Beyond “law vs. politics” in constitutional adjudication: Lessons from South Korea†

Chaihark Hahm*

Taking its cue from Michel Rosenfeld’s formulation of a paradox arising from comparison of American and European constitutional adjudication systems, this article seeks to situate the development of constitutional adjudication in Korea within a global context. The growing influence of Korea’s Constitutional Court has attracted the charge that it is acting too politically, as well as judicializing politics. One symptom of this was the recent political row over the appointment of the Court’s president. The Korean debate thus has much in common with the global discussions on judicialization and politicization triggered by the recent trend toward “court-centered” constitutionalism—a phenomenon with which our vocabulary and framework for discussing constitutionalism have yet to catch up. In order, however, to fully understand the sources of the debates surrounding the Korean Court, certain institutional settings and practices must be noted: procedures for appointing the Court’s members, obligation to publicize dissents, absence of abstract/a priori review, and difficulty of constitutional amendments. Such factors conspire to create an environment in which a putatively “European-style” court is made to appear and operate more like the US Supreme Court, thereby generating talks of politicization and judicialization.

Introduction

A few years ago, Michel Rosenfeld posed in these pages an interesting paradox arising from a comparison of constitutional adjudications in Europe and the United States.¹ Why is it, he asked, that charges of undue politicization have been made “much more

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* Assistant Professor of Law, Yonsei University. Email: chaihark@yonsei.ac.kr.

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vehemently” against the American practice of judicial review, when in fact the European constitutional courts exercise far more expansive and “political” powers? The French Constitutional Council (Conseil constitutionnel) has the power to invalidate laws even before they are promulgated, even without a concrete case or controversy. Given that parliamentary sovereignty is a strong part of the French political tradition, it would seem that such a “court” should be subject to more criticism. In Germany, the Federal Constitutional Court (Bundesverfassungsgericht) has the power to enshrine and enforce certain substantive values and policies. This results in an atrophy of the sphere of ordinary politics in regards to certain issues which are effectively taken over by the Court. And yet, according to Rosenfeld, it is the US Supreme Court, and not these European courts, which has become the target of vociferous attacks for behaving too politically. An example is the contentious debate on the so-called “counter-majoritarian difficulty” which continues to exercise many American legal scholars, but which apparently has no parallel in the European context.

Rosenfeld’s article was an attempt to solve this riddle. He showed that in fact the paradox has a logical explanation. In the American context, a combination of historical, structural, institutional, and societal factors conspire to create an environment in which the legitimacy of constitutional adjudication by the Supreme Court continues to be challenged. Among the causes discussed by Rosenfeld are the common law background of American constitutional tradition, the lack of express textual authorization for judicial review, the specific terrain of American political landscape, and the dynamics between the judiciary and the political branches of the government. Suffice it to say that, according to Rosenfeld, the American practice of constitutional adjudication all but invites the charge of undue politicization, whereas in Europe, despite the patently political powers wielded by their constitutional adjudicators, such concerns are rarely raised.

The truth or accuracy of professor Rosenfeld’s argument is not my concern here. Rather, my aim here is to show how a new paradox emerges if we apply his analysis to a different context—the Republic of Korea. Since 1988, Korea has had a separate “European-style” constitutional court with exclusive jurisdiction over adjudication of constitutional matters. Yet, it has become the target of criticisms very similar to those directed at the US Supreme Court. It is being criticized for exceeding the limits of its competence and meddling in issues that should more properly be left to the people and their representatives—that it is becoming too politicized. Attacks focusing on its alleged democratic deficit are now commonplace in Korean political and legal discourse. According to some critics, the Court has been guilty not only of overreaching,

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2 Id. at 634 (citing works by Robert Bork and Mark Tushnet as examples of such attacks).
3 Id. at 652–655.
but also of staging a “judicial coup d’état.” What is it about this supposedly European-style Korean constitutional adjudication system that provokes such charges of politicization and challenges to its legitimacy? Why doesn’t Rosenfeld’s analysis apply here?

An easy sociological answer, one that is actually suggested by Rosenfeld, may be found in the fact that contemporary Korean society is deeply divided on many issues of substantive values and ideals. Discussions of deepening divisions within Korea—along class, generational, and regional lines—have become a staple of recent analyses of the country. According to Rosenfeld’s analysis, too, the German Bundesverfassungsgericht is increasingly finding itself at the center of criticism as the general consensus on substantive values that used to obtain previously is steadily eroding. There is no doubt that Korea’s polarization—between the progressives and the conservatives, between supporters and critics of the policy of engagement with North Korea, between advocates and opponents of free trade and globalization—is providing fertile grounds for criticism of constitutional adjudication. Seen in this light, the criticism directed at the Korean Constitutional Court may simply be a reflection of the wide range of viewpoints that exists in any society that aims to promote tolerance and value pluralism. If the society is deeply polarized, it would not be surprising to find harsh reactions to the results of official decision-making processes, including constitutional adjudication.

Yet, to attribute the charges of the Court’s overreaching and politicization to such social and political polarization would not be wholly satisfactory. For one, it would not shed much light toward resolving the paradox mentioned above. Contemporary Korea does exhibit a wide range of political and other viewpoints, but it is not obvious that it is particularly more polarized than other countries. More importantly, if we were to focus on the degree of political and social polarization as the primary cause for the charges of the Court’s politicization, then we might be led to conclude that charges

5 See, e.g., Park Du-sik, “Sudoijŏn Wilhegm Kyŏcksŏng-ŭn Sabŏp K’udet’a”: Yŏ Ŭiwm Hŏmap Chaep’anso Kyŏngnyŏl Pinnan [“Decision of Unconstitutionality on Capital Relocation is a Judicial Coup d’Etat”: Ruling Party Lawmaker Severely Criticizes Constitutional Court], CHOSUN ILBO, Nov. 12, 2004. See also Kuk Sun-ok, Hŏnpap Chaep’ani gwandilbŭ Sabŏp K’udet’a [Judicial Coup d’Etat by the Justices of the Constitutional Court], 27 MINJU POP’EAK 457 (2005). Of course, they were not the first to use this rhetoric. In his criticism of the worldwide trend of judicial policy-making, Robert Bork has also written: “What judges have wrought is a coup d’état.” ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 13 (2003). While it is highly unlikely that Korean pundits and politicians had studied Bork’s writings, the similarity in their rhetoric is nevertheless interesting.


7 Rosenfeld, supra note 1, at 641–642.

8 This is similar to what Ferejohn calls the fragmentation hypothesis, according to which courts tend to be freer to make policy decisions when the political branches are too fragmented to make decisions effectively. John Ferejohn, Judicializing Politics, Politicizing Law, 65 L. & CONTEMP. PROB. 41, 55–60 (Summer 2002).
of politicization will be heard more often and more loudly in the European context than in the United States. For it is commonly accepted that, as measured in terms of political parties’ ideological positions, politics in Europe is much more polarized than in America. The degree of polarization must be only marginally related to the emergence of debates on the politicization of constitutional adjudication. So, like Rosenfeld, we must look deeper and elsewhere for an explanation of the Korean paradox.

This article is an attempt to find such an explanation. It will be shown that there are institutional arrangements and judicial practices in Korea which contribute to the rhetoric of politicization such that, despite its “European” pedigree, the Korean Constitutional Court is often criticized as being unduly political. Before probing into the Korea-specific factors for the charges of politicization, however, we would do well to situate the Korean phenomenon in a wider context of constitutional adjudication in late twentieth and early twenty-first century. Korea’s adoption of its system of constitutional adjudication was a result of the democratic transition in 1987. It thus preceded the oft-commented-upon spread of constitutional courts in Eastern Europe following the fall of communism or in South Africa after the demise of apartheid. The Korean case might nevertheless be seen as part of the recent development in many parts of the world toward institutionalization of constitutional adjudication, and even “judicialization of politics.” Viewing the Korean system of constitutional adjudication as an instance of a widespread trend toward “governing with judges” will in turn help to accentuate the distinctiveness the Korean phenomenon of politicization.

Section 1 will start by describing a political controversy that took place in 2006 over the appointment of the president of the Constitutional Court of Korea. This will serve as an indicator of the degree to which that tribunal has become the subject of political controversy. Section 2 will be a discussion of the extent to which the Korean phenomenon might fruitfully be understood as an instance of the broader reaction to the global emergence of a more “court-centered” form of constitutionalism. Section 3 will then provide an analysis of a number of special circumstances confronting the Korean Constitutional Court that tends to aggravate the charges of politicization. It will be suggested that, due to certain idiosyncratic features of the Korean system of constitutional adjudication, the Court is situated in an institutional matrix that tends to promote hyper-politicization.

1. **Symptom: The appointment fiasco**

On August 16, 2006 then-president of the Republic of Korea Roh Moo-hyun nominated Jeon Hyo-sook to take up the post of the president of the Constitutional Court

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when it became vacant the following September upon the retirement of the then-

president of the Court Yun Young-chul. As required by the Constitution, Jeon’s

appointment had to be consented to by the National Assembly. In accordance

with the provisions of the National Assembly Act and the Law on Personnel Hearings, a

“Special Personnel Hearings Committee” was formed within the National Assembly
to perform the task of scrutinizing the nominee.

