

*The Role of the Constitutional Court of Korea
in the Protection of the People's Rights
and Liberties*

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International Symposium on
“The Constitutional Court on the Protection of the People’s Rights and
Liberties” on the Occasion of the 25th Anniversary of the Constitutional
Court of the Kingdom of Thailand
“The Role of the Constitutional Court of Korea in the Protection of the
People’s Rights and Liberties”

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1. Introduction

Let me begin by offering sincere congratulations on the 25th anniversary of the Constitutional Court of the Kingdom of Thailand.

I would like to express my gratitude to President Worawit Kangsasiatam and staff of the Constitutional Court of the Kingdom of Thailand for providing us with a valuable forum to introduce the experience of the Constitutional Court of Korea and share ideas on the topic of “The Constitutional Court on the Protection of the People’s Rights and Liberties.”

Looking back on human history, the Constitution which guarantees human rights and limit State power for this purpose was what provided a solid legal foundation for democracy. To realize constitutional democracy, a valuable asset for humanity, the constitutional adjudication system is essential to ensuring the normative power of the Constitution in all aspects of State activities and social life.

Koreans’ democracy movement in 1987 overthrew the authoritarian regime that has long disregarded human rights and abused State power. As a result, the Constitutional Court was established on September 1, 1988 to protect human rights and control State power. The Constitutional Court of Korea has jurisdiction over adjudication on the constitutionality of statutes, impeachment, dissolution of a political party, competence

disputes, and constitutional complaint (Article 111(1) of the Constitution). The Court has received over 40,000 cases and rendered over 1,900 rulings of unconstitutionality over the past 35 years. By doing so, the Court has continued its endeavors to clearly declare constitutional ideals and values including human rights and to narrow the gap between constitutional norms and reality.

Today, I will present our Court's rulings rendered in the last five years to share with you some of the considerations and efforts we have made for protecting human rights and freedom.

2. Enhancing political freedom of the people

(1) Democracy is a decision-making process based on the precondition that all citizens are equal and free persons. The freedom of political expression and activities is the key element that constitutes democracy.

The Constitutional Court of Korea has made rulings of unconstitutionality on provisions concerning the following issues: banning of election campaigns through internet media; banning of night-time demonstration; limiting the population deviation in electoral redistricting; and restricting the voting rights for persons under suspended sentence and sentenced inmates. These rulings have led to many changes in ensuring the freedom of political expression and activities and electoral equality. Also, the Court considered the abuse of power by the former President a gross violation of the principles of democracy and the rule of law and upheld the impeachment in 2017.

(2) Educational public officials have recently filed a constitutional complaint over a provision of the *State Public Officials Act* which bans public officials from participating in an organization of, or joining in, any political party or other political organization. The Constitutional Court found that forbidding public officials to join a 'political party' is an appropriate means to guarantee political neutrality of public officials and education enshrined in the Constitution, and thus, does not violate the Constitution. However, the

Court held that since the term ‘other political organization’ uses an ambiguous concept making it difficult to define the normative content, it fails to meet the strict clarity requirement for restricting the freedom of political expression and therefore violates the Constitution (2018Hun-Ma551, April 23, 2020).

(3) Also, the *Public Official Election Act* comprehensively defined the concept of an election campaign, placed a strict limit on the period of election campaigns, and stipulated criminal punishment for violation of the limitation. These provisions were introduced to prevent social and economic losses due to overheated election campaigns and to guarantee substantive equality of opportunity for all candidates.

However, considering the well-developed democracy of Korea today, such regulations would excessively restrict the citizens’ freedom of political expressions including election campaigns. Notably, they created a problem of banning and punishing election campaigns that do not involve money and thus are not likely to cause an imbalance of opportunities for election campaign among candidates with different financial backgrounds. In this connection, the Constitutional Court declared some of the provisions unconstitutional and allowed election campaigns conducted face-to-face and verbally before the official campaign period (2018Hun-Ba146, February 24, 2022).

(4) These cases demonstrate that the Constitutional Court of Korea, born of and grown by democracy, acts as a guardian of democracy itself by protecting the people’s political freedom and controlling State power. This role of the Court ensures a peaceful process of political decision-making which shapes and represents public opinion, contributing to regime change based on a fair balance between political majorities and minorities and a free election. This will ultimately contribute to a peaceful coexistence of pluralistic values and interests in the long run.

3. Evolution of constitutional interpretation: Right to self-determination

(1) The Constitution implicitly describes the key elements as it establishes fundamental values sought by the community, and it allows a historical evolution of the meaning and content of constitutional provisions through its abstractness and openness. In order to implement such constitutional norms in State activities and social life, it necessarily requires constitutional interpretation, a process of concretely finding the meaning and content of the norms.

Article 10 of the Korean Constitution prescribes that “all citizens shall be assured of human dignity and worth and have the right to pursue happiness.” The Constitutional Court previously held that individuals’ right to personality and the pursuit of happiness protected by this constitutional provision is premised on the right to determine its own destiny.

Furthermore, the Constitutional Court interpreted that the right to informational self-determination is guaranteed by the right to personality and freedom of privacy under Article 17 of the Constitution. The right to informational self-determination is the right of an individual to determine when, to whom, and to what extent to make his/her personal information known and used. Such interpretation led to the enactment of the *Personal Information Protection Act* in 2011. The act was drafted to respond to human rights violations caused by the indiscriminate collection and use of personal information, which has emerged with the development of information and communication technologies in modern society.

