Korea needs to reestablish the jurisdiction between the KCC and the Korean Supreme Court. In a constitutional complaint case dealing with the unconstitutionality of the Supreme Court Rule for the enforce-

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167. See generally, Dai-Kwon Choi, *supra* note 126 at 107, 112-113. Such an abnormal provisional exemption was enacted through the Supreme Court's lobby to the legislators.

168. The provisory clause of KCCC art. 68 § 1 states "after finishing the other judicial remedies if available." The KCCC admits the doctrine of exhaustion of other judicial remedies. In the U.S. the doctrine seems to be adopted in state court level. "[T]he state court of last resort has jurisdiction in a particular action, provided that all remedies have been duly exhausted." See ABRAHAM, *supra* note 61, at 180.

169. See Zeidler, *supra* note 97, at 506.

170. "The constitutional complaint should be applied by the complainant within sixty days after he knows the infringement." KCCC art. 69.

171. See S. KOREA CONST. art.113 § 1.

ment of the judicial scrivener exam,<sup>172</sup> there was jurisdictional conflict between the two courts. The conflict comes from the fact that the right of final judicial review on legal norms is not uniformly given to one court. While the right of final judicial review on laws is given to the KCC, the right on administrative rules and orders is bestowed to the Korean Supreme Court. Let us think about the nature of constitutional adjudication for a while. It has different backgrounds, principles and techniques, which are distinguished from the other fields of adjudication. Giving full powers for constitutional adjudication, including the power of final judicial review on administrative rules and orders, like Germany, is better than separating the powers into different courts, in order to prevent this kind of useless conflict and further to unify the interpretation of constitutional law.

Second, Korea needs reform in the way of staffing the KCC. Korea requires judicial qualification that is passage of the national bar examination as a Justice qualification. It blocks the participation of law professors who have a good knowledge of constitutional law but have not taken the examination. Germany makes the most of the knowledge of law professors through their participation on the FCC. In appointment procedure, there is too much intervention of the other branches (the Executive and the Congress). This intervention works against the achievement of an independent judiciary shielded from the pressure of the branches. As stated before, the Justice's term of office is six years in Korea. The U.S. gives us a good lesson that life tenure of the office contributes much to the judicial independence.

#### IV. CONSTITUTIONAL ADJUDICATION AND SUPPORT OF THE OTHER BRANCHES

When the constitutional court invalidates legal norms that are made by Congress or Administrative agencies, the court loses the support of the other branches. Its very existence may be threatened by the other branches. This can be seen by examining examples in the States and Germany and even in Korea, although the examples in Korea are extremely few compared to those of the former two western countries, having long histories and many judgments in constitutional adjudication. Judicial independence in constitutional adjudication and its limitations are crucial issues for judicial studies.<sup>173</sup>

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<sup>172</sup>. See generally, Moon-hyun Kim, *The Relationship between Korean Constitutional Court and Korean Supreme Court* in THEORY AND REALITY OF CONSTITUTIONAL ADJUDICATION 79-107 (1993).

<sup>173</sup>. In this study, historical methods will be used to analyze examples. Therefore, this chapter will be long on facts and short on analysis.

### A. U.S. Supreme Court and Court Packing Plan

In the public eye, Court packing has been most closely associated with Franklin D. Roosevelt. Having had not a single opportunity to fill a Court vacancy in his first term from 1933 to 1937 and seeing his domestic programs continually attacked by the Court, the frustrated President tried to get his way just once. This was Roosevelt's court-packing bill.<sup>174</sup>

Roosevelt, who worked with a Democratic majority in Congress, enacted a series of new programs collectively known as the New Deal. However, in 1935 and 1936, as the courts challenged these new programs, the U.S. Supreme Court declared them unconstitutional as beyond the scope of national authority. The Court frequently cited federalism as the basis of its decisions.<sup>175</sup> According to the Court's reasoning the national government was one of restrained and delegated authority. The 10th Amendment of the Constitution expressly makes the point that the powers not delegated to the United States by the Constitution are reserved to the states. The Court maintained that if the interstate commerce clause or the power to tax and spend could be interpreted to allow the national government to reach "local activities" such as manufacturing, mining and agriculture, then the federal authority would cover actually all the activities of the people, and the authority of the state over its domestic concerns would exist only by tolerance of the federal government.<sup>176</sup>

