

4th Congress of the World Conference on Constitutional Justice
THE RULE OF LAW AND CONSTITUTIONAL JUSTICE
IN THE MODERN WORLD
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A. The rule of law and constitutional justice in the modern world

□. The different concepts of the rule of law

1. What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The principles of the rule of law in the Republic of Korea are derived from laws, case-law, and the Constitution. There is no express provision in the Constitution which indicates the rule of law, but it is widely accepted and established as a fundamental constitutional principle through relevant provisions.

We have a written Constitution which provides for the fundamental rights (Article 2) and due process (Article 12 Section 1), separation of powers (Chapters III through VIII), *nulla poena sine lege*, or principle of legality (Article 12 Section 1, Article 13 Section 1), the principle of no taxation without law (Article 38 and 59), substantial guarantee of constitutional normative power through constitutional adjudication (Chapter VI, etc.), the rule against blanket delegation and law-governed administration (Article 75, Article 95, etc.), judicial protection of rights (Article 27, etc.), the rule against excessive restriction (Article 37 Section 2), prohibition of retroactive legislation (Article 13 Section 1 and 2), and the principle of statutory reservation that is laid down in a number of provisions. The rule of law also provides the basis for the principle of clarity (void-for-vagueness doctrine), principle of protection of legitimate expectation (principle of reliance), and the principle of systemic integration.

The Constitutional Court of Korea has also ruled, “Our Constitution is based on the idea that Korea is 'a state under the rule of law' which aims to protect the fundamental rights of its people from the abuse of state powers. This notion not just involves the general, formal conception of the rule of law that employs the principle of legality and the prohibition of retroactive legislation set out in the Constitution or laws as well as the prohibition of application by analogy that is derived therefrom, but also the substantive approach of the rule of law that requires an appropriate proportionality between the gravity of the crime and the responsibility of the offender, and prohibits arbitrariness and excessive restriction to exclude harsh criminal punishment without due process. This means that even the legislative

discretion or legislative policy perspectives by the National Assembly should limit the restriction of people's freedom and rights to the minimum extent necessary, and that no legislation can infringe on the essence of fundamental rights (90Hun-Ba24, decided April 25, 1992, etc.)."

2. How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

The 'rule of law' is commonly interpreted as the 'rule by law,' which means a state action should be based on and governed by the requirements of objective law. In general, there are two principal conceptions of the rule of law: formal rule of law and substantive rule of law. The formal interpretation of the rule of law focuses on the formal legitimacy of the law and, regardless of the content of law, recognizes the normative power of any law that has been enacted by the National Assembly. On the contrary, the substantive interpretation of the rule of law requires the justness of law itself in terms of its content, in addition to its formal aspects, and holds that the content of law should be protective of freedom and equality, in consistency with justice. The Constitutional Court of Korea views that a constitutional state governed by the rule of law does not have merely formal and procedural characteristics, but has substantive attributes as well (92Hun-Ba27, July 21, 1995, etc.).

3. Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

Historically, criminal punishment and taxes are important areas where the rule of law should be respected, in that they can be associated with serious human rights violations. The Korean Constitution expressly provides for the principle of legality (Article 13 Section 1), no taxation without law (Article 38 and 59), and limits to restrictions on fundamental rights (Article 37 Section 2).

In its decision in case 91Hun-Ka4 (decided July 8, 1991), the Constitutional Court of Korea stated that the 'law' specified in Article 13 Section 1 of the Constitution stipulating *nulla poena sine lege* or principle of legality refers to formal law enacted by the legislature, and that even if legislative delegation to administrative agencies is exceptionally permitted in light of the increasing social functions of modern states and complexity of social phenomena, it must be limited only to specific and individual cases of certain types. In addition, legislative delegation of penal provisions are undesirable, given the constitutional provisions that set forth, in particular, the principle of legality and due process to offer the utmost guarantee of human rights and the supremacy of fundamental rights protection that places special emphasis on no punishment without law. Thus, the requirements and scope of such legislative delegation should be carried out in a stricter and more limited manner. As such, the Constitutional Court

held that the rule of law should be respected in penal provisions, stating that the delegation of penal provisions should be confined only to cases of urgency and to unavoidable circumstances where the specifics cannot be fixed in law beforehand, and that, even in such cases, the law should clearly define the elements of crime so that it is predictable which acts are subject to punishment, along with the type and range of punishment.

