

Democratization in Korea and Its Influence on the Constitution

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1. Introduction

—a beautiful rose blooming in a garbage can—

The Constitution is the supreme legal norm of a country. All national institutions should be based upon the Constitution, the standard of interpreting every legal order. However, the Korean Constitution has been only a decoration under the long dictatorship. Although the Korean Constitution protects various basic rights and regulates the separation of the three powers—administrative, legislative and judicial—it has been an abstract proclamation and has not been very effective.

Power holders and the ruling power frequently ignore or violate the Constitution. The Constitution is readily revised for the convenience of those in power and for prolongation of their regime. In the process of revising the Constitution, the opposition parties and peoples are oppressed. As a result, the Constitution is tattered and its dignity is forfeit. However, no oppression or disdain could occlude the passion and desire of the Korean peoples for a democratic Constitution. The struggle to achieve a democratic Constitution for the people, not for a dictator, has been maintained. When people's right to even choose their government and to demand the revision of the Constitution were forbidden in 1986, people united to protest and demonstrate against the dictator. As a consequence, we could achieve the democratic Constitution and legal order.

A foreign journalist, who witnessed the dictatorship and powerlessness and ignorance of people in Korea, mentioned that democracy in Korea was a rose blooming in a garbage can. It showed the hopelessness of democracy in Korea that cannot fully bloom. Dictatorship through our history such as Japanese colonialism, independence, the disunion, and the confrontation of North and South Korea can't provide a fertile soil to achieve democracy. However, the Korean people's passion for democracy has continued in various forms to oppose and defy dictatorship. Finally, the Grand Struggle in June in 1986 achieved the democracy where dictatorship can no longer settle down. A beautiful rose has bloomed in a garbage can of despair.

2. The History of the Constitution in Korea

(1) Enactment of the Korean Constitution

Korea obtained independence from Japanese imperialism on 15 August 1945. Korea went through US military administration for three years and finally built up a real country in 1948. On 10 May 1948, a general election was conducted to build the Constitutional Assembly. The Constitutional Assembly formed the Constitutional Committee to begin the enactment of the Constitution in cooperation with constitutional experts. Through many processes, finally the Constitution adopted the unicameral system and the President and Prime Minister system was promulgated on 17 July 1948.

The first Constitution of Korea protects basic human rights and the separation of the three powers and includes conviction about the new democracy. The contents of the first Constitution of Korea were superb in that they put Korea on a democratic basis. However, Korean people who were unfamiliar with democracy needed a long

time to make the Constitution democratic.

(2) *A Brief History of the Nine Revisions of the Constitution*

The First Revision

The first revision was done on 7 July 1952. There was a serious conflict between major and opposition parties concerning the revision of the Constitution. After prolonged negotiations, both parties compromised. The main context of the revision is about direct election of the President and Vice-President, a bicameral parliamentary system and so on.

The Second Revision

The second revision was done on 27 November 1954 after prolonged negotiations between government and opposition parties. According to voting returns of lawmakers, of 203 lawmakers present, 135 supported the revision of the Constitution, so the revision bill was rejected due to the shortage of the necessary numbers to pass a bill. On the following day, the government party insisted 135 was the fixed number for passing a bill according to the rule of rounding off to the nearest integer, and rescinded the rejection. The revision bill was passed. The main content was to retract limits on the second running by the first President in presidential elections, the introduction of a referendum, and the cancellation of the Prime Minister system.

The Third Revision

The autocratic Lee Seung-Man administration finally collapsed due to mass demonstrations initiated by students. In particular, the presidential election on 15 March 1960 was the epitome of absolute vote rigging and faced a widespread resistance from the people. After the collapse of the Lee administration, an interim government was introduced led the revision of the Constitution. The content of this revision was prohibition of pre- and post-censorship on the freedom of the press, publication, and assembly. The basic rights are strengthened; the fundamental content of basic rights should not be damaged in any case, according to the Constitution.

The Fourth Revision

This was made on 29 November 1960 in order to get the legal background to punish the instigators of vote rigging and the killers who kill and injure people protesting against vote rigging. The special laws were enacted such as an anti-rigged election law and anti-democratic actor punishment law. They were subsidiary laws to provide the background for penalty according to the retroactive law.

The Fifth Revision

This was done after the 5.16 military coup. In 1961, some soldiers carried out a military coup and instituted the Military Revolution Committee. They came into power and proclaimed martial law in the whole country. They made the existing Constitution ineffective and enacted the emergency law for national rebuilding which had the same power as the Constitution. In a year of military dictatorship, the new Constitution was adopted by a referendum. As a result of this adoption, the government has the presidential system, the court has the right to judge constitutionality of laws, and the parliament became the unicameral legislature.

