The Responsive Judge: Comparative Perspectives of Korea and Japan

Young Hoa Jung[287]
Jeonbuk National University, Jeonju

Abstract:

This article begins by outlining the legal culture of citizens, judges, and courts in two countries' modern history–that of Korea and Japan. It first examines the Constitutional Court of Korea as compared to the Supreme Court of Japan, focusing on the role and function of constitutional adjudication and examining the judicial responsiveness of each through judicial review of legislation. The article then examines the judiciaries of each country in their role as adjudicators of litigants' rights through civil litigation. The core of this article is an evaluation of the most significant features of the Korean and Japanese judiciaries in these legal areas–the activism of the former in constitutional matters compared to the passivism of the latter in similar situations, and differences in approach to alternative dispute resolution in civil litigation. Korea's Constitutional Court exemplifies the autonomy of justice from external control or influence through a process of active constitutional adjudication, while Japan's Supreme Court has played a more passive constitutional role. By contrast, Japan's judiciary and its judges are more responsive in their embrace of settlement and mediation in civil litigation than their counterparts in Korea. Some explanations for these differences amongst the judiciaries of these two countries are advanced.

Rezumat:

Acest articol începe cu prezentarea culturii juridice a cetățenilor, judecătorilor și instanțelor din istoria modernă a două țări - cea a Coreei de Sud și a Japoniei. Acesta analizează mai întâi Curtea Constituțională a Coreei de Sud în comparație cu Curtea Supremă a Japoniei, concentrându-se pe rolul și funcția judecătorii constituționale și analizând gradul de reacție judiciară al fiecăreia prin controlul judiciar al legislației.

[287] Young Hoa Jung is a Professor at the Jeonbuk National University School of Law. He holds a Ph.D. in Law and LLM from Northwestern University Law School, and LLB from Seoul National University. Professor Jung was a visiting scholar at Northwestern University Law School in 2006–2007 and 2009, and Wisconsin University Madison Law School in 2015–2016. He has also been a member of the Law and Society Association (USA) since 2000; Professional e-mail: hoajung@gmail.com.

Articolul analizează apoi sistemele judiciare ale fiecărei țări, în rolul acestora de judecători ai drepturilor justițiabililor prin litigii civile. Nucleul acestui articol îl constituie o evaluare a celor mai importante caracteristici ale sistemelor judiciare coreene și japoneze în aceste domenii juridice - activismul primului în chestiuni constituționale în comparație cu pasivismul celui din urmă în situații similare, precum și diferențele de abordare a soluționării alternative a litigiilor în litigii civile. Curtea Constituțională a Coreei de Sud exemplifică autonomia justiției față de controlul sau influența externă printr-un proces de adjudecare constituțională activă, în timp ce Curtea Supremă a Japoniei joacă un rol constituțional mai pasiv. În schimb, sistemul judiciar din Japonia și judecătorii săi sunt mai receptivi în soluționarea și medierea în litigii civile decât omologii lor din Coreea de Sud. Sunt prezentate unele explicații pentru aceste diferențe între sistemele juridice ale celor două țări.

Keywords: constitutional adjudication, judicial responsiveness, judicial review of legislation

1. Introduction

In the Confucian tradition of Korea and China, judges traditionally applied a combination of mediation and adjudication in the resolution of disputes because of a deep gap in legal culture between legal professionals and ruling, the present legal system of Korea remains formally European Civil Law with some influence of American Common Law. Consequently, Korea and Japan's legal systems share the same roots and many features in their modern legal histories (Hahm 1986). Due to differences in Confucian legal culture, Korea's legal system and laws were repressive. Korea now has a tool to ensure the enforceability of the laws and norms of the dominant group in the vertical social structure.

Before the Meiji restoration in 1868, Japan had developed a legal system based on custom. Until the Meiji era, there were no lawyers in Japan on the terms of modern society (Hahn 1983). The Tokugawa government adopted Confucianism, and its doctrines of social hierarchy and 'wa' (harmony,˜a), as a state orthodoxy in an effort to prevent commercial disputes from reaching any formal stage. They used these tenets as societal pressures to force potential litigants to settle their problems by themselves, refrain from litigation, and preserve the harmony of society (Henderson 1965). To have one's own rights emphasized in court meant telling another that he or she had erred. The Tokugawa system abhorred such judgments. By viewing the pursuit of individual rights in court as a disruption of societal harmony, the system strongly discouraged litigation. Thus, conciliation dominated civil procedure in the Tokugawa period (Henderson 1965). In fact, the concept of individual rights mattered little against the state in the era of Tokugawa (Tanaka 1976; Hahn 1983). The Meiji Government took steps to import the Western law system (Lockwood 1968). The German civil law system most heavily influenced Japan's modern legal system.

My aim in this chapter is first to describe the features and changing trends in legal culture, constitutional review, and civil litigations in Korea and Japan's judiciaries. I begin by outlining the legal culture of citizens, judges, and courts in the two countries' modern history. The chapter first examines the Constitutional Court of Korea as compared to the Supreme Court of Japan, focusing on the role and function of constitutional adjudication and examining the judicial

responsiveness of each through judicial review of legislation. The chapter then examines the judiciaries of each country in their role as adjudicators of litigants' rights through civil litigation. The core of this chapter, however, is an evaluation of the most significant features of the Korean and Japanese judiciaries in these legal areas – the activism of the former in constitutional matters compared to the passivism of the latter in similar situations, and differences in approach to alternative dispute resolution in civil litigation. Korea's Constitutional Court exemplifies the autonomy of justice from external control or influence through a process of active constitutional adjudication, while Japan's Supreme Court has played a more passive constitutional role (Ginsburg 2003; Higuchi 2004; Jung 2011). By contrast, Japan's judiciary and its judges are more responsive in their embrace of settlement and mediation in civil litigation than their counterparts in Korea. Further, many Japanese judges are mentored and monitored by seniors and peers.

2. Legal Culture of Korea and Japan

Korea and Japan have relatively enjoyed a Confucian tradition, with an attitude of distrust toward litigation and a preference for internalized norms as a means of social orderings. The civil law tradition is thus the starting point for any analysis of Korean law, but not the only source of influence. Since independence in 1945, Korea has had six republics and nine constitutional amendments until 1987. While the regime types have varied, there have been certain constants in postwar Korean politics (Yoon 1995; Choi 1995; Ahn 1998). Gregory Henderson claims Korean politics can be understood as a vortex, with all power at the center (Henderson 1968). The political rulers have continuously depended upon the law to make use of political authority and legality. After the assassination of Park Chung-hee by his subordinate, the chief of Korea's CIA, a military group subsequently took power in a coup in December 1979.

In 1987, the civilian democratic movement finally overcame its military suppression. Consequently, the Congress of the three main political parties agreed upon the amendment of the Constitution. The ruling parties made the decision to reestablish the Constitutional Court that had the power of constitutional review at that time. Why did the political parties agree to a designated Constitutional Court? There were some important causes for the creation of the Constitutional Court (hereafter 'the Court') in the amendment of the Constitution in 1987. On the one hand, the Supreme Court itself may have been reluctant to take on the power of constitutional review (West and Yoon 1992). The Supreme Court does fundamentally prefer to avoid "the politicization of judiciary" due to its involvement in constitutional controversies (Yoon 1995). On the other hand, the Constitutional Court draws its considerable strength from the reaction to the authoritative and military regimes of the pre-democratic period. These regimes abused people's rights and many peoples disliked and distrusted the Supreme Court. It was necessary to create a strong Court to guard human rights in the future. While legislators did consider the Constitutional Court and its role, they mainly took into consideration the traditional questions of how to separate law and politics, what kind of judicial or political institutions would exercise constitutional review, and how this new institution should be constituted.

The Court is the highest court in the judicial system. The Court is the cornerstone of constitutional democracy just as Parliament is the hallmark of representative government. The idea of constitutional justice lies in the legal force

that it has acquired in the eyes of the citizens. The Court has a monopoly of binding constitutional interpretation.[288] It has jurisdiction to hear and decide certain kinds of constitutional cases. The Court makes decisions within a legal framework. Legal institutions are responsive to social change. Many basic questions about the relationship of law to social change and to cultural development are completely neglected (Friedman 1969). Today, the concept of culture—and perhaps legal culture—remains useful as a way of referring to clusters of social phenomena (patterns of thought, and belief patterns of action or interaction, characteristic institutions) coexisting in certain social environments, where the exact relationships existing among elements in the cluster are clear or are not of concern. In this sense, legal culture may have the same degree of significance for the sociology of law that the idea of legal families has for the comparative law (Cotterrell 2006).

2.1. Korea's Legal Culture

In 1961, the military government took a revolutionary revocation of a former colonial legislature in accordance with the "Act on Special Measures for Consolidation of the old laws" (15 July 1961) until the end of 1961. Further, the government took action to automatically abolish all colonial acts without exception until January 20th, 1962. Although this transformative legislative revolution seemingly revoked Japanese colonial legal institutions during three decades all at once, what Japan's colonial professors cultivated through legal education has overtly remained in current legal terminologies and legal professional practices within courts and prosecution proceedings (Jung 2010). The hallmark of the law becomes its association with, and subordination to, the requirements of government.

The first Constitution of 1948 was not only influenced by the Weimar Constitution in the sense of modern constitutionalism, but the judicial system was also substantially influenced by legal formalism in the USA. Korea's constitutional democracy was not realized until the ninth amendment of its Constitution. Before this transformative Constitutional amendment in 1987, the mere existence of law did not guarantee fairness, much less substantive justice. Just as the "monopoly of legitimate violence" is celebrated as a major achievement of the modern state, the main implications of the long authoritative regime (1961–1992) were the repressive laws, vortex political culture, and a rigid formalism of judicial process (Jung 2013b, 2014a). However, the democratic movement resulted in the separation and independence of law and politics and led to the transformative current Constitution and Constitutional Court, which, since 1987, has imported the style of the German Constitutional Court.

