CONSTITUTIONALISM ON TRIAL IN SOUTH KOREA

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With Roh Moo Hyun’s narrow election to the presidency on 19 December 2002, the democratic transition that South Korea began in 1987 entered a profoundly new era. Even on a cursory level, Roh’s personal background, political style, and electoral constituents amount to something radically new in the country’s presidential politics.

A self-made tax lawyer who turned to dissident politics during the tumultuous 1980s, Roh springs from provincial and déclassé origins that may come across as either endearing or alarming, yet are certainly alien to Korean voters. His habit of bypassing institutionalized avenues of democratic politics and appealing directly and emotionally to the people may make him either a champion of participatory democracy or a populist demagogue in the tribunal of public opinion. And yet all would agree that no previous president has so nakedly relied on popular support outside institutional channels. Roh’s inclination toward class and generational politics is also new to the Korean public, which has grown accustomed to the spirit of interregional rivalry that has long dominated Korean politics. It is little wonder that Roh’s radical reform presidency and his center-left agenda have generated loud dissonance and sharp fissures in posttransitional Korean politics.

Lately, the loudest and the sharpest of these has been the ill-fated effort, lasting from March to May 2004, to remove President Roh via parliamentary impeachment. In the eventuality, the nine-member Constitutional Court, which constitutionally has final say over impeachment cases, declined to remove the president from office—yet not before
issuing a string of stern admonitions to the president. For the Court’s decision also found him to have been in the wrong on several particulars of the allegations made by parliament. While reinstating the impeached president, that is, the Court nonetheless warned strongly about the prospect of presidents stretching the bounds of institutional arrangements put in place by Korea’s young constitution.

Under the circumstances, the Constitutional Court has been forced to address the inherent tension between, on the one hand, the idea of majoritarian democracy, and on the other, the idea of erecting limits to it, often in the name of minority or individual rights. The 1987 constitution, like any liberal-democratic constitution worthy of the name, seeks to honor and uphold both these ideals. In the early years of Korea’s democratic transition, this tension seemed far more potential than actual. Recently, however, its saliency has been rising, and it will in all likelihood remain a focal point of public debate for some time to come. In this potential tension between constitutionalism and democracy, on one side are Roh and his Uri Party (UP), representing surging forces resolved to win what they view as more substantive socioeconomic justice (both redistributionist and nationalist), even if doing so might jeopardize the current constitutional arrangements. On the other side—and seemingly no less resolved—is the Constitutional Court. As the nation’s supreme judicial body, it is determined to defend those arrangements and with them, or so the Court believes, the ideal of constitutionalism. These strains are unlikely to go away. Upon their adequate management by all parties concerned, we contend, may hang the fate of constitutional democracy in Korea.

The Democratic Transition and Its Aftermath

At bottom, the story of “democracy after democratization” in Korea is one of strains in the political settlement embodied in the 1987 constitution. The immediate impetus to the transition came from the civil protests in the streets. The constitutional order established as a result nonetheless reflects a political “pact” between the reform wing of the conservative establishment and the moderate section of the opposition front. Bluntly put, in the political space cracked wide open by popular civil resistance, the opposition and the establishment struck a political bargain. The former wanted to restore electoral politics in the full sense of the term and other political rights associated therewith. In return for more open democratic politics, the latter sought to reproduce the political stability that it deemed necessary for continued economic growth. Often dubbed a union of “democracy and development” by pundits, the 1987 settlement was approved by voters when they overwhelmingly ratified the new constitution that year.

Despite the dramatic increase in the number of labor disputes that
followed the transition, the settlement has held up fairly well. Competitive electoral processes, including direct election of the president and a diffusion of power to localities, have been restored. Basic political and civil rights have come to be assiduously enforced and some injustices left over from authoritarian days redressed, thanks in no small part to the new Constitutional Court. Perhaps the best evidence of stability has been the four peaceful transfers of power from one duly elected president to another that have taken place over the past 18 years.