When the Committee convened for its first session on September 6, however, an

opposition lawmaker, Chough Soon-hyung, raised an objection regarding the legal

propriety of the hearing itself. According to the Constitution, the president of the

Court must be appointed “from among the Justices” of the Court. Jeon had indeed

been a member of the Court when she was nominated by President Roh to be the

next head of the Court, but prior to the meeting of the hearings committee she had

resigned from the Court as of August 25. She apparently did so after being apprised

of Roh’s intention to have her start a new six-year term as the president of the Court.
The objection, therefore, was that she was not eligible for the position of the Court’s

president because the Constitution prohibits the appointment of a non-member of

the Court. Chough further suggested that the Hearings Committee and the National

Assembly might be violating the Constitution if they confirmed Jeon.

This greatly emboldened the other opposition lawmakers on the Hearings Committee

who had been unhappy with Jeon’s nomination in the first place. From the opposition’s

point of view, her nomination was a classic case of a personnel decision based on partisan

interest and personal loyalty. They pointed to the fact that she had been Roh’s classmate

in the Judicial Research and Training Institute, and that hers was the only dissenting

opinion in the Court’s decision that blocked one of Roh’s key policy agenda, namely, the

relocation of the nation’s capital. The claim was that she had a track record of siding

with Roh’s government on many politically divisive issues that had come before the Court.

Roh’s decision to have her start a new term as the president of the Court also

irritated the opposition because they perceived it as a violation of the spirit, if not the

11 TAEHANMIN’GUK Hŭnp’ [CONSTITUTION OF REPUBLIC OF KOREA] [hereinafter KOREAN CONSTITUTION], art. 111, sec. 4 (S. Kor.).


13 KOREAN CONSTITUTION art. 111, sec. 4.

14 Ḥŏnpjaep’ænsojang (Jeon Hyo-sook) Immyŏng Dongŭi mit Ḥŏnpjaep’ænsan soa Jeap’an’guan (Mok Yŏng-jun · Yi Tong-hŭp) Sŏng’al’-e kwahun Insa Chi’ıngmun Tŏ<kryŏl> Wikŏnhoe Horai’k [Proceedings of the Special Personnel Hearings Committee for Confirmation of Appointment of President of the Constitutional Court (Jeon Hyo-sook) and for Election of Justices of the Constitutional Court (Mok Yŏng-jun and Yi Tong-hŭp)], 262nd National Assembly, No. 3, at 2 (Sept. 6, 2006) [hereinafter Proceedings of the Hearings].

15 In Korea, in order to become licensed to practice law, one must not only pass the national judicial examina- tion, but then also go through the two-year program at the Judicial Research and Training Institute. Members of the same graduating class from the JRTI often develop personal bonds that last throughout their professional careers. For a description of the Korean legal education and licensing system (prior to the drastic changes instituted in 2008), see JAMES M. WEST, EDUCATION OF THE LEGAL PROFESSION IN KOREA (1991).


17 Proceedings of the Hearings, supra note 14, at 5.
letter, of the constitution. The Constitution provides only that all justices of the Court shall serve for a term of six years. Interestingly, in case a president of the Court is appointed from among the sitting justices, the Constitution does not specify whether that person is to serve only the remainder of his or her original term, or if a new six-year term begins with the appointment as the president of the Court. This had never been an issue before because all previous presidents of the Court had been appointed from outside. They all started their terms as the Court’s president on the same day that they were appointed justice of the Court. Technically, this too should have been problematic as they were not being appointed “from among the Justices.” No one had raised an issue, however, for most people just assumed that their appointments served the dual function of making them a Justice first, and then conferring upon them the status of the Court’s president.

In the case of Jeon, this was also the argument put forth by her supporters in the National Assembly, i.e., lawmakers of the ruling party of President Roh. For example, claiming that in law “the greater includes the lesser,” assemblyman Choi Jae Chon argued that appointment to be the Court’s president naturally and logically includes appointment as a justice of the Court. It was disingenuous of the opposition to claim that Jeon’s nomination was somehow improper. Nevertheless, the fact that she had already been a justice for three years, but then resigned from the Court upon hearing Roh’s decision to nominate her gave the opposition lawmakers at least a pretext under which to attack the propriety of the appointment process and of the confirmation proceedings itself. For them, actively relinquishing the position of a justice of the Court, a status that she would need to gain back before being appointed the Court’s president, was at least irregular, if not unconstitutional.

Thus started an extremely long and acrimonious political clash within (and without) the National Assembly between supporters of Jeon and her detractors, which was essentially a contest between Roh’s ruling party and the opposition parties. As mentioned, the opposition lawmakers were unhappy with the nomination of Jeon because they perceived her as essentially a lackey of President Roh. Making her the head of the Constitutional Court was seen as part of a larger plan to make sure that the Court behaved in a way favorable to Roh’s policy objectives, even beyond Roh’s own term in office. The whole purpose of having her resign was to make sure that she would start a new six-year term as the Court’s president so that the Court would continue to be under the leadership of someone Roh trusted. The President was in fact quite candid about this, which was why the opposition was so determined to prevent it. Allowing him to mold the Court in his own image was something the opposition was not prepared to accept.

18 Id. at 3 & 48.
19 The opposition lawmakers might have wanted to cite Henry Monaghan on this. Commenting on the power of the US President to appoint Supreme Court justices, he has argued that “nothing in the language of the appointment clause, in its origins, or in the actual history of the appointment process supports a constitutionally based presidential “right” to mold an independent branch of government for a period extending long beyond his electoral mandate.” Henry P. Monaghan, The Confirmation Process: Law or Politics?, 101 Harv. L. Rev. 1202, 1204 (1988).
On November 27, after almost three months of posturing between the ruling party and the opposition, President Roh finally withdrew Jeon’s nomination at her own request. Another month later, on December 21, Roh made his second nomination for the same position. The confirmation hearings for Lee Kang-kook took place on January 15–16, 2007 without much event, and the plenary session of the National Assembly met on January 19, which consented to his appointment as the fourth president of the Constitutional Court. By this time, the general public had grown weary of the long war of attrition among the politicians, and the lawmakers themselves were eager to get on with other business.

This was the first time that appointment to the Korean Constitutional Court occasioned such an intense face-off between the ruling party and opposition. It was, however, not surprising given the political style of Roh and the recent rise of the Court’s visibility in relation to a number of politically sensitive issues. For example, it had been revealed in 2004 that the Court has the ultimate authority to decide on the fate of a democratically elected president when he is impeached by the legislature. Also, its judgment on the constitutionality of the government’s decision to dispatch Korean troops to Iraq as part of United Nations’ Peace-Keeping Operations had been quite controversial. Similarly, when the Court blocked the administration’s move to relocate the nation’s capital southward, accusations of politicization flared up again, with charges of “judicial coup” leading the way. It became evident to many Koreans, including politicians, that the Court exercised awesome powers which have deeply political ramifications. Who would be appointed to that bench was all of a sudden a critical issue for politicians of all persuasions.

Appointments to the highest court of any nation usually involve fierce political battles and passionate posturing. For those familiar with the Senate confirmation hearings in America for appointing a Supreme Court justice, this is nothing new. At least since the failed nomination of Robert Bork, everyone is aware that judicial appointments can trigger unseemly public contests among politicians, which can transform the process into a media circus. Yet, herein lies the paradox mentioned earlier. The Korean system of constitutional adjudication is said to be modeled on the “European” type with a specialized court with exclusive and centralized jurisdiction over constitutional issues. Many commentators have observed that one of the distinctive features of the European system in relation to the appointment of constitutional adjudicators is that the process rarely attracts the public’s attention. In most countries, the appointment is made either through a behind-the-scenes political bargaining among the relevant stakeholders, or by a decision-maker whose authority to make the appointment

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20 On the “novelty” of Roh’s political style, as well as the recent increase of politically charged cases at the Constitutional Court’s docket, see Hahm Chaihark & Sung Ho Kim, Constitutionalism on Trial in South Korea, 16 J. Demo. 28 (April 2005).
23 See supra note 16. For a discussion of this case, see Hahm & Kim, supra note 20, at 37–39.
24 Ferejohn, supra note 8, at 65 (noting that the politicization of courts in America has no parallel in the European context).
is not subject to challenge by other political actors. Nevertheless, in Korea, both the public and the media have now learned that nomination to the Constitutional Court can occasion a politically heated contest which is fought out in the public, and that the principal political actors are often only interested in scoring rhetorical points. The Constitutional Court of Korea itself is discovering that it can become the subject of a political battle, or at least an arena in which proxy wars are fought between supporters and critics of the government.

