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The judicial politics of enmity : a case study of the Constitutional Court of Korea's jurisprudence since 1988

Justine Guichard

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Institut d'Etudes Politiques de Paris
ECOLE DOCTORALE DE SCIENCES PO
Programme doctoral Asie
CERI

Double doctorat en Science politique entre Sciences Po et Columbia University

The Judicial Politics of Enmity.
A Case Study of the Constitutional Court of Korea's Jurisprudence
Since 1988.

Justine GUICHARD

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Soutenue le 6 juin 2014

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My doctoral journey, and the project which has emerged along its way, would have undoubtedly been very different had I not been given the opportunity to pursue them at two institutions: Sciences Po and Columbia University.

It is during my time at Columbia that I fully immersed myself in the myriad interstitial spaces where law and social sciences meet, thanks to the Law and Humanities Workshop animated by Julie Peters in the Department of English and Comparative Literature in the Fall 2011, and the seminar on Law, History, and Anthropology taught by Brinkley Messick in the Department of Anthropology during the Spring 2012. My own interest in socio-legal studies plunged its roots deeper, in the early days of my undergraduate studies at Sciences Po, but these two courses introduced me to new possibilities in reading, analyzing, and subverting legal materials. This most fortunate and fruitful detour through other disciplinary shores has eventually led me to encounter unknown horizons within my own field: the realm of comparative constitutional politics.

Along this sinuous and at times disorienting journey, I had the chance to never lose the support and understanding of two cardinal mentors: Françoise Mengin at Sciences Po and Andrew J. Nathan at Columbia University. I would like to thank them for their patience as the present project was imperceptibly maturing, and for their invaluable help in attending to its late, but fast-paced, blooming. I would also like to thank Pasquale Pasquino whose nurturing comments and encouragements have accompanied my research on constitutionalism and enmity from New York to Paris.

A third character should be added to this tale of two cities for the story to be complete: Seoul, which has been host of most of my summers since the days when I first discovered South Korea as an exchange student in 2006-2007. It is during one of these summers that I benefited from the extraordinary instruction of Andre Schmid and Michael Robinson on Korean history, and of Cho Kuk and Tom Ginsburg on Korean law and society at Seoul National University.

A few years later, and as fall was looming around, I had the opportunity to pursue research in this last direction at the Research Institute of the Constitutional Court of Korea. Although my own approach to constitutional politics primarily relies on an interpretive reading of jurisprudence, my experience at the Research Institute and at the Constitutional Court was made uniquely memorable by the generosity of all the members from both organizations whom I met as an intern. They are the ones whom, finally, I would like to warmly thank.

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LIST OF KOREAN ACRONYMS

ACA	Anti-Communist Act (<i>pan 'gongpöp</i>)
ACES	Advisory Council of Elder Statesmen (<i>kukkawönno chamunhoeüi</i>)
ADA	Assembly and Demonstration Act (<i>chiphoe mit siwi-e kwanhan pömnnyul</i>)
ANSP	Agency for National Security Planning (<i>kukka anjön kihoekbu</i>)
CAA	Criminal Administration Act (<i>haenghyöngpöp</i>)
CCK	Constitutional Court of Korea (<i>hönpöp chaep 'anso</i>)
CPC	Criminal Procedure Code (<i>hyöngsa sosongpöp</i>)
CPKI	Committee for the Preparation of Korean Independence (<i>chosön kö'n 'guk chunbi wiwönhoe</i>)
CRC	Civilian Review Committee (<i>min 'gan simüi wiwönhoe</i>)
DJP	Democratic Justice Party (<i>minju chöngüidang</i>)
DKP	Democratic Korea Party (<i>minju han 'gukdang</i>)
DLP	Democratic Liberal Party (<i>minju chayudang</i>)
DPRK	Democratic People's Republic of Korea (<i>chosön minjujuüi inmin konghwaguk</i>)
DSC	Defense Security Command (<i>kukkun kimu saryöngbu</i>)
EMPT	Eight-Member Political Talks (<i>8in chöngch 'i hoedam</i>)
GAKRJ	General Association of Korean Residents in Japan (<i>chae ilbon chosönin ch 'ongnyönhaphoe</i>)
GNP	Grand National Party (<i>hannaradang</i>)
HRCPC	Human Rights Committee of the Police (<i>kyöngch 'alch 'öng inkwön wiwönhoe</i>)
IKECA	Inter-Korean Exchange and Cooperation Act (<i>nambuk kyoryu hyömnyök-e kwanhan pömnnyul</i>)
JRTI	Judicial Research and Training Institute (<i>sapöp yönsuwön</i>)
KCIA	Korean Central Intelligence Agency (<i>chungang chöngbopu</i>)
KDF	Korea Democracy Foundation (<i>minjuhwa undong kinyöm saöp'hoe</i>)
KNP	Korea National Party (<i>han 'guk kukmindang</i>)
KRUJ	Korean Residents Union in Japan (<i>chae ilbon taehan min 'guk mindan</i>)
LKJ	League of Koreans in Japan (<i>chae ilbon chosönin yömmaeng</i>)
LSD	Lawyers for a Democratic Society (<i>minju sahoe rül wihan pyönhosa moim</i>)
MDP	Millenium Democratic Party (<i>sae ch 'önnnyön minjudang</i>)
MMA	Military Manpower Administration (<i>pyöngmuch 'öng</i>)
MOD	Ministry of National Defense (<i>kukpangbu</i>)
MOI	Ministry of Interior (<i>naemubu</i>)
MOJ	Ministry of Justice (<i>pöpmubu</i>)

MOU	Ministry of Unification (<i>t'ongilbu</i>)
MSA	Military Service Act (<i>pyöngyökpöp</i>)
NA	National Assembly (<i>kukhoe</i>)
NA	Nationality Act (<i>kukchökpöp</i>)
NADUK	National Alliance for Democracy and Unification of Korea (<i>minjujuüi minjok t'ongil chön'guk yönhap</i>)
NALJC	National Assembly Legislation and Judiciary Committee (<i>kukhoe pöpche pöpsa wiwönhoe</i>)
NGL	National Guidance League (<i>kungmin podo yönmaeng</i>)
NHRCK	National Human Rights Commission of Korea (<i>kukka inkwön wiwönhoe</i>)
NIS	National Intelligence Service (<i>kukka chöngbowön</i>)
NKDP	New Korea Democratic Party (<i>sinhan minjudang</i>)
NPA	National Police Agency (<i>kyöngch'alch'öng</i>)
NSA	National Security Act (<i>kukka poanpöp</i>)
NSC	National Security Council (<i>kukka anjön pojang hoeüi</i>)
NSH	National Security Headquarters (<i>ch'ian ponbu</i>)
OHI	Office of Hearing and Inspection (<i>ch'öngmun kamsagwan</i>)
OKA	Overseas Koreans Act (<i>chaeoe tongp'öpöp</i>)
OKFA	Overseas Koreans Foundation Act (<i>chaeoe tongp'o chaedanböp</i>)
PDP	Peace Democratic Party (<i>p'yönghwa minjudang</i>)
PGROK	Provisional Government of the Republic of Korea (<i>taehanmin'guk imsijöngbu</i>)
PPA	Political Parties Act (<i>chöngdangpöp</i>)
PRC	People's Republic of China (<i>chunghwa inmin konghwaguk</i>)
PSIH	Public Security Investigation Headquarters (<i>kongan susa ponbu</i>)
RDP	Reunification Democratic Party (<i>t'ongil minjudang</i>)
RICCK	Research Institute of the Constitutional Court of Korea (<i>hönpöp chaep'an yön'guwön</i>)
ROK	Republic of Korea (<i>taehan min'guk</i>)
SCK	Supreme Court of Korea (<i>taeböbwön</i>)
SDPO	Seoul District Prosecutors' Office (<i>söul chibang kömch'alch'öng</i>)
SP	Socialist Party (<i>sahoedang</i>)
SPA	Social Protection Act (<i>sahoe pohöpöp</i>)
SPO	Supreme Prosecutors' Office (<i>taegömch'alch'öng</i>)
SSA	Security Surveillance Act (<i>poan kwanch'alpöp</i>)
SSA	Social Security Act (<i>sahoe anjönöpöp</i>)
TRCK	Truth and Reconciliation Commission of Korea (<i>chinsil hwahae rül wihan kwagösa chöngni wiwönhoe</i>)
UP	Uri Party (<i>yöllin uridang</i>)
UPP	Unified Progressive Party (<i>t'onghap chinbodang</i>)

NOTE ON THE ROMANIZATION AND USE OF KOREAN NAMES

Two methods exist for romanizing Korean language: the traditional McCune-Reischauer system and, since 2000, the official Revised Romanization system. While the use of the latter has recently spread in scholarly publications, the former is still academically predominant. This dissertation therefore relies on the McCune-Reischauer system to romanize all common nouns and expressions from Korean, as well as the names of institutions, organizations, and places (except Seoul and Pyongyang) mentioned in the text.

When it comes to the romanization of surnames, however, the following rules are applied:

-for well-known figures, the most common romanized version of the name is used;

(for example, Park Chung-hee instead of Pak Chŏng-hŭi)

-for scholars, the romanized version of the name adopted by the author and reproduced in his or her English publications is used;

(for example, Choi Jang-Jip instead of Ch'oe Chang-jip)

-for constitutional judges, the romanized version of the name reproduced in the court's publications is used;

(for example, Byun Jeong-soo instead of Pyŏn Chŏng-su)

-for other surnames, the McCune-Reischauer's romanized version is always indicated in parentheses, if necessary, upon the name's first occurrence.

The Korean usage wherein surnames precede first names is followed throughout the body of the text. This order is however inverted in the bibliographical references contained in the footnotes, where the first name of the author is followed by his or her surname and the title of the reference.

PREAMBLE

From South Korea's Prison Cells to the Constitutional Stage: the Birth of the Topic

The present research is born from my fascination for an unsettling aspect of South Korea's transition to democracy in the late 1980s: the resilience of political imprisonment after the change of regime, that is to say, the continuity apparently manifested in South Korea's economy of punishment before and after 1987, the year when the military regime of Chun Doo-hwan relinquished power and allowed for direct presidential elections to take place. This continuity is conspicuously embodied in the sustained use of the repressive instruments inherited from the authoritarian period, such as the emblematic 1948 National Security Act ("*kukka poanpŏp*") which has remained heavily enforced throughout the 1990s, or the ideological conversion policy ("*sasang chŏnhyang*") deployed against imprisoned "thought criminals" until the early 2000s.

The roots of both mechanisms not only originate in the post-1945 era but date back to the colonial rule which Korea as a whole experienced under the control of Japan between 1905 and 1945.¹ The Master thesis which I defended in June 2009 at Sciences Po was precisely dedicated to exploring the colonial matrix of Korea's modern economy of punishment by focusing on a site where such modernity had been both physically recorded and discursively erased: the prison of Seodaemun ("*Sŏdaemun hyŏngmuso*"), built in 1907 as part of Japan's "dispositif of power" in Korea, but transformed in the 1990s into a resistance memorial exhibiting the "unlawful" and "immoral" character of colonial occupation.²

Among the many silences embedded in the narrative of the reconstructed site and museum, was the unaddressed continuity of its use as a penitentiary from 1945 to 1987. Seodaemun prison's closing in 1987 - the year of South Korea's transition to democracy - does not mark, however, a fundamental rupture in the history of repressive practices and political imprisonment due to the post-transition resilience of instruments such as the ideological conversion policy and the National Security Act. While the security legislation's maintenance and persistent application to date have been justified by most successive elected governments in relation to the crisis situation which has characterized the Korean peninsula since its division in 1945, the resort to old security tools after 1987 has been consistently

¹ Korea became Japan's protectorate in 1905 and colony in 1910.

² Justine Guichard, *La prison de Seodaemun, lieu de mémoires. La renaissance d'une prison sud-coréenne en mémorial de la résistance anti-coloniale*, Unpublished Master thesis, Sciences Po, Paris, 2009.

denounced by its many critics (including the government of Roh Moo-hyun in the early 2000s) as a lingering vestige of the authoritarian years.

Yet, neither of these two explanations - the security threat posed by the North on the one hand, and the endurance of an anachronistic legacy from the past on the other hand - exhausts the reality of repressive patterns in the South. Instead, the construction of enmity and the mechanisms deployed in relation to it after 1987 should be analyzed from the viewpoint of their functionality and efficacy in the frame of South Korea's contemporary state-society dynamics. This domestic dimension of national security has been more extensively documented for the decades preceding the transition than for those following it. As demonstrated by Moon Seungsook and Choi Jang-Jip for instance, the primacy accorded to national security has indeed been indissociable from the modernization project pursued by the state since the 1960s and premised on the mass mobilization of all resources - labor and business forces alike.³ By contrast, the "productive effects" attached to the repressive uses of national security in post-transition South Korea still call for greater inquiry.⁴

While my study started in the vicinity of political prisoners and the practice of punishment, it has come to displace the locus of its attention toward a site centrally involved in the definition of who enemies are and what can be done to them in the democratic era. This site corresponds to the realm of constitutional adjudication. Indeed, the Constitutional Court of Korea ("*hōnpōp chaep'anso*"), an institution introduced by the constitutional revision of 1987, has been invested as the privileged stage upon which not only repressive practices but the very understanding of what counts as "national" and "anti-national" have been challenged since the change of regime. In return, the role played by the constitutional court is generally described as activist and progressive in this area. The critical analysis which this research undertakes, however, interrogates this largely unanimous and univocal representation of the court's role by exploring the ways in which its jurisprudence has contributed to reframe enmity over the past twenty-five years.

I came across a ruling of the Constitutional Court of Korea for the first time in the course of fieldwork conducted in the summer 2011 in Seoul, at the Korea Democracy Foundation ("*minjuhwa undong kinyōm saōphoe*"). The objective of that stay was to collect qualitative data about the ideological conversion policy and the individuals who were still

³ Seungsook Moon, *Militarized Modernity and Gendered Citizenship in South Korea*, Durham, London: Duke University Press, 2005; Jang-Jip Choi, *Democracy After Democratization. The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2012.

⁴ Michel Foucault, *Discipline and Punish. The Birth of the Prison*, Harmondsworth: Penguin Books, 1991. [Michel Foucault, *Surveiller et punir. Naissance de la prison*, Paris: Gallimard, 1975].

subjected to it in the 1990s. Research in the archives of the Korea Democracy Foundation drew me to encounter a judgment rendered by the court in 2002 confirming the constitutionality of the “pledge to abide by the law,” as the conversion policy was renamed following a 1998 reform. The reading of this decision prompted for my research a whole new field of investigation, revealing constitutional adjudication as a site where the construction of enmity had been disputed and possibly altered since the late 1980s.

As I further immersed myself into the jurisprudence of the court and the literature surrounding legal mobilization in South Korea, the resort to constitutional litigation as an arena where certain segments of society have contested their marginalization from the conservative confines of the post-transition order clearly imposed itself. Through the issue of drawing the boundaries of “enmity,” the constitutional court has thus addressed a fundamental political problem: the contentious determination of how political inclusion and exclusion are negotiated in South Korean democracy, of who has “a place in the symbolic community of speaking beings” by opposition to who is instead considered as making noise - or, in the South Korean context, as posing a threat.⁵ Questioning whether and how the court has lived up to, or disappointed, the demand for recasting enmity after 1987 delineates the horizon of the present research, which seeks to explore both the possibilities and limits associated with the constitutional stage after the regime change.

⁵ Jacques Rancière, *Disagreement. Politics and Philosophy*, Minneapolis: University of Minnesota Press, 1999, p.25. [Jacques Rancière, *La mésentente. Politique et philosophie*, Paris: Galilée, 1995].

CHAPTER ONE

Introduction

Interrogating the role of the Constitutional Court of Korea in reframing the boundaries of enmity after the 1987 transition

Among the countries which have experienced a political transition away from authoritarianism in the 1980s, South Korea is usually considered as a paragon of “democratic success.” As with most instances of regime change since the late 18th century, its 1987 transition was accompanied by a constitutional reform.¹ This episode has taken the form of a negotiated process between political elites which resulted in the revision, rather than replacement, of the constitution adopted in 1948, in the context of the two Korean states’ competing founding - with the Republic of Korea being established in the south of the peninsula on August 15, while the Democratic People’s Republic of Korea was proclaimed in the northern half on September 9. The South Korean transition of 1987 therefore fits within a larger universe of cases where political and constitutional change have been the product of pact-making between the ruling and opposition forces.² However, South Korea also belongs to a rarer subclass of cases where the constitution of the “*ancien régime*” was retained and amended, as in the Republic of China on Taiwan, Chile, or Hungary - the three prominent states in East Asia, Latin America, and Eastern Europe respectively which did not enact a new basic norm during the wave of democratization and constitution-making of the 1980s.³

¹ As stressed by Jon Elster, “constitution-making tends to occur in waves.” The first wave that he identifies took place between 1780 and 1791 in “various American states, the United States, Poland, and France.” The next waves respectively followed the 1848 revolutions in Europe, the end of the First and Second World Wars, the breakup of the French and British colonial empires, the fall of dictatorships in Southern Europe during the mid-1970s and across Eastern Europe, South America, and Asia in the 1980s. Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal*, Vol.45, No.2, 1995, pp.368-369.

² According to Juan Linz and Alfred Stepan, “one of the most common paths away from a nondemocratic to a democratic regime is via a ‘pacted transition.’ ” Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation. Southern Europe, South America, and Post-Communist Europe*, Baltimore: Johns Hopkins University Press, 1996, p.356.

³ The scope of the amendment process however presents major differences among these cases. “The Hungarian Constitution [of 1949] was continuously amended throughout 1989 and 1990, until approximately 95 percent of the clauses had been rewritten.” Jon Elster, “Constitutionalism in Eastern Europe. An Introduction,” *The University of Chicago Law Review*, Vol.58, No.2, 1991, p.462. By contrast, “in Chile we observed a rather moderate and gradual process of amendment” of the so-called Pinochet’s constitution of 1980, “designed to maintain the privileges of specific groups (right-wing parties and the military).” Claudio Fuentes, “A Matter of the Few. Dynamics of Constitutional Change in Chile, 1990–2010,” *Texas Law Review*, Vol.89, No.7, 2011, p. 1749. As for Taiwan, the Constitution of the Republic of China has been in force since 1947. Its 1991 amendment however introduced major changes as institutions based on a multiparty system with regular, free elections now represent the island’s population, and it alone. Françoise Mengin, *Fragments d’une guerre inachevée. Les entrepreneurs taiwanais et la partition de la Chine*, Paris: Karthala, 2013.

By contrast to the constitution of North Korea, which was replaced in 1972,⁴ that of the South has endured since 1948 and undergone nine amendments. While the last constitutional revision of 1987 was mainly aimed at transforming the presidential election from an indirect vote by an electoral college into a direct suffrage of the population, it also introduced a new institution to check the conformity of legislative statutes with constitutional norms and to strike down the former in case of conflict with the latter: the Constitutional Court of Korea. Since 1945, the establishment of judicial review has become a standard feature of constitutional transitions to democracy, in Europe and elsewhere.⁵ Considerable attention has consequently been dedicated to the variation which the institutions in charge of constitutional adjudication exhibit in terms of independence and strength, two dimensions along which the Constitutional Court of Korea is considered to score high.

Although much uncertainty surrounded its birth and its capacity to act as a guardian of the constitution and of the fundamental rights that the text consecrates,⁶ the South Korean constitutional court is today recognized as “the most important and influential” institution of its kind among its counterparts in the region.⁷ Yet, concentrating on features such as the independence and authority enjoyed by the Constitutional Court of Korea only sheds partial light on the role it has assumed in the post-transition period. Indeed, the assumption that strong courts’ commitment to defend the constitutional order necessarily translates into liberal outcomes, such as fortifying the rule of law, has been interrogated in a variety of contexts, and deserves to be in the South Korean case.

As underlined by Choi Jang-Jip, “in Western societies, democracy and liberalism have been historically closely interlinked and maintained a mutually complementary relationship,

⁴ The so-called “Socialist Constitution” which was enacted in 1972 registered the fact that Kim Il-sung had emerged as the unparalleled leader in the struggle for absolute power over North Korea. The new text also incorporated both “*chuch’e*” ideology (or self-reliance) and the complete abolition of private ownership. See Dae-kyu Yoon, “The Constitution of North Korea. Its Changes and Implications,” *Fordham International Law Journal*, Vol.27, No.4, 2003, pp.1289-1305.

⁵ John Ferejohn and Pasquale Pasquino, “Constitutional Adjudication. Lessons from Europe,” *Texas Law Review*, Vol.82, No.7, 2004, pp.1671-1704. As will be developed in chapter two, institutions in charge of judicial review can be generically referred to as “constitutional courts” but they may further be divided into two categories: high courts which are in charge of judicial review while also serving as courts of last appeal (like the United States Supreme Court), and constitutional courts proper (such as the Federal Constitutional Court of Germany, the Constitutional Council of the French Republic, or the Constitutional Court of Korea)

⁶ James West and Edward Baker, “The 1987 Constitutional Reforms in South Korea. Electoral Processes and Judicial Independence,” *Harvard Human Rights Yearbook*, Vol.1, 1988, pp.135-178.

⁷ Tom Ginsburg, “The Constitutional Court of Korea and the Judicialization of Korean Politics,” in Andrew Harding and Penelope Nicholson (eds.), *New Courts in Asia*, New York: Routledge, 2010, p.145. In recent years, the court has advocated this role of constitutional leader for itself by encouraging initiatives such as the formation of the “Association of Asian Constitutional Courts and Equivalent Institutions,” launched in 2010 and whose inaugural congress was held in Seoul in May 2012.

although their relationship has not always been smooth. That is, the development of democracy would lead to the reinforcement of liberalism and vice versa. In Korean society, however, such a phenomenon has hardly been identified.”⁸ This disjunction between liberal norms and democratic development which Choi diagnoses for South Korea is nonetheless the result of a given political and socio-historical trajectory, rather than the expression of a cultural inability to accommodate liberal values. As a result, the critical analysis of constitutional politics which this dissertation undertakes is not premised upon a culturalist argument that would proclaim the incompatibility between Western liberalism and Eastern forms of constitutionalism.⁹

To explore the role of the Constitutional Court of Korea, this dissertation focuses on one of the central issues in which the new court has been asked to intervene, early on and consistently since the beginning of its operations in 1988: redrawing the boundaries of enmity after the change of regime, that is to say, defining which activities count as “national” or “anti-national” in democratic South Korea. Rather than raising the question of the inter-Korean division, contesting the contours of enmity before the constitutional court has primarily implied for litigants to challenge the dynamics of political inclusion and exclusion shaping the post-transition order, that is to say, to dispute the distribution of who is recognized a part in this order and who is denied one through the deployment of security instruments such as the National Security Act. In the process, the division and the state of North-South relations have also been addressed, but they do not constitute the overriding point of contention or underlying disagreement brought onto the stage of constitutional adjudication.

The present research is therefore dedicated to analyzing how the Constitutional Court of Korea has embraced the task of reframing enmity since the change of regime. While it is argued that the court has been “especially visible in dealing with the legacies of the authoritarian regime, particularly the National Security Act and the Anti-Communist Act”¹⁰ and that its decisions have “had the effect of domesticating the administration of the National Security Act, the single most egregious law associated with military rule by bringing the act

⁸ Jang-Jip Choi, “The Fragility of Liberalism and its Political Consequences in Democratized Korea,” *Asea Yöngu*, Vol.52, No.3, 2009, p.252.

⁹ Such argument has been classically formulated in the 1960s by South Korean legal scholar Hahm Pyong-choon. See Pyong-choon Hahm, *Korean Political Tradition and Law. Essays in Korean Law and Legal History*, Seoul: Hollym, 1967. For a critique of Hahm, see Kun Yang, “Law and Society Studies in Korea. Beyond the Hahm Theses,” *Law and Society Review*, Vol.23, No.5, 1989, pp.891-902.

¹⁰ Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*, Cambridge, New York: Cambridge University Press, 2003, p.236. The two laws were fused in 1980, when the provisions of the 1960 Anti-Communist Act were incorporated into the 1948 National Security Act.

into conformity with the dictates of ordinary procedural law,”¹¹ this dissertation seeks to interrogate the common and celebratory vision of the court’s role through a careful study of its jurisprudence over the past twenty five years. The project is thus interested in understanding a particular instance of “judicial politics” by exploring how the court has contributed to reframe, and potentially reinforce, the boundaries of political inclusion and exclusion challenged through constitutional channels in the post-transition period.

Literature review: the state of the art in constitutional politics and South Korean state-society relations after 1987

The literature relevant to this dissertation’s theme can be divided into two categories. The review first introduces the field of constitutional politics, which has developed in recent years an acute interest in excavating the non-inclusive dynamics which permeate constitutional lawmaking by legislators and judges. Focusing on South Korea contributes to this scholarship a valuable case study likely to both complement and subvert some of the main theoretical and comparative works to date. The review follows with the abundant literature which has emerged on South Korea’s contentious relations between the state and civil society since the transition. In particular, careful attention is devoted to synthesize the empirical findings upon which the present research builds concerning the domestic nature and evolving patterns of repression after 1987 on the one hand, and the growth of legal mobilization as a strategy for contestation on the other hand. Yet, the present research does not contend itself to appropriate these cumulative findings, but also enriches them through its reconceptualization of the constitutional court’s role in the post-transition era.

Constitutional politics and non-inclusive dynamics

i. Theoretical and comparative perspectives

This project’s general research interest and contribution lie in comparative constitutional politics, where heightened attention has been drawn in recent years to non-

¹¹ *Ibidem*, p.237.

Western contexts in general, and new democracies in particular.¹² From this perspective, the value of a study centered on contemporary South Korea is not only to empirically document a largely overlooked case, but to uncover dynamics and processes generalizable beyond it.¹³ The possible affinities between constitutionalism and certain forms of non-inclusiveness or illiberalism which the South Korean case exemplifies have indeed been increasingly taken into consideration by the literature on comparative constitutional politics, but an in-depth analysis of the Constitutional Court of Korea's role reveals the pitfalls of studies which do not sufficiently taken into account the part of contingency which characterizes the birth and development of institutions such as courts.

