

The Judicialization of Politics in Korea

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I. INTRODUCTION

After the authoritarian military regime of South Korea fell in 1987, the people of Korea rushed to build a foundation for transforming their political system into a liberal constitutional democracy.¹ The most important task was revision of the Constitution. After serious deliberation and numerous debates, Korea introduced a special institution for constitutional adjudication into its constitution.² This new institution was the Constitutional Court of Korea, a special tribunal in which nine judges

¹ See Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L. J. 71, 74 (1997).

² See generally James West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73, 73-119 (1992) (giving a general overview of the Constitutional Court of Korea).

selected by political institutions have the power to nullify unconstitutional legislative enactments or executive orders.

Since its establishment in 1988, the Constitutional Court of Korea has successfully contributed to the development of constitutional democracy in Korea and confirmed the value of significant basic rights. However, the Constitutional Court of Korea has often faced collective opposition and harsh criticism from political and social powers that are not satisfied with the decisions of the Court. This is essentially because constitutional adjudication seeks to resolve high-profile cases involved in intense political controversies. This political nature of constitutional adjudication by the Court unavoidably produces conflicts between opposing political powers, even after the Constitutional Court of Korea makes final decisions on matters that concern political powers. Although this phenomenon happens frequently, in 2004 Korean politics and the Constitutional Court of Korea experienced the most politically controversial cases since Korea launched the new type of institution for constitutional adjudication.

The first case occurred on March 12, 2004, when the 16th National Assembly of Korea, controlled by the opposition party, voted to impeach President Roh Moo-Hyun,^{*} reproving him for violating the Public Official Election Act of Korea. The impeachment motion temporarily suspended President Roh. After the Constitutional Court of Korea decided that the impeachment motion by the National Assembly of Korea was unconstitutional,³ Roh was reinstated to his office. The decision was politically important because it had been rare for the Constitutional Court of Korea to intervene with extremely political matters and because it was the first time in the history of the Korean Constitution for the Court to decide on a presidential impeachment.⁴ In addition, it was politically significant because the Constitutional Court seemed to declare its own political authority and agenda to safeguard Korea's constitutional democracy. This attitude of the Constitutional Court could be regarded as a significant signal that announces the advent of the era of "judicialization of politics (or juridification of politics)."⁵ In addition, a similar sentiment

* The format of Korean names in the text of this paper will be written family name first.

³ Constitutional Court of Korea, Decision of May 14, 2004 (2004Hun-Na1), *English version available at* <http://english.court.go.kr> (follow "Landmark Decisions" hyperlink; then follow "Impeachment of the President Case" hyperlink).

⁴ Youngjae Lee, *Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, 53 AM. J. COMP. L. 403, 404 (2005).

⁵ The phrase "judicialization of politics" is borrowed from Ran Hirschl's book. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 169 (2004).

was repeated in a following case of the same year, which produced many criticisms of the judicialization of politics.

In October 2004 and November 2005, the Constitutional Court of Korea made decisions on a similar constitutional topic. The Court reviewed the capital relocation plan of the Roh administration. In the first case, the Constitutional Court of Korea ruled against the plan.⁶ Although earlier in this same year, the Constitutional Court of Korea had ruled in favor of the interest of the President in the impeachment case, the Court in this case nullified the most important part of presidential agenda, which was to relocate the capital of Korea to the geographically central area of South Korea. The rationale for this decision was that the government plan was not consistent with the “customary constitution,” as evidenced by the fact that Seoul has been the nation’s capital for 600 years.

After the Constitutional Court of Korea ruled the capital relocation project unconstitutional, the Roh government proposed an alternative plan to relocate the capital of Korea. In this alternative plan, the Roh administration maintained the centerpiece of the former, unconstitutional plan, but proposed construction of an administrative-centered town in Chungcheong, the geographically central area of South Korea.⁷ Also, the administration stressed that this alternative differed from the former plan because the presidential office would have remained in Seoul after the building of the special administrative town.

Regarding this new plan, a constitutional complaint was filed on April 27, 2005. But here, the Constitutional Court ruled in favor of the plan. Although the constitutional complaint asserted that this alternative plan was identical to the former, unconstitutional plan, the Constitutional Court of Korea dismissed the complaint.⁸ In this decision, the Court said that the new plan did not violate the customary constitution.

Although a series of capital relocation decisions had a political nature similar to the impeachment case, it was not until these capital relocation decisions were made that people started to pay attention to the political participation of the Constitutional Court. These seemingly opposing conclusions by the Constitutional Court in a series of capital relocation cases invoked skepticism of the recent phenomenon of the judicialization of politics, in which the Constitutional Court intervenes

⁶ Constitutional Court of Korea, Decision of October 21, 2004 (2004Hun-Ma554, 566 (consolidated)), available at <http://english.court.go.kr> (follow “Landmark Decisions” hyperlink; then follow “Relocation of the Capital City Case” hyperlink) (English version).

⁷ Sung-Ki Jung, *Uri Tables Own New Town Bill*, THE KOREA HERALD, Feb. 16, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=000019252>.

⁸ Constitutional Court of Korea, Decision of November 24, 2005 (2005Hun-Ma579, 763).

with political matters and makes decisions with political consideration.

Critics analyzing the situation have concluded that, because the alternative plan was quite similar to the former relocation plan, it is reasonable to believe that these completely opposing decisions of the Constitutional Court were made based on the Justices' consideration of the political situation rather than any other factors, such as political stabilization or governmental interests.⁹ These critics have pointed out that the judicialization of politics (or politicization of law) by the Constitutional Court of Korea inevitably destroys the value of the rule of law.

However, before discussing this recent criticism, one should bear in mind that the Constitutional Court is just one of the political institutions in Korea. It cannot be completely independent and separate from politics. Therefore, its function is closely related to politics and naturally must be understood in the context of Korea's political situation. From this perspective, the judicialization of politics is an extremely natural phenomenon in that one political institution takes charge of constitutional adjudication.

Consequently, criticism of the judicialization of politics itself is a short-sighted and distorted view which ignores the political nature of constitutional adjudication. A sound and productive criticism of the recent trend of the judicialization of politics in Korea should focus on finding a good model of the judicialization of politics, one in which the Constitutional Court considers politics properly. This project will be tremendously significant because it might lead to real legitimacy in constitutional adjudication.

Because the judicialization of politics is an inevitable and natural phenomenon, the Constitutional Court should clarify its role in politics and take politics seriously. The Constitutional Court should not hesitate to participate in pure political matters and to give up the solemn distinction between law and politics by which it has enjoyed a freedom from political criticism of its constitutional adjudication. Because the consideration of politics ultimately means the reflection of people's opinion, it is the most important ground of existence of the Constitutional Court.

Section II will show the development of the judicialization of politics in Korea by discussing two landmark constitutional cases, the presidential impeachment case and the capital relocation case. Through analysis of the decisions and political situations of these cases, this paper will show that these cases should be regarded as an aggressive signal by

⁹ Chung-Un Cho & Sun-Young Lee, *Constitutional Court Approves New Administrative City Law*, THE KOREA HERALD, Nov. 25, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000054710>.

the Constitutional Court of the judicialization of politics. The Constitutional Court has announced that politics can be adjudicated before the Court and, furthermore, that it will be more likely to participate in political matters. Then, this paper will introduce not only a criticism of the attitude that the Constitutional Court should be isolated from political matters, but also the author's skepticism of this criticism.

Section III will further show why it is unreasonable and unrealistic to claim that the Constitutional Court should be politically isolated. First, by analysis of the origin, competence, organization, and standard of review of the Court, this paper will examine the Court's inherent political nature. Then, by studying the political situation in Korea, this paper will demonstrate that political deadlocks made by conflicting ideologies and interests in a democratized Korean society seek political solutions from the Constitutional Court of Korea.

Section IV will explain why the judicialization of politics by the Constitutional Court is both desirable and inevitable. By comparing different responses from Korean society to the aforementioned two cases, this paper will explicate a decisive factor which yields different evaluations. Then, to accept and encourage the judicialization of politics as a natural political phenomenon in a democratized constitutional state, this paper will suggest a way to institutionalize this factor in an ideal model of the judicialization of politics.

Finally, Section V will conclude by summarizing the debates in previous sections.

II. TWO RECENT CASES BEFORE THE CONSTITUTIONAL COURT OF KOREA: THE JUDICIALIZATION OF POLITICS

The main purpose of this section is to show the development of the judicialization of politics in Korea. Detailed information and analysis of the two aforementioned landmark cases will be provided in the first part of this section. This section will especially focus on the political background and aftermath of each case as a logical bridge to reveal the political nature of these cases in the latter part of this section. From the perspective that these two cases are precursors of a new era of the judicialization of politics, the latter part will accept the Constitutional Court's positive participation in pure political questions. In addition, this section will introduce criticism of the Court's intervention with politics and its assertion that the Constitutional Court, as a judiciary branch, should be neutral and isolated from politics.

A. *Impeachment of President Roh Moo-Hyun Case*

1. Background of the Case

The first case in which the Constitutional Court moved toward the aggressive judicialization of politics was the impeachment case of

President Roh Moo-Hyun in 2004.¹⁰ On March 12, 2004, President Roh became the first President to be impeached by the National Assembly of Korea in Korean constitutional history. Upon his impeachment, President Roh's presidential powers were suspended until the Constitutional Court of Korea reinstated his power.

The starting point of the impeachment case was when, in December 2003, President Roh made a public announcement that people of Korea should aggressively participate in achieving a civic revolution by supporting the ruling party in the upcoming April 2004 general election.¹¹ Although he was a public official holding the position of President, he begged the public to support his party in the next election for members of the National Assembly. At this, the opposition Grand National Party (GNP) and Millennium Democratic Party (MDP), which held a majority in the National Assembly at that time, accused President Roh of violating the Public Official Election Act of Korea, which prohibits sitting public officials, including the President, from trying to influence elections or electoral processes.¹²

In February 2004, President Roh again expressed his interest in the April general election by saying that if the people of Korea would support his party, which was built recently by the leadership of President Roh, he would complete his various political plans to achieve a progressive society.¹³ Within a week, the National Election Commission of Korea, which is established by the Constitution of Korea as a state agency supervising electoral processes,¹⁴ ruled that the remarks of President Roh constituted improper attempts to influence elections and that these activities violated the Public Official Election Act of Korea.¹⁵ However, President Roh played down this decision by saying that only the upcoming

¹⁰ See 2004Hun-Na1, *supra* note 3.

¹¹ Anthony Faiola, *S. Korean President Calls for Vote: Roh Offers to Quit If Referendum Goes Against Him*, WASH. POST, Oct. 13, 2003, at A16; see also Sung-Tae Sim, *Roh Takes Another Political Gamble: President May Resign If Campaign Spent Over 10% of GNP Funds*, THE KOREA HERALD, Dec. 15, 2003, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000039802>.

¹² *MDP Takes Roh and Uri Leader to Election Watchdog*, THE KOREA HERALD, Mar. 1, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=101&oid=044&aid=000042187>.

¹³ *President's Gamble Aims for Election Jackpot in April*, THE KOREA TIMES, Jan. 9, 2004; *Roh Calls on Nation to Support Pro-Government Party*, THE KOREA TIMES, Feb. 25, 2004.

¹⁴ CONSTITUTION OF REPUBLIC OF KOREA art. 114.

¹⁵ *Letter from the National Election Commission to President* (Mar. 3, 2004) (on file with author).

election could determine whether he acted illegally.¹⁶

In response, the opposition parties in the National Assembly started an impeachment process on March 9 and passed it on March 12 with 193 votes out of 271 to remove the President from his office. Following the provisions of the Constitution of Korea, Prime Minister Goh Kun started to play an *ad hoc* presidential role until the Constitutional Court of Korea, which has final authority to review the impeachment motion of the National Assembly, made a decision.¹⁷

2. Impeachment Process under Korean Law

Generally, the impeachment process by legislatures, such as the National Assembly of Korea, is an effective method to control other branches of government.¹⁸ Especially under a governmental system in which the President has more power than any other governmental branch, the impeachment process is an important means to remove a President who violates the Constitution or other laws from his office.¹⁹ Therefore, under the current Korean impeachment process, public officials may not be removed for acts of immorality, political incompetence, or policy mistakes, but only for illegal activities.

The process for the impeachment of the President of Korea is articulated by two bodies of law: the Constitution of Korea and the Constitutional Court Act. The latter provides most details of the process. Under these two bodies of law, a President who violates the Constitution

¹⁶ Hyun-Jin Seo, *Poll Results Will Decide My Fate: Roh; President Rejects Rivals' Demand to Apologize for Violating Public Official Election Act*, THE KOREA HERALD, Mar. 12, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=101&oid=044&aid=000042492>; Sang-Min Joo, *Parties Demand Roh Apology for Violating Election Law: Opposition Threatens Impeachment If Demand Is Not Met*, THE KOREA HERALD, Mar. 5, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=101&oid=044&aid=000042324>.

¹⁷ Sang-Min Joo, *Assembly Votes to Impeach Roh*, THE KOREA HERALD, Mar. 14, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=101&oid=044&aid=000042518>.

¹⁸ Jong-Sup Chong, *Review on the Korean Impeachment System*, 46-1 SEOUL NAT'L UNIV. L. REV. (SEOULDAEBUPHAK) 514, 527 (2005) (available only in Korean).