In deciding case 96Hun-Ba36 (decided July 16, 1997), the Korean Constitutional Court also stated that 'no taxation without law' demonstrates the rule of law in tax administration, and that the rule of law in today's world goes beyond the formal conception of the rule of law that requires the rights and duties of the people to be set down in law and extends to one that demands substantive due process with its purpose and content consistent with the constitutional ideal of protecting fundamental rights. The Court stated that no taxation without law proclaimed by Article 38 and 59 of the Constitution also refers to such rule of law that requires substantive due process, and so even if the conditions of taxation are set out in law, that does not suffice unless the purpose and content of the tax law is consistent with the constitutional protection of fundamental rights and with all the constitutional principles that support this idea.

Furthermore, the Constitutional Court held in case 99Hun-Ma480 (decided June 27, 2002), "Considering that the freedom of expression in a modern democratic society is indispensable for realizing the idea of popular sovereignty, restricting the freedom of expression based on an ambiguous regulation may intimidate the expressions guaranteed under the Constitution and thus invalidate its inherent role, which is to enable the expression of diverse views, opinions, and thoughts and to allow for mutual experimentation amongst such expressions. In other words, when it is unclear as to which kind of expression is banned, it is likely that those who are unsure of whether their intended expression is subject to regulation or not will generally refrain from expressing themselves in fear of regulation. Thereupon, the Constitution demands that the laws that restrict the freedom of expression should define the concept of the regulated expression in detail and with clarity." This way, the Korean Constitutional Court is safeguarding the rule of law in a wide range of areas including tax law and laws related to freedom of expression.

4. Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

The concept of the rule of law is permeated throughout the Constitution of Korea, and the Korean Constitutional Court derives a number of principles from the rule of law: principle of systemic integration, *nulla poena sine lege*, or principle of legality, principle of clarity or void-for-vagueness doctrine, the principle of statutory reservation, principle of protection of legitimate expectation, prohibition of blanket delegation, principle of self-responsibility, etc.

In case 2013Hun-Ba120 (decided July 30, 2015), the Constitutional Court viewed the principle of systemic integration as one of the subordinate principles comprising the rule of law and stated, "The principle of systemic integration is a constitutional request that there should be no conflict or contradiction within the same regulation or between different regulations in terms of their structure, content, or underlying principles. It intends to prevent the arbitrariness of the legislator and thereby ensure the clarity, predictability, trust and legal certainty or stability of norms, which are derived from the principles of the rule of law that direct the control of state powers and, through this, the protection of people's freedom and rights."

The Constitutional Court proclaimed the following principles, among others, as the subordinate rules constituting the principles of the rule of law: the principle of separation of powers and the independence of judiciary, stating that "The independence of the judiciary, a principal indicator of liberal democracy whose core element is separation of powers, constitutes the rule of law (2015Hun-Ba331, decided September 29, 2016)"; the principle of statutory reservation and law-governed administration in general, holding that "The Constitution claims the rule of law as one of its fundamental principles, and that one of its core elements is the principle of statutory reservation, which requires administrative actions to be based on formal laws enacted by the National Assembly (2009Hun-Ba167, decided April 28, 2011)"; the principle of self-responsibility, stating that "The principle of self-responsibility seriously reflects the freedom and accountability as well as the dignity of human beings, and it should be viewed as a principle inherent in the rule of law serving as the fundamental idea of modern law, not just limited to civil or criminal law (2009Hun-Ma170, decided March 25, 2010),"; the principle of clarity and legal certainty, saying that "The principle of clarity as one of the elements representing the rule of law, in principle, is required in all legislations limiting fundamental rights. Legal certainty and predictability cannot be achieved unless the norm addressees can discern which acts are banned and which are not from the content of the norm, without which the law enforcement authorities may become arbitrary in their execution (2005Hun-Ka1, decided June 30, 2005),"; and, lastly, principle of trust protection, saying that "The principle of protection of legitimate expectation is derived from the rule of law (2001Hun-Ma194, decided September 25, 2003)."

5. Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

As reviewed earlier, the Constitutional Court of Korea, since its establishment in 1988, has consistently interpreted the principles of the rule of law under the Constitution as substantive, going beyond mere formal and procedural interpretation.

6. Does international law have an impact on the interpretation of the principle of the rule of

law in your country?

Article 6 of the Korean Constitution provides that the treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as domestic law (Section 1), and also that the status of aliens shall be guaranteed as prescribed by international law and treaties (Section 2). This indicates that international law is viewed as inferior to the Constitution, and that as the rule of law is a fundamental principle of the Constitution, the understanding or interpretation of constitutional principles are not swayed by international law. Yet, there is no objection to the idea that international law can offer supplementary standards in interpreting the Constitution, and the Korean Constitutional Court has actually made numerous efforts to refer to international law in its constitutional interpretation.