2. Background: The global rise of “court-centered” constitutionalism

Whenever political attention and energy is directed at a court, we may need to be wary of the law becoming politicized. For many, this is unhealthy for a legal system because it tends to threaten the independence of the court. “Political court” is often identified with perversion of the justice system under political pressure. In a democracy, however, who gets appointed to the courts cannot remain free of political considerations. While judges are not expected to be accountable to the people in the same sense that elected officials are, judges of a democratic state must also be seen to derive their legitimacy through some form of democratic pedigree. This is all the more so when we consider that courts, particularly those dealing with constitutional issues, are in the business of making generally applicable rules which affect the general public. Practically nobody nowadays adheres to the image of adjudication as a mechanical process of applying pre-given rules to uncontroverted facts. Given that “judicial lawmaking,” as it were, is now a fact of life, it may be natural—indeed desirable—that the composition of a court should become the subject of political contestation. To a certain extent, this may explain the increasing politicization of the Korean Constitutional Court. Its growing importance as a lawmaking, and policy-making, institution is surely causing the people and the political sector to care more about who gets appointed to that court.

From the perspective of the historical development of constitutionalism, this is one of the outcomes of the growing prominence of adjudication as the primary means through which to enforce constitutional norms. As is widely known, employing the judiciary in the service of constitutionalism was once thought to be a peculiar feature of the American practice. Previous to the American “invention” of judicial review, the constitution was rarely thought to be a matter for judicial enforcement. Even after the American innovation, the low esteem in which the judiciary was held in other parts of the world long prevented the involvement of judges in the business of implementing constitutional norms. But as the judiciary has grown in importance and in the realm of lawmaking, the idea of judges enforcing constitutional norms has been widely accepted.

25 Stone Sweet, supra note 4, at 46–49 (reviewing the recruitment system for constitutional adjudicators in France, German, Italy and Spain).
26 See, e.g., H. W. Koch, In the Name of the Volk: Political Justice in Hitler’s Germany (1989).
27 For a forceful argument that courts actually do not suffer from any “democratic deficit” as compared to the legislative or executive branches, see Chris Eisgruber, Constitutional Self-Government (2001).
28 Ferejohn, supra note 8, at 44 (noting that “when the domain of courts includes the making of general rules that affect everyone and not just actual litigants—as it does in constitutional courts—we should expect popular and political reactions.”).
the constitution. Thus, in most textbooks on the history of constitutionalism, the role of courts is not the major focus of discussion. This is no longer true. With the dramatic changes that took place in the second half of the twentieth century, it is now almost taken for granted that establishing a democratic constitutional order requires the creation of some sort of a judicial agency that can interpret and enforce the constitution. Specialized courts with exclusive competence on constitutional issues have become de rigueur in most countries that have made the transition to democracy. Such courts are now in charge of constitutional matters. The phenomenon is not limited to countries newly transitioning to democracy. The British trend toward more reliance on the judiciary for enforcing constitutional principles has sparked critical responses extolling the virtues of the “political constitution.” Even France has recently moved toward a system of allowing the Conseil constitutionnel to adjudicate a posteriori the constitutionality of legislation. Adjudication has now become the central means for implementing the constitution. As noted by many scholars, the phenomenon once observed by Tocqueville about the American propensity to turn political issues into judicial questions has now become a universal trend. Constitutionalism has become “court-centered.”

2.1. Court-centered constitutionalism and the inadequacy of our conceptual tools

The rise of court-centered constitutionalism has spurred the familiar discussion on the normative desirability and political legitimacy of judges’ assuming the role of the guardian of the constitution. Scholars like Ronald Dworkin, who focuses primarily on the institution of judicial review in the United States, commend it as necessary for protecting individuals’ rights and for correcting the excess of majoritarian politics. Others, such as Ran Hirschl, who study the rise of judicial power in

29 See, e.g., Scott Gordon, Controlling the State: Constitutionalism from Ancient Athens to Today (1999); R. C. van Caenegem, An Historical Introduction to Western Constitutional Law (1995); Charles H. McLuhain, Constitutionalism: Ancient and Modern (rev. ed. 1947). Courts may be mentioned, for example, in relation to Edward Coke’s contention that even the king and parliament are subject to the law as interpreted by the common law courts. Interestingly, Bagehot’s famous treatment of the English constitution does not mention the role of the judiciary at all. Walter Bagehot, The English Constitution (Cornell University Press, 1963) (1867).


31 Federico Fabbrini, Kelsen in Paris: France’s Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation, 9 German L.J. 1297 (2008). There was in fact a proposal to change the name of the institution to a ‘court’ (Cour constitutionnel). Id. at 1308–1309.

32 Alexis de Tocqueville, Democracy in America 280 (George Lawrence trans. 1969). See, e.g., Ferejohn, supra note 8, at 42; Ran Hirschl, The New Constitutionalism and the Judicialization of Pure Politics Worldwide, 75 Fordham L. Rev. 721, 722 (2006). To be sure, the crucial difference is that in the recent model, ordinary judges are specifically prohibited from reviewing the constitutionality of legislation.

33 For his defense of judicial review in relation to what he calls the “partnership conception” of democracy, see Ronald Dworkin, Is Democracy Possible Here? (2006); Justice for Hedgehogs (2010).
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“new constitutionalism” states, see it as a result of a more sinister move by the political and economic elites to preserve their hegemonic interests against future encroachment by the masses. Whether justifiable or not from a normative standpoint, it is undeniable that this transformation of constitutionalism into one in which adjudication has taken the center stage is a ubiquitous and probably irreversible development. Seen in this light, the case of the Korean Constitutional Court may not be all that special. It may be just another example of the growing trend toward court-centered constitutionalism.

More interestingly, discussions in Korea and other places about the politicization of constitutional courts may be understood as a reflection of a lag between this global spread of court-centered constitutionalism, on the one hand, and the conceptual tools we use to understand constitutional politics, on the other. For it is apparent that we are having difficulty apprehending and comprehending this trend of “governing with judges.” It seems to pose a deep challenge to our conventional framework for understanding constitutional governments in general, and the role of adjudication in particular.

On reflection, this is not surprising. For it took a very long time for our political and legal vocabulary to finally catch up with the reality that the judiciary is and should be so much more than la bouche de la loi. To be sure, that image of adjudication was shown to be a myth almost the instant it was enunciated. Nevertheless, the myth has exerted a powerful influence on our thoughts regarding the role of the judges. It still lingers on to the extent that judges are expected to be neutral and non-political. Moreover, in many civil law jurisdictions, it took a long time for the judiciary to be recognized as a co-equal branch of the government. “Separation of powers” was understood more often as a means for making sure that the judges were subordinated to the legislature, and less as an ideal for guaranteeing judicial independence. The power of judges to review the constitutionality of statutes was widely considered unacceptable because it violated the separation of powers principle. As Kelsen famously noted, “[t]he judicial review of legislation is an obvious encroachment upon the principle of separation of powers.” Even when the judiciary is recognized as a full and equal partner in the government, as in the United States, the idea of keeping the judges under restraint continues to have a certain intuitive attractiveness. The ongoing discussions on originalism and popular constitutionalism might be seen as responses to the supposed need to control the judges.

In other words, most of our ideas about the role of courts in a constitutional government have roots in political ideologies that sought to limit the judiciary to

specifically non-political tasks. “Judicial” means, almost by definition, non-political, and “political” means non-judicial. The two are regarded as mutually exclusive spheres of activity governed by different ideals and principles. For many in the European tradition, “constitutional” was also considered a thoroughly political sphere that must be kept separate and segregated from the judiciary. Court-centered constitutionalism, from this perspective, is an aberration. It can only be seen as a corruption. Similarly, “separation of powers,” even if it is meant to convey a sense of checks and balances among co-equal branches, necessarily implies that no one branch should become the sole, or even primary, venue for sorting out constitutional issues. In short, most of the terms we use to describe and analyze constitutions and constitutional governments are premised upon the view that it is illegitimate to combine adjudication and constitution. We have a limited vocabulary through which to deal with the rise of court-centered constitutionalism.

There are, of course, views which recognize the limitations of the conventional terms of discourse. For Alec Stone Sweet, constitutional adjudication is necessarily both “judicial” and “political” such that it is unhelpful to speak in terms of the distinction between the two spheres. He describes the European model of constitutional review as one in which the constitutional courts typically “occupy their own ‘constitutional’ space, a space neither clearly ‘judicial’ nor ‘political.’” According to Rosenfeld, the French term *état de droit* represents a desire to go beyond the limited connotations of *état legal* and to broaden the scope of “constitutional” to emphasize the legal dimensions of rights so that they may be protected through adjudication. Similarly, the use of *Verfassungsstaat* in Germany indicates the transformation of the earlier ideology of *Rechtsstaat* to legitimate the use of courts to enforce constitutional norms and values. Regarding the American practice of judicial review, some scholars emphatically state that constitutional adjudication is “both law and politics.”

Despite such efforts, however, we still lack a term in English that can capture this fusing of the judicial and the political. In Rosenfeld’s comparison between American and European conceptions of constitutional adjudication, the English analogue to *état de droit* and *Verfassungsstaat* is the term “rule of law,” with all its ambivalence and intimations of the judge’s role in the common law tradition. The suggestion is that the

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38 Ferejohn, supra note 8, at 49–52 (noting the inadequacy of classical theoretical framework regarding legislative and judicial works).
39 In Alec Stone Sweet’s words: “Traditional, Continental separation of powers doctrines are in deep crisis. Conceived as a set of prescriptions, they appear increasingly obsolete and incoherent. Conceived as descriptions, they obscure more than they clarify what is actually going on in the world.” Stone Sweet, supra note 4, at 130.
40 Id. at 139.
41 Id. at 34. He also writes: “The founders [of postwar European constitutions] recognized the mixed politico-legal nature of these new jurisdictions, just as they recognized the mixed nature of constitutional law.” Id. at 151.
42 Rosenfeld, supra note 1, at 642–643.
43 Id. at 639–640.
role of the constitutional adjudicator in the American context is still tethered to the image of a common law judge who, albeit enjoying greater room for discretion than the civil law judge, is nevertheless held to the ideal of a relatively non-political role.\textsuperscript{45} This may be another sign that the arsenal of conceptual tools at our disposal has yet to catch up with the global rise of court-centered constitutionalism.