The *Protection of Communications Secrets Act* allowed an investigative agency to request a telecommunications business operator to broadly provide the ‘location data’ of individuals. Since ‘the location data’ of individuals is sensitive information which requires sufficient protection, the Constitutional Court found the provisions nonconforming to the Constitution and advised the legislature to strengthen the requirements for requesting access to location data for the purposes of preventing and investigating crimes (2012Hun-Ma191, etc., June 28, 2018).

(2) In a 2012 case, the Court held the criminal punishment of abortion constitutional, but four out of nine Justices presented their opinion of unconstitutionality. The issue of

unconstitutionality of criminal punishment of abortion was raised again in a 2019 case.

Imposing criminal punishment for an abortion is to protect the life of a fetus. However, pregnancy, childbirth, and parenting are among the most important matters that may fundamentally and decisively affect the life of a woman. Therefore, a pregnant woman's decision whether to continue or terminate a pregnancy amounts to a decision reflecting profound consideration of all her physical, psychological, social, and economic circumstances and based on her own chosen view of life and society. It is a holistic decision central to her personal dignity. The Constitutional Court concluded that a pregnant woman's right to self-determination must be sufficiently guaranteed. Therefore, the Court rendered a decision of nonconformity to the Constitution on the criminal provision that imposes a complete and uniform ban on all abortion throughout pregnancy (2017Hun-Ba127, April 11, 2019).

(3) As described above, constitutional review bodies, through constitutional adjudication, make the final interpretation of the Constitution and contribute to concretely implementing constitutional values including human rights and freedom. I believe that one of the most significant missions of constitutional review bodies is to achieve human rights and freedom by concretizing the basic concepts of abstract constitutional provisions in line with changes of the era and applying more elaborated constitutional norms to a wide range of political, economic and social issues.

4. Harmony and balance of legal interests

(1) Constitutional adjudication is sometimes asked to address the issue of conflicting fundamental rights between citizens. A case in point is the conflict between an individual's right of expression and the other individual's right to personality or human dignity. In this case, it is desirable to find ways to harmonize or at least balance conflicting fundamental rights through the weighing of legal interests.

(2) For instance, there was a case on the *Criminal Act* which stipulates punishment for defaming another by publicly alleging facts. Also, there was a case on the *Seoul Ordinance of Student Rights* which provides that school members shall refrain from violating the rights of others through discriminatory actions and hateful expressions.

There are a lot of interesting issues to discuss about those cases in detail. But, due to the time constraint, I will briefly talk about the conclusions of the cases. The Justices split on the defamation case. Five Justices argued for the protection of individuals' honor while four Justices dissented, placing greater emphasis on guaranteeing the freedom of expression (2017Hun-Ma1113, etc., February 25, 2021). Also, the Court unanimously dismissed the constitutional complaint on the Ordinance to protect the human dignity of minorities (2017Hun-Ma1356, November 28, 2019).

5. Conclusion

(1) Human dignity and freedom lies at the center of human rights guaranteed by the constitutions around the world. The fundamental right to freedom is based on and strives towards human dignity. The right to freedom is equally guaranteed to all. The fundamental social rights are conducive to building material basis for the exercise of human dignity and freedom. Therefore, there is a complementary relationship between freedom and equality, and between the right to freedom and social right, because they are all based on the common value of human dignity and have intrinsic relevance with each other.

In a modern, free democracy, different values and interests coexist and sometimes conflict with each other. For peaceful development of such a pluralistic society, it is imperative to find the standard for balancing or harmonization based on constitutional values and principles. Here, the constitutional principle of proportionality will play a crucial role. Also, the principle of non-discrimination and equality with regard to minorities is highlighted to maintain pluralistic democracy. Diversity can be ensured through the equal guarantee of the right to freedom, which is the precondition for social

peace and contributes to building a pluralistic and generous society.

(2) Adjudication on constitutional complaint played a key role for the Constitutional Court of Korea to fulfill its duty of safeguarding human rights and freedom. Other adjudication procedures only allow the state authorities to file a petition to the Constitutional Court. But in an adjudication on constitutional complaint, the individuals whose fundamental rights have been infringed by the State power can directly file a petition to the Constitutional Court. This laid the groundwork for the Constitution of Korea to substantially guarantee individuals' human rights and freedom. I would like to reiterate that the landmark decisions in the last five years that I explained earlier are all cases of constitutional complaint.

(3) Constitutional review bodies should not be swayed by the 'everyday changes of public opinion' but they should progressively improve and develop constitutional principles based on insight into the 'changes in the spirit of the times.' Since constitutional adjudication is about interpreting and applying constitutional norms and principles which are often open and abstract, we need constructive criticism and discussion from outsiders' perspective in order to keep up with the spirit of the times and changes in social reality.

I believe that today's International Symposium on "The Constitutional Court on the Protection of the People's Rights and Liberties" has also become an important forum for sharing outsiders' perspectives and experience to catch up with the changes in the spirit of the times concerning constitutional interpretation and application. I am hopeful that the Constitutional Court of Thailand will continue its contribution to safeguarding human rights and freedom through mutual communication and cooperation.

Thank you for listening.