□. New challenges to the rule of law

7. Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

In the past, long-term dictatorship and military coups were the major threats to the rule of law. Reflecting this, constitutional amendments to this day have been made mostly in relation to the term of the nation's President, specifically concerning the form of government and governance, and even then it was often the case that the amendment procedures laid out in the Constitution were not adhered to. The May 16 coup and the December 12 military insurrection are key examples of the constitutional order being destroyed by the military authorities in Korea. However, such threats have been resolved to a considerable degree, thanks to continuous efforts for democratization.

8. Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

Recently, Korea experienced a controversy surrounding the enactment of an anti-terrorism act to respond to the increasing terrorist threats around the world. However, due to its particular geographic and political characteristics stemming from the inter-Korean division, the Republic of Korea is more influenced by the North Korean security threats and other North Korean issues than other international incidents. The matter of enacting an anti-terrorism act was also addressed in this context. In the initial stage of inter-Korean exchanges, there were times when the lack of relevant laws resulted in problems related to the divorce and bigamy of North Korean refugees and inheritance issues involving the separated families of South and North Korea. Nevertheless, the Republic of Korea labels the North Korean region as an anti-state group and considers the territory above the Military Demarcation Line also to be part of its territory under its jurisdiction (Article 3, Constitution),

and thus inter-Korean issues, from the South Korean perspective, do not constitute international events.

9. Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional/international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts/bodies? What is the essence of these difficulties? Please provide examples.

Case 1

Conscientious objection to military service (2008Hun-Ka22, decided August 30, 2011, etc.)

The United Nations Human Rights Committee and the United Nations Commission on Human Rights derived the right to conscientious objection to military service from Article 18 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") (right to freedom of conscience and religion). They called on the states not recognizing this right to prevent discrimination against the essential faith of conscientious objectors and called for the creation of an independent, impartial decision-making body to determine the seriousness of conscientious objection in specific cases, and advised states that adopt military conscription to introduce non-punitive, alternative military service that are non-combative or civil in nature. However, the Korean Constitutional Court denied the right of conscientious objection, holding that "No provision in the Covenant, including Article 18, explicitly states that the right of conscientious objection is a fundamental human right. While there have been discussions on including the right of conscientious objection in Article 18 in the course of the enactment of the Covenant, states that were involved in the legislation were against it. The interpretation of the UN Human Rights Committee and the UN Commission on Human Rights merely serves as a recommendation, and does not carry legal binding force. Moreover, the recognition of the right of conscientious objection and the question of whether to adopt alternative military service options should respect policy decisions that are based on the disparate and diverse circumstances of each State Party to the Covenant, such as its history, security conditions, social hierarchy, as well as political, cultural, religious or philosophical values. Considering the above, it is hard to say that the right of conscientious objection is recognized, or that it has legal binding force, under the Covenant."

This decision was based on the grounds that, "At the time the Korean Constitution was enacted, the Korean peninsula was in an exceptional situation where the South, at least, had to establish an independent democratic nation. Also, the two Koreas still have vivid memories of the Korean War, during which people of the same nation engaged in warfare, and have amassed strong military power in an arms race incurred by extreme ideological conflicts between left and right since the armistice. Korea is now the only divided nation in the world, and still remains in a state of hostile confrontation." Furthermore, "The Korean people are

experiencing severe ideological conflicts on national defense, security and North Korean issues, while crises on the Korean peninsula caused by North Korea's nuclear development and missile tests strongly affect the diplomatic and security situations of neighboring countries including the US, China and Japan. As seen, in particular, the recent armed provocations, North Korea's military threat is no longer implied or potential, but direct and very real," and that, "Human troops still play a significant role in national defense power; we must also consider the natural decline in troops due to the recent sharp fall in birth rates; and even if demand for troops falls on account of the development of information and scientific warfare, the scale and degree of this fall in demand depends on to what extent the military becomes more information and science-oriented. Therefore, we cannot risk losing troops solely based on expectations for such military development."

Case 2

Capital Punishment (2008Hun-Ka23, decided on February 25, 2010, etc.)

Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, prohibits capital punishment, while Article 2 prescribes that a State Party continuing to apply the death penalty shall pronounce a death sentence only under the strictest circumstances. The Republic of Korea continues to maintain the capital punishment system, and the Korean Constitutional Court has on several occasions held that the system is constitutional.