Given this state of affairs, it is not surprising that recent reactions to this new stage in the historical development of constitutionalism have tended to revolve around the themes of “judicialization” and “politicization.” They seem to be the only vocabulary available to us for framing the discussion on court-centered constitutionalism. There is remarkably little effort to analyze the constitutional courts as institutions occupying “their own ‘constitutional’ space.” The premise of most discussions is that they are suspended in an awkward and inherently unstable space between politics and law, or between legislature and judiciary. They do not fit the conventional separation of powers scheme. Further, the presupposition is that such court-centered constitutionalism poses a threat to our received ways of thinking about democratic legitimacy.

To a large extent, the same situation is replicated in discussions about the role of the Korean Constitutional Court. Among scholars, there is an ongoing debate about the proper way to capture the essence of its role. While most acknowledge the political or law-making dimensions of constitutional adjudication, the general view is that it is primarily a “judicial” function whose essence lies in taking cognizance of constitutional provisions and applying them to the case at hand. As grounds for this view, the following are commonly cited: the fact that it is conducted by an agency named “court” or, in Korean, chaep’anso (literally, place of adjudication); that its members are staffed by persons licensed to sit on regular courts; that a proceeding can only begin when a “case” is filed at the Court; that its ruling is final and authoritative for the case at hand, etc.\textsuperscript{46} As against this, some argue that the function of the Court cannot be subsumed under any of the traditional rubrics of state function (i.e., legislative, administrative, or judicial), and must be labeled a “fourth” state function. In support, they point to the fact that the political process is inevitably shaped by constitutional adjudication; that constitutional norms are open-ended; that political sensibilities are required to adjudicate constitutional cases; that constitutional provisions for the Constitutional Court comprise a separate chapter from that for the regular courts, etc.\textsuperscript{47}

More recently, Korean academics have started debating the supposed dangers of judicialization of politics by the Constitutional Court. Mostly by scholars in the progressive camp, arguments have been put forward that the increasing role of courts in determining issues of political import is detrimental to the health of Korean

\textsuperscript{45} Rosenfeld, supra note 1, at 636–637.

\textsuperscript{46} See Kim Jongcheol, Hŏnp’op Chaep’anso Kusŏngbanghŏn-ui Kaehyŏknun [A Proposal for Reform in the Composition of the Constitutional Court], 11(2) Hŏnp’op Yŏn’gu 9, 15 (2005) (summarizing the views of various scholars). See also Yi Uk-han, Hŏnp’op Chaep’an-gwa Pŏp-gwa Chŏngch’i [Constitutional Adjudication and Law and Politics], 3 Hŏnp’op Nongch’ong 407, 428–30 (1992) (discussing the German debate on the issue, from which the Korean discussion is heavily drawn).

\textsuperscript{47} Kim, supra note 46, at 15–16; See also Yi Uk-han, supra note 46, at 430–432.
democracy. Terms like “democratic deficit” and “counter-majoritarian difficulty” are now standard part of the discourse. In response, some argue that the definition of democracy presupposed by such criticism is too shallow and the so-called problem of “unelected judges” is also premised on a limited understanding of democratic legitimation. Others point out that the Court, like all other state organs, ultimately derives its authority from the constitution, implying that its role is actually mandated by the people themselves who are the author of the constitution. Still others claim that the phenomenon of judicialization of politics is in fact a result of the process of democratization and therefore should not be regarded as per se antithetical to democracy. In short, the discussion in the Korean context is also framed around the dichotomy of judicial vs. political. Many recognize that the growing involvement of the Constitutional Court in political matters is all but inevitable in a democracy. Yet, given the limited range of available conceptual tools, the debate is structured in such a way that this inevitability is greeted at best begrudgingly. Even those who welcome it are forced to assume a defensive posture.

2.2. Korean Court’s involvement in “mega-political” issues

Meanwhile, there is no denying that this new form of court-centered constitutionalism is spreading around the globe “like wildfire.” For example, in a recent article, Ran Hirschl catalogues the worldwide trend toward what he calls the “judicialization of mega-politics.” This represents for him a level of constitutional adjudication that goes beyond the normal review of legislation through interpretation of the constitution’s rights provisions. It refers to the phenomenon of judges deciding on political issues for which the constitution itself provides little guidance and which typically relate to the ideological foundation of the state itself. They include such questions as “a regime’s legitimacy, a nation’s collective identity, or a polity’s coming to terms with its often less than admirable past.” Among the many examples cited by Hirschl are the Pakistani Supreme Court’s decision on the legality and constitutionality of a coup d’état, the role of the South African Constitutional Court in certifying the


51 Pak Un Jong, Ch’ŏngch’i-ŭi Sabŏphwa-wa Minjujuai [‘Judicialization of Politics’ and Democracy], 51 Seoul Tae’akhayo Pophak 1 (2010). Kim Jongcheol, Ch’ŏngch’i-ŭi Sabŏphwa-ŭi Uii-ŭi Han’gyhe [Significance and Limits of ‘Judicialization of Politics’], 33 Kongpoph Yonggu 229 (May 2005).


53 Hirschl, supra note 32, at 729–743.

54 Id. at 727.
post-apartheid constitution, the Canadian case on the propriety of secession by the province of Quebec, the German decision on the conditions for the exercise of the people’s sovereignty in relation to the process of European integration, and the Israeli cases dealing with the question of who is a member of the Jewish state. These and other cases involve political questions of such magnitude that, for him, they should be decided by the entire populace, rather than by the judiciary. I do not intend to engage his normative arguments here. Rather, I mention his examples and categories because they invite comparison with a number of cases decided by the Korean Constitutional Court.

An example of the Court deciding on the legitimacy of regime change can be found in the series of decisions it rendered in relation to the famous prosecution of two former Presidents of Korea who had seized power through coup d’état.55 As is well known, after the transition to democracy, Korea put on trial for treason and mutiny two ex-generals and their cohorts under a special law designed to punish perpetrators of “crimes destructive of the constitutional order.”56 Before the law was passed, however, several civilian and military personnel who were victims of the coup d’état asked the prosecutors to initiate a criminal prosecution of the former presidents Chun Doo-hwan and Roh Tae-woo, and followers.

In one of the cases, the prosecutors declined to indict the leaders of the coup d’état on grounds that a new constitutional order had been founded on the basis of that coup and that the powers of the prosecutors themselves were derivative of that initial act of founding. It was logically and legally impossible for a derivative power to question the validity of its own source. The Constitutional Court was then asked to cancel this decision of the prosecutors as an abuse of their discretionary power to initiate criminal prosecutions.57 In a celebrated minority opinion, four justices of the Constitutional Court castigated the prosecutors for their misunderstanding of the fundamentals of a constitutional government. A coup d’état, even if successful, does not found a new constitutional order, according to the justices. It is still a criminal act that should be punished, and the fact that the leaders of the coup were in power is merely a practical, not a normative, obstacle to their prosecution. The coup and its aftermath was a temporary disruption of the normal constitutional order, which had been restored with the transition to democracy. Now that the obstacle to their prosecution is gone, they should be duly brought to justice.58 This clearly is a case in which the Justices were not interpreting specific rights provisions of the constitution. Rather they were engaging

55 For an account of these decisions, see Chaihark Hahm, Rule of Law in South Korea: Rhetoric and Implementation, in Asian Discourses of Rule of Law 385, 399–403 (Randall Peerenboom ed., 2004).
56 For a detailed discussion of the special law, and other issues surrounding the prosecution of the former presidents, see James M. West, Martial Lawlessness: The Legal Aftermath of Kwangju, 6 Pac. Rim L. & Pol’y J. 85 (1997).
57 In one of its earlier decisions, the Korean Constitutional Court clearly indicated that it would look into the prosecution’s decision not to initiate a criminal prosecution, if a constitutional complaint is filed by the victim of the crime.
58 Hahm, supra note 55, at 401–402.
in constitutional theory and legal philosophy regarding the foundation of the nation’s constitutional order. In Hirschl’s terms, it is an instance of judicial involvement in the mega-political issue of “corroborating regime change.”