First of all, contemporary research on constitutional politics, from both positive political science and normative political theory, seriously takes into account the interests and potential non-inclusive dynamics which can pervade constitution-making and judicial review. As described by Jon Elster for the former, "in idealized stories about constitution-making, impartial and rational framers design institutions that will reduce the scope for dangerous passions and channel the self-interest of future generations to promote the public good. Constituent assemblies are made up by saints or demigods who legislate for beasts. But this is nonsense. In general, framers are no less subject to interest and passion than those for whom they are legislating."¹⁴

In so far as the present analysis conceives constitutionalism in general, and constitutional courts' practice in particular, in this non-idealized way, it situates itself in the continuity of the realist tradition. This approach can be traced to the early 20th century when the school of American legal realism rejected the classical idea - and ideal - of law as an autonomous field.¹⁵ Instead, the hallmark of the realist tradition which further developed after

¹² Besides Tom Ginsburg's above-mentioned study of Asian cases - including Mongolia, Taiwan, and South Korea, stand the prominent comparative contribution of Ran Hirschl on Israel, Canada, South Africa, and Mexico, and the work of scholars of Latin America. See Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, London: Harvard University Press, 2004; Gretchen Helmke and Julio Ríos-Figueroa (eds.), *Courts in Latin America*, New York: Cambridge University Press, 2011.

¹³ As demonstrated by the pioneering work of Marie Seong-hak Kim on colonial jurisprudence, the value of a case study centered on Korea can be inherently comparative. Marie Seong-hak Kim, *Law and Custom in Korea. Comparative Legal History*, Cambridge, New York: Cambridge University Press, 2012.

¹⁴ Jon Elster, "Executive-Legislative Relations in Three French Constitution-Making Episodes," in *Revolusjon og Resonnement*, Oslo: Norwegian University Press, 1995, p.69.

¹⁵ The legal realists (among whom were figures such as Oliver Wendell Holmes, Jerome Frank, Benjamin Cardozo, or Karl Llewellyn) were united by their dismissal of "mechanical jurisprudence and the faith that legal reasoning is determined by principles of logical deduction." Instead, they understood jurisprudence as being shaped by the ways in which judges interpret the law, which are in turn influenced by "the value judgments and political morality of their cultures, as well as more personal perspectives on law, morality, economics, and the like." Susan Dimock, *Classic Readings and Cases in Philosophy of Law*, New York: Pearson Longman, 2007, p. 36.

World War II and in the 1960s especially¹⁶ is to consider constitutional lawmaking, by legislators or judges, as a “form of politics by other means.”¹⁷ While Jon Elster’s analysis of the political interests and passions at work in constitutionalism has been mainly confined to constitutional design, with special attention being paid in his work to the Federal Convention in Philadelphia (1787) and the first French constituent assembly (1789-1791),¹⁸ authors such as Melissa Schwartzberg have fruitfully incorporated both the process of legislative and judicial constitutional lawmaking into their analyses.

In particular, Schwartzberg’s work highlights how entrenchment, or the insulation of certain parts of a constitution from the possibility of legal change through amendment, “serves as a means by which legislators can seek to protect not only those rules that they regard as most important or those that serve a ‘constitutive’ purpose - securing the conditions of democratic decision making, or preventing democracy from revising itself into tyranny - but as a means of preserving privileges and power asymmetries.”¹⁹ As stressed by her work, the resort to entrenchment is most likely to protect a certain form of regime type (republican or democratic), as illustrated by the constitutions of Brazil, France, Greece, Italy, Portugal, or Germany.

The risk ensuing from entrenchment is to render courts solely responsible for shaping the content of non-modifiable constitutional clauses and constructs such as “human dignity,” the “basic order of free democracy,” or the “republican form of government,” which they can do in ways that will only be mended by judges themselves through reversing precedents. Indeed, “we must bear in mind that entrenchment of a provision as vague as regime type may empower the constitutional court to determine the contours of what, precisely, a ‘republic’ entails, with the distributive consequences and the irreversibility such a decision might entail.”²⁰ The scope of this argument can nonetheless be extended as courts in charge of judicial review are ordinarily endowed with the task of defining and therefore shaping the

¹⁶ The works of Robert Dahl and Martin Shapiro are seminal in this respect. See Robert Dahl, “Decision-Making in a Democracy. The Supreme Court as a National Policy-Maker,” *Journal of Public Law*, Vol.6, No.1, 1957, pp. 279-295; Martin Shapiro, “Political Jurisprudence,” *Kentucky Law Journal*, Vol.52, No.1, 1964, pp.294-345.

¹⁷ Ran Hirschl, “The Realist Turn in Comparative Constitutional Politics,” *Political Research Quarterly*, Vol.62, No.4, 2009, p.825.

¹⁸ Jon Elster, “Constitution-Making and Violence,” *Journal of Legal Analysis*, Vol.4, No.1, 2012, pp.7-39.

¹⁹ Melissa Schwartzberg, *Democracy and Legal Change*, Cambridge, New York: Cambridge University Press, 2007, p.2.

²⁰ *Ibidem*, pp.190-191.

“basic structures” or “fundamental principles” which compose the constitutional order, even in the absence of entrenchment.

Specifying what these structures and principles are does not merely contribute to the historicization of law in the context of post-WWII legal systems’ re-foundation outside any meta-referentiality to philosophical norms or to nature.²¹ It can also contribute to the politicization of constitutional law - and correlatively, the judicialization of politics - in contexts where these “basic structures” and “fundamental principles” are a source of disagreement. Ran Hirschl has mobilized the concept of “mega-politics” to describe these “matters of outright and utmost political significance that often define and divide whole polities” and whose resolution is increasingly delegated to constitutional courts.²² These issues “range from electoral outcomes and corroboration of regime change to matters of war and peace, foundational collective identity questions, and nation-building processes pertaining to the very nature and definition of the body politic.”²³

Defining which activities count as “national” or “anti-national” in post-transition South Korea pertains to this type of matters. While all constitutional courts may be confronted with such a task, it has occupied a prominent place in the jurisprudence of the Constitutional Court of Korea. Contrary to what may seem, the construction of enmity in which constitutional courts can engage does not contradict the essence of constitutionalism. Indeed, safeguarding the constitution does not merely entail for courts to uphold the rights and freedoms that it recognizes. As pointed out by John Finn, the task of “constitutional maintenance” involves a commitment to preserve both the “physical” and “constitutional” integrity of the existing order.²⁴

This dual concern is for instance expressed in article 37, section 2 of the South Korean constitution, which provides that “the freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or rights shall be violated.” The South Korean constitution is additionally committed to defending itself against another figure of enmity than the enemy of the state, who threatens national

²¹ François Ewald, “Une expérience foucauldienne. Les principes généraux du droit,” *Critique*, Vol.42, No. 471-472, 1986, pp.788-793.

²² Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science*, Vol.11, No.1, 2008, p.94.

²³ *Ibidem*.

²⁴ John Finn, *Constitutions in Crisis. Political Violence and the Rule of Law*, New York: Oxford University Press, 1991, p.219.

security. The text also appears ready to confront the enemy of the “basic order of free democracy,” following the model set by the 1949 Basic Law of the Federal Republic of Germany. This “basic order” (“*freiheitlich demokratische Grundordnung*” in German, “*chayuminjujök kibonjilsö*” in Korean) is however a notion left undefined by the two constitutions and which courts have had to refine, thus paving the way for the potential distortions and asymmetries described by Melissa Schwartzberg and Ran Hirschl.

In a work which sees itself as exemplary of the contemporary realist approach to comparative politics, Ran Hirschl analyzes the process of constitutionalization undergone by countries such as Israel or Canada in the 1980s-1990s (that is to say, in the absence of “transition scenario”) as a form of self-interested preservation from threatened political, economic, and judicial elites with a shared interest in maintaining their hegemony.²⁵ For instance, Hirschl demonstrates how elites’ attitude toward judicial review started to evolve in Israel “as the secular Ashkenazi bourgeoisie and its political representatives increasingly lost their grip on Israeli politics.”²⁶ The 1992 Basic Law on Human Dignity and Liberty was precisely enacted in the context of the shifting demographics associated with the growth of the religious and non-Ashkenazi segments of the Jewish population, and the corresponding erosion of traditional elites’ power and influence over imposing their sense of the “national.”

As a result, the constitutionalization of basic rights is not conceived as the product of a progressive revolution, but as the outcome of a strategic interplay between elites with compatible interests in preserving their vision of the state. Because of the variety of actors taken into account, Hirschl distinguishes his “thick” strategic explanation from the “thin” view emphasizing partisan competition only. In the latter framework, the emergence of an effective mechanism for judicial review stands as the result of a bargain among political parties which are not sure of winning the first election after the transition. This explanation is in particular associated with Tom Ginsburg who has applied it to the South Korean case.²⁷

Ginsburg’s theory accounts for the introduction and variation in strength of constitutional courts in new Asian democracies in relation to the degree of electoral uncertainty which exists at the time of constitution-making. Judicial review is supported when two or three political parties of roughly equal weight seek to “insure” themselves against the risk of losing elections by introducing a mechanism which will constrain the policy-making

²⁵ Ran Hirschl, *Towards Juristocracy*.

²⁶ *Ibidem*, p.54.

²⁷ Tom Ginsburg, *Judicial Review in New Democracies*.

power of the future majority. If electoral uncertainty is severe (as it was in the South Korean case), a constitutional court will be empowered by the framers to minimize the costs of not being in power; while if this uncertainty is weak (as in Mongolia and to a lesser extent Taiwan), the dominant political party does not have an incentive to bind its future policy-making capacity.

ii. Contribution of the case study

Hirschl's "thick" strategic explanation can be used against the "thin" theory of Ginsburg to bring attention to the broader variety of interests than mere partisan ones involved in, and potentially entrenched through, the process of constitutionalizing fundamental rights and new institutional arrangements. In the South Korean case, the transition to democracy was controlled by political elites from both the ruling and opposition parties whose interests were irreducible to particular policy preferences. While both sides are only presented as antagonistic in Ginsburg's account, they were also united around a consensual and common objective: resisting the pressure for systemic and substantive reform exerted by the popular democratization movement, composed of the various groups (mainly student organizations, trade unions, and church activists) which were mobilized against the regime throughout the 1970s-1980s and prompted its collapse.

In this perspective, Choi Jang-Jip has remarkably demonstrated how the modalities of the 1987 change of regime, and of its constitution-making moment in particular, made it possible for conservative forces and interests to survive and even reinforce themselves.²⁸ According to Choi, "the period from June 29, 1987, until the constitutional amendments were adopted in the National Assembly in October of the same year can be called the period of pact-making between the ruling and the democratic forces in Korea. The bilateral negotiations took the form of a political meeting between representatives of the ruling and opposition parties, participating on behalf of major political forces of the time. But these roundtables meetings for negotiating democratic institutions were a political game among the elites of institutional politics, and did not involve movement forces."²⁹

The elites in question were the respective leaders of the governing Democratic Justice Party (DJP, or "*minju chōngŭidang*") and of the opposition Reunification Democratic Party

²⁸ Jang-Jip Choi, *Democracy After Democratization. The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2012.

²⁹ *Ibidem*, p.100.

(RDP or “*t’ongil minjudang*”), namely General Roh Tae-woo on the one hand, and Kim Young-sam and Kim Dae-jung on the other hand, who all successively became presidents after 1987. Choi further argues that the way in which democracy was institutionalized as a result of political elites’ compromise has not only contributed to the eviction of the popular democratization movement from the constitution-making moment, but it also explains the post-transition relevance of national security tools used to perpetuate the marginalization of a crucial part of South Korean society from politics: workers and trade unions. Indeed, the dual logic of limiting the political representation and participation of labor “has created a vicious cycle where it promotes conflicts, which in turn requires an authoritarian state mechanism.”³⁰

While South Korea’s transition and constitution-making process were clearly dominated by the kind of coalition stressed by Hirschl (with the interests of the political, bureaucratic, and economic elites being secured to the detriment of the popular democratization movement), the strength that the constitutional court has displayed since the late 1980s cannot be automatically attributed to a calculated effort on the part of these elites to preserve the “conservative bias” of the new democratic order.³¹ Indeed, the introduction of a specialized court patterned on the Continental model of constitutional adjudication and able to settle direct complaints from citizens was a non-predetermined outcome of the “Eight-Member Party Talks” through which the constitution was reformed in the summer of 1987.³² Moreover, “many feared that [the court] would turn out to be like the Constitutional Committees of previous constitutions, and end up being just another agency that existed only on paper. In fact, the governing elites at the time of its creation were not unlike the previous regimes in that they were not so enthusiastic about the idea of activating the system of constitutional adjudication. A number of legal scholars and jurists were therefore doubtful about the court’s future and its role in the constitutional order.”³³

The Constitutional Court of Korea’s empowerment therefore stands as the contingent product of a series of paradoxes which elite-based strategic theories fail to elucidate. While

³⁰ *Ibidem*, p.147.

³¹ *Ibidem*, p.5. Choi Jang-Jip’s insightful analysis is particularly useful to distinguish between two processes and temporalities which account for the tension between democracy and liberalism in contemporary South Korea: in the short term, the modalities of the 1987 change of regime are responsible for the “conservative bias” which South Korean democracy continues to display to date; but in the long term, a shared illiberalism has characterized both the right and the left since 1945, whose common ground has instead lied in their ideological identification with nationalism.

³² Jung-Kwan Cho, “The Politics of Constitution-Making During the 1987 Democratic Transition in South Korea,” *Korea Observer*, Vol.35, No.2, 2004, pp.171-206.

³³ The Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2008, p.99.

the court emerged in the context of the 1987 elite-controlled revision of the constitution, it was not necessarily crafted by its designers to become the strong institution that it now appears to be. To understand this transformation's advent, the literature on the contentious dynamics which have opposed the state and civil society after the transition can be relied upon. In particular, works on legal actors and mobilization reveal how constitutional litigation has been invested as a site where the very forces marginalized by the institutionalization of democracy have contested, with the help of public interest lawyers, the boundaries of enmity after the change of regime.

Post-transition contentious relations between the state and civil society in South Korea

i. The irreducibility of repression to the inter-Korean division

The South Korean case offers the particularity to be a new democracy operating under an old and lasting security threat: the 1945 division of the Korean peninsula, which remains in a “state of war” since no peace treaty was signed following the civil and international conflict which opposed the U.S.-backed South and the Communist North between 1950 and 1953. The inter-Korean division is not however the only marker of political inclusion and exclusion in the peninsula. Its own coming into being has given birth to a more insidious line of separation than the 38th parallel, a division not only between but inside both regimes as each became obsessed with eliminating its “enemies from within.” Scholars such as Choi Jang-Jip have consequently underlined how “the law that contains the ideological foundation and practical guidelines in South Korea is not the constitution,” but the National Security Act which was adopted the same year, in 1948.³⁴ To Choi, “this law is the higher normative law that supersedes all other laws in South Korea; this was true under authoritarian rule, and it is true today.”³⁵

Choi Jang-Jip's analysis nonetheless leaves relatively unaddressed the dissensus which has existed around the status of the security legislation in the post-transition period, and which has led its validity and relevance to be repeatedly challenged before the Constitutional Court of Korea. Officially, the purpose of the National Security Act is to suppress the activities of “anti-state organizations,” defined since 1948 as the groups which “claim the

³⁴ Jang-Jip Choi, *Democracy After Democratization*, p.48.

³⁵ *Ibidem*, p.49.

title of government” (i.e., North Korea) or which aim at disrupting the state. While the permanence of the security legislation has been justified by the real and enduring threat posed by the scission of the peninsula and the hostility of the North, it has not merely remained in the books in the post-transition period. On the contrary, the law has been actively resorted to by all successive elected governments, at times more intensively than during the authoritarian era, and regardless of the provocations emanating from North Korea.³⁶ The law has therefore resisted the test of the transition to democracy in 1987, the first political alternation in power in 1998, and even the attempt by one administration to repeal it in the mid-2000s.

While marginally dealt with in the literature on post-transition politics, this problematic dimension of the democratic era has not been entirely neglected as demonstrated by the pioneering study of William Shaw on human rights,³⁷ the work of legal scholars such as Cho Kuk,³⁸ and the more recent contributions of José Alemán, Nam Taehyun, or Shin Gi-Wook and his colleagues from Stanford University.³⁹ On the side of the sources available in Korean language, the National Human Rights Commission (“*kukka inkwŏn wiwŏnhoe*”) has best contributed to document, in a systematic way, repressive patterns since the late 1980s.⁴⁰ In particular, its 2004 *Report on the Situation of Human Rights Arising from the Application*

³⁶ U.S. Congressional Research Service, *North Korean Provocative Actions. 1950-2007*, Washington: U.S. Library of Congress, 2007. Several provocative actions have been undertaken by the North since 1987, such as the bombing of a civilian aircraft in November of that year and the deadly cross-border incidents recurrently taking place along the terrestrial Demilitarized Zone (DMZ) and the disputed maritime Northern Limit Line (NLL) delineated at the end of the Korean War. Yet, the correlation between the intensity of the North Korean menace and the enforcement patterns of the National Security Act appears at best imperfect.

³⁷ William Shaw (ed.), *Human Rights in Korea. Historical and Policy Perspectives*, Cambridge: Harvard University Press, 1991.

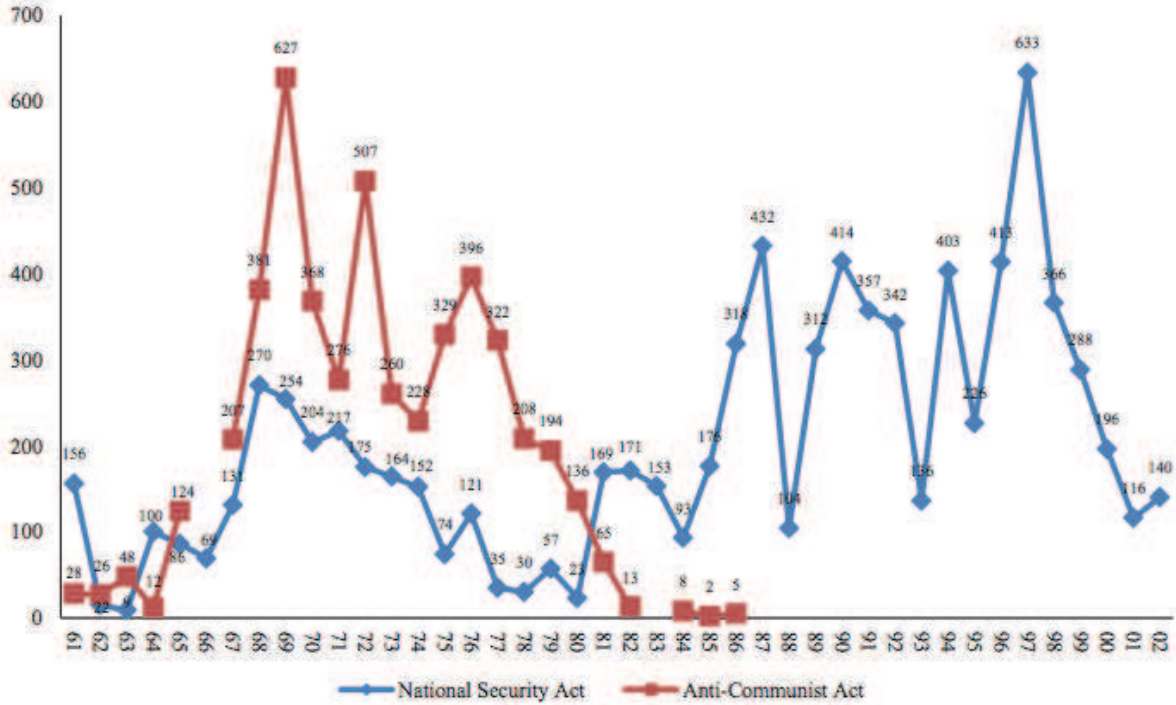
³⁸ Kuk Cho, “Tensions Between the National Security Law and Constitutionalism in South Korea,” *Boston University International Law Journal*, Vol.15, No.1, 1997, pp.125-174. In the beginning of his piece, Cho indicates that “this article stems from the fact that few comprehensive, academic articles appear in English with regard to the NSL [National Security Law], although some publications have provided a general discussion of South Korea’s human rights situation” (pp.129-130). Cho’s point is however an understatement as most of the materials published in English consist of reports from human rights organizations, particularly Amnesty International.

³⁹ José Alemán, “Protest and Democratic Consolidation. A Korean Perspective,” *International Journal of Korean Studies*, Vol.9, No.1, 2005, pp.71-90; Taehyun Nam, “The Broken Promises of Democracy. Protest-Repression Dynamics in Korea, 1990-1991,” *Mobilization: An International Journal*, Vol.11, No.4, 2006, pp. 427-442; Gi-Wook Shin, Paul Chang, Jung-eun Lee, and Sookhyung Kim, *South Korea’s Democracy Movement (1970-1993)*. *Stanford Korea Democracy Project Report*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2007; Jung-eun Lee, “Categorical Threat and Protest Policing. Patterns of Repression Before and After Democratic Transition in South Korea,” *Journal of Contemporary Asia*, Vol.43, No. 3, 2013, pp.475-496. See also Jong Bum Kwon, “Exorcizing the Ghosts of Kwangju. Policing Protest in the Post-Authoritarian Era,” in Gi-Wook Shin and Paul Chang (eds.), *South Korean Social Movements. From Democracy to Civil Society*, Abingdon, New York: Routledge, 2011.

⁴⁰ National Human Rights Commission of Korea, *Report on the Situation of Human Rights Arising from the Application of the National Security Act (Kukka poanpŏp chŏgyongsa esŏ nat’anan in’gwŏn silt’ae)*, Seoul: Minjuhwa silchŏn kajok undong hyobuihoe, 2004. Other notable sources include human rights lawyer Park Won-Soon’s three-volume study of the security legislation: *A Study of the National Security Act (Kukka poanpŏp yŏn’gu)*, Seoul: Yŏksa pip’yŏngsa, 1989-1992.

of the National Security Act established that, 1,529 individuals were prosecuted under the National Security Act between 1988 to 1992, which exceeds the 1,093 prosecutions registered from 1980 to 1986 during the Chun Doo-hwan regime.⁴¹ This number rose to 1,989 between 1993 and 1997 and reached 1,058 between 1998 and 2002.⁴²

Table 1. Number of individuals annually prosecuted under the National Security Act and the Anti-Communist Act between 1960 and 2002.



Source: National Human Rights Commission of Korea, *Report on the Situation of Human Rights Arising from the Application of the National Security Act*, 2004.

As a result, the sustained application of the National Security Act has not only characterized the presidency of Roh Tae-woo (February 1988 - February 1993), who personally embodied the continuity between the old regime and the new order, but also the civilian administration of Kim Young-sam (February 1993 - February 1998) and the “human rights era” of the Kim Dae-jung government (February 1998 - February 2003). Both Kim Young-sam and Kim Dae-jung were politicians who opposed the authoritarian regimes and together formed in 1987 the Reunification Democratic Party which participated in the negotiations to revise the constitution. Later that year, Kim Dae-jung left the RDP and both

⁴¹ National Human Rights Commission of Korea, *Report on the Situation of Human Rights*, p.36.

⁴² *Ibidem*, p.44 and p.66.

Kims separately ran for presidency in the first post-transition elections of December 1987, thereby enabling the victory of Roh Tae-woo⁴³ and causing civil society groups' distrust vis-à-vis the political sphere.⁴⁴ Their disenchantment heightened when Kim Young-sam's opposition party merged with Roh's ruling camp to give birth to the Democratic Liberal Party in 1990 (DLP or "*minju chayudang*"), an alliance which made it possible for Kim Young-sam to be voted president in December 1992.⁴⁵ The first alternation in power therefore occurred when Kim Dae-jung won the presidential election of December 1997.⁴⁶ Although Kim Dae-jung was arrested and sentenced to death under the National Security Act in the early 1980s, the security legislation continued to be frequently applied during his administration.⁴⁷

The enforcement patterns of the National Security Act after 1987 indicate that the law was more heavily resorted to during the ten years which have followed the transition than during the decade which preceded it. Rather than declining over time, the number of annual prosecutions under the security legislation climaxed in 1997. The repressive peak reached in the late 1990s overlaps with the economic and social upheaval that South Korea experienced in the wake of the 1997 Asian financial crisis. Indeed, "in the period of economic downturn which followed the East Asian financial crisis of 1997-1998, the [National Security Act] proved to be a useful tool enabling the government to harass students and workers who organized demonstrations and other forms of protest against unemployment."⁴⁸ These trends suggest that the primary relevance of the security legislation has been domestic rather than premised on the state of inter-Korean relations.

Indeed, the specific post-transition uses made of the National Security Act can be refined by examining which provisions of the law have been most heavily mobilized. Between 1993 and 2002, provisions related to forming anti-state groups (article 3), committing anti-state acts (article 4), infiltrating from North Korea (article 6), communicating with anti-state groups and their members (article 8) or aiding them (article 9), and not

⁴³ 36.6% of the vote went to Roh Tae-woo, 28% to Kim Young-sam, 27% to Kim Dae-jung, 8.1% to Kim Jong-pil, and 0.2% to Shin Jung-il.

⁴⁴ Sunhyuk Kim, "State and Civil Society in South Korea's Democratic Consolidation. Is the Battle Really Over?," *Asian Survey*, Vol.37, No.12, 1997, p.1139.

⁴⁵ 42% of the vote went to Kim Young-sam against 33.8% to Kim Dae-jung.