In other words, legal culture may not only relate to economic development, democracy, and political certainty, but these are also the important factors for the enhancement of human rights. In particular, existing political elites could hardly overcome the political culture of the centralized vortex in real life The question of how Korea's democracy has developed therefore relies upon the change of legal culture that may have determined Korea's advanced democracy and rule of law.

According to Henderson's (1968) analysis of Korean history and political

[288] The Public Officials Election Act absolutely prohibits door-to-door election canvassing. Since 1950 the Supreme Court has continuously held that such regulation is constitutional: 4 Keishu 1799 (Sup. Ct., G.B. Sept. 27, 1950); 21 Keishu 1245 (Sup. Ct. 3rd. P.B., Nov. 21, 1967); 38 Keishu 387 (Sup. Ct., 3rd, P.B., July 21, 1981).

culture, the pattern of "the vortex"[289] constitutes the single magnet of political culture in the past and present. Moreover, it appears that the current presidential system has been "the greatest vortex summoning men/woman rapidly into it, placing them briefly near the summit of ambition, and then sweeping them out both political decision and economic interest" (Jung 2016). Since Korea's economic development in 1962, all governments have consistently interfered in the market through resources central and selective investment of resources as economic coordinator and regulator so far (Jung 2014b). Korean legal culture has led to a surge in court litigation since the establishment of the Constitutional Court in 1988. In this chapter, I propose to consider the ways in which judges give expression to political and moral values through civil litigations and constitutional adjudications under the rule of law.

2.2. Japan's Legal Culture

Japan was strongly influenced by the United States' legal system after World War II. Japan's current Constitution, which took effect in 1947, reflects the American influence. The Japanese corporate, civil rights, securities regulation, income tax, and labour laws have also carried a strong overtone of American law, as did Japan's antitrust laws initially after 1947. Thus, Japan's commercial legal system is a unique hybrid of German civil law and Common law systems grafted onto the legal system based on traditional customs and values which have held paramount importance in Japan for centuries and remain vibrant today (Hahn 1983). Japan has been incredibly successful in absorbing features of foreign legal systems without sacrificing its own indigenous values.

Korea and Japan have some common characteristics in their legal culture and legal system which have rooted from their Confucian heritages and colonial Civil Law as well as a political culture of the vortex and symbiotic societal environment.

Japanese legal history is particularly interesting because it contains a significant discontinuity. In the course of the Meiji Restoration, in the middle of the nineteenth century, Japan adopted western codes of law. This move turned Japan into a civil law country. It aligned Japan with a legal tradition that, in some regards, harked back to the days of the Roman Empire. Obviously, Julius Caesar and the Roman emperors never quite got to Japan. Nonetheless, Japan opted to join the civil law family. The government was in the process of modernizing Japanese society, and it was plausible to include the legal system in their plans. The ruling circles looked, not unnaturally, to advanced European countries as models. Of course, after more than a century and a half, Japanese lawyers do not see their legal system as some sort of 'alien intrusion', any more than they would consider tempura an alien intrusion, despite the fact that they owe this marvelous food to Portuguese Jesuits.

Almost all countries have constitutions with bills of rights, and most of them have some sort of judicial review. To be sure, judicial review may be an American invention; it has been part of the American constitutional system for the last two hundred years. But as the world modernizes and globalizes, these

[289] "Vortex" means the powerful, centripetal, and vertiginous updraft that sucks "all components" of a "mass society" toward the power apex (Henderson 1987).

institutions have spread all over the world. To a large extent, judicial review does not work the same in each country. The Japanese Supreme Court does not have the same record of activism as both the Korean and German Constitutional Courts. The United Kingdom and the Netherlands still lack judicial review, but both of these countries adhere to international human rights treaties and to the European Court of Human Rights (Friedman 2002).

A focus on the court system, the predictability of court decisions, and the costs of litigation, is much more profitable than discussing the problems in general terms of legal cultural dichotomy. Japan's legal culture has the following features: First, Japan's law is characterized by uniformity in the source of law: a centralized legal system under a unitary national government. This uniformity can be contrasted with the pluralism built into the structure of the federal system in the USA. It also fosters conformity among individual and group/community values. Second, a traditional system of social relations favors resolving disputes informally over an extended period of time. Defining issues is avoided in order to leave room for mutual compromise and litigation is viewed as a last resort which leads to a complete termination of the relationship. Third, law furnishes a formal framework to maintain social order and processes such as conciliation, mediation, and arbitration are actively employed. Finally, a law is not regarded as a major source of normative decision-making, affecting public as well as private conduct (Fujikura 1996).

3. The Comparison of Constitutional Review in Korea and Japan

We can see constitutional democracy through the lens of constitutional justice. The structural differences between constitutional review in the USA and the European model of constitutional justice are well known. The characteristics of the latter originate from the first constitutional court of Czechoslovakia and Austria, established in 1920. These courts are inseparable from democratic changes. The three generations of the European model emerged from a "system change".[290] Many constitutions have created constitutional courts following this model, not only in Europe, but also in Asia, Latin America and Africa (Lopez 1994). The Korean Constitutional Court fundamentally adopted the jurisdiction and structure of the Federal Constitutional Court in Germany. This model of constitutional justice provides for a court which is distinct and separate from the ordinary court system and has the power to examine the constitutionality of laws passed by parliament and, if necessary, to annul any laws found to be in conflict with the constitutional text.

3.1. Korea - Judge's Responsive Activism

Korean Constitutions have provided an overview of various judicial review systems in the constitutional history. The Constitution of the First Republic (1948–1960) established the Constitutional Committee that was a mixed American model and European Model. The Committee had the power of judicial

[290] The first generation, the German and Italian constitutional courts, was set up after the fall of the Fascist regimes, in the early 1950s. The second generation, the Spanish and Portuguese courts, followed the collapse of the authoritarian regimes of Franco and Salazar in the 1970s. The third generation, the constitutional courts in the new post-Soviet democracies, were founded in the 1990s, this time expressly as symbols of the new democratic system and as the latest link in the chain of an established tradition (Sólyom 2010).

review of legislation, and made decisions over seven cases, including two cases which struck down laws restricting the right of appeal to the Supreme Court. The Constitution of the Second Republic (1960–1961) introduced the judicial control system of the German Federal Constitutional Court, but regretfully, could not operate the Court due to the coup in 1961. The Constitution of Third Republic (1961–1972) adopted the judicial system of the U.S. Supreme Court. During its operation over ten years, the Supreme Court held a clause of "State Damage Redress Act" unconstitutional in only one case, which challenged restrictions on compensation for military armies and policemen seeking to claim damage redress against the state.[291] Moreover, the purport of this decision was overturned by a subsequent amendment of the Constitution. Constitutions of both the Fourth Republic (1972–1980) and the Fifth Republic (1981–1987) maintained a judicial control system of the Constitutional Committee that remained strictly a nominal constitutional institution which never referred to any case under the repressive laws of authoritative regimes. From this overview of Korean judicial control in our constitutional history, we can learn an important lesson: the autonomous law cannot operate the constitutional control system without a real political democracy.

The Justices of the Constitutional Court may be appointed by the President with the consent of Congress. Candidates are nominated by Congress, the President, and the Chief Justice of the Supreme Court. All candidates should be qualified as judges, be more than 40 years of age, and have more than 15 years of career experience as a judge, prosecutor, or attorney. The terms of office and the retirement age of Justices are the same as those of Justices of the Supreme Court. Justices are subject to constitutional obligations not to join a political party or participate in politics. Justices of the Constitutional Court shall not be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment (Article 112(3) of the Constitution). The Constitutional Court may review the legislation by the Congress and equivalent statutes by other entities. However, according to Article 107(2) of the Constitution, the constitutionality of subordinate legislation, such as administrative orders, regulations, rules, and measures, is subject to the judgment of the Supreme Court. Consequently, a dualism causes a serious conflict of law between the Constitutional Court and the Supreme Court. If a different interpretation of the Constitution arises between both Courts, the Constitution does not expressly prescribe whose opinion shall be final. This incomplete dualism undermines the uniformity and consistency of constitutional order. The Constitutional Court's jurisdiction has fundamentally been important in relation to judicial review of statutes and determination of constitutional complaints.

3.1.1. Judge's Purposive Interpretation

The Court was established on the basis of the Constitutional Court Act (hereafter 'CCA') of 1988. Under Chapter VI of the Constitution, the Court has the following jurisdiction: adjudicating the constitutionality of a law upon the request of a court; Impeachment; deciding on the

[291] The Government was concerned about the decision in the context of claims of redress for Vietnamese war veterans. Most justices of the Supreme Court concerned with the decision of unconstitutionality of that law resigned from the bench and the law was subsequently amended.

dissolution of a political party; resolving jurisdictional disputes among state agencies and local governments; and hearing constitutional complaints (public petitions relating to the Constitution) as prescribed by the Act.[292] As the jurisdiction of the Constitutional Court excludes both an abstract judicial review and the constitutional complaints against a court trial, some scholars and lawyers have argued that the scope of its jurisdiction was insufficient to readily take a constitutional adjudication. In the course of legislation of the National Assembly, the CCA has reflected three limitations of the Court's power on request of the Supreme Court. First, only ordinary courts can request the Court to review the constitutionality of statutes.[293] However, litigants can file a challenge to the constitutionality of a law through a constitutional complaint, meaning the above restriction is void.[294] Second, under Article 107(2) of the Constitution the Supreme Court has strongly campaigned for the intrinsic power to review the constitutionality of administrative legislation such as administrative orders, rules, and regulations excluding the Court. Third, Article 68(1) of the CCA excludes the judgment of an ordinary court from the object of an adjudication[295] complaint by the Court (Yang et al. 1999).