In the next round of constitutional adjudication that arose from this historic trial, the Constitutional Court was asked to rule on the constitutionality of the special legislation passed specifically for the purpose of enabling the prosecution of the leaders of the coup d’État. In this case, the Court decided, in essence, that when there is an overriding concern for rectifying past wrongs and restoring the constitutional order, the normal rules against retroactive legislations and private bills targeting specific individuals may be suspended. It thus cleared the way for the prosecution to proceed on the basis of the special law to convict the two former Presidents and their accessories. Here, the Constitutional Court was taking into consideration political demands for “transitional justice” and made a conscious effort to read constitutional provisions in a way that could accommodate those demands. Making exceptions to the most basic principles of criminal justice was warranted, it reasoned, because the benefits of restoring the nation’s constitutional order outweighed any harm that might accrue to the defendants.

An instance of “defining the nation via courts” may also be found among the Korean Constitutional Court’s decisions, some of which raised the issue of legal and historical grounds of membership in the Korean polity. In one case, it held that all ethnic Koreans of foreign citizenship are entitled to the same treatment by the Korean government even if they cannot demonstrate positive links to the Republic of Korea (ROK). Under the Overseas Koreans Act, a law designed to facilitate the return of Koreans living abroad and their contribution to the homeland economy, foreign citizens of Korean descent were entitled to a few “preferential” treatments. Yet, the law specifically provided that it applied only to persons whose Korean citizenship had been “expressly ascertained before acquiring foreign citizenship.” This resulted, said the Court, in an invidious discrimination against ethnic Koreans living in certain parts of the world. The Korean government apparently had a constitutional duty to accord the same treatment to all ethnic Koreans abroad. This included even those who had never resided in the Republic of Korea, because they had left Korea during Japanese colonial occupation (1910–45) or before, and thus prior to the creation of the modern Korean state in 1948.

59 The prosecutors’ decision not to indict the leaders of coup was partially based on their judgment that the destruction of an old constitutional order and the creation of a new one represented a change in the “basic norm” (Grundnorm) underlying the legal system. The petitioners in turn criticized the prosecutors for relying on such a “nineteenth-century theory of legal positivism,” which has “long been refuted in modern legal philosophy.”

60 Hirschl, supra note 32, at 732.

61 Hahm, supra note 55, at 402–403.


63 Though liberated from Japanese occupation in 1945, Korea was for three more years under military control by the Soviet Union in the north and the United States in the south. For a theoretical reflection on the constitutional founding of modern Korea, see Chaihark Hahm & Sung Ho Kim, To Make “We the People”: Constitutional founding in postwar Japan and South Korea, 8 Int’l J. Const. L. (I•CON) 800 (2010).
One tragic aspect of modern Korean history is that many Koreans had been displaced from the Korean Peninsula by the end of World War II, either to flee the exploitations of Japanese colonialism or to join the independence movement abroad. Many went to China and the Soviet Union; some of them were later forcibly relocated to states in Central Asia. When such persons and their descendants became citizens of the countries of their residence, having their ROK citizenship ascertained was not a possibility. For one thing, when they had fled Korea, many were technically citizens of the Japanese Empire, rather than the Republic of Korea. For another, even if they somehow held Korean citizenship, it would have been impossible to have it ascertained prior to their acquisition of Chinese or Soviet citizenship. This is because the chief means of ascertainment contemplated by the Overseas Koreans Act was registration at a Korean diplomatic or consular mission. Given that Republic of Korea had no diplomatic relations with China or Soviet Union until the 1990s, there were no Korean missions where they could have registered as Korean citizens before they became Chinese or Soviet citizens.

According to the Constitutional Court, the Act violated the constitutional principle of equality by excluding such persons from the scope of its beneficiary. The Court stressed that those ethnic Koreans in China and the former Soviet Union were more in need of any protection or benefit that might be provided by the Korean government, as compared to those living in North America or other more affluent countries. To deny them the benefit of the Act was therefore all the more pernicious. Worth noting here is that for the Court there was no doubt at all that they had once been ROK citizens, despite the fact that when they emigrated, there was as yet no state called the Republic of Korea. Before Korea’s annexation by Japan in 1910, residents of the Korean Peninsula were under the jurisdiction of Taehan Cheguk, the “empire” that had been proclaimed in 1897 by the penultimate monarch of the Chosŏn Dynasty (1392–1910). Yet, according to the Constitutional Court, all such persons as well as their descendants living abroad were obviously members of the Korean nation, and therefore ROK citizens. That they were Korean needed no documentation or verification. The fact that some of them could not have their ROK citizenship ascertained was a mere practical impediment.

The Court in this case essentially dictated who a Korean citizen is. It also pronounced on the status of members of the Korean diaspora and their relation to home country. Who is a member of the Korean nation and/or state is a question for which

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64 The Japanese colonial authorities even made sure that their Korean subjects could not forfeit their Japanese nationality so that they would continue to exercise personal jurisdiction over them.

65 Chulwoo Lee, supra note 62, at 234–239.

66 It was apparently of no consequence that, in a different case, the Supreme Court of Korea had indicated that all residents of the Korean Peninsula had acquired the citizenship of the Republic of Korea in 1948 upon the establishment of the ROK government. Until that time, it implied that all Koreans had been citizens of Chosŏn (the dynasty that had been annexed by Japan in 1910) by virtue of a provisional statute passed in 1948 under US military government. Supreme Court, 96 Nu 1221, Nov. 12, 1996. Chulwoo Lee, supra note 62, at 233.
little guidance can be found in the individual provisions of the Constitution. That belongs in the realm of identity-formation and perhaps even of myth-making. To be sure, the successful articulation of a constitutional self-identity sometimes requires the invocation of myths. Citizenship criteria often incorporate ethnic and cultural elements. Yet, it is arguable that this should not be done by judicial fiat alone, but through a more discursive process among various actors, and perhaps across generations.

Another prominent example of the Korean Constitutional Court’s involvement in “watershed national questions” would be the above-mentioned decision that blocked the government’s plan to relocate the nation’s capital southward. Since Seoul has been the capital of Korea for six-hundred years, this meant according to the Court that its status as the capital is now part of “customary constitution.” Relocating the capital therefore required a constitutional amendment, and any ordinary statute that provided for such relocation was therefore unconstitutional. In addition to the novelty of the idea of customary constitution itself, this decision was problematic because it essentially made the Court not only the sole interpreter of the constitution, but also its sole “discoverer.” Following this logic, any time-honored tradition or even long-enduring fact could now be recognized by the Court, given constitutional status, and used to strike down statutes. Since no one else but the Court would be in a position to discover customary constitutions, this almost amounted to a declaration of judicial supremacy. Some criticized the Court for usurping the constitution-making power of the sovereign people. Given that the whole nation had been polarized over this issue of capital relocation, it was also unsurprising that some of its advocates criticized the Court for staging a “judicial coup d’etat.”

The case that revealed in starkest terms the Korean Constitutional Court as a powerful “political” agent is perhaps the 2004 decision on the impeachment of President Roh Moo-hyun by the National Assembly. Upon seeing the Court adjudicate the fall-out between the two political branches of the government, many citizens for the first time were alerted to the tremendous influence it could have on the political scene. Many were also led to ask about the democratic propriety of nine unelected Justices deciding upon the fate of a popularly elected President. In countries

67 The Constitution simply delegates to the National Assembly the power and responsibility of defining the criteria for Korean nationality and of protecting citizens residing abroad. KOREAN CONSTITUTION art. 2. It is silent on the status of ethnic Koreans overseas.


69 Hirschl, supra note 32, at 728.

70 See Hahm & Kim, supra note 20, at 37–39.

71 In a later decision, the Court permitted the construction of an “administrative capital” to which only a part of the government agencies would be relocated. Several justices, in a separate opinion, explicitly refuted the idea of customary constitution. Const. Ct. 2005 Hun-Ma 579, Nov. 24, 2005.


73 For a brief review of the significance of this case for Korean constitutionalism, see Hahm & Kim, supra note 20, at 28.
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like the United States, impeachment is regarded as a thoroughly political event, and the judiciary plays no role in the process. From such a perspective, the Korean decision cannot but be seen as an instance of judicialization of politics. The Korean Constitutional Court, fully aware that it will likely be seen as playing politics, declared that its decision was strictly the result of legal, not political, deliberation. Whether or not it actually avoided political considerations is a topic of disagreement among commentators. Yet, most agree that the Court took its constitutional role seriously. It made a point of calling attention to the fact that only it has the power under the Constitution to declare a law unconstitutional, such that even if the president believes a law to be unconstitutional he has a duty to observe it until the Court says so. That it is constitutionally authorized to decide on impeachment cases as well as to review the constitutionality of legislations seemed to imply for some that the Constitutional Court is above both the president and the National Assembly. In sum, the advent of court-centered constitutionalism in Korea has resulted, as in other places, in questions being raised about the propriety of judicialization of politics and judicial supremacy.

3. The Korean paradox: Politicization of a “European” constitutional court

Court-centered constitutionalism has also resulted in focusing the politicians’ attention on the Constitutional Court’s activities and in efforts to influence its personal and ideological make-up. This may be a natural response to the phenomenon of lawmaking and policy-making by the judiciary. Whenever courts “make politically consequential and more-or-less final decisions,” those affected by such decisions will “have reason to seek to influence and, if possible, to control appointments to the courts.” When mega-political issues are decided by the judiciary, this means that the range of affected persons is extremely broad. It basically includes the entire nation, if we are to follow Hirschl’s logic. When the whole population is concerned to influence the conduct of the judiciary, it is no surprise that courts are politicized. In the Korean context, the appointment fiasco described above was a prime example of such “politicalization” of the Constitutional Court.