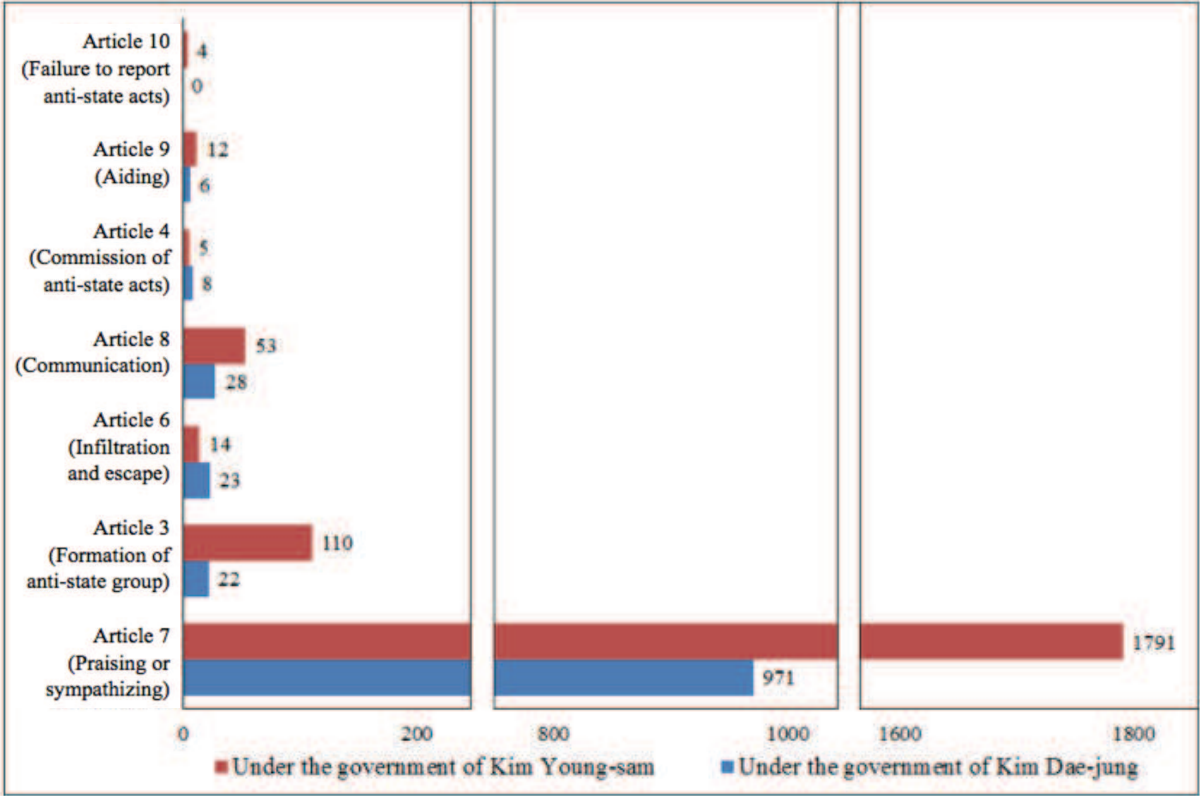
⁴⁶ Kim Dae-jung won 40.3% of the vote, against the conservative candidate Lee Hoi-chang who received 38.7% of it.

⁴⁷ During the first two years of Kim Dae-jung's presidency (1998-2000), Kim Jong-pil, the founder of the Korean Central Intelligence Agency in 1961, served as Prime Minister.

⁴⁸ Ian Neary, *Human Rights in Japan, South Korea and Taiwan*, London: Routledge, 2002, p.82.

reporting anti-state acts (article 10), have only been incidentally resorted to compared with the prohibition of “praising or sympathizing with an anti-state organization” under article 7.

Table 2. Total number of prosecutions per provision of the National Security Act under Kim Young-sam (February 1993 - February 1998) and Kim Dae-jung (February 1998 - February 2003).



Source: National Human Rights Commission of Korea, *Report on the Situation of Human Rights Arising from the Application of the National Security Law*, 2004.

These patterns of enforcement reveal that the greatest challenge associated with national security after the transition has not resulted from “anti-state acts” or “espionage,” but has instead derived from certain forms of expression as article 7 prohibits the act of “praising” (“*ch’anyang*”), “encouraging” (“*komu*”), “propagandizing” (“*sōnjōn*”), and “sympathizing with” (“*tongjo*”) an “anti-state organization,” its “members,” or “any individual receiving orders from them.” Looking more closely at the enforcement patterns of the National Security Act reveals that students and progressive intellectuals have been disproportionately prosecuted under the security legislation, mostly for the speech crimes sanctioned under article 7.

Table 3. Classification of the individuals prosecuted under the National Security Act per social status between 1993 and 2002.

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	Total
Student	31	193	102	318	500	310	227	104	91	114	1,998
Worker	5	38	20	38	44	18	1	2	10	0	176
Intellectual	63	128	110	92	89	71	46	16	15	9	640
Military	13	34	53	51	44	13	14	6	2	3	233
Total	112	393	285	499	677	412	288	128	118	126	3,047

Source: National Human Rights Commission of Korea, *Report on the Situation of Human Rights Arising from the Application of the National Security Act*, 2004.

The two main trends in the National Security Act enforcement patterns after 1987, mainly the disproportionate amount of prosecutions for speech crimes under article 7 and the targeting of students and intellectuals, call into question many scholars’ claim that the deployment of security instruments has predominantly been a function of sustained “radical” and at times violent mobilization, in particular from trade unions. Several studies have indeed underlined the continued mobilization of civil society and its confrontational engagement with the state following the change of regime.⁴⁹ The part of civil society which was the most active and contentious after 1987 has been widely identified with so-called “radical people’s movement groups,” such as student associations or labor unions, by opposition to the “moderate citizens’ movement groups” which multiplied after the change of regime but only became prominent in the mid to late-1990s.⁵⁰

The label “radical” is highly ambiguous in this context as referring to it amounts to appropriate the language of state policing, also conveyed by the conservative press which dominates South Korea’s media landscape. The differentiation within civil society groups is also captured by the distinction between “*minjung*” (or “mass people”) militancy and “*simin*” (or “citizen”) activism,⁵¹ which connotes that the former is revolutionary, utopian,

⁴⁹ Hagen Koo (ed.), *State and Civil Society in Contemporary Korea*, Ithaca: Cornell University Press, 1993; Sunhyuk Kim, *The Politics of Democratization in Korea. The Role of Civil Society*, Pittsburg: University of Pittsburg Press, 2000; Charles Armstrong (ed.), *Korean Society. Civil Society, Democracy, and the State*, London, New York: Routledge, 2007.

⁵⁰ Sunhyuk Kim, “State and Civil Society in South Korea’s Democratic Consolidation,” p.1137.

⁵¹ Namhee Lee, “From *Minjung* to *Simin*. The Discursive Shift in Korean Social Movements,” in Gi-Wook Shin and Paul Chang (eds.), *South Korean Social Movements*, pp.41-57.

and engaged in an antagonistic relationship with the state, while the latter is reformist and tolerated, or even accommodated, by the state. Repressive patterns after 1987 are thus commonly understood by the literature on state - society relations in connection to two mutually reinforcing processes: the frustrations born of the transition are thought to explain why civil society in general, and “radical” groups in particular, have not demobilized and therefore encouraged the state to respond through traditional channels given the strong permanence of authoritarian “enclaves” and “reflexes” expected in “non-crisis transitions” - that is to say, in cases where the change of regime is negotiated between the ruling elites and opposition forces, thus leaving the former leadership and state apparatus highly influential during and after the transition process.⁵²

As empirical patterns demonstrate however, the National Security Act has been primarily resorted to in order to sanction the discursive claims articulated by students and intellectuals. Although labor has remained active after the transition, especially during the “Great Struggle” of the summer 1987 and throughout the two following years (with 3,749 disputes erupting in 1987, 1,873 in 1988, and 1,616 in 1989),⁵³ workers’ militancy has been handled through extra-legal violence and specific tools of policing, such as anti-demonstration and anti-union laws.⁵⁴ Contrary to the labor movement who tended after 1987 to mobilize around interests and issues of its own (in particular over wage increase and collective bargaining), thus breaking its 1980s alliance with the other forces of the democratization movement, students and intellectuals have continued to advocate a maximalist definition of democracy in the wake of the transition.

In the context of South Korea, this maximalist conception has not only entailed demands related to substantive reforms and socio-economic justice, but to the reconciliation of the peninsula, thereby revolving around the “three *min*”: achieving democracy (“*minju chaengch’wi*”), liberating the people (“*minjung haebang*”), and realizing national reunification (“*minjok t’ongil*”).⁵⁵ The roots of this maximalist discourse plunged in the

⁵² Stephan Haggard and Robert Kaufman, “The Political Economy of Democratic Transitions,” *Comparative Politics*, Vol.29, No.3, 1997, pp.263-283.

⁵³ Hagen Koo, “The Dilemmas of Empowered Labor in Korea. Korean Workers in the Face of Global Capitalism,” *Asian Survey*, Vol.40, No.2, 2000, p.231.

⁵⁴ George Ogle, *South Korea. Dissent Within the Economic Miracle*, London, New Jersey: Zed Books, 1990. As noted by Ogle in his analysis of labor activism during the years 1987-1989, “intimidation, kidnappings and beatings are standard procedures used against union people.” (p.120).

⁵⁵ Namhee Lee, *The Making of Minjung. Democracy and the Politics of Representation in South Korea*, Ithaca: Cornell University Press, 2007, p.23. This program was in particular advocated by the student organization “*Sammint’u*” (“Committee of the Three *Min* Struggle”) in the mid-1980s.

1980s, when the student movement started to shape its mission and identity in relation to the “othering” of three forces: the authoritarian regime, the “*chaebŏl*” or business conglomerates, and the United States, all accountable in the movement’s terms for South Korea’s unrealized process of decolonization and the artificial division of the homeland against the aspirations of the “true” people or “*minjung*.”⁵⁶

Against the bulk of the literature on state - society relations, the work of Lee Jung-eun contributes to show how the groups articulating the anti-government discourse associated with the “*minjung*” after 1987 have been primarily repressed as a result of being perceived by authorities as posing an unconditional menace, rather than due to circumstantial factors such as the size and tactics of their protests. Indeed “people’s movements experienced differential repression due to their categorical threats, independently of the situational threats, targets and goals. [...] Whereas the distinction between people’s and citizens’ movements was not salient under authoritarianism because most protests were pro-democracy by nature, it became one of the most important factors that shaped protest policing during democratization, where movement groups sharply diverged between two camps. The categorical threat attributed to people’s movements affected the police’s decision-making process, which resulted in the higher probability of police containment and the higher intensity of repression during their protests than those of citizens’ movements.”⁵⁷

Given the frustrations and disillusionments emanating from the institutionalization of democracy (in particular the elite control of the transition process, the split of the political opposition in the presidential elections of December 1987 leading to the victory of Roh Tae-woo, and the 1990 merger of Kim Young-sam’s forces with the ruling party), the post-transition period did not extinguish but rather intensified the dispute about the meaning of democracy and the understanding of the “national” originating in the 1980s.⁵⁸ Yet, this dispute has not been permitted to fully unfold after the change of regime, as national security tools remained deployed against the articulation of any alternative way of imagining the nation. South Korea therefore presents us with a case where political elites from both the old regime and former opposition have supported the use of security instruments to suppress the

⁵⁶ According to Lee Namhee, “in the students’ moral-ethical discourse, the dichotomy of the world as *abang* (friends) and *t’abang* (enemies) became crucial. The *minjung* was projected as a true intersubjective agency, and the military dictatorship, conglomerates, and foreign powers, as not only anti-*minjung* but also as anti-national and anti-democratic.” Namhee Lee, “The South Korean Student Movement. *Undongkwŏn* as a Counterpublic Sphere,” in Charles Armstrong (ed.), *Korean Society*, p.135.

⁵⁷ Jung-eun Lee, “Categorical Threat and Protest Policing,” pp.486-487.

⁵⁸ Sunhyuk Kim, *The Politics of Democratization in Korea*; Charles Armstrong (ed.), *Korean Society*; Jang-Jip Choi, *Democracy after Democratization*.

maximalist discourse principally formulated by students and intellectuals. It is in this context that constitutional justice became invested as a site to contest such instruments by the forces whose exclusion from politics they enforced and maintained.

ii. Contesting enmity through constitutional channels

According to the hierarchy of norms, the National Security Act as well as the security instruments premised upon ordinary legislative provisions are subordinated to constitutional norms and thus susceptible of being challenged before the constitutional court. In addition, the institution is in charge of adjudicating direct constitutional complaints - a mechanism which originated in post-war Germany and enables any individual in South Korea who has suffered an infringement of his or her basic rights as a result of “an exercise or non-exercise of governmental power [...], except the judgments of the ordinary courts” to petition the court.⁵⁹ Since the change of regime, the constitutionality of security tools inherited from the authoritarian period and their uses have been repeatedly raised before the constitutional court. In recent years, an increasing number of significant studies have explored how legal mobilization in general, and constitutional litigation in particular, have been resorted to as channels for contestation since 1987.⁶⁰

While the small community of South Korean lawyers has been traditionally marginalized from the field of state power and politics,⁶¹ one pivotal actor can be identified as a catalyst in the transformation of the country’s socio-legal landscape since the change of regime: “*Minbyun*,” or “Lawyers for a Democratic Society” (“*minju sahoe rül wihan pyõnhosa moim*”) an association founded in May 1988 by fifty-one attorneys. The literature on legal mobilization in South Korea largely converges over the claim that “the birth of the

⁵⁹ Article 68, section 1 of the Constitutional Court Act.

⁶⁰ See for instance Jae Won Kim, “The Ideal and the Reality of the Korean Legal Profession,” *Asian-Pacific Law and Policy Journal*, Vol.2, No.1, 2001, pp.45-68; Tom Ginsburg, “Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan,” in Terence Halliday, Lucien Karpik, and Malcolm Feeley (eds.), *Fighting for Political Freedom. Comparative Studies of the Legal Complex and Political Liberalism*, Oxford, Portland: Hart Publishing, 2007; Patricia Goedde, “From Dissidents to Institution-Builders. The Transformation of Public Interest Lawyers in South Korea,” *East Asia Law Review*, Vol.4, No.1, 2009, pp. 63-89; Yves Dezalay and Bryant Garth, *Asian Legal Revivals. Lawyers in the Shadow of Empire*, Chicago: University of Chicago Press, 2010; Seong-hyun Kim, “The Democratization and Internationalization of the Korean Legal Field,” in Yves Dezalay and Bryant Garth (eds.), *Lawyers and the Rule of Law in an Era of Globalization*, Abingdon, New York: Routledge, 2011.

⁶¹ Yves Dezalay and Bryant Garth, “International Strategies and Local Transformations. Preliminary Observations of the Position of Law in the Field of State Power in Asia: South Korea,” in William Alford (ed.), *Raising the Bar. The Emerging Legal Profession in Asia*, Cambridge: Harvard University Press, 2007.

group marked the beginning of a new era in the systematic activities of lawyers in Korea.”⁶² As pointed out by Kim Jae Won for instance, “*Minbyun* was the first official organization dedicated to ‘cause lawyering’ in Korea. In addition to representing workers in labor disputes, *Minbyun* lawyers have vigorously pursued lawyers’ ideals, including campaigning for the release of prisoners of conscience and for the abolition of undemocratic laws such as the National Security Law.”⁶³

Out of the 2,274 individuals prosecuted under the security legislation between June 1988 and May 1995, 1,623 were represented by *Minbyun* lawyers.⁶⁴ During this period, nearly half of the cases handled by the association concerned offenses against the National Security Act (43% of its caseload). In the meantime, “*Minbyun*’s defense of political dissidents, whether students, workers or intellectuals (nearly half of whom were arrested on grounds of violating the National Security Law), more or less situated it as being part of the ideological left,” and throughout the 1990s, “the government perceived ‘human rights’ as voiced by *Minbyun* as being too related to socialism.”⁶⁵ It is in this context that investing constitutional adjudication as a site where to contest the contours of political inclusion and exclusion after the transition became one of the strategies adopted by the association.⁶⁶

This phenomenon has led Tom Ginsburg to note in his comparison of South Korea and Taiwan that “the private legal profession emerged along with democracy in both countries. [...] In this sense the story is similar to Epp’s (1998) account of ‘Rights Revolutions.’ A support structure of activist lawyers was needed to effectuate and channel broader demands for rights. At the same time, the ‘supply’ side of the equation cannot be ignored. Had it not been for the crucial factor of constitutional courts making themselves available to claims challenging the government, the activists’ strategies would have been ineffectual. The constitutional courts’ willingness to constrain governmental decisions at the highest level had great symbolic importance for scaling back the previously dominant administrative apparatus.

⁶² Jae Won Kim, “The Ideal and the Reality of the Korean Legal Profession,” p.62.

⁶³ *Ibidem*.

⁶⁴ Patricia Goedde, “Lawyers for a Democratic Society (*Minbyun*). The Evolution of its Legal Mobilization Process since 1988,” in Gi-Wook Shin and Paul Chang (eds.), *South Korean Social Movements*, p.231.

⁶⁵ *Ibidem*, pp.228-229.

⁶⁶ Litigation in general has been the central, yet not the exclusive, strategy pursued by *Minbyun*, which also drafted reports and held or attended domestic and international conferences to obtain the abolition or revision of what they considered as “bad laws” (“*akpŏp*”), “primarily the National Security Law, labor-related laws, social welfare laws, laws concerning the Korean Central Intelligence Agency, telecommunications, education, and media.” *Ibidem*, pp.232-233.

This emboldened activist elements in the legal profession to pursue their agendas more vigorously.”⁶⁷

The literature addressing post-transition contentious dynamics between the state and civil society is fruitful to construe the empowerment of the Constitutional Court of Korea as a contingent product of the asymmetrical struggle between the political elites who institutionalized democracy and the segments of society which this process marginalized. Studies which apprehend legal mobilization in this perspective do not however critically interrogate the role played by the court and the ambivalence with which it has met the demand for redrawing the boundaries of enmity after the change of regime. Although scholarship on the “judicialization” of South Korean politics is blooming, authors tend to contend themselves to assess the independence and prominence gained by the court since its establishment.⁶⁸ In this respect, due attention has been devoted to the constitutional review of the security instruments inherited from the authoritarian regime and to the court’s effort to bring them into conformity with the rule of law.⁶⁹

This characterization of what the institution has done is however incomplete on at least two accounts. First, it fails to specify the fundamental political disagreement behind the cases brought before the Constitutional Court of Korea. This dispute has not primarily concerned undoing the legacies of the authoritarian regime, but redrawing the boundaries of inclusion and exclusion embedded in the institutionalization of democracy. Second, missing this dimension of the court’s intervention necessarily leads to a partial understanding of how it has discharged its role as guardian of the constitution. Excavating the two-sidedness of South Korean constitutional justice is where the present research ventures through its interpretive analysis of jurisprudence since 1988.

⁶⁷ Tom Ginsburg, “Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan,” pp.61-62.

⁶⁸ See for instance James West and Dae-kyu Yoon, “The Constitutional Court of the Republic of Korea. Transforming the Jurisprudence of the Vortex?,” *The American Journal of Comparative Law*, Vol. 40, No.1, 1992, pp.73- 119; Kun Yang, “Judicial Review and Social Change in the Korean Democratization Process,” *The American Journal of Comparative Law*, Vol.41, No.1, 1993, pp.1-8; Jibong Lim, “Korean Constitutional Court Standing at the Crossroads. Focusing on Real Cases and Variational Types of Decisions,” *Loyola of Los Angeles International and Comparative Law Review*, Vol.24, No.3, 2002, pp.327-360; Chaihark Hahm, “Beyond ‘Law v. Politics’ in Constitutional Adjudication. Lessons from South Korea,” *The International Journal of Constitutional Law*, Vol.10, No.1, 2012, pp.6-34; Jongcheol Kim and Jonghyun Park, “Causes and Conditions for Sustainable Judicialization of Politics in Korea,” in Björn Dressel (ed.), *The Judicialization of Politics in Asia*, Abingdon, New York: Routledge, 2012.

⁶⁹ Tom Ginsburg, *Judicial Review in New Democracies*; Kuk Cho, “Tensions Between the National Security Law and Constitutionalism in South Korea.”

Toward a critical analysis of the constitutional court's role in reframing enmity

The present research explores the subtle solidarity between constitutionalism and the political exclusion of certain segments of society in contemporary South Korea, commonly considered as a model of democracy and judicial review among the countries which have transitioned in the late 1980s in general, and in East Asia in particular. The point of the analysis is to demystify what these two insignias entail by highlighting the ambivalence which has characterized the way in which the constitutional court has played its role as guardian of the constitution. This ambivalence does not however epitomize the possible separation between constitution and constitutionalism formulated, for example, by Jon Elster: “Constitutions may exist without constitutionalism, if they are perceived mainly as policy tools or as instruments for short-term or partisan interests. Conversely, constitutionalism may exist without a written constitution, if the unwritten rules of the game command sufficient agreement.”⁷⁰

Constitutional democracy in South Korea is not a sham or a façade, as illustrated by the vibrancy of constitutional adjudication and the court's commitment to promote the rule of law and fundamental rights. Therefore, the critical perspective adopted by this dissertation does not aim at refuting that the court has acted as a guardian of the constitution. Instead, it seeks to call attention to the illiberal dimension which has accompanied the court's commitment to defend the post-transition constitutional order. As a result, the research concentrates on constitutional language as an order of discourse or form of discursivity to explore the ways in which an institution thought to be liberal can nonetheless instantiate an illiberal component. This dissertation's approach to constitutional discourse, as articulated in jurisprudence, is thus an interpretive one, which enables the analysis to take into account both the text and subtext of the court's decisions. The underlying dispute forming the subtext of constitutional litigation in contemporary South Korea concerns defining the very boundaries of what constitutes enmity after the change of regime. In this respect, the concept of judicial politics of enmity that this study proposes aims at capturing the fact that the court's intervention has taken place in the midst of an ongoing disagreement about what counts as “national,” “legitimate,” and “authorized” conduct in South Korean democracy, by opposition to what is still criminalized as “anti-national,” “deviant,” and “threatening” behavior.

⁷⁰ Jon Elster, “Constitutionalism in Eastern Europe,” p.465.

Identifying the nature of this disagreement makes possible, in turn, to uncover the court's response to the demand for more inclusiveness emanating from the parts of society which the institutionalization of democracy by political elites has marginalized. In discharging its role as guardian of the post-transition constitutional order, the Constitutional Court of Korea appears to have been caught in a paradox: that of defining and defending the constitutional order when the foundations that it lays for society exclude certain segments of the polity.

Excavating this two-sidedness of the court's intervention discloses how constitutionalism is not an institutional-discursive formation intrinsically tied to the promotion of liberal values. The critical argument advanced by this dissertation consequently goes further than contending that constitutional courts are bound to weigh liberty against security in times of crisis, and to impose restrictions on the former in the interest on the latter. Instead, the present research highlights how safeguarding the constitutional order can imply for courts to preserve the non-inclusive interests by which such an order is shaped. Although critical of constitutional lawmaking in South Korea, the present analysis does not entail a normative assessment about what the court should have done. One of the reasons why the research refrains from this judgment stems from our belief that the court may not have had the possibility to act much differently than it did. Ultimately, the court indeed appears constrained by the very nature of the paradox in which it has been caught: that of defining and defending the constitutional order when the foundations that it sets institutionalize a durable bias against certain segments of society.

The implication of this argument is double. In terms of methodology, the structural roots of the paradox outlined and of the court's ambivalence justify why the dissertation's approach is not primarily sociological and focuses on the multilayered language articulated by the court in place of the choices made by the individual actors who compose it - i.e., nine justices appointed for a six-year renewable term, three of whom are designated by the President of the Republic of Korea ("*taet'ongnyŏng*"), three by the chief justice of the Supreme Court ("*taebŏbwŏn*"), and three by the National Assembly ("*kukhoe*"). In terms of comparative scope, it could be expected that transitions taking place by amendment may be symptomatic of the non-inclusive configuration displayed by the South Korean case given the limited re-foundation of the political order which revising rather than replacing the constitution materializes.

In South Korea, the fact that security tools have been used to enforce the “conservative bias” of democracy as demonstrated by Choi Jang-Jip should be understood as an outcome of the transition rather than as a mere legacy of authoritarianism. Overall, most behaviors sanctioned as threats since the transition have therefore either concerned the speech crimes defined under article 7 of the National Security Act or the declaration of faith by which conscientious objectors have refused to perform the compulsory military service on religious grounds and have been correspondingly penalized under article 88 of the Military Service Act. Since the 1990s, the number of imprisoned conscientious objectors, principally Jehovah Witnesses, has been dramatically on the rise. In so far as they are objecting to conscription on the ground of their belief in a higher normative order than patriotism, religious minorities such as Jehovah’s Witnesses jeopardize a certain idea of the “national,” not by formulating an alternative version of its contents (as the “*minjung*” did), but by making a claim that situates itself beyond the realm of the nation-state.

In the name of protecting national security, instruments such as the National Security Act, the ideological conversion policy, or the ban on conscientious objection therefore police a certain distribution of speech or “partition of the sayable” in the post-transition period.⁷¹ Rather than operating in the defense of the state, these security tools act in the defense of a non-inclusive and contentious way of envisioning the “national.” In light of this imbalance, constitutional justice has been invested as a site where to challenge the boundaries of enmity and the mechanisms of exclusion alienating certain segments of society from the post-transition order. Indeed, the compelling, and seemingly subversive, power of the constitutional stage in this regard is to apparently give a voice to those who are being denied one by the very mechanisms of exclusion that judicial review offers the opportunity to contest, by raising the issue of their conformity to constitutional norms.

Some authors have however questioned the possibility to speak and to become visible which the constitutional stage supposedly effectuates. Indeed, this possibility only exists as long as individuals are able and willing to articulate a particular language and subjectivity, that of the right-claiming subject, which “as Kirstie McClure has argued, [...] implies the modern constitutional state as ‘a privileged expression of political community and hence as

⁷¹ This expression is borrowed from Jacques Rancière who defines politics as “a way of framing, among sensory data, a specific sphere of experience. It is a partition of the sensible, of the visible and the sayable, which allows (or does not allow) some specific data to appear; which allows or does not allow some specific subjects to designate them and speak about them.” Jacques Rancière, *Dissensus. On Politics and Aesthetics*, London, New York: Continuum, 2010, p.152. [Jacques Rancière, *Le partage du sensible. Esthétique et politique*, Paris: la Fabrique, 2000].

the principal and necessarily privileged site of political action.’ ”⁷² Although the individual gains derived from bringing one’s case on the constitutional stage can be real, appealing to law and courts to denounce injustice also risks lending credibility to the order being opposed, thus producing a form of “involuntary legitimation.”⁷³ Jacques Rancière’s skepticism goes further when he argues that “the practice of the ‘constitutionality checkup’ ” is nothing more than “state mimesis of the political practice of litigation.”⁷⁴ What judicial review achieves according to him thus amounts to the “transformation of the political dispute into a legal problem.”⁷⁵ For Rancière, constitutional justice is therefore not a stage where politics - conceived as disagreement, “a dispute over the object of the discussion and over the capacity of those who are making an object of it”⁷⁶ - is likely to happen.⁷⁷

By contrast, this dissertation and its hypotheses are located in between the optimistic view and the skeptic stance toward legal mobilization and constitutional intervention, with the former mostly celebrating the political achievements of courts such as the South Korean one while the latter discounts the possibility of such achievements’ occurrence on the constitutional stage. In place of these two approaches, the present research seeks to highlight the ambivalence which has characterized constitutional litigation in South Korea, as a site where the fundamental political disagreement of the post-transition era has been both staged and interrupted. Analyzing its jurisprudence over the past twenty-five years indeed reveals how the Constitutional Court of Korea, in the name of defining and defending the constitutional order, has been involved in the struggle over redrawing the contours of enmity in an ambiguous way.