¹⁹ Article 65(1) of the Constitution of Korea of 1987 states, "if 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 the Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment." THE CONSTITUTIONAL COURT OF KOREA, THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT 339-40 (2001).

or other laws in the performance of official duties is subject to a motion for impeachment by the National Assembly. A motion for impeachment may be proposed by a majority of the members of the National Assembly and approved by two-thirds or more of the members.²⁰

If the motion for impeachment is approved, the President is suspended from his office until the Constitutional Court of Korea makes a final decision on the impeachment case.²¹ In the process of impeachment adjudication by the Constitutional Court, the chairman of the Legislation and Justice Committee of the National Assembly acts as the representative prosecution commissioner, leading the procedure of adjudication and examination of the President.²²

Within 180 days after the Constitutional Court of Korea starts the impeachment process, it makes a decision on the subjected matter.²³ If the Court wants to uphold the impeachment motion of the National Assembly, it needs votes of at least six out of nine judges in favor of the impeachment.²⁴ If the impeachment motion is finally approved by the Constitutional Court, a new election for the President of Korea should be held within 60 days.²⁵

3. The Decision

By the decision of the Constitutional Court of Korea on May 14, 2004, President Roh Moo-Hyun recovered his chair. Although the Constitutional Court of Korea held that the President violated the Constitution and the Public Official Election Act of Korea by voicing his hope that people would support his newly created Uri Party in the April 2004 general election, the Court said that this infringement is not unconstitutional enough to impeach the President.²⁶

The decision that overrode the impeachment motion was not unanimous. However, the Constitutional Court of Korea did not offer any dissenting opinion. This was because the Constitutional Court was concerned that the revelation of a dissenting opinion would not build political stability, but could have produced endless political

²⁰ CONSTITUTION OF REPUBLIC OF KOREA art. 65(2).

²¹ *Id.* at art. 65(3).

²² CONSTITUTIONAL COURT ACT art. 49(1).

²³ *Id.* at art. 38.

²⁴ CONSTITUTION OF REPUBLIC OF KOREA art. 113(1).

²⁵ *Id.* at art. 68 (2).

²⁶ So-Young Kim, Court reinstates President Roh, *THE KOREA HERALD*, Mar. 17, 2004, *available at* <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000043876>.

confrontation.²⁷

In the decision, the Constitutional Court held that President Roh violated the duty of political neutrality in elections and electoral processes.²⁸ It pointed out that the public statement of the President during a meeting with several news reporters on February 24, 2004, in which the President openly begged people's support for the Uri Party in the next general election, infringed upon the President's obligation of political neutrality as a public official. In addition, the Constitutional Court asserted that President Roh's remark in November 2003 that he would regard the result of the next general election as a confidence vote violated the Public Official Election Act of Korea. Furthermore, the Court stressed that the President's criticism of the decision of the National Election Commission that President Roh violates the Public Official Election Act of Korea is improper in the context of the Constitution of Korea.

However, the Constitutional Court held that President Roh's violation of the Public Official Election Act of Korea was not serious enough to be regarded as a significant threat to constitutional democracy. Consequently, the Court declined to remove the President from his office.²⁹ Although Article 53(1) of the Constitutional Court Act states that "when there is a valid ground for the petition for impeachment adjudication, the Constitutional Court shall issue a decision removing the respondent from office," by relying on the principle of proportionality, the Constitutional Court interpreted this provision in such a way that a minor breach cannot be sufficient to confirm impeachment.³⁰

Thus, the Constitutional Court held that public officials could only be removed through the process of impeachment for "grave violations."³¹ The Court noted that the grave violations must be interpreted by "balancing the degree of negative impact on or the harm to the constitutional order caused by the violation of the law and the effect to be caused by the removal of the respondent from office."³² The Constitutional Court held that there was no grave violation in the activities of President Roh. In addition, the Constitutional Court held that it could not find any justification for the other two charges against President Roh

²⁷ Sang-Min Joo, *Roh Trial Ends With No Conflicts*, THE KOREA HERALD, Mar. 14, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000043846>.

²⁸ 2004Hun-Na1, *supra* note 3, at 5(1)(E)

²⁹ *Id.*

³⁰ *Id.* at 6(B)

³¹ *Id.*

³² *Id.*

for alleged corruption and economic mismanagement.³³ The Court said that these charges were not relevant to the impeachment case, so they were not subject to constitutional adjudication.

4. Analysis: Politics of Impeachment

a. A Split Over the Legally Difficult Case

The causes for impeachment of President Roh were the violation of the Public Official Election Act of Korea, incompetence, and corruption. However, the centerpiece of the charge against President Roh was the election law matter. The key is whether his statement hoping for national support for his party in the April 2004 general election violated the Constitution of Korea. Although the National Election Commission of Korea and the National Assembly of Korea firmly believed that the activities of the President were improper and unconstitutional, during the process of impeachment adjudication by the Constitutional Court, political opinion was divided.³⁴

Even the legal profession of Korea was conflicted on the matter of interpretation of the impeachment provision of the Constitution. For example, the Korea Bar Association, the largest association of lawyers in Korea, announced that there is no constitutional ground to impeach President Roh and cried out that the Court should override the motion of the National Assembly.³⁵ However, the Seoul Bar Association and four other local affiliates of the Korean Bar Association objected to the announcement of the Korea Bar Association.³⁶ Many lawyers who disagreed with the announcement of the Korea Bar Association stressed that the impeachment case is inherently a pure political matter and that lawyers should not participate.

Just as lawyers could not form a unified opinion over the impeachment case, law professors in academia were also divided. According to a survey, around 70 percent of law professors thought that the National Assembly's motion was unreasonable.³⁷ In addition, 56 percent of law professors believed the Constitutional Court would ultimately override the motion of impeachment.³⁸

³³ *Id.* at (5)(E).

³⁴ Todd Thacker, *Courtside at the Impeachment Games*, OHMYNEWS, Mar. 4, 2004, [available at](http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=104&oid=047&aid=000045352) <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=104&oid=047&aid=000045352>

³⁵ Suk Ha et. al., *The Announcement of the Korea Bar Association*, THE HANKYOREH, Mar. 9, 2004 (available only in Korean).

³⁶ *The Objection of Seoul Bar Association*, YONHAP NEWS, Mar. 18, 2004 (available only in Korean).

³⁷ *See Poll*, THE HANKYOREH, Mar. 11, 2004 (available only in Korean).

³⁸ *Id.*

b. Political Situation and the Decision

This division among members of the legal profession showed that it would be difficult to solve this impeachment case from a purely legal viewpoint. Consequently, the key to solving this legally difficult case was the observation of the political situation around the Roh government and impeachment process. The charges against President Roh had less to do with legalities and more to do with his political ideology.

Generally, the supporters of President Roh can be classified as those in the younger generation who believe in progressive politics and desire the eventual reunification with North Korea. On the other hand, the opponents of the President, including the major opposition party, Grand National Party, can be classified as those of the older generation who have bad memories of the Korean War and share a conservative political ideology. This ideological confrontation was revealed through the matters regarding the diplomatic relationship with the United States and social welfare. Finally, the conservative power attacked the progressive power, President Roh, through the impeachment process.

At first, the conservative power was optimistic that this impeachment process would succeed in curbing the progressive movement of the Roh Government and restoring political hegemony. However, it underestimated the power of the progressive political group. After the National Assembly's impeachment action, the progressive political power, including politicians and civic groups, showed organized resistance and protested against the impeachment by asserting that this impeachment by the National Assembly is a *coup d'état* by the legislature.³⁹ This became a social event in which many people participated in favor of President Roh.

For example, the absolute majority of South Korean university students who were supporters of the Roh government and progressive ideology were against the impeachment, according to the poll reported by Yonhap News.⁴⁰ The poll of 1,010 students on March 18, 2004, showed that 90.5 percent were against the impeachment. In addition, after impeachment action by the National Assembly, their approval of the Uri Party rose from 22.3 to 37.3 percent. This phenomenon was led not only by young progressive political powers, but also by the ordinary people of Korea, as evidenced by how this political situation affected the result of the April 15, 2004 general election.

The general election, which could be regarded as a referendum on the impeachment action of the National Assembly, was the best chance to recognize people's attitude toward the impeachment case because it

³⁹ See Editorial, *Uri Leader's Blunder*, THE KOREA HERALD, Apr. 14, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=101&oid=044&aid=000043234>.

⁴⁰ *Poll*, YONHAP NEWS, Mar. 29, 2004 (available only in Korean).

occurred between the impeachment action of the National Assembly and the decision of the Constitutional Court. In this election, President Roh's Uri Party's huge success led to it becoming the majority by occupying 152 of 299 seats.⁴¹

After the election, the pro-Roh Uri Party and the Democratic Labor Party, which succeeded in obtaining political approval by the progressive powers' victory over the general election, pressed the opposition party to rescind the impeachment. However, Grand National Party rejected this offer and waited for the decision of the Constitutional Court.⁴²

Due to the people's apparent opposition to impeachment shown by the result of general election, the Constitutional Court could not help considering political circumstances and recognizing the victory of progressive power in Korean politics. Although the Constitutional Court said the result of the election would not be relevant to the final decision of the Court, it was evident that this election could be seen as a good justification for its decision. The decision reflecting the result of the election also relieves some of the burden from the Constitutional Court.

c. Evaluation and Response

In the unprecedented impeachment of President Roh, the Constitutional Court relied on its own interpretation of the provisions of the Constitution. This pivotal role played by the Court was in line with the way it had helped solve political matters over the past 15 years since democratization. Above all, the decision was significant because the impeachment case decided by the Constitutional Court was an extremely difficult political matter, and the Court seriously considered the political situation. The Constitutional Court concluded that it is natural for the Court to intervene with political matters because its role is to solve this kind of pure political question and to protect constitutional democracy.

The new agenda of the Constitutional Court, the judicialization of politics, can be easily found in this decision. For example, in clarifying the requirements of impeachment, the Court held that this job should be guided by the principles established by the Court as well as the constitutional text.⁴³ The Court extended its power tremendously and declared it has an authority to solve political questions. In sum, the judicialization of politics in which the Court reviews political questions with political consideration started in Korea.

⁴¹ Anthony Faiola, *Korean Vote Shifts Power in Assembly: Turnover May Aid Impeached President*, WASH. POST, Apr. 16, 2004, at A14.

⁴² Hyun-Jin Seo, *Scrap Impeachment: Uri, DLP*, THE KOREA HERALD, Apr. 18, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000043325>.

⁴³ 2004Hun-Na1, *supra* note 3, at 6(B).

However, most people did not take the advent of the powerful Constitutional Court seriously. Most Koreans just welcomed the decision of the Court because it could stabilize the political situation by restoring President Roh's power and authority. Therefore, most people, including the opposition parties, which realized public opinion toward impeachment motion after the huge defeat in the general election, agreed with the conclusion of the Constitutional Court's decision. In addition, the conclusion was easily accepted because it seemed to reflect public opinion on that matter as it was expressed in the general election.

However, the important matter in this case was the Constitutional Court's attitude toward political questions rather than a conclusion on this specific case. Therefore, there was a possibility that the Court's new attitude and the judicialization of politics would be harshly criticized if most political powers were opposed to the conclusion of the Court in some political cases. Consequently, the culmination of this intertwining of the law with politics in this decision was repeated in the following case of same year. This later case produced many criticisms of the judicialization of politics.

B. *Relocation of the Capital City Case*

1. Background of the Case

When Roh Moo-Hyun ran in the presidential race in 2002 as his party's candidate, he made several pledges. The most noteworthy pledge was that he would relocate the capital from Seoul to another location.⁴⁴ He proposed that the administrative functions of the capital, for example, the governmental ministries, be moved to the geographically middle area of South Korea, Chungcheong province, if he was elected as the President of Korea. He explained that this proposal would promote equal development of other areas of Korea and solve overpopulation problems in Seoul.

After Roh was elected President, his government started to make a bill for "The Special Act on the Establishment of the New Administrative Capital" (hereinafter "the Act") to build a new capital in the Chungcheong area. It was proposed by the administration and enacted by the National Assembly on Dec. 29, 2003, in which the opposition Grand National Party held the majority.⁴⁵ In response, 169 Korean citizens filed the constitutional complaint. They asserted that the Act was not consistent with the Constitution of Korea because the relocation of the capital would

⁴⁴ Chan-Soo Park, *Pledge Debate*, THE HANKYOREH, Dec. 11, 2002.

⁴⁵ Dong-Ho Yoo, *Assembly Passes New Administrative Capital Bill*, THE KOREA TIMES, Dec. 29, 2003, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=000007436>.

require a revision of the Constitution.⁴⁶

2. Decision

The Constitutional Court, in an 8-1 opinion, held the Act unconstitutional on October 21, 2004.⁴⁷

a. Majority Opinion of Seven Justices

Seven justices of the Court participated in the majority opinion holding that the Act is unconstitutional. They pointed out that although the Act is to transfer administrative function of the capital to other areas, it can be regarded as a relocation plan to build new capital because the objects of the Act are governmental institutions that are critically significant in operating the nation. Therefore, the majority opinion stressed that the relocation of the capital should be treated as an extremely significant matter that needs constitutional deliberation by the people.⁴⁸

The problem with this reasoning is that there is no provision in the Constitution of Korea stating, "Seoul is the capital." On this matter, seven justices asserted that, because Seoul has been the capital of Korea for over 600 years since the Chosun Dynasty period, and because this fact has been recognized by people, there is a kind of "customary constitution," that compels Seoul as the capital.⁴⁹ According to the majority, the national consensus and the constitutional custom that Seoul is the capital should be protected by the Constitutional Court as a constitutional principle even though it is not written in the Constitution. In conclusion, the justices asserted that the designation of Seoul as the capital of Korea is a part of the unwritten constitutional custom.

