



Kwangju Incident and Role of the Judiciary in South Korea

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ABSTRACT

Objective – The Constitutional Court of South Korea ('the Court') is the guardian of the constitution and has jurisdiction to decide cases concerning potential violations of the constitution. In the Kwangju incident, innocent citizens were murdered and injured while they were protesting against the military government. Their demand was to be provided the basic rights which are granted by the constitution of South Korea, as well as seeking democracy in the country. This paper analyses the judgment of the Court and observations of the judges. Further, it discusses the effects of the judgment on legislation, as well as analysing the situation involved in deciding the case in which unconstitutional actions of the military government were declared inhumane.

Methodology/Technique – The research reviews articles in related area.

Findings – Through this judgement, the Court played a major role in strengthening the constitution and democracy, through the way in which it reached a conclusion in the Kwangju incident case. The Court suggested the legislator should introduce new legislation to remove the latches of the case.

Novelty – The study intends to learn the effects of the judgement on South Korean legislation.

Type of Paper: Review.

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JEL Classification: K10, K14.

1. Introduction

After the long period of army government, in 1987, democracy was restored to South Korea and the new Constitution of the country was promulgated. A new Constitutional Court was introduced in order to ensure the protection of the basic fundamental rights of the citizen and to deal with issues of potential violations of the Constitution. The separate act, "The Constitutional Court Act", was promulgated and established the Constitutional Court of South Korea. The Court has jurisdiction to decide cases related to alleged violations of the Constitution.

The Korean Constitutional Court also works under the Constitution of South Korea. The role of the Court is very important in maintaining the rule of law and providing checks and balances on the organs of the State, such as the Executive and the Legislature. Further, the Court plays an effective role in the restoration of the basic rights of the citizen, as granted by the South Korean Constitution. The Court takes notice of the violation

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of the Constitution or any institution or organ of the State and as a result, a constitutional complaint may be filed before that Court.¹ The Court is situated in Seoul, the capital of South Korea, and has jurisdiction throughout the country. This is the only court that has the power to decide constitutional issues. The Court is equal in status to the Supreme Court of South Korea. All of the Court's judges receive the same benefits as Supreme Court judges, and the President of the Constitutional Court receives the same benefits as the Chief Justice of the Supreme Court. The Constitutional Court of Korea is also equal to the Supreme Court of South Korea in having jurisdiction over the whole country. Decisions of the Court attain finality and, moreover, no remedy such as an appeal or revision is available. A decision of the Court cannot be challenged before the Supreme Court of South Korea. No court, other than the Constitutional Court, has jurisdiction to decide cases over which the Supreme Court has jurisdiction. If a constitutional issue is raised before an ordinary court, this issue should be transferred to the Constitutional Court for adjudication, through application by the parties or an ordinary transfer by the Court.

The Court has jurisdiction in special matters involving the Constitution of South Korea.² There are nine judges in the constitutional court, including the President. The judges of the constitutional court are appointed for a six year term.³ Separate rules, procedures, and qualifications are required for the appointment of a judge to the Court. The procedure of the Court is also determined by separate legislation.⁴

In 1961, for the first time in its history, South Korea came under military rule, with the army general Park Chung-hee's rising to power. He abrogated the constitution, suspended the basic rights of the citizens, and occupied the country. Subsequently, he was murdered on 26 October 1979 by his subordinate. After his death, a new civilian acting president was appointed but failed to control the situation in the country. Park Chung-hee's murder had created a vacuum which led to Chun Doo-hwan (another army general) occupying the government on 12 December 1979 and imposing Martial Law in the country.

On 5 May 1980, in the Kwangju city of South Korea, civil society and political forces started protesting against the Martial Law, demanding civilian government and seeking the restoration of their their basic rights, as per the Constitution.⁵ However, the armed forces then attacked innocent people making such demands. After the attack, Kwangju looked like the scene of a battle.⁶ In this incident, more than three hundred were murdered and thousands were wounded. The incident in Kwangju city lasted ten days, but the political system, democracy, and basic fundamental rights of the citizens were only restored twenty years later. The incident was a symbol of the fight against the military regime and of the restoration of democracy and the basic rights of the citizens.⁷

In 1987, the rights of the citizens and democracy were restored in South Korea, however, one of the main culprits of the Kwangju incident was then elected as a president. In 1993, the first independent president of South Korea was elected and, after the restoration of the democracy, the Kwangju incident resurfaced as a burning issue in the country. Under pressure from the victims of the incident, President Kim Young-Sam directed the Prosecutor General's office in Seoul to start an investigation against those primarily accused of being responsible for the Kwangju incident. The report, submitted to the president by the Prosecutor General, indicated that the Kwangju incident case could not be opened due to being barred by time and other technical

¹ Under s 5 of the Constitutional Court Act, the Constitutional Court has jurisdiction to decide the constitutional issues through constitutional complaints.