The Sixth Revision

The main content is to allow a president to run up to three times. According to the Constitution at that time, only twice was allowed. So this revision is called the 'three times running for election revision'. On 7 August 1969, the government party submitted the revision bill and only ruling party lawmakers were gathered at night to pass it. This revision was adopted by referendum on 17 October.

The Seventh Revision

This revision is called the Constitution for Revitalizing Reform because it was initiated by the 'Revitalizing Reform' system in October 1972. At that time, President Park Jeong-Hee proclaimed martial law, dissolved the parliament, and prohibited political party and political activities. The emergency Cabinet meeting replaced the parliament, proclaimed the revision of the Constitution, and confirmed its revision on 21 November. The characteristics of the Constitution for Revitalizing Reform are to weaken basic rights and to ensure the system of the president's long-term reign. The article concerning the protection of fundamental contents of basic rights is annulled from the Constitution and the review system of legality for confinement was also erased. The National Conference for Unification was newly instituted and had the rights to elect the President and appoint one-third of the lawmakers. In addition, it had the right to confirm revision of the Constitution. The President has the right to appoint or dismiss all judges as well as the President of the Supreme Court, so judicial power was clearly weakened at that time. The right of the parliament to conduct investigations in relation to government was restricted as well.

The Eighth Revision

After the President Park Jeong-Hee, dictator of Korea for 18 years, passed away in October 1979, General Jeon Doo-Hwan became president through a coup against the peoples' fervent hope for a democratic election. He declared martial law in the whole country in May 1980 and instituted the National Emergency Countermeasure Committee. In the same year, the Constitution adopted by the referendum strengthened basic rights such as the pursuit of happiness, environmental rights, freedom and so on. However, this was nothing but nominal. On the other hand, the President was given enormous rights such as the right of dissolution of parliament and of emergency control. The people were deprived of the right to elect a government.

The Ninth Revision

The ninth revision was made as a result of civil protest against the Jeong administration. People collectively protested for direct election of the President and real expansion of basic rights. The people's power was poured into the June struggle in 1986. At that time Ro Dae-Woo, the representative of the ruling party, accepted the demands through the June 29 proclamation. Therefore, the Constitution was revised and proclaimed for the first time in history by mutual agreement.

(3) A History of the Constitution Revision For the Convenience of Power.

All the revised Constitutions, except the third and fourth revisions achieved by student demonstrations and the ninth revision by June struggle, have the same characteristics in the history of the Constitution revision.

First, in almost every case, Constitution revision was done for the convenience of those in power, to strengthen and prolong their power. The rights of the ruling party and the President were expanded, judicial power was weakened, and human

rights were seriously infringed. The 18-year dictatorship of the Park administration made the Constitution ineffective in a day. They made a new Constitution arbitrarily and the real Constitution became like a mere scrap of paper.

Second, revision of the Constitution was made by the unilateral power of the ruler. Objection from opposition parties and people was readily suppressed by physical power. Even worse, revision was passed without informing lawmakers of the opposition party. In some cases, lawmakers from the opposition party were expelled from an assembly hall.

(4) Democratization Movements and Koreans peoples' struggle for Democratic Constitution

As mentioned above, power holders revised the Constitution many times to extend their reign and for convenience in maintaining their power. As a consequence, the Constitution deprived people of election rights and justified limitation of basic rights.

It was natural that the Korean people were against the Constitution justifying dictatorship. The anti-government movement and democratization movement has the aim of opposing the dictatorship's Constitution and winning a democratic Constitution. The democratic restoration of the Constitution has been the central task of democracy.

Especially during the Park administration, people were deprived of the right to elect the President directly and instead, the National Conference for Unification elected him. Besides, peoples' basic rights were seriously infringed and people demanding the revision of the Constitution were severely punished. In spite of harsh punishment, a plethora of students, workers, and intellectuals insisted the Constitution for Revitalizing Reform must be rescinded and many of them were jailed. Finally, this Constitution was rescinded after the death of President Park.

Jeon Doo-Hwan's military regime, against the people's fervent hope, produced a Constitution that was a continuation of Revitalizing Reform. Therefore, the people could not elect the President by votes and basic rights were trampled down and restricted. However, the people's demands for democracy and a democratic constitution were getting stronger. In spite of rigorous oppression and punishment, many people including students, workers, intellectuals, and artists protested for democracy and a democratic constitution. In some cases, 1600 students were arrested in a day. Many innocent people were arrested and were tortured and punished severely. In spite of this, the protests of righteous peoples could not be denied. Thousands of people joined the protests, and more came everyday. In the end, the dictatorship regime accepted the people's demands.

3. The Reality of Constitutional Judgement and Its Practice

(1) Titular Constitutional Judgement of the Past

Constitutional Judgement was adopted from the first Constitution and went through vicissitudes. In 1948, the first Constitution instituted the Constitutional Committee to deal with constitutionality of laws and the Impeachment Court to deal with impeachment. However, the Constitutional Committee dealt with six cases of constitutionality of laws for ten years. Its activity was insignificant.