⁷² Namhee Lee, “The South Korean Student Movement,” p.120.

⁷³ Stephen Ellmann, “Struggle and Legitimation,” *Law and Social Inquiry*, Vol.20, No.2, 1995, pp.339-348.

⁷⁴ Jacques Rancière, *Disagreement. Politics and Philosophy*, Minneapolis: University of Minnesota Press, 1999, p.109.

⁷⁵ *Ibidem*, p.110.

⁷⁶ *Ibidem*, p.xii.

⁷⁷ It should be underlined that the separation drawn by Rancière between political disagreement and constitutional dispute is not a matter of intrinsic incompatibility, as a lawsuit - like “an election, a strike, a demonstration - can give rise to politics or not give rise to politics.” *Ibidem*, p.32. This contingent possibility is illustrated by the 1832 trial of August Blanqui, which engendered “a speech scene that is one of the first political occurrences of the modern proletariat subject.” *Ibidem*, p.37.

Hypothesis: explaining the twofold role of the constitutional court

The dissertation's main hypothesis posits the ambivalence of the constitutional court's contribution to the reframing of enmity in post-transition South Korea. The court's very commitment to defend constitutionalism can indeed be expected to have translated into both liberal and illiberal outcomes, setting bonds on the powers of government by dismantling a number of authoritarian legacies while reinforcing the non-inclusiveness of the post-transition order by confirming the continued relevance of security instruments which, since 1987, have been primarily deployed not to protect the state but to enforce a certain and contentious way of envisioning the "national." To be adequately captured, the double-edged role of the court can be broken down into two sub-propositions.

Sub-hypothesis 1: the Constitutional Court of Korea has tried to undo the authoritarian legacies attached to security instruments and their uses.

The positive understanding which exists in the literature about the Constitutional Court of Korea's role derives from the fact that the institution has indeed strived to bring the security tools inherited from the authoritarian period into conformity with the requisites of the rule of law. These efforts can be expected to be highly visible in decisions reviewing the constitutionality of the rules and practices implemented by law-enforcing agencies. In terms of judicial reasoning, the court's concern may take the form of a debate about whether too much continuity or enough differentiation with the past has prevailed. When it comes to adjudication results, the court's commitment to reform authoritarian legacies should result in the introduction of new procedural guarantees in order to rule out the extra-legal and arbitrary uses of national security which litigants have challenged early on, and consistently. The judicial reshaping of security instruments may have however met two limits: the unwillingness of law enforcement institutions to comply with constitutional jurisprudence, and the fact that undoing some of the authoritarian past's remains does not amount to dismantling the non-inclusive legacy of the transition.

Sub-hypothesis 2: while the Constitutional Court of Korea has tried to bring inherited security tools into conformity with the rule of law, its jurisprudence has also contributed to reinforce their post-transition relevance as mechanisms of exclusion.

In acting as a guardian of the new constitutional order, the Constitutional Court of Korea could have both sought to reform various authoritarian legacies attached to security tools and contributed to consolidate their post-transition functionality as mechanisms of exclusion. While the constitutional court may have endeavored to bring the security instruments inherited from the authoritarian era into conformity with the requisites of the rule of law, its jurisprudence can also be expected to have reinforced the legitimacy of their resilience as mechanisms of exclusion enforcing the non-inclusive bias of the post-transition order. This should translate into the confirmation of such mechanisms' constitutionality and relevance for the democratic era across the court's jurisprudence. The promotion of the rule of law which the court may have embraced would therefore represent only one side of the dual way in which the institution has carried its task of defending the constitution: introducing procedural guarantees against discretionary and arbitrary uses of security instruments while validating their function as devices policing the boundaries of inclusion and exclusion in contemporary South Korea.

Methodology: collection and textual analysis of constitutional jurisprudence

Constitution of the corpus

The total volume of decisions included in the present research consists of eighty-some rulings delivered since the constitutional court began to operate. Between September 1988 and September 2013, 24,445 cases have been filed with the court, which amounts to a thousand cases being annually received by the institution. An overwhelming majority of them (96%) reach the court through one of the two mechanisms for constitutional complaints, and especially through the procedure of article 68, section 1 of the Constitutional Court Act by which any person alleging a violation of his or her basic rights by an exercise or non-exercise of government can directly petition the court (19,350 complaints were filed through this mechanism between 1988 and 2013, that is to say 79% of the caseload).

Approximately half of the cases filed with the court are dismissed as non-justiciable by a small bench of three justices (11,753 cases between 1988 and 2013). Out of the remaining 12,692 cases, 757 were withdrawn and 771 still pending as of September 2013, leaving the total of the cases decided by the court's full bench of nine justices to 11,164 over the past

twenty-five years, which amounts to less than 500 cases settled a year. Most of the cases decided by the full bench are however rejected (6,496), dismissed (1,663) or annulled (455). As a result, only a slim minority of cases (2,544) has resulted in a decision of constitutionality or unconstitutionality between September 1988 and September 2013: 1,822 of them were found constitutional, 480 unconstitutional, 148 non-conform to the constitution, 66 only partly unconstitutional, and 28 only partly constitutional. About 60 judgments of constitutionality or unconstitutionality are included in the present analysis, which also counts six cases dismissed by a small bench and a dozen dismissed or rejected by the full bench.

Table 4. Case statistics of the Constitutional Court of Korea between September 1988 and September 2013.

Type		Total	Constitutionality of Law	Impeachment	Dissolution of a Political Party	Competence Dispute	Constitutional Complaint		
							Sub total	§68 I	§68 II
Filed		24445	820	1		81	23543	19350	4193
Settled		23674	780	1		76	22817	18945	3872
Dismissed by Small Benches		11753					11753	10007	1746
Decided by Full Bench	Unconstitutional	480	234				246	76	170
	Unconformable to Constitution	148	55				93	34	59
	Unconstitutional in certain context	66	15				51	19	32
	Constitutional in certain context	28	7				21		21
	Constitutional	1822	289				1533	4	1529
	Annulled	455				16	439	439	
	Rejected	6496		1		20	6475	6475	
	Dismissed	1663	61			27	1575	1339	236
	Miscellaneous	6					6	5	1
Withdrawn		757	119			13	625	547	78
Pending		771	40			5	726	405	321

Source: The Constitutional Court of Korea.⁷⁸

⁷⁸ Statistics of the Constitutional Court of Korea from the court's website, accessed on January 17, 2014, at: <http://english.ccourt.go.kr>.

While the decisions covered by the dissertation represent only a small numeric proportion of the cases whose constitutionality was adjudicated by the court (less than 3%), the selected corpus deals with one of the overriding issues in which the court has had to intervene since 1988: redrawing the boundaries of enmity in post-transition South Korea. This issue encompasses most of the major matters examined by the court over the past twenty-five years: reviewing the constitutionality of the National Security Act, the ideological conversion policy, the compulsory military service, and the criminal justice process; putting the past on trial and examining measures of transitional justice; defining the contours of the national community through the assessment of nationality, citizenship, and immigration laws; or settling matters of war and peace.

The body of cases chosen as relevant for the analysis is therefore not limited to the constitutional rulings concerning the main security instruments which have remained deployed after the change of regime. The corpus also interrogates the court's construction of enmity in relation to a broader set of issues which incorporates several of the court's most momentous and commented judgments, such as its 1995 decisions relating to the prosecution of former dictators Roh Tae-woo and Chun Doo-hwan, or its 2004 verdict against the impeachment of President Roh Moo-hyun. Both instances have indeed been fully part of the disagreement about what counts as "national" and "anti-national" in post-transition South Korea.

The corpus upon which the analysis is based was collected and analyzed over a ten-month period, between December 2011 and October 2012, from the entire volume of decisions rendered by the court since the late 1980s. All of the court's settled cases are accessible in Korean through the Constitutional Court of Korea's official website, on which rulings can be found through their case number or by keyword search. This option first enabled me to gather cases in which expressions such as "national security" made an appearance. In approaching them, I relied on both the Korean text and the court's official English translation, when available. Approximately 10% of the court's decisions are indeed either summarized or fully translated into English by the institution, which makes them accessible through the English version of its official website and its own publications. The latter comprise the court's 2008 report entitled *Twenty Years of the Constitutional Court of Korea*, which covers the period from 1988 to 2008 with cases' summaries as well as commentaries on the history of constitutional adjudication in South Korea and its present structures. A more thorough compilation of summarized and fully translated rulings is also

available in the *Constitutional Court Decisions Volume I* (1998-2004), *Volume II* (2005-2008), 2009, and 2010.

This collection was extensively consulted in the course of a four-week internship carried out at the Research Institute of the Constitutional Court of Korea (“*hōnpöp chaep’an yōn’guwōn*”), located in Seoul, during September 2012. A substantial part of the four weeks spent at the Research Institute was dedicated to an in-depth reading of the judgments published in these volumes, through which the universe of cases relevant for the present study was expanded in two directions: by including decisions relating to nationality and immigration laws as well as rulings connected to the compulsory military service. My time at the Institute also provided me with the opportunity to conduct informal interviews with constitutional researchers, to perfect my understanding of the court and of its internal dynamics, to attend working sessions and conferences at the Research Institute and at the Constitutional Court of Korea, and to consult the records of some of the main cases on which the dissertation focuses.

The present research spans over four terms of the constitutional court, under the presidency of Cho Kyu-Kwang (1988-1994), Kim Young-jun (1994-2000), Yun Young-chul (2000-2006), and Lee Kang-kook (2007-2013). Among the forty-some individuals who have served as constitutional justices between 1988 and 2013, only two were women (Jeon Hyo-suk, from 2003 to 2006) and Lee Jungmi (who was appointed in 2011). Constitutional justices are usually former judges or prosecutors, a difference in terms of career and professionalization which seems to weigh more on their sensibility than the branch of power (executive, judicial, or legislative) which has appointed them. As will be justified in the following section, the research does not rely on a sociological approach to the court in order to understand the role played by the institution in the reframing of enmity after the change of regime. It does not focus on the trajectory of, or interactions between, individual justices as undertaken by the attitudinal model⁷⁹ or the strategic framework.⁸⁰ Instead, the dissertation’s primarily adopts an interpretive approach to constitutional discourse through a textual analysis of the court’s jurisprudence.

⁷⁹ The attitudinal model postulates that the voting patterns of judges translate their personal preferences. See Glendon Schubert, *The Judicial Mind. The Attitudes and Ideologies of Supreme Court Justices, 1946-1963*, Evanston: Northwestern University Press, 1965; Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model*, Cambridge, New York: Cambridge University Press, 1993.

⁸⁰ According to the strategic approach to judicial decision-making, judges’ choices are the result of calculated interactions between different actors - that is to say, between judges themselves as well as between the court and the other branches of government. See Walter Murphy, *Elements of Judicial Strategy*, Chicago: University of Chicago Press, 1964; Lee Epstein and Jack Knight, *The Choices Justices Make*, Washington: CQ Press, 1998.

Table 5. Constitutional appointments since 1988.

Year	Presidential Nominees			Chief Justice of the Supreme Court's Nominees			National Assembly's Nominees							
	Court's President	Justices		Justices			Justices							
1988	Cho Kyu-Kwang (Sep. 1988-Sep. 1994)	Choe Kwang-ryool (Sep. 1988-Sep. 1994)	Kim Yang-kyun (Sep. 1988-Sep. 1994)	Lee Seong-yeol (Sep.1988-Aug.1991)	Justice Lee Shi-yoon (Sept. 1988-Dec. 1993)	Kim Moon-hee (Sep. 1988-Sep. 2000)	Byun Jeong-soo (Sep. 1988-Sep. 1994)	Han Byung-chae (Sep. 1988-Sep. 1994)	Kim Chin-woo (Sep. 1988-Jan. 1997)					
1989														
1990														
1991														
1992														
1993														
1994	Kim Yong-Joon (Sep. 1994-Sep. 2000)	Kim Chin-woo (Sep. 1988-Jan. 1997)	Chung Kyung-sik (Sep. 1994-Sep. 2000)	Lee Seong-yeol (Sep.1988-Aug.1991)	Lee Jae-hwa (Dec. 1993-Dec. 1999)	Koh Joong-suk (Sep. 1994-Sep. 2000)	Kim Moon-hee (Sep. 1988-Sep. 2000)	Cho Seung-hyung (Sep. 1994-Sep. 1999)	Shin Chang-on (Sep. 1994-Sep. 2000)					
1995														
1996														
1997		Lee Young-mo (Jan. 1997- Mar. 2001)	Song In-jun (Sep. 2000-Sep. 2006)	Han Dae-hyun (Aug. 1997-Aug. 2003)						Kim Young-il (Dec. 1999-Mar. 2005)	Kim Kyoung-il (Sep. 2000-Sep. 2006)	Kwon Seong (Sep. 2000-Aug. 2006)	Ha Kyung-chull (Sep. 1999-Jan. 2004)	Kim Hyo-jong (Sep. 2000-Sep. 2006)
1998														
1999														
2000	Yun Young-chul (Sep. 2000-Sep. 2006)	Choo Sun-hoe (Mar. 2001-Mar. 2007)	Song In-jun (Sep. 2000-Sep. 2006)	Han Dae-hyun (Aug. 1997-Aug. 2003)	Kim Young-il (Dec. 1999-Mar. 2005)	Kim Kyoung-il (Sep. 2000-Sep. 2006)	Kwon Seong (Sep. 2000-Aug. 2006)	Ha Kyung-chull (Sep. 1999-Jan. 2004)	Kim Hyo-jong (Sep. 2000-Sep. 2006)					
2001														
2002														
2003		Jeon Hyo-sook (Aug. 2003-Aug. 2006)	Kim Hee-ok (Sep. 2006-Feb.2011)	Kim Jong-dae (Sep. 2006-Sep. 2012)						Lee Kong-hyun (Mar. 2005-Mar. 2011)	Min Hyeong-ki (Sep. 2006-Sep. 2012)	Mok Young-joon (Sep. 2006-Sep. 2012)	Cho Dae-hyen (Jul. 2005-Jul. 2011)	Lee Dong-heub (Sep. 2006-Sep. 2012)
2004														
2005														
2006	Lee Kang-kook (Jan. 2007-Jan. 2013)	Song Doo-hwan (Mar. 2007-Mar. 2013)	Kim Hee-ok (Sep. 2006-Feb.2011)		Lee Kong-hyun (Mar. 2005-Mar. 2011)	Min Hyeong-ki (Sep. 2006-Sep. 2012)	Mok Young-joon (Sep. 2006-Sep. 2012)	Cho Dae-hyen (Jul. 2005-Jul. 2011)	Lee Dong-heub (Sep. 2006-Sep. 2012)					
2007														
2008														
2009														
2010														
2011		Lee Jung-mi (Mar. 2011-)	Park Han-chul**	Kim Chang-jong (Sep. 2012-)						Lee Jung-mi (Mar. 2011-)	Lee Jin-sung (Sep. 2012-)	Kang Il-won (Sep. 2012-)	Kim Yi-su (Sep. 2012-)	Ahn Chang-ho (Sep. 2012-)
2012														
2013	Park Han-chul (Ap. 2013-)	Cho Yong-ho (Ap. 2013-)	Seo Ki-seog (Ap. 2013-)											

*(Feb.2004-June 2005) **(Feb. 2011-)

The argument put forth by the present research highlights the double-edged way in which the court has embraced its role as guardian of the constitutional order. This study therefore hopes to demonstrate how constitutionalism has served to both curb and strengthen the instruments which have remained deployed after 1987 to enforce the non-inclusive legacy of the transition - such as the National Security Act, the Military Service Act, and the ideological conversion policy. To do so, the dissertation primarily relies on an interpretive reading of constitutional jurisprudence. While paying close attention to the language of the court, this approach neither concentrates on the doctrinal dimension of constitutional decisions, nor provides an internal, juridical analysis of their content.

Instead, the research focuses on constitutional language as a form of discursivity which encompasses both legal and non-legal arguments and considerations articulated in the frame of a conflict. Such a conflict is usually not exhausted by the constitutional terms and claims through which it has to be framed. Although it has been argued that judicial review amounts to the “transformation of the political dispute into a legal problem,”⁸¹ traces of the underlying and society-wide disagreement which constitutes the subtext of judicial intervention can be unearthed from rulings. This notion of “subtext” echoes the idea that multiple layers of discourse and meaning are embedded in jurisprudence, whether they are or not explicitly articulated in it. In this perspective, the interpretive method offers the possibility to restore these layers and the subtext which they convey.

The interpretive reading of law embraced by the present research distinguishes itself from the approach advocated by Clifford Geertz to law as a language, that is to say a symbol-system and a “distinctive manner of imagining the real.”⁸² The analysis of legal discourse undertaken by this dissertation is less cultural than political, envisioning constitutional jurisprudence as a multilayered text whose analysis is incomplete without reconstructing its implicit subtext. As this research contends for the South Korean case, the fundamental dispute which composes the subtext of constitutional intervention concerns the very definition of what counts as “national” or “anti-national” in the post-transition era. This conflict has

⁸¹ Jacques Rancière, *Disagreement*, p.110.

⁸² Clifford Geertz, “Local Knowledge. Fact and Law in Comparative Perspective,” in *Local Knowledge. Further Essays in Interpretive Anthropology*, New York: Basic Books, 1983, p.182. Against Geertz and the idea of a common imaginary at work in and through law, Sally Humphries has for instance evoked the multiple imaginaries operating within a single legal system, highlighting how “what is ideologically coherent in the legal discourse appears as ‘theory,’ while discordant elements are relegated to the status of mere ‘practice.’” See Sally Humphreys, “Law as Discourse,” *History and Anthropology*, Vol.1, No.2, 1985, p.256.

gained access to the constitutional stage in so far as the mechanisms of exclusion preventing it from unfolding in the public sphere have been challenged before the court. Yet, constitutional adjudication has only represented a limited place of contention, one which has both contributed to stage and interrupt the disagreement about the boundaries of enmity. Such ambivalence is precisely treated as part of the constitutional court's discourse by the interpretive reading of jurisprudence which this dissertation adopts. In other words, the bifurcation between constitutionalism and liberalism which the case study exemplifies is not conceived as a deficiency or anomaly vis-à-vis what the court's intervention ought to have been or done.

The approach of the present research therefore accords equal significance to the reliefs and recesses of the court's language, its emphases and silences, what distinguishes judges' opinions and the consensus which they nonetheless share beyond their apparent discordances. Indeed, the court often appears as "polyvocal" and its members frequently pronounce split decisions taking the form of a majority ruling accompanied by one or several dissenting opinions. Disagreements within the institution have not only been synchronic but diachronic, manifested overtime through the practice of reversing established precedents. While differences among judges and judgments reflect the existence of both "conservative" and "progressive" sensibilities, the polarization that they imply should not, however, be exaggerated.

This is the reason why the dissertation departs from studies of judicial politics which focus on judges' individual attitudes and choices. While it is possible to identify important contrasts in terms of decision-making among the justices of the South Korean constitutional court, there also exists among them a largely shared order of discourse when it comes to enmity. The commonality upon which this order of discourse ultimately rests is not only produced by the fact that constitutional language emanates from a certain kind of elites (to be sure, the legal profession does enjoy an elite status in South Korea where it forms a closely-knit community). This commonality is also premised upon the institutional nature of the constitutional court and the dual solidarity which binds it to the state, that is to say, not only to the state's physical integrity which the court is committed to defending, but also to a certain way of envisioning the "national."

This double cohesion, in turn, shapes the order of discourse shared by constitutional justices. If the discourse of the court is regularly traversed by a debate and discord between justices over the extent to which basic rights, which are never recognized as absolute, should

be protected, judges' diverging positions never express a dispute over their understanding of the "national." This shared understanding is itself an incomplete part or fragment of the larger and contentious subtext upon which the court's intervention is based, namely the asymmetrical dispute between the state and parts of civil society over the boundaries of inclusion in and exclusion from the "national" body.

An interpretive reading of constitutional jurisprudence therefore exposes the domestic and self-referential nature of the issues raised by the construction of enmity. Indeed, the dispute surrounding its definition can neither be reducible to a disagreement about the authoritarian past nor to a conflict over the status of North Korea and the nature of inter-Korean relations. Rather than convoking dyschronic and dystopic alterities, the underlying textuality of the court's intervention refers to the present of South Korean democracy and to the dynamics of inclusion and exclusion as enforced and contested in the post-transition period. To better reconstitute how this subtext comes into play for each of the particular issues brought before the court, this dissertation's textual analysis of constitutional jurisprudence is supported by the use of secondary sources, newspaper articles, and human rights reports helpful to identify litigants, their lawyers, as well as the public debates surrounding a given case. In addition, these materials and the court's own publications are particularly relevant to track the impact of constitutional verdicts once litigation is over.

Outline of the dissertation

The seven chapters which compose the rest of this dissertation proceed as follows. Chapter two provides a political genealogy of the Constitutional Court of Korea, analyzing the institution's coming into being in the context of the negotiated constitutional revision of 1987, which was controlled by political elites from both the authoritarian leadership and the opposition to the exclusion of the forces, demands, and alternative "national" imaginary of the grassroots democratization movement. Taking into account the inherent contingency of institutional design, this chapter evades the functionalist argument according to which the court was strategically created by political elites in order to reinforce the conservative bias of the transition.

Chapter three surveys the intensity of South Korea's constitutional commitment against enmity, by examining the two figures of threat which the basic norm is ready to confront: the enemy of the state who jeopardizes the integrity and security of the nation, as

well as the enemy of the regime who endangers constitutional democracy. This second figure has provided the constitutional court with the language and ground to establish itself as a privileged actor in charge of defending the “basic order of free democracy” and of unpacking, in its name, the values and arrangements worthy of being upheld in the post-transition period.

Chapter four delves into the paradox of the court’s empowerment, showing how constitutional justice became invested as a site where to contest the non-inclusive legacy of democracy’s institutionalization after the change of regime. This non-inclusive legacy is not only manifested in the security instruments inherited from the authoritarian period and operating after 1987 as mechanisms of exclusion, but also in the limited path to transitional justice which was contested before the court in the mid-1990s.

Chapters five, six, seven, and eight undertake a detailed examination of constitutional jurisprudence for the mechanisms of exclusion challenged before the court since the late 1980s. Each of them indeed sheds light upon different aspects of the illiberal and excluding dimension of South Korean constitutional democracy after the change of regime. Chapter five interrogates how the notion of enmity has been reshaped by the court in the aftermath of the transition, focusing on rulings delivered in relation to the National Security Act. This chapter revisits the traditional understanding made of these decisions as landmarks of the court’s commitment to protect fundamental rights.

Chapter six complements the analysis of how the court’s has redefined enmity by looking at the ways in which the contours of the national community have been delineated by constitutional jurisprudence. The court has indeed reviewed a variety of laws which highlight criteria of inclusion in, and conditions of exclusion from, the collective body. These decisions reveal that the contours of the national community can be projected both beyond and within the territory of the South, as illustrated by the ideological conversion policy following which political prisoners refusing to pledge allegiance to the prescribed notion of the “national” have remained identified and detained as “thought criminals” in the post-transition era.

Chapter seven is dedicated to a closely related mechanism of exclusion: the special procedures - or lack thereof - deployed against national security suspects and defendants in the criminal justice process. The rulings delivered by the court in this area demonstrate the firmness of its commitment to defend the rule of law and to undo several of the extra-legal or arbitrary rules and practices associated with the criminal handling of national security. The militant idea that rights have to be protected against the risk of being abused and misused has nonetheless provided the ultimate constitutional rationale for their restriction.

Finally, chapter eight analyzes the role of the court in cases calling into question the exigencies of national defense. The dispute over the “national” which constitutes the subtext of the court’s intervention has indeed led various South Korean military initiatives to be constitutionally challenged on the ground that they represented aggressive and unfavorable behavior towards North Korea and the perspective of reunification. While these issues reflect that constitutional adjudication has been increasingly invested as a site of political contention, they also highlight how the court has prevented the dispute between competing “national” imaginaries from unfolding on its stage.

CHAPTER TWO

A Political Genealogy of the Constitutional Court of Korea

THE CONSTITUTION OF THE REPUBLIC OF KOREA

Enacted	Jul.	17, 1948
Amended	Jul.	7, 1952
	Nov.	29, 1954
	Jun.	15, 1960
	Nov.	29, 1960
	Dec.	26, 1962
	Oct.	21, 1969
	Dec.	27, 1972
	Oct.	27, 1980
	Oct.	29, 1987

PREAMBLE

We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial, upholding the cause of the Provisional Republic of Korea Government born of the March First Independent Movement of 1919 and the democratic ideals of the April Nineteenth Uprising of 1960 against injustice, having assumed the mission of democratic reform and peaceful unification of our homeland and having determined to consolidate national unity with justice, humanitarianism and brotherly love, and

To destroy all social vices and injustice, and

To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political, economic, social and cultural life by further strengthening the basic free and democratic order conducive to private initiative and public harmony, and

To help each person discharge those duties and responsibilities concomitant to freedoms and rights, and

To elevate the quality of life for all citizens and contribute to lasting world peace and the common prosperity of mankind and thereby to ensure security, liberty and happiness for ourselves and our prosperity forever, Do hereby amend, through national referendum following a resolution by the National Assembly, the Constitution, ordained and established on the Twelfth Day of July anno Domini Nineteen hundred and forty-eight, and amended eight times subsequently.

Oct. 29, 1987

This chapter explores the context in which the Constitutional Court of Korea was created in 1987, as a result of a revision of the constitution which was negotiated by political elites from the authoritarian leadership and the opposition to the exclusion of the actors, demands, and alternative “national” imaginary of the popular democratization movement. Both this elite bargain and the marginalization which it produced are recorded in the text of the amended constitution in general, and in the making of the constitutional court in particular. The chapter however highlights the paradox of institutional design, as the way in

which the court was fashioned - i.e., by political elites through a number of selective borrowings to South Korean history and comparative experience (especially the German model) - did not pre-determine what it would become.