These decisions placed the U.S. in what can only be called a "constitutional crisis." In the middle of this crisis, Roosevelt was reelected to a second term as President and immediately turned his attention to the problem of the U.S. Supreme Court. He proposed that Congress enact legislation that would allow him to appoint an additional Justice to the Supreme Court for every sitting Justice over seventy years of age at that time. His public justification for the proposal was that the Court was overworked and needed the additional Justices to keep up with its caseload. However, everyone knew that what Roosevelt really wanted was to pack the Court with more friendly Justices.<sup>177</sup>

Roosevelt's proposal sparked controversy, and in spite of the President's great popularity, no one could be sure that his court-packing plan would have passed if it had come to a formal vote in the Congress.<sup>178</sup> The

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174. See generally, Henry J. Abraham, *Can Presidents Really Pack the Supreme Court?* in AN ESSENTIAL SAFEGUARD: ESSAYS ON THE UNITED STATES SUPREME COURT AND ITS JUSTICES 43-44 (1991).

175. See Ellis Katz, *The U.S. Supreme Court and the Integration of American Federalism* in FEDERALISM AND SUPREME COURTS 35, 42 (Edmond Orban ed., 1991).

176. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

177. See Katz, *supra* note 175, at 40-44.

178. See *id.* at 43.

court-packing plan offered by President D. Roosevelt in 1937 caused a storm of protest. Roosevelt was accused of using trickery to endanger the coequal status of the judiciary. Some opponents of the plan objected in particular to any interference with the Court's historic role as guardian of the Constitution. When the Senate Judiciary Committee reported adversely on the reorganization bill, it said that the bill "applies force to the judiciary ... its initial and ultimate effect would undermine the independence of the courts ... it undermines the protection our constitutional system gives to minorities and is subversive of rights of individuals."<sup>179</sup>

The committee report emphasized the importance of keeping an independent judiciary:

It is essential to the continuance of the constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the government, and we assert that independent courts are the last safeguard of the citizen, where his rights reserved to him by the express and implied provisions of the Constitution, come in conflict with the power of governmental agencies.<sup>180</sup>

Furthermore, the committee claimed that the framers never wavered in their belief that an independent judiciary and a Constitution defining with clarity the rights of the people were the only safeguards of the citizen. The responsibility of Congress and the President to safeguard constitutional rights was omitted from this claim. The committee also lapsed into exaggeration by stating, "Minority political groups, no less than religious and racial groups, have never failed, when forced to appeal to the U.S. Supreme Court to find in its opinions the reassurance and protection of their constitutional rights."<sup>181</sup> The committee report included some examples to show how the Court protected human rights in cases involving Chinese, blacks, the press, and labor unions as well. The committee concluded that the independence of the judiciary was the only certain protection for individual rights.<sup>182</sup>

Roosevelt's proposal never came to a vote because in the middle of the political battle the Supreme Court changed its mind, and in two surprising decisions<sup>183</sup> upheld both state and federal regulation of the economy. This judicial turnaround was so complete that there have been only

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179. See Louis Fisher, *One of the Guardians Some of the Time, in IS THE SUPREME COURT THE GUARDIAN OF THE COURT?* 175 (Robert A. Licht ed., 1993) (quoting S. Rep. No. 75-711, at 3 (1937)).