In 1960, in order to correct this kind of situation, the Constitutional Committee was abolished and the Constitutional Court was adopted. The new Constitutional Court dealt with judgement on constitutionality of laws, dissolution of

political parties, impeachment, competence disputes and election litigation. Its role was similar to that of the current Constitutional Court. And it was a permanent commission. However, in reality, it was not established because of the 5.16 military coup.

In 1962, the Constitution did not have the Constitution Court but let the Supreme Court deal with judgement on constitutionality of laws, dissolution of political parties, and election litigation. At that time, this system was not fully activated, so that the Supreme Court had only two cases decided as unconstitutional such as national reparation law and court organizational law.

In 1972, the Constitution for Revitalizing Reform was made and according to it, the Supreme Court was not entitled to deal with judgement on constitutionality of laws. Instead, the Constitutional Committee was established to deal with judgement on constitutionality of laws. However, there was no case decided as unconstitutional by the Constitutional Committee.

In 1980, the revised Constitution was similar to the Constitution of Revitalizing Reform. The difference is that two-thirds of the judges of the Supreme Court should agree on unconstitutionality of a law before it can be actually screened by the Constitutional Committee. In fact, this made it more difficult to judge unconstitutionality of laws at that time and the Constitutional Committee became a dormant institution.

(2) Establishment of the Constitutional Court in the Ninth Constitution Revision

As a result of people's resistance against dictatorship and struggle for democratization movements, the new Constitution was instituted and the Constitutional Court was revitalized. From the experience that the Supreme Court couldn't fully function to protect basic rights if they had to deal with judgement on constitutionality of law, the Constitutional Court was instituted to deal with impeachment, constitutionality of laws, dissolution of political party, constitutional complaints and competence disputes. Judgement on Constitutional complaints was newly introduced to Korea and has significant meaning in our history because in cases of basic rights violated by exercise and nonexercise of public powers, people can demand redemption. The Constitution institutionalized the Constitutional Court that became effective on 1 September 1988. On 15 September, nine judges were appointed and it became officially active.

(3) Tensions With the Supreme Court

There was tension between the Supreme Court and the Constitutional Court when judgement rights such as constitutionality of laws was left to the Constitutional Court. It shows that the final interpretation right of the Constitution was left to the Constitutional Court and because of it, there was friction with the Supreme Court regarding which is the highest institution in the machinery of law. In the process of establishing the Constitutional Court, it was agreed that the president of the Constitutional Court has power equal to the presiding officer of the Supreme Court, and judges of the Constitutional Court have power equal to the justice of the Supreme Court. However, in a concrete case of judgement, the judgement of the Constitutional Court was contrary to that of the Supreme Court and neither of them wanted to yield to the other's view. So there were frictions between them.

(4) The Reality of the Judgement of the Commission Court

As the Constitutional Court was institutionalized and many cases of

Constitutional judgements were made, the active period for a Constitution judgement was started in Korea. Due to revitalization of the Constitution judgements, the Constitution was no longer nominal and declaratory and became the concrete norm by which to judge issues. Table I shows the cases of Constitutional judgement. As of 1 September 1988, in nearly 13 years, 7049 cases were filed and 6553 cases were adjudicated. 471 of them have been decided unconstitutional. These figures show that the Court has been very active in safeguarding our Constitution.

The Constitutional Court adopted by the current Constitution deals with five different kinds of judgements: constitutionality of laws, dissolution of a political party, impeachment, competence disputes, and constitutional complaints. Among them, judgements on impeachment and dissolution of political parties are not frequent and cases of competence disputes are likely to increase because the conflict between national institutions and local self-government bodies tends to be increased since local self-government was introduced. However, the most frequent cases are judgements on the constitutionality of laws and constitutional complaints.

Judgement on constitutionality of laws can be done by requests of court with the presupposition that there will be a judgement on constitutionality of laws. The requests of the court can be made by the official authorities of the administration of justice or by individual registrations. If an individual's registration is rejected by the administration of justice, individuals can appeal directly to the Constitutional Court.

The system of Constitutional Complaints is the redemption system in the Constitutional Court for when the basic rights protected by the Constitution are infringed by public powers of legislation, judicature, and administration. Victims can institute a lawsuit in the Constitutional Court. This was newly introduced by the current Constitution. It is a practical redemption system against infringement of basic rights and is considered the flower of the Constitutional judgement.