A constitution in place since 1948: the imprint of history and politics

Constitutional transitions often serve as established landmarks in the history of nations, where they conveniently provide a definite date to which the (re)foundation of a political order can be traced back. Of course, history neither starts nor closes with the enactment of a new founding document, and constitutions always run the risk to be no more than “parchment institutions,”¹ that is to say, inconsequential rules merely existing on paper. Where they matter, constitutions are both common and uncommon legal texts: common, because despite the language of generality, and sometimes of universality, in which they are carved, constitutions remain man-made localized institutions - in time and space; yet, uncommon given their higher status in the “hierarchy of norms,”² where they stand as the “supreme law of the land.”³

Constitutions are not merely a system of higher rules and principles binding power, but they also consist of an ensemble of concrete and local arrangements which can be shaped by specific interests. They rarely imitate the 1920 Federal Constitutional Law of Austria,⁴ exclusively the work of jurists and legal scholars such as Hans Kelsen, devoid of the grandiloquent declarations and guiding ideals which saturate the preamble of the South

¹ Steven Levitsky and Maria Victoria Murillo, “Variation in Institutional Strength,” *Annual Review of Political Science*, Vol.12, No.1, 2009, pp.115-133.

² Hans Kelsen, *General Theory of Law and State*, New Brunswick: Transaction, 2005 (c1945).

³ “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding” (Article 6, clause 2 of the United States Constitution, also referred to as the “supremacy clause”). According to Jon Elster, “any of the following features might be used” to define a constitution: “The constitution regulates all and only the basic aspects of political life; The constitution regulates the adoption of lower-level norms, such as statutes and ordinances; The constitution takes precedence in the case of conflict with a lower-level norm; The constitution is entrenched to a higher degree, more difficult to change, than ordinary statutes.” Jon Elster, “Why a Constitutional Court?,” Paper presented at the VIIth Conference of the Colombian Constitutional Court, Bogotá, 2011.

⁴ The 1920 Constitution of Austria was reinstated as the fundamental norm of the country in 1955, when the Allies’ occupation following World War II ended. According to Michael Thaler, the sobriety and purely juridical nature of the text, coupled with a tradition of strict interpretation, exactly fitted the need of the torn postwar Austrian society, and provided it with a formal consensus that was lacking in all the other spheres of social life. Michael Thaler, “La constitution et le consensus fondamental d’une société,” Paper presented at *La constitution en question. Concepts et conceptions à l’épreuve de l’évolution du droit. Contributions des écoles allemandes et autrichiennes*, Institut Historique Allemand, Paris, January 18, 2013.

Korean constitution. On the contrary, constitutions are usually designed by political forces rather than jurists alone. They can be authored by a dominant actor (such as the French 1958 constitution, the work of De Gaulle's entourage) or be the negotiated outcome of a bargain among several parties, and therefore reflect elements of compromise (such as the American constitution, with the infamous three-fifths rule of its first article by which Southern states obtained that each slave be counted as three-fifths of a person when calculating each state's demographic strength and the corresponding number of seats to be attributed in the House of Representatives). Conversely, the absence of a formal written constitution in Israel, replaced by the adoption of separate basic laws, results from the failure of secular and religious forces in the 1949 constituent assembly to reach together a comprehensive agreement. Many constitutions - or lack thereof - thus bear the mark of their inscription in specific historical, and therefore local, contexts.

So does the constitution of South Korea, enacted with the country's founding in 1948. Since then, the text was never replaced but instead modified nine times, reflecting the major shifts of regime that the Republic of Korea experienced throughout its six decades of existence.⁵ Out of the nine revisions, five coincide with post-1948 political transitions. As underlined by Choi Jang-Jip, most amendments have moreover centered on the issue of presidential power.⁶ The first two, promulgated on July 7, 1952 (in the midst of the Korean War) and November 29, 1954, stiffened President Rhee Syngman's hold on power by transforming the presidential election from an indirect to a direct vote and by removing the two-term limit on the presidential office. This allowed Rhee to successfully run for a third term in 1956 and a fourth in 1960.

The blatantly rigged election of 1960 ignited nation-wide protests which led Rhee to flee by the end of April. The regime change that ensued was consecrated by the constitutional amendment of June 15, 1960. It marked the success of the April 19 student revolution which ousted Rhee, the sole president of the twelve-year long First Republic, and brought about a short-lived democratic government, the Second Republic. This episode of South Korean history is celebrated by the 1987 preamble of the constitution, which makes reference to "the democratic ideals of the April Nineteenth Uprising of 1960 against injustice" as a milestone on the road toward political liberalization.

⁵ By contrast, a new North Korean constitution was adopted in 1972 as mentioned in chapter one.

⁶ Jang-Jip Choi, *Democracy after Democratization. The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2012, p.48.

The Second Republic engendered two constitutional revisions but surrendered a year after its birth to a coup d'état by General Park Chung-hee, followed by the establishment of a new regime on December 26, 1962, the Third Republic. Two additional modifications of the constitution were later prompted by Park Chung-hee himself to tighten his grip on South Korean politics: on October 21, 1969, allowing him to run for a third presidential term; and, on December 27, 1972, when the *Yusin* constitution (meaning “revitalization”) begot the Fourth Republic and a greater concentration of prerogatives in the hands of the executive. This hardening of Park’s regime took place in the immediate aftermath of the Joint Communiqué of July 4, 1972, through which the two Koreas pledged to pursue the peaceful reunification (“*t’ongil*” in Korean) of the peninsula.⁷

The domestic response to this rapprochement was abrupt, as martial law was declared throughout the country and all political activity banned. Seven years later, Park Chung-hee was assassinated by the chief of his security services and a clique of generals led by Chun Doo-hwan seized power by a coup d'état on December 12, 1979. On October 27, 1980, they proceeded to a seventh constitutional revision which coincided with the establishment of the Fifth Republic. Under the pressure of mass street demonstrations against the regime which culminated in June 1987 across the country, the Fifth Republic was replaced on October 29, 1987 by the current and longest-lived regime in South Korea up to date, the Sixth Republic.

Table 6. Political events and systems of judicial review associated with South Korean constitutional revisions.

Constitutional Event	Political Event	Judicial Review
July 17, 1948	First Republic , President Rhee Syngman	Constitutional Committee
July 7, 1952	Revision making the presidential election direct	
November 29, 1954	Revision lifting the two-term limit on presidential office	
June 15, 1960	April 19 Revolution, Second Republic , Premier Chang Myon	Constitutional Court
November 29, 1960	Revision introducing <i>ex post facto</i> penalties for crimes of corruption under the previous regime and creating a special tribunal and prosecutor for those crimes	

⁷ Like Chinese language, Korean only knows the term “unification” to designate what in English is usually translated as “reunification.” The North-South Joint Communiqué of 1972 stated three principles of reunification: first, reunification should be solved independently, without interference from or reliance on foreign powers; second, it had to be realized in a peaceful way without using armed forces; finally, it was to transcend ideological and institutional differences by resting on the unity of Korean people as an ethnic group.

Constitutional Event	Political Event	Judicial Review
December 26, 1962	Coup d'état, Third Republic , General Park Chung-hee	Supreme Court
October 21, 1969	Revision allowing the president to run for a third term	
December 27, 1972	<i>Yusin</i> Constitution, Fourth Republic , General Park Chung-hee	Constitutional Committee
October 27, 1980	Coup d'état, Fifth Republic , General Chun Doo-hwan	Constitutional Committee
October 29, 1987	June Democratization Movement, Sixth Republic , Presidents Roh Tae-woo (1988-1993), Kim Young-sam (1993-1998), Kim Dae-jung (1998-2003), Roh Moo-hyun (2003-2008), Lee Myun-bak (2008-2013), Park Geun-hye (2013-)	Constitutional Court

Whereas previous regimes bore the imprint of a single man (Rhee Syngman for the First Republic, General Park Chung-hee for the Third and Fourth Republics, General Chun Doo-hwan for the Fifth Republic), the Sixth Republic has been characterized by a compromise among ruling and opposition elites at its founding and by their subsequent rotation in power. To this end, article 70 of the 1987 constitution prescribes that the president be in office for five years, but forbids his reelection.⁸ This prohibition is further entrenched in article 128, which provides that amendments to extend the presidential term of office or to allow for reelection cannot be effective for the president in office at the time of the proposal.⁹

Such safeguards are only meaningful in so far as they are complied with by political actors, which was verified when ex-General Roh Tae-woo stepped down in February 1993. The handpicked successor of Chun Doo-hwan, Roh had been victorious in the first free direct presidential election of December 1987 thanks to the division of the opposition.¹⁰ The following election of December 1992 was won by Kim Young-sam, the first civilian president since 1960 but candidate of the ruling coalition after merging his party with that of Roh Tae-woo in 1990 to form the Democratic Liberal Party. It meant that, by the mid-1990s, the Sixth Republic still failed to meet the definition of democracy as “a system in which parties lose

⁸ “The term of office of the President shall be five years, and the President shall not be reelected” (Article 70 of the Constitution of the Republic of Korea).

⁹ “Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the President shall not be effective for the President in office at the time of the proposal for such amendments to the Constitution” (Article 128, section 2 of the Constitution of the Republic of Korea).

¹⁰ The results of the 1987 presidential election were distributed as follows: Roh Tae-woo: 36,6%; Kim Young-sam: 27,5%; Kim Dae-jung: 27%; Kim Jong-pil: 7,9%; Shin Jung-il: 0,2%. The voter turnout reached 89,2%.

elections.”¹¹ This eventually occurred in December 1997, when Kim Dae-jung became the first opposition candidate to ever ascend to power. Therefore, the three dates of 1987, 1992, and 1997 all represent complementary but also potentially competing starting points in the genealogy of contemporary South Korean democracy. They also illustrate the limits of democracy’s institutionalization as a result of a closed compromise between elites of the old regime and the political opposition. As pointed out by Charles Armstrong,

[I]f South Korea’s democratic transition was accomplished by a popular movement, its democratic consolidation was effected by intra-elite coordination - leading Choi Jang-Jip, one of the most eminent scholars of Korean politics, to term it a “passive revolution.” From the outset, South Korea’s “transition to democracy” was arguably more procedural than substantive - a “conservative democratization,” in Choi’s term, over-determined by the structures of the country’s Cold War state and its *chaeböl* [South Korean conglomerates] -dominated industrialization which has failed to produce a party system representative of the real diversity of interests in Korean society.¹²

As this dissertation contends, the role of the constitutional court consequently has to be interrogated in light of the dual outcome arising from democratization: on the one hand, the non-inclusiveness of South Korea’s post-1987 order; and, on the other hand, the continued mobilization of parts of civil society contesting the conservative legacy of the transition embedded in the making and in the text of the revised constitution.

The preamble’s exclusionary narrative

The constitution of 1987 is rooted in continuity rather than rupture by the historical narrative displayed in its preamble. The very first words opening the text bring together the combination of generality and particularism pervasive in most constitutions. The canonical reference to “We, the people” is immediately qualified in time and space: “We, the people of Korea, proud of a resplendent history and traditions dating from time immemorial.” The celebration of the immemorial history of the country reflects the political appropriation of

¹¹Adam Przeworski, Michael Alvarez, Jose Antonio Cheibub, and Fernando Limongi, *Democracy and Development. Political Institutions and Well-Being in the World, 1950-1990*, Cambridge: Cambridge University Press, 2000.

¹² Charles Armstrong, “Contesting the Peninsula,” *New Left Review*, No.51, 2008, p.119.

Korea's mythical foundation in 2333 B.C.¹³ The ancientness and uniqueness of Korean history is particularly a commonplace of nationalist historiography since the late 19th century, when the threat posed by foreign powers' territorial greed made pressing the constitution of a discourse on Korean identity.¹⁴

The colonial experience that Korea underwent under Japanese rule from 1910 to 1945 is integrated in the preamble's narrative through the reference to "the cause of the Provisional Republic of Korea Government born of the March First Independent Movement of 1919." Colonial history is thus reified to a pair of powerful symbols: on the one hand, the Korean declaration of independence of March 1, 1919 and the ensuing mass demonstrations which were ruthlessly repressed by the Japanese authorities; on the other hand, the formation of a provisional government exiled in Shanghai in April 1919. Both are emblematic of the post-1945 nationalist discourse, articulated around the condemnation of the unlawful occupation of Korea by Japan and the correlated glorification of Korea's resistance.¹⁵ All the conventional ingredients of nationalist historiography are therefore assembled in the vision of Korea's past conveyed by the preamble of 1987, where they coexist with an effort to overcome parochial interests and tie the country's destiny to the universal values of mankind.

Yet, by tracing "the mission of democratic reform and peaceful unification of our homeland" to the anti-colonial independence movement of March 1, 1919 and the student revolution of April 19, 1960 which put an end to the dictatorship of Rhee Syngman (1948-1960), the preamble voluntarily omits the foundational event of South Korea's democratization movement: May 18, 1980, or the Kwangju uprising which erupted in reaction to the coup d'état and nation-wide martial law imposed by Chun Doo-hwan and his clique of fellow generals, including future president Roh Tae-woo. According to Henri Em, Kwangju indeed represents the turning point after which a new and alternative "national" narrative developed within the democratization movement, identifying both the military regime in

¹³ According to a legend recorded in the 13th century, the first Korean kingdom was founded in 2333 B.C. by Tan'gun, a prince of heavenly descent. This anachronistic claim was part of an effort to legitimize the kingdom of *Koryŏ* (935-1392) and the ancientness of its origins vis-à-vis the Chinese Empire. The mythical birth of the Korean nation is celebrated every year on October 3rd as the National Foundation Day.

¹⁴ The shaping of the nationalist discourse in terms of "*minjok*," that is to say the people as "race," or Korean nationalism defined in terms of ethnic identity, emerged at the end of the 19th century but only fully imposed itself with the construction of Korean identity in the discourses of the colonial era (that is to say in both colonialist and anti-colonialist discourses). See Gi-Wook Shin, *Ethnic Nationalism in Korea. Genealogy, Politics, and Legacy*, Stanford: Stanford University Press, 2006.

¹⁵ In doing so, nationalist historiography is trapped in a certain number of falsifications: falsification of the complexities of colonial history, during which resistance to Japan was marginal, and falsification of the independence movement itself, irreducible to the March 1, 1919 demonstrations as its forces became dominated by radical and communist activists after the 1920s.

power from 1980 to 1987 and the United States as responsible for the rebellion's brutal crackdown. In Em's words,

[I]t was the people's uprising in the city of Kwangju in 1980 [...] and the massacre perpetrated by South Korean troops that finally broke the South Korean government's ideological hegemony. The magnitude of the state violence drove students and intellectuals to search for the structural and historical origins of South Korea's dictatorships. [...] Students and intellectuals sought to constitute the *minjung* (the subaltern) as a national and nationalist subject, a subjectivity that could be an alternative to and autonomous from nationalist narratives authorized by either the North Korean or the South Korean state."¹⁶

As the very leaders behind the perpetration of the massacre negotiated the 1987 change of regime and the correlated reform of the constitution, its preamble's pledge "to consolidate national unity with justice, humanitarianism and brotherly love, and to destroy all social vices and injustice" while leaving the memory of May 1980 unmentioned could only resonate as bitter irony to the forces of the democratization movement. No matter their ambitions, all national constitutions thus remain localized texts which can produce surreptitious forms of exclusion while speaking in the name of "We, the people."

In addition, the embeddedness of South Korea's constitution in a particular space is much deeper in original language than its English translation makes readily available. In Korean, the expression "We, the people of Korea" becomes "*uri taehan kungmin*," literally "We, the people of the Great Han" - where "*uri*" stands for "us/we," "*taehan*" for "the Great Han/Korea," and "*kungmin*" for "people/nation." However, the Korea associated with "*taehan*" in the post-1945 context is unmistakably "*taehanmin'kuk*," that is to say the Republic of Korea or South Korea as referred to by South Koreans. As a result of the division of the peninsula in two halves situated north and south of the 38th parallel since 1945, Korean language does not possess one generic word to name Korea, as English does, but instead resorts to four localized terms: South and North Korea in the mouth of the South (respectively "*han'guk*" and "*pukhan*"); North and South Korea in the mouth of the North (respectively "*chosŏn*" and "*namjosŏn*"). A similar cleavage governs the use of the term "people," "*kungmin*" in the South by opposition to "*inmin*" in the North.

Although it does not openly mention the existence of North Korea, the preamble of the 1987 constitution does not, and linguistically cannot, escape the fact of the division. Its

¹⁶ Henry Em, *The Great Enterprise. Sovereignty and Historiography in Modern Korea*, Durham, London: Duke University Press, 2013, p.16.

presence pervades the text, both implicitly and explicitly. Implicitly, references to pre-1945 history, and the “immemorial time” during which the country was united, neighbor a definition of the Korean people which, by contrast, cannot be politically neutral. Explicitly, the division is strongly echoed when the preamble embraces “the mission of democratic reform and peaceful unification of our homeland,” in order “to consolidate national unity with justice, humanitarianism and brotherly love.” The rest of the constitution is not silent either. The horizon set forth by the preamble is reasserted in article 4 of the constitution:

The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

The language of “peaceful unification” is not a novelty introduced in the constitution by the 1987 revision. It was initially made reference to “in the preamble of the 1972 Constitution after the first-ever inter-Korean Joint Communiqué of July 4, 1972, and was kept in the 1980 Constitution.”¹⁷ The perspective of the peninsula’s “peaceful unification” is reinforced in the 1987 text, through the addition of article 4. Yet, the indirect recognition of the division which this provision implies conflicts with how the boundaries of South Korea’s political sovereignty are still defined by article 3 of the constitution:

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent island.

The straight congruence established between the territory of the ROK and the whole Korean peninsula rather than its southern half testifies to the official position of the South Korean state in 1948, when it considered itself as the only legitimate government on the Korean Peninsula.¹⁸ More than sixty years later, this fiction remains legally, if not politically, valid.

Although the government in the South cannot exercise its sovereign authority over the North, the territory of the northern part of the peninsula still belongs to the South Korean government from the viewpoint of the constitution. Article 3 has been the basic legal grounds for negating the legitimacy of the North Korean government and the grounds on which the government in

¹⁷ Dae-Kyu Yoon, *Law and Democracy in South Korea. Democratic Development since 1987*, Seoul: Kyungnam University Press, 2010, p.259.

¹⁸ *Ibidem*, p.261.

Pyongyang has been defined as “an anti-state organization.” Laws such as the Anti-Communist Act and the National Security Act that ban or legitimize crackdowns on pro-North Korean activity in the South were justified on the basis of Article 3.¹⁹

Apart from the references to reunification, the rhetoric of peace and pacification features prominently in both the preamble and the constitution, but interestingly, the language of security never looms very far away. For instance, the declared objective to “contribute to lasting world peace and the common prosperity of mankind” is supposed to ensure the realization of a triptic of unalienable rights akin to those enshrined in the American Declaration of Independence: life, liberty, and the pursuit of happiness.²⁰ However, in the Korean version, the enumeration becomes “security, liberty and happiness for ourselves and our posterity forever.” Article 5 of the constitution further intensifies this juxtaposition of peace and security, and reinforces the consecration of the latter as the ultimate collective good:

- (1) The Republic of Korea shall endeavor to maintain international peace and shall renounce to all aggressive wars.
- (2) The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality shall be maintained.

The “sacred mission of national security” entrusted to the armed forces is not a distinctive aspiration of post-1987 democratic South Korea, but ensuring the political neutrality of the army represents an exigency with a particular resonance in the history of the ROK, under the yoke of military regimes from 1961 to 1987. Both Generals Park Chung-hee (1961-1979) and Chun Doo-hwan (1980-1987) seized power as a result of coups d'état and legitimized their rule through indirect presidential elections. At the time of the revision,

Debate on how the new constitution should mandate the military's political neutrality was contentious. The RDP [the opposition Reunification Democratic Party] wanted the preamble to proscribe the military's involvement in politics and the body to forbid “any kind of military intervention for any reason.” The governing DJP [Democratic Justice Party] protested, arguing that Article 4.2 of the incumbent constitution - “The Armed Forces shall be charged with the

¹⁹ *Ibidem.*

²⁰ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” (United States Declaration of Independence, July 4, 1776).

sacred mission of national security and the defense of the land” - adequately defined the military’s duty. ²¹

Defining the role of the military was only one of the divisive issues which were settled through the talks held between the government and the political opposition to negotiate the constitutional revision of 1987.

A negotiated constitutional revision

The opposition’s demand for constitutional reform emerged in the mid-1980s when it crystallized around the modalities of the presidential election. Under the Fifth Republic’s constitution, the president was to be elected for a seven-year non-renewable term through indirect vote. With the prospect of Chun Doo-hwan’s presidency terminating in 1987, opposition parties started to campaign for direct suffrage as early as 1985. In April of that year, three of them (the New Korea Democratic Party or “*sinhan minjudang*,” the Democratic Korea Party or “*minju han’gukdang*,” and the Korea National Party or “*han’guk kukmindang*”) won together more than the majority of the popular vote in the legislative polls, a victory which strengthened their determination even though it did not translate in a majority of seats in the parliament given electoral malapportionment rules.

Convinced that the incumbent leader General Chun Doo-hwan and his handpicked successor General Roh Tae-woo could be defeated in the forthcoming presidential election if the voting system was altered, the opposition continued to press for a constitutional reform that the government kept on resisting. However, the organized political opposition was far from being the only force mobilized in favor of change in the 1980s. Major social movement groups independent from the opposition parties were also engaged in the struggle to take down Chun’s regime and bring democracy in its place: students, workers, and church activists principally. In the spring of 1987, the pro-democracy struggle accelerated as anti-regime groups were crucially rallied by the urban middle class, outraged by a series of torture cases against student dissidents made public earlier that year. The mobilization culminated in the mass demonstrations of the “June Democracy Movement,” leading the ruling camp to concede an eight-point reform proposal presented by Roh Tae-Woo on June 29. It is commonly thought that the massive nature of the demonstrations, coupled with the prospect

²¹ Jung-Kwan Cho, “The Politics of Constitution-Making during the 1987 Democratic Transition in South Korea,” *Korea Observer*, Vol.35, No.2, 2004, p.186.

of the upcoming 1988 Olympic Games in Seoul, were responsible for discouraging the incumbent military elite from resorting to repression and spilling blood the way it had in May 1980, when the Kwangju uprising was crushed.²²

Although the amendment of October 27, 1987, was the first of South Korea's constitutional revisions to take place following negotiations between the government and the opposition, its process was mainly elite-controlled and highly exclusive.

The dramatic opening of political transition rapidly shifted public focus from confrontation between the state and contentious civil society to negotiation between governing and opposition parties [...]. The change of focus gained political parties increasing autonomy from previous power sources - the governing Democratic Justice Party (DJP) from the state and the opposition Reunification Democratic Party (RDP) from the pro-democracy movement. Negotiation about political schedules and rules would be conducted primarily by party politicians.²³

The negotiation format that the Democratic Justice Party, led by Roh Tae-woo, and the newly formed Reunification Democratic Party, dominated by the rival factions of Kim Young-sam and Kim Dae-jung, agreed upon was the following:

The two parties alone would reach a bipartisan proposal not by vote but by mutual compromise during the Eight-Member Political Talks (EMPT). Next they would invite minor parties to participate in a Special Committee for Constitutional Revision (SCCR) in the National Assembly to turn the bipartisan proposal into a formal constitutional amendment bill for adoption by referendum.²⁴

The "Eight-Member Political Talks" ("*8in chŏngch'i hoedam*") proceeded daily from August 3 to 31, when a final compromise was adopted. The creation of a constitutional court features among the institutional changes decided by the two camps. Judicial review in itself was not a novelty introduced by the constitution of 1987. The various political regimes experienced by the Republic of Korea all displayed mechanisms to uphold the supremacy of the constitution and potentially review the conformity of legislative statutes to its norms. By 1987, three different systems had been put to test: the constitutional committee of the First,

²² Jung-Kwan Cho, *From Authoritarianism to Consolidated Democracy in South Korea*, Unpublished doctoral dissertation, Yale University, New Haven, 2000, p.251.

²³ Jung-Kwan Cho, "The Politics of Constitution-Making," pp.182-183.

²⁴ *Ibidem*, p.183.

Fourth, and Fifth Republics; the constitutional court of the short-lived Second Republic; and the decentralized model embraced by the Fourth Republic, in which constitutional adjudication was carried through the ordinary tribunals and the supreme court (as is done in the United States, in contrast to the practice of continental Europe). Even though judicial review was not completely inexistent, it never went very far given the absence of separation of powers and lack of independence on the part of the judiciary that characterized most of South Korean governments after 1948 - with the exception of the Second Republic, which perished only a year after its coming into being.

As a matter of fact, the institution conceived in articles 111, 112, and 113 of the 1987 constitution is closely modeled on the constitutional court which was envisioned for the democratic Second Republic, but never had the opportunity to operate due to the regime's very limited existence - the Constitutional Court Act was passed on April 17, 1961, a month before General Park Chung-hee seized power through a coup d'état. The "unrealized" precedent of 1960 was itself designed after the European system of constitutional adjudication, centralized in the hands of a specialized institution rather than delegated to ordinary tribunals as exemplified by the American model. Yet, such choice was not predetermined in the South Korean context.

With the collapse of the Syngman Rhee government [in 1960], many arguments arose regarding the need to establish a constitutional court. The Korean Bar Association, however, opposed the idea on the basis that, given that the Rhee government had weakened the judiciary through unlawful interferences by the executive, establishing a constitutional court separate from the Supreme Court would further weaken the judiciary as it would be tantamount to dividing and diminishing the judicial powers into smaller parts. By contrast, the scholarly community of public law experts was actively in favor of creating a constitutional court. They argued not only that the adoption of the constitutional court system was a worldwide trend, but also that it is right and proper to confer the power to adjudicate constitutional issues on a constitutional court that has expertise on constitutional matters.²⁵

In 1987, debates about the most appropriate form of constitutional adjudication were rekindled, and both options considered again. According to the Constitutional Court of Korea's own account of the events,

²⁵ The Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2008, p.75.

During the revision process, different political factions expressed different views on how to structure the system of constitutional adjudication. As of July 1987, during the initial stages of negotiations within the National Assembly, the ruling party and the opposition were all in agreement as regards the idea of granting the power of judicial review to the Supreme Court. However, as negotiations progressed, the idea of adopting the system of constitutional complaints began to emerge, and both the ruling party and the opposition eventually agreed to establish an independent Constitutional Court for adjudicating constitutional complaints.²⁶

This narrative nonetheless appears to simplify and slightly mischaracterize the positions of the actors and their respective evolutions when contrasted with Cho Jung-Kwan's study of the constitution-making process during August 1987. According to Cho, the ruling Democratic Justice Party did not enter the "Eight-Member Political Talks" supporting the proposal to grant the supreme court the power to review the constitutionality of laws. Indeed, the DJP's position regarding existing institutions in general, and judicial institutions in particular, was to ensure as minimal as possible a departure from the framework of the Fifth Republic. The mechanism for judicial review provided by the 1980 constitution being a constitutional committee separate from the judiciary, the DJP limited itself to advocate its transformation into a constitutional court.