Although the Court has encountered institutional inertia in constitutional adjudication, nonetheless, the Court has actively worked towards enforcing a constitutional order. In general, a concrete control of law may be distinguished from an abstract control on the constitutionality of the law, with a reference to a concrete conflict arising from the application of the law in a particular case after a law has been put into effect.

As the Court has the competence to annul unconstitutional laws in their adjudications, the principle that all powers are subject to the law while guaranteeing that the law will conform to the Constitution can be maintained. Even though the Court has some role in resolving jurisdictional disputes between organs of governments, this differs from an abstract review. In particular, Article 61(2) of the CCA restricts this form of review to those cases where the act or omission of the responding agency "infringes on or is in obvious danger of infringing on" the abstract review, and requires the presence of at least a threat to a concrete interest. The creation of constitutional jurisdiction is linked with a guarantee of constitutional democracy in the light of past dangers and the need to keep constitutional mandates from being suppressed by an authoritarian regime threatening the Constitution.

[292] Article 111(1) provides that the Constitutional Court shall have jurisdiction over the following matters: 1. The constitutionality of a law upon the request of the courts; 2. Impeachment; 3. Dissolution of a political party; 4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and 5. Constitutional complaint as prescribed by Act (Article 3(1) of Constitutional Court Act is contained same provisions).

[293] When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court and shall judge according to the decision thereof (Article 107(1) of the Constitution).

[294] If a request made for adjudication on the constitutionality of a law under Article 41(1) is dismissed, the party who has made the request may request adjudication on a constitutional complaint to the Constitutional Court. In this case, the party shall not request again adjudication on the constitutionality of a law, for the same reason in the litigation procedure of the case concerned (Article 68(2) of CCA) [This Article Wholly Amended by Act No. 10546, Apr. 5, 2011].

[295] The Court's institutional inertia mainly resulted from the interest conflicts of both political parties and the judiciary itself (West and Yoon 1992, 15–18).

In fact, Article 45 of the CCA provided for a dichotomous decision as to constitutionality. The Court adopted from the German Constitution various other categories of decision that the Court can render. First, the Court can hold an act unconstitutional, voiding the act immediately. The Court can find the act to be non-conforming with the constitution, in which case the Congress may be required to amend the act in the near future. The Court can find that the act is conditionally constitutional as long as it is interpreted in the instant case. Finally, the Court may uphold the act as constitutional. These various types of declarations of constitutionality and unconstitutionality may place the Court in dialogue with the legislators and executive agencies. In other words, the Court can also provide guidance for enforcement agencies as to how to apply the law to avoid constitutional defect (Ginsburg 2003).

The Constitutional Court provides the other powers of the State with conceptual tools and criteria for their conduct through the interpretation of the Constitution. Thus, the Court plays the dual roles that defend and create the legal order. The judicial character of the Courts means that they cannot act on their own accord, but rather, only in legal procedures initiated by others or in specific cases provided for in the Constitution. They must follow criteria determined by the Constitution, and not by political opportunity or convenience (Lopez 1994).

When a person's constitutional rights have been infringed by executive or administrative action or nonfeasance, she or he may directly make a complaint to the Court for relief on the basis of Article 68(1) of the CCA.[296] There are two separate grounds for such complaints. Article 68(1) of the CCA may allow complaints after all available legal remedies have been exhausted by plaintiffs whose rights have been infringed by unconstitutional state action.[297] Moreover, Article 68(2) of the CCA relates to cases in which the plaintiff has unsuccessfully sought referral by the ordinary courts under Article 41 of the CCA, and leads to a stay in ongoing adjudication pending the Constitutional Court judgment. This system is designed to partially remedy the lack of jurisdiction over the decisions of ordinary courts. If the right of the petition did not exist, ordinary courts' processes would be unreviewable by the Court.

However, they are heard, the original concept that the Court has been designed as an instrument only to defend the Constitution is no longer valid. This is because there is explicit evidence of so many cases of specific procedures before the Court which seek to guarantee the protection of the constitutional fundamental rights of individuals. In Korea and Germany, constitutional complaint is of the utmost significance and is designed as a means by which the Court can remedy individual violations of any fundamental rights defined in the Constitution. The relevant characteristic of this procedure is that it does not seek a ruling of the Court on general legislative or administrative statutes, but rather on

[296] CCA 68(1): Any person whose basic rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the governmental power, *excluding judgment of the ordinary courts*, may file a constitutional complaint with the Constitutional Court: Provided, that if any remedy is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.

[297] Most of these cases have involved allegations of abuse of prosecutorial discretion when prosecutors did not indict, however, before the related article of the Criminal Procedure Act was amended in 2010, Article 68(1) cases predominated because decisions of ordinary courts were excluded from the jurisdiction of the Constitutional Court.

the individual acts of specific executive powers and of individuals (by means of the application of the doctrine of public function). In Germany and Spain, a constitutional complaint may be raised against all public powers in the event of the violation of a fundamental right, in a procedure which has often been described as a "universal appeal" (Lopez 1994). By means of the constitutional complaint, the Court may guide the action of the judicial, executive and legislative powers in all matters concerning constitutional rights. But in the case of Korea, the constitutional complaint has been the instrument for orienting the actions of executive and legislative powers, excluding the judgment of ordinary courts in Article 68(1) of the CCA. Actually, the vast number of constitutional complaints in annual constitutes a strain on the efficacy of the Court and this result in the necessity of establishing a type of filter, both outside and within the realm of constitutional jurisdiction. In constitutional theory, as the Court should itself be prevented from reviewing the judgments of ordinary courts involving violations of constitutional rights, some serious tensions have arisen between the Court and the ordinary courts, and particularly the Supreme Court, in cases in which they believe the Constitutional Court to have acted ultra vires, reviewing judicial decisions not directly related to the protection of constitutional rights.

3.1.2. Constitutional Court's Responsive Autonomy

Just as the "monopoly of legitimate violence" is celebrated as a major achievement of the modern state, the essential implications of a long authoritative regime (1961–1987) have been the repressive laws, vortex political culture, and a rigid judicial formalism. In short, since the achievement of political democracy and the amendment of the Constitution in 1987, the Court of September 1988 has been working under an autonomous law. The Constitutional Court has been quite active in its five terms of operations.[298]

The 1st Court's term operated from September 1988 to August 1994.[299] Relying on the accumulation of the Court's precedents, laymen have also directly resorted to the Court as a tool for the remedy of their rights and controlling the executive powers. In short, the said Court was established in the wake of rapid social changes, and its major efforts went into remedying many statutes which had accumulated over many years under the authoritarian regimes, the constitutionality of which was relatively easy to adjudicate.

The 2nd Court's term (1994–2000) faced ever harder and more sophisticated adjudications and a constitutional complaint was filed challenging the prosecutor's decision not to indict the former presidents, who Mr. Chun and Mr. Roh involved in the military coup d'état in 1979.[300] The Court decided to include the

[298] The 1st term Court (September 1988–September 1994); the Second Term Court (September 1994–2000); the third term Court (September 2000–2006); the Fourth Term Court (September 2007–2013); the Fifth Term Court (September 2013–2017).

[299] By the first term in 1988–1994, the Court was composed of six permanent judges and three non-permanent judges. It has been widely acknowledged that the Court was established as the final resort which the people trusted and turned to for the protection of their fundamental human rights under the Constitution. The Constitutional Scholars' Society and Attorney's Community evaluated favourably the Justices' efforts to firmly establish the constitutional adjudication. In a survey of lawyers and law professors conducted by a citizen group in September 1994, the overwhelming majority of respondents gave high marks for the Court's activities during its first six years.

[300] The Campaign to "rectify the past" continued in a series of similar challenges against the non-institution of prosecution of those involved in the May Incident of 1980. Over this complaint adjudication, the Court upheld the Special Act on the May Democratization Movement, which suspended the statute of limitations for prosecuting those involved in the coup.

prosecutor's decision not to indict as a proper subject matter for constitutional complaints on the ground that there were no other effective control mechanisms checking the prosecutor's power to prosecute because appeals on such decisions could be made only under exceptional circumstances. This is because the control over the prosecution's arbitrary exercise of its powers is a matter of legislative discretion.[301]

The 3rd Court's term (2000–2006) made a contribution to criminal human rights and was proactive in fields where violations of rights had been condoned due to Confucian social custom or the traditional convention that the system of family registry (patriarchy, 'hojuje') is discrimination based on outdated notions of gender roles, and is incompatible with the Constitution because the individual is being treated merely as an instrument in the service of the maintenance and preservation of the family. Hot political controversies such as the construction of administrative capital and impeachment of the president were decided by the Court.

The 4th Court's term (2007–2013) had important goals such as a social integration through constitutional adjudication. The Court consistently expanded the scope of constitutional protection over freedom of speech. Such unconstitutional decisions were "a rating system of video materials case",[302] "a prior review of broadcasting advertisements case",[303] a "restricted screening rating case",[304] "a withholding of video product classification case",[305] a "nighttime outdoor assembly ban case",[306] a "ban on internet distribution of obscene materials case",[307] a "real name verification of internet news site case",[308] and an "identity verification system on the internet".[309] The above decisions made a substantial contribution to enhancing the freedom of speech and liberal democracy in Korea.

The 5th Court's term (2013–2017) decided the hot case of the dissolution of 'the Unified Progressive Party' after its major members' actions violated the liberal democratic order of the Constitution in 2014.[310] Moreover, the Court made the rigid decision that the respondent, President Park Gun-hye, was to be removed from office in the adjudication on the impeachment of the President on 10 March 2017.[311]

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[301] 94 Hun-Ba 2, August 21, 1997.

[302] 2004 Hun-Ba 36, Oct. 4, 2007.

[303] 2005 Hun-Ma 506, June 26, 2008.