Economically, the outcome has been more mixed. While the Gross Domestic Product kept growing at a remarkable average annual rate of 8.4 percent from 1987 to 1996, allaying fears that the shift to democracy would wreck prosperity, the government was slow to grasp Korea’s need for a more open, market-friendly, capital-intensive, and high-technology economy. This left the door open for the devastation wrought by the Asian financial crisis of 1997, whose deleterious political and social consequences have outlived the serious crimp that it put in the Korean economy. The neoliberal restructuring that newly elected president Kim Dae Jung had to implement under close International Monetary Fund (IMF) scrutiny meant swallowing a bitter medicine whose side effects included massive job losses, reduced employment security, and falling household incomes. Economic growth recovered, but widening income disparities, perceived as well as real, and other socioeconomic discontents have left voters more susceptible than before to class-based political appeals.

The postcrisis socioeconomic turbulence was further exacerbated by the increasing volatility of the security regime. Kim Dae Jung’s much-vaunted “sunshine policy,” which sought an accelerated reconciliation with communist North Korea and the end of the Cold War regime on the peninsula, has significantly changed popular perceptions in the South about the security threat that the North poses, despite its unrelenting nuclear ambitions. As a result, rapidly growing anti-American sentiment and nationalist zeal for immediate unification, traditionally items on the left-wing agenda, have suddenly found more sympathetic ears among a general public grown weary of U.S.-led economic globalization (which many hold culpable for the 1997 crisis). As Hahm Chaibong and Kim Seog Gun have observed, “Once the urgency of Cold War rhetoric began to lose its force, the discourse of nationalism—hitherto relegated to a secondary status—resurfaced.”

In sum, a political hybrid of reinvigorated class consciousness and proud nationalism is finding remarkably fertile ground in posttransition Korea. The younger generation especially has turned out to be exceptionally vulnerable to these political gospels. Economic restructuring has hit hardest those in their twenties and thirties, a well-groomed generation whose self-confidence and collective pride have never been bruised by the historical humiliations with which earlier generations had to live. In other words, the political and economic development in
posttransition Korea has produced a young, proud, self-assertive, and yet deeply discontented generation of voters who are prepared to endorse radical change for its own sake.

Roh’s close win over Lee Hoi Chang of the Grand National Party (GNP) typified this mood. Lee stood for the almost-two-decades-old order of 1987, meaning a mildly conservative rule that aspires to bolster a fair procedural democracy and a formal rule of law while keeping up the extraordinary record of economic achievement passed down from the authoritarian past. Adroitly taking advantage of general disaffection as well as Lee’s troubles in coping with a growing number of charges alleging various legal improprieties, Roh eked out a win by 48.9 to 46.6 percent in the December 2002 balloting. But the victor’s campaign had succeeded at the cost of intensifying the public’s suspicion that the existing order was somehow falling short of meeting the people’s political and economic needs, not to mention betraying their sense of social justice. Then as now, at stake was the legitimacy of the 1987 settlement.

**Liberalism, Democracy, and Constitutional Review**

As we have seen, the 1987 settlement was a product of a political pact between democracy and development. Aspiring toward a liberal-democratic regime, it rests on principles of the impartial rule of law and procedural justice that are meant to enable it to stand above and arbitrate between many conflicting demands. The constitutional order also reflects this historical situation, as one may see from that order’s odd mixture of heterogeneous constitutional principles. For one, despite the de facto imperial power that the posttransition presidents have enjoyed, the constitution provides the parliament with checking and balancing measures to an extent uncommon for a presidential system (which is what the constitution officially aspires to be). For another, the constitution’s bill of rights richly enumerates socioeconomic rights to an extent that might invite conflict with the private-property regime that the constitution also guarantees. All these potentially conflicting elements, however, have been held together more or less successfully thanks in large part to the constitution’s most innovative feature—the Constitutional Court.

Article 111 gives the Court power to: 1) review the constitutionality of statutes; 2) rule on the final disposition of impeachment cases brought against high-ranking officials, including the president; 3) dissolve political parties for having unconstitutional purposes or engaging in unconstitutional activities; 4) adjudicate jurisdictional disputes between state agencies; and 5) rule on constitutional petitions. Aided in part by the system of constitutional petitions, which may be filed by any citizen alleging the violation of his or her constitutional rights, the Court emerged as an extremely active and assertive institution during the first phase of democratic transition. Around twelve percent of the
more than five thousand cases that it has decided on the merits were cases in which the Court has found constitutional infirmities with a statute or a government action. This is extraordinary, for the total number of such cases during the forty years preceding the passage of the 1987 constitution was around ten.