III. New challenges to the rule of law

10. What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

Article 61 Section 1 of Korea's Constitutional Court Act states that "When any controversy on the existence or the scope of competence arises between state agencies, between a state agency and a local government, or between local governments, the state agency or local government concerned may request adjudication on competence dispute to the Constitutional Court." Meanwhile, decisions on competence disputes by the Constitutional Court binds all state agencies and local governments (Article 67 Section 1 of the Constitutional Court Act), which means that decisions by the Constitutional Court serve as the guideline for constitutionally defining each agency's scope of authority.

The Korean Constitutional Court also has jurisdiction over constitutional reviews and constitutional complaints (Article 111 Section 1 of the Constitution), and therefore can revoke or invalidate the exercise of governmental power if it is confirmed to be unconstitutional (Article 47 Sections 2 through 4, Article 75 Sections 3 through 7 of the Constitutional Court Act), and through an adjudication on impeachment remove the accused person from public

office (Article 53 of the Constitutional Court Act).

For instance, regarding the former “Act on Special Measures for National Security and Integrity,” which granted the President the right to declare a state of national emergency beyond the scope of the President’s authority granted by the Constitution, the Korean Constitutional Court held that the invocation of the right to declare a national emergency, which may excessively restrict the fundamental rights of the Korean people, should be established based on strict legal grounds and control, and that this law had a high probability of being abused and misused. Thus, it was pronounced unconstitutional, for running contrary to constitutionalism and the rule of law. Through this decision, the constitutional limits of presidential authority were clarified (92Hun-Ka18, decided on June 30, 1994).

11. Do the decisions of your Court have binding force on other courts? Do other/ordinary courts follow/respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The decisions of the Korean Constitutional Court bind all state agencies and local governments in the legislative, administrative and judicial branches (Article 47 Section 1, Article 67 Section 1, and Article 75 Section 1 of the Constitutional Court Act). However, there was a dispute with the Supreme Court over the ‘power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions,’ and over the ‘binding force of decisions on limited constitutionality (unconstitutionality).’

Article 68 Section 1 of the Korean Constitutional Court Act prescribes that the “exercise or non-exercise of governmental power” is subject to the review of a constitutional complaint, but Article 107 Section 2 of the Korean Constitution prescribes that “The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.” This presents the question of which institution has the right to make constitutional judgments on administrative decrees, regulations or actions. The Constitutional Court held that this right lies with the Constitutional Court, in its decision (89Hun-Ma178, decided on October 15, 1990) stating that “The power of the Supreme Court to make a final review of administrative decrees or regulations as prescribed in Article 107 Section 2 of the Constitution means that when the constitutionality of an administrative decree or regulation becomes the premise of a trial in a specific litigation case, the Supreme Court can make the final decision without making a request to the Constitutional Court, unlike in the case of the law. As long as the Constitutional Court, as prescribed in Article 111 Section 1 Item 1 of the Constitution, has jurisdiction over the constitutionality of law, it is only natural - for maintaining consistency in constitutional interpretation and control of norms - that regarding constitutional complaints for reasons of infringement of fundamental rights by governmental power, the right to review the constitutionality of administrative decrees and regulations - which are the lower rules of law -

belongs to the jurisdiction of the Constitutional Court. Article 107 Section 2 of the Constitution cannot be considered an exception. Thus, as in the case of the law, this article of the Constitution plays no role when fundamental rights have been directly infringed upon by administrative decrees and regulations and a constitutional complaint has been filed for this reason. Also, 'governmental power' as a subject of adjudication of a constitutional complaint as prescribed by Article 68 Section 1 of the Constitutional Court Act indicates all governmental power across the legislative, judicial and administrative branches. Therefore, law enacted by the legislative branch, enforcement decrees or enforcement rules enacted by the administrative branch and regulations enacted by the judicial branch, etc. can all become the subject of adjudication of a constitutional complaint when they directly infringe upon fundamental rights without awaiting alternative execution."