[304] 2007 Hun-Ka 4, July 31, 2008.

[305] 2004 Hun-Ka 18, Oct. 30, 2008.

[306] 2008 Hun-Ka 25, Sept. 24, 2009.

[307] 2006 Hun-Ba 109, 2007 Hun-Ba 49, 57, 83, 129 consolidated, May 28, 2009.

[308] 2008 Hun-Ma 324, 2009 Hun-Ba 31 (consolidated), Feb. 25, 2010.

[309] 2010 Hun-Ma 47, 252 (consolidated) Aug. 23, 2012.

[310] 2013 Hun-Da1, Dec. 19, 2014.

[311] It was in the outline of petition for adjudication on impeachment of reasons that the respondent publicly announced her intention to resign from the presidency in accordance with the National Assembly's decision. The National Assembly formed a special committee and conducted an investigation of state administration into suspicions that a civilian had intervened in state affairs, and on December 1, 2016, appointed a special prosecutor. On December 8, the National Assembly presented to the plenary session a 'motion for the impeachment of the President (Park Geun-hye),' proposed on December 3, 2016, by 171 National Assembly members including Woo-Ho, Park-Won and Roh-Chan. The motion to impeach the respondent passed with 234 members in the 300-seat National Assembly voting in favor, at the 18th plenary of the 346th session (regular session) on December 9, 2016. The impeachment prosecutor requested impeachment adjudication against the respondent by submitting the original copy of the impeachment resolution to the Constitutional Court pursuant to Article 49 section 2 of the Constitutional Court Act (2016 Hun-Na1, March 10, 2017). By contrast, the Court rejected the case concerning the impeachment of former President Roh Moo-hyun on May 14, 2004 (2004 Hun-Na1). The question of whether to remove the President from office when he or she has violated the law should be determined by whether this violation is of such gravity in terms of protecting the Constitution, that it is required to preserve the Constitution and restore the impaired constitutional order through a decision in favour of removal; or whether the President, through a violation of law, has betrayed the trust of the people to such an extent that said public trust vested in the President should be forfeited before the presidential term ends (*see also* 2004 Hun-Na1, May 14, 2004).

In recent years, the Court decisions of unconstitutionality have explicitly decreased compared with former Courts.

Table 1 The caseload of the constitutional court (1988.9–2017.10)

Classification	Total	Constitutionality of laws	68(1) Complaint	68(2) Complaint	Competence dispute	Dissolution of party	Impeachment
Filed	32,844	935	25,443	6360	102	2	1
Settled	31,953	879	24,936	6046	88	2	2
Dismissed by panel	19,772		16,246 (14,737)	3523 (3192)			
Unconstitutional	580	274	104	202			
Unconformable	206	59	59	71	17		
Conditional Unconstitutional	70	18	20	32			
Conditional Constitutional	28	7		21			
Constitutional	2410	329	4	2077			
Upholding	618		616			1	1
Rejected	7254		7233		20		1
Dismissed	1929	69	1512	312	35	1	
Withdrawn	900	123	643(8)	118(2)	16		
Total decisions on merit	12,181	879	8687	2523	37	2	1
Number struck out	1502	358	799	326	17	1	1
Percentage struck out (%)	12.3	40.7	9.2	12.9	46	50	100
Pending cases	891	56	507	314	14	–	–
Pending percentage (%)	7.3	6.3	5.8	12.4	38		

Source Extracted from Constitutional Court Statistics. In the legal practice of Korea, merits cases include rejections but not dismissals by litigants. Partially/fully struck out includes all decisions but "constitutional" and "rejected."
1. "Unconstitutional": Used in the constitutionality of laws cases
2. "Unconformable": This conclusion means the Court acknowledges a law's unconstitutionality but merely requests the National Assembly to revise it by a certain period while having the law remain effective until that time
3. "Conditionally Unconstitutional": In cases challenging the constitutionality of a law, the Court prohibits a particular way of interpretation of a law as unconstitutional, while having other interpretations remain constitutional
4. "Conditionally Constitutional" means that a law is constitutional if it is interpreted according to the designated way. This is the converse of "Unconstitutional, in a certain context". Both are regarded as decisions of "partially unconstitutional"
5. "Upholding": This conclusion is used when the Court accepts a Constitutional Complaint which does not include a constitutionality of law issue

The Court has found 1502 of 12,181 cases, or 12.3% of cases, unconstitutional in whole, or in part, in their application. The percentage of laws struck down has been the highest at 40.7%. Petitions under Article 68(1) of the CCA have been occupied in 60% of cases in which the Court dismissed a prosecutor arraignment not to prosecute. Some prosecutors interpret the findings as an instruction to reinvestigate the case; others, including scholars and activists, see it as an order to prosecute. As a result, findings of unconstitutionality do not always lead to prosecution. However, after the scope of application for adjudication of the Criminal Procedure Act was amended in 2008, Constitutional complaints apparently decreased. If a person who has filed a criminal complaint, with a right to file such criminal complaint, receives a notice of non-prosecution from a prosecutor, she/he may file an application for adjudication to find out whether such disposition is properly made, with the High Court having jurisdiction over the venue where the District Prosecutors' office to which the prosecutor belongs is situated (hereinafter referred to as the "Competent High Court"). With respect to a crime referred to in Article 126 of the Criminal Act, an application for adjudication shall not be filed against the clearly expressed intent of the publicized [Criminal Procedure Act, Article 260(1)].

The Court found 326 of 2523 cases, or 12.9% of cases, unconstitutional in whole, or in part, in their application. Constitutional complaints under Article 68(2) of the CCA have been heard less on the merits than as a result of an Article 68(1) petition, but the chances of success are higher for those that reach the merits stage. After a law upon the request of the courts is rejected by the ordinary courts, the ongoing litigation can be referred to the Court by litigants as a constitutional complaint under Article 68(2) of the CCA.

Indeed, one factor in the relatively high "strike rate" of this petition of Article 68(2) of CCA shows the capacity of judges' constitutional interpretation in ordinary courts. While a speedy trial shall be applicable to the constitutional adjudication within 180 days in the course of proceeding, an excessively delayed trial, such as more than four or five years, results in a high rate of 7.3% of unsettled pending cases, as shown in Table 1.

On the one hand, it is important to emphasize that the rule of law (Rechtsstaat Principle) requires executive power to be enforced according to statutes and any wrongful administrative action should be redressed in the judicial process. As the notion of democratic constitutionalism evolved, the importance of the rule of law moved from the formal conception to the substantive one. The current Constitution adopts constitutional litigation, including constitutional review as well as constitutional complaints. It seems clear that the Constitutional Court has firmly applied a legal formalism on the basis of Justice's value neutrality, derived from the work of the United States Supreme Court. In other words, it is assumed that the Constitutional Court is independent of political powers, in accordance with a strict separation of law and politics. The Constitutional Court has contributed to the establishment of the rule of law by presenting the clear limits and precise standards regarding the exercise of executive power. As the source of constitutional jurisprudence in legal practice and education, the Constitutional Court may scrutinize orders that offend the protection afforded by fundamental rights and freedoms. Another issue involves determining what kind of constitutional issue is raised when fundamental rights and freedoms are restricted. Here, it is useful to examine whether the order's restriction of those rights and freedoms can be justified (Jung 2011, 2016).

As noted above, if a matter does not fit within the scope of protection of those rights and freedoms (i.e. it is outside the restriction's ranges), it would constitute a failure to qualify for constitutional protection (for example, violence incitement). Second, it needs a legal basis or rationale for restricting those rights and freedoms (statutory requirement). A restriction of those rights and freedoms must meet substantial standards such as 'compelling public interest' and 'legitimacy', as well as the scrutiny standard of the principle of proportionality.

Accordingly, the Constitution is vested with due process of law [Art. 12(1), (3)], and the requirement of protection against restriction of fundamental rights and freedoms, and the prohibition of laws infringing an essential element of fundamental rights and freedoms in accordance with Article 37 section 2. If the four requirements for restricting fundamental rights are not all met as above, fundamental rights protection will supersede the doctrine of general statutory reservation by which fundamental rights and freedom may be restricted.

On the other hand, the Constitutional Court is faithful to the purposive constitutional interpretation. Justices may interpret the Constitution in the context of the current situation so that the legal source of the written Constitution is applied to bring about the expected constitutional order and its associated legal culture. The Justices shall not be unconditionally bound to the intent of the Drafters, but must precisely interpret the objective purpose of the Constitution. Therefore, the Constitutional Court has consistently adopted a purposive interpretation which is able to explore the purpose of constitutional provisions.[312]

[312] Japan's Supreme Court has also the same way of purposive interpretation as Korea's Constitutional Court (Ito 1995; Jung 2011).

Ultimately, the Constitutional Court should be established to faithfully apply the doctrine of purposive constitutional interpretation of the United States Federal Supreme Court and general Constitutional Court. Based on this premise, if the democratic constitutionalism may rationally improve the method of selecting judges, who can participate in the expert of the Constitutional court, it is expected to improve the efficiency of the Constitution culture.

3.2. Japan's Less Responsive Supreme Court

The constitution of Japan took effect on May 3, 1947, and was enacted as the mainstay of the democratizing reforms after Japan's defeat in World War II. Its preamble declares: "resolved that never again shall we be visited with the horrors of war through the action of government, [we] do proclaim that sovereign power resides with the people." The Constitution is also founded on the principle of separation of powers as following: "the whole judicial power is vested in a Supreme Court and such inferior Courts as are established by law" [Art. 76(1)] and "all judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws" [Art. 76(3)]. The Constitution solemnly pledges the guarantee of fundamental human rights (Art. 11), coupled with the power of the Supreme Court, as the court of last resort, to "determine the constitutionality of any law, order, regulation or official act" (Art. 81). This power of judicial review represents the most salient feature of the Constitution inspired by America law and is interpreted to reside in all the inferior courts as well.