In numerous landmark rulings, the Court has stood by what the general public has considered to be democratic and progressive causes. First, the Court has endeavored to establish on firmer and more explicit grounds the freedoms of speech and of academic or artistic expression, the right to privacy, the right to personal integrity, and the right to legal counsel. For example, in a string of cases the Court struck down laws authorizing the censorship of films and attorney-client communications. The Court also tried to restrict the scope of application of the National Security Law on grounds that certain overly broad and vague provisions may chill the freedoms of speech and expression. By circumscribing the way in which state authority is exercised, in short, the Court has significantly advanced the civil rights of Koreans.

Moreover, the Court has done much to improve the electoral process and promote greater political accountability. In striking down one electoral-districting plan, the Court ruled that the population discrepancy between electoral districts must not be allowed to widen so far as to make the value of a vote in the most populous district less than a quarter of the vote in the least populous one. The Court also found that a section in the election law requiring independent candidates to deposit more money than party-sponsored candidates with the authorities overseeing local elections failed to pass constitutional muster, as did a law banning campaign activities by anyone except a very limited range of people closely associated with the candidate. Such limits, reasoned the Court, violated the freedoms of political participation and expression. These rulings allowed common citizens to become involved as never before in the political process, and may have paved the way for the groundswell that carried Roh to the Blue House in 2002.

Third, the Court has at times stretched the limits of legal interpretation in order to rectify injustices that took place during the authoritarian past. In February 1996, a four-justice “controlling minority” (six votes are needed to overturn a law on constitutional grounds) upheld a 1995 law suspending the statute of limitations in the cases of two former presidents implicated in the military coup and various human rights
abuses of 1979–80. To reach this conclusion, the four justices reasoned that under extraordinary circumstances exceptions can be made to statutes of limitations. That is, the public interest in punishing the offenders who committed crimes “destructive of constitutional order” can outweigh the interests of the accused or the cause of preserving a stable legal order. This and other rulings of similar nature have done much to consolidate the Court’s reputation as the guardian of democratic justice in Korea.

Finally, in ruling after ruling, the Court has upheld the inviolability of private property rights against the intrusive practices of the developmental state. Given the history of widespread government intervention in the economy during the period of industrialization, for instance, the 1993 decision concerning the legality of the government’s dissolution of a business entity is often regarded as an important indicator of the Court’s resolve to safeguard private property and the market system. In that case, the Court even pierced through the legal formalities to declare that where a private bank’s withholding of credit at the direction of the government results in the dissolution of a private business, this must be seen as the direct consequence of a government measure that lacks legal grounds. Time and again, the Court has made it unmistakably clear that it will jealously guard private property rights against government intrusion.

Despite the criticism that the Court has drawn, the role which it has played in the process of democratic transition has been remarkable. Politically, the Court has become an important institutional arbiter of the pace and extent of the democratic transition. More importantly, the Court’s empowerment has contributed greatly to the deepening of democracy in Korea by consolidating the rule of law. The Court has done much to restore constitutionalism as the supreme norm and principle that can no longer be distorted for political, administrative, and other arbitrary reasons, thereby increasing the predictability of political practices and legal transactions as well as protecting basic civil rights and rights to private property. It is largely for these reasons that, despite the relatively short period during which the Court has been in operation, it has firmly established itself as a champion of progressive causes in posttransitional Korea. All this, however, might soon change.

Fareed Zakaria has famously argued that liberal autocracies are on balance more likely than illiberal democracies to pave the way for the eventual consolidation of constitutional (which is to say, liberal) democracy. As far as Korea is concerned, this argument is misleading. “Liberal” refers not merely to the conditions that promote market-oriented (even if state-led) development, but also to the impartial rule of law. Korea before 1987 was surely an autocracy, but hardly a liberal one. It was precisely because pre-1987 Korea was so illiberal and so undemocratic that democratization and constitutionalism at first made
such happy fellow travelers. Liberalism and democracy alike demanded safeguards for basic constitutional rights, both to protect the market economy and to enable popular self-rule. This also explains how the Constitutional Court, an institution that rests more on liberal than on democratic logic, nonetheless quickly emerged as democratization’s champion.

