

Political Question Case of Korean Constitutional Court for Asia Peace —focusing on Case Concerning the Presidential Decision to Dispatch Korean National Armed Forces to Iraq—

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Korean Constitutional Court has declared 555 Constitutionality of Law cases (This type of "Constitutionality of Law" case refers to the constitutionality of statutes cases brought by ordinary courts) unconstitutional and accepted 326 constitutional complaints from September 1, 1988 to July 31, 2010. That is to say, a cumulative total of 19,411 cases were filed, out of which 18,749 were disposed of. Among the disposed cases, 555 statutes and regulations were struck down, and 326 constitutional complaints alleging infringement of basic rights by exercise or non-exercise of governmental power were upheld. And yet, unfortunately, there are few cases on the Right to Live in Peace.

In this article, this writer aims to provide a brief introduction to historical overview of Korean Constitutional Court system and decision case concerning the presidential decision to dispatch Korean National Armed Forces to Iraq made by the Korean Constitutional Court on the political question, especially related to the Right to Live in Peace over more than twenty years. The relatively short history of the Court may not satisfy the maximum protection for human dignity but this writer sincerely hopes that this essay would be a stepping stone for promoting a better understanding of the Korean Constitutional Court and constitutional adjudication and ultimately bringing the Constitution closer to Korean lives.

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I . Introduction

Traditionally Koreans have followed Confucian political philosophy for centuries. Such does not contain the modern concept of the 'rule of law'. Confucius believed that kings and government officials should rule with integrity. The high integrity of rulers was emphasized as more important than establishing a legal system upon which the relationship between rulers and people could be built.

The Constitution of the Republic of Korea has shown how the 'rule of man' has been replaced by the 'rule of law'. There have been nine revisions to the Korean Constitution since its adoption, seven of them concerning the presidency. The most recent amendment in 1987 established the peaceful transfer of political power by popular election. None are above the law, including former presidents. The rule of law is now accepted as an operating principle in the politics and administration of South Korea.

The present Constitution of the so-called Sixth Republic, the product of a bipartisan consensus in the wake of the June Democracy Movement in 1987, embodied several important moments in the development of constitutionalism in Korea. For instance, it improved upon the president-centered concentration of power, the anti-democratic presidential electoral system, and other problems of the political system under the pre-1987 authoritarian regimes, and provided for stronger protection for peoples basic rights. Especially, a European-style constitutional court was established as a venue of relief for infringement of basic rights, and the thus founded Constitutional Court engaged in active scrutiny of the constitutionality of statutes and constitutional complaints for the past nearly twenty years and played a decisive role in firmly establishing constitutionalism in Korea. The development and present structure of Korean constitutional adjudication, and the Court's achievements for the about twenty years after the founding are detailed in the accumulation of the Court's decisions.

Korean Constitutional Court has declared 555 Constitutionality of Law cases (This type of "Constitutionality of Law" case refers to the constitutionality of statutes cases brought by ordinary courts, i.e., any court other than the Constitutional Court) unconstitutional and accepted 326 constitutional complaints from September 1. 1988 to July 31. 2010. That is to say, a cumulative total of 19,411 cases were filed, out of which 18,749 were disposed of. Among the disposed cases, 555 statutes and regulations were struck down, and 326 constitutional complaints

alleging infringement of basic rights by exercise or non-exercise of governmental power were upheld. Constitutional adjudication took firm roots in the Korean constitutional system.

The drafters of the Constitution of the Sixth Republic in 1987 agreed that they must create a new, revitalized Constitutional Court, anticipating that the Principle of the Rule of Law will be accomplished via this Constitutional Court and that such accomplishment will bring a more democratic, free society. The Framers of the Constitution adopted, in addition to the Supreme Court, a new independently specialized court, based on the European Model, in order to fully protect the people's fundamental rights and effectively check governmental powers.

The functions of the Constitutional Court include deciding on the Constitutionality of Laws, ruling on Competence Disputes between governmental entities, adjudicating Constitutional Complaints filed by individuals, giving final decisions on Impeachments, and making judgments on Dissolution of Political Parties.