Meanwhile, regarding the constitutionality of interpreting the law, the Supreme Court held in its decision (Supreme Court Decision 95Jae-Da14, decided on April 27, 2001) that "Article 101 of the Constitution prescribes that judicial power shall be vested in courts composed of judges (Section 1), and that the courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels (Section 2). In the case of trials on specific disputes, the authority to decide the meaning, content and scope of application of the law or statutes - in other words the authority of legislative interpretation and application - constitutes the very essence of the judicial branch, and it is the dominant principle of legislative interpretation and application to interpret laws in line with constitutional norms. Thus, the authority of legislative interpretation and application, which includes the interpretation of legal constitutionality, is vested in the exclusive jurisdiction of courts that hold the Supreme Court as the highest court of the State." Thus, the Supreme Court adheres to its stance (Supreme Court 2003Ka-Ki110, decided on July 14, 2005; Supreme Court 2011Ah83, decided on June 27, 2013; Supreme court 2013Ze-Ki5, decided on November 27, 2015, etc.) that "Article 107 Section 1 of the Constitution and Article 41 Section 1 of the Constitutional Court Act prescribe that when the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and that the authority of legislative interpretation and application, including constitutional legal interpretation in a specific dispute trial, is vested in the exclusive jurisdiction of courts that hold the Supreme Court as the highest court of the State. Judging by this, the only subject of a court's request to review the constitutionality of a statute as prescribed in Article 41 Section 1 of the Constitutional Court Act would be the constitutionality of the statute *per se*, and not the constitutionality of an interpretation of the statute. Thus, a request for constitutional review claiming that a statute is 'unconstitutional for being interpreted as ...' is merely contending the interpretation of the court, and is therefore unjustified." Further, the Supreme Court also denies that decisions on limited constitutionality are binding, stating (Supreme Court 2012Jae-Du299, decided on March 28, 2013) that "Regarding limited constitutionality decisions, where the Constitutional Court leaves a statute as is and pronounces only the interpretation and application of specific content related to that statute as unconstitutional,

the effect of an unconstitutionality decision as prescribed by Article 47 of the Constitutional Court Act cannot be granted. Thus, that decision on limited unconstitutionality cannot bind ordinary courts, and cannot serve as the grounds for a retrial.” In response, the Constitutional Court held that “Decisions on the unconstitutionality of law made by the Constitutional Court includes not only decisions on simple unconstitutionality, but also on limited constitutionality, limited unconstitutionality and nonconformity to the Constitution, and they all carry legal binding force,” and that “The interpretation of Article 68 Section 1 of the Constitutional Court Act should be that in cases where an ordinary court, against the binding unconstitutionality decision of the Constitutional Court, applies a law that has lost its effect and thus infringes on the fundamental right of a person, such a judgment should exceptionally become subject to adjudication of a constitutional complaint for the reasons mentioned above. Therefore, as long as ‘judgment of ordinary courts’ in Article 68 Section 1 of the Constitutional Court Act is interpreted as including judgments that infringe on the fundamental rights of the people by applying laws that have lost effect (having been pronounced unconstitutional by the Constitutional Court) Article 68 Section 1 of the Constitutional Court Act violates the Constitution,” and revoked the Supreme Court judgment of 95Nue11405 decided on April 9, 1996 (96Hun-Ma172, decided on December 24, 1997, etc.).

12. Has your Court developed/contributed to standards for law-making and for the application of law?(e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

The Constitutional Court is considered to have contributed significantly to making legislation and law enforcement more closely conform to the Constitution, and to the protection of people’s basic rights. People whose fundamental rights were infringed upon by wrongful statutes and systems filed constitutional complaints, and the Constitutional Court invalidated such statutes and systems through unconstitutionality decisions, ensuring the fundamental rights of the people and rectifying illogical systems; with the ultimate aim of delivering on the ideology and value of the Constitution.

(Please refer to Answers 3, 7, and 17 for detailed examples.)

In the case where the voting rights of nationals residing abroad became an issue, the Korean Constitutional Court provided a legislative standard for voting rights (2004Hun-Ma644, decided on June 28, 2007, etc.), holding that, “Although Article 24 of the Constitution takes on the form of statutory reservation by stating that all people shall have the right to vote ‘under conditions prescribed by statute,’ this does not signify a reservation to comprehensive legislation that acknowledges the right to vote ‘only under the terms of the law.’ This means that the basic rights of the people should be materialized through the law and to specifically actualize the right to vote through the law. Such statutory reservation is to realize and ensure the right to vote and not to restrict it. Therefore, even when stipulating the contents and process regarding the right to vote, such stipulation must conform with Article 1 of the

Constitution which declares popular sovereignty, Article 11 which speaks of equality, and Articles 41 and 67 which guarantee popular, equal, direct and secret elections for presidential and national assembly elections. Also, pertaining to the importance the right to vote holds in a democratic nation as the apparatus for realizing popular sovereignty and democracy through representation, the legislative branch should enact laws that guarantee the right to vote to its fullest. Accordingly, in cases where the constitutionality of legislation that restricts the right to vote is examined, the said examination must be strict. Therefore, legislations that restrict the right to vote cannot be justified directly by Article 24 of the Constitution, but can only be justified according to Article 37 Section 2 of the Constitution in exceptional and unavoidable cases only when necessary for national security, the maintenance of law and order or for public welfare. Even then, the essential aspect of the right to vote cannot be violated.”