This more or less happy partnership between constitutionalism and democracy may not be so firmly sealed as some might believe. The second phase of democratization in Korea is now well under way. Under Roh’s populist leadership, democratization seems poised to move beyond the kind of political and legal democratization that Max Weber had called “passive,” and into an “active” phase in which popular demands for more substantive economic equality and social justice will have to be heeded in one way or another. In the new “active” phase, the Court may find it increasingly hard to champion both formal-procedural and substantive-democratic justice.

Roh’s government, for instance, is now pressing hard to secure passage of the so-called Four Reform Bills, which are sure to trigger constitutional controversies. These bills concern, respectively, new controls on the newspaper market, the regulation of private schools, retributive proceedings against collaborators and their descendants for actions done under the Japanese colonial regime (1910–45), and abolition of the National Security Law. The bills aim squarely at conservative bastions in Korean society. The Roh government is heralding each proposed law as urgently needed, and street-level activism on their behalf has been mobilized as well. Each of the first three bills entails elements that could involve rights violations. An influential group of jurists has already warned that the bills will be challenged before the Constitutional Court should any or all of them become law. Supporters of the bills have begun talking about limiting the Court’s power—or even abolishing the Court itself.

The Court will likely find itself perilously close to being caught between its own staunch insistence on protecting rights and the demands for justice coming from a strong-willed president and his supporters. Ironically, the Court’s early and successful assertiveness may have helped to lay the basis for its current predicament. During what we can now see was the first phase of democratic transition, from 1987 to 2002, the Court’s defenses of the constitution received a kind of “legitimacy bonus” because they also promoted majority rule. Yet now that the second phase of democratization has arrived—and has swept into office a government strongly wed to what it sees as a more substantive ideal of democracy—the Court’s defense of the constitution may look to many Koreans like a group of judges standing stubbornly athwart the rails of democratization. Three high-profile rulings that the Court has rendered since Roh took office in early 2003
show why heightened tensions between liberal constitutionalism and popular democracy are likely.

**Mounting Tensions**

While any constitutional democracy with judicial review is bound to face some familiar strains, Korea’s Constitutional Court will have to realize that it can no longer expect the natural symbiosis between constitutionalism and democracy which used to obtain during the first phase of democratic transition. It could be that not only the Court but also the liberal constitutional order itself will face a populist backlash. Perhaps the Court’s realization of this explains why, in some recent rulings, it has been so willing to address the president with stern admonitions against cutting constitutional corners.

1) **The Presidential-Referendum Case.** In 2003 came the first of a series of cases in which President Roh’s behavior became the subject of a constitutional controversy. As his first anniversary in office drew near, Roh, in true populist style, seriously suggested holding an up-or-down national referendum in order to verify the voters’ confidence in him and his government. Some of his foes thereupon lodged a constitutional petition. They charged that Roh was threatening to ride roughshod over the constitution’s clear stipulation that the Republic of Korea shall have for its chief executive a president serving for a fixed term, not a prime minister who serves subject to a vote of confidence. Moreover, claimed the president’s critics, Articles 72 and 130 spell out the only circumstances in which national referenda are permitted, and Roh’s proposal failed to meet those tests. While Roh claimed to be merely respecting the people’s choice, his detractors blamed him for leaning dangerously toward plebiscitarianism and ignoring constitutional bounds. In the end, the Court dismissed the case against Roh on a technicality, but not before four of the nine justices issued a strongly worded opinion warning that efforts such as Roh’s to bend the constitution in a plebiscitarian direction could become a cover for authoritarianism. The Court’s growing anxiety about the direction that Korean democracy might be taking was unmistakable.

2) **The Presidential-Impeachment Case.** On 12 March 2004, Roh Moo Hyun became the first sitting president in history to be impeached by Korea’s unicameral National Assembly. Upon the impeachment, Roh’s powers were suspended, not to be restored until the Constitutional Court rendered its final decision in May 2004. The impeachment imbroglio began in December 2003 when Roh, in a speech to supporters marking the first anniversary of his election, urged them to come out in the upcoming April 2004 general election in order to complete the “citizens’ revolution” that they had started a year before. At this, the opposition parties (then holding most of the seats in parliament) complained that
Roh had broken Korea’s strict elections law, which bars sitting presidents from trying to “influence” elections or electoral processes.

In February 2004, Roh told the press of his hope that the “voters would give overwhelming support” to his newly manufactured UP in the general election, and pledged his aid to that party, of which he was not yet formally a member (he would not join till May 2004). Political remarks such as these may sound routine, but in the Korean context they were legally problematic in view of the legislative ban on presidential electioneering. Within a week, the National Elections Committee (NEC), a constitutionally established state agency, ruled that Roh had violated his presidential duty to maintain electoral neutrality. Roh characteristically defied the NEC by stating publicly the next day that its ruling “did not make sense” to him. The opposition began to talk seriously about starting impeachment proceedings.

The president refused to back down, and his foes in the National Assembly introduced an impeachment resolution on March 9. Even then, Roh could have defused the situation with a simple apology and a promise of neutrality, for 72 hours were left before the National Assembly vote, and the opposition camp was showing signs of fraying unity and flagging resolve. On March 11, however, Roh did the exact opposite, giving a nationally televised speech in which was made clear once more his unwillingness to compromise. The following day, an infuriated opposition coalition passed the impeachment resolution by a vote of 193 out of 271, surpassing the two-thirds majority required by the constitution, as Roh’s party members tried physically to stop the voting. The president’s fate now lay in the Court’s hands, with a general election looming just a month away.16

On May 14, almost a month after the election, the Court offered up its ruling. It found that the president had violated the law on at least three counts.17 First, his press-conference remarks courting votes for the UP violated Article 9 of the Law on the Election of Public Officials and the Prevention of Election Frauds, which states that government officials shall maintain neutrality and not exercise influence over election matters. The Court stressed that the president is a public servant with a duty to all the citizens of the Republic of Korea, not just his supporters. Second, Roh’s defiance of the NEC ruling transgressed his official duty to uphold the constitution and laws. The Court emphasized that the president, as the highest public official, has constitutional responsibilities to respect the rule of law and to set an example for his subordinates and the public at large. Third, the Court found that Roh’s speeches calling for a confidence referendum, while infringing upon no one’s rights, still violated his own duty to uphold the constitution. In sum, he was found to have violated both the constitution and a national statute.

Although the Court’s ruling was hardly a ringing vindication for
President Roh, the justices spared him from the worst penalty. To convict the president and end his term, they reasoned, they would have to find that the harm resulting from Roh’s transgressions outweighed the harm of removing a democratically elected president from office. This the justices were not willing to do. In the end, the Court concluded that Roh’s wrongdoing, while serious, neither formed part of a deliberate plan to subvert the constitution and laws nor posed a fundamental threat to the “free and democratic basic order” that the constitution enshrines as its supreme value and fundamental principle.

At the end of its decision, the Court nevertheless delivered another stern admonition to the president regarding his constitutional responsibilities. The president’s power and authority are based on the constitution, warned the Court, so any president who disregards the constitution undermines his own position. Referring to Korea’s relative inexperience with constitutionalism, the Court stressed that the president in such a context must be a role model who promotes the rule of law and upholds the constitution at all times.

The opinion was also noteworthy because, in many places, the Court seemed to assert its own role and authority to guard the constitutional order. For example, it stressed that the power to find a statute unconstitutional lies solely with the Court itself, so that even if a president is unhappy with an existing law, he has the duty to obey and enforce it unless and until the Court declares it unconstitutional. Also, as part of its effort to clarify when a president can be impeached, the Court proclaimed that the constitution should be broadly construed to include not only its text, but also the principles established through the Court’s own precedents. In another part of the opinion, the Court asserted its prerogative to frame the issues in the case without being bound by the legal arguments stated in the impeachment resolution. These passages suggest that the Court is positioning itself as the ultimate defender of the constitution, while casting the president as an unpredictable element in the constitutional order.

3) The Capital-Relocation Case. While the popular Roh may have walked away from the referendum and impeachment cases with his powers and office still intact, the Court has ruled against him in a more recent case involving Roh’s plan to move the capital away from Seoul, the nation’s political center for more than six hundred years as well as home to a quarter of South Korea’s 48 million people.

The idea of relocating the capital southward to a brand-new city
originated as one of Roh’s many pledges during the 2002 presidential campaign. Then, prior to the impeachment crisis, the National Assembly passed a bill in December 2003 that mandated the relocation of the capital. While President Roh’s government was obviously backing the bill, legislators on both sides of the aisle also thought it a good way to cultivate voters in the region where it was expected that the new capital would be built. In May 2004, immediately following his reinstatement after the impeachment controversy, a newly emboldened Roh proceeded to launch a governmental commission to study and decide upon the exact site for the new capital. Critics of the relocation plan, which included residents of not only Seoul but also other parts of the country, filed several constitutional petitions in July 2004 to block the relocation. Unfazed by such measures, however, the government announced in August 2004 the location for the new capital.