Moreover, the majority opinion stressed that this custom can be regarded as the constitution and that there is no difference in constitutional effects of this custom and the written provisions of the Constitution. Therefore, if the nation wants to revise this constitutional custom, it should follow constitutional revision procedure in Article 130 of the Constitution.⁵⁰ According to Article 130, constitutional revision requires a

⁴⁶ So-Young Kim, *Public Divided on Capital Relocation*, THE KOREA HERALD, Sep. 1, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000046143>.

⁴⁷ 2004Hun-Ma554, 566, *supra* note 6.

⁴⁸ *Id.* at 3(D).

⁴⁹ *Id.* at 49(C).

⁵⁰ The contents of the Article 130 are summarized as follows:

1. The National Assembly shall decide upon the proposed amendments within sixty days of the public announcement, and passage by the National Assembly shall require the concurrent vote of two thirds or more of the total members of the National Assembly.

national referendum. Therefore, the vote to recognize public opinion on the relevant constitutional matter is required. The majority opinion concluded that the Act violates the Constitution because it did not give any chance to recognize the people's opinion on the capital relocation matter through national vote.

b. Separate Concurring Opinion of One Justice

Justice Kim Yung-il wrote a separate, concurring opinion in this case.⁵¹ His conclusion is identical with that of the majority decision in that the capital relocation plan was unconstitutional. However, he did not regard the matter of the capital relocation as the object of constitutional amendment. In addition, he did not accept the concept of a customary constitution. Nevertheless, he said that the capital relocation plan should be subjected to referendum.

He started by pointing out that Article 72 of the Constitution states, "the President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if she deems it necessary."⁵² Then he concluded that the capital relocation plan constituted an important policy relating to the national destiny under Article 72 of the Constitution. Therefore, he stressed that the plan is a matter to be determined by referendum.⁵³

In his view, it is an abuse of discretion to make an important policy relating to the national destiny, such as the capital relocation plan, without referendum. Therefore, the Act violates the Constitution in that the Act unequivocally excludes the referendum process in developing the capital relocation plan. He concluded that the Act infringes the people's right to vote on a referendum guaranteed by the Article 72 of the Constitution.

c. Dissenting Opinion of One Justice

Only Justice Jeon Hyo-sook expressed a dissenting opinion in this case.⁵⁴ She showed the constitutionality of the Act by analyzing and

2. The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

3. When the proposed amendments to the Constitution receive the concurrence prescribed in paragraph (2), the amendments to the Constitution shall be finalized, and the President shall promulgate it without delay.

See THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 353-54.

⁵¹ 2004Hun-Ma554, 566, *supra* note 6, at 6.

⁵² CONSTITUTION OF REPUBLIC OF KOREA art. 72.

⁵³ *Id.* at 6(B).

⁵⁴ *Id.* at 7.

criticizing the majority and concurring opinions. She started by attacking the concept of customary constitutional law. She asserted that in a constitutional regime under a written constitution, customary constitutional law may not exist apart from the written constitution. She pointed out that under the written constitutional system, this customary constitution, at best, supplements the written constitution. Even then, the customary constitution is only applicable to the extent that it can be understood and accepted within the context of the written constitution.⁵⁵

Justice Jeon wrote that because the customary constitution is not identical with the provisions of the written Constitution, the change of the customary constitutional law is not a matter of constitutional revision. There is no special requirement in the Constitution regarding the change of supplementary customary constitutional law. Therefore, it is absolutely adequate to change the constitutional custom, such as the custom that Seoul is the capital of Korea, by the legislation of the National Assembly. She concluded that the Article 130 of the Constitution does not apply to this matter.⁵⁶

Justice Jeon countered the concurring opinion by pointing out that Article 72 of the Constitution allows the President to submit important policies to a national referendum, but does not require the President to do so. In other words, under the Constitution, the President has full discretion to call a national referendum regarding the capital relocation plan. Therefore, she concluded that, although there was no referendum process in the procedure of establishing the Act, it cannot be understood as the violation of Article 72 of the Constitution.⁵⁷

3. Aftermath of the Case

a. The Debate: “Customary Constitution”

The Constitutional Court’s ruling against the Act invoked a series of wide-ranging debates between political powers. Specifically, the new concept of a customary constitution, which was adopted by the Court for the first time in the constitutional history of Korea,⁵⁸ caused serious debates among lawyers and legal professors.

Some lawyers emphasized the value of a customary constitution in the constitutional adjudication and interpretation. Also, they stressed that the Constitutional Court has discretion to find the existence of a customary constitution and to apply it to constitutional adjudication. From the

⁵⁵ *Id.* at 7(A)(3).

⁵⁶ *Id.* at 7(A)(6).

⁵⁷ *Id.* at 7(B).

⁵⁸ Bok-Hyun Nam, *A Critical Analysis on the Theory of 'Customary Constitution' of the Constitutional Court*, 19 HANYANG LAW REVIEW (*HANYANGBUBHAK*) 3, 5 (2006) (available only in Korean).

perspective of constitutional interpretation, of course, the customary constitution can be accepted as one of various methods to interpret constitution.⁵⁹ Many legal professionals and Korean citizens, however, could not accept the assertion that Seoul should be considered as the nation's capital under this *de facto* customary constitution.

Most criticism of this decision has focused on the fact that in a nation under the civil law system like Korea, it is absurd to treat a customary constitution as a written constitutional provision because the customary constitution was not confirmed by the people during the creation of the constitution.⁶⁰ Therefore, it is natural to assert that the customary constitution just supplements the written constitution. In this respect, the decision in the capital relocation matter seemed to neglect the difference between the customary constitution and written constitutional provisions.

The Constitutional Court asserted that it cannot find any difference between the customary constitution and written constitutional provisions. The majority opinion in this case said that the customary constitution has the same power as a written constitutional provision due to the fact that Seoul has been the capital of Korea for more than 600 years and the national consensus that Seoul is the capital.⁶¹ Therefore, the plan to relocate the capital should follow the constitutional amendment procedure.

Legal professionals, however, have criticized the decision. Some critics maintain that under the present legal system of Korea, which has a written constitution, it was inappropriate to employ this unfamiliar concept in this extremely significant case related to the national destiny.⁶² Some radical powers criticized the concept of a customary constitution as similar to the theories used by Adolf Hitler and Benito Mussolini to repudiate democracy.⁶³ In addition, it seemed that, according to the logic of the Constitutional Court in this case, if a bad custom has existed for a long time and has been accepted as a constitutional norm, then it is improper to

⁵⁹ Seung-Dae Kim, *The Normative Feature of Customary Constitution*, 15 THE COLLECTION OF CONSTITUTIONAL DISCOURSE (*HUNBUBNONCHONG*) 133, 133-75 (2004) (available only in Korean).

⁶⁰ Yon-Ju Jung, *Constitutional Review of the New Capital City Founding Act Case of the Constitutional Court*, 7-1 PUBLIC LAW STUDY (*GONGBUBHAKYEONGU*) 267, 274-78 (2006) (available only in Korean).

⁶¹ 2004Hun-Ma554, 566, *supra* note 6, at 4(C)(1).

⁶² Seung-Ju Bang, *Is Customary Constitution The Fact That The Capital Is Seoul?*, 6-1 PUBLIC LAW STUDY (*GONGBUBHAKYEONGU*) 153, 156-57 (2005) (available only in Korean).

⁶³ Song-Wu Park, *Lawmaker Likens Court Ruling to Nazism Staff*, THE KOREA TIMES, Nov. 16, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=000016890>.

revise this bad custom by quick process of the National Assembly. Critics view this as an absurd result. Although the Court's extraordinary concept of a customary constitution appears to be a weak basis, lawyers who praised the Court's decision asserted that since Seoul is clearly the capital of the Korea, this custom should be protected in a written constitutional provision.⁶⁴

b. Reaction from the Political Field: The Alternative Plan

While lawyers argued about the concept of a customary constitution, reactions from politicians were swift and strong. First of all, the ruling Uri Party called for the resignation of Constitutional Court justices.⁶⁵ The party that held the majority of seats in the National Assembly after the general election asserted that the Court's ruling destroys not only the critical agenda of the new progressive administration, but also the nation's legal system and the principle of separation of powers.

In addition, the Uri Party severely criticized the judicialization of politics in this case. The Uri Party believes that most of the justices of the Court are oriented to political conservatism and that the Court's ruling was motivated by conservative political considerations.

Consequently, thirty-four lawmakers of the ruling party prepared a bill giving the National Assembly the authority to hold confirmation hearings for Constitutional Court justices.⁶⁶ In addition, to change political orientation of the Constitutional Court from conservatism to progressivism, the bill allowed constitutional law experts and civic group leaders to be Constitutional Court justices.⁶⁷

The most important reaction from the political field was the preparation of the second act regarding building an administrative capital outside of Seoul. After the Constitutional Court's ruling, the Roh administration and his Uri Party started to prepare an alternative plan to build an "administration-centered city" in the city of Yeongi-Gongju, Southern Chungcheong Province. They reduced the number of governmental institutions that would be moved into a new administrative town in this new plan. For example, this moving plan excluded the presidential office of Cheong Wa Dae, the Supreme Court, the National Assembly, and some ministries dealing with foreign affairs and national security.⁶⁸ The Uri Party, which held majority of the National Assembly,

⁶⁴ Bang, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ Song-Wu Park, *Uri Seeks Hearings of Constitutional Court Justices*, THE KOREA TIMES, Oct. 28, 2004.

⁶⁷ *Id.*

⁶⁸ Sung-Ki Jung, *Uri Tables Own New Town Bill*, THE KOREA TIMES, Feb 6, 2005, available at

reviewed this new act and finally established and enacted this special act on March 2, 2005.⁶⁹

Since the original plan regarding the capital relocation was declared unconstitutional by the Constitutional Court just a few months prior, the ruling party and the government felt pressure in preparing this alternative plan. Therefore, the lawmakers of Uri Party and the governmental lawyers of the Ministry of Justice tried to find the best way to build a town that is not the capital but functions as an administration-centered city. Above all, they were careful not to violate the Court's ruling in preparing this new act.

The governmental lawyers of the Justice Ministry continually warned that, in order for it to be constitutional, the new special act would need to be evidently different from the old one.⁷⁰ This endeavor worked, although the final draft of the government and the ruling party was similar to the original special act. Despite the similarities, most lawyers expected that the new plan would be constitutional due to its down-sized model.⁷¹

Some citizens, however, did not agree that this new act regarding the alternative plan was constitutional and consequently filed a constitutional complaint on April 27, 2005. The core of the complaint was that because the new act was nearly identical to the old one, the new act was unconstitutional for the same reasons. In response to the complaint, the Court unanimously ruled that the alternative act is not unconstitutional. The Court reasoned that this new act differed from the old one such that this new plan did not constitute a relocation of the capital.⁷²

C. *The Judicialization of Politics*

1. New Era of the Constitutional Court

The Constitutional Court's ruling against the first capital relocation plan of the Roh government and the Court's ruling against the impeachment motion of the National Assembly were the critical moments of that year.⁷³ Moreover, almost every constitutional scholar, even

<http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=000019252>.

⁶⁹ Hae-In Shin, *Storm Clouds Over GNP After Administrative City Law Passes*, THE KOREA HERALD, Mar. 4, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000049545>.

⁷⁰ So-Young Kim, *Cabinet OKs Administrative Capital Plan*, THE KOREA HERALD, May 11, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000050823>.

⁷¹ *Id.*

⁷² 2005Hun-Ma579, 763, *supra* note 8.

⁷³ Hyun-Jin Seo, *Korea Undergoes Changes in Political Forces*, THE KOREA

including the Constitutional Court itself, regarded these two cases as landmark decisions in the constitutional history of Korea.⁷⁴

Although there were different responses to each decision, it is commonly accepted that the Constitutional Court opened a new era of the judicialization of politics by positively participating in political debates.⁷⁵ People and legal experts started to take the Constitutional Court seriously after these two cases.⁷⁶ The cases were related to the nation's destiny and the struggle between political powers. In this situation, the Constitutional Court showed a power to solve the problems in the name of the constitution. People and even the Court itself were surprised to learn for the first time the role and tremendous power of the Constitutional Court. They started to approve the role of the Constitutional Court in these cases and to accept the Court as the ultimate judiciary that reviews highly important political matters.

Above all, the growing power of the Constitutional Court can be understood in the context of a global trend toward the judicialization of politics.⁷⁷ Especially under President Roh's administration, Korea had experienced this phenomenon. Beyond the "countermajoritarian difficulty,"⁷⁸ the Constitutional Court continually participated in political matters and did not hesitate to express its opinions of the previous years of the Roh government. Although this phenomenon prevailed, it is improper to say this phenomenon results in "juristocracy."⁷⁹ This is because the Constitutional Court did not aggressively try to influence its political power and just solved given political matters.

HERALD, Dec. 30, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000048349>.