4. A Little Momentum in Improvement of Human Rights

The Establishment of a National Human Rights Commission and New Experiments

Kim Dae-Jung, who was a dissident during the dictatorship, was elected president with the public pledge of establishing a National Human Rights Commission. So the National Human Rights Commission was an important task of the new government. However, in reality, the institutionalisation of the National Human Rights Commission was faced with objections and resistance from the national institutions holding power, such as the Ministry of Justice and prosecutors whose rights could be restricted by the National Human Rights Commission. Due to this, the law regarding the National Human Rights Commission was delayed and passed only in the latter half of Kim Dae-Jung's presidency 2001. This law provides the National Human Rights Commission with legal backing. The National Human Rights Commission has the following rights:

1. Investigation of and research on laws, systems, policies, and practices of human rights. Expression of opinion when improvement is needed
2. Investigation and redemption of human rights infringements
3. Research on and redemption of discrimination
4. Research on the situation of human rights
5. Education and public relations regarding human rights
6. Preventive measures or advice concerning human rights infringements.; provides standard of human rights infringement.

7. Affiliation with International Human Rights Convention; research on its implementation and expression of opinions
8. Support for human rights and cooperation with associations and individuals
9. Cooperation and exchanges with international human rights institutions and international organizations
10. Any items necessary to protect and improve human rights

Although the National Human Rights Commission does not have compulsory subpoena and compulsory investigation right, it can be a restraining power on human rights infringements and has, at the same time, widespread investigation rights on systems and practices of human rights violations and the right to advise. Therefore, it will be able to make a huge contribution to the improvement of human rights conditions.

(2) Involvement in the International Human Rights Community

These are the international conventions that Korean government acknowledges:

- January 1979 International Convention on the Elimination of All Forms of Racial Discrimination
- January 1985 Convention on the Elimination of All Forms of Discrimination against Women
- July 1990 International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights
- December 1991 Convention on the Rights of the Child
- February 1995 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Among the international conventions mentioned above, in 1990 the Korean government ratified International Human Rights Conventions including A.B norms and even optional protocol. Therefore individual communication can be protected. In addition, since its ratification, the Korean government should submit a country report regularly and civil NGOs can submit counter reports. Through this, there can be disputes over human rights conditions in Korea. In the process, however, Koreans can have opportunities to examine each ministry, laws, and policies about whether they meet international standards and are appropriate for implementing international conventions. Related authorities and civil organizations can evaluate their efforts to protect human rights. Korea just stepped into the international human rights community but these disputes and pressure from NGOs can help to improve human rights conditions in Korea.

5. Conclusion

People's Demands on the New Constitution

Political parties have disputes over the presidential system and the parliamentary system according to their gains from each. Political power whose stronghold is mainly from a certain region espouses a parliamentary government system because the presidential system can ensure nothing for them unless they become president. It shows that politicians can take advantage of the Constitution and political system for their own gains.

People and civil organizations that do not have interests in the matter also ask

for revision. Items to be revised are as follows.

1. Insertion of the concept of Participatory Democracy into the Prelude of the Constitution.
2. Voting rights should be expanded to the age of 18
3. Introduction of a Public Hearing system on the Occasion of Confirmation of high-ranking public servants
4. The Prosecutor General's duty of being present in Parliament and duty to answer questions

There is no contingency for Koreans to suffer from a military coup in Korea any longer. Democratic changes of regimes between ruling and opposition party have been made. The president is allowed for only a single term and there is no possibility of long-term reign. Therefore the possibility for power abuse has been greatly reduced. However, in the same way as Rome was not built in a day, the Korean people have a long way to go to achieve high quality democracy. And it can't be achieved for free without paying the price of struggle.

Table I

Case Statistics of the Constitutional Court of Korea

As of
September 30, 2001

Type	Total	Constitutionality of Law ¹⁾	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint			
						Sub-total	§68 I	§68 II	
Filed	7131	414			15	6702	5787	915	
Settled	6658	387			12	6259	5450	809	
Dismissed by Small Benches	2459					2459	2387	72	
Decided by Full Bench	Unconstitutional ²⁾	216	68			148	23	125	
	Unconformable to Constitution ³⁾	62	24			38	6	32	
	Unconstitutional, in certain context ⁴⁾	32	8			24	6	18	
	Constitutional, in certain context ⁵⁾	27	7			20		20	
	Constitutional	602	164			438	3	435	
	Annulled ⁶⁾	141				2	139		
	Rejected	2043				3	2040		
	Dismissed	767	18			5	744	665	79
	Miscellaneous	3					3	2	1
Withdrawn	306	98			2	206	179	27	
Pending	473	27			3	443	337	106	

1. This type of "**Constitutionality of Law**" case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court.

2. "**Unconstitutional**" :Used in Constitutionality of Laws cases.

3. "**Unconformable to Constitution**" :This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time.

4. "**Unconstitutional, in certain context**" :In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional.

5. "**Constitutional, in certain context**" :This means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in certain context". Both are regarded as decisions of "partially unconstitutional".

6. "**Annulled**" :This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue.