

Judicial Independence in Korea

– Past, Present, and Future–

June. 2008.

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I . Introduction

Fair and proper justice will be secured and the democratic fundamental order, liberty and right be guaranteed when the Judiciary makes fair judgment only based on the law in ruling cases without any outside influence; the court exercises its judicial power independently. In this regard, judicial independence would serve as a cornerstone of a modern democratic society.

The constitutions of many advanced or developing countries regard judicial independence as an important constitutional principle and provide institutional apparatus by which the independence can be secured. The Constitution of Korea also has provisions to guarantee judicial independence. However, as the history of many developing countries shows, the real challenge is not whether a constitution contains a provision for judicial independence, but whether the principle for judicial independence is actually implemented in reality.

Like many other developing countries, Korea had also been under long military or authoritarian rules and finally achieved democracy at the sacrifice of many people. Under the military or authoritarian regimes, judicial independence was often interfered by the strong executive powers, especially in a politically sensitive case. However, with the political democratization, the Korean judiciary has eventually gained the independence.

After discussing the meaning of judicial independence, I will introduce the history of the progress of judicial independence, covering from 1945 until today. In the following section I will present, as a judge, my own notion on the current status of judicial independence, and perspectives over the future of judicial independence of Korea.

II. The meaning of Judicial Independence

The concept of judicial independence came from "the principle of separation of powers for the check and balance among governmental branches." Therefore, it is generally accepted that judicial independence means that organizations and operations of the judicature shall be independent and separated from the administrative and legislative powers. But substantially it means that the judges shall make independent judgment without being restrained by any orders or directions in deciding specific cases. It may be said that judicial independence ultimately aims at the independence of trial or freedom of judgment.

In the past, judicial independence was to realize the democratic judiciary by excluding the despotic power or administrative judgment from jurisdiction. Therefore, judicial independence has its institutional significance in that it protects the judgment system where the final decision is made by courts independently from the influence of the administrative power or of an administrative body, and, as a result, it guarantees fair and impartial judgment system where judges make judgements only according to law and their conscience.

Nowadays, however, in democratic society based on a partisan politics, judicial independence has more significance, compared to the traditional society as mentioned above. In a partisan system, because the legislature and the executive administration tend to share common interests by means of one political party, the legislative branch is not in the best position to check the administration under the separation of power. This reality demands that the Judiciary, which is only non-political governmental branch, play a larger role to balance our system, by means of examining the orders, decrees, and specific actions of the

administrative power to check the abuse of its power, and to restrain the legislative power from legislating unconstitutional laws.

III. The History of Judicial Independence of Korea

- Focusing on the History of Amendment of the Constitution

1. Judicial system before 1st Republic

The modern judicial system was first introduced to Korea in 1895. Although there was a sophisticated judicial system, before then, the Judiciary and the executive branch were not separated and the executive branch carried out both administrative and judiciary functions. After Joseon Dynasty opened its door to Japan and the Western powers, radical reformers instituted Gap-O reformation. On December 12, 1894, King Gojong introduced the 14 articles of Hongbum, which was the first modern written Constitution of Korea. The following year, on March 25, 1895, Court Organization Act was promulgated. Thus for the first time, Korea adopted a modern independent judicial system in which the Judiciary was separated from the executive branch. However, the modernization was disrupted by the invasion and occupation of Japan.

2. Judicial System under the Constitution of First Republic

After Korea became independent from Japan in 1945, the Constitution of the Republic of Korea was drafted and adopted on the 17th of July 1948. The Original Constitution declared the separation of powers principle, providing independence of the courts, term and age limit, eligibility, and tenure of judges. Based on those provisions of the Constitution, Court Organization Act was enacted on the 26th of September 1949 and, thereafter, a modern judicial system began.

It may be said that the Original Constitution more firmly ensured judicial independence than any other constitutions in the world, except the Article 80 which specified that judges may be dismissed by the disciplinary measure. However, during that period, judicial independence was not guaranteed well, because of the dictatorship of then president Lee Seung-man who had control over the Judiciary. He jeopardized the judge's independent status by refusing to reappoint some judges when their 10-year-terms expired.

3. Judicial System under the Constitution of Second Republic

In the constitution of Second Republic rewritten by the 19th of April 1960, Article 78 and Article 81 were amended, and a new article providing constitutional court was inserted in Chapter 8. Article 78 in the Original Constitution prescribing the process of appointment of judges, had provided that the Chief Justice of the Supreme Court shall be appointed by the president. The Article 78 was amended; to set forth in Paragraph 1 of the article, "The Chief Justice and other Justices of the Supreme Court shall be elected by the electoral college consisting of members with qualifications for judges, subject to president's approval."; to set forth in Paragraph 2 of the article, "Detailed conditions with regard to the number of persons, structure, and the election of the electoral college prescribed in the forgoing paragraph, if necessary, shall be provided by laws."; and to set forth in Paragraph 3 of the article, "Judges other than the ones prescribed in Paragraph 1 are appointed by the Chief Justice with the consent of the Supreme Court according to the decision of Supreme Court Justices Council."

However, before the election of the Chief Justice and other Justices of the Supreme Court to be held, the military revolution on the 16th of

May 1961 broke out, and the election could not be held.

In addition, on account of discontent with the Constitutional Committee as a political negotiating institution under the Constitution of First Republic, Second Republic established the Constitutional Court as a judicial machinery which was provided in Article 83-3 and Article 83-4 of the Constitution. However, while structuring the court was being delayed, the constitutional regime was brought to a halt by May 16th military revolution and the Constitutional Court Act was suspended by Article 5 of supplementary provisions of Emergency Procedure Act.

The Constitution of the second Republic was very reformative in a way to guarantee judicial independence with respect to the appointment process of Chief Justice and other Justices, but unfortunately it was not effective for a long time due to the outbreak of the military revolution.

4. Judicial System under Emergency Procedure Act.

After May 16th military revolution, the revolution committee organized the Nation Rebuilding Supreme Committee, legislated and enacted Nation Rebuilding Emergency Procedure Act (Hereinafter “The Act”). In practice, the Act was perceived as equal as, or even superior, authority than the then Constitution in that the Constitution of Second republic took its force only to the extent that it was not in conflict with the Act. Under the judicial system under the Act, judicial administrative powers, including the right of personnel management of the judges were concentrated in the aforementioned Committee, and so judicial independence could not be secured firmly.

5. Judicial System under the Constitution of Third Republic

Repulsion against the system of power centralization under the Act,

caused systems guaranteeing judicial independence to be set.

The Constitution of Third Republic, which entitled the Supreme Court to adjudicate the constitutionality of laws and to dissolve a political party, uplifted the Supreme Court to be one of the most powerful organization. As the case may be, it was even possible for the judiciary to attain superiority over other branches. But Revitalizing Reform enacted in October 1972 hampered the judicial power again with a variety of restrictions.

6. Judicial System under the Constitution of Forth Republic

The October Revitalizing Reform carried out by then president Mr. Park on the 17th of October 1972 led to the establishment of the Constitution of Forth Republic on December 27 in the same year.

It was a beginning of so-called dark days of judicial independence. The constitution abolished the Judge Recommendation Council, and entitled the president to appoint and assign any judges, including the Chief Justice and Justices of the Supreme Court. Judges could be dismissed by a disciplinary measure, and the Supreme Court was deprived of its power to review constitutionality of laws, having only the power to request the Constitutional Committee to review the constitutionality of laws.

7. Judicial System under the Constitutions Since Fifth Republic

In the process of establishing the Constitution of Fifth Republic after the assassination of then president Mr. Park, judicial independence was particularly emphasized. Therefore, that Constitution granted the Judiciary the power to appoint judges. Under the Constitution of Fifth Republic, like the Constitution of Forth Republic, the president appointed

the Chief Justice and the Justices of the Supreme Court, while other judges were appointed and assigned their positions by the Chief Justice of the Supreme Court. Moreover, a disciplinary dismissal of judges was not admitted.

The present Constitution was amended on October 29, 1987 and so some say that we are in the era of the Sixth Republic. That amendment was the outcome of the continuous struggle of the Korean people, who were determined to establish a democratic government and to build an advanced modern state. Accordingly, it guaranteed maximum autonomy and independence to the Judiciary as a strong means to promote a law governing principle and to protect the basic rights of the people.

Under the present Constitution, the Constitutional Court was established to handle constitutional issues such as the constitutionality of a law, impeachment, dissolution of a political party, constitutional petitions filed directly to the Constitutional Court, and jurisdictional conflicts involving State agencies and/or local governments. While the Constitutional Court retains jurisdictions to decide the constitutionality of a law, other courts have some part in this process. When the constitutionality issue of a law, which is to be applied to a concrete case, becomes a precondition of a court's judgment and the court deems the law to be in contravention of the Constitution, the court shall request, of its own motion or according to the application of the parties, adjudication of the Constitutional Court as to the constitutionality of that law. The Constitutional Court then adjudicates this issue. The Chief Justice of the Supreme Court takes part in forming the benches of the Constitutional Court. Of nine Justices of the Constitutional Court who are commissioned by the President of the Republic, three are elected by the National Assembly, and three are designated by the Chief Justice of the

Supreme Court.

8. Conclusion

Judging from the vicissitudes of judicial independence from the Original Constitution through the present Constitution, the desire of the dictatorial president for prolonged rule restricted judicial independence. But, with the continued protest of the Korean people, the constitutional justice of guaranteeing judicial independence has eventually been regained. It shows that people's dedication and endeavor for fair trial and judicial independence are more important than anything else in consummating judicial independence. T

IV. Current State of Judicial Independence of Korea

1. Introduction

Two basic elements are needed to secure judicial independence: one is the independence of courts from the Administration and the Legislature in terms of structuring and administering the Judiciary. The other is the independence of judges, guaranteeing fair adjudication and the independent status of judges.

Article 101, Paragraph 1 of the Constitution provides that "Judicial power shall be vested in courts composed of judges". Article 108 provides that "The Supreme Court may establish, within the scope of law, regulations pertaining to judicial proceedings and internal discipline and regulations on administrative matters of the court". In this way, the current Constitution declares the independence of courts in a definite voice. In addition, this independence is completely guaranteed in Korea. We are confident to say that the Korean Judiciary is free from any

influence of the Legislature or the Administration. So, nowadays, the focus of discussion in Korea tends to move toward the independence of judges.

Therefore, from now on, let me talk about the independence of judges, including the independence of adjudication and the independent status of judges.

2. The independent adjudication

Article 103 of the Constitution guarantees the independent adjudication by saying that "Judges rule independently according to their conscience and in conformity with the Constitution and the law." In reality, all Korean judges do exercise the independence of judgment only in accordance with the constitutional provision, without being interfered with from outside or inside influence.

However, nowadays, there is an assertion that the independence of judgment in court is often threatened not only by the criticism of the general public, but also by the criticism or pressure of the political or social organization and mass media. Therefore, some argue that judges should retain the independence from the public opinion, organizations of interest and mass media in the first place.

Even though the Judiciary cannot be completely free from the public criticism, nor be indifferent to the trends of the times, it is not just for the Judiciary to administer justice under the influence of public opinions. The Judiciary should only hear their voice through a proper court action such as filing a petition. The criticism should not interfere with the substance of a judgment, or directly threaten a judge by a collective action to affect judgment in advance. However, there are some occasions when judicial independence could be undermined by arousing public

opinion.

It is not possible to present verified evidences, but it seems that individual judges, trying not to be influenced by public opinions, are ruling independently according to their conscience and in conformity with the Constitution and the law.

3. The Independent Status of Judges

(1) Appointment of the Justices and judges and reassignment of judges

To secure the independence of judges, personnel management of judges, including appointment and assignment to a position, must be objectively and fairly done. To be objective and fair, the personnel management of judges should be done by autonomous decision of the Judiciary. The present Constitution grants the Judiciary the power of appointment, as it prescribes, "Judges other than the Chief Justice and the Supreme Court Justices are appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices." (Paragraph 3 of Article 104). The Court Organization Act even gives the court the power of assignment for the purpose of enhancing judicial autonomy, as it prescribes, "The Chief Justice of the Supreme Court shall assign judges to their positions." (section 44 of Court Organization Act)

(2) Terms of Office and Retirement

Article 105 of the Constitution provides as follows; (1) The term of the Chief Justice is six years and he/she cannot be reappointed. (2) The term of Justices of the Supreme Court is six years and they may be reappointed as prescribed by law. (3) The term of judges other than the Chief Justice and Justices of the Supreme Court is ten years, and they

may be reappointed under the conditions as prescribed by law. (4) The retirement age of judges is determined by law.

It appears that the Constitution restrains the terms of the Justices and judges to prevent the court from becoming too conservative and to make the court catch up with the rapidly changing world.

(3) Guarantee of Status

No judge shall be removed from office except either by impeachment or by a sentence of imprisonment or heavier, nor shall a judge be subject to suspension from office, and subject to a reduction in remuneration or other unfavorable treatment except by disciplinary measures(Paragraph 1, 2 of Article 106)

4. Overview of Korean Judiciary

The current number of judges stands at 2,352 as of May. 2008. It is noteworthy that the proportion of women judges among them is about 21% and is increasing every year.

The Judiciary is composed of six types of courts, which are the Supreme Court, 5 High Courts, 18 District Courts, the Patent Court, the Family Court, and the Administrative Court. Among those, the Supreme Court, the High Courts and the District Courts are courts of general jurisdiction and form the basic three-tier system. The Patent Court, the Family Court, the Administrative Court are specialized courts. For the convenience of people living in rural area, Branch Courts and Municipal Courts are established throughout the nation under the District Court.

As in the countries of the civil law tradition, no court is bound by the

views of another court as a matter of law. However, there are certain de jure and de facto exceptions to this principle. For example, a lower court must follow the interpretation of the law rendered by the Supreme Court in a particular case when the lower court's ruling has been reversed and the case has been remanded to the lower court. Also, the ruling of the higher courts generally exert a significant de facto influence on subsequent court decisions.

The number of cases received in 2006 is about 5.6 million in total. As you see 67% of all cases are civil, about 28% are criminal and the rest less than 5% are domestic relations, administrative and patent cases.

V. Efforts from within the Court for Judicial Independence

Judicial independence can be specifically ensured by strong passion of individual judges including the Chief Justice of the Supreme Court to protect the independence practically, as well as the people's ardent will based upon the matured citizenship to protect judicial independence. Efforts from within the Judiciary in Korea has not only promoted the people's trust in the Judiciary but also uplifted the court's standing. Specific examples are as shown below.

Lee Seung-man, the first president of Korea under First Republic, publicly criticized the Judiciary for the appointment procedure of the Justices of the Supreme Court or for its judgments. The first Chief Justice of the Supreme Court Kim Beoyng-no, emphasizing the independence from the government or from public opinion, put forth every ounce of his energies to protect judicial independence. When the president Lee said that the judicial power should be restricted, asserting

that judgments violating policies of the administration were being made, the Chief Justice strongly retorted against the president by saying, *'Judges make judgments independently and even the Chief Justice of the Supreme Court cannot interfere with or order the judges in relation to their judgments. And thus, although the Supreme Court is of the opinion that smugglers should be severely punished, the Supreme Court cannot give instruction to or interfere with the courts below regarding their judgments. It shall not be possible for the Judiciary to confer with the government to apply laws. The restriction of power of the chief justice is the matter invested in the legislature. In addition, the special legislation shall not happen in any event.'* These comments positively show the ideology of judicial independence.

Another good example is about judicial disturbance. During Third Republic, the despotic military government's complaint against the Judiciary was increasing due to its rejection of warrant issuance, acquittal for the various demonstrations, and the decision of unconstitutionality on State Compensation Act. Eventually, the warrants of detention against two judges of Seoul Criminal District Court were requested on suspicion of being bribed with air fare, drink money, and lodging charge, but the warrants requested twice were rejected. However, when the plan to indict the two judges was established, 36 percent of all the judges across the nation demonstrated their will for judicial independence by collectively handing in their resignations starting from the judges of Seoul Criminal District Court. The judges criticized that the indictment plan obstructed judicial independence, saying that, apart from the ostensible reason, it was actually a retaliatory measure against Judiciary taken by the government under despotic military administration.

Besides those specific cases mentioned above, judges have preserved the

tradition of judicial independence by making judgments independently according to their conviction, uninfluenced by the government, public opinion, and all other intervention from outside the court. It is regrettable that all the cases cannot be introduced for lack of space.

VI. Further discussion

- the additional requisites for judicial independence.

1. Career and Promotion System of Judges

Like many other civil law countries, Korea is taking the career judge system whereby those who qualify as judges are immediately appointed as judges.¹⁾ As we discussed before, the Constitution provides that "Qualifications for judges are determined by law."

According to the provision, section 42 of Court Organization Act provides for the eligibility requirements to become a judge. The basic requirements are to pass the judicial exam(Korean bar exam) and to finish the two-year training at the Judicial Research and Training Institute.²⁾ After finishing the training, one will be nominated as a judge.³⁾ Some complain against this system in that judges are very young - most of them are in their thirties or forties and so they are not widely experienced. Therefore, Korean Judiciary has appointed more than 10 judges among experienced lawyers or public prosecutors as a supplementary measure every year.

Starting as an associate judge in a collegiate division, a judge would

1) In the non-career system that is adopted in the United States and England, all qualified judges first become attorneys and will be appointed judges only after acquiring sufficient experience.

2) Private attorneys or public prosecutors can also be appointed judges because they have the same qualifications as judges.

3) Those who finish the two year training course at the Institute could be appointed as an apprentice judge before the amendment of Court Organization Act last year.

trace several steps of becoming a single presiding judge, a presiding judge in a collegiate division of district court, a presiding judge in a collegiate division of appellate court, and so on as time passes. The most harsh debate relating to this kind of promotion system is focused on promotion from the presiding judge in a collegiate division of district court to the presiding judge in a collegiate division of appellate court. If she/he fails to get promoted, he/she would resign. Some argue that this system is making a bureaucratic hierarchy among judges. It has been also criticized that this system may jeopardize the independent status of judges and so endanger the freedom of judgment on the reason that they may weigh options in deciding cases with consciousness of their senior judges' or Chief Justice's opinion. In consideration of this criticism, the Supreme Court introduced the single-tier salary system ensuring the equal treatment between the presiding judges of district and appellate courts a few years ago.

2. The Drafting of Court Budget

It is a pity that in Korea the court budgeting is done by the Ministry of Strategy and Finance based on estimated revenue and expenditure submitted by the Chief Justice. The National Assembly, after deliberating on the budget plan, passes the court budget bill. Therefore, the independent right of preparing a court budget is not vested solely in the Supreme Court.

It goes without saying that the realization of certain plans of the courts such as beginning of a new project in the process of carrying out a judicial policy, increase or reorganization of a structure to improve the judicial operations, or improvement of judicial process, cannot be

attained without a budgetary support. Consequently, it is necessary for the Judiciary to make up its own budget in order to acquire complete and substantial independence from the government or from the legislature. If it may come true, it will be possible to guarantee remuneration suitable for dignity of judges, resulting in the security of substantial independence of Judiciary.

VII. Recent Judicial Reform

1. Judicial Reform Committee

Judicial Reform Committee was formed to develop a new plan for judicial reform in 2003. The Committee has dealt with several issues including the following:

- (i) Change of judge appointment system
 - whether to appoint judges among experienced lawyers or prosecutors
- (ii) Change of legal education system
 - whether to introduce Law School
- (iii) Public participation in the judicial procedure
 - whether to introduce Jury system

The Committee, composed of members representing the legal circles, academia, politics, media and several civic groups, has submitted final proposals including the establishment of graduate-level law school, the promotion of lay participation in the judicial decision-making, redefining the functions and organization of the Supreme Court, restructuring the appointment system of judges, the substantial reform of criminal procedures and other numerous matters.

2. The Presidential Committee on Judicial Reform(PCJR)

The Presidential Committee on Judicial Reform(PCJR) was established as a presidential advisory body on Jan. 18th, 2005 for the comprehensive and systematic implementation of overall judicial reform proposals that were recommended by Judicial Reform Committee of the Supreme Court to the President of Korea.

3. The Enactment of proposals

The graduate-law school system and the jury system was introduced recently. Furthermore, criminal procedure was changed a lot. I hope that through the successful implementation, Korean judicial legal system should take its place among the most advanced legal systems in the world in near future.

(1) Citizen Participation Trial

The Citizen Participation Trial was introduced in 2008. It is a unique system that has combined the jury system of the common law and the lay-judge system of the civil law with some modification.

Which cases can be brought to Citizen Participation Trial is stipulated by law; crimes with the capital punishment, crimes resulting in intentional death, crimes combining burglary, rape, injury, killing, and corruption bribery as well as cases designated by the Rule of the Supreme Court.

Members of the jury are to reach a verdict whether it be guilty or not guilty, and the appropriate punishment such as years of imprisonment so that judges can consider the verdict to make a judgment.

(2) Law School System

Law School System will begin in 2009. Now, students who want to

become lawyers or judges must go to a three-year law school after graduating from university before they are qualified to take the bar exam. The existing state-administered bar exams will be phased out. The purpose of creating law schools is to train legal service providers with the ability to resolve conflicts in a wide range of fields including international finance, environmental regulation, fair trade, intellectual property rights and mergers and acquisitions. Next year 25 universities will open American-style law schools nationwide.

VIII. Final Conclusion

We have explored the history and current state of the Korean Judiciary and discussed the problems related to the judicial independence of Korea. Considering all of those mentioned above as a whole, we may say that the current Constitution well ensures judicial independence, and each individual judge has been pursuing the utmost ideals of judicial independence by exercising appropriate judicial powers or judicial review, confronting dictatorship or the abuses of administrative powers. As a result, the status of the courts has been highly uplifted through increased public confidence in the Judiciary.

The judicial power is the final stronghold to guarantee fundamental rights of the people, and to balance governmental powers as the Judiciary is the only non-political organization and the guardian of constitutional state to check the administrative and legislative powers. Not to mention the members of the Judiciary, all the people of the nation shall acknowledge the importance of the judiciary role, help to secure judicial independence through various systems, and respect a courage and passion for judicial independence more than anything else, to achieve the ultimate independence of the Judiciary.

In this regard, I can not place the value of judicial independence of my own country too high, possibly the highest in the world, even though not all the people fully respect the Judiciary yet. All Korean judges with their conviction and courage armed with thorough and high sense of duty and morality are protecting judicial independence, and about 50 million of people possessing superb democratic Constitution, which is the fruit of firm passion to protect the Constitution despite the short history of democracy, are supporting the judicial independence.

Finally, even though Korea has relatively short history of a democratic government, I hope our experience would serve as a good example for other countries undergoing a democratizing process.