² Under art 111 of the Constitution of South Korea, the Constitutional Court has jurisdiction to decide impeachment issues, issues related to the political parties, issues between the state institutions, constitutional complaints on the violation of the constitution of South Korea etc.

³ Under Art. 112 of the Constitution of South Korea.

⁴ The Constitutional Court of South Korea Act. This legislation was passed in 1987 at the time of the restoration of the constitution. Under this law the Constitutional Court of South Korea was introduced to protect the Constitution as well as the rights of the people of Korea. The Constitutional Court of Korea is the guardian of the Constitution.

⁵ Kwangju is one of the biggest cities of South Korea and has political backgrounds before the Kwangju massacre. Some scholars have opined that this incident threatened to stop the political activities of the government and threatened the civil society against their demands.

⁶ Georgy Katsiafika and Na Kahn-chaee, *South Korea Democracy; Legacy of Kwangju Uprising* (2006) (in which detail explanations have been provided and analyze the Kwangju incident. It also explains socio-economic background).

⁷ "Uprising in Korea" 67–85 (Gi-Wook Shin and Kyung Moon Hwang eds, 2003).

reasons.⁸ Further, the Prosecutor General's report discussed the fact that some of the accused persons were ex-Presidents of South Korea and they therefore had immunity under the constitution of South Korea.⁹

The matter was brought before the Court and was subsequently dismissed with the observation that the Court did not have jurisdiction to decide retroactively. The Court suggested that if the Legislative Assembly passed a special law amending the jurisdiction of the Court and the limitation issue in response to the Kwangju incident, then this case could be decided by the Court.¹⁰

In December 1995, the Legislature introduced a special law regarding the Kwangju incident. This special law addressed the limitation point and determined the criteria for a decision to be made by the Constitutional Court.¹¹ This law was criticized as being unconstitutional because it related to an incident that predated the introduction of that Court. The special law was challenged before the Court in the hope that it would be declared illegal, unlawful, and unconstitutional.¹² However, the Court dismissed the case and ruled by a majority that special law was not unconstitutional. Thereafter, the case against the former presidents was initiated and they were found guilty. The Court awarded punishments for both of the accused; 25 years of imprisonment to Mr. Chun Doo-Hwan and 17 to Mr. Roh Tae-woo.¹³ Moreover, a bribery scandal was uncovered, with suggestions that the accused persons received huge sums of money as bribes during their presidency.¹⁴ The case was finalized after a significant struggle by the legal heirs of the victims of the Kwangju incident. After this decision, victims of the Kwangju incident had achieved some of their goals however some legal questions were not determined in the judgment. This paper will analyse the observations of the judges and the verdict of the Court, as well as discussing the factors that influenced the decision.¹⁵

The decision of the Court sets an example, in the judicial history of South Korea, for the conviction of military men/dictators, and paved the way for the Prosecution to take legal action. Political forces and civil society were pressuring the Court at the time to ensure that the case was dealt with independently and without internal and external influence. The special law promulgated by the legislature also provided solid ground on which to base the decision of the case, thereby justifying the unconstitutional action.

2. Legal Proposition before the Constitutional Court

The Court had two legal issues to decide. First, whether the special law violated art 11 of the Constitution of South Korea and second, whether s 2(1) of the special law contradicted the basic norms of the Constitution. The Court observed that the special law was not unconstitutional because as it was justified through reasonable grounds. On the second issue, the Court held that ex post facto law is against the norms of the Constitution. The special law was validated by the Court by the majority opinion, with five judges out of nine judging in favor of the special legislation¹⁶ and the other four judges commenting that the special law addressing the limitation issue is not a constitutional issue and should, therefore, be decided before the ordinary courts. The ordinary court could decide that issue is declaratory or formative. The constitutional matter would only arise if the ordinary court found the issue to be formative. Three judges took the view that the limitation point only arose when there was no legal and systemic problem to avail the prosecuting jurisdiction. The statute of limitations can only be suspended for special crimes against the constitutional order, and the same could not be exercised by the prosecution. Further, it was observed that special law is not retroactive law. Two judges

⁸ Incident non-institution of the Prosecution case, dated Jan, 20, 1995. Reported as, 94 Hun-Ma 246.

⁹ As per art 84, during the presidency, if any kind of offence committed the accused can not be prosecuted during his appointment as president.

¹⁰ 94 Hun-Ma 246. The decision of the Constitutional Court which was given based on the constitutional complaints received. The same was filed by the legal heirs of the victims of the Kwangju incident. In this decision, the Court gives some suggestions regarding introducing new legislation, which should cover the technical laches of the incident to be determined by the Constitutional Court.