The Japanese court system is made up of a hierarchy of three levels of ordinary courts, in accordance with the "three instances principle" that had been adopted in the Meiji era: the Supreme Court, 8 High Courts, and 50 District Courts. In addition, to constitute the fourth level of court hierarchy, there are about 440 Summary Courts with limited jurisdiction over the lightest civil and criminal cases, excluding family matters, placed under the District Courts. The Summary Court's civil jurisdiction presently covers claims valued at 1.4 million yen or lower. There are three kinds of ordinary courts: the District Court, Family Court, and Summary Court. Japanese courts are unique in other respects as well. Judicial corruption is virtually unknown. Judges do not take bribes. A combination of factors helps to explain this extraordinary integrity (Haley 2007).

3.2.1. The Features of Constitution Interpretation

The Japanese Constitution made clear that it is the supreme law of the land and any legislation or acts of the government which would violate the Constitution are invalid. Chapter X—Supreme law, of the Constitution thus provides that "[t]his Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity" [Article 98(1)]. The supremacy of the Constitution is derived from the foundation law for freedom, and the Bill of Rights is the core of the Constitution which may protect positive natural rights deriving from human dignity (Ashibe 1994). Stated positively, the important issue is whether all statutes and orders enacted under the Meiji constitution have an effect. Article 98(1) of the Constitution allows those statutes and orders under the Meiji Constitution to be valid so long as they do not violate the Constitution.

Since 1947, the United States Constitution has contributed to the Japanese Constitution on the concepts and foundations in both political democracy and judicial review. It cannot be denied that the Meiji Constitution represented pseudo-constitutionalism in the light of

democratic constitutional history. To be sure, the pre-war political regime was absolute monarchy sovereignty in pursuit of a continental civil law system and military imperialism. Similarly, the Constitution relied on the concepts of both legal positivism and reactive rights derived from the German Rechsstaat Principles in the 19th Century (Jung 2011). In contrast, the post-war current Constitution has declared the national sovereignty of the people who shall govern and a preference for a bicameral system in the British parliamentary cabinet style. But the so-called MacArthur Draft had to introduce unicameralism on the ground that bicameralism is not wholly democratic (Okudaira 1990). While the Japanese founders were sticking to the ideas of bicameralism, the House of Councilors, as well as a House of Representatives, adopted a house of vocational representation, similar to the two Councils of both Labor and Management in the Weimar Constitution of 1919.[313] Judicial review was enacted and implanted in line with the judicial review to which the United States Supreme Court was entitled pursuant to the Supremacy Clause of US Constitution and the judgment in *Marbury v. Madison* (5 U.S. 137, 1803) (Corwin 1929). While the judicial review was established in some cases, the more general abstract judicial review, however, under which the judiciary can exercise a broader discretion for protection of the Constitution in constitutional adjudication, is not vested in due to the principles of separation of power and national sovereignty (Ito 1995; Jung 2011). Subsequently, as concrete judicial review has the main purpose of settling an individual litigation, the Supreme Court can impose the self-restriction of judicial review, if it is possible to solve the case without making the decision a constitutional issue. Japanese Justices may obey the doctrine of "Constitutional avoidance." In *Ash wander v. Tennessee Valley Authority* [297 U.S. 288 (1936)], Brandeis set out a broad formulation of the avoidance doctrine. This reluctance to use the power of judicial review was, according to Brandeis, predicated on the principle of separation of powers that one branch must not "encroach upon the domain of another." Brandeis identified two prominent limitations on the federal judicial power based on the separation principle: the "case or controversy" requirement and the rule that federal courts have no power to render advisory opinions.[314] Brandeis linked a host of justiciability doctrines, including a political

[313] Der Arbeiterrat und der Wirtschaftsrat, art. 165 von der Weimar Verfassungsrecht, August 11, 1919.

[314] Brandeis described how the Court had developed "prudential" rules—meaning non-constitutional, self-imposed restraints—by which to avoid "passing upon a large part of all the constitutional questions" presented to it, despite having jurisdiction to hear them. He described the avoidance doctrine as consisting of a "series" of seven rules: (1) "The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding"; (2) "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it"; (3) "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"; (4) "The Court will not pass upon a constitutional question, although properly presented by the record if there is also present some other ground upon which the case may be disposed"; (5) "The Court will not pass upon the constitutionality of a statute unless the plaintiff was injured by the operation of the statute"; (6) "The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits"; (7) Even if "serious doubt[s]" concerning the validity of an act of Congress is raised, the Court will first ascertain "'whether a construction of the statute is fairly possible by which the question may be avoided". Brandeis concludes his discussion of the avoidance doctrine with this warning: "One branch of the government cannot encroach upon the domain of another, without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule": Ash Wander, 297 U.S. [quoting Sinking-Fund Cases v. U.S. Central Pacific Railroad Co., 99 U.S. 700, 718 (1871)] (Katzmann 1988; Frohnmayer 1973).

question and standing inquiries, to these limitations. In particular, Japan's Supreme Court has ruled only nine statutes to be unconstitutional in 70 years of constitutional litigations (1947–2017).

Human rights under Japan's Constitution have adopted the concept of the American notion of civil liberties derived from natural law as well as various unique American ideas and legal concepts such as individualism, fundamental human rights, freedom, and equality. Moreover, the Constitution enumerates some social economic rights in pursuit of the principle of the welfare state which stemmed from the Weimar Constitution and the United States' New Deal policies. The Constitution prescribes that all people shall have the right to maintain the minimum standards of wholesome and cultured living (art. 25), in addition to freedom of thought (art. 19), freedom of religion (art. 20), freedom of speech and of press (art. 21), and freedom of assembly and association (art. 23).

However, the Supreme Court has applied the double standard of scrutiny: the strict scrutiny and rational basis test, which originated in Justice Stone's footnote four in *United States v. Caroline Products Co*.[315] By contrast, the American Supreme Court has generally maintained the level of scrutiny and burden of proof that relies upon the three classifications of strict scrutiny, intermediate scrutiny, and rational basis test. Even though the Japanese Constitution entails more lists of human rights than the United States Constitution, the Japanese Supreme Court has never applied the scrutiny to social human rights (Ashibe 2004). In the Japanese Constitution, freedom of speech and political freedom may be entitled to protection as "it is politically free, but is socially not free." Still, everyone may enjoy the freedom of expression and keep a delicate balance between formal and informal social relationships due to the symbiotic feature of traditional hierarchical culture (Okudaira 1990). In sum, the Supreme Court receives and decides over 4000 civil, administrative, and criminal cases including constitutional cases per year. Except for constitutional cases, the Court rarely decides cases "en banc". Most cases are decided by one of the three petty benches, each with five justices, into which the court is divided and cases assigned in sequence (Beer and Itoh 1996).

3.2.2. Formalism and Constraint of Politics

Over seven decades, there have been nine cases in which the Supreme Court has ruled statutes to be invalid for violating the Constitution. There have been various comments or opinions regarding the function of judicial review. Many scholars and lawyers have observed that the Supreme Court's attitude has been one of rigid passivism of judicial review, allowing for broader legislative discretion on Constitutional interpretation. Generally,

[315] Footnote 4 introduced to the Supreme Court jurisprudence the idea of levels of judicial scrutiny. In keeping with the New Deal Revolution, Footnote 4 established the rational basis test for economic legislation, an extremely low standard of judicial review. The rational basis test mandates that legislation (whether enacted by Congress or state legislatures) which deals with economic regulation must be rationally related to a legitimate state interest. Therefore, Footnote 4 outlines a higher level of judicial scrutiny for legislation that meets certain conditions: (1) On its face violates a provision of the Constitution (facial challenge); (2) Attempts to distort or rig the political process; and (3) Discriminates against minorities, particularly those who lack sufficient numbers or power to seek redress through the political process. This higher level of scrutiny, now called "strict scrutiny", was first applied in Justice Black's opinion in *Korematsu v. U.S.* (1944). In fact, the cited work above (while quite useful on the origin and growth of the Footnote) does not claim that the law clerk was the author, and implies the opposite through letters between the justices: 304 U.S. 144 (1938).

the Supreme Court relied upon the broad "public welfare" standard. However, the Court prefers to give weight to the wide discretion of the legislature (Okudaira 1990).

3.2.3. Why Has the Japanese Supreme Court Shown Very Passive Judicial Review?

First, Japan's legal culture has been more collective and collaborative, and less autonomous due to its strong symbiotic tradition. In fact, the legal culture is used to emphasize collectivism rather than individualism. The long experience of the rule of law for more than one hundred years inherently established the autonomous laws.

Second, the Supreme Court's constitutional interpretation inherited a more rigid approach based on formalism and textualism from the American Supreme Court and remained wedded to a 'Rechtsstaat' principle derived from the German Constitution since the 19th Century. With regard to the incidental system of judicial review, some members have questioned the adequacy of deciding the constitutionality of laws and other measures after the fact and in conjunction with litigation on specific cases.

Third, since the Meiji Constitution and Weimar Constitution that was run on the passive interpretation of constitutional provisions by the judiciary, Justices of the Supreme Court must rigidly obey the doctrine of Constitutional avoidance under the legal culture. Judicial review according to this approach included the following: guaranteeing human rights and protecting the Constitution. Maintaining an appropriate tension between the judicial and political branches through the medium of judicial review is very important to constitutional democracy. Judicial review also serves to stimulate constitutional debate.

Fourth, Supreme Court justices, with their large caseload of final appeals, are too busy to decide questions of constitutionality. The passive stance of the judiciary may be attributed in large part to: (1) the restraints on judicial review due to the fact that Japan's system is construed as being a U.S. style system of incidental review; (2) the influence of the idea that the executive branch takes precedence; and (3) the fact that, in the absence of free debate on constitutional revision, any Supreme Court decision on the constitutionality of a high-level matter of governance risked drawing intense scrutiny as a political issue. In particular, an environment in which the Constitution could be amended when a law was ruled unconstitutional was lacking, mainly due to the strict amendment procedure laid down by Article 96. The problem lies in the political coloration of appointments of Supreme Court justices and other judges, and in the judicial bureaucracy, which does not adequately ensure their freedom and independence.