In the opinion of the petitioners, the law that provided the legal basis for the relocation plan was constitutionally problematic for several reasons: it took away their right to vote by seeking to circumvent the need for a national referendum as prescribed by the constitution; it violated their due-process rights to take part in open hearings that should precede such a momentous move; and it was forcing them as taxpayers to help fund a measure in whose crafting they had not been properly consulted.

The political significance of the relocation case was large, for it expressed a deep tension within Korea’s constitutional democracy. Roh mobilized support for relocation in starkly populist terms, painting it as crucial to his broader program of dismantling the political and socio-economic “establishment.” He cast his critics as reactionary conservative elements with vested real-estate interests in Seoul, who were only thwarting his efforts to consummate the process of democratization. He even tried to rally support for the relocation program by likening it to the ancient practice of relocating the capital (cheondo) as a way of marking a new beginning at the start of a new dynasty. Although polling evidence suggested that Roh’s appeals were meeting with only mixed success, and although petitions had been filed to challenge the constitutionality of the whole plan, his government pushed ahead anyway by not only announcing the exact site for the new capital but also starting to plan the logistics of the move.

When the Constitutional Court announced its decision on 21 October 2004, it was evident that the Court was taking seriously as perhaps never before its role as the defender of the entire constitutional order. The Court went beyond even the impeachment opinion’s claim to interpret and define what the constitution means by articulating a controversial theory of the “customary constitution” and then asserting the power to say what it contains. The Court struck down the relocation law on the grounds that it would have the effect of changing the constitution without following the revision process stipulated
therein. The site of the capital is a constitutional matter, the Court reasoned: Seoul has been the capital ever since the Chosun dynasty (1392–1910 C.E.), and therefore its status as the nation’s capital may be called part of the “customary constitution.” To change this, said the Court, following the proper revision process would be necessary. This would involve publicizing the proposed revision for at least twenty days, passing it with the votes of at least two-thirds of the National Assembly’s total membership, and then holding a national referendum to ratify the change. The relocation law met none of these requirements, and in particular violated the voters’ right to cast their ballots in a referendum.

A separate opinion concurred in the Court’s conclusion but laid out more modest grounds for holding the capital-relocation law unconstitutional. While questioning the majority opinion’s conclusion that a full-scale constitutional revision was the only way to move the capital, this view still agreed that a referendum was necessary, but for a different reason. On this view, a referendum was required not in order to amend the constitution but for the purpose of ascertaining the actual wishes of the people on the relocation issue as required by Article 72 of the constitution. This was the same provision that the Court’s impeachment decision held Roh had violated when he sought to hold a referendum of a type not stipulated in the article.

The Court’s ruling triggered a storm of criticism from Roh’s populist supporters, residents of the projected new capital region, and some media outlets that condemned the Court for impeding democracy’s progress. At the same time, however, Roh’s government has found itself forced to rethink its relocation plan and to proceed more cautiously so as to ensure compliance with all requirements of legal propriety as well as wider public support. For its part, the Court has now reached a point where it can no longer treat the promotion of some democratic values and the vindication of the rule of law as for all practical purposes one and the same. This decision is indicative of the Court’s resolve to assert itself as the guardian of the present constitutional order—as Korea’s Hüter der Verfassung (“guarantor of national constitutional legitimacy”) in the posttransition era.

The Judicialization of Politics

The Constitutional Court’s growing political presence and the rising potential for tension between constitutionalism and democracy may be understood as a particular instance of a global trend toward the “judicialization of politics.” While it is surely premature to conclude that the Court already has gained enough authority to make Korea a “juristocracy,” there is nevertheless an unmistakable sense that the Court will soon find itself asked to adjudicate and resolve a mounting
number of controversial political issues. Perhaps this reflects the immate-
ure state of Korean democracy. Not yet fully at ease with the democratic
arts of negotiation and compromise, Koreans are still prone to stick to
extreme positions that stymie the regular political process. (Some ob-
servers even suggest that this is getting worse as generational or
ideological polarization intensifies.) With political solutions blocked,
it is argued, many look to the Court to step in and settle matters.

Yet perhaps this assessment has things backward. Perhaps we should
see the Court’s relative success so far in crafting judicial, and perhaps
also judicious, resolutions to difficult cases arising from an increas-
ingly contentious democracy as a sign that the system of constitutional
adjudication is working and that Korean democracy, while young, is
not so awkward or immature after all. Some of Roh’s supporters took to
the streets when he was impeached, but their protests bore little resem-
blance to the violent clashes between demonstrators and riot police that
were long a staple of Korean politics in more authoritarian times. For
the most part, the country waited calmly and patiently, even conduct-
ing a free, fair, and orderly parliamentary election, while the
Constitutional Court weighed the president’s case and wrote its deci-
sion. More importantly, once the decision came, no one aside from a
few extremists called for defiance or denied the Court’s authority to
have the final say. The same was true when the Court decided on the
constitutionality of the capital-relocation program. Despite the uneasi-
ness caused by the “customary-constitution” theory, no one went so far
as to flout actively the Court’s judgment. This is surely a sign that
Korean democracy has matured to a point where the rule of law is under-
stood as an overarching virtue that exists not to frustrate democratic
aspirations and ideals, but rather to protect really existing democracy
from its own potential for excess. In this view, Koreans are learning to
cope with the tension between constitutionalism and democracy and to
balance their sometimes conflicting demands.

Given this situation, calls for more “democratization” under an alleg-
edly more expansive or substantive understanding of democracy—calls
that might entail casual disregard for the constitutional order—must be
greeted with a measure of caution. In the same vein, the more muted calls
for constitutional revision to further empower the political branches of
the government to undertake reforms in the name of substantive justice
should also be considered with a degree of circumspection. Whatever
success constitutional democracy in Korea has achieved so far is attrib-
utable in no small part to the constitution’s having been spared from
tampering for almost two decades—the longest such period in modern
Korean history. The Constitutional Court should receive the room that it
needs to cultivate a solid constitutional tradition through which even
the alleged imperfections in the 1987 constitution can be mended. Ulti-
mately, then, the future of Korea’s “democracy after democratization”
will depend on the citizens’ democratic self-restraint and due respect for the constitutional order.

NOTES


5. Case Nos. 93 HeonGa 13; 91 HeonBa 10 (consolidated) (judgment of 4 October 1996); Case No. 92 HeonMa 144 (judgment of 21 July 1995); Case No. 91 HeonMa 111 (judgment of 28 January 1992).


7. Case No. 95 HeonMa 224 (judgment of 27 December 1995).

8. Case No. 88 HeonGa 6 (judgment of 8 September 1989); Case No. 93 HeonGa 4 (judgment of 29 July 1994).

9. Case Nos. 96 HeonGa 2; 96 HeonBa 7; 96 HeonBa 13 (consolidated) (judgment of 16 February 1996).


14. According to Article 72, the president may call national referenda on “important policies relating to diplomacy, national defense, unification, and other matters relating to the national destiny.” Article 130 also provides for referenda as part of the procedure for amending the constitution. The constitution never mentions any vote of confidence in the president.
15. Five justices held that Roh’s proposal failed to amount to a state action, meaning that it could not become an object of a constitutional petition.

16. In the April 2004 election, voters showed their displeasure with impeachment by handing Roh and the UP a 152-seat majority in the 282-member National Assembly. The center-right GNP, long dominant in national politics, dropped from 133 to 121 seats. Roh’s original party, the Millennium Democratic Party (MDP), lay shattered by the defection of Roh-supporting legislators to the UP and suffered a near wipeout, going from 115 to just 9 seats.


20. Articles 128, 129, and 130.


22. On “juristocracy,” see Ran Hirschl, “The Political Origins of the New Constitutionalism,” Indiana Journal of Global Legal Studies 11 (Winter 2004): 71–108. Unlike other constitutional courts, the one in Korea lacks the power of abstract constitutional review and must instead have an actual case or controversy to decide. Moreover, the conditions of acute political uncertainty that prevailed at the time of the Court’s founding make it a poor fit for Hirshl’s thesis that such courts are the fruit of elitist schemes to preserve established interests. For another account that stresses the role of uncertainty, see Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (New York: Cambridge University Press, 2003).