This brings us back to the paradox of the Korean Constitutional Court. On the one hand, according to Rosenfeld, the criticism that the constitutional adjudicator is acting too politically is a phenomenon found primarily in the American context.


75 For example, regarding its decision not to reveal the votes of the individual justices, some view it as driven by political considerations. See infra text accompanying notes 96–100. For a view that the nature of the conflict itself all but precluded the possibility of a non-political decision, see Youngjae Lee, supra note 74, at 423–427.

76 Ferejohn, supra note 8, at 63.

77 “In this sense, ‘judicialization’ of politics tends to produce the politicization of courts.” Id. at 63–64.
European constitutional courts are rarely at the center of such controversy. Similarly, John Ferejohn notes that “the American form of politicized courts is unusual in the advanced democratic world” and that European constitutional courts tend to be less partisan and their ideology more centrist. On the other hand, it is widely understood that the Korean Constitutional Court was consciously modeled on the European system, particularly the German Bundesverfassungsgericht. Like its European models, the Court is an independent, specialized tribunal that has exclusive competence over constitutional matters. Unlike the American system of diffuse constitutional review, the Korean system is one of centralized review. And yet, this European-style constitutional court has become the subject of overt and severe politicization only seen in the American context. Rosenfeld states that, in the civilian tradition, there is an acceptance, or at least openness, toward the political nature of constitutional adjudicators. Korea is a civil law jurisdiction, but there seems to be very little tolerance for the political role of its Constitutional Court.

From a political standpoint, the debate over the Constitutional Court’s political role can be interpreted as a reflection of the fact that politicians are increasingly finding it convenient to let the Court decide on sensitive political issues. Tossing the ball over to the Court, as it were, can be “an effective means of shifting responsibility, and thereby reducing the risks to themselves and to the institutional apparatus within which they operate.” According some political scientists, presidential systems are more prone to result in divided governments, in which case politicians might be less able to settle issues by themselves and more willing to have the courts decide for them. This in turn will likely generate more controversy over judicialization of mega-politics. That is why Ferejohn and Hirschl both point out that judicialization is induced to a great extent by the political sector. It is not necessarily the result of power-hungry activist judges flexing their muscles.

Such analysis, while correct, neglects to take note of the institutional arrangements that allow, or even promote, such a phenomenon. For example, the Korean cases

78 Id. at 65.
79 Particularly, the system of allowing individual citizens to file “constitutional complaints” (Verfassungsbeschwerde) to seek remedy for violations of their constitutional rights was consciously taken from the German system. West & Yoon, supra note 4, at 93.
80 During the drafting process of the current constitution, the idea of adopting the American model was discussed and expressly rejected. Id. at 75–77.
81 To be sure, according to Hirschl’s “cascade of examples,” courts in many other countries are also being subjected to politicized criticism and even overt political and physical pressure. Hirschl, supra note 32, at 747–751. Most of these are, however, from authoritarian or dictatorial states where the judiciary has not even attained the minimum degree of independence. Therefore, the political backlash they are suffering cannot be considered at the same level as the politicization of the US Supreme Court. Even though Korean democracy is relative young, the respect and independence enjoyed by the Korean Constitutional Court makes it implausible to compare its politicization to those cases.
82 One of the reasons why the Supreme Court of the United States attracts criticism, according to Rosenfeld, is because its power of judicial review does not have explicit textual authorization. Rosenfeld, supra note 1, at 637–638. This, however, does not apply to the Korean case. The Constitutional Court’s powers are explicitly provided for in the Korean Constitution.
83 Hirschl, supra note 32, at 744.
mentioned above were made possible because the Constitution specifically provides for mechanisms through which such “political” issues could reach the Constitutional Court. A system of constitutional adjudication which requires that impeachment cases be decided by a constitutional court will necessarily attract more political attention and energy on that institution as compared to, say, the American system where the judiciary almost plays no role. Similarly, a system that allows individual citizens to file constitutional complaints may generate more opportunity for the constitutional court to adjudicate mega-political issues than a system which does not. In short, we need to be cognizant of institutional and practical factors which tend to raise the political stakes for relevant actors with an interest in constitutional adjudications. In the following, I shall discuss a number of such factors in the Korean system, which seems to attract political energy and attention on a supposedly “European-style” constitutional court.

3.1. Appointment procedure

We have seen that the process of appointing members of the Korean Constitutional Court can turn into a highly divisive political event. Readers will have noted that the process is very different from its putative models. Of the nine justices of the Court, three are named by the president, three are nominated by the National Assembly, and three designated by the chief justice of the Supreme Court. 84 On the surface, this is similar to the system used in France to appoint members of the Conseil constitutionnel, or the Italian system of appointing the fifteen judges of the Corte costituzionale. It is certainly very unlike the German appointment system where all members of the Bundesverfassungsgericht are chosen by the two houses of the federal legislature, basically through closed-door negotiations among various political parties. 85 In contrast to the French and Italian cases, however, all of the Korean Court’s justices must be qualified to sit on ordinary courts and, more importantly, be confirmed by the National Assembly.

In a system where the legislature is entitled as well as required to scrutinize the candidates, it is not surprising that the appointment procedure can become the subject of political controversies. It may be revealed to the world over that the Constitutional Court, its rhetoric of political neutrality notwithstanding, does not and cannot operate in a political vacuum. In this connection, it is interesting to note that, originally, not all justices of the Court were required to undergo scrutiny by the National Assembly. The Constitution itself requires only that the President of the Constitutional Court be appointed with the consent of the National Assembly. 86 By statute, the three justices nominated by the National Assembly were also required to undergo a hearing before a special committee of the National Assembly. As for the other justices, until recently, no hearing was required. In other words, the potential for politicization was limited in the original design of the constitutional structure.

84 Formally, all nine are appointed by the President. It is also the President who appoints the President of the Court.
85 Stone Sweet, supra note 4, at 46–49.
86 Korean Constitution art. 111, sec. 4.
This, however, was criticized by many as a serious defect. In light of the fact that consent of the National Assembly is required for all fourteen justices of the Supreme Court, which has no competence over constitutional issues, that some members of the Constitutional Court could be appointed without public scrutiny was deemed a major flaw of the Constitution.\(^{87}\) At the least, it was an imbalance difficult to justify on rational grounds. Eventually, the relevant statutes were revised to remedy this. Now, all those nominated to the Constitutional Court must be questioned at a hearing by the National Assembly.\(^{88}\)

A few differences still remain, though. The hearing for the President of the Court and for those nominated by the National Assembly is held before a Special Personnel Hearings Committee convened expressly for that purpose. For other justices (those appointed by the president or designated by the chief justice), the hearings take place in the relevant standing committee of the National Assembly, namely, the Legislation and Judiciary Committee. More importantly, even under the changed rules, the consent of the full session of the National Assembly is not required for the other justices. Also, the new rule allows for the appointment of these nominees if the Legislation and Judiciary Committee fails to complete its hearing within thirty days.\(^{89}\) As a result, the National Assembly can block the appointment of the Court’s president and those justices nominated by itself, whereas it lacks such veto powers for other justices.

Despite these differences, however, the potential is now always there for the process to become politicized. That all candidates for the Constitutional Court must stand before politicians is enough to ensure this. The appointment procedure, in other words, has evolved to a system which resembles the American practice of subjecting nominees for the federal bench to the Senate’s scrutiny. Under such a system, there is an ever present danger that each appointment to the Constitutional Court will be an occasion for polemical exchanges and partisan politics, which may further promote the charge that the Court itself is ultimately a “political,” i.e., non-neutral, institution. This is precisely what happened during the political row over Roh Moo-hyun’s attempt to appoint Jeon Hyo-sook as the Court’s president.

It should be noted that this evolution of the appointment procedure in a direction that may attract more political attention on the Court was fueled by democratic demands. Although the Constitutional Court is widely perceived to have contributed to the consolidation of Korean democracy, it is itself becoming the object of demands for more democratic oversight or control over state institutions. As a result, as compared to its putative European models, the Korean Constitutional Court may claim better democratic credentials. Yet, precisely because of this, it is more likely to become the subject of political controversy.\(^{90}\)

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89 *Law on Personnel Hearings, amended by Act No. 7627, July 29, 2005, arts. 3 & 9.*

3.2. The practice of public dissent

The justices’ mode of reaching a decision may also be a cause for focusing political attention on the Korean Constitutional Court. Relevant here is the fact that, from the very beginning of the Court’s operation, some justices have taken to writing lengthy dissenting opinions. The lack of consensus or unanimity on any court certainly runs the risk of giving the impression that the judges are merely representing different factional interests or viewpoints. Of course, it would be unrealistic to expect the justices to reach unanimous decisions on all the cases they decide. Yet, it is quite another matter for them to publicize their differences. A comparison between the constitutional adjudicators of the United States and European countries might be instructive.

As is well known, justices of the US Supreme Court often publish their dissenting opinions in which they severely criticize the views of the majority. To be sure, this may not have been the practice from the beginning, but it has become the norm since at least the middle part of the twentieth century and is now accepted as such by most people. By contrast, in European jurisdictions, dissent among the constitutional adjudicators is seen as much more problematic. The idea that courts must speak in a unified and impersonal voice is still strong in many countries. How judges deliberated in a given case, as well as the final viewpoints of the individual judges, are kept from the public. In countries like France and Italy dissents are prohibited. In Germany, the publication of dissents is allowed since 1970 and some judges of the Bundesverfassungsgericht do write dissenting opinions. Yet, these are still the exception, and the practice of consensual decision-making remains the norm. One of the arguments commonly made against revealing dissenting voices is precisely that it may cause the public to regard the courts as a group of “political” actors with partisan viewpoints. Of course, it is not empirically clear whether prohibiting the publication of dissents actually enhances the perception of “neutrality.” Nevertheless, the worry is that revelation of dissenting votes might lessen the perception of courts as disinterested voices of truth or wisdom because it shows individual members of the court to be biased human beings.

If there is indeed a link between the publication of dissents and charges of politicization, then this might help explain the case of the Korean Constitutional Court. For, the individual justices of that Court are actually required by law to reveal how they voted in each case. The Constitutional Court Act provides that each justice who participates in adjudication must indicate his or her opinion on the written decision. 95 This requirement was in fact the result of a small controversy in the wake of the Court’s

92 Ferejohn, supra note 8, at 65.
93 Id. at 67; Stone Sweet, supra note 4, at 145–146.
94 For more considerations both for and against allowing dissenting opinions in highest courts, see John Alder, Dissents in Courts of Last Resort: Tragic Choices?, 20 OXFORD J.L. STUD. 221, 239–244 (2000).
95 CCA art. 36, sec. 3.
judgment on the impeachment case against President Roh Moo-hyun. At the time of the decision, the previous version of the law only stipulated three types of cases—adjudications of statute’s constitutionality, of competence disputes, and of constitutional complaints—as instances in which the justices were required to indicate their opinions. Since impeachment decision was not specifically enumerated in the article, the Court decided to issue an opinion of the court and not to disclose the votes of the individual justices. It decided that it lacked legal basis for revealing minority opinions.96 Interestingly, though, the opinion also noted that the issue of disclosing the votes had been discussed among the justices, but was decided in favor of not revealing who had voted for and who against convicting the president.97

This in turn set off criticisms of cowardice and irresponsibility. The charge was that each justice should be prepared to take personal responsibility for his or her position and not hide behind the pretense of an impersonal institution speaking with a unified voice.98 By mentioning that the issue had been discussed among the justices, the Court was all but admitting that the impeachment decision was not reached by a unanimous vote. Furthermore, there was a possibility that the provision invoked by the Court could have been interpreted the other way, i.e., not as a ban on indicating the votes in an impeachment decision, but rather as merely enumerating the cases in which individual votes must be revealed, effectively leaving the other cases to the Court’s discretion.99 To invoke such a provision as their reason for not revealing the individual votes seemed rather unconvincing and ineffectual.

In the end, the issue was settled by a revision of the Constitutional Court Act. The provision stipulating the three types of adjudication in which the justices must indicate their opinions was replaced in July 2005 by a new one mandating the justices to indicate their views on all decisions, regardless of the type of adjudication.100 By law, the individual justices are now required to reveal how they voted in all types of cases, and effectively to publicize their differences. We might say that the law was changed in the direction of making the Court behave more like the US Supreme Court rather than its European models. This change of course may not account for all the criticism of politicization that is being lodged against it. The amendment was in fact prompted by an already-existing charge of politicization, for the impeachment decision was seen by many as manifesting the Court’s inherently political and biased nature. Even before the impeachment decision triggered the change in the law, the practice of

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97 The Court even released a separate statement explaining why no votes were revealed and no dissenting opinions were attached to the final decision. Taet’ongnyŏng T’anhaek Sakŏn-ŭi Kyŏlchŏngmun-e Hĕmpŏ Chaep’anso-ŭi Ugyŏngmunil Kijaehan Iyu [The Reason the Court Released Only the Court’s Opinion in the Presidential Impeachment Decision], May 14, 2004.
99 This possibility was in fact stated in the Court’s decision as a view that had been expressed by some justices during their deliberation.
100 CCA, amended by Act No. 7622, July 29, 2005, art. 36, sec. 3.
writing dissenting opinions had already been firmly established. It is also common knowledge that the Court reaches its decision through vote-counting, and it is becoming increasingly common for observers of the Court to engage in predicting which justice will take which view in a given case. Nevertheless, it is interesting to note that one of the responses to the charge of politicization was a change in the law which may potentially exacerbate the perception that the Constitutional Court is a political institution.

3.3. Concrete and a posteriori review

The fact that the Korean Constitutional Court is not authorized to engage in abstract or a priori review of legislation may ironically be another factor that contributes to its heightened “politicization.” According to the Constitution, the Court is empowered to decide on questions of constitutionality of statutes passed by the National Assembly. Yet, it does not specify the concrete means for exercising this power. The Constitutional Court Act does that. According to article 41(1) of the Act, the Court has the power to decide on the constitutionality of a statute only when it is “material to the adjudication of a concrete case.” As such, an ordinary court presiding over a concrete case may certify a constitutional question to the Court, either ex officio or upon motion by a party. There is no way for the issue of a statute’s constitutionality to reach the Court independent of particular disputes between parties, as no government party is empowered to raise the issue in the abstract.

Further, the Korean Constitutional Court is not allowed to review the constitutionality of a piece of legislation before it goes into effect. The constitution does not provide for any mechanism by which the review power of the Court could be exercised a priori. Unlike the French Conseil constitutionnel, for example, the Korean Court is not authorized to become involved with the process of lawmaking in the legislature. On the surface, this may appear to exclude and shield the Court from the more overtly political pressures. Yet, ironically enough, this may in fact fuel the charge that it is becoming embroiled in politics. This becomes clearer when set against the comparison between European and American models.

As is well known, most constitutional courts in Europe are expected to safeguard the constitution as an objective order, quite apart from any specific claim of violation by individual litigants. As a corollary, a wide range of agencies are empowered to commence a proceeding in the constitutional court with a view to reviewing the constitutionality of legislations and various government actions. As a result, abstract

101 Influenced by the “attitudinal” or “strategic” models developed by American political scientists, some observers of the Korean Court have started analyzing its rulings by considering which justice was appointed during whose presidency.

102 In some translations, the clause is rendered: “When the constitutionality of a statute must be determined prior to reaching a judgment in a case. . . .” Twenty Years of the Constitutional Court of Korea 650–651 (Constitutional Court of Korea ed., 2008).

103 Rosenfeld, supra note 1, at 640, 650.
and/or a priori review is common among European constitutional courts. By contrast, the American system rejected the idea of allowing the Supreme Court to issue advisory opinions, by stipulating that there be a concrete “case or controversy” before any federal court can commence an adjudicatory proceeding. This means that challenges to the constitutionality of a statute may not be raised unless and until a claim is made in the context of a concrete dispute.

In this regard, the Korean Court is closer to the American system. Despite the “centralization” of constitutional issues into one specialized court, the way it actually exercises review power is only incidenter and a posteriori. While there is no “case or controversy” requirement in the constitution, the statutory condition that the issue of constitutionality be material to deciding a concrete case has the same effect. The Korean Constitutional Court is limited to deciding only those issues that arise in the course of litigation in ordinary courts. Ironically, this may tend to promote the appearance that the Court is essentially a “judicial” organ which settles concrete cases among individual litigants, with no competence over political or policy issues. In other words, it prevents the Court and the general public from generating an expectation that the Court’s powers actually go beyond narrow, technical “legal” issues.

Rosenfeld states that in the American tradition the constitution has been understood as a legal norm from the beginning and that the influence of common law mode of judging has tended to produce an expectation that, even when the Supreme Court is interpreting the constitution, it should be confined to vindicating the legal rights of an individual, rather than safeguard any objective order of values. The idea is that reactions will tend to be more critical when such a court is perceived to be making policy decisions or enforcing certain substantive values not found in individual rights provisions. Although neither the legal conception of constitution nor the common law mode of judging has been part of the Korean tradition, the limitation of the Court’s power to concrete and a posteriori review is having a similar effect. Korea is a civil law jurisdiction, but it does not seem to share the European presumption that constitutional adjudication by special judges is inherently political.

This is in part due to the fact that constitutional adjudication is a relatively recent development in Korea. Prior to the democratic transition in 1987, systems of constitutional adjudication provided for in previous constitutions were rarely utilized. There may have been a presumption that the constitution is a political norm, but that was understood primarily in a negative way to mean that it was merely a means to legitimate the existing power relations. Under authoritarian regimes, most judges and lawyers out of fear studiously avoided invoking the constitution against the government.
But, the perception that the Constitutional Court is or should be a “legal” institution may also be related to a new feature of the current constitution. According to article 111, section 2 of the Constitution, all Constitutional Court Justices are required to be licensed to sit on ordinary courts. Under previous constitutions, even the nominal agencies in charge of constitutional review could be composed of public officials and legal scholars, in addition to professional judges. It is unclear why this new requirement was inserted in the Constitution, but whatever the cause, it may operate to promote the expectation that the Constitutional Court should not become involved in mega-political issues.