180. See *id.* at 14.

181. See *id.* at 20.

182. See *id.* at 87-88.

183. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937), *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937).

two decisions since 1937 in which the court held that Congress exceeded its authority under the interstate commerce clause.<sup>184</sup>

### B. *Germany and Nazi Court*

When it comes to Germany, the Court under Hitler's rule is a vivid example of the problem. In this period, the courts in Germany did not have judicial independence. Over the composition of the Judiciary including the appointment of the Justices, Hitler exercised his almost limitless power. Therefore, the courts did not play a role as the bulwark of people's right, rather were just the subordinate agencies that confirmed the law and regulations enacted by Hitler's government. If not, the judge was removed from the judiciary. In Hitler's government, the Executive, the Legislature and the Court, which were filled with the members of Nazi party, were in a perfect order issued by Hitler, the *Führer*. It was expressed as "loyalty to state leadership."<sup>185</sup>

Legal positivism was an important factor making the Court weak during this period. The Justices felt precluded from challenging inhumane and unjust Nazi laws because they had been trained to separate law and morality in their positivistic legal education. There was a fairly large degree of overlap between the ideas and attitudes of middle-class conservatives in the Weimar Republic and the National Socialists.<sup>186</sup> The Weimar Court was reluctant to punish Nazis, particularly Hitler, with the full force of the law. The basic legal principle of Nazi dictatorship— "whatever benefits the people is right"—been established by the highest courts five years before the Nazis seized power.<sup>187</sup>

Documented in meticulous detail, were many cases ranging from racial law to criminal law and military law. In April of 1939, Max Israel Adler, a Jew, was sentenced to one month imprisonment for looking across the street at the fifteen year old (German-blooded) Ilse S.<sup>188</sup> In early 1942, the sixty-seven-year-old Jew, Leo Katzenberger was sentenced to death for alleged sexual relations with an Aryan woman.<sup>189</sup>

The party courts (*Reich-Urschla*) usurped many judicial powers from

184. See *National League of Cities v. Uesry*, 426 U.S. 833 (1976); *U.S. v. Lopez* 514 U.S. 549 (1995).

185. See, INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 297 (Deborah Lucas Schneidef trans., 1991).

186. See *id.* at 293-94.

187. See *id.* at 24.

188. See Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM L. REV. 1807, 1810 (1993).

189. See *id.* at 1810. The sentencing court specifically referred to Katzenberger's frivolity as evidenced by the fact that "neither the National Socialist Revolution of 1933 nor the proclamation of the Blood Protection Law in 1935, neither the action against Jews of 1938 nor the outbreak of the war in 1939, sufficed to make him change his ways." *Id.*

the regular courts in this period. The significance of the work of party's courts for the average German was that he could presumably expect to live under the suspicion and could barely anticipate a bright future in his job or community unless he belonged to the NSDAP. This was particularly true of those in certain professions: teachers, doctors, lawyers and civil service employees (*Beamten*) in the government.<sup>190</sup>

When Hitler was appointed as Chancellor, members of such groups clearly started to recognize the dismal facts of life instantaneously, in as much as thousands rushed to join the party in 1933 and 1934.<sup>191</sup> The same mass inflow was true of teachers and lawyers. Lawyers or judges failing to join the party could anticipate complete removal from privileged promotions and recurrent denial of even normal professional advancements.<sup>192</sup>

Until late 1933, the *Reichs-USchla* and its lower courts had experienced few important organizational changes. At the end of the year, a series of state and party laws were enacted which significantly increased the penal and disciplinary powers of the *Uschlas*. An *Uschlas circular* formally renamed the committees calling them simply *Parteigerichte* (party courts). The *Reichs-USchla* became the *Oberstes Parteigericht* (Supreme party courts, or OPG), each *Gau-USchla* a *Gaugericht* (district court) and each *Orts-USchla* an *Ortsgericht* (local court). In as much as party organizations had been formed at the *Kreis* (county) level as well, the order provided for the renaming of the *Kreis-USchlas*.

The *Kreis-USchlas* became *Kreisgerichte* (county courts) and were to operate administratively between the *Gaugerichte* and the *Ortsgerichte*. Within the constitutional framework of the Third Reich, the *Parteigerichte* were established as official legal institutions in the German state by the Act Securing Unity of Party and State that was decreed by the *Reich* government on December 1, 1933. Until 1942 and the last several years of World War II, the basic law governing the *Parteigerichte* was a directive issued by the *Reichsleitung* in 1934. The order was the result of a great deal of planning that began with a memorandum on party justice drafted by Hitler himself.