On the contrary, the opposition Reunification Democratic Party defended the project to transfer the power of judicial review from the ineffective constitutional committee to the supreme court, while reforming the procedure to appoint the institution's chief justice and justices by requiring that the President of the ROK (responsible for all appointments under the 1980 constitution) "secure recommendations and consent from an autonomous judges council."²⁷ None of these proposals were however retained in the final compromise. By the end of August 1987, "the opposition relented on many issues," including more important ones to it than the reform of the judiciary which did not appear to be at the forefront of the negotiations that lasted less than a month. According to Kim Young-sam, the feeling then prevailing in the opposition was that "since ninety percent was already obtained by introduction of direct presidential election, we did not need to delay the political schedule because of a mere ten percent remaining."²⁸

The Constitutional Court of Korea's description of the bargaining process which preceded its birth remains instructive in so far as it highlights why agreeing to the ruling

²⁶ *Ibidem*, p.82.

²⁷ Jung-Kwan Cho, "The Politics of Constitution-Making," p.190.

²⁸ *Ibidem*, p.194.

party's proposal to create a constitutional court did not represent a one-sided concession on the part of the opposition. Indeed, not only did the constitution of the democratic Second Republic provide a framework for the new institution, but a court separate from the judiciary could also be granted a competence which had never existed before in any system of judicial review experimented with by the ROK: the power to adjudicate constitutional complaints.

The making of a new institution: from selective borrowing to creative adaptation

Neither decentralized judicial review (through ordinary tribunals and the supreme court), nor the European model of constitutional adjudication by a specialized institution, were abstract novelties first discussed in 1987. By contrast, the introduction of a system of constitutional complaints represented a true innovation in the Korean scheme of constitutional review. The constitution of 1987 did not specify anything about what this system would look like, leaving the issue to be determined later through ordinary legislation. Yet, the general procedure was well known from the constitutional experience of other societies. The primary purpose of constitutional complaints is to enable individuals who allege that their basic rights have been violated by an exercise of state power to directly bring their case before a constitutional jurisdiction. It is a mechanism particularly relevant in post-transitional contexts as it is considered to make possible an effective protection of basic rights. The procedure itself is deeply associated with German constitutional justice, which is why the Constitutional Court of Korea is often said to have been modeled after the Federal Constitutional Court of Germany sitting in Karlsruhe. The kinship between the two courts is real, but should not be exaggerated.

The first element of convergence between them lies in the general structure of centralized adjudication entrusted to a specialized constitutional court. The model was born in Austria in the early 1920s, but was truly "popularized" after the constitutional re-foundation of the Federal Republic of Germany in the aftermath of the Second World War. Indeed, as the West German constitutional court imposed itself as one of the most successful institutions of the post-war order, it came to embody a model of rupture with the authoritarian past and commitment to basic rights emulated by many post-transitional societies in Europe and the rest of the world. The German experience seemed to exemplify how the establishment of a new, small, and specialized constitutional court could represent an efficient way to isolate constitutional review from the institutions and personnel of the traditional judicial order,

necessarily part of the old regime's state apparatus. The creation in 1951 of a mechanism of direct constitutional request concretized the German court's mission of protecting and promoting basic rights.²⁹

Both the general structure of centralized adjudication and the specific replication of the direct request procedure constitute strong elements of resemblance between the Federal Constitutional Court of Germany and the Constitutional Court of Korea. Yet, institutions are far from being predetermined in their inner workings by the formal mold in which they were made. As a result, two courts similar in design can operate in diverging ways depending on the context in which they are placed. The constitutional courts sitting in Karlsruhe and Seoul are not such twin jurisdictions. A closer comparative examination of both institutions reveals that the borrowings made by the Korean court to its German counterpart are highly selective, while they also display completely unrelated features.

Composition and selection

In terms of composition, the two courts notably present little likeness. While the Federal Constitutional Court of Germany is made of sixteen justices chosen for a twelve-year term by the parliament, the Constitutional Court of Korea appears to be strictly fashioned after its 1960 predecessor. It consists of nine full-time members (only six of them were full-time members in 1987),³⁰ appointed for a six-year renewable term.³¹ Although all justices are formally appointed by the President of the ROK, the selection process is evenly divided between the executive, the judiciary, and the parliament, as each branch nominates three judges.³² The President of the ROK also designates the president of the constitutional court among the three justices of his choice and the nomination has to be validated by the National

²⁹ Christoph Schönberger, "La constitution allemande, la cour de Karlsruhe, et le 'patriotisme constitutionnel'," Paper presented at *La constitution en question. Concepts et conceptions à l'épreuve de l'évolution du droit. Contributions des écoles allemandes et autrichiennes*, Institut Historique Allemand, Paris, January 18, 2013.

³⁰ "The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President" (Article 111, section 2 of the Constitution of the Republic of Korea).

³¹ "The term of office of the Justices of the Constitutional Court shall be six years and they may be reappointed under the conditions as prescribed by Act" (Article 112, section 1 of the Constitution of the Republic of Korea).

³² "The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President" (Article 111, section 2 of the Constitution of the Republic of Korea). "Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court" (Article 111, section 3 of the Constitution of the Republic of Korea).

Assembly.³³ A very similar formal selection process based on institutional checks and balances was designed for the “unrealized” constitutional court of 1960.

Yet, procedural additions were also made to this original scheme rehabilitated in 1987. Regarding the three nominees of the National Assembly, an important informal practice has developed since the early days of the Sixth Republic: one of the judges has to be chosen by the opposition, while another is selected as a result of an agreement between the majority and the opposition.³⁴ This second constraint, of more recent origin than the first, has produced a deadlock situation throughout 2012, leaving the court with only eight justices for a year as rival parties could not settle on a common nominee. They finally concurred for the wave of appointments which took place in September 2012, when five new justices were inaugurated at the constitutional court (three of whom were nominated by the National Assembly and two by the chief justice of the supreme court). A further transformation of the selection process was initiated in September 2000 with the start of confirmation hearings for the appointment of the president of the court as well as for National Assembly nominees. During these hearings,

Candidates were asked about their views on controversial constitutional issues and on certain decisions of the Constitutional Court as well as about their decisions during their past career as judges. Candidates were also scrutinized about their wealth, and educational and professional backgrounds.³⁵

This practice was extended to the presidency’s and judiciary’s remaining nominees in September 2006. Relatively blurred, ideological preferences and “judicial philosophies” are not seen as playing the same role in the Korean selection process as they do in the U.S. context.³⁶ So far, controversies have tended to crystallize on the appointment of the head of the court alone, and were not directly related to the beliefs of the candidates in question. On the contrary, most incidents seem to have mainly derived from inter-institutional disputes between the presidency and the parliament. The first controversy occurred in 2006, when President Roh Moo-hyun chose Justice Jeon Hyo-sook (the first of the only two women who have served in the court to date) to become the next president of the institution. On the constitutional court’s bench since 2003, Jeon resigned in August 2006 in order for Roh to

³³ “The president of the Constitutional Court shall be appointed by the President from among the Justices with the consent of the National Assembly” (Article 111, section 4 of the Constitution of the Republic of Korea).

³⁴ Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

³⁵ The Constitutional Court of Korea, *Twenty Years*, p.111.

³⁶ Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

proceed to her nomination as president of the court, but a polemic arose over the meaning of article 112, section 1 of the constitution, which was interpreted as implying an obligation for judges to complete their six-year term. The plan to appoint Mrs. Jeon had to be nullified, and a judge from the supreme court, Lee Kang-kook, was designated at the head of the jurisdiction in February 2007. The replacement of Lee Kang-kook scheduled for February 2013 also led to a conflict within the National Assembly, which must consent to the appointment of the court's president. The nomination of Justice Lee Dong-heub at the head of the institution was strongly resisted by the opposition party, on the ground that Lee was guilty of embezzlement practices which leaked after his designation. The significance of this quagmire still has to be appraised, as it represents the first corruption scandal hitting the constitutional court, potentially putting its reputation at risk in the eyes of the public.³⁷

Table 7. The composition of the Constitutional Court of Korea in comparative perspective.

Composition of the Constitutional Court of Korea	Comparisons with South Korea's 1960 precedent and Germany
-nine full-time members for a six-year renewable term	-Constitutional Court of 1960: same composition -Federal Constitutional Court of Germany: sixteen full-time members for a twelve-year term
-three members nominated by President of the ROK, three by the National Assembly, and three by the Chief Justice of the Supreme Court; all appointed by the President of the ROK -informal practice that one of the parliamentary nominations be decided by the opposition and one as a result of a compromise between the majority and opposition parties	-Constitutional Court of 1960: similar formal selection process -Federal Constitutional Court of Germany: nomination by Parliament, appointment by President of the Republic
-confirmation hearings since 2000 for the National Assembly nominees, since 2004 for all nominees	-post-1987 innovation -Federal Constitutional Court of Germany: no confirmation hearings -feature inspired by the American system
-qualifications: at least forty years of age and fifteen years or more of experience as (1) judge, prosecutor, or attorney; (2) a worker in a law-related area in a state agency, a public or state corporation, a state-invested or other entity, with a license to practice law; (3) a faculty member (assistant professor or higher) in the discipline of law at an accredited college, with a license to practice law	-Constitutional Court of 1960 and Federal Constitutional Court of Germany: justices also have to be qualified as court's judges -early and continuing debates about whether such qualifications are too narrow or not, French Constitutional Council considered a model by those in support of diversifying the composition of the court

³⁷ Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

Jurisdiction

In terms of jurisdiction, the constitutional court of 1987 is endowed with five competences enumerated in article 111 of the constitution:

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 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.

i. Constitutional review of legislation through and outside the ordinary courts

The top four attributions were already those granted to the constitutional court of 1960. The first constitutes the essence of constitutional review, controlling the conformity of laws to the text of the constitution. This task is of a relative recent origin in the history of judicial institutions, invented or “discovered” by the U.S. Supreme Court in its 1803 ruling *Marbury v. Madison*.³⁸ As mentioned before, the model of decentralized judicial review associated with the American system can be contrasted with the centralized model of constitutional adjudication which appeared in Europe in the 1920s and is characterized by the existence of a specialized jurisdiction. Within the centralized system, different forms of constitutional review are available. The type of constitutional review implied in article 111, section 1 of the South Korean constitution is “*a posteriori*” or “reactive,” taking place once laws are enacted and in force (by opposition to an “*a priori*,” or “preventive” form of control, occurring before the lawmaking process is completed as was exclusively the case in France before 2008). It is also a “concrete” or “incidental” mode of review, that is to say, happening in the course of a concrete dispute, and as a result of a request by the ordinary courts (by opposition to “abstract” review, when the constitutional jurisdiction intervenes regardless of whether the challenged statute applies to a concrete dispute).

In the system of centralized adjudication, ordinary courts are not empowered to engage in constitutional interpretation the way they are in decentralized judicial review, but

³⁸ *Marbury v. Madison*, 5 U.S. 137 (1803).

their role is not necessarily void. Indeed, in the incidental type of constitutional control which always takes place *a posteriori*, ordinary tribunals are in charge of deferring issues before the constitutional court. Consequently, they may also filter what gets decided by the higher jurisdiction. In the South Korean post-transition context, this potential source of discretion and inaction has raised legitimate concerns:

If the Constitutional Court's power to review the constitutionality of statutes can only be exercised upon the request of ordinary courts, there is a danger that this power will become dependent upon the decisions of ordinary courts. Indeed, under previous constitutions, the courts were so timid in making any request for a review that the review powers of the constitutional adjudicator could rarely be exercised.³⁹

As a result, a remedy against the possible obstruction of ordinary tribunals was explicitly introduced by the Constitutional Court Act enacted on August 5, 1988. Drafted almost a year after the political talks and compromise of August 1987, the Constitutional Court Act was designed to “set forth the provisions necessary for the organization and operation of the Constitutional Court and its adjudication procedures,”⁴⁰ issues which had not been decided at the time of the constitutional revision. The configuration of the political forces in the summer 1988 was however different from what it was a year before, when the ruling Democratic Justice Party negotiated with the opposition Reunification Democratic Party.

The Constitutional Court Act was indeed drafted and enacted after the legislative elections of April 1988 in which the ruling DJP lost its absolute majority but remained the strongest party in the National Assembly, while the former united opposition was now split between Kim Young-sam's Reunification Democratic Party and Kim Dae-jung's Peace Democratic Party (“*p'yŏnghwa minjudang*”).⁴¹ Therefore, the Constitutional Court Act was the product of a new compromise which included the possibility to circumvent the ordinary courts' traditional inertia. This remedy is exposed in article 68, section 2 of the law and ensures that if an ordinary tribunal declines to ask the constitutional court to examine a statute's validity, a request can be filed by the litigants directly with the constitutional

³⁹ The Constitutional Court of Korea, *Twenty Years*, p.95.

⁴⁰ Article 1 of the Constitutional Court Act.

⁴¹ Let's recall that the two Kims competed separately in the presidential election of December 1987, enabling the victory of Roh Tae-woo.

jurisdiction.⁴² Therefore, this mechanism offers parties the opportunity to bypass the possible reluctance of ordinary courts to activate judicial review, which was considered their dominant attitude under the authoritarian regimes. This disinclination is not only a matter of judicial independence, but also of institutional rivalry, as established jurisdictions can be - and often are - unwilling to cooperate with new ones that encroach upon some of their entrenched interests. This has been the situation in South Korea where the supreme court and the constitutional court have been and, to a certain extent, still are in competition for institutional preeminence.

To come back to article 68, section 2, although its mechanism is “categorized as a constitutional petition, it is no more than an initiation to review the constitutionality of law.”⁴³ Constitutional petitions in the usual sense are covered by article 68, section 1 of the Constitutional Court Act. They entitle “any person who claims his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power” to file a constitutional complaint. The provision does not specify what constitutes “an exercise or non-exercise of governmental power,” leaving it to the court to define the notion’s contours. As noted above, the possibility of an abstract control of laws’ constitutionality - which implies that legislative acts may be reviewed outside litigation - is not explicitly provided for by the South Korean constitution of 1987. However, the constitutional court has deduced it from the mechanism of constitutional complaint in article 68, section 1:

When there is no concrete dispute being litigated at an ordinary court, an individual can file a constitutional complaint on grounds that a specific statute is infringing upon his or her constitutional rights. Article 68 Section 1 of the Constitutional Court Act provides that constitutional complaints may be filed to seek relief for violations of right caused by the exercise of state power. The Constitutional Court has interpreted “state power” in this provision to encompass legislative power, and therefore ruled that if an individual’s constitutional rights are being violated directly and currently by a statute, even before any specific act takes place to implement it, then the individual may file a constitutional complaint without having to go through prior relief procedures (2 KCCR 200, 89 Hun-Ma 220, June 25, 1990). This has become the established precedent of the Court.⁴⁴

⁴² “If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected [by an ordinary court], the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned” (Article 68, section 2 of the Constitutional Court Act).

⁴³ Dae-kyu Yoon, *Law and Democracy in South Korea*, p.153.

⁴⁴ The Constitutional Court of Korea, *Twenty Years*, p.171.

Therefore, there are three channels through which the Constitutional Court of Korea can be asked to review the constitutionality of laws: upon the request of an ordinary court in the course of a legal dispute where the constitutionality of a statute has been raised by a party (article 41 of the Constitutional Court Act); by a party who may file a constitutional complaint if the ordinary court does not request the review (article 68, section 2 of the Constitutional Court Act); and, outside a concrete dispute, by any individual who estimates that a statute constitutes an exercise of legislative power, and by extension of state power, which directly infringes upon one of his or her basic rights (article 68, section 1 of the Constitutional Court Act as interpreted by the jurisprudence of the constitutional court).

By September 2013, 24,445 cases had been filed with the Constitutional Court of Korea. However, less than 20% of them were challenging the constitutionality of legislation, either through ordinary courts (820 cases filed between 1988 and 2013) or article 68, section 2 (4,193 were filed against decisions by ordinary courts not to request a review of constitutionality to the constitutional court). Almost 80% of the cases (19,350) reached the court through constitutional petition against state power (article 68, section 1).⁴⁵ As was mentioned above, legislative power has been interpreted by the court as falling within the scope of governmental power which can violate basic rights and be directly appealed against. However, only a small portion of petitions against state power are filed against legislative power, with about 80% of them being raised against executive acts.

The complaint procedure of article 68, section 2 is supposed to be unique to the South Korean system.⁴⁶ The possibility to trigger constitutional review when the judiciary does not request it expresses a clear defiance against ordinary courts, as it sets up a remedy against their possible inaction. However, judicial dynamics are complex and the powers vested in the constitutional court do not unequivocally make it an all-powerful institution in the face of ordinary tribunals in general, and of the South Korean supreme court in particular. In the first place, three of the nine constitutional justices are designated by the chief justice of the supreme court, a practice recently criticized by Lee Kang-kook - former president of the constitutional court (2007-2012) and himself a judge at the supreme court before - on the ground that it confers undue ascendancy to the supreme court over the constitutional jurisdiction.⁴⁷ Second, the judgments of ordinary courts cannot be construed as falling under

⁴⁵ See table 4 in chapter one.

⁴⁶ Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

⁴⁷ Kang-Kook Lee, Hye-Jin Kim, and Yoo-Min Won, "La cour constitutionnelle de la République de Corée," *Les nouveaux cahiers du Conseil constitutionnel*, No.37, 2012, pp.205-226.

the category of “state power” susceptible to infringe on basic rights. This exemption is explicitly provided by article 68, section 1, according to which “any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court.” As a result, constitutional complaints can only target ordinary tribunals’ decision not to defer a constitutional issue before the constitutional court. Petitions cannot challenge ordinary courts’ judgments, which contrasts with the German system where such judgments can be a proper matter for review. Finally, the rulings of the constitutional court are not immune against the risk of being ignored and left unapplied by the judiciary, an adversary position which the South Korean supreme court has embraced for a long time.

ii. Rationalization of the legal order

The Constitutional Court of Korea’s jurisdiction over “competence disputes between State agencies, between States agencies and local governments, and between local governments” has only drawn an infinitesimal portion of cases: 81 out of 24,445 cases received in the course of the past twenty-five years. However, this function is not a marginal one in the broader history of judicial review. Indeed, seminal institutions such as the United States Supreme Court or the constitutional courts of Austria and Czechoslovakia (the first ones to emerge on the continent in 1919 and 1920) were not created to ensure the protection of individual basic rights, which is recognized as the prominent function of courts today. Instead, judicial review first appeared as a mechanism designed to stabilize the hierarchy of norms which exists in any rational legal system - whether it is democratic or not. Therefore, it is not a coincidence if the first constitutional courts developed in federal polities where conflicts between national and local legislation needed to be reconciled. By contrast, the Republic of Korea has a long tradition of centralized government. After the 1987 transition and especially since the mid-1990s, local autonomy has progressively increased, leading to more cases being filed with the constitutional court in recent years. While only nine competence disputes were brought to the court between 1988 and 1998, this number was six times higher in the following decade (reaching forty-two cases), and thirty new cases were filed between between 2008 and 2013 alone.

iii. Militant powers and the defense of the democratic order

Two of the court's five tasks enumerated in article 111 of the constitution can seem highly politically charged: impeachment and dissolution of a political party. These responsibilities are precisely conferred upon the court so that they can be withdrawn from the realm of pure partisan decision-making and thus receive an extra-political source of legitimacy. Both the impeachment and dissolution procedures sanction the same type of behavior from public officials or political parties: acting in contradiction with the "basic order of free democracy." Impeachment is meant to remove a high profile public official (such as the President of the Republic, Prime Minister, Members of the State Council and Ministers, etc.) if he or she has committed a grave violation of the constitution or of the laws in the course of his or her services.⁴⁸ Judges of the constitutional court can also be expelled from office through the impeachment procedure.⁴⁹ Impeachment resolutions have to be passed by the parliament (which is unicameral in South Korea), leading to a trial where the chairman of the Legislation and Judiciary Committee of the National Assembly ("*kukhoe pŏpche pŏpsa wiwŏnhoe*") stands as the impeachment prosecutor and the constitutional court as the adjudicator. The impeachment procedure was famously used on one occasion since the beginning of the Sixth Republic, against President Roh Moo-hyun in the spring of 2004.⁵⁰

The other possible involvement of the constitutional court in defense of the democratic order stems from its power to pronounce the dissolution of political parties. Article 55 of the Constitutional Court Act specifies the conditions under which a party can be outlawed:

If the objectives or activities of a political party are contrary to the basic order of democracy, the Executive may request to the Constitutional Court, upon a deliberation of the State Council, an adjudication on dissolution of the political party.

This procedure is exemplary of the means at the disposal of democracies to defend themselves against the forces that try to subvert them by abusing their very rules and principles - such as the freedom of association or the freedom of speech. The notion of "militant democracy" captures the attitude of constitutional regimes which prevent rights and freedoms to be used in a way meant to undermine the democratic order. The most notorious

⁴⁸ Article 48 of the Constitutional Court Act.

⁴⁹ Article 112, section 3 of the Constitution and article 48, section 2 of the Constitutional Court Act.

⁵⁰ This case is analyzed in chapter three.

example of a constitutionally militant democracy is Germany. As stated in article 21 of the 1949 Basic Law for Federal Republic of Germany:

(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

Two cases of dissolution were rendered in the early years of the Federal Constitutional Court: in 1952, against the Socialist Reich Party, openly neo-Nazi; and in 1956, against the Communist Party of Germany.⁵¹ As the German constitutional court made clear in its 1956 decision against the Communist Party, the basic law's provisions are only aimed at those parties which, by their purpose or plan, demonstrate their hostility to the "free democratic basic order," thereby asserting that it was not advocating the doctrine of Marxism-Leninism itself which was on trial.⁵² In South Korea, no request to dissolve a political party was ever brought by the executive before the constitutional court until recently.⁵³ This does not mean that political tolerance has reigned in the country since its transition to democracy in the late 1980s. On the contrary,

Registration of a political party with the National Election Management Committee under the Political Party Act is required for it to be eligible for legal protection. When a political party's objectives or activities run contrary to constitutional order, the party is subject to criminal prosecution under the National Security Act, which outlaws "anti-state organizations" (whether or not constituted as political parties) and subject individuals to severe criminal punishment for any form of association with or assistance provided to such outlawed organizations. Threat of prosecution under the National Security Act makes it difficult to

⁵¹ 2 BVerfGE 1 (1952) and 5 BVerfGE 85 (1956).

⁵² Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Durham: Duke University Press, 1997, p.223.

⁵³ On November 5, 2013, the Ministry of Justice petitioned the Constitutional Court of Korea requesting the dissolution of the Unified Progressive Party ("*t'onghap chinbodang*") which counts six lawmakers in the National Assembly, accusing it of pro-North Korean activities. As of January 2014, the petition had not been adjudicated by the court. See He-suk Choi, "Ministry Files for Dissolution of Unified Progressive Party," *The Korea Herald*, November, 5, 2013.

imagine a situation where a registered political party would be subject to dissolution by judgment of the Constitutional Court. Consequently, no such case has yet been filed.⁵⁴

As will be explored in this dissertation, the language of militant democracy and the rhetoric of defending the constitutional order have led the court to discharge its role as guardian of the constitution in an ambivalent way, both curbing the security instruments inherited from the authoritarian regimes and strengthening their relevance as mechanisms enforcing the non-inclusive legacy of the transition.

iv. The moving contours of the protection against basic rights violations

The two “militant” attributions of the court (adjudication of impeachment and dissolution of political parties) are not unprecedented features of constitutional adjudication in South Korea. They were already envisioned as part of the jurisdiction of the court established by the 1960 constitution. The introduction of constitutional complaints is thus the true novelty of the 1987 constitution when it comes to judicial review. Under article 68, section 2 of the Constitutional Court Act, constitutional complaints can be used to bypass inactive courts when they refuse to request that the constitutionality of a statute contested in the course of a concrete dispute be examined by the constitutional court. However, this procedure is only one of the two mechanisms of constitutional petition set up by the revised version of the constitution. It is not the most important one either. The other procedure is directly inspired by German constitutional justice, and consists in the possibility to file a constitutional complaint against state power. As provided for in article 68, section 1 of the Constitutional Court Act:

Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court: *Provided*, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.

After the provision was enacted in 1988, there was no sense of certainty about how it would work in practice and how heavily the enunciated restrictions would weigh on its use. Progressively, the scope of governmental power falling under the article was specified, and

⁵⁴ Dae-kyu Yoon, *Law and Democracy in South Korea*, p.164.

extended, by the court. As mentioned earlier, it was first interpreted to encompass legislative power, thereby allowing individuals to seek relief against statutes and treaties infringing upon their basic rights outside the course of a concrete dispute. The scope of article 68, section 1 was then construed as including executive orders, administrative regulations, and ordinances,⁵⁵ as well as state action not subject to administrative litigation.⁵⁶ Judgments of the ordinary courts stand nonetheless outside the purview of the court, an exception which exists in Austria but not in Germany and is lamented by some constitutional activists.⁵⁷

Almost 80% of the cases filed with the Constitutional Court of Korea are constitutional petitions against state power. The majority of them are raised against executive acts, and in particular against public prosecutors' decisions to indict - and more frequently not to indict - a person suspected of a crime. Until 2008, a constitutional complaint represented the "last means available to challenge prosecutors' broad discretion to indict."⁵⁸ Yet, a ruling of unconstitutionality from the court could only bind prosecutors to reexamine a decision of (non-) indictment, and not force them to change the decision's outcome. Since the revision of the Criminal Procedure Act enforced on January 1, 2008, it is now possible to also challenge a prosecutor's decision before the higher court active in the same jurisdiction as the prosecutor.

While the Constitutional Court of Korea has held that executive prerogative actions constitute proper subject matters for constitutional complaints,⁵⁹ it has also removed issues of a "highly political nature" from falling under its scrutiny.⁶⁰ In 2004 for instance, the court considered that it could not pronounce itself on whether the executive decision to dispatch South Korean troops to Iraq was constitutional or not, thus resisting the judicialization of the issue prompted by the demand for review.⁶¹ As the present research contends, this attitude is far from being anecdotal within the national security jurisprudence of the Constitutional Court of Korea, or of its corresponding institutions in other democracies. Jurisdictions in

⁵⁵ 2 KCCR 365, 89Hun-Ma178, October 15, 1990.