The Constitutional Court also provided a legislative standard for the occupation system in a decision on the freedom of occupation (2005Hun-Ma161, decided on November 27, 2008, etc.), holding that, “The protection of freedom of occupation does not require that the legislature infinitely maintain a profession that already exists or keep the requirements for working in a profession the same. However, it is required by the principle of government by the rule of law under the Constitution that the confidence of existing workers are protected when the legislature reforms the occupation system, for instance by changing or strengthening the requirements for exercising an occupation for the necessity of public interest. Whether such confidence has been protected to the fullest extent will be the basis for deciding whether the principle against excessive restriction has been violated.”

13. Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

The Constitutional Court holds that the rule of law and its underlying principles also apply to the acts of a private entity entrusted with administrative functions.

In 2005Hun-Ma506 (decided on June 26, 2008), the Constitutional Court held that while a private entity entrusted with administrative functions, under its responsibility and title, exercises authority and is vested in those legal effects, the government commands and supervises such entrusted matters, and can cancel or suspend its dispositions if such entrusted matters are illegal or unjustified. In this case, the administrative agent is not the private entity but the state or public authority that has entrusted it with public power, and thus the exercise of public power by the private entity entrusted with administrative functions is no different in terms of legal effect from power exercised by the government.

14. Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight

against corruption? Do you have case-law related to the accountability of public officials for their actions?

Responsibility for actions as a public official can largely be divided into two areas: public officials for which such responsibility, criminal offense charges and impeachment are prescribed by the Constitution, such as the President and National Assembly members; and other public officials.

National Assembly members have the right to not be arrested or detained during sessions of the National Assembly (Article 44 Section 1 of the Constitution) and to not be held responsible for opinions officially expressed or votes cast in the Assembly (Article 45 of the Constitution). The President has the right to not be charged with a criminal offense during tenure of office (Article 84 of the Constitution). In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, Justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by law have violated the Constitution or other statutes in the performance of official duties, the National Assembly may pass motions for their impeachment (Article 65 Section 1 of the Constitution), and any person against whom a motion for impeachment has been passed shall be suspended from exercising power until the impeachment has been adjudicated (Article 65 Section 3 of the Constitution). A decision on impeachment by the Constitutional Court removes the person from public office, but this does not exempt the person impeached from civil or criminal liability (Article 65 Section 4 of the Constitution). Up until today, two motions for impeachment of a President have been filed with the Constitutional Court (2004Hun-Na1, 2016Hun-Na1). The Constitution also clarifies the responsibilities of a public official that has caused damage to another person by unlawful acts in the course of official duties, prescribing in Article 29 Section 1 of the Constitution that, "In case a person has sustained damages by an unlawful act committed by a public official in the course of official duties, he may claim just compensation from the State or public organization under the conditions as prescribed by law. In this case, the public official concerned shall not be immune from liabilities."

IV. The law and the individual

15. Is there individual access to your Court (direct/indirect) against general acts/individual acts? Please briefly explain the modalities/procedures.

In Korea, an individual can file for two types of adjudications with the Constitutional Court: a constitutional review of statutes, and a constitutional complaint. Thus in Korea, the review of unconstitutionality of statutes is conducted either in the form of concrete review or in the form of individual complaints.

In the case of concrete review, the judges of an ordinary court where a case is pending file a motion with the Constitutional Court of Korea either at the request of a party to a case or at the court's own initiative. If the motion is denied by the ordinary court, in the case of the former, the same individual (the party to the case) may file the same complaint with the Constitutional Court under Article 68 Section 2 of the Constitutional Court Act. Thus, this type of constitutional complaint can also be categorized as an adjudication that can be requested by an individual.

In case where there is no pending case with the ordinary court, an individual may directly take the statute to the Constitutional Court for review in the form of a constitutional complaint according to Article 68 Section 1 of the Constitutional Court Act ("Any person whose basic rights guaranteed by the Constitution is infringed due to exercise or non-exercise of governmental power may file a constitutional complaint with the Constitutional Court."). In case of a constitutional complaint, the Constitutional Court decides whether fundamental rights have been infringed upon, while adjudications on constitutional reviews of statutes, in addition to this, examine whether the Constitution has been violated.

Provided, adjudication on a constitutional review of statutes, or on a constitutional complaint under Article 68 Section 2 of the Constitutional Court Act, examines laws that have 'equal power to statutes,' including statutes that have been approved by the National Assembly and other treaties and emergency orders, etc. (2010Hun-Ba132, decided on March 21, 2013, etc.). Meanwhile, adjudication of a constitutional complaint under Article 68 Section 1 of the Constitutional Court Act deals with the exercise of governmental power. Thus no complaints involving acts under private sphere or of a private entity can be filed with the Constitutional Court.