These party courts were still less independent, compared with the other formal courts. They were not courts which exercised independent judicial power, but subdivisions of a Nazi party. Accordingly, the other branches of the government including Hitler himself directly affected them.<sup>193</sup>

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190. DONALD M. MCKALE, *THE NAZI PARTY COURTS* 114 (1974).

191. By January 1935, "some 307,205 civil servants in Germany were members of the NSDAP, and about 250,000 entered the party between 30 January and 30 April 1933." *Id.*

192. See, MCKALE, *supra* note 190, at 114-15.

193. In 1934, "Hess ordered the OPG to investigate the rebellious Ley, but Hitler, again

### C. Korea and Judiciary Crisis

Just after the emancipation from Japan, the early judiciary in Korea was very independent, owed to the efforts of Chief Justice Kim Byung-Ro who always emphasized judicial independence against other governmental branches. Generally speaking, this tradition in the Korean judiciary was kept until the 1960s. The tradition came to be fiercely threatened by President Park Jyung-Hee in 1970, who was becoming a dictator at that time.

The so-called "judiciary crisis" (1970) occurred because of President Park's desire for revenge on the Supreme Court Justices who had declared some important Acts<sup>194</sup> unconstitutional.<sup>195</sup> Park became angry at the judiciary and, by many strategies, forced the Justices to retire. Because of this crisis, more than half of the Justices were replaced. At that time, the Constitution provided that Supreme Court Justices should be appointed by the President upon the proposal of the Chief Justice after he had secured the approval of the majority of the Council for the Recommendation of Judges, and their tenure of office was guaranteed for 6 years. However, the President compelled them to resign before the completion of the tenure. This judiciary crisis became a bad precedent and judges were reluctant to hold laws unconstitutional. At that time, judicial independence in Korean judiciary received a great blow and judicial passivism has continued to spread widely over the Korean judiciary.

## V. CONCLUSION

In its institutional aspect, as stated above, the Korean Constitutional Court adopted and imitated the German Constitutional Court system, based on the concept of American judicial review. Therefore, it has many common institutional factors with that of the U.S. and Germany, and indeed shares in many of the features common to all judicial review systems. The threat from other governmental branches to the Court was also a universal phenomenon suffered by every judiciary in the world. On the

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revealing his old lack of respect for the party judiciary, intervened in Hess's favor before the conflict could reach the OPG and thus create a major embarrassment for the *Führer*." *Id.* at 131-32.

194. *E.g.*, Article 3 of National Indemnity Act, which restricted the indemnity claim of the military and police to the State, was invalidated for violating the Equal Protection Clause. This decision widened the scope of State liability.

195. Under the Constitution of the Third Republic (1962-1972), the Supreme Court acquired the power to decide with finality the constitutionality of a law when a determination of its constitutionality was prerequisite to deciding a case before a court. This was the closest the Korean system came to the United States system of constitutional adjudication. *See generally*, SUPREME COURT OF REPUBLIC OF KOREA, JUSTICE IN KOREA 5-11 (1981).



other hand, the role of Constitutional adjudication in Korea can be seen as an example of particularity. The role of constitutional adjudication in Korea as a unitary state, was different from that of the U.S. and Germany, as federal states. While the latter was the final arbiter in federal-state relations, the former was to directly protect the people's constitutional rights by the interpretation of the Korean Constitution. I believe that argument about institutional reform should be preceded by an exact understanding of the universality and particularity of the Korean constitutional adjudication system.

As long as the efforts for developing a better constitutional adjudication system, through timely and successful reform based on this kind of analysis, are made continuously in Korea, the Korean constitutional adjudication system will continue to develop and the protection of the fundamental rights of the Korean people will be further strengthened.