Lastly, citing evidence such as the rarity of Supreme Court rulings that find statutes unconstitutional, some scholars have expressed the view that the judiciary is reluctant to decide questions of constitutionality ("judicial passivism") and is not adequately fulfilling the role entrusted to it in guaranteeing the Constitution (Matsui 2011). Other scholars have also criticized the courts' tendency to avoid rendering a decision by invoking the "act of state" doctrine on the grounds that the case is highly political in nature. Some scholars have expressed the view that the judiciary should have a limited involvement in acts of the state, leaving decisions in that area to the political branch,[316] while others have commented that whether the courts rule on constitutionality is a question that affects the autonomy of the judicial branch, and

[316] In fact, the Japanese Supreme Court employs both conservatism and activism in order to avoid judicial depoliticization (Matsudaira 2011).

the legislative branch should not intervene (Haley 2007). Under the unitary social structure and implied unilateral political governance, the Supreme Court hears very diverse cases in addition to ordinary litigations related to the bylaws of local government, and most Justices are inclined to follow the typical thought and conduct of a career judge. This is because the Cabinet will appoint the Justice, whom the ruling party may substantially select as a candidate from among career judges, prosecutors, practicing attorneys, and law professors, according to the recommendations of some sections of the legal community. A significant element of judicial passivism is attributed to a highly bureaucratic machinery, a rigid formalism, and a conservatism concerned to avoid "depoliticization" of controversies which should remain within the realm of politics (Matsudaira 2011).

4. Civil Litigation and Conciliation in Korea

4.1. Less Responsive to Civil Litigation

What factor(s) brought about Korea's economic miracle? Korea achieved one of the most rapid economic growths among developing countries during the 1960s–1980s. But until 1997, politics gradually changed from a rigid military authoritarian regime toward a post-democratic government. Advanced judicial states such as the Common Law and EU legal system have focused on a new area of therapeutic jurisprudence for lawyer's competence to resolve legal disputes. The adjudication has generally evolved in accordance with the legal culture and characteristics of social structures. In Asian countries, the judicial role is more likely to be limited to the adjudication rather than the settlement of legal disputes. Economic development requires various kinds of investment such as time and effort. Without the diligence of economic agents, it is impossible for a country to develop its economy. The economic development of a country is an essential investment in human capital, and a highly educated and skilled workforce is a prerequisite for the production of all goods and services (Becker 1993).

First, a judicial system fully enforces a formal contract by way of a court trial, judgment, and judicial enforcement proceedings if required. By negotiation between the parties, the full execution of the contract, if necessary by means of judgment given at trial is at the Pareto optimality[317] (Johnson et al. 2002). Thus, informal contract enforcement (compromise through reconciliation, mediation etc.) appears to be a solution to the lack of a court trial and less than Pareto optimal (Djankov et al. 2002).

Second, in most developed countries, courts which are guaranteed by a rule of law and independent jurisdiction have a lower risk of private property rights infringement (North 1990). In other words, the property rights system proved to be an important element of economic development.

Third, the rule of law and private property rights in any country are the essential elements of economic development. The effectiveness of the judicial system has a significant impact on economic and social development (Hall and Jones 1999; Acemoglu et al. 2001).

4.2. Statistic Trends of Civil Litigation

Table 2 shows the trends related to the amount of civil litigation filed in all courts

[317] Pareto optimality is a state of allocation of resources from which it is impossible to reallocate so as to make any one individual or preference criterion better off without making at least one individual or preference criterion worse off.

between 1960 and 2015. Litigation refers to civil litigation merits, including small claims cases. As shown in Table 2, the total amount of civil litigation sharply increased during the late 1980s. However, small claims cases were introduced not exceeding the monetary value of 20,000 USD (20 million KRW) in 1973 in the ordinary courts as well as the municipal courts. The common procedure in small claims cases has been to resolve matters at the pretrial stage in contrast to ordinary civil litigation.

Table 2 Statistic trend of civil litigation, population and real GDP (1960–2015)

Year	Civil litigation[a]	Small claims (B)[b]	Practicing attorney[c]	Population (thousand)[d]	GDP(Billion KRW)[e]
1960	29,863	–	456	25,012	27,305
1965	73,400	–	662	28,704	38,821
1970	68,847	–	719	32,882	67,650
1975	102,138	88,610 (86.7%)	809	35,280	108,549
1980	134,204	84,560 (63%)	940	38,123	163,065
1985	316,177	165,316 (52.3%)	1320	40,805	254,991
1990	302,156	136,075 (45%)	1983	42,869	419,518
1995	524,065	308,269 (58.8%)	3078	45,092	628,442
2000	771,551	495,814 (64.3%)	4228	47,008	820,843
2005	1,121,889	868,370 (77.4%)	6997	49,267	1,034,337
2010	1,133,188	687,449 (60.6%)	10,263	49,554	1,265,308
2015	1,318,640	686,407 (52%)	20,200	51,075	1,466,788

Source [a,b](Supreme Court, Judicature Yearbooks)
[c](Korea Bar Association Yearbooks)
[d](Statistics Korea)
[e](Bank of Korea's Economic Statistics System)

During the fifty-five years from 1960 to 2015, the statistics show some characteristics which rely not only on the legal culture of Korean citizens but also on various societal economic factors. The population in 2015 was twice that of 1960, and the rate of civil litigation cases was 44 times that of 1960. The GDP in 2015 was 54 times that of 1960 and the figure of practicing attorneys was 44 times that of 1960. The number of litigation cases per 1000 citizens increased from 1.2 cases (1960) to 25.8 cases (2015). In particular, small claims cases have constituted the main source of civil litigations during 1975–2010. The rate of small claims has exceeded 70% of the total civil litigations per year. However, the curve of small claims has gradually decreased in contrast to the trend of civil merits cases since 2005. In short, it has been shown that the increase in civil litigation was directly correlated with the increase in GDP and population.

If it is difficult for litigants to access small claims cases, Fig. 1 shows that the judicial system may not work due to the costs of litigation. Civil litigations have increased to more than twice that of the 1980s since the crisis of currency in 1997, due to a harsh increase in small claims cases which were equivalent to an average rate of 70% in total civil merits until 2010 (Jung 2015a). This is plain evidence that Korea was under the explosion of civil litigation during two decades (1990–2010). The ratio of civil litigation in proportion to the population has rapidly increased because of small claims by banking creditors against debtors, from 45% at the end of 1990 to 77% in 2005. For example, 66 banking and financial companies sued 560,000 debtors through small claims actions under 20,000 USD among a total of 1,121,889 merits civil cases in 2005 (Jung 2015a). If we can easily control lots of small claims litigation, apart from merits of civil cases, this study may examine the essential relationship between judicial disputes and court trials, as well as the underlying reasons why Alternative Dispute Resolution ('ADR') in various forms has not flourished in social disputes resolution for a long time (Jung 2014b).

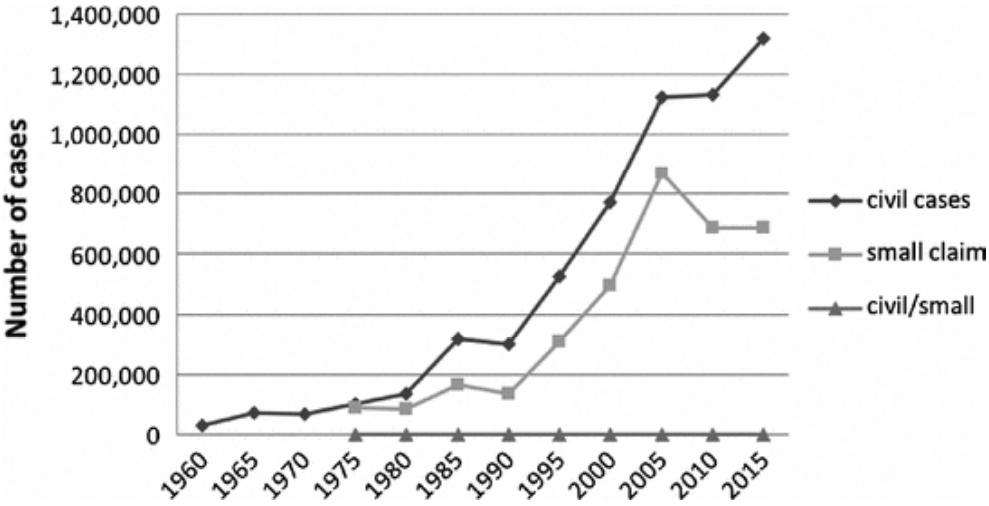

Fig. 1. The curve of Civil litigation and small claims in Korea (1960–2015)

As a rule, Korean people have traditionally avoided court trials as a form of dispute settlement due to a legal culture and tradition of avoiding a lawsuit in accordance with the maxim "litigant makes himself ruin by the lawsuit." In the Ly Dynasty, all of the public agencies had to carry out both administrative and judicial power, but they did not have the professional responsibility of a judge. Most litigants had to spend significant time and money to settle a legal dispute. For this reason, they have generally emphasized the importance of the professional responsibility of judges in the resolution of a legal dispute. When a plaintiff sues a defendant for a breach of contract, there is a de facto bias regarding the litigation as a zero-sum game in which the plaintiff will be a winner against the defendant. Two parties will not take into consideration alternative dispute resolution options such as a conciliation or mediation process by a non-judge. Although there is clear positive evidence of cost and time savings, and numerous

other benefits of some judicial resolution programs, it is evident that ordinary parties to civil litigations depend on the results of civil adjudication and the winner's feeling of gratification against the loser in that lawsuit (Jung 2010).