16. Has your Court developed case-law concerning access to ordinary/lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

The Korean Constitution recognizes the right to trial as a fundamental right, prescribing in Article 27 Section 1 that, "All citizens shall have the right to trial in conformity with law by judges qualified under the Constitution and law." The Constitutional Court broadly recognizes the discretion of the legislature, holding that, "The right to trial means that 'during legal disputes, the people have the right to file a lawsuit to seek a comprehensive review by an independent court, based on facts and laws,' and indicates the right to at least one trial, and to request at least one instance; the specific procedures are up to the broad legislative discretion of the legislature (2003Hun-Ba34, decided on March 31, 2005)."

In this light, the legislature's decision has been respected on various occasions, for example on lawsuit fees such as revenue stamp costs, etc. (93Hun-Ba57, decided on August 29, 1996), discontinuation of review by the Supreme Court (97Hun-Ba37, decided on August 29,

1996, etc.), the right to appeal including the appeal period (2003Hun-Ma439, decided on November 25, 2004), etc. The intention of prescribing the right to trial “in conformity with law” is to ensure the right to a trial by a judge, but also to ensure a trial that conforms to the law; in other words, a trial in accordance with the procedures defined by adjective law and with the content defined by substantive law. Given that a trial, in essence, is based on the finding of facts and interpretation of the law, one should be entitled to a review, at least once, by a judge from a factual perspective and legal perspective, and no restrictions or barriers should make it difficult to access such an opportunity. The Korean Constitutional Court held that the failure to guarantee such an opportunity could lead to the fundamental infringement of the right to trial (90Hun-Ba, decided on June 26, 1992).

17. Has your Court developed case-law on other individual rights related to the rule of law?

The Korean Constitutional Court considers the rule of law under the Constitution to hold substantial meaning, rather than merely being formal and procedural. The Constitutional Court pointed out that the protection of fundamental rights is the key element of a government by the rule of law, stating in a decision (90Hun-Ba24, decided on April 28, 1992) that, “The Constitution is based on the underlying ideology of realizing a government by the rule of law that protects the people’s fundamental rights from the abuse of governmental power.” It also clarified that the rule of law under the Constitution indicates substantive rule of law, in a decision (92Hun-Ba27, decided on July 21, 1995) stating that, “The rule of law today goes beyond the formal rule of law, which prescribes that matters pertaining to the rights and obligations of the people should be defined by law. Rather, it requires substantive due process, ensuring that the objective and content of the law should conform to the constitutional ideal of protecting fundamental rights.”

In the case where Kukje Group was dissolved due to the infringement of property rights, the Korean Constitutional Court clarified that the restriction of fundamental rights with no legal grounds violates the principle of government by the rule of law, stating in its decision (89Hun-Ma31, decided on July 29, 1993) that, “However good the cause, when governmental power restricts people’s rights and imposes obligations, it should be based on predictable law, and the same applies to intervention in and restriction of the management rights of a company. In this light, the exercise of governmental power with no legal grounds, as seen in this case, violates the procedures of governmental rule of law. It also violates the principle against arbitrariness, which derives from the principle of equality prescribed in Article 11 of the Constitution, in that it was an exercise of arbitrary governmental power with no legal authority.”

In the case of the television broadcast receipt fee involving the Korean Broadcasting System (hereinafter “KBS”), where the legal basis of restricting property rights became an issue, the Constitutional Court held that, “One of the basic principles of the Constitution is the rule of

law. The rule of law centers on the principle of statutory reservation. Today, it is not enough to require that all administrative actions limiting people's liberties and rights or imposing obligations are merely based on a statute (statutory reservation). The principle requires that all essential issues that hold fundamental significance to the people, and especially those concerning the realization of their basic rights, be decided by the legislature itself (parliamentary reservation). ... While KBS is not an administrative agency, it should be considered an independent administrative body given its purpose of establishment, organization and work duties. The television broadcast receipt fee is a special contribution fee that imposes on the people the duty to pay. Therefore, the imposition and collection of fees by KBS is an administrative act that limits people's right to property. The amount of the fee, together with the scope of the fee-payers and the collection procedure, is an essential element of the imposition and collection of fees. In times when most households possess television sets, the decision on the amount of the fee directly affects the interest of the majority of the people, regardless of how much it is. Therefore, the amount of the fee must be determined by the legislature itself." As seen in this decision, the Korean Constitutional Court maintained that notwithstanding the existence of a legal basis, the essence of this matter should be ruled directly by law (98Hun-Ba70).