⁵⁶ 4 KCCR 51, 91Hun-Ma111, January 28, 1992.

⁵⁷ Kang-Kook Lee, Hye-Jin Kim, and Yoo-Min Won, "La cour constitutionnelle de la République de Corée," p. 214.

⁵⁸ Dae-kyu Yoon, *Law and Democracy in South Korea*, p.160.

⁵⁹ 8-1 KCCR 111, 93Hun-Ma186, February 29, 1996.

⁶⁰ 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004.

⁶¹ This case is analyzed in chapter eight.

charge of judicial review can importantly assert themselves through the decision not to rule.⁶² Such an act of self-restraint does not necessarily indicate that they are in a situation of relative weakness or intrinsic subservience vis-à-vis the political branches of the government. On the contrary, self-restraint constitutes an important resource whose activation is not antagonistic to courts' own interests.

Table 8. The jurisdiction of the Constitutional Court of Korea in comparative perspective.

Jurisdiction of the Constitutional Court of Korea	Comparisons with South Korea's 1960 precedent and Germany
1. the constitutionality of statutes at the request of ordinary courts 2. impeachment motions 3. dissolution proceedings of political parties 4. competence disputes 5. constitutional complaints as provided by law	-attributions 1, 2, 3, 4 are the same as those of the Constitutional Court of 1960 -attribution 5 is an innovation of the 1987 constitution, modeled on the German practice of direct constitutional request
Two mechanisms for constitutional complaints: 1. constitutional complaint to seek relief for a violation of basic rights caused by an exercise or non-exercise of state power (Article 68, section 1 of the Constitutional Court Act) 2. constitutional complaint to trigger the Constitutional Court's power of reviewing the constitutionality of statutes when an ordinary court refuses to request constitutional review (Article 68, section 2 of the Constitutional Court Act)	-procedure 1 against state power is derived from the German model, which has influenced other systems than the South Korean one (see the <i>recurso de amparo</i> in Spain for instance); in South Korea however, possible violations of rights by judgments of the ordinary courts are outside the scope of review (like in Austria but unlike Germany) -procedure 2 is idiosyncratic to the South Korean system; judgments by the ordinary courts cannot be reviewed but an individual may bypass an ordinary court's decision not to raise the constitutionality of a statute through a direct constitutional complaint

Adjudication procedures

When it comes to composition and selection, the new constitutional court of 1987 looks like a copy on paper of its 1960 predecessor. However, formal rules only account for part of an institution's life. Some unwritten procedures greatly contribute to the specificity of the Constitutional Court of Korea, such as the requirement that one of the parliament's three nominations be left to the discretion of the opposition and another be the result of a consensus between the opposition and the majority. In terms of jurisdiction, the procedure of direct constitutional complaint and the fact that petitions against state power have become the

⁶² Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Haven: Yale University Press, 1986.

central vehicle to reach the court justify comparisons with its German counterpart, even though the two systems are not identical. The relation of the South Korean system to the German model is consequently best described as one of selective borrowing and creative adaptation.

The Constitutional Court of Korea's adjudication procedures illustrate how the institution is a mix of both idiosyncratic elements and selective transfers. For instance, a distinctive feature of the current court, inherited from its 1960 model, rests in the supermajority constraint. The vote of six justices (instead of five for a simple majority) is indeed necessary for a decision of unconstitutionality to be pronounced.⁶³ In addition to the structural difficulty of invalidating a legislative act, the court has manifested early on its reluctance to render a straight unconstitutionality ruling. Less than a year after having started its operations, the court defended the position that "a statute must be interpreted as constitutionally as possible to the extent that such interpretation does not change the letter of the law or make the legislative intent ineffectual,"⁶⁴ thereby establishing its "preference for constitutionally valid interpretation."⁶⁵

As a result, the institution has adopted the German practice of modified holdings, which provides it greater flexibility in its review of statutes' constitutionality. Alongside the dichotomous possibility to declare a legislative provision constitutional ("*haphŏn*") or unconstitutional ("*wihŏn*"), the court has also engaged in rulings of limited constitutionality ("*hanjŏng haphŏn*") and limited unconstitutionality ("*hanjŏng wihŏn*"), as well as incompatibility with the constitution ("*honpŏp pulhapch'i*"). The first two are fundamentally similar in terms of legal effects and amount to a decision of partial constitutionality. They reflect the court's "preference for constitutionally valid interpretation," which was evoked before. While leaving the flawed legislation in place, rulings of partial constitutionality or unconstitutionality create a non-binding incentive for the legislature to reform the incriminated provisions. The "incompatibility" decision is used by the court when it censures a statute but holds it applicable until the legislative branch cures the defects of the law. The justices usually set a deadline by which the lawmakers have to abide, and justify the delayed nullification of the provisions as necessary to prevent the emergence of a "legal void."

⁶³ Article 23, section 2 of the Constitutional Court Act.

⁶⁴ 1 KCCR 69, 88Hun-Ka5 et al., July 14, 1989.

⁶⁵ The Constitutional Court of Korea, *Twenty Years*, p.132.

Customary in the common law tradition, the practice of publishing dissenting opinions was adopted by the Federal Constitutional Court of Germany in 1971, and by the Constitutional Court of Korea since its inception. As a matter of fact, “the practice became particularly identified in the first term with the single justice nominated by opposition parties in the National Assembly,” Byun Jeong-soo, while in the second term of the court “this role shifted to Justice Cho Seung-hyung, another Kim Dae-jung appointee.”⁶⁶ Byun is most famously associated with the dissenting opinion that he wrote against the constitutionality article 7 of the National Security Act in 1990, while Cho has continued to criticize the law’s provisions which have subsequently been examined by the court. Interestingly, their disagreements with the majority have not primarily rested on diverging understandings of national security, as both Byun and Cho recognized the serious threat posed by North Korea in the context of the division.

The tools of reasoning deployed in the court’s majority and minority decisions have been strongly influenced by the practice of other institutions. With the passing of time, the Constitutional Court of Korea has notably refined its application of a stricter four-step proportionality test comparable to the one elaborated and practiced in Europe or Israel. However, the appeal of the continental model coexists with alternative sources of reference, most prominently from the United States. This hybridization of influences was exposed by former justice and president of the court Kim Yong-joon (1994-2000) when he recognized that:

We have drawn a great deal of inspiration from the German constitutional adjudication system which is, in a sense, the forerunner of the European model. Nevertheless, we often face situations in which we wish to look away from the elaborate and heavily theoretical system of Germany and to the more lively decisions of the United States. This is probably because we feel that we can witness the spirit of freedom embedded in the American decisions, which are a source of inspiration and stimulation for us on the essence of constitutional values. Even though the Constitutional Court of Korea is patterned after the German model, we are continually looking to learn from the merits of the American system. This, I think, also partly explains the recent trend among our constitutional legal researchers, who assist the Justices of the Constitutional Court, in choosing to come to the United States for their long-term overseas training opportunities.⁶⁷

⁶⁶ Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*, Cambridge, New York: Cambridge University Press, 2003, p.226.

⁶⁷ Yong-Joon Kim, “Constitutional Adjudication and the Korean Experience,” Speech delivered at Harvard Law School, October 4, 1999. Accessed on January 27, 2013 at: <http://transitionaljustice.fyz.cn/b/650148>.

For instance, the influence of U.S. legal doctrine is manifest in the Constitutional Court of Korea's above-mentioned justification not to review the executive decision to dispatch the national armed forces to Iraq. In the course of defending why "utmost deference should be given to such a decision of highly political nature,"⁶⁸ the court compared its own attitude with the "judicial self-restraint over the matters concerning diplomacy and national defense that require a resolution of highly political nature in other nations with a long tradition of democracy."⁶⁹ The framing of the court's decision is thus very close to the "political question doctrine" which exists in American constitutional law and according to which issues by nature political, and not legal, are non-justiciable. The "political question doctrine" is only one of the many filters available to the U.S. Supreme Court. Procedurally, its main selecting device corresponds to the "writ of *certiorari*." Cases indeed reach the institution through petitions for "writ of *certiorari*," requiring that at least four justices out of nine agree to grant the writ and hear the case; otherwise, the petition is denied - which occurs for an overwhelming majority of petitions.

With or without a procedure similar to the writ, all constitutional courts narrowly select the cases that they choose to review through their screening process. The Constitutional Court of Korea cannot dismiss requests to review legislation referred by ordinary courts, but it can filtrate constitutional complaints. Over the last two decades, "more than half of the cases disposed by the Constitutional Court were denied the opportunity to be reviewed on their merit. The grounds for dismissing a petition in the course of preliminary examination include failure to exhaust other available remedies, failure to satisfy the time limits for filing a petition, and failure to submit the petition through a licensed attorney."⁷⁰

As a result, solely focusing on the decisions of constitutionality or unconstitutionality rendered by the court does not give an accurate depiction of its activities. Legislation was deemed unconstitutional in 234 out of 820 cases referred by ordinary courts between September 1988 and September 2013, which amounts to about 30% of the laws challenged through incidental review being struck down. This proportion increases when decisions of non-conformity to the constitution or partial constitutionality are added; however, it diminishes when constitutional review of legislation is initiated through petition. Out of the

⁶⁸ 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume 1, 1998-2004*, Seoul: Constitutional Court of Korea, 2006, p.348.

⁶⁹ *Ibidem*, p.349.

⁷⁰ Dae-kyu Yoon, *Law and Democracy in South Korea*, p.160.

4,193 petitions raised against ordinary courts’ decisions not to request review, half were dismissed during the screening process and only 5% led to a decision of unconstitutionality. This rate is even smaller for complaints against state power, which make up 80% of the docket before the court. Half of them were also dismissed during the screening process and less than 1% resulted in a ruling of unconstitutionality. These statistics do not erode the significance of the judgments that will be paid attention to in the course of this study. Yet, it should be kept in mind that rulings of constitutionality, unconstitutionality, or the other modified adjudication outcomes are actually very rarely pronounced by the court in comparison with the number of cases filed. Most cases are dismissed during the screening process by small benches of three justices or later rejected by a decision of the full bench. These rulings are no less important or “positive” than (un)constitutionality judgments, for they enact moments when the court decides not to rule, a position which is not neutral choice but can instead constitute a political choice.

Table 9. Adjudication procedures of the Constitutional Court of Korea in comparative perspective.

Adjudication by the Constitutional Court of Korea	Comparisons with South Korea’s 1960 precedent, Germany, and the United States
-super-majority of six members required for unconstitutionality and impeachment decisions	-same requirement in the Constitutional Court of 1960
-dichotomous type of holding (either constitutional or unconstitutional rulings) provided for by Article 45 of the Constitutional Court Act	-in practice, adoption of the German system of multiple types of holding less than a year after the establishment of the Constitutional Court of 1987; modified decisions include: limited constitutionality, limited unconstitutionality, and incompatibility with the constitution
-review of constitutional complaints by designated panels of three justices	-Germany: same preliminary review system -United States: writ of <i>certiorari</i>
-issuance of minority opinions (dissenting or concurring)	-Germany, United States: similar practice

Reconstructing South Korea’s “legal universe”

Germany as the Western mirror of the national division?

The institutional influences evoked so far have been mainly confined to recent constitutional borrowings to the post-war German model and South Korean history through

the “unrealized” precedent of 1960. Almost invisible on paper, inspiration has also been drawn in practice from the U.S. Supreme Court. The emulation of the continental model best exemplified by the court of Karlsruhe has been both selective and creative. Moreover, it is not unique to the South Korean case as other transitioning societies, like Spain, have shown interest in German constitutional patterns. Nonetheless, the parallel between judicial review in South Korea and Germany is all the more tempting since further affinities seem to tie the two cases. An element of convergence between them which is rarely insisted upon by the literature comparing the two courts is the national division context.⁷¹

After all, the German paradigm that South Korean lawmakers could contemplate in 1987 and 1988 was only that of the Western half of the country. The potential kinship between (West) German and (South) Korean institutions due to the division not only has to be raised, but interrogated, for it may hide more differences than similitudes. Both the Basic Law for the Federal Republic of Germany before 1990 and the Constitution of the Republic of Korea today allude to the prospect of reunification, albeit under different terms. The German basic law was precisely envisioned by its drafters as a provisional document, and not a full constitution, given the political situation of the country in 1949. Provisions in the preamble and main body of the text plainly expressed the understanding that the division itself was a temporary fact, and that the whole German nation could be accommodated in due time under the system of the Federal Republic. For instance, article 23 formerly read as:

For the time being, this Basic Law shall apply in the territory of the Länder of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, North Rhine Westphalia, the Rhineland Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.

The language in the preamble and provisions of the South Korean constitution are far from displaying the same degree of clarity and confidence. The main concern tied to reunification is with the peaceful nature of the process, which comes as no surprise since the ROK and the DPRK are still technically in a state of war. Indeed, no peace treaty was signed after the war which ravaged the peninsula from 1950 to 1953 ended. The North remains designated as an “anti-state organization” (“*pande kukka tanch’e*”) in part of South Korea’s criminal legal system - most conspicuously by the National Security Act in force since 1948. Yet, as will be explored in subsequent chapters, the division is not an overriding factor in

⁷¹ No mention is ever made of this shared reality in the publications of the Constitutional Court of Korea.

explaining how enmity is construed in the post-transition era by the jurisprudence of the Constitutional Court of Korea.

Although the court is today respected as one of the most trusted public institutions of the country,⁷² its success has not been equated with the development of a new culture such as the “constitutional patriotism” of West Germany. This concept emerged in the late 1970s to capture the idea that the basic law could embody the common land of the divided nation. It also expressed the possibility that patriotism could be disconnected from nationalism, and based on liberal norms rather than blood or faith.⁷³ This vision of constitutionalism as an a-nationalistic ideal is very far from being echoed in South Korea today. Therefore, the semblance stemming from the division may conceal more differences than similarities between the German and Korean cases.

An alternative source of affinity nonetheless exists between them, predating the post-war era. This kinship derives from the early 20th-century reception of the German civil law tradition in the Korean peninsula through Japan’s colonial rule. Yet, it does not imply that the three systems are interchangeable. As cautioned by Marie Seong-hak Kim,

The general lack of interest in the West in Korean law can be ascribed, at least in part, to the common belief that Korean law during the Chosŏn dynasty was dominated by, and hardly distinct from, Chinese law, whereas its modernization in the twentieth century was fastidiously modeled after German law modified by the Japanese, rendering modern Korean law rarely distinguishable from Japanese law.⁷⁴

Just as post-transitional South Korean constitutional order and practice are only selectively patterned after the German model of constitutional justice, the legal system of colonial Korea was far from being a copy of its Japanese counterpart. Nonetheless, the colonial period did have a profound impact on legal institutions, as South Korea retained most of them in the wake of the Liberation.

⁷² In the “Public Trust and Influence of Power Organizations” joint survey conducted between 2005 and 2008 by the East Asian Institute and the daily newspaper *JoongAng Ilbo*, the constitutional court ranked first in terms of trust and influence among all public institutions and government agencies, followed by the supreme court. However, if all “power organizations” are taken into account, the courts only come after conglomerates such as Samsung, Hyundai Motors, SK, and LG which are considered both more trustworthy and influential. See *JoongAng Ilbo*, “People Trust Conglomerates Rather Than Political Parties,” June 14, 2008.

⁷³ Jan-Werner Müller, *Constitutional Patriotism*, Princeton, Oxford: Princeton University Press, 2008.

⁷⁴ Marie Seong-hak Kim, “Law and Custom Under the Chosŏn Dynasty and Colonial Korea. A Comparative Perspective,” *The Journal of Asian Studies*, Vol.66, No.4, 2007, p.1091.

In 1905, the Korean peninsula, then known as the Kingdom of *Chosŏn*, became a protectorate of the Empire of Japan, only to be annexed as a colony five years later. Independence was only recovered on August 15, 1945, close to the surrender of Japan in the Pacific War. Forty years of experience under the Japanese colonial government brought about profound and irreversible changes in Korean society. They are hardly acknowledged by South Korean nationalist historiography, which mainly apprehends the colonial situation as an “unlawful” occupation on the part of Japan, a deplorable “distortion” forced upon Korean history. Since the early 1990s, the relations between the two countries have periodically deteriorated over issues such as the demand for official apologies, especially in relation to the tragedy of “comfort women” (“*wianbu*”), the sexual slaves of the Japanese army coercively recruited from Korea and other countries in the region during the 1930s and 1940s.

While nationalist narratives obstruct a proper understanding of the significance and complexity of the colonial experience, critical approaches have emerged - mainly outside Korea - to account for the transformative nature of the period. One of the most powerful frameworks is the “colonial modernity” paradigm, first articulated by Tani Barlow,⁷⁵ and applied to Korea by Shin Gi-Wook and Michael Robinson.⁷⁶ This approach shows how the reality of any society experiencing a “colonial situation” does not amount to a unidirectional application of power, but a complex set of interactions and dynamics. The legal sphere is one of the realms where this type of analysis can be fruitfully deployed to nuance the oversimplified view of law as an indiscriminate tool of oppression in the hands of colonial authorities.

The preoccupation of Korean legal historians with the “premodern” or “distorted” character of the legal-governmental process under Japanese rule has resulted in a disregard of the important changes in the nature of power and mode of domination that accompanied colonial legal-governmental change. Japanese rule has been described as “brutal” and “arbitrary,” but little effort has been made to discern the logic of power and domination underlying that governmental practice. If Japanese rule was repressive, we must ask what kind of repression

⁷⁵ Tani Barlow, *Formations of Colonial Modernity in East Asia*, Durham: Duke University Press, 1997.

⁷⁶ Gi-Wook Shin and Michael Robinson, (eds.), *Colonial Modernity in Korea*, Cambridge: Harvard University Asia Center, 1999.

there was, specify its characteristics, and identify its differences from the repression experienced by precolonial Koreans.⁷⁷

As stressed by Lee Chul-woo, the legal modernization that took place in Korea during the colonial period first has to be distinguished from the “civilizing” project through which Japan justified its enterprise, especially in the eyes of the West. From the beginning, Japan adopted the language of legality and legislation as part of its colonizing politics, appropriating the very terms of Western imperialist discourse to demonstrate the rightfulness of its status as a new “civilizing” nation.⁷⁸ Indeed, it was widely thought in the international order of the 20th century that:

A regime was civilized only if it could claim the ability to transform an uncivilized people. The logic of the politics of enlightened exploitation can be described as the practice of legalizing the claim to protect a place inhabited by people who were defined as incapable of becoming civilized on their own. It was understood, of course, that the protecting regime had access to the material and human resources of the place it protected. Ultimately, the ability to control colonial space defined a nation as “sovereign” and “independent.”⁷⁹

The declared objective of modernizing legal institutions was already familiar to Tokyo, not only in rhetoric but also in practice. It had governed Japan’s own domestic reform movement during the “*Meiji Restoration*” (1869-1912), impelled as a means to defend its sovereignty against the assaults of Western foreign powers in the region, embodied by the concession of extra-territorial privileges and unequal commercial territories. In this context of resistance to the West through emulation, the Japanese government remodeled many of its institutions, especially in the legal sphere, drawing from the German civil law tradition to rationalize and codify its own legislation.⁸⁰

This process resulted in the six codes making the Japanese modern legal system: the Criminal Code of 1870, the Constitution of 1889, the Criminal Procedure Act and Civil Procedure Act of 1890, the Civil Code of 1896, and the Commercial Code of 1899. Initially associated with Japan’s own domestic strategy of renewal, legal modernization then became a

⁷⁷ Chul-woo Lee, “Modernity, Legality, and Power in Korea Under Japanese Rule,” in *Ibidem*, p.23.

⁷⁸ Alexis Dudden, *Japan's Colonization of Korea. Discourse and Power*, Honolulu: University of Hawai'i Press, 2005.

⁷⁹ *Ibidem*, p.9.

⁸⁰ While the German and French models were originally weighed against each other, the former came to prevail after France was defeated in the war of 1870-1871 which opposed the two countries.

critical element in asserting its colonizing and “civilizing” capacity as a developed and “enlightened” power. Yet, analyzing the experience of Korea between 1905 and 1945 in terms of “colonial modernity” does not mean espousing the modernization discourse of Japanese authorities. On the contrary, it is an invitation to understand the specificity of the changes that were produced, more than introduced, by the distinctive form and nature of Japanese colonial domination.

[M]odernization took place in the sense that the legal-governmental system was organized and implemented in such a way that the state was able to extend its powers and control to minute details of life untouched by the traditional Korean state. Such intensification of control may be a common feature of modern states, whose preoccupation with internal pacification has led to the extensive reach of administrative power coupled with enhanced knowledge of the population, but the particularities of Japanese colonial practice led to unique features in Korea.⁸¹

Along with Lee Chul-woo, Marie Seong-hak Kim’s work has also significantly contributed to overcome the nationalist bias embedded in research on colonial law and historiography. According to her study of custom as a product of colonial jurisprudence, “the ‘myth’ of [pre-colonial] customary law was bolstered in Korean historiography by an effort to safeguard the identity of indigenous legal culture in the dynastic period from the stifling influence of colonial law.”⁸² The impact of Japanese colonial rule on Korean legal structures is therefore deep and manifold. Its institutional legacy has been strengthened by the unfolding of events after independence was recovered.

Indeed, the colonial state apparatus was largely preserved under the provisional government of the U.S. Army, which was established in the southern half of the peninsula in early September 1945. While reforms were implemented in the northern part of the territory under Soviet control, the American military government relied on the administrative structures and personnel in place.⁸³ As the concern for anti-communism overrode other policy objectives in South Korea, stability largely prevailed over change, contrary to the political reforms that were encouraged by the United States in Japan. Elements of continuity between the colonial and post-war periods are for instance visible in the National Security Act,

⁸¹ Chul-woo Lee, “Modernity, Legality, and Power,” p.23.

⁸² Marie Seong-hak Kim, *Law and Custom in Korea. Comparative Legal History*, Cambridge, New York: Cambridge University Press, 2012, p.29

⁸³ Bruce Cumings, *The Origins of the Korean War. Vol.1. Liberation and the Emergence of Separate Regimes, 1945-1947*, Princeton: Princeton University Press, 1981.

modeled after the 1925 Peace Preservation Law which was first enacted in Japan, and then extended to Korea, in order to fight communism, socialism, and anarchism, construed as “thought crimes.”⁸⁴ While the law was repealed in Japan by the American occupation authorities at the end of the Second World War, it became the matrix of the National Security Act that the South Korean government enacted in 1948. The effacement of the legislation’s colonial origins is however manifest in contemporary discourses, including the Constitutional Court of Korea’s jurisprudence.

Theorizing uncertainty

The judicial mechanisms that were created by the revised constitution of 1987 and the Constitutional Court Act of 1988 did not necessarily bear in them the seeds of later developments. On the contrary, nothing seemed to ensure that the constitutional court and its new instruments would be sufficient to realize a strong and effective commitment to basic rights in the post-transition era. In particular,

The fact that the judgments of ordinary courts could not be challenged through constitutional complaints, and the requirement that all other avenues of remedy must be exhausted before a constitutional complaint could be filed, led many to believe that in reality the range of state powers amenable to constitutional complaints would be extremely limited. Many also expected that the ordinary courts would not be proactive in requesting constitutionality of review of statutes, just as they had been in the past.⁸⁵

Among further potential obstacles to the court’s action were the supermajority requirement for unconstitutionality decisions and the undefined notion of state power which could be interpreted restrictively. Nascent institutions are never predestined to become what they are at some later point in time. Their initial formal design matters, as it allows or precludes possible trajectories, but without prescribing a single and particular one. This dimension of uncertainty is often forgotten in analyzing institutions, especially when their well-established authority exhales an impression of naturalness which conceals the constructed character of their strength and legitimacy. Yet, those qualities are always acquired, and even conquered, rather than inherent. Texts alone do not suffice to bequeath them.

⁸⁴ Richard Mitchell, *Thought Control in Prewar Japan*, Ithaca: Cornell University Press, 1976; *Janus-Faced Justice. Political Criminals in Imperial Japan*, Honolulu: University of Hawai‘i Press, 1992.

⁸⁵ The Constitutional Court of Korea, *Twenty Years*, p.100.

This reality not only applies to the Constitutional Court of Korea, but also to the Federal Constitutional Court of Germany or the U.S. Supreme Court, whose celebrated paths and successes were not ingrained in the story of their origins. For instance, the recognition of the German constitutional court as a national symbol was only consecrated three decades after its creation, when the philosopher and political scientist Dolf Sternberger coined the expression “constitutional patriotism” in a 1979 article.⁸⁶ As for the U.S. Supreme Court, its *Marbury v. Madison* decision of 1803, associated with the creation of judicial review, did not instate the court in the powerful position that it is widely seen to occupy today. After *Marbury*, the institution refrained from using its self-conferred power to strike down a federal statute for more than fifty years, until the infamous *Dred Scott* decision of 1857 which held the Missouri Compromise of 1820 unconstitutional.⁸⁷

In light of this broader pattern, it is no wonder that much uncertainty surrounded the birth of South Korea’s constitutional court. Doubts did not only project their shadow over the issue of how provisions regulating the new institution would be interpreted. They were also tied to a more general concern about the fate of democratization in the country. Indeed, many contemporary observers seem to have shared the perception that the judiciary’s potential role and very independence were not solely in its hands, but highly subject to external factors such as how the separation of powers between the executive and legislative branches would consolidate.

As of March 1988, it is too early to pronounce the Constitution[al] Court stillborn, but it is also too early to offer an optimistic prognosis about its future guardianship of human rights. At best, the Constitution[al] Court will reflect and coordinate a separation of powers instituted through political processes. It cannot be relied upon to discharge the threshold task of overcoming South Korea’s long-entrenched military-executive supremacy. In the short term, if the National Assembly elections result in an opposition majority and this majority succeeds in achieving legislative autonomy, then the Constitution[al] Court may become a very significant factor. On the other hand, if no true separation of powers can be instituted, the Court may not play a major role in protecting human rights.⁸⁸

⁸⁶ Christoph Schönberger, “La constitution allemande, la cour de Karlsruhe, et le ‘patriotisme constitutionnel.’ ” The concept was later invested by Jürgen Habermas and extended in its scope beyond the German context. See Jan-Werner Müller, *Constitutional Patriotism*, Princeton, Oxford: Princeton University Press, 2008.