¹¹ On 19 December 1995, the Legislative Assembly of South Korea promulgated two different special laws regarding the laches of the Kwangju incident case. The first special law was Law No.5028 of 1995 and the second was Law No. 5029 of 1995.

¹² The Democratization Movement Case (The Special Act Case) decided on Feb.16, 1996, 96 Hun-Ka2.

¹³ 95 Hun-Ma221, Kwangju incident case.

¹⁴ Ahn, cheol, Significant Setting, "Gwangju Uprising". pp. 112, 121 (2002).

¹⁵ Yi-Li Lee, The Korean Constitutional Court and Kwangju Case. *National Taiwan University Law Review*, Vol.4:2 p 231(2009).

¹⁶ Decisions of the Constitutional Court of South Korea, Reported as, 1996, 96 HunKa 2, 96 HunBa 7 & 13.

opined that the special law was a retroactive legislation.¹⁷ The special law was rightly promulgated to convict the accused persons. On the other hand, under the criminal law, proceedings could be initiated regarding the murder and injury of the innocent citizens who were demanding their human rights from the accused.

3. Consequences of the Decision of the Constitutional Court

3.1. Further Legislation

After the Court's judgement on the Kwangju incident, the Legislative Assembly of South Korea passed many laws between 1996 and 2005, including the law to restore the honor of the participants of the Kwangju movement and to compensate the affected citizens. The law primarily related to the treatment of injured persons from the Kwangju movement however, a law was also passed aiming to uncover the truth and establish reconciliation.¹⁸ The decision of the Court paved the way for transitional justice and many legal reforms related to the victims of the Kwangju incident were introduced, such as compensation and protection.

3.2. The Impact of the Judiciary

According to the Constitution, if a case relates to violations of its special provisions, it should be decided by the Constitutional Court. The Kwangju incident was a criminal act hence the Criminal Court had jurisdiction to decide the case. The special was promulgated by the authorities to bring about a result to these continuing social justice issues. The special law was challenged before the Court, which held that it was in fact in accordance with the Constitution. Moreover, proceedings against the accused could begin on the basis of this new legislation.¹⁹

The Supreme Court of Korea endorsed the sentence of the accused in April 1997 stating:

"The Supreme Court observed that the special Act was constitutional and lawfully suspended the statute of limitation. The court further observed that there is sufficient material available on the record as evidence before the court which proved that the accused persons are the real culprits of the Kwangju miscarriage. The accused persons abrogated the constitution, occupied in the country and derail the political system. If, they had strong based justification to do that then under the constitution they can justify through referendum. The new constitutional order of the accused persons is not acceptable and cannot be tolerated under the circumstances because due to that all powers of the state institutions have been suspended without adopting the proper procedure of law. Subsequently, on the mitigating circumstances, the Supreme Court has been reduced the sentence of the accused persons in appeal".²⁰

3.3. The Truth Commission Model

The decision of the Court effectively solved the issue regarding the Court's limitation. Following this development, many similar proceedings have been initiated and the Truth Commission Model was introduced.²¹ This decision was also widely accepted by the citizens of South Korea who had increased confidence in the judiciary as an independent institution of South Korea.

¹⁷ The Special Act Case, and Kun Yan, the Court and Democratization, 33, 39 (Yoon, Kyued, 2000).

¹⁸ Kuk Cho, Legally Coping about the Wrongs, 590–610 (2007).

¹⁹ In the complaints case the Court stated that the opinion of the prosecution regarding immunity relating to dictators in the criminal system is based on a misunderstanding of the ideals of the Constitution.

²⁰ Decision of the Supreme Court of Korea, Reported as, 96 Do 3376.

²¹ Angelika S, *Truth and Reconciliations*, 415, 416 (1998). This was the first time this type of commission was established in South Africa. This commission usually probed issues involving the violation of human rights in different countries. On the bases of the reports of this Commission, their main development has been proposed by the administration to democratic rule, in the wake of violent internal conflicts, or a gradual peaceful revolution when civilian leadership took over from a military regime.

4. Conclusion

Through this judgement, the Constitutional Court of South Korea played a major role in strengthening the Constitution and the practice of democracy in South Korea, by suggesting that the legislator introduce new legislation to remove the latches surrounding limitation periods and jurisdictional issues. In this case, the Court also removed the ways in which the military and other forces of the country could violate the Constitution and also punished the accused persons effectively. His case sent a clear message that no one is above the law. Following the decision, the Constitutional Court was seen as an independent and active body, able to resolve political issues amicably. The Court played a vital role in resolving the issue of the Kwangju massacre and in defending the basic rights of the citizen, which are granted by the Constitution of South Korea.

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