4.3. Relative Responsive Type of Court Mediation

4.3.1. The Introduction and Management of Early Mediation

The original function of law focuses on maintaining social order and resolving disputes, but the function of modern law is creating and promoting social change. The function of laws promoting social change has recently emerged as a legislative trend (Jung 2014b). In 1990, the Court enacted the Civil Conciliation Act (hereafter 'CMA') in order to facilitate the small claims in civil litigation. The civil conciliation procedure can economically resolve civil disputes, with a judge or conciliation committee of the court able to hear an allegation from parties to the lawsuit, and suggest mediation plan by taking into consideration various circumstances. Compromise is reached through mutual concession. The civil conciliation has some advantages for the parties, courts, and judges. First, it is a fundamental, final, and early resolution of legal disputes for both the court and the parties. Second, civil conciliation minimizes judicial expense, constituting one-tenth of the cost of ordinary civil litigation. Third, parties can easily use civil conciliation procedures and can be freed from the strict formalism of legal procedure. Fourth, since it may not apply to the zero-sum game, even the worst resolution is better than the judgment (Schlichten ist besser als Richten). Fifth, civil conciliation respects the decision of the parties and makes it possible to voluntarily carry out the dispute, which makes it less vulnerable to neighbours. Sixth, the burden of the court or judge can be alleviated, and a fair and speedy trial can be achieved (Jung 2014b). In the CMA, the conciliating agencies are a subordinate judge, annexed court, and the conciliation committee (judge or annexed court). During the period of 2002–2009, conciliation cases by litigants in civil cases were below 1%, but in the case of court decisions, most mediation cases by an annexed court have exceeded 90% in civil litigation cases (2014).[318] In particular, "the early mediation" was introduced because the rate of applications for mediation was very low at 1% during the 1990s, and civil conciliation procedure has been conducted at the discretion of the civil court or mediating judge (Jung 2014a, b). Before the Court-Annexed Mediator Committee and Trial-Day Mediation System were introduced in civil disputes resolution in the District Courts in 2009 and 2010, most of the civil conciliation cases were dependent upon the litigants' will or the judge's discretion due to the inclination of the zero-sum game from traditional legal culture (Jung 2014b).

According to the CMA, "early mediation" is a tribunal attempting to wait for the trial period before the trial on the merits of the case. In other words, it intends to resolve the dispute early after the investigation of the previous evidence or before/ after the closing of the pleading of litigation. Before the trial court appoints the first date of the trial, or before the commencement of the trial, the case is referred to the mediation procedure by the trial court and the mediation committee exercises early mediation at its discretion not involving the court. If the trial court submits the case to the mediating judge,

[318] Judge Lee Young-jin carried out Mediation Procedure in the Seoul District Court from 2010 to 2014, and he presented at the performance of the Court Conciliation System in 2014.

the judge assigns the early mediation to the court mediator [CMA 7(2)], or the non-standing mediation committee, or an external mediating agency who shall hear the opinions of the parties and carry out the necessary investigations [CMA 7(3)]. The standing mediator shall himself process it, and the non-standing mediator and the external mediator shall report the results to the judge in charge within two months. If the parties reach an agreement on their dispute, the judge shall make a decision or amendment to the mediation procedures. If an agreement is not reached, it will be referred to the trial court proceedings.

Early Mediation has the following characteristics in Table 3: (1) At the beginning of a civil trial, the early mediation may heal up litigants' torments by prompt resolution of his/her legal dispute to the courts; (2) The expertise and experience of the mediation committee can facilitate communication and reconciliation between litigants; and (3) The mediating committee may hear the opinions of parties regarding the time and place, and shall establish conditions for the coordination of the meeting time and place where possible. While dispute settlement has been increased by early mediation, the success rate of mediation is not high. The mediating effort of judges and mediators in courts is affecting the settlement of disputes by mediation. For example, it is difficult for a mediating judge or court mediator to transfer the civil litigation case of a lawyer into the early mediation procedure in practice. In fact, most litigants or judges have been inactive and passive for the civil mediation cases, but improvements to the mediation institution have rapidly enhanced the early mediation of small claims cases through annexed-court judicial resolution since 2009. Consequently, in recent years, most judges in district courts have gradually been responsive by encouraging early mediation for uni-litigants in 90 percent of total small claims litigation cases.[319]

Table 3 Statistic trend of mediation cases in 2002–2012 (Korea)

Year	Civil cases	Small claims (A)	Party's mediation (B)	Judge's mediation (C)	Court-annexed mediation		Total mediation
					Committee mediation (D)	Court's mediation (E)	B + C + D + E sub total
2002	1,015,894	795,371	6918	4564	5362	47,971	64,815 (8.15%)
2003	1,151,072	906,205	7283	3260	4127	44,905	59,575 (6.6%)
2004	1,190,231	934,378	7041	2749	3319	49,650	62,759 (6.7%)
2005	1,121,889	868,370	6660	2594	2983	49,706	61,943 (7.1%)
2006	1,288,987	967,588	5800	2838	2838	43,015	54,581 (5.6%)
2007	1,213,805	901,488	6848	49,346	2780	46,566	105,540 (11.7%)
2008	1,259,031	944,712	9216	57,824	1546	56,278	124,864 (13.2%)
2009	1,074,236	780,220	11,382	58,459	2226	56,446	128,513 (16.5%)
2010	981,188	687,449	10,166	64,93	6206	58,729	140,036 (20.3%)
2011	985,533	690,239	7722	67,090	9616	57,474	141,901 (20.6%)
2012	1,044,928	739,842	8112	75,033	15,378	59,655	158,175 (21.4%)

[319] According to the statistics of Supreme Court's Judicature Yearbook, the rate of uni-litigants consistently appeared at about 90 percent among total small claims litigation until the 2000s (Jung 2014a).

5. Pro-responsive Type of Court Mediation in Japan

5.1. Responsive Civil Mediation

The first comprehensive overhaul of Japan's Civil Procedure Code, since it was enacted in 1890 drawing primarily on German law (Taniguchi 1997), took effect in 1998 and added discretionary restrictions on the final right of appeal to the Supreme Court. Under Japan's current judicial system, whilst litigants of civil dispute may file a lawsuit to a court, there are also other litigation procedures as follows: (1) ordinary civil lawsuits, bankruptcy procedures, and civil preservation procedures can be brought to a district court or summary court; (2) small claims procedures and dunning procedures (request for payment of a fixed sum of monetary claim on debt) can be brought to a summary court; and (3) conciliation litigation prior to a lawsuit can be brought to a summary court.

During the first industrialization of Japan, the rate of civil litigation cases hardly increased from 146,855 cases (1960) to 148,920 cases (1975), but the rate of civil Summary cases did gradually increase by 22% from 155,981 (1960) to 190,782 cases (1975). This shows the impact of a stable social structure and the politics of Japan at that time. As almost Japanese remained true to traditional values including avoiding lawsuits in this period (1960–1975), Kawashima saw a gap between Japanese citizen's legal consciousness and principles of modern law (Kawashima 1967).

By contrast, the trend of civil litigation and conciliation cases sharply increased by 267% from 1975 (148,920 cases) to 1995 (397,765 cases). There was also a large fluctuation from "42 to 110% between 1985 (360,965 cases), 1990 (208,949 cases), and 1995 (397,765 cases) due to civil litigation cases in Courts. As shown in Fig. 2, the small claims of summary courts have consistently increased about 300% in civil litigation from 1970 (190,782 cases) to 2000 (573,366 cases). Most of the small claim cases have not exceeded 900 thousand yen (9000 USD) and 93% of the increase in litigation from 1974 to 2003 (367,759 cases) can be accounted for by small pecuniary claims (342,717), 83% of which were summary court cases (287,230 cases).[320] Those kinds of small pecuniary claims have been filed and won by credit loan companies via default judgments or instant adjustments (Tanase 2001; Hamano 1999–2000).[321] Most litigants in small pecuniary claims have hardly made use of attorneys (Hamano 1999–2000). These phenomena indicate two factors. First, in the 1970s, consumer credit loans and sales rapidly came into wide use among individuals in a period of a low growth economy.

Second, repeat litigants of credit firms have made use of the instrumental litigation and judicial system.

The trend of civil litigation has shown large-scale fluctuations between 1980 and 1995, with a 'bubble economy' emerging between 1985 and 1990.[322] Although the ratio of summary procedures, including civil mediations, slightly increased between 1985 and 1990, this kind of civil procedure was not a complete substitute for civil litigation. During the bubble economy in the 1990s, small claims cases rapidly increased

[320] In 1982, the value of the subject matter of jurisdiction for Summary Courts was raised from 300 thousand yen to 900 thousand yen. In 2004, it was raised again to 1400 thousand yen.

[321] The rate of attorney-less cases in all of the Summary Courts was about 68.9% in 1973. This rate continued to rise to about 90% in 1995 and later (Ozaki 2007).

[322] The Plaza Agreement depreciated the dollar value between America and Japan in 1985.

23.7% from 1990 (435,967 cases) to 1995 (539,541 cases). However, the increasing rate (10%) of civil litigation in this period (from 360,965 to 397,765 cases) remained the same level (17.6%) as it was from 1970 (174,013 cases) to 1980 (204,801 cases) (Fig. 3 and Table 4).