This article aims to provide an introduction to historical overview of Korean Constitutional Court system and decision of significance made by the Korean Constitutional Court on the political question, especially related to the Right to Live in Peace over more than twenty years. Into the bargain, this article also highlights the contributions Korean Constitutional Court has made to democracy and constitutionalism.

II . Historical Overview of Korean Constitutional Court system

Although the constitutional litigation system in Korea changed with each shift of regime, the Republic of Korea has had some form of a constitutional litigation or judicial review system.

The first constitution of the First Republic of Korea (1948-1960) gave the authority to review the constitutionality of legislation to the Constitutional Committee. The Constitutional Committee was composed of a vice president, five justices of the Supreme Court, and five members of the parliament. In its eleven-year history, the Constitutional Committee reviewed only seven cases, among which only two laws were decided unconstitutional.

The Second Republic of Korea (1960-1962) adopted the Constitutional Court system in place of the Constitutional Committee, a decision influenced by the success of the West German Constitutional Court. But the Constitutional Court of the Second Republic, although the Constitution at that time had provisions for it and the Constitutional Court Act was enacted, could not actually be established because of a sudden military coup d'etat which occurred on May 16, 1961.

The Third Republic of Korea (1962-1972) adopted the American style of judicial review system

as the Supreme Court was designated as the main protector of the constitution. Judicial review by the courts, encouraged by the successful record in the United States, was launched with the expectation that certain politicized issues would be subject to litigation. The courts had many opportunities to review the constitutionality of laws, but were very reluctant to declare a law unconstitutional.

Under the Fourth (1972-1980) and Fifth Republics (1980-1988), the Constitutional Committee was reinstated for the review of the constitutionality of laws. The Constitutional Committee didn't review any legislation during this authoritarian ruling at all. Unlike the previous Constitutional Committee of the First Republic of Korea, its jurisdiction was extended to impeachment and dissolution of political parties. In addition to lawyers, high officials and law professors with more than 20 years professional experience in legal matters were eligible for membership on the committee. Regrettably, the Constitutional Committee remained completely inactive and merely ornamental throughout its existence.

The latest constitution of the Sixth Republic of Korea (1987-present) adopted the Constitutional Court system. The Constitutional Court has been very active in exercising its authority to review the constitutionality of state actions, including state legislation. In addition to judicial review power, the Constitutional Court has vast authority to secure the constitutional system.

The adoption of the Constitutional Court system in Korea was not based on theoretical grounds but was a result of a compromise between political parties in existence at the time the constitution was being drafted. Those involved in the drafting of the constitution may have thought that the future activity of the Constitutional Court would follow that of its ineffective predecessors and hardly imagined the actual results its inauguration would bring.

Ⅲ. Case Concerning the Presidential Decision to Dispatch Korean National Armed Forces to Iraq

1. Background of the Case

The President of the Republic of Korea decided on October 18, 2003, to dispatch the Korean National Armed Forces to Iraq, upon consulting the National Security Council that is in charge of the establishment of policies concerning national security. The complainant filed the constitutional complaint in the capacity of a Korean national, seeking to confirm the unconstitutionality of the above decision on the ground that, inter alia, the decision of the President to dispatch the Korean Armed Forces to Iraq was in violation of Article 5 of the

Constitution of the Republic of Korea renouncing all aggressive wars.

2 . Summary of the Decision

The Constitutional Court, in a unanimous opinion, dismissed the constitutional complaint in this case as lacking the legal prerequisites to a constitutional complaint. Four of the Justices issued a concurring opinion. The summary of the decision is as follows.

(1) Majority Opinion of Five Justices

A decision to dispatch the National Armed Forces to a foreign jurisdiction is a complex and significant matter affecting the interest of the citizens and of the nation. As such, such a decision requires a determination of a highly political nature to be reached through the deliberation of various elements and circumstances including domestic and international political relations. Therefore, the judgment upon the question of whether or not a decision to dispatch the Armed Forces, such as the one challenged in this case, is in violation of the Constitution, including the question of whether the war in Iraq is a war of the aggressive nature that is against the international norms, should be rendered by the President and the National Assembly, which are elected and composed directly by the constituents.

The dispatch of the Armed Forces at issue in this case was determined by the President upon considering various elements concerning national interest as well as the justifiability of the dispatch, and subsequently secured the procedural justification under the Constitution and the applicable statutes by obtaining the consent of the National Assembly following the deliberation and the decision of the State Council.

Then, as long as the decision to dispatch the Armed Forces at issue in this case which requires a determination of highly political nature was made in observance to the procedures required by the Constitution and the applicable statutes, deference should be given to the judgment of the President and the National Assembly. The judiciary, which may obtain no more than limited information by its own nature, should thus abstain from reviewing such a matter solely under the judicial standard. The constitutional complaint in this case is dismissed.

(2) Concurring Opinion of Four Justices

The constitutional complaint system under the Constitution and the Constitutional Court Act is one of the remedies available to the individual citizens for the redress of their rights. Only those citizens whose constitutionally guaranteed fundamental right is presently and directly infringed by the exercise or non-exercise of the governmental power may file a constitutional complaint.

The complainant does not have a standing as he is not to be dispatched subject to the detachment decision at issue in this case, and, further, stands only in the capacity of a general citizen as he is neither presently nor scheduled to be in the military service. As such, although the complainant may have factual or indirect interest in the detachment decision at issue in this case, none of the constitutionally guaranteed fundamental rights of the complainant is presently or directly infringed by the decision.

Therefore, the complainant lacks self-relatedness to the detachment decision at issue in this case that is required as a legal prerequisite for the constitutional complaint. The constitutional complaint in this case is dismissed.

3. Holding

The constitutional complaint is dismissed.

4. Reasoning

(1) Overview of the Case and the Subject Matter of Review

A. Overview of the Case

The complainant, who is a Korean national, filed in such capacity a constitutional complaint on November 17, 2003, pursuant to Article 68, Section 1, of the Constitutional Court Act (Any person who claims his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court: Provided, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.). The complainant claimed that the decision to dispatch the Korean National Armed Forces to Iraq was unconstitutional, on the ground that the decision of the government of the Republic of Korea on October 18, 2003 to dispatch the National Armed Forces to Iraq was in violation of Article 5 of the Constitution of the Republic of Korea renouncing all aggressive wars, and, further, that dispatching soldiers to Iraq in particular was in violation of the provisions of the Constitution pertaining to national security and the duty to defend the nation, as the rank and file in mandatory service, unlike career officers and deputies with regular payment of salaries, did not get paid for their service in any practical meaning.

B. Subject Matter of Review

1) Subject Matter of Review

The constitutional complaint seeks to hold unconstitutional the 'decision of the National Security Council of October 18, 2003 to dispatch private soldiers to Iraq.' However, the National Security Council is no more than an advisory organization established under the Constitution and is not the entity that performs state action or exercises public authority such as detachment of the National Armed Forces at issue in this case. Even if the National Security Council did make such a decision or resolution, apart from the probability that such a decision would be presumed to be the one rendered by the President as the Commander-In-Chief, such a decision would be regarded as no more than internal decision-making within the state institution, such as the advice or suggestion of opinions to the President, and could not be deemed to be an act that would be legally binding or effective in itself.

The National Security Council is the advisory organization established by the Constitution for the President to consult in forming foreign policies and military policies concerning national security, and its resolution is not legally effective in itself as it is not binding. However, should the President have determined and publicly announced to dispatch the National Armed Forces with the advice and the resolution of the core international policy and military personnel, such a decision should be regarded as one rendered substantively by the President. Therefore, the subject matter of review in this case should be deemed to be the decision of the President to dispatch the National Armed Forces. This also conforms with the remedy the complainant seeks in this case.

Then, the subject matter of review in this case is the constitutionality of the 'decision of the President of October 18, 2003 to dispatch the National Armed Forces to Iraq(hereinafter referred to as the 'detachment decision at issue in this case').

2) Relevant Provisions of Law

The Constitution of the Republic of Korea(as revised on October 29, 1987)

Article 5, Section 1(The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.)

Article 10(All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm! and guarantee the fundamental and inviolable human rights of individuals.)

Article 60, Section 2(The National Assembly shall also have the right to consent to the declaration of war, the dispatch of armed forces to foreign states, or the stationing of alien forces

in the territory of the Republic of Korea)

Article 74, Section 1 (The President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act.)

Article 91, Section 1 (A National Security Council shall be established to advise the President on the formulation of foreign, military and domestic policies related to national security prior to their deliberation by the State Council.)

(2) Summary of the Complainant's Argument and the Opinions of the Relevant Parties

A. Summary of the Argument of the Complainant

1) Majority of the nations in the international community are in a position that the war in Iraq was waged by aggression. The decision at issue in this case to dispatch the Korean National Armed Forces to an aggressive war as such is in violation of Article 5, Section 1, of the Constitution of the Republic of Korea that "renounces all aggressive wars."

2) It is necessary to dispatch soldiers rather than officers or deputies as the dispatch of the National Armed Forces has been determined. This will disturb the peace of all those who currently serve the military and are scheduled to serve, and the parents whose children are currently in service, as the Constitution obligates all citizens with a duty to defend the nation, thereby infringing their right to pursue happiness.

B. Summary of the Opinions of the Relevant Institutions

1) Answer of the President, as the Chair of the National Security Council

The subject matter of review as stated in the constitutional complaint in this case is the decision of the National Security Council of October 18, 2003 to dispatch additional Armed Forces to Iraq. However, the decision of the National Security Council is no more than the advice required for decision-making internal to the state institution, and is not in itself an act causing legal effect upon the rights and obligations of the citizens. Therefore, the constitutional complaint filed in this case is unjustified as it lacks the legal prerequisites, as it seeks review upon a matter other than the exercise of governmental power within the meaning of Article 68, Section 1, of the Constitutional Court Act. Should the detachment decision of the National Security Council be deemed as an exercise of governmental power, such a decision does not presently or directly infringe the fundamental right of the complainant himself, rendering the constitutional complaint in this case unjustified in this regard as well.

2) Opinion of the Minister of the Ministry of Defense

(A) The decision of the President of October 18, 2003 to dispatch additional Armed Forces to Iraq, which is the subject matter of review in this case, constitutes no more than one step in the internal decision-making process of the state institution until the National Assembly consents to it, and does not in itself cause direct legal effect upon the citizens. Therefore, a constitutional complaint challenging such a decision is unjustified, lacking legal prerequisites.

(B) The detachment decision at issue in this case constitutes a so-called executive prerogative action, for (i) the above detachment decision is an exercise of state power undertaken by the President in his capacity as the head of the state or the head of the executive branch endowed by the Constitution; (ii) the above detachment decision is a determination of highly political nature borne out of consideration of such various domestic and international political situations such as its influence upon national interest, relationship with the allies, an amicable settlement of the nuclear situation in North Korea, and the solidification of the South Korea-U.S. alliance; (iii) should the above detachment decision obtain the consent of the National Assembly, it would be inappropriate for the Constitutional Court, which is not on par with the legislative branch in terms of democratic legitimacy to determine the constitutionality of the above decision; and, (iv) should there be a decision holding the above decision unconstitutional, there is no legal method to enforce such a decision. As the judicial review over an executive prerogative action or political question should be restrained, the constitutional complaint in this case is unjustified.

(C) The complainant has only an indirect and factual interest upon the above detachment decision, and does not have a direct legal relation to the infringement of the fundamental right claimed by the complainant. As such, the constitutional complaint in this case is unjustified, as it lacks self-relatedness.

(3) Determination of the Court

The Constitution endows the President with the authority to declare war and conclude peace along with the authority concerning the diplomatic relationship with foreign nations (Article 73: The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace.), and also with the authority to command the Korean National Armed Forces pursuant to the Constitution and the applicable laws (Article 74, Section 1). At the same time, however, the Constitution prevents arbitrary warfare or dispatch of Armed

Forces by mandating prudence in exercising the prerogative of supreme command of military by the President, by requiring the consent of the National Assembly in case of the declaration of war or the dispatch of National Armed Forces (Article 60, Section 2).

A decision to dispatch Armed Forces to a foreign nation as at issue in this case is a complex and significant matter not only affecting the life and the bodily safety of the individual soldiers who are dispatched, but ultimately affecting the interest of the citizenry and the nation, including the status and the role of the nation in the international community, the nation's relationship with the allies, and the national security issues. As such, a decision to dispatch Armed Forces requires a resolution of highly political nature based upon the consideration of total circumstances concerning domestic and international political relations, and upon the presupposition of the future and the establishment of the goals concerning a desirable stance of the nation in the future and the direction in which the nation should move forward.

Therefore, it is desirable that such a decision is to be made by the institution representative of the constituents that can be held politically responsible toward the constituents, by way of prudent decision-making through an expansive and extensive deliberation with the experts in the relevant fields. The Constitution in this vein endows such authority onto the President who is directly elected by the constituents and is responsible directly for the constituents, while authorizing the National Assembly to determine whether or not to consent to a decision to dispatch the Armed Forces, in order to ensure prudence in the President's exercise of such authority. Under the government structure of representative democracy adopted by the current Constitution, an utmost deference should be given to such a decision of highly political nature as this one rendered by the representative institutions of the President and the National Assembly.

Therefore, whether or not the dispatch decision at issue in this case is in violation of the Constitution, that is, whether such decision contributes to the world peace and human prosperity, whether such decision will ultimately benefit the interest of the citizenry and the nation by enhancing national security, and whether the war in Iraq is a war of aggression that is in violation of international norms, should be judged by the representative institutions of the President and the National Assembly, and may not be appropriately judged by this Court that is by nature in possession of no more than limited materials and information. Here, the judgment of this Court might not assertively be more right or correct than that of the President or the National Assembly; further yet, the judgment of this Court may not securely receive public trust over its judgment upon this matter.

The record indicates that the dispatch at issue in this case was determined by the President after consultation with the National Security Council with respect to the nature and the size

of the detachment and the duration of the station, based on the consideration not only of the justifiability of the dispatch but also of various elements concerning national interest such as the relationship with the allies for amicable settlement of the nuclear situation in North Korea, our national security, and the domestic and foreign political relationships; and subsequently that the dispatch decision at issue in this case was rendered with the consent of the National Assembly following the deliberation and the resolution of the State Council, thereby securing procedural justification pursuant to the Constitution and the relevant statutes.

The detachment decision at issue in this case is by its own nature a matter requiring a determination of highly political nature concerning national defense and diplomacy. As this decision has clearly been rendered following the procedures established by the Constitution and the relevant laws, the judgment of the President and the National Assembly upon this matter should be respected, while this Court should refrain from passing judgment upon this matter solely under judicial standards. Judicial self-restraint over the matters concerning diplomacy and national defense that require a resolution of highly political nature in other nations with a long tradition of democracy is also deemed to be in the very same vein. Although there may be concerns that such abstention of judicial review might leave arbitrary decisions intact, such decisions of the President and the National Assembly will ultimately be subject to the assessment and the judgment of the constituents through elections.

Then, as it is appropriate for this Court to refrain from judicially reviewing the detachment decision at issue in this case, with the exception that there is a concurring opinion of Justices Yun Young-chul, Kim Hyo-jong, Kim Kyung-il and Song In-jun, this Court in a unanimous opinion of the rest of the Justices decides to dismiss the constitutional complaint in this case. It is so determined.

5. Evaluation

A decision to dispatch Armed Forces to a foreign nation as at issue in this case is of highly political nature based upon the consideration of total circumstances concerning domestic and international political relations, and upon the presupposition of the future and the establishment of the goals concerning a desirable stance of the nation in the future and the direction in which the nation should move forward. As this Court decided above, the judgment of the President and the National Assembly upon this matter should be respected because this decision has clearly been rendered following the procedures established by the Constitution and the relevant laws.