⁷⁴ See Constitutional Court of Korea, <http://english.ccourt.go.kr> (introducing these two decisions as landmark decisions in the history of the Korean Constitution) (last visited Oct. 18, 2008).

⁷⁵ Jongcheol Kim, *Constitutional Implications and Limits of the Judicialization of Politics*, 33-3 PUBLIC LAW (GONGBUBYEONGU) 229, 230-31 (2005) (available only in Korean).

⁷⁶ Sung-Ho Kim, *The Constitutional Soul of Korea's Democracy*, THE KOREA HERALD, Dec. 26, 2007, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=001&oid=044&aid=000069953&>.

⁷⁷ See, e.g., Leslie Friedman Goldstein, *From Democracy to Juristocracy*, 38 LAW & SOC'Y REV. 611, 612-14 (2004); Duncan Kennedy, *Three Globalization of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 67-71 (David M. Trubek & Alvaro Santos eds., 2006).

⁷⁸ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962); see generally FRANK R. STRONG, *JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER* (1997).

⁷⁹ See HIRSCHL, *supra* note 5.

2. Political Nature of Two Decisions

a. Impeachment Case

The presidential impeachment case of the judiciary is inherently political.⁸⁰ In most cases, political conflicts play pivotal roles as motives to start impeachment process. Therefore, the solutions of entrenched disputes between the President and the President's opponents are naturally political. Some solutions are compromises, and others are a collapse of one side. The law or legal tests usually cannot be practical enough to effectively solve the political deadlock and to persuade parties to accept the result.

In the United States' 228 years of constitutional history, only two of forty-three Presidents have been impeached by the House of Representatives.⁸¹ The two Presidents impeached were the 17th President, Andrew Johnson (1865-69), and the 42nd President, William Jefferson Clinton (1993-2001). In these impeachment cases, political antagonism among opposing factions, as well as genuine crimes, played roles as the primary causes of impeachment. Especially in the impeachment case of President Clinton, some people viewed the sexual details contained in the "Starr Report," prepared by the Independent Counsel Kenneth Starr, as a political attack on the President, rather than a strictly legal document to justify impeachment.⁸²

In Korea, although the Constitutional Court, a special judiciary, has the authority to decide an impeachment case, rather than the Senate in the United States, the political nature of an impeachment case causes the Court to consider the political situation. The Constitutional Court's ruling was the best example because the Court implicitly showed its deep consideration of the political situation in the decision. Even though the Constitutional Court did not explicitly state that it was considering the political situation, and although the Court mentioned that in deciding the case the result of general election would not be considered, many expected the Court to consider the fact that the people had showed overwhelming support for President Roh in the general election.

The result of the decision can be understood only from this political perspective. As mentioned above, the Constitutional Court's

⁸⁰ Michael J. Gerhardt, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 244 (1994).

⁸¹ See Michael J. Gerhardt, *A Symposium On The Impeachment Of William Jefferson Clinton: The Historical And Constitutional Significance Of The Impeachment And Trial Of President Clinton*, 28 HOFSTRA L. REV. 349 (1999).

⁸² See John M. Broder, *Clinton Aides Step Up Attacks on Starr Inquiry*, N.Y. TIMES, Apr. 8, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9C04E7DD163DF93BA35757C0A96E958260>.

legal analysis and logic is not clear. The Court showed that it has discretion in interpreting both the Public Official Election Act and the Constitution. The Constitutional Court held that although the activities of President Roh violated the Public Official Election Act, the severity was not grave enough to justify impeachment. In addition, the Court did not explain the meaning of the term “grave” at all. Moreover, in the interest of subsequent political stability, the Court did not reveal any dissenting opinion. In conclusion, it is not improper to say that the decision was politically motivated.

b. Relocation of the Capital Case

The political importance of the capital relocation case was huge, not just because it treated a highly political administrative plan, but also because it revealed a deep tension in Korean politics. President Roh, who declared that the preparation of the capital relocation plan was the centerpiece of his presidential pledges in the presidential election of 2002, was selected by people who agreed with his view that dismantling the political and socioeconomic powers in Seoul is required for the completion of democratization. However, the conservative political powers who lost the presidential election adamantly objected to this new plan because they held the most political and socioeconomic power in Seoul.

This political tension made the Constitutional Court act politically in order to solve the problem. When the Court released its decision on October 21, 2004, it seemed to understand its political role. The Court recognized the importance of political consideration rather than strict legal interpretation. In this case, the Court went beyond its previous work, in which it had executed discretion in interpreting the Public Official Election Act and the Constitution in the presidential impeachment case. Rather, it created a new source of constitutional law in this case.

In countries with written constitutions, such as Korea, it is extremely difficult to understand why the Constitutional Court would create a new source of constitutional law. However, by defining and applying a customary constitution, the Court showed that its decisions will not be limited in reflecting political considerations. Because it is difficult to justify the political consideration of the Court by logical interpretation of the constitution, the Court relied on its discretion to recognize a new source of constitutional authority.

Some critics pointed out the political nature of this decision, especially when compared to the decision of November 24, 2005. Those critics noted that the alternative to the capital relocation act was not much different from the first act.⁸³ Of course, the first act proposed that all

⁸³ Dai-Kwon Choi, *A Study on Constitutionality of the Second Capital Relocation Act*, 46-3 SEOUL NATIONAL UNIVERSITY BUB-HAK 201, 201-26 (2005) (available only in Korean).

administrative agencies, save for the Presidential office of Blue House, move to the special city in Yeongi-Gongju. The second act was less drastic, in that it kept some important governmental institutions in Seoul. However, if we compare the first act, where twenty-five administrative agencies involving 16,467 public officials would move to the new administrative town, and the second act, where twenty-two administrative agencies involving 14,104 public officials would move to a new administrative town,⁸⁴ it is appropriate to regard the second act as a *de facto* relocation of the capital.

The Court, however, ruled the second plan constitutional because the political reaction toward the first decision was too harsh to handle. If the reason for the first decision was purely legal rather than practical or political, it would have been tremendously difficult for the Court to change its attitude toward the capital relocation.

3. Criticism of the Judicialization of Politics

After the Constitutional Court made its landmark rulings to strike down the impeachment motion and the capital relocation plan of the Roh administration, there have been apparent moves among political powers involved in some major political issues to seek solutions through the intervention of the Constitutional Court.⁸⁵ They seem to have been moved to do so by the Court's positive intervention in politics.

Some praised the action of the Constitutional Court in the two landmark cases. According to their analysis, through these cases, the Court rapidly obtained people's approval of the Court as a special governmental institution that executes its power to control the activities of other governmental institutions. The Court showed how to place checks and balances on other institutions in these cases. These cases are very similar to a landmark decision of the U.S. constitutional history, *Marbury v. Madison*, in which the U.S. Supreme Court attempted to establish its role of judicial review through participating in a political matter.⁸⁶ In *Marbury*, the U.S. Supreme Court established the power of judicial review through discretionary interpretation of the U.S. Constitution without having any expressly written constitutional provisions.⁸⁷ Likewise, the

⁸⁴ Sun-Young Lee, *Once All Ministries Go, What's Left For Gwacheon?*, THE KOREA HERALD, Mar. 2, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000049496>.

⁸⁵ See, e.g., Constitutional Court of Korea, Decision of Aug. 26, 2004 (2003Hun-Ba85) (discussing an article of the National Security Law that had been the main topic of political debate in Korea).

⁸⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸⁷ See generally Larry D. Kramer, *The Supreme Court, 2000 Term-Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

Constitutional Court in these landmark decisions broadened its power and role by using discretionary interpretation methods, such as using the concept of a customary constitution.

However, in Korea, these landmark decisions seemed to play pivotal roles in politics rather than in promoting the status of the Constitutional Court. After the decision on the capital relocation plan, some conservative political groups, which were impressed by the ruling of the Court in favor of their interests, started to find a way to develop the new concept, the customary constitution, to protect their interests.⁸⁸ In addition, they thought that this concept of an unwritten constitution had the potential to nullify reform legislation prepared by the progressive Roh government. Conservative powers sought to justify their previous interests, which were the objects of reform in the eyes of progressive powers, by asserting that those interests are protected by customary norms.

Consequently, the major conservative and opposition party, the Grand National Party, questioned the constitutionality of four instances of reform legislation prepared by Uri Party. The four bills are the National Security Law, the Act regarding the control of private school foundations, the Act regarding the investigation of past anti-national, undemocratic activities, and the Act regarding the regulation of the newspaper market.⁸⁹

In addition, extremely conservative Confucian scholars used the term customary constitution to maintain their interests in the family law field. They have traditionally opposed progressive action by civic groups to get rid of the male-oriented “family head system” (*Hojujedo*) through revising the Civil Code of Korea.⁹⁰ Their conservative interpretation is that the male-oriented family head system has been protected by the customary constitution based on Confucian ethics, even if it is not expressly written in the Constitution of Korea.⁹¹

Although this current trend was caused by the Court’s adoption of customary constitution, it can be understood as the development of democracy or the revelation of people’s faith in the rule of law. However, there was a concern that the enlargement of the role and power of the Constitutional Court through the adoption of a customary constitution might allow political powers to use the Court to favor their interests.

Generally, under a democratic political system, weaker political powers have often sought to use the courts to protect their interests against

⁸⁸ *Help Law Avoid Politics*, THE KOREA HERALD, Oct. 28, 2004, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=044&aid=000047150>.

⁸⁹ Kim, *supra* note 75, at 231.

⁹⁰ Under the system, the legal status of female members in a family is subjected to its head male. See Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 287-96 (2003).

⁹¹ See *supra* note 88.

the stronger powers.⁹² This inclination for legal struggle prevails under the system of judicial review, which can effectively solve political questions without huge social costs. Under the separation of powers, even if some political groups fail to hold legislative power, they have opportunities to restore political balance by relying on the courts. From this perspective, one can understand why conservative political powers began to emphasize and rely upon constitutional adjudication after the two landmark decisions of the Constitutional Court. As long as the Court participates in political conflicts, there is a strong possibility that it can be a useful political tool.

Many people have worried about the judicialization of politics. Of course, there is a strong belief that legal institutions, such as the Constitutional Court, can maintain judicial objectivity and neutrality without political consideration.⁹³ Traditional theories of constitutional adjudication have continually sought neutral principles to justify judicial decisions without considering any political motive.

In addition, to promote the value of constitutionalism and to prevent the Constitutional Court from being the puppet of some political power, some assert that a well constructed and coherent constitutional theory and standard would allow the Court can decide controversial political cases without considering political topography.⁹⁴ Therefore, there might be a realistic possibility for the Court not to be a political actor.

However, it is doubtful that the Constitutional Court can be apolitical. Generally, the Court decides issues involving the redistribution of social values in constitutional adjudication. In deciding issues involving social values, it is absurd to exclude political consideration. Also, since law is an important political resource, it is unnatural to distinguish politics from law in adjudication. Although the judicialization of politics raises possibilities for the Constitutional Court to be a field of political schemes and struggles, it is a natural phenomenon in the democratically developed political system. The next section will develop a more detailed argument about how to accept the judicialization of politics in the constitutional system and political situation of Korea.

⁹² Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2018 (1990); see, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹³ See, e.g., Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1298 (2002); Lawrence G. Sager, *Constitutional Justice*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 14-15 (2002-03); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 556 (1988); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959).

⁹⁴ See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997); *LAW'S EMPIRE* (1996).

III. INEVITABILITY OF THE JUDICIALIZATION OF POLITICS

This section's main purpose is to criticize the premise that the Constitutional Court can escape being political. First, a look at the inherently political nature of the Constitutional Court of Korea will prove that the judicialization of politics is inevitable. This research will focus on the Court's origin, competence, organization and standard of review. Then, this section will examine the hypothesis that the deadlock of conflicting ideologies and interests, which have existed in every field of politics since the democratization of Korea, have led people to seek the Court's help in their resolution. Then, this section will review the proposition that political groups who were disappointed with the product of the legislature have tried to use the Constitutional Court as another legal authority to justify their ideologies and interests. Finally, this section will show that every Korean constitutional case contains conflicting political positions and that the Court's review of these politically-oriented cases necessarily needs deep consideration of politics and the will of the people.

A. *Inside the Constitutional Court: The Inherent Political Nature of the Constitutional Court of Korea*

1. The Origin of the Constitutional Court of Korea

a. The Constitution of Korea of 1987

One of the most remarkable achievements in the Constitution of Korea of 1987 was the establishment of the Constitutional Court of Korea.⁹⁵ In the history of the Constitution of Korea, the debate over the governmental system had always been superior to the debate concerning basic rights.⁹⁶ Although the issue of the establishment of the constitutional adjudication system as a critical means to protect basic rights by special institution has a relationship with the debate of the governmental system in every "constitutional moment,"⁹⁷ as when political powers amended the Constitution of Korea, the primary issue was the presidential election and term.⁹⁸

Political powers, in order to protect their interests, have in the past established special systems for constitutional adjudication.⁹⁹ The Constitution of the Second Republic of Korea created the Constitutional Court of Korea in 1960,¹⁰⁰ but the Court did not issue any decisions due to

⁹⁵ West & Yoon, *supra* note 2, at 75.

⁹⁶ See generally Ahn, *supra* note 1.

⁹⁷ BRUCE ACKERMAN, WE THE PEOPLE, FOUNDATIONS 6-7 (1991).

⁹⁸ Ahn, *supra* note 1, at 74.

