Bringing the Courts to the Constitution

The Extension of Constitutional Complaint to Court Judgments in South Korea

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On 27 February 2026, the National Assembly of the Republic of Korea passed an amendment bill to the Constitutional Court Act introducing constitutional complaints against court judgments, 38 years after the Constitutional Court's establishment. Through this amendment, the phrase "excluding court judgments" was deleted from Article 68(1) of the Act.[1] The amendment takes effect on 12 March; consequently, rulings by South Korean courts, including the Supreme Court, will be subject to review by the Constitutional Court to determine whether they infringe constitutional rights. Despite the Supreme Court's strong objections, most people welcomed the reform as a long-overdue end to the exclusion of the judiciary from constitutional review.

This amendment marks a watershed moment for constitutional justice in Korea. By bringing judicial decisions within the scope of constitutional complaint, the amendment closes a long-standing gap in the protection of constitutional rights and resolves an institutional anomaly that had effectively placed the judiciary beyond constitutional review.

Background and Controversies of the Limited Constitutional Complaint

The current Constitution of the Republic of Korea, amended during the democratisation process of 1987, introduced the Constitutional Court and established the constitutional complaint system as one type of constitutional adjudication. The specific details were reserved for legislation (Article 111, Paragraph 1, Item 5: '… constitutional complaint as prescribed by Act'). In the process of enacting the Constitutional Court Act in 1988, Article 68(1) set forth the requirements and procedures for constitutional complaints against violations of constitutional rights by public authorities. However, some legal experts strongly insisted that court judgments should be excluded from the scope of constitutional complaints. Lee Kang-kook, who participated in the working committee at the time and later served as a Supreme Court Justice and, subsequently, the President of the Constitutional Court, stated in an interview that he then represented the Supreme Court's interests. His primary argument was that a failure to exempt judicial rulings would create a de facto "fourth instance" of trial, undermining the supremacy of the Supreme Court. As a result, the constitutional complaint system embodied in Article 68(1) excludes court judgments from the scope of public authority. The provision also mandates the principle of subsidiarity; one must exhaust all other legal remedies before seeking recourse from the Constitutional Court.

This has led to a significant gap in the protection of citizens' rights. In particular, remedies for infringements of constitutional rights through administrative action have been undermined. Under the principle of subsidiarity, litigation must be pursued first; however, as a constitutional complaint cannot be filed against the outcomes of such litigation, the path to remedy is blocked. Consequently, infringements of constitutional rights caused by administrative or judicial powers have effectively been excluded from the scope of constitutional review.

In the mid-1990s, such institutional pitfalls eventually evolved into an inter-institutional conflict. In 1996, the Supreme Court applied a legal provision

[1] The previous text states that "[a]ny person whose constitutional rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the public authorities, excluding courts judgments, may request adjudication on a constitutional complaint with the Constitutional Court."

despite it having been interpreted as "conditionally unconstitutional"[2] by the Constitutional Court. The Supreme Court asserted that the Constitutional Court's legal interpretation constituted nothing more than its own view and could not interfere with the Supreme Court's exclusive authority to interpret and apply the law.[3] This triggered tensions between the institutions. Soon, the constitutionality of Article 68(1) of the Constitutional Court Act was challenged. Petitioners argued that the provision unjustly discriminated against those seeking redress for rights infringed by the judiciary, compared with those affected by other public authorities. In 1997, the Constitutional Court held that while Article 68(1) itself was constitutional, it would be unconstitutional if interpreted to exempt court judgments that infringed constitutional rights by applying statutes previously ruled unconstitutional by the Constitutional Court.[4] This opened the exceptional possibility of challenging judicial rulings. However, the Supreme Court continued to explicitly deny the binding force of the Constitutional Court's interpretation of the law, significantly fueling uncertainty and confusion for the parties involved. Consequently, this led to several challenges against Article 68(1) of the Act.

In 2012, the Constitutional Court, however, opted not to invalidate the relevant article; instead, it unanimously reaffirmed its precedent decision.[5] The Constitutional Court appeared overly cautious about what would effectively result in the self-expansion of its own powers.

This culminating tension demonstrated that the failure to bind judicial power by constitutional rights created a serious loophole in the protection of citizens' constitutional rights, underscoring the necessity of appropriate checks on judicial power. Ultimately, in 2022, the Constitutional Court secured the enforceability of its own rulings by overturning Supreme Court decisions that ignored the intent of prior Constitutional Court rulings.[6] Put precisely, inter-institutional conflicts, gaps in the protection of rights, and unchecked judicial power have collectively underscored the need for the legislative introduction of constitutional complaints against judicial rulings.

Reform for Constitutional Review of Court Judgments

Against this background, the legislature has now undertaken a reform of the constitutional complaint system. A brief overview of the revised Constitutional Court Act is as follows:

Article 68(1) of the Constitutional Court Act stipulates that "[a]ny person whose constitutional rights guaranteed by the Constitution are infringed due to exercise or non-exercise of the public authorities, excluding court judgments, may request adjudication on a constitutional complaint with the Constitutional Court." By deleting the phrase "excluding court judgments" from this provision, judicial power has been brought back under constitutional scrutiny.