In the case on the unconstitutionality of the proviso to Article 331 of the Criminal Procedure Act, where the infringement of physical freedom became an issue, the Korean Constitutional Court held that, "The principle of due process stipulated by the current Constitution does not stop at the limited interpretation of simply restricting the reservation of legislative power. The principle should be interpreted as an independent fundamental right under the Constitution, which governs all state action. ... Furthermore, its interpretation should be that when applying laws in relation to statutes that restrict physical freedom during criminal procedures, the essence of physical freedom should not be infringed upon, even through the exercise of legal authority to impose punishments; and that especially, only when it does not go against the principle of proportionality or the prohibition of excessive legislation can its appropriateness and constitutionality be recognized." As seen here, the Korean Constitutional Court stated that the strict application of due process of law is especially required when restricting physical freedom (92Hun-Ka8, decided on December 24, 1992).

In the case where the restriction of voting rights of nationals residing abroad became an issue, the Korean Constitutional Court held that, "Although Article 24 of the Constitution takes on the form of statutory reservation by stating that all people shall have the right to vote 'under conditions prescribed by statute,' this does not signify a reservation to comprehensive legislation that acknowledges the right to vote 'only under the terms of the law.' This means that the basic rights of the people should be materialized through the law and to specifically actualize the right to vote through the law. Such statutory reservation is to realize and ensure the right to vote and not to restrict it. Therefore, even when stipulating the contents and process regarding the right to vote, such stipulation must conform with Article 1 of the

Constitution which declares popular sovereignty, Article 11 which speaks of equality, and Articles 41 and 67 which guarantee popular, equal, direct and secret elections for presidential and national assembly elections. Also, pertaining to the importance the right to vote holds in a democratic nation as the apparatus for realizing popular sovereignty and democracy through representation, the legislative branch should enact laws that guarantee the right to vote to its fullest. Accordingly, in cases where the constitutionality of legislation that restricts the right to vote is examined, the said examination must be strict. Therefore, legislations that restrict the right to vote cannot be justified directly by Article 24 of the Constitution, but can only be justified according to Article 37 Section 2 of the Constitution in exceptional and unavoidable cases only when necessary for national security, the maintenance of law and order or for public welfare. Even then, the essential aspect of the right to vote cannot be violated.” As seen here, the Korean Constitutional Court held that the restriction of fundamental rights should adhere to the principle against excessive restriction, even in the case of fundamental rights of the Constitution that take on the form of statutory reservation (2004Hun-Ma644, decided on June 28, 2007, etc.).

Meanwhile, the Korean Constitutional Court also reflected degrees of confidence in the restriction of individual rights, by drawing the principle of protection of confidence from the principle of government by rule of law (2001Hun-Ma194, decided on September 25, 2003). For instance, regarding the freedom of occupation, the Korean Constitutional Court held that, “The guarantee of freedom of occupation does not require that the legislature infinitely maintain a profession that already exists or keep the requirements for working in a profession the same. However, it is required by the principle of government by rule of law under the Constitution that the confidence of existing workers are protected when the legislative branch reforms the occupation system, for instance by changing or strengthening the requirements for exercising an occupation, for the necessity of public interest. Whether such confidence has been protected to the fullest extent will be the basis for deciding whether the principle against excessive restriction has been violated (2005Hun-Ma161, decided on November 27, 2008, etc.).”

When adjudicating on the right to request payment by the government, the Constitutional Court used the principle of government by rule of law as a standard (99Hun-Ma289, decided on June 29, 2000), holding that, “In cases where legal status under public law is powerful enough to be comparable to property rights under private law, and the deprivation of such status runs contrary to the principle of government by rule of law, such public rights should be protected by property rights.”

18. Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

The Korean Constitution does not expressly refer to the rule of law as a fundamental

principle of the Constitution. However, it accommodates the rule of law by giving shape to it through a series of systems and regulations. The constitutional provisions through which the rule of law is materialized are the fundamental rights - including human dignity - stipulated in Chapter 2, and the principle of separation of powers, opportunity for judicial remedy including constitutional adjudication, and state compensation systems, etc. included in the regulations on state organizations stipulated from Chapter 3 onwards. The separation of powers between government authorities and the protection of basic rights in the relationship between the government and the people are the foundation of the rule of law.

More detailed examples of the application of the rule of law can be found in Answers 3, 4 and 17.