⁹⁹ See generally DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 151-70 (1990); THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 6-11.

¹⁰⁰ CONSTITUTION OF REPUBLIC OF KOREA OF 1960 arts. 83-3, 83-4.

the military *coup d'état* on May 16, 1960.¹⁰¹ Under the military governments from 1960 to 1987, it was impossible for any governmental institution to object to the decision of the legislative branch, which was organized by members of the junta. The judiciary, as did all governmental institutions, served to justify the actions of the military governments.¹⁰² During this time, constitutional adjudication was isolated from any important debates on constitutional amendment.

After almost 30 years of military government, the Korean people finally had an opportunity to claim their own rights and to be protected by the Constitution of Korea. Since that time, the popular power of the Korean people has struck down the military government and people were able to have their status reflected through the amending process of the Constitution. Especially since the “People’s Protest” of June 1987, the most critical civic activity to collapse the military government, which itself was the culmination of the protests against the anti-democratic dictatorship of the military junta, the demand for the democratization of the Korean people was the main object of constitutional amendment.¹⁰³

Later, the military government leaders Chun Doo-Whan and Roh Tae-Woo announced a kind of surrender to the people in their Declaration of June 29, 1987.¹⁰⁴ The congressmen of the ruling party and the minor opposition parties then drafted the constitutional amendment.¹⁰⁵ After three months of deliberation, the National Assembly approved this amendment on October 12. Finally, the Constitution of Korea of 1987 became effective after 93.1 percent of Koreans supported it in the referendum of October 27, 1987.¹⁰⁶

Above all, the centerpiece of the Constitution of Korea of 1987 was the protection of basic rights. To protect people from dictatorship by guaranteeing basic rights, the new Constitution provides constitutional provisions that can effectively secure political freedom of the people. The establishment of the Constitution of 1987, which is still effective, was motivated by the political situation.

b. The Constitutional Court of Korea

¹⁰¹ THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 8.

¹⁰² YOON, *supra* note 99, at 151-70.

¹⁰³ See Generally CARTER J. ECKERT ET AL., KOREA OLD AND NEW: A HISTORY (1990); CUMINGS, KOREA'S PLACE IN THE SUN (1997).

¹⁰⁴ James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Process and Judicial Independence*, 1 HARV. HUM. RTS. Y.B. 135 (1988).

¹⁰⁵ Tscholsu Kim & Sang Don Lee, *The Influence of U.S. Constitutional Law Doctrines in Korea*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 303, 322 (Lawrence W. Beer ed., 1992).

¹⁰⁶ THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 16.

In addition, the process for establishing the Constitutional Court of Korea was political. To keep the solemn meaning of the glorious revolution of the Korean people, people wanted to construct a constitutional system to check any governmental activity that infringes the basic rights of people within a normal political process, but not through radical political movement, such as a revolution. Consequently, the people demanded a special judiciary for constitutional adjudication. The Constitutional Court of Korea was formed for the second time in the history of the Korean constitution.

During the special committee of the National Assembly's debates on constitutional amendment, the ruling and opposition parties showed different views on the Court's establishment. At issue was whether the amended Constitution would vest the power of constitutional adjudication in the Constitutional Court of Korea instead of the Supreme Court of Korea. Early in July 1987, all parties, namely, the Democratic Justice Party (ruling party), the New Democratic Party, the Democratic Korea Party, and the National Party, agreed to allow the Supreme Court of Korea resolve constitutional problems.¹⁰⁷

However, the ruling party suddenly changed its position and asserted that the Supreme Court should be isolated from political issues to protect independency of judiciary.¹⁰⁸ The ruling party stressed that if the Supreme Court continued to participate in political issues, it could not be free from political intervention. Because it seemed inappropriate for the Supreme Court to intervene in political matters, the ruling party of the military government suggested the establishment of a special governmental institution for constitutional adjudication.

It was fairly strange that the ruling party of the military government, which had controlled the judiciary and oppressed people, was concerned with the independency of the judiciary. Nonetheless, it advocated for a Supreme Court that would be free from any political intervention. The ruling party asserted that the establishment of a new institution for constitutional adjudication would protect basic rights of people effectively. The actual intention of the ruling party's proposal was to create a court that is could control easily. The small size of the special committee for constitutional adjudication, it was thought, would enable the government to control it.¹⁰⁹

The independence of the government institution from political intervention was the most important issue in the debate on constructing the system of constitutional adjudication. People could not be properly

¹⁰⁷ THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 16-17.

¹⁰⁸ *Id.* at 16-17.

¹⁰⁹ *Id.*; *see also* Former Representative Doo-bin Lim's statement at an international academic seminar at the Law Research Institute of Seoul National University on August 26, 1988 (on file with author).

protected by the government-controlled judiciary under the military government. Therefore, despite the reasons behind the military government's support, the proposal for establishing an independent court for constitutional adjudication was persuasive.

For the opposition parties, the centerpiece issue was the introduction of constitutional adjudication.¹¹⁰ They were not as concerned with which entity they vested the power of constitutional adjudication. Rather than comparing the strengths and weaknesses of the system of the Supreme Court's constitutional adjudication (American-style judicial review) with that of an independent entity (European/German-style constitutional review),¹¹¹ they concentrated on how to introduce constitutional adjudication as soon as possible, because the political situation was in a state of emergency. People wanted a concrete renovation after the revolution and the ruling party suggested a fairly legitimate proposal for a constitutional adjudication system. It was impossible for the opposition parties to take more time to review this political issue thoroughly. Finally, a compromise between the parties led to the establishment of the Constitutional Court of Korea on September 1, 1988.¹¹²

Likewise, the origin of the Constitutional Court of Korea is purely political. The talk of its establishment was brought up by an important political event, the People's Protest of June 1987. The essence of the talk was negotiation and bargaining between parties without any consideration of theoretical analysis of the meaning and effect of constitutional adjudication. Even the independent entity for constitutional review was made by compromise between the political parties. The core, however, of the political discourse regarding the Constitutional Court was the people's demand for democratization and protection of their basic rights. In sum, we cannot fully understand the origin of the Constitutional Court without knowledge of the political background, but the background should be comprehended through the politics as embodied by the People's Protest of June 1987. The origin of the Constitutional Court of Korea lies in the politics of the people.

2. The Competence of the Constitutional Court of Korea

The provisions for the Constitutional Court in the Constitution of Korea of 1987 are articles 111-113 of chapter VI. In addition, the details

¹¹⁰ *Id.*

¹¹¹ Jibong Lim, *A Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea*, 6 TULSA J. COMP. & INT'L L. 123, 125-34 (1999); see Kyu Ho Youm, *Press Freedom and Judicial Review in South Korea*, 30 STAN. J INT'L L. 1, 7 (1994) (accounting for the distinction between the Supreme Court and the Constitutional Court.).

¹¹² THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 16-17.

for the functioning of the Constitutional Court are enumerated in the Constitutional Court Act.¹¹³

Article 111(1) of the Constitution of 1987 provides jurisdiction to the Constitutional Court in any of five types of cases: (1) constitutional review of a statute, (2) constitutional complaints, (3) impeachment, (4) dissolution of political parties, and (5) competence disputes between state organs (for example, between state agencies, between a state agency or a local government, or between local governments). These functions of the Constitutional Court show the political nature of the Court.

Above all, the Constitutional Court has authority to review an impeachment motion of the National Assembly regarding the President of Korea or other high officials. The Constitutional Court plays a pivotal role in the process of impeachment through its power to finalize the impeachment decision, which is granted by Article 111(1)(2) of the Constitution of 1987. Considering the fact that most impeachment cases have been caused by conflicts between political powers, this function of the Constitutional Court made the Court a political decision maker.¹¹⁴

Furthermore, the Constitutional Court's power to dissolve political parties puts the Court in the center of politics. It is evident that the system of dissolving political parties functions as a means to defend the basic order of free democracy. Article 8(4) of the Constitution provides that "if the purposes or activities of a political party are contrary to the fundamental democratic order, the government may bring an action for its dissolution in the Constitutional Court, and the political party shall be dissolved in accordance with the decision of the Constitutional Court."¹¹⁵ The text does not define what the "fundamental democratic order" means. Consequently, the decision of dissolving political parties by the Constitutional Court is fundamentally a political decision.

The Court's constitutional review of a statute further reveals the political nature of the Constitutional Court. Article 111(1)(1) of the Constitution and Article 41 of the Constitutional Court Act provide that the Court can adjudicate the constitutionality of a law upon the request of ordinary courts. The exercise of constitutional review depends upon the request of an ordinary court.¹¹⁶ If the ordinary court does not request constitutional adjudication by the Constitutional Court, the Constitutional Court cannot adjudicate the case. Thus, Article 68(2) of the Constitutional Court Act allows a party at trial to have an opportunity to obtain constitutional review of the statute at issue by filing a constitutional complaint to the Constitutional Court.

¹¹³ The Act No. 4017 of Aug. 5, 1988, *entered into force* Sept. 1, 1988. It was amended as Act No. 4408 of November 30, 1991.

¹¹⁴ CONSTITUTION OF REPUBLIC OF KOREA art. 111.

¹¹⁵ THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 329.

¹¹⁶ CONSTITUTIONAL COURT ACT OF KOREA art. 41(1).

Consequently, there are two forms of constitutional review of statutes.¹¹⁷ The ultimate purpose of this dual system of constitutional review is to allow people to protect their basic rights. However, the fact that the ordinary court can refuse to move the case to the Constitutional Court by its own legal standard shows that the Constitutional Court's review considers both legal and political issues.

The most important part of the consideration of the Court's political function is that people are at the center of the political discourse. In the democratic political system, the Constitutional Court acts on behalf of people's direct political participation to protect constitutional order without any radical change of society. The Constitutional Court contributes to securing political stability, and protects individual life, liberty, and property. Therefore, the competence of the Constitutional Court is based on political consideration, and the politics of the Constitutional Court originates from the people.

3. The Organization of the Constitutional Court of Korea

Article 111 of the Constitution and the Article 5(1) of the Constitutional Court Act regulate the procedure to appoint nine justices of the Constitutional Court and define their necessary qualifications. Basically, people who are qualified as judges are usually nominated as Justices of the Court. Article 5(1) of the Constitutional Court Act provides that justices are to be appointed from eligible persons who are forty or more years of age and have been in any of the following positions for fifteen or more years: (1) Judge, public prosecutor, or attorney; or (2) a person who is qualified as an attorney and has been engaged in legal affairs for or on behalf of a governmental agency, a national or public enterprise, a government-invested institution, or other corporation; or (3) a person who is qualified as an attorney and has been in a position higher than assistant professor of jurisprudence in a recognized college or university.¹¹⁸ Three justices are nominated by the President, three by the National Assembly (one of them by the opposition party), and three by the Chief Justice of the Supreme Court. The Presiding Justice of the Court is designated by the President with the consent of the National Assembly.¹¹⁹

Justices are usually former judges of the judiciary, the most remote branch to political process. However, the fact that most of them are selected by other political branches causes the justices to be politically involved. In addition, the political parties naturally play pivotal roles in selecting justices. Parties make compromises about appointments with

¹¹⁷ Woo-Young Rhee, *The Influence Of The U.S. Constitution On Korean Constitutional Cases* 40-44 (1997) (LL.M. thesis, Harvard Law School) (on file with author).

¹¹⁸ CONSTITUTION COURT ACT OF KOREA art. 5(1).

¹¹⁹ CONSTITUTION OF REPUBLIC OF KOREA arts. 111(2), (3), and (4).

deep political consideration. Therefore, various political factors are considered during the appointment process, and each justice represents various political viewpoints. This multi-vocal selection process shows the political nature of the Constitutional Court.

The fatal weakness of the Constitutional Court's selection process is that it lacks democratic legitimacy because justices are not elected.¹²⁰ However, this counter-majoritarian problem¹²¹ makes the Constitutional Court adherent to public opinion in seeking democratic the approval of the people of its decisions. The Constitutional Court well recognizes that simple legal reasoning based on the text of the Constitution cannot justify its decisions sufficiently for people to accept it as the product of democratic discourse. The Court knows that people can easily ignore the decisions of the Constitutional Court by asserting that decisions are made by an undemocratically organized institution. To overcome this weakness, the Constitutional Court cannot help considering public opinion as fully as possible. Therefore, the fact that justices are selected by political powers, not by election, makes the primary consideration of the Court in constitutional adjudication to be not legal or constitutional reasoning, but political consideration.

4. The Standards of Review

In deciding cases, the Constitutional Court usually relies on some standard of review. Among several standards, the proportionality test is most frequently used in constitutional adjudication.¹²² The Court usually calls the proportionality test the "rule against excessive restriction."¹²³

For example, Article 37(2) of the Constitution states that "the freedoms and rights of citizens may be restricted by statutes only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated."¹²⁴ Most constitutional lawyers and scholars interpret this provision as a description of the principle of proportionality or prohibition of excessive restriction.¹²⁵ The Constitution does not provide absolute protection to most basic rights. In reviewing the constitutionality of governmental actions restricting basic human rights, the Court does not declare any restriction unconstitutional per se, but

¹²⁰ KUN YANG, MOON-HYUN KIM & BOK-HYUN NAM, REPORT ON REFORM OF THE KOREAN CONSTITUTIONAL COURT ACT 14-16 (1999) (available only in Korean).

¹²¹ BICKEL, *supra* note 78.

¹²² See DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004) (providing a general account on proportionality test in comparative perspective).

¹²³ THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 125.

¹²⁴ *Id.* at 334.

¹²⁵ *Id.* at 125.

rather employs the proportionality test.

The Court's proportionality test has four parts. A statute must satisfy the following four conditions to be constitutional:

- (1) the statute must be aimed at a valid purpose;
- (2) the statute must be reasonable as a means chosen by the state to achieve and promote such purpose;
- (3) the statute must be the least restrictive among all equally effective options;
- (4) the importance of public interest and the degree of infringement are balanced on a relationship of proportionality.¹²⁶

The "valid purpose" condition requires that the governmental action be legitimate. This standard is similar to the ends analysis of the rational basis review of the U.S. Supreme Court.¹²⁷ The "least restrictive" prong requires that the means used by the state to achieve the aforementioned end should not be excessive or restrictive. This standard is similar to the means-ends analysis in judicial review of the U.S.¹²⁸ The centerpiece of the proportionality test is the balancing standard. The balancing standard, also called the narrow proportionality standard, indicates that public interests that can be achieved by the infringement of basic rights are only constitutional if the public interests outweigh those rights.

This balancing standard gives the Constitutional Court a wide range of discretion.¹²⁹ No constitutional provision or constitutional principle offers objective prices or valuations of public interests and basic rights; the Court itself is left to make those calculations. In almost every constitutional case, there are two conflicting political positions, and the Court must choose one position or the other. To make this determination, the Constitutional Court must seriously account for political considerations. Therefore, the constitutional adjudication is necessarily political.

In addition to the internal political nature of the Constitutional Court, the political environment around the Court also requires the Court to be a political agent. The next section will elaborate this point.

¹²⁶ *Id.*

¹²⁷ See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 512-16 (5th ed. 2005).

¹²⁸ See *id.* at 516-23.

¹²⁹ For anti-balancing critiques, see, e.g., Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *HASTINGS L.J.* 711 (1994); Jed Rubenfeld, *The First Amendment's Purpose*, 53 *STAN. L. REV.* 767 (2001).

B. *External Forces Affecting The Constitutional Court in Politically Difficult Cases*

1. Diversified Society after Democratization

It was a critical moment of modern Korean history when South Korea's military regime collapsed in 1987 after three decades. The aforementioned People's Protest of June 1987 was an especially significant signal of democratization, the idea that the authority of political power should be based on people who enjoy political freedom.¹³⁰ By this glorious revolution, Korea ended military dictatorship by demolishing the political structure of military government. By changing the terms of the presidency and the system of presidential election,¹³¹ Korea was finally a truly democratic country. Therefore, it is extremely important to understand how the democratization process changed the political structure.

The progress toward democracy in Korea can be understood as the change of political structure. Before the People's Protest of June 1987, the President was selected indirectly by members of the military government.¹³² All kinds of political matters were controlled by the government. There was an authoritarian regime on the top of the political hierarchy. This regime was in the hands of a small number of members in military government. Political participation by various political powers and groups was almost impossible. However, after the People's Protest of June 1987, Korea started to experience a radical change in political structure. In the process of democratization after the death of military government, it was possible for various political powers to participate in politics. This is because the government did not have the power to unilaterally control political matters any more. The successful actors in the Protest, the people and other political groups, constructed civil society, an ideal political field, in which they formulated public opinion and reflected it in the political process. As democratization developed in Korea, various political powers vigorously participated in political process. For example, labor, feminist and environmental movements all raised their voices in the political process. The decentralization of political powers dispersed opportunities to influence political opinion.

Likewise, after democratization, Korea has experienced the establishment of a civil society where political discourse takes place without any government intervention. Decentralization of political power has transferred political power from a centralized group to various social

¹³⁰ Rhee, *supra* note 117, at 11.

¹³¹ See, e.g., JOHN KIE-CHIANG OH, KOREAN POLITICS: THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT 87-102 (1999); Ahn, *supra* note 1, at 74.

¹³² ECKERT ET AL., *supra* note 103, at 380-84.

groups and has been the most critical change that has resulted from the democratization in Korea. As more political powers have had opportunities to participate in politics through the process of democratization, Korean society has become more complex and diversified. Since these various social groups hold multifarious views on social matters, it was natural for a democratizing society to reveal different ideas and interests as much as possible.

2. The New Spectrum of Political Ideology

Prior to the 1990s, before the start of democratization by the Protest, it was absolutely impossible to express various political ideologies in political discourse. The existence of North Korea and the experience of the Korean War blocked any deep consideration and discussion on political ideologies.¹³³ Under the cold war structure, South Korea had faced North Korea, which had a political system based on an opposing ideology, communism. In addition, due to the Korean War, it had been taboo to express any kind of progressive ideology, such as the labor movement, which may be viewed as friendly to communism.

The progressive political powers were treated harshly by the government because they were seen as supporting the political regime of North Korea. Therefore, only conservative political ideology could be supported by the Korean government. This conservative ideology was supported by elite groups in the military government, which needed theoretical grounds to justify the political power of the existing military elite and to curb the new movements of radical political powers. Conservatism dominated Korean political discourse for a long time.¹³⁴

After the People's Protest of June 1987, the government lost control of the country's political discourse. As people successfully demolished the absolute political power of conservative groups, various political ideologies, including progressive ones, appeared. Roughly 20 years after the Protest, Korea has a widened spectrum of political ideology, which even includes left wing political parties representing radical socialism.¹³⁵

For example, the victory of the presidential candidate Roh Moo-Hyun can be understood as the triumph of left wing political powers in Korea. In the 16th presidential election of 2002, Roh defeated the conservative presidential candidate, Lee Hoi-Chang, a former Supreme Court Justice.¹³⁶ His victory was possible because of his progressive

¹³³ Kuk Cho, *Tension Between The National Security Law And Constitutionalism In South Korea: Security For What?*, 15 B.U. INT'L L.J. 125, 126-27 (1997).

¹³⁴ *Id.*

¹³⁵ See generally Chan Jin Kim, *Korean Attitudes Towards Law*, 10 PAC. RIM L. & POL'Y 1 (2000).

¹³⁶ Barbara Demick, A "Lincoln" Climbs to Top in Elitist Korea, L.A. TIMES,

image. He appealed to Korean people who needed more progressive policies to complete the process of democratization. His various social plans led to the advent of a left-wing government and a widened ideological spectrum. In sum, political ideology played a pivotal role in the political process.

In addition, the Democratic Labor Party (DLP), which emerged as the representative leftist party in Korea, actually has political power in the government.¹³⁷ This leftist political party succeeded to gain 10 seats in the general election of 2004.¹³⁸ As a result of this election, the DLP became the third largest party in the National Assembly. It was the first time that any labor party had a strong and independent power to effect the normal political process in modern Korea. Although the DLP obtained just five seats in the general election of April 9, 2008,¹³⁹ the Labor Party, through cooperation with United Democratic Party, the previous leading progressive party, still exercises political power.

This political situation reveals that Korean society holds diverse ideological orientations and that political ideology becomes significant in measuring the political situation. In addition, the advent of various political ideologies results in frequent conflicts between opposing political powers. The best example was the impeachment case of President Roh. Conservative and progressive ideologies produce numerous political confrontations. These hard cases usually cannot be solved with political discourse or compromises. These impasses led to the Constitutional Court's involvement in political issues.

3. The Era of Interest

In Korea, economic growth preceded political progress. The military government focused on economic development as a way to minimize the people's concerns about such an authoritarian regime. Industrialization had been successfully developed under the control of the market by the military government.¹⁴⁰ However, as industrialization proceeded, various economic interest groups emerged. Although these interest groups were too weak to raise their voices under the military government, they had a strong potential for growth as political powers.

As Korea achieved a spectacular economic growth, various social problems appeared. Wealth gaps between the rich and the poor, and

Dec. 20, 2002.

¹³⁷ Kim, *supra* note 135, at 20-22.

¹³⁸ Mike Weisbart, *New Assembly Will Be Young, Inexperienced*, THE KOREA TIMES, Apr. 11, 2004.

¹³⁹ Ji-Hyun Kim, *Ruling Party Gains Assembly Control*, THE KOREA HERALD, Apr. 10, 2008.

¹⁴⁰ CUMINGS, *supra* note 103, at 351.

between the urban and the rural emerged. Various classes of people were formulated by the unequal distribution of wealth. People who believed that they were isolated from economic growth and its fruits started to form interest groups and show their discontent regarding the economic growth.

In addition, as Korea developed democratization after the Protest, interest groups free from the control of the military government actively expressed their positions. Finally, interest groups began to participate in the normal political process. Since these groups were usually made up of the classes that were suppressed and discriminated against by the government and existing economic hegemony, they focused on how to challenge this domination. Therefore, these interest groups tried to create powerful organizations to affect the political process effectively.

There have been various newly emerging interest groups since 1990. Their goal has been to reflect their interests in the political process. Toward this goal, they transformed their interests into important political issues. By this process, various economic-political actors, such as labor unions, peasant unions, consumer protection groups, and environmentalists, began to argue for their interests to the government in the name of public policy.

For example, peasant unions severely protested against the government's free trade agreement with Chile in 2004 and the U.S. in 2006 and 2007.¹⁴¹ Because their opposition was serious, the government should now consider peasant unions' interests in the negotiation process. In addition, environmentalists organized opposition against the government's land reclamation project in Saemankum in 2003.¹⁴² The confrontation between the government and this organized environmental movement continued for a quite long time until the judiciary solved this problem.¹⁴³

Likewise, the advent of the era of interest groups has not only economic effects but also political effects. Because interest groups continually try to affect the political process to reflect their interests, their political power should not be neglected. In addition, just like political ideologies, interest groups formulate severe conflicts and politically hard cases. The unsolved political problems eventually may be resolved in the judiciary.

¹⁴¹ Duk-Kun Byun, *Thousands of Farmers Protest FTA*, THE KOREA TIMES, Dec. 29, 2003.

¹⁴² Hyo-Sik Lee, *NGOs Lose Court Battle Over Keeping Tidal Flats*, THE KOREA TIMES, Dec. 21, 2005, available at <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=108&oid=040&aid=000027799>.

¹⁴³ See Supreme Court of Korea, Decision of March 16, 2006 (2006 Du 330).

4. The Constitutional Court: Court of Politics

As Korean society has undergone democratization, ideological political powers and interest groups have raised their voices in the political process. Their active participation has successfully formed a diversified civil society. Also, their conflicting positions on specific issues have caused serious confrontation between them. These confrontations have, at times, deadlocked the normal political process. In these cases, it has become extremely difficult for the political process to solve these stalemates.

Eventually, these various political powers and interest groups have accepted the judiciary as an institution capable to solve such politically hard cases. Especially after the establishment of the Constitutional Court of Korea, which was born to be political and to solve political questions, every political power has tried to use it and to obtain its support. As time has progressed, all kinds of political question have been submitted to the Constitutional Court. The Court became the Agora of politics. In conclusion, the political situation has led to the advent of a political Constitutional Court.

IV. PROPOSAL: THE IDEAL MODEL OF THE JUDICIALIZATION OF POLITICS

The main purpose of this section is to draw an ideal picture of the judicialization of politics. Although the judicialization of politics is inevitable, this cannot justify every result of this phenomenon. The criticism that politics should be excluded from the court is nonsense, but criticism attacking the legitimacy of some particular examples of this phenomenon is noteworthy. Considering the different responses to the two aforementioned cases, it is evident that different evaluations of this phenomenon are possible. Therefore, to accept and encourage the judicialization of politics as a natural political phenomenon in a democratized constitutional state, it is important to determine which types of factors affect popular support. The following section points out the differences in the process and logic of the two aforementioned Korean cases that led to the difference in popular opinion. Then, the section will use these differences to propose a way to institutionalize a model of the judicialization of politics in constitutional adjudication that will be supported by the people.

A. *Rethinking Two Korean Cases*

1. Different Responses

The judicialization of politics by the Constitutional Court of Korea is an inevitable and natural phenomenon from the intrinsic political nature of the Constitutional Court and constitutional adjudication in Korea. Therefore, it is not reasonable to react hyper-sensitively to this phenomenon itself. However, it is also a logical fallacy to equate inevitableness with legitimacy in accepting the status quo. Criticism of

the judicialization of politics itself often misses the fundamental characteristic of constitutional adjudication and fails to suggest a workable alternative. Until the Constitutional Court is abolished, one must accept the judicialization of politics and find the way to improve this in the best way.

Although some scholars have been sarcastic about this phenomenon,¹⁴⁴ there are different reactions to the actual results of this phenomenon. As analyzed in section II, the general reaction of the presidential impeachment case contrasted with that of the capital relocation case, even though the Court aggressively participated in political matters in both cases. In other words, the judicialization of politics can be evaluated differently in each situation.

The respective decisions of the impeachment case and the capital relocation plan case showed different political orientations. The former, which restored President Roh to his office, was an approval of the dominance of the new progressive political power in Korea. On the other hand, in the latter case, the Court agreed with the conservative powers of Korea. The Court protected the interests and privileges that traditional powers have enjoyed through controlling of the capital, Seoul, which is the symbol of an economic and political hegemony.

The general public reacted positively to the Court's political intervention in the impeachment case. Even conservative powers, especially the opposing Grand National Party, respected the decision.¹⁴⁵ In addition, the media did not issue strong criticism. The decision was accepted universally, beyond political ideologies and orientations.

On the other hand, the reaction to the latter case was totally different. Although there were some attempts by conservatives to justify the decision, the majority of both progressive and conservative powers criticized it.¹⁴⁶ Commentators said that the Court abused its power and that it should have restrained itself from making the mistake of nullifying a project of such political and economic importance.

Considering that the decision of the former case was enthusiastically approved and that the latter case's decision was intensely criticized by the public, it is an urgent and important task to determine which factors causes such different responses.

¹⁴⁴ See, e.g., TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS—A COMPARATIVE VIEW* 273 (2003); STRONG, *supra* note 78, at 157; ALEC STONE-SWEET, *GOVERNING WITH JUDGES—CONSTITUTIONAL POLITICS IN EUROPE* (2000).

¹⁴⁵ Hyun-Jin Seo, *GNP Accepts Ruling, Uri, DLP Welcome It*, THE KOREA HERALD, May 17, 2004.

¹⁴⁶ Jeong-Ju Na, *Relocation Ruling Stirs Controversy*, THE KOREA TIMES, Oct. 22, 2004.

2. The Cause of the Difference

a. In the Logic: Manipulation

First of all, many constitutional scholars criticized the capital relocation decision because the Court did not provide any legal ground that was persuasive to the people of Korea. Many scholars have claimed that the Constitutional Court's manipulated the source of the constitution by recognizing the customary constitution. They argue that the Court arbitrarily created the customary constitution to supplement a weak decision with concepts not expressed in the written Constitution of Korea. Moreover, it was the first time that the Constitutional Court employed this unfamiliar concept in the Court's history.¹⁴⁷

Most critics of this decision start by asserting that in a nation under the civil law system, like Korea, it is absurd to put customary law before a statute.¹⁴⁸ Therefore, even if the concept of customary law is employed, it can only have the effect of supplementing a statute. The important thing is that customary law can be effective only as far as it supplements statutory law.

In addition, the Constitution does not contain a provision to accept this supplementary effect of customary law. Also, there is no constitutional provision that acknowledges any other sources of constitutional law outside the written Constitution of Korea. Thus, the decision of the Constitutional Court aroused suspicion from critics. Legal academics argued that the Court created the source of law in order to achieve a result for which there was no legal basis. In other words, the Court manipulated the source of constitutional authority to support its logic of the decision of the capital relocation case.¹⁴⁹ Furthermore, due to the Court's manipulation, it would be extremely difficult to change any evil law or system once established for a long enough time to be a customary law. Manipulation by the Constitutional Court has been a cause of severe criticism against the decision in capital relocation case.

However, it is also possible to find the manipulation of the Constitutional Court in the logic of the decision in impeachment case. Some scholars properly point out that the Court's legal analysis and logic are not clear in the impeachment case.¹⁵⁰ The Court ruled that, although President Roh violated the Constitution by breaking the election law, the severity was not grave enough for impeachment. The Court did not provide any legal explanation or justification at all of the meaning of

¹⁴⁷ Bang, *supra* note 62, at 156-57; Jung, *supra* note 60, at 274-78.

¹⁴⁸ Jung, *supra* note 60, at 274-78.

¹⁴⁹ Chong, *supra* note 18, at 515-16.

¹⁵⁰ *Id.*

“grave.”¹⁵¹

Manipulation occurred in both cases; therefore, manipulation alone cannot be the cause of the harsh criticism. Furthermore, considering various methods of constitutional interpretation, this manipulation can be understood as the realization of judicial discretion. Judicial discretion in interpreting the Constitution can be understood as another way to find the most adequate solution of a constitutional dispute. Even Justice Jeon Hyo-Sook, who dissented in the capital relocation case, asserted that the justices of the Court are given much discretion in interpreting the constitution.¹⁵² Therefore, manipulation itself, especially the adoption of the customary constitution by the Constitutional Court, cannot be the cause of the different responses to the two cases.

b. In the Process: An Opportunity to Know Public Opinion

Although the logic of the two cases commonly relied on the Court’s manipulation, the processes of the decisions of the two cases were totally different. When the Court struck down the impeachment motion of the National Assembly, the situation surrounding the case played a pivotal role in the Court’s decision. The main political power who led the impeachment movement expected the Court to rule in its favor, progressive political groups showed unexpectedly strong and effective resistance. In addition, more people started to participate in this resistance movement.

At first, the younger generation led this resistance. However, as the unstable political situation continued, the general public also participated in street protests and organized resistance actions. Finally, this political situation affected the result of the April 15, 2004 general election. In the general election, which was regarded as a referendum on the impeachment action, the people of Korea showed an absolute approval of President Roh and his policies. The election was held between the motion of impeachment and the expected date for the Court to decide the impeachment case. Even if the Constitutional Court did not fully explain and justify the logic of this decision in legal terms, the opportunity to find public opinion and to reflect it in the decision could justify the result of decision, in favor of the President, beyond any defect of decision.

In stark contrast, it is impossible to find any reflection of public opinion in the decision of the capital relocation plan case. In this case, there was no referendum process to collect public opinion before the Court’s decision. The Constitutional Court did not have an opportunity to learn the view of the people in this case. Of course, it is harsh to blame the bad luck of the Court compared to the impeachment case; however, there was also no effort for the Court to investigate public opinion

¹⁵¹ See Lee, *supra* note 4, at 425 (justifying this attitude of the Court).

¹⁵² 2004Hun-Ma554, 566, *supra* note 6, at 7(A).

regarding the Roh government's capital relocation plan. Court instead relied on the new source of constitutional law to reflect its own point of view on the matter.

It is natural that a decision by the Court based on public opinion will obtain people's approval. Therefore, the cause of different responses to the aforementioned cases lies in whether the Court's decisions reflected public opinion. Although the Court uses various theories and interpretation methods that are manipulations and have weak grounds for justification, if the Constitutional Court makes a decision which truly reflects people's opinions, it is easily approved as a good decision.

3. The People and Constitutional Adjudication

As discussed in section III, the Constitutional Court of Korea and the constitutional adjudication model have a political nature, and people and public opinion are the most significant factors in justifying the existence and activities of the Court. Although it is evident that political powers should not interfere with the Constitutional Court in order that the Court maintain judicial independency, in the difficult political cases the Court should not hesitate to interact with political field.¹⁵³ In these situations, the matter is indiscernible from politics. The only practical ground to justify the Court's decision is the people's approval, not any complex constitutional theory or sophisticated legal term focusing on the logical matter of decision.¹⁵⁴

Considering the political nature of constitutional adjudication, as evidenced by these two cases, it is more important that the Court finds a better process to acknowledge and confirm public opinion on the given issues than it is to establish the logic of constitutional discourse in the decisions. Although judicial discretion of the Court is inevitable in such hard cases,¹⁵⁵ to be justified, that discretion should be exercised within the limits of public opinion.

The Constitutional Court showed the culmination of the intertwining of the law with politics in the impeachment case. In this highly political case, the Court made a legal decision by absorbing the product of politics and fusing it into legal terms. It is evident that the decision should be praised for reflecting public opinion, and above all, keeping the basic principles of the Constitution and constitutional adjudication that put people foremost. The Constitutional Court in constitutional adjudication should investigate and reflect what people

¹⁵³ Gregory M. Jones, *Proper Judicial Activism*, 14 REGENT U.L. REV. 141 (2001-02).

¹⁵⁴ See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005).

¹⁵⁵ H. L. A. HART, *THE CONCEPT OF LAW* 132 (2d ed. 1994).

want.

Various political groups have begun to seek a solution for numerous political questions since the establishment of the Court. There are criticisms that this phenomenon is an example of immature democratization. In a matured democratic society, this kind of political conflicts can be solved in the process of normal politics but adjudication. However, the Constitutional Court of Korea is also a part of the normal political process. It was established to protect people's rights and interests in the normal political process, not by radical social renovation, such as revolution. Therefore, the fact that constitutional adjudication works actively shows that Korea is approaching the completion of democratization, in which contentious interests can be adjusted by discourse.

Facing political deadlock from conflicting political ideologies and interests, the decision of the Court became a prize for one party in the contest of politics. In the contest of politics, the standard of review should be response of the audience, in this case, the Korean people. In this situation, the Constitutional Court as a governmental institution should settle political matters by reflecting public opinion.

B. *The Way to Know Public Opinion*

1. In Two Korean Cases

It may have been a matter of luck that the Court was able to realize the public's attitude toward the impeachment before it made a decision on that matter. However, the Court should be praised because it properly used this luck. It skillfully responded to the highly polarized political situation. The Court decided the issue with a method that consists of both legal and political consideration. In order to be impartial, the Court relied on the ultimate source of politics, the people. For this reason, the party that lost could not resist the decision. Therefore, although the legal argument was not coherent enough to persuade relevant political powers, there was no major criticism of the decision after the Court released it.

However, it is impossible to expect that the Court will have an opportunity to know public opinion regarding relevant issues before it decides as the Court did in the impeachment case. In addition, in the era of the judicialization of politics, the Court faces politically difficult cases, which cannot be solved without considering politics. The Court might fail to solve the political question properly if it does not consider the politics of the problem. In the capital relocation case, the Court failed to obtain public approval of its decision. The main problem was that the Court did not know public opinion and how to reflect it.

It is important to find what kinds of mistakes the Constitutional Court made in recognizing and reflecting public opinion in the capital relocation case. By checking the faults in the bad example of the judicialization of politics, a solution for the way the Court responds to

politically hard cases can be proposed.

First of all, the Court made a serious mistake in its failure to consider President Roh's campaign promises. By this, the Constitutional Court voluntarily gave up the opportunity to confirm and use public opinion in making a decision. When Roh Moo-Hyun ran for President in 2002, he made a pledge to relocate the capital from Seoul to another location. His intentions were to promote the equal development of other areas of Korea and to solve the social problems of the overpopulated city of Seoul. The people's selection of Mr. Roh as the President of Korea can be understood as the people's approval of his pledge. This pledge was one of the biggest issues during election.

In addition, the new government of President Roh concentrated on this pledge and regarded it as the primary task of the government as soon as he was inaugurated. Finally, after various public hearings and governmental investigations on how to build the administrative capital, the government made a bill on the establishment of the new administrative capital. This process was based on the people's approval of the pledge in the presidential election.

The result of the presidential election of 2002 was the best material for the Constitutional Court to use in deciding this case. However, the Court did not use this given information. The Court did not even address the matter of the pledge in the decision. Of course, it can be said that it would have been improper to guess public opinion from the result of the previous presidential election.¹⁵⁶ There was a time gap between the election and the new act. People's approval of the pledge is too abstract to be used as approval of any specific plans of the new government.

The important matter is that the Constitutional Court did not care about the public opinion at all. Although it is understandable for the Court to differentiate public approval of the campaign pledge from the approval of the new act, it is extremely unreasonable for the Court to make no effort to investigate and determine public opinion on this issue. The only thing the Court did in this case was to create a new source of constitutional authority to justify its discretionary decision without considering public opinion. The Court did not even use any statistics to determine public opinion.¹⁵⁷

In that the Constitutional Court did not use given information as fully as possible, nor did it try to find information by itself, the Court failed to make a decision that reflected public opinion and ultimately to obtain people's approval. However, it can be asked how the Court should find public opinion. Is it reasonable to ask the Court to collect and follow

¹⁵⁶ *Bill for New Administrative Capital*, THE KOREA TIMES, Dec. 9, 2003.

¹⁵⁷ A poll showed that about 65 percent of those asked opposed to the governmental plan. *Controversy Rages over Relocation of Capital*, THE KOREA HERALD, Jun. 16, 2004.

the result of public polls whenever it makes decisions?

In the situation where public opinion as found through deliberative democratic process is unclear, the Constitutional Court should seek to find public opinion.¹⁵⁸ However, it is dangerous for the Court to follow the most recent result of a poll because the result sometimes lacks serious deliberation on the issue and can be manipulated by the polling methods. The simple collection of people's preference on the issue cannot reflect various points of view on the issue from diverse political powers.

Therefore, the best way to learn public opinion is for the Constitutional Court to ask the political field to show its attitude on the issue through the normal political process. This does not mean that a referendum is needed whenever the Court faces a politically hard case. Instead, it means that the Court should have a chance to know about the political environment around the issue. Although the law, the object of the case, is a product of the political process, to achieve people's approval of the law, it is necessary for the Constitutional Court to know real public opinion, which can be neglected in the process of the National Assembly. For a better decision to reflect real public opinion, the Court must engage in its own analysis of the political landscape to find public opinion on issues.

2. Field Trip: Modified Forms of Decision

In constitutional adjudication, the Court has a duty to review laws by using public opinion. People's opinion made by deliberation in political process should be the standard of review in constitutional adjudication because the people's opinion is the ultimate ground to justify the constitution. If the law provides relevant material to show that it reflects deliberated public opinion, then the court should find and use those materials in adjudication. If it is difficult for the court to confirm public opinion because of lack of information, the court should ask the political field what the public opinion on the issue is.

In principle, it is desirable to know public opinion by a national vote, a referendum on the issued law. This suggestion is not practical because the social cost of a referendum is too high in the era of the judicialization of politics, in which numerous political questions are sent to the court for solution. Alternatively, the court can ask the political field to reveal the evidence showing public opinion. In the situation where it is suspicious whether or not the law is based on public opinion, it is proper for the court to ask the political field to make a deliberative political process regarding the law. The court can then make a better decision which reflects public opinion and cannot be refused by the political field.