Along with this, Article 68(3) was added, providing that "constitutional complaints shall be filed against finalised judicial decisions." This allows for a constitutional complaint if a finalised court judgment infringes upon constitutional rights by: (1) rendering a decision in contradiction to a prior decision of the Constitutional Court; (2) failing to observe the due process of law as prescribed by the Constitution and statutes; or (3) violating the Constitution and statutes. Among these, subparagraph (1) can be interpreted as a requirement for the Supreme Court to be bound by the Constitutional Court's decision of 'conditional unconstitutionality', which the Supreme Court had previously ignored. Subparagraph (2) signifies control over the exercise of judicial power by ensuring due process within trial procedures, and subparagraph (3) refers to oversight of unconstitutional or unlawful interpreta-

[2] The Korean Constitutional Court sometimes rules a law as 'conditionally unconstitutional', that is to say, 'unconstitutional in a certain context', instead of simply 'unconstitutional', when the Court finds a particular way of interpretation seems unconstitutional while having other interpretations remain constitutional.

[3] Supreme Court, 95Nu11405, 9 April 1996.

[4] Constitutional Court, 96Hun-Ma172 etc., 24 December 1997.

[5] Constitutional Court, 2010Hun-Ma27 etc., 29 November 2012.

[6] Constitutional Court, 2014Hun-Ma760, 30 June 2022; Constitutional Court, 2013Hun-Ma496, 21 July 2022.

tions and applications of the law during a trial. The scope and level of court judgments subject to review are not limited, including all levels of court, from the first-instance court to the Supreme Court.

Regarding the claim period, while a regular constitutional complaint must be filed within 90 days from the date on which the reason for the infringement of constitutional rights became known, or within one year from the date on which the reason occurred, a complaint seeking review of court judgments must be filed within 30 days from the date the court judgment becomes final.

Regarding the legal effect, Article 75(4) was added to stipulate that when the Court upholds a constitutional complaint by recognising an infringement of constitutional rights caused by the court judgment, the Constitutional Court shall quash the court's ruling in question, and the court is then required to retry the case in accordance with the rationale of the Constitutional Court's decision.

However, the introduction of the review of court judgments cannot be implemented immediately through legislative amendment alone; it requires institutional adjustments within the Constitutional Court for receiving and processing cases, along with the establishment of preliminary review procedures and criteria. Another prevalent concern put forward by those opposing or expressing scepticism towards the introduction of such review centres on the practical issues, including a potential surge in the number of cases, and prolonged case processing times. In particular, they pointed out that the majority of constitutional complaint cases handled annually in Germany are reviews of court judgments, and that Taiwan, which introduced such review in 2022, experienced a dramatic increase in the number of cases.

In response, however, the Chief of the Constitutional Court Secretariat stated that by strengthening preliminary procedures and refining the legal requirements, the annual caseload could ultimately be manageable within the current staffing levels, with a range of 100 to 200 cases per year. Citing the case of Taiwan, he also noted that as precedents accumulated and the system gradually stabilised, the number of claims is expected to gradually decrease. To that end, on 3 March, the Constitutional Court convened a meeting of its Justices and began preparing its preliminary review procedures, which included establishing a specialised preliminary review panel composed of eight experienced constitutional research officers.

Implications and Impacts of Reform

The core opposing arguments raised against the reform were that it would contravene the Constitution's intent in establishing the Supreme Court as the highest court, create a four-tier judicial system, and lead citizens dissatisfied with court rulings to cling to futile hopes, trapping them in so-called "litigation hell" that harms citizens and increases social costs. The Supreme Court explicitly raised concerns that the Korean Constitutional Court would become a '*Superrevision*'.

Yet, the Constitutional Court maintained that it "does not intend to re-examine the interpretation and application of the law or fact-findings made by the court, but rather to re-examine the constitutional interpretation concerning the meaning and effect of constitutional rights". It further held that "even if court judgments are reviewed by the Constitutional Court, the Supreme Court does not become a subordinate body of the Constitutional Court".

Ultimately, the most critical point is that this reform rectifies a procedural flaw that had placed judicial power—which must inherently be bound by constitutional rights—beyond the reach of constitutional oversight. This flaw resulted from intense pushback from the established judiciary during the establishment of the Constitutional Court, and was hard to refute due to a lack of understanding and confidence in the new system of constitutional justice. By correcting this, the constitutional adjudication system can more faithfully fulfill the state's duty to confirm and guarantee the inviolable constitutional human rights of the citizens, as enshrined in the second sentence of Article 10 of the Korean Constitution. While the current legislative process and political context may appear complicated, it is fair to assess that this was a long-discussed reform that marks a turning point in the

Korean constitutional court system. Fueled by decades of public trust in the Constitutional Court, in stark contrast to the recent intense distrust of the Supreme Court due to its politicisation, the reform, addressing a long-standing dilemma, has finally paved the way for a new era of constitutional justice in Korea: the *Bürgergericht*.[7]

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[7] We acknowledge that the establishment of the constitutional complaint system by individual citizens has enabled the German Federal Constitutional Court to become a true citizens' court. https://jura-online.de/blog/2021/09/09/das-bverfg-feiert-70-geburtstag-ein-ruckblick/