⁸⁷ *Dred Scott v. Sandford*, 60 U.S. 393 (1857). The Missouri Compromise, in addition to admitting Missouri to the Union as a slave state and Maine as a free state, drew a line across the American territory north of which slavery was “forever prohibited.” In 1857, The U.S. Supreme Court however ruled that Congress lacked the power to exclude slavery from certain parts of the territory.

⁸⁸ James West and Edward Baker, “The 1987 Constitutional Reforms in South Korea. Electoral Processes and Judicial Independence,” *Harvard Human Rights Year Book*, Vol.1, 1988, p.165.

While democratization did not suffer any significant reversal in the aftermath of the transition, the process of its entrenchment has neither been smooth nor linear. As was evoked earlier in the chapter, it took a decade before the first alternation of parties in power took place, as the two initial presidents of the ROK, Roh Tae-woo and Kim Young-sam, were members of the same conservative coalition. This was the outcome of an unexpected merger between their camps in 1990, which allowed Kim, a long-time critic of the military regimes, to ally with the political forces behind Roh, the ex-general and handpicked successor of former dictator Chun Doo-hwan. Roh's election as first president of the Sixth Republic was itself responsible for much of the skepticism surrounding the political becoming of the young democratic regime. It is during his mandate that the major attempt at reducing the burgeoning constitutional court's powers was made.

Political forces sought to punish the court by limiting jurisdiction, most prominently in 1992, when the ruling party proposed to restrict the court's jurisdiction to cases of interbranch disputes. This proposal by the ruling party was withdrawn due to strong public pressure.⁸⁹

The uncertainty that accompanies the birth of new institutions such as the Constitutional Court of Korea in 1987 or the Federal Constitutional Court of Germany in 1949 is usually poorly taken into account by theories of institutional design in general, and constitutional design in particular. Institutional analysis has known a revival in the 1980s, under the impulse of three methodological approaches: historical institutionalism, rational choice institutionalism, and sociological institutionalism.⁹⁰ It is in the wake of this renewed interest for institutions that courts emerged as an object of comparative political inquiry in the early 1990s.⁹¹ Since then, the realm of comparative judicial and constitutional politics has been thriving, while the avenues for research have diversified, geographically and thematically. For instance, new works in the field have recently focused on the active role of

⁸⁹ Tom Ginsburg, *Judicial Review in New Democracies*, p.223.

⁹⁰ Peter Hall and Rosemary Taylor, "Political Science and the Three New Institutionalisms," *Political Studies*, Vol.44, No.5, 1996, pp.936-957.

⁹¹ One of the seminal works in the revived field of comparative judicial politics is Alec Stone Sweet's study of the French Constitutional Council. See Alec Stone Sweet, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective*, New York: Oxford University Press, 1992. In contrast to comparative politics, the field of American politics never lost sight of its judicial institutions and Supreme Court.

courts in authoritarian settings, including countries such as Argentina, Egypt, or China.⁹² A major trend has also been the increasing application of rational choice frameworks to the analysis of courts in general, and constitutional design in particular.

At the crossroads of these two movements - the diversification of comparative judicial politics to new objects and regions on the one hand, and the increasing application of rational choice theories on the other hand - stands Tom Ginsburg's study of constitutional courts in Asia, where he offers a comparative analysis of Mongolia, South Korea, and Taiwan.⁹³ The rational choice premise of Ginsburg's analysis lies in the postulate that constitutional design is the result of strategic decisions made by politicians acting in their own self-interest. In crafting a new system of judicial review, constitutional drafters follow the motivation to maximize their political benefit in the present. They are not interested in setting constraints upon their future actions as contended by the "commitment theory" of constitutional design which Ginsburg criticizes. Construing judicial review as a form of self-binding is problematic according to Ginsburg because it veils the political dynamics and interests at work in constitutional design:

In light of the agency problem of constitutional design, we must ask why self-interested politicians would design a system of judicial review. It is not sufficient to describe constitutional review as a device to protect citizens from future politicians without explaining why it serves the interests of present politicians who serve as a veto gate for the constitution. Although constitutional designers are subject to the same constraints of bounded rationality as everyone else, there are reasons for assuming that they consider their institutional choices carefully.⁹⁴

One of these institutional choices is whether to create or not a strong mechanism for judicial review. To account for the variation in institutional strength of Mongolia's, South Korea's, and Taiwan's respective constitutional courts, Ginsburg elaborates an "insurance theory" based upon the calculations of politicians involved in constitutional design at the time of the transition. The "insurance theory" predicts that if a strong party then dominates

⁹² See respectively Gretchen Helmke, *Courts Under Constraints. Judges, Generals and Presidents in Argentina*, Cambridge, New York: Cambridge University Press, 2004; Tamir Moustafa, *The Struggle for Constitutional Power. Law, Politics, and Economic Development in Egypt*, Cambridge, New York: Cambridge University Press, 2007; Stéphanie Balme and Michael Dowdle (eds.), *Building Constitutionalism in China*, New York: Palgrave Macmillan, 2009.

⁹³ Tom Ginsburg, *Judicial Review in New Democracies*.

⁹⁴ *Ibidem*, p.23.

politics, the emergence of a weak court can be expected. Indeed, constitutional designers do not anticipate their side to lose elections any time soon. As a result, they do not see the need to insure themselves against the risk of a change of majority in power by creating a strong court which would constrain its policies. Instead,

By setting up a weak court, the dominant party may gain some marginal benefits in legitimacy without sacrificing policy flexibility.⁹⁵

On the contrary, if two or three parties of roughly equal strength compete at the time of the transition, they are uncertain about their ability to secure electoral victory and therefore push for the establishment of a strong system of judicial review. According to Ginsburg, this scenario is best exemplified by South Korea. Therefore, two variables are critically important to explain differences in the design of judicial review across cases: the political uncertainty that reigns before the constitutional bargain, and the political diffusion which exists afterwards. If the prospective positions of political parties are unsure at the time of the transition and remain so in its aftermath, all the conditions are met for a strong judicial system not only to develop, but to be intentionally designed and implemented.

This is where the “insurance theory” appears to give too mechanical an explanation of the different dynamics at work in constitutional processes, with the strength of judicial review being largely predetermined by the electoral calculations of the designing actors. Nonetheless, it should be stressed that the theory’s point of departure - not to consider constitutional institutions as the result of disinterested choices on the part of politicians - is a relevant one. As a matter of fact, this claim does not constitute a point of contention between the “insurance” and “commitment” theories which Ginsburg associates with authors such as Jon Elster and Stephen Holmes.⁹⁶ As confessed by Elster more than twenty years after he first extended the metaphor of individual self-binding or precommitment to constitutionalism,

I have been much influenced by a critical comment on *Ulysses and the Sirens* by my friend and mentor, the late Norwegian historian Jens Arup Seip: “In politics, people never try to bind

⁹⁵ *Ibidem*, p.248.

⁹⁶ “With others, I have written about political constitutions as a form of precommitment. By creating a set of laws that are more difficult to amend than ordinary legislation, or even unamendable in a strict sense, the political community can prevent itself from backsliding and giving in to partisan interests or momentary passions,” Jon Elster, “Don’t Burn Your Bridge before You Come To It. Some Ambiguities and Complexities of Precommitment,” *Texas Law Review*, Vol.81, No.7, 2003, pp.1797-1758. See for the initial formulation of this argument, Jon Elster, *Ulysses and the Sirens*, Cambridge: Cambridge University Press, 1979; and for a collective exploration of the theme, Jon Elster and Rune Slagstad, (eds.), *Constitutionalism and Democracy*, Cambridge, New York: Cambridge University Press, 1993.

themselves, only to bind others.” Although that statement is too stark, I now think it closer to the truth than the view that self-binding is the essence of constitution-making. Ulysses bound himself to the mast, but he also put wax in the ears of the rowers.⁹⁷

Ginsburg recognizes that both the “commitment” and “insurance” theories are similar in many respects but suggests that they diverge in terms of empirical implications, since the former conceives judicial review as “a device of self-binding by powerful parties to get other parties to accede to the constitutional scheme.”⁹⁸ As a result, “the commitment theory might predict *more* powerful institutions of judicial review with a dominant party,” whereas “the insurance theory predicts *less* powerful institutions of judicial review” under the same circumstances.⁹⁹

This statement seems to mischaracterize the distinctive claim of authors such as Elster vis-à-vis Ginsburg’s approach. While he does not disagree with the rational premise of Ginsburg’s analysis, Elster’s approach to constitution-making contains a much more radical criticism than a mere departure on empirical grounds. In the “insurance theory” framework, constitutional designers do not only act strategically; the very weakness or strength of constitutional courts is the outcome of intentional choices on their part. Consequently, the success or failure of judicial review appears largely predetermined by the will of political actors and their shared perception that a strong system of judicial review is the most desirable option available to them in a context of electoral competition.

A similar strategic logic is advanced by Ran Hirschl to explain the constitutional revolution undergone by countries such as Israel in the early 1990s or South Africa in the late 1990s: their late constitutionalization of rights is described as a “form of self-interested hegemonic preservation” by threatened elites “who seek insulation from majoritarian policy-making processes by transferring policy-making authority to semiautonomous, professional bodies” such as courts.¹⁰⁰ These strategic accounts are particularly vulnerable to falling prey to a pitfall known as the “functionalist fallacy.” This type of reasoning occurs when “the explanation of institutional forms is to be found in their functional consequences for those

⁹⁷ Jon Elster, *Ulysses Unbound*, New York: Cambridge University Press, 2000, p.ix

⁹⁸ Tom Ginsburg, *Judicial Review in New Democracies*, p.250.

⁹⁹ *Ibidem*, p.28.

¹⁰⁰ Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, London: Harvard University Press, 2004, pp.11-12. Hirschl however distinguishes his “thick” strategic explanation, in which threatened political and economic elites interact with judicial elites with compatible interests, from the “thin” strategic explanation of the “electoral market thesis,” in which judicial independence correlates electoral competitiveness and uncertainty.

who create them.”¹⁰¹ It implies that, too often, intention is derived from consequences. This is problematic because these consequences may have been entirely unintended or wrongly anticipated by actors, even when they benefit them in retrospect. According to Jon Elster,

[The] appeal to beneficial but unintended consequences to explain behavior (or, alternatively, the inference from consequences to intention) is the hallmark of the functional explanation.¹⁰²

As a result, functionalist explanations leave no room for the unpredicted effects of institutional design. Uncertainty itself is not absent from functional theories, but it is only the motive that prompts risk-averse actors to try to insure themselves against the reversals of the democratic policy-making process when they cannot - or can no longer - expect to control it. The outcome of these political calculations itself is not uncertain.¹⁰³ In the case of Tom Ginsburg’s theory, the strength of judicial review is the product of constitution-makers’ deliberate crafting. A court will be strong where they want it strong, and weak where they want it weak. The type of contextual uncertainty featured in the “insurance theory” is thus very different from the fundamental contingency surrounding the birth and trajectory of institutions. This contingency is erased by functional explanations which commit the mistake to consider positive outcomes as necessarily desired and conscientiously produced by actors through careful institutional engineering. This can happen, but its occurrence is very likely infrequent. Elster for instance finds a rare example of it in the reform of the French Constitutional Council orchestrated by President Valéry Giscard in 1974.

A conspicuously successful attempt to present partisan goals in the guise of self-binding is provided by the strengthening of the French Conseil Constitutionnel by President Valéry Giscard d’Estaing in 1974. Up to that point, the council had mainly been an instrument of the government of the day in its dealings with unruly parliaments. The opposition had no power to call upon the council to scrutinize laws for their possible unconstitutionality. As president, Giscard d’Estaing offered this weapon to the opposition on a plate, by allowing any group of sixty deputies or senators to bring a law before the council. His motive, however, was not to restrict his own freedom of action. He foresaw, correctly, that the next parliamentary majority would be socialist; also, correctly again, that one of its priorities would be to nationalize

¹⁰¹ Paul Pierson, “The Limits of Design. Explaining Institutional Origins and Change,” *Governance*, Vol.13, No. 4, p.475.

¹⁰² Jon Elster, “Don’t Burn Your Bridge before You Come To It,” p.1794.

¹⁰³ A notable exception to rational choice theories’ disregard for the fundamental contingency that accompanies institutional design is the work of Terry Moe. See for instance Terry Moe, “Power and Political Institutions,” *Perspectives on Politics*, Vol.3, No.2, 2005, pp.215-233.

important industries; and finally, once more correctly, that the council would strike down such legislation as unconstitutional. He very deliberately and successfully sought to restrain the freedom of actions of his successors.¹⁰⁴

The congruence between actors' calculations and institutional outcomes is however probably not the rule in terms of constitution-making. Even when institutional designers obtain what they may have initially wanted for the protection of their interests, such consequences can result from other processes than the ones they intended to create.

As John Schiemann has shown, some Hungarian Communists were in favor of a strong constitutional court because they predicted, correctly, that if parliament were to adopt retroactive legislation or extend the statute of limitations for the purpose of bringing them to justice, these measures would be struck down by the court. One Communist delegate to the Round Table Talks said, "We thought that this was one of the institutions which would later be able to prevent a turning against the constitution, a jettisoning of the institution, the creation of all sorts of laws seeking revenge." One should add, however, that unlike Giscard d'Estaing they were proved right for the wrong reasons. The Hungarian Communists thought they would be able to appoint "reliable" judges as the first members of the court, as an insurance device in case they should become a minority in the new parliament. The court that was actually appointed had a quite different composition. The principle the judges invoked when striking down the retaliatory legislation, namely, that it violated the principle of legal certainty, was not in any way window dressing for Communist self-protection.¹⁰⁵

Jon Elster's analysis therefore confirms that constitutional design can be the result of strategic decisions on the part of politicians, but that their intentions - even when realized - do not predetermine the institutional effects that they seek to create. When it comes to South Korea, there seems to be little evidence in the genesis of the constitutional court indicating that the system was purposively designed to be strong and proactive. On the court's own admission,

[M]any feared that it would turn out to be like the Constitutional Committees of previous constitutions, and end up being just another agency that existed only on paper. In fact, the governing elites at the times of its creation were not unlike the previous regimes in that they were not so enthusiastic about the idea of activating the system of constitutional adjudication.

¹⁰⁴ Jon Elster, *Ulysses Unbound*, p.171.

¹⁰⁵ *Ibidem*.

A number of legal scholars and jurists were therefore doubtful about the court's future and its role in the constitutional order.¹⁰⁶

Consequently, the way in which judicial review developed was far from being preordained by the intentions and choices of political actors in a context of electoral volatility. Factors such as the diffusion of power between the political parties and, maybe more importantly, between the different branches of government (something which was not assured in the aftermath of the transition) probably sustained the possibility for an independent court to not only emerge, but to assert itself. Yet, this dissertation contends that one of the most powerful forces behind the court's empowerment has to be found elsewhere: in the investment of constitutional adjudication as a site where to contest the non-inclusive legacy of the transition for the very actors which the elite-controlled change of regime marginalized. An unintended outcome has however ensued from this activation of constitutional justice from below. Although political elites did not necessarily want a strong court, the institution has discharged its role as guardian of the constitution in a way which has nonetheless benefited them by strengthening the conservative bias of South Korea's democratic order.

¹⁰⁶ The Constitutional Court of Korea, *Twenty Years*, p.99.

CHAPTER THREE

Defending Society Within the Rule of Law

Article 8

- (1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.
- (2) Political parties shall be democratic in their objectives, organization, and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.
[...]
- (4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.

Article 37

- (1) Freedoms and rights of citizens shall not be neglected on the grounds that they are not enumerated in the Constitution.
- (2) The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

Article 65

- (1) In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment.
[...]

The Constitution of the Republic of Korea

This chapter surveys the intensity of South Korea's constitutional commitment against enmity, by examining the two figures of threat which its basic norm is ready to confront: the enemy of the state who jeopardizes the integrity and security of the nation, as well as the enemy of the regime who endangers constitutional democracy. Defending society against these two figures of enmity while staying within the boundaries of the rule of law is a challenge which all constitutional democracies can potentially face and answer through the use of emergency measures, militant provisions, or ordinary legislation. Courts such as the South Korean one are however caught in a further paradox: that of defending constitutionalism when the foundations that it lays for society institutionalize a durable bias against certain segments of the polity. While the measures designed against enmity in the

constitution of South Korea have hardly been deployed, they have nonetheless provided the constitutional court with the language and ground to establish itself as guardian of the “basic order of free democracy” and to unpack, in its name, the values and arrangements worthy of being upheld in the post-transition era.

Democracy and enmity: beyond Carl Schmitt

Two figures of enmity have been predominant in the history of political regimes in general, and of democracies in particular. On the one hand, is identified as enemy he who violently challenges the territorial integrity of the state and the nation (i.e., separatists, independentists, or secessionists expressing their claims to sovereignty outside the ordinary institutional channels). On the other hand, is also an enemy he who opposes and endangers the nature of the regime or the form of government (for instance, monarchists and conservatives denying the legitimacy of a republican government; revolutionaries such as anarchists at the turn of the 20th century or leftist radicals in the 1970s; and of course, interwar fascist movements). These two figures - the enemy of the state’s territorial integrity and the enemy of the democratic or republican form of government - are not exhaustive. A third archetype may be represented by the spy, he who secretly operates within the country he lives in for the benefit of another government.

It can be contended that terrorism in itself does not outline the contours of a specific figure of enmity as it is best understood as a strategy of violence deployed by a variety of actors, from 19th century Russian anarchists to independence movements such as the Irish Republican Army and the Basque ETA, or radical leftist organizations like the German Red Army Faction or the Italian Red Brigades following the genealogy established by David Rapoport.¹ Terror is not even a weapon limited to non-state actors. When deployed on a large scale and systematized, it is a strategy of violence most often associated with state resources.² If no specific figure of enmity is tied to terrorism, the actors that resort to it are likely to be labeled as enemies in a democratic polity. This is the case with the perpetrators and supporters of the new international terrorism, which does not easily fit within the categories of enmity briefly sketched above.

¹ David Rapoport, “The Four Waves of Modern Terrorism,” in David Rapoport (ed.), *Terrorism. Critical Concepts in Political Science*, Abingdon, New York: Routledge, 2005, pp.3-30.

² Charles Tilly, “Terror, Terrorism, Terrorists,” *Sociological Theory*, Vol.22, No.1, 2004, pp.5-13.

Democracies are not candid, but they are not unprincipled regimes either. As a result, the issue of how crises and threats can be fought within the law may pose a puzzle, but it does not necessarily represent a paradox. Different types of constitutional traditions reflect the concern and possibility for a norm-abiding defense of society, that is to say, for responding to a situation of exception through norms which regulate the exception. Affirming this possibility contradicts the thesis of authors such as the German jurist Carl Schmitt, whose early essays combat the idea that liberalism is able to face the moment of decision created by unpredictable crises.³ As famously asserted by Schmitt in the first sentence of his *Political Theology*:

Sovereign is he who decides on the exception.⁴

According to Schmitt, the liberal constitutional order precisely “attempts to repress the question of sovereignty by a division and mutual control of competences.”⁵ This posture is untenable in a state of exception, defined as a situation in which no preexisting norm can apply. The general significance of the exception in Schmitt’s theory is not to prove the rule, but instead to disprove the whole regime of rules by which liberal constitutional regimes abide in normal times.

What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind. The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its rights to self-preservation, as one would say.⁶

For Schmitt, the rule of law necessarily fades away in the exception, demonstrating the structural fragility and weakness of liberalism.

³ Carl Schmitt, *La dictature*, Paris: Seuil, 2000 (c1921); *Political Theology. Four Chapters on the Concept of Sovereignty*, Chicago, London: University of Chicago Press, 2005 (c1922).

⁴ Carl Schmitt, *Political Theology*, p.5.

⁵ *Ibidem*, p.11.

⁶ *Ibidem*, p.12.

The essence of liberalism is negotiation, a cautious half measure, in the hope that the definitive dispute, the decisive bloody battle, can be transformed into a parliamentary debate and permit the decision to be suspended forever in an everlasting discussion. Dictatorship is the opposite of discussion.⁷

Carl Schmitt's thesis about the retreat of the norm in front of the exception has been recently revived by Giorgio Agamben, under the form of a dual paradox: If law employs the exception to suspend itself, does the exception remain inside or stand outside the juridical order?

In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that is established is not (or at least claims not be) unrelated to the juridical order. Hence the interest of those theories that, like Schmitt's, complicate the topographical opposition into a more complex topological relation, in which the very limit of the juridical order is at issue. In any case, to understand the problem of the state of exception, one must first correctly determine its localization (or illocalization).⁸

Yet, the threshold of indeterminacy where Agamben locates the "real state of exception in which we live" has clearly no ties left with the rule of law. It conjures up a much more monstrous "paradigm of government" than Schmitt's dictatorship. This new Leviathan is described by Agamben as nothing less than a "killing machine,"⁹ whose power over life and death derives its effectivity not from mere force but the very guise of law in which it dresses. Agamben goes further than Schmitt when he contends that the state of exception "has continued to function almost without interruption from World War I, through fascism and National Socialism, and up to our own time."

Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that - while ignoring international law externally and producing a permanent state of exception internally - nevertheless still claims to be applying the law.¹⁰

⁷ *Ibidem*, p.63.

⁸ Giorgio Agamben, *State of Exception*, Chicago: University of Chicago Press, 2005, pp.23-24.

⁹ *Ibidem*, p.86.

¹⁰ *Ibidem*, pp.86-87.

In essence, the vision shared by Schmitt and Agamben is one of impotence and worthlessness of liberal norms in times of exception - a state of things which is extraordinary, yet determinant, according to Schmitt, while voluntarily made permanent in contemporary politics for Agamben. Yet, the historical experience of constitutional systems and the present experience of democracies bear evidence to contradict the idea that such regimes are condemned to negate their rules and principles when they confront a crisis and, therefore, their enemies.

The very use of the notion of “enmity” deserves some discussion and clarification. Democracies are not candid regimes and identify as enemies the groups or individuals which threaten their physical or constitutional integrity.¹¹ In doing so, they engage in what this study refers to as “the politics of enmity,” by which democratic governments define who their enemies are and what are the permissible means to deal with them. This conception of enmity does not follow Carl Schmitt’s claim that the distinction between friend and enemy is the essence of politics.¹² The proposition advanced here is much more modest and restricted. Enmity needs not be consubstantial to democratic politics, but it is not alien to it either. Engaging in the politics of enmity is a potentiality of democratic life that may or not become actualized but for which most constitutional regimes are prepared given the “claim to perpetuity” which characterizes them.¹³

Confronting the exception within the rule of law

Constitutional traditions of emergency institutions

Various constitutional systems going as far back as Ancient Rome have experienced the triadic challenge of being exposed to exceptional circumstances and surmounting them without falling outside rules. Indeed, departing from the “normal” - as the ordinary state of affairs - does not inevitably entail to depart from the “norm.” For regimes like the Roman republic, the response to crises has not taken place outside the legal order but within it, by resorting to constitutional arrangements specifically designed to cope with the exception.

¹¹ John Finn, *Constitutions in Crisis. Political Violence and the Rule of Law*, New York: Oxford University Press, 1991.

¹² Carl Schmitt, *The Concept of the Political*, Chicago: University of Chicago Press, 2007 (c1927).

¹³ “My thesis is that whatever its status in the constitutional *text*, the claim to perpetuity is an essential element of constitutional *practice*.” John Finn, *Constitutions in Crisis*, p.4.

Such arrangements consist of what are generally known as “emergency institutions.” Against Carl Schmitt and Giorgio Agamben, multiple authors have sought to demonstrate that the use of emergency measures does not amount to a suspension of law by itself. In this respect, one institution that they have paid considerable attention to is the dictatorship of Ancient republican Rome (509 B.C. - 27 B.C.), for it has influenced many of the later constitutional devices meant to deal with crises. Indeed,

No emergency institution has attracted more attention than the Roman dictatorship; it has been considered a model of constitutional emergency powers by a long tradition of writers ranging from Machiavelli and Rousseau to Clinton Rossiter and Carl Friedrich in recent times.¹⁴

The image that can be restituted of the dictatorship is necessarily a reconstructed one, subject to two constraints. First of all, available Latin sources are posterior to the time when the institution appeared and became regularly in use.¹⁵ Secondly, the model itself lacks a formal written basis given the customary character of the Roman constitution. Despite these difficulties, the dictatorship can nonetheless be described as a delegation of undivided authority, for a temporary period of time (usually six months), and with the purpose that a specified task be accomplished by the individual in charge.

The fact that records always indicated the task for which a given dictator was appointed demonstrates the importance of this feature. While the dictatorship was originally designed to confront military crises or internal dissensions, its use gradually extended to circumstances in which a magistrate enjoying supreme power (*imperium*) was needed while the consuls were unavailable (such as performing religious rituals in case of epidemics, or convening electoral assemblies). In the context of military crises the six-month time limit might have been due to pragmatic considerations (such as the length of military campaigns by the time of the early republic), but it could also be seen as the symbol of the republican character of an office that was otherwise similar to kingship.¹⁶

¹⁴ Bernard Manin, “The Emergency Paradigm and the New Terrorism,” in Sandrine Baume and Biancamaria Fontana (eds.), *Les usages de la séparation des pouvoirs*, Paris: Michel Houdiard, 2008, p.137.

¹⁵ According to Bernard Manin, “most sources concerning the Roman dictatorship date from the second and first centuries B.C. or later, while the institution itself was in regular use much earlier. The annals of Rome indicate that seventy-six dictators were appointed from 501 B.C. to 202 B.C. After that, dictatorship fell into disuse for one hundred and twenty years. Then, Sulla and Caesar briefly revived it (in 82 B.C. and 49-44 B.C. respectively), although in ways that have traditionally been viewed as destructive of republican institutions. Thus, while it is the dictatorship of the earlier period that has been held up as a model of constitutional emergency government, most of our information about it involves some measure of conjecturing in the sources themselves.” *Ibidem*, p.138.

¹⁶ *Ibidem*, p.141.

According to Bernard Manin, the office of dictator presents three important characteristics that always recur in subsequent constitutional devices: it authorizes a deviation from ordinary norms (1) which is time-bounded (2) and subject to special conditions designed to ensure that circumstances necessitate such a deviation (3).¹⁷ These conditions can take the form of *ex ante*, continuing, or *a posteriori* controls. In the case of the Roman Republic, control was exercised *ex ante* by the Senate which would instruct the consuls to appoint the to-be dictator. This means that the dictator was not