Therefore, the Constitutional Court takes stance of judicial self-restraint over the matters

concerning diplomacy and national defense that require a resolution of highly political nature in other nations with a long tradition of democracy is also deemed to be in the very same vein. Then, it is appropriate for the Constitutional Court to refrain from judicially reviewing the detachment decision at issue in this case. However, as the Constitutional Court pointed out relevantly, there are concerns that such abstention of judicial review might leave arbitrary decisions intact. Accordingly, it is indispensable that the procedures established by the Constitution and the relevant laws should be observed. Keeping in mind that separation of power is merely a means for protecting basic right of people, a political question such as a decision to dispatch Armed Forces to a foreign nation is subject to review by the Constitutional Court when it directly involves a violation of fundamental rights of citizens

IV. Conclusion

The Constitution is the fundamental law that regulates the structure, organization and function of a state to protect people's liberties and rights and to check and control its power with reason. Since the late eighteenth century, modern constitutionalism has begun to take written forms in most countries and has successfully institutionalized those democratic values long sought for by the mankind: liberty and equality.

The role and status of the courts in the society are different in each country. The courts, especially the Supreme Court or Constitutional Court, play active roles and act as a policy-maker through their judgments in some countries. On the contrary, in other countries, the courts play very passive roles in that they frequently hide themselves behind the shield called judicial self-restraint in some politically sensitive cases. By and large, Korean judiciary has belonged to the second category until the advent of the Constitutional Court according to the Korean Constitution of 1987.

The Republic of Korea, with the start of the so-called Sixth Republic in 1988, the Constitutional Court was established as an integral part of the constitutional system. The Constitution of the Sixth Republic, based on the Korean people's deep enthusiasm for democracy, adopted a new constitutional justice system to safeguard the Constitution through special procedures for adjudication of constitutional issues.

The creation of the Korean Constitutional Court was the product of a political compromise between the ruling party, which expected to play an insignificant role like the previous constitutional committees, and the opposition party, which also had only vague hopes for its role. However, the people, reflecting on the past when constitutional adjudication under the Supreme

Court did not bring about any notable result, had high hopes for the new Court as an institution specialized in defending the Constitution. The Korean Constitutional Court was established in a mixed mood of hopes for the first system of active constitutional adjudication in Korean history and concerns for its ability to perform the constitutionally delegated duties.

The sudden appearance of the Korean Constitutional Court itself was stimulating enough to awaken the Korean judiciary from judicial passivism, and, furthermore, the fact that Korean Constitutional Court was much more active than expected and applauded by many Korean people for that, roused the general courts in Korea into activeness. In addition, the change in political situation in Korea strengthened this tendency; since the end of military regime and start of civil government in early 1990s, various changes in the Korean courts have been observed in many places.

The Korean Constitutional Court has laid down a number of important decisions regarding political question over about twenty years. The positive attitude of Korean Constitutional Court on a series of political questions could be one of the best examples for the change. Many Koreans gave a big hand to Korean Constitutional Court wholeheartedly, praising it as a manifestation of "judicial activism." The Korean Constitutional Court is now beginning to firmly establish itself as the last bastion of basic rights in the minds of the people. Koreans including Constitutional scholars and legal circles take pride in Korean Constitutional Court as a successful representative model in Asia through active contribution to protection of people's basic rights despite its limit. Therefore, Korean Constitutional Court should make every effort to secure the normative force of the constitution as the supreme law and guarding basic rights under it. Then Korean Constitutional Court can live up to Koreans as a last reliable resort to protection of people's basic rights.

In this article, this writer tried to cover the important case on the political question of the Korean Constitutional Court, especially focusing on Case Concerning the Presidential Decision to Dispatch Korean National Armed Forces to Iraq. The relatively short history of the Court may not satisfy the maximum protection for human dignity but this writer sincerely hopes that this essay would be a stepping stone for promoting a better understanding of the Korean Constitutional Court and constitutional adjudication and ultimately bringing the Constitution closer to Korean lives.

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