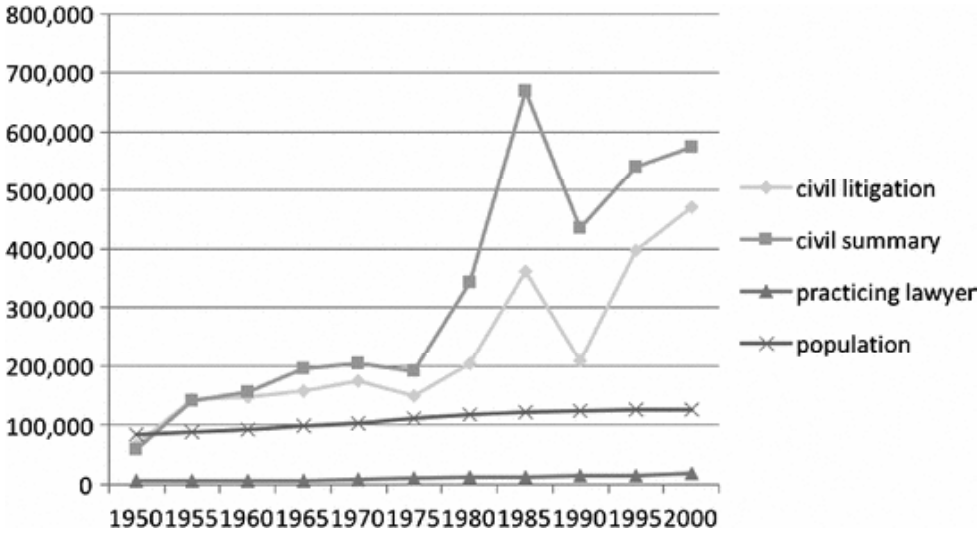

Fig. 2. Mediation curve of civil litigation and small claims in Korea (2002–2012)

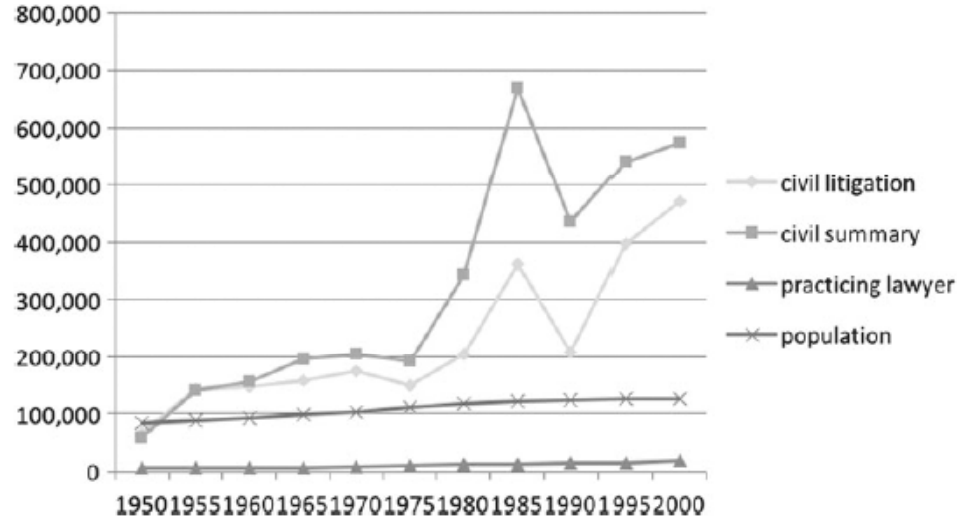

Fig. 3. The curve of civil litigation, lawyer and GDP in Japan (1950–2000)

Table 4

Statistic trend of civil cases, population and GDP in Japan (1950–2000)

Year	Civil litigation	Civil summary	Practicing lawyer	Population (thousand)	GDP (Billion Yen)
1950	66,746	58,761	5804	83,200	–
1955	142,975	141,217	5967	89,276	–
1960	146,855	155,981	6439	93,419	71,683
1965	158,355	195,981	7343	98,275	111,294
1970	174,013	204,556	8797	103,720	188,323
1975	148,920	190,782	10,421	111,940	234,459
1980	204,801	342,209	11,624	117,060	310,720
1985	360,965	669,439	12,830	121,830	365,304,
1990	208,949	435,967	14,080	123,611	463,059
1995	397,765	539,541	15,456	125,570	498,697
2000	471,770	573,366	18,243	126,926	534,411
Source [a,b]Supreme Court of Japan, Annual Report of Judicial Statistics (Shiho Tokei Nenpo)					
[c]Hayashiya & Sugawara 2001 and Japan Federation of Bar Associations, Liberty & Justice (Jiyu to Seigi), No. 627, 639, 664					

5.2. Conciliation of Summary Court

Conciliation may be disposed of by the court based on the mutual consent of parties to settle a dispute on certain conditions. A Judge in a lawsuit can make a settlement pending the lawsuit. The Judge may intervene after having heard the evidence or part of the evidence. It is normal practice that the Judge sets a date for a conciliation conference instead of a trial (Rokumoto 1986). The Judge may form her/his legal evaluation of the trial case on the basis of evidence already taken or submitted before she/he suggests to the parties to seek a mutually agreeable solution or to consider a proposed solution. If a settlement is reached in this way, which the judge approves, then the terms of a settlement are registered in the court's protocol and they acquire the same final effect as a formal judgment of the court. Litigants can appeal following the conciliation. The aim of conciliation and mediation is to reach a legally binding settlement of the dispute. However, the difference between conciliation and private mediation is that the former includes discovery of evidence and statement of claim and allegation in open court.

Furthermore, mediation refers to another way of bringing a civil case to court. It may take place informally outof-court, with a third party assisting the parties to reach a settlement.[323] Mediation takes into consideration not only the legal merits of the case, but also any other aspects of the case relevant to its resolution between both parties. As the judge is normally too busy to take part in the hearing sessions of mediation, a layman may also attend to assist the litigants in the mediation procedure. After the fluctuation of litigation in the 1990s,

[323] Japan's civil mediations are composed of civil mediation procedures and family matter mediation procedures. Civil mediation is a procedure involving the litigant's choice to bring his/her complaint before the Summary Court or a District Court. Family matter mediation is a proceeding instituted in the Family court for matrimonial disputes, including those involving divorce.

civil litigation cases constantly increased. Civil mediation cases also accounted for the increase in Summary Cases which composed more than 95% of the mediation litigation during the 1990s.[324]

6. Conclusion

Korea and Japan have some common characteristics in their legal culture and legal system which have rooted from their Confucian heritages and colonial Civil Law as well as a political culture of the vortex and symbiotic societal environment. In Korea and Japan, most judges are politically independent and professionally competent in the world today. Organized as an autonomous bureaucracy, the judiciary comprises a small, largely self-regulating cadre of elite legal professionals who enjoy with reason an extraordinarily high level of public trust. The vast majority of judges begin their careers in their mid-to-late 20s upon graduation from the court-administered Legal Training and Research Institute (LTRI) and Law School. Most spend a professional life of 20–30 years within the nation-wide structure of courts that they themselves administer. Assignments and promotions are determined by a central personnel office staffed by peers.

In Korea's politics, however, authoritarian governments emphasized political efficiency through economic modernization rather than political legitimacy based on democracy until the late 1990s. Moreover, the military elite had an affinity for the instrumental value of economic development rather than the democratic value in Korean modernization and post-democracy (Jung 2015b). Furthermore, the judicial culture has shown the characteristics of the pursuit of jurists' rent-seeking that limit the opportunities for legal services of citizens in a legal market. Authoritarian political power guaranteed monopoly rents to minority lawyers based on repressive law. In fact, the term "preferential treatment" refers to the endowment of making an income several times higher than their former job as a judge or prosecutor, even after their retirement. This legal culture may violate the fairness and efficiency of the judiciary and is contrary to the legal ethics of judges and lawyers. Moreover, the culture may threaten the justice of the judiciary and result in a rigid formalism in the judicial procedure.

There is a slight difference in the concept of "civil litigation" which Korean courts deal with in civil trials, including "small claims" that are conducted on the legal merits of the dispute. However, Japan's civil litigation excludes the cases of "dunning procedures" which is only preliminary to a lawsuit proper, as well as the cases of "civil motion" and "civil execution", which are both only auxiliary to a lawsuit (Choi and Rokumoto 2007). Korea's civil litigation does not cover the family litigations or administrative litigations, but family mediation procedure is compulsory for family disputes under the Family Litigation Act. In fact, in Korea and Japan it is mandatory for family matter litigants to resort to family mediation procedure first, and only when attempts at mediation procedure have failed are litigants then allowed to file a lawsuit to the ordinary court. In particular, although the constitutional review is contrasted with the activism of the Constitutional Court and conservatism of the Supreme Court, both judiciaries of Korea and Japan are equally remarkable in terms of their statistical similarity of mediation cases.

[324] This expulsion of civil litigation cases strikes a sharp contrast to the mediation system in Korea, which failed before the introduction of early mediation in 2009.

But Japan's Supreme Court has hardly had this kind of judicial responsiveness and autonomy from political influence and control. It seems that Japanese judicial conservatism stems from the pre-war reception of German statutory positivism. However, the German legacy establishes itself as an invisible constitution, rather than judicial philosophy. In sum, the Japanese Supreme Court can be active or conservative, depending on how it assesses the risk of judicialization (Matsudaira 2011). However, Japan's judiciary and its judges are more responsive and autonomous for mediation cases in civil litigations than Korea's judiciary, because the Japanese judiciary has a relatively long comparative legal history which commenced from the civil law of 1868 and common law of 1947. Furthermore, most judges have been mentored and monitored by seniors and peers.

In addition, a major disincentive to litigation has always been the longstanding delay of most constitutional adjudication and civil litigation in both Korea and Japan. Japan's reforms implemented in 1998 have helped keep this issue on the agenda, and an aim of the reforms seems to be to make the courtroom less daunting by involving more laypersons. This parallels the reintroduction of a jury or lay assessor (saiban-in) scheme for serious criminal cases, which was enacted in 2004 and took effect from 2006 in Japan (Nottage 2005; Ambler 2007; Corey and Hans 2010).

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