In a context where there is no shared understanding that the constitutional adjudicator’s role is properly to go beyond narrowly confined ideas of legality, it will be more likely that charges of overreaching will be directed against it, and as a result political energy brought to bear on it to somehow control it. Whenever it appears to take on mega-political issues or to take political considerations into account, it will be castigated for exceeding its proper role and mandate.

Of course, this perception of the Court sits in awkward tension with the fact that it is authorized by the constitution itself to adjudicate such highly political disputes as impeachments of high-ranking officials and dissolution of political parties whose purpose and activities are deemed contrary to the basic principles of the constitution. It could even be argued that the Court is actually mandated to judicialize mega-political issues. To this, however, it may be replied that such cases are rare exceptions, at least in numbers. Since it was established in 1988, the Court has decided only one impeachment case; there has not been a single case on dissolution of unconstitutional parties. The overwhelming majority of its caseload, by contrast, consists of constitutional complaints in which individual citizens seek to vindicate their rights against unconstitutional uses of public power. To be sure, many citizens have started utilizing the constitutional complaint for political purposes to oppose government policy. The dominant perception, however, of the Court’s primary mandate remains the concrete adjudication of narrowly defined rights of the individual. Decisions on broad and seemingly open-ended questions of policy will likely be censured as illegitimate.

3.4. Difficulty of amendment

Another factor which tends to raise the political stakes and which fuels the argument about the Court’s politicization may be found in the procedures for amending the constitution. The fact that Korea has a “rigid” constitution which may only be changed through special procedures might be driving heated and acrimonious political battles against the Court. This of course is more in line with the European model of constitutional review in which the adjudicators are quite often drawn from the academia.

109 Korean Constitution art. 111, sec. 1, Items 2 & 3.

110 For example, the decision on capital relocation was initiated through a constitutional complaint proceeding. The case on dispatching Korean troops to Iraq also arose as a constitutional complaint by those opposed to the government’s foreign policy. Chung Tae Ho, Inkwŏnhangjeidojeon: Hŏnpŏchwa Hŏnp'ŏchwa Silje [The Concept and Practice of Constitutional Complaints as a Human Rights Protection Institution], 14 Hŏnp'ŏchwa Yŏn'gu 1, 25–36 (2008).

111 This of course is more in line with the European model of constitutional review in which the adjudicators are quite often drawn from the academia.
to the Court, which will naturally attract political attention and energy. This is again readily seen if one takes a comparative perspective.

In countries like Germany and France, where the constitution may be amended through regular legislative votes, or at least through supermajority votes that can be regularly achieved, political actors are less likely to devote their energy to making sure that their constitutional adjudicators reach what they consider to be the right decision. This is because the constitutional adjudicators’ decisions are not necessarily the final word. There is always the option of amending the constitution itself by amassing the necessary votes in the legislature. Similarly, if the constitution provides a way for the legislators to override the decision of the constitutional adjudicators, as in Canada, there may be less political attention and pressure on them.

By contrast, in the United States, because the formal requirements for amending the constitution are far more difficult to meet, the decision of the Supreme Court tends to be seen as the final word, which cannot be overridden through regular legislative votes. This causes all relevant players to be so much more concerned about how the Supreme Court reaches its decisions and who gets appointed to that tribunal. The stakes are therefore much higher, and it is natural for political actors to bring all available resources to bear on the politics surrounding the Court. Constitutional adjudication is more prone to be seen as an extension of politics, thus making it easier for critics to charge that it is becoming improperly politicized.

According to the Korean Constitution, an amendment is possible only when a number of special hurdles are passed. A proposal for an amendment can be made by a simple majority vote in the National Assembly; it may even be made by the president alone. But once a proposal has been made, it must be made public for at least twenty days, and then the National Assembly must vote on it within sixty days. A two-thirds majority of the entire lawmakers is required for the proposal to pass. After the proposed amendment has passed the National Assembly, it must be then put to a national referendum, in which it must be approved by a majority of all voters. Clearly, the constitution is designed to be a special norm different from regular legislation, which should not be tampered with lightly. In this context, the decisions of the Constitutional Court will have a tendency to be seen as the last word on the issue at hand. Since politicians normally do not have the option of changing the constitution, they will tend to apply all their power and influence to make sure that the Court will decide according to their own partisan, political standards. This will include affecting the personal make-up of the Court, as seen in the appointment fiasco discussed above. It will also include letting the Court know of their displeasure through charges of “judicial coup d’état” whenever it decides against their interests. The temperature

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112 Rosenfeld, supra note 1, at 653–655.


114 Many scholars have argued that empirically, over the long term, the Supreme Court does not have the last say. Neal Devins & Louis Fisher, *The Democratic Constitution* (2004); Barry Friedman, *The Will of the People* (2009). Still, it may be the “perception” that the Court’s pronouncements cannot be changed short of a constitutional amendment which tends to raise the stakes.

115 Korean Constitution arts. 129 & 130.
of political debate will definitely be higher because the stakes are higher when the Court decides on mega-political issues. It is no surprise that accusations of undue politicization will be made “much more vehemently” by Korean political actors than by their European counterparts.

In sum, the Korean Constitutional Court operates in an environment that tends to heighten the political stakes. Although it is a “European-style” court that has exclusive and centralized jurisdiction over constitutional issues, the institutional setting and its practices cause it to be regarded more like the US Supreme Court. Due to the public confirmation hearings at the National Assembly, the Court and the justices may find themselves in the crossfire of political battles. The fact that the justices are required to publicize their disagreements tends to encourages the perception that the Court’s decisions are merely partisan viewpoints. The absence of abstract or a priori review powers may generate an expectation that it is a court that deals primarily with narrowly defined “legal” issues, which will appear violated whenever the Court decides on mega-political issues. Lastly, the constitution’s rigidity may cause political actors to focus more energy and attention on the rulings of the Court, which results in more polemical discourse about whether or not it is acting in an unduly political manner.

It is almost natural that the Korean Constitutional Court is increasingly finding itself at the center of the kind of controversy that Rosenfeld claimed is exclusive to the US Supreme Court. We might even conclude that, to a limited extend, Rosenfeld’s explanations for the causes of the American debates on politicization are also applicable to the Korean context. The Korean paradox turns out to have a logical explanation after all.

Conclusion

In many respects, the appointment fiasco of 2006 was an indication of the status and influence of the Constitutional Court in the political life of Korea. Many are debating the growing trend of judicialization of politics as more political issues that could not be resolved by politicians are finding their way to the Court. This in turn is attracting more political attention, often critical, onto the Court. In response, the Court has time and again emphasized that its decisions are strictly legal and not based on any political considerations. The irony is that the more it claims to be a strictly legal institution, the more likely that its decisions will be seen as exceeding the bounds of strict legality. For, given the range of powers the Court exercises, which includes adjudicating competence disputes among state agencies, deciding on impeachments, and even dissolving political parties, it is inherently difficult for it to act according to a strictly legal script.

From the beginning, the specialized constitutional court designed by Kelsen was never a mere “negative legislator.” Modern-day constitutional courts are even less so, now that guarantee of constitutional rights has become an essential part of any such court’s mandate. With the advent of court-centered constitutionalism, it is

116 Stone Sweet, supra note 4, at 37–38, 133–139 (noting that “negative legislator” was possible only when the court was precluded from interpreting open-ended rights provisions).
inevitable that adjudicative bodies will be the main forum for addressing “watershed national questions.” Yet, the fact that the Korean Constitutional Court is forced to argue that it is operating as a legal, or judicial, institution should suggest to us that the conceptual tools we use to understand and evaluate the activities of the Court are inadequate and perhaps outdated. They are drawn from an age in which adjudication was seen a narrow, technical task for politically neutral (which often meant politically inept) judges. The rise of court-centered constitutionalism can be understood as a response to the often tragic consequences of such a limited conception of adjudication. This in turn calls for a rethinking of our vocabulary and theoretical framework for thinking about constitutional governments.

Until then, it appears unavoidable that the Korean Constitutional Court will continue to be the subject of politicized discussions and be challenged for its purported lack of legitimacy. This is all the more so given the institutional peculiarities surrounding the Court noted above. For, its “European” origins have apparently failed to convey the sense that constitutional adjudication inevitably, and even properly, has political dimensions. On the contrary, demands for democratic control seem to have pushed the Court into a setting where it is more likely to be attacked for being unduly political. Fortunately, the Court enjoys for now a high level of public trust as compared to other state institutions. This may not last, however, if our conceptual tools and terms of discourse are not altered to meet the needs of court-centered constitutionalism.

117 According to a survey conducted for five consecutive years on the influence and trustworthiness of major public and private organizations, the Constitutional Court of Korea has consistently scored the highest among state organizations in the trustworthiness category. For the results of the most recent survey, see 25-gae ‘P‘awŏjŏjik’ Yŏnghyôngnyŏk, Silloedo Pyŏngka [Influence and Trustworthiness of 25 ‘Power Organizations’ Assessed], Joongang Ilbo, July 1, 2009.