¹⁵⁸ See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1996); JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (2002); JON ELSTER, *DELIBERATIVE DEMOCRACY* (1998).

Although this process will take time and incur costs, the interaction between the court and the political field to reflect public opinion in law is the best alternative to a referendum.

Generally, the Court can only release its opinion by declaring the law constitutional or unconstitutional.¹⁵⁹ Under this system, it is impossible for the court to make a non-conclusive decision which leads another political process to confirm public opinion on the issue. However, under the system of constitutional adjudication of Korea, the Constitutional Court has used several “modified forms of decision.”¹⁶⁰ These forms can make the decision of the Court non-conclusive and build a new stage of political deliberation.

Although only two general forms of decisions—decisions declaring a law constitutional or unconstitutional—are accepted by Article 45 of the Constitutional Court Act, the Constitutional Court of Korea has continually introduced and used several modified forms of decision. It is because the Constitutional Court acknowledged early on that two simple forms of decisions are not sufficient to reflect public opinions in decisions in various political questions. The Court imported the modified forms of decision from the constitutional adjudication system of Germany to respond to this situation.¹⁶¹ The modified forms of decision are “limited constitutionality,” “limited unconstitutionality,” and “nonconformity to the Constitution.”¹⁶²

Basically, the Court decides only whether the requested law, statute or any provision of the statute, is constitutional. In addition, this decision should be made on the whole statute. In limited constitutionality or limited unconstitutionality decisions, the Court can decide that a part of a statute has an unconstitutional factor, requiring the political field to revise and supplement the questionable provision to better reflect public opinion.¹⁶³

Above all, the decision of nonconformity to the Constitution can cause an interaction between the political field and the Constitutional Court to reflect public opinion. Instead of simply invalidating the requested law as unconstitutional, the decision of nonconformity to the Constitution is used when new deliberation and legislation is necessary for the law to reflect public opinion. If the Court doubts whether the political field sufficiently takes a deliberative processes to find public opinion in

¹⁵⁹ VICKI C. JACKSON & MARK V. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 551-54 (2d ed. 2006).

¹⁶⁰ THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 57-61.

¹⁶¹ Yang-Kyun Kim, *The Modified Forms of Decisions in the Constitutional Court*, 25-1 PUBLIC LAW (*GONGBUBYEONGU*) 215, 217 (1997) (available only in Korean).

¹⁶² THE CONSTITUTIONAL COURT OF KOREA, *supra* note 19, at 57-61.

¹⁶³ *Id.*

making a law, it can ask the political field to deliberate on the issue again by this form of decision. This form does not decide whether the law is unconstitutional or constitutional, it merely suspends the application of the law until the political field finds public opinion to support the law.

Some assert that it is a breach of duty for the Constitutional Court to use this form of decision to throw the problem back to the political field without making a conclusive decision.¹⁶⁴ According to these critics, this form of decision just invokes political chaos. In spite of these criticisms, most constitutional lawyers and scholars approve of modified forms of decisions and believe that their use has successfully solved political problems in the constitutional adjudication system of Korea. The Court uses these modified forms of decisions frequently.¹⁶⁵ In addition, there are examples where the Court and political field made a better law in terms of reflecting public opinion by using the decision of nonconformity to the Constitution.¹⁶⁶

These modified forms of decisions help the Court interact with the political field and create better laws reflecting public opinion. Where the Court has to solve various political questions and persuade society by its decision, knowing public opinion on the issue is the most critical factor.

V. CONCLUSION

As the authoritarian military regime of South Korea fell after the People's Protest of June 1987, Korea introduced a special institution for constitutional adjudication. Since the Constitutional Court of Korea was established in 1988, it has successfully contributed to the development of constitutional democracy by confirming the values of significant basic rights. However, the Court has often faced collective opposition and harsh criticism from political and social powers who are not satisfied with its decisions. In 2004, Korean politics and the Constitutional Court of Korea experienced the most politically controversial cases ever.

The first case was the impeachment case of President Roh Moo-Hyun's impeachment in 2004. In December 2003, President Roh made a public announcement that people should complete the progressive civic revolution by voting for the ruling party in the 2004 April general election.

¹⁶⁴ Seung-Ju Bang, *Problems of Decisions of Nonconformity to the Constitution*, 13-3 CONSTITUTIONAL STUDY (*HUNBUBHAKYEONGU*) 50, 50-52 (2007) (available only in Korean).

¹⁶⁵ Ju-Hwan Kim, *Decision of Nonconformity to the Constitution*, 11-2 CONSTITUTIONAL STUDY (*HUNBUBHAKYEONGU*) 503, 503-05 (2005) (available only in Korean).

¹⁶⁶ See, e.g., Constitutional Court of Korea, Decision of Sept. 8, 1989 (88Hun-Ga6); Constitutional Court of Korea, Decision of Sept. 28, 1995 (92Hun-Ga11); Constitutional Court of Korea, Decision of Mar. 27, 1997 (95Hun-Ga14).

Opposition parties accused President Roh of violating the Public Official Election Act of Korea, which prohibits public officials from intervening in elections. Finally, his opposition passed an impeachment motion against him in the National Assembly on March 12, 2004. According to the Constitution of Korea and the Constitutional Court Act, the President shall be suspended from his office until the Constitutional Court of Korea makes a final decision on the impeachment case.

On May 14, 2004, the Court held that the impeachment motion of the National Assembly was improper and unconstitutional. Consequently, President Roh recovered his chair. Although the Constitutional Court of Korea held that the President violated the Constitution and the Public Official Election Act of Korea, the Court said that this infringement was not grave enough to impeach the President.

During the process of impeachment adjudication by the Constitutional Court, the opinions among lawyers were divided. It seemed extremely difficult to decide upon one reasonable interpretation of the relevant provisions of the Constitution and Public Official Election Act. The divided opinion of legal professionals showed that it would be difficult to solve this impeachment case by pure legal reasoning. Consequently, the key to solving this difficult legal case was the observation of the political situation around the Roh government and the impeachment process.

Understanding the confrontation between conservative and progressive political power was the key to solving this political stalemate. As progressive political powers showed an organized resistance against the conservative powers' attempts to curb the Roh government and restore political hegemony, many people participated in social activities to support President Roh. Finally, this political situation affected the result of the April 15, 2004 general election. The general election, which was regarded a referendum on the impeachment, was a victory for President Roh's Uri Party.

Because people showed their opposition to impeachment by the result of the general election, the Court could not help considering political circumstances and recognizing the victory of progressive power in Korean politics. By the decision of the Court, President Roh regained his power.

In facing this purely political matter, the Court concluded that it is its duty to solve political questions and protect constitutional democracy. The Court started to think that it is natural for the Court to intervene in political matters. It was advent of a new agenda for the Constitutional Court, the judicialization of politics.

This agenda was confirmed again in the capital relocation plan case. In the 2002 presidential election, candidate Roh Moo-Hyun pledged that he would relocate the capital from Seoul to another location to promote equal development of nation. Although his government passed a

bill for “the Special Act on the Establishment of the New Administrative Capital,” opposing political powers filed a constitutional complaint.

The Constitutional Court ruled the Act unconstitutional on October 21, 2004. The majority opinion held that under the customary constitution, Seoul’s status as the capital is protected as a constitutional principle even though it is not written in the Constitution. According to the Court, because the location of the capital is a part of the Constitution, the government should have followed constitutional amendment process.

Due to the new concept of the customary constitution, which was adopted by the Court for the first time in the constitutional history of Korea, serious debates among lawyers and legal professors ensued. Most critics pointed out that under the present legal system of Korea which has a written constitution, it was improper to employ this unfamiliar concept in such a significant case related to the national destiny. In response, the political field reacted to this decision by preparing an alternative plan to build an administration-centered city.

These two cases are understood as the Constitutional Court’s opening of a new era of the judicialization of politics by actively participating in political debates. The impeachment case was a typical political matter, in that entrenched disputes between the President and his opponents are naturally political. The capital relocation case was a political matter because there was a political conflict between the conservative powers, who wanted to maintain the political and socioeconomic hegemony of Seoul, and the progressive powers, who wanted to demolish L’Ancien Regime. By the decisions in these two cases, the Court obtained people’s approval as to the role of the Court.

As long as the Court participates in political conflicts, there is a strong possibility that the Court will be a useful tool of political powers; therefore, many people are worried about the judicialization of politics. However, the judicialization of politics is a natural and inevitable phenomenon in a democratically developed political system.

First of all, the Constitutional Court itself was born by the need for a special institution to review political questions. The centerpiece of the Constitution of Korea of 1987 was the protection of basic rights. The Constitution was created as a result of the People’s Protest of June 1987 against the military government. To protect people from dictatorship by guaranteeing basic rights, the new Constitution focused on providing constitutional provisions which can effectively secure the political freedom of the people. Finally, in an effort to protect basic rights, the parties’ compromise led to the establishment of the Constitutional Court of Korea on September 1, 1988.

The function of the Court also shows its political nature. The procedure of appointing the nine justices of the Constitutional Court is political. According to the Constitution of Korea, three justices are nominated by the President, three by the National Assembly, and three by

the Chief Justice of the Supreme Court. The fact that most of justices are selected by other political branches causes justices to have a close relationship with the political field. In addition, because the appointment requires political discourse, parties make compromises or tradeoffs over appointments with deep political consideration. To overcome the biggest weakness of the Constitutional Court, counter-majoritarian problem, the Court becomes political, in that it seeks to reflect public opinion. In addition, the Court's proportionality test, the most frequently used standard of review in Korean constitutional adjudication, shows the political nature of the Court. The balancing standard of the proportionality test gives a great deal of discretion to the Court and causes it to consider political situations.

In addition to the internal political nature of the Constitutional Court, the political environment around the Court also has caused the Court to be a political agent. By the People's Protest of June 1987, Korea ended its military dictatorship and demolished the political structure of the military government. The people struck down the existing political hierarchy under the authoritarian regime. It became possible for various political powers to participate in politics because the government no longer had the power to unilaterally control political matters. Finally, the decentralization of political power, caused by the growth of various social groups, is the most critical factor in the democratization in Korea.

As more political powers had opportunities to participate in politics as a result of democratization, Korean society became more complex and diversified. Since these various social groups were equipped with multifarious standpoints on social matters, it was natural for a democratizing society to reveal different ideas and interests. Therefore, various political ideologies and interests that had been suppressed through the military dictatorship started to emerge. Because Korean society experienced diverse ideological orientations, political ideology has become significant in measuring the political situation. In addition, the advent of various political ideologies results in frequent conflicts between opposing powers. These difficult political cases were brought to the Court for solutions.

Also, as various economic interest groups emerged during industrialization, various interest groups began to raise their voices in the political process. Because interest groups continually try to affect the political process, just like political ideologies, interest groups tend to create politically hard cases. These groups also turn to the judiciary for solutions.

Finally, due to the political nature of the Constitutional Court and political situations surrounding the Court, a wide variety of political question started to be submitted. Through the inevitable judicialization of politics, the Court became the Agora of politics. However, there are different reactions to the actual results of the judicialization of politics.

For example, a general public reaction to the impeachment case was to welcome the Constitutional Court's intervention with politics and the stabilization of politics. On the other hand, the reaction to the decision in the capital relocation case was to criticize the Court for abusing its power. Many felt that it should have restrained itself from making a huge mistake nullifying a national political and economic project.

Many constitutional scholars criticized the decision in the capital relocation case because the Court did not provide legal grounds sufficient to persuade the people of Korea. Most of them have pointed out that the defect of this decision lies in the Constitutional Court's manipulation of the source of constitutional authority by recognizing the customary constitution. However, the Court also manipulated the logic of the decision in the impeachment case by not providing any legal explanation or justification of the meaning of "grave" in the presidential impeachment case.

Although the logic of two cases commonly relied on the manipulation by the Constitutional Court, the situations in the processes of decisions of two cases were totally different. When the Constitutional Court struck down the impeachment motion of the National Assembly, it was able to discern public opinion due to the intervening result of the general election. On the other hand, it was impossible to find any reflection of public opinion in the decision regarding the capital relocation plan. In this case, the Court did not have any opportunity to know the views of the people. Therefore, the cause of different responses to the two aforementioned constitutional cases lies in whether the Constitutional Court reflected public opinion into its decisions.

It was a matter of great luck that the Constitutional Court was able to realize public attitude toward the impeachment before it decided the matter. The Court, however, cannot enjoy this luck in every case. It is important to find a way for the Court to respond to politically hard cases properly in the era of the judicialization of politics.

When public opinion, as found through the deliberative democratic process is unclear, the Court should ascertain public opinion. This does not mean that the Court should follow the most recent result of polls. The best way for the Court to know public opinion is for it to ask the political field to show its attitude on the issue through the normal political process. For a decision that better reflects real public opinion, the Constitutional Court justly requires more sophisticated deliberation by the political field to find public opinion.

To do this, the decisions of the court should not be conclusive, because conclusive decisions cut off political debate. Under the system of constitutional adjudication of Korea, the Constitutional Court has used several "modified forms of decision." These modified forms of decisions can help the Court interact with the political field to decide cases in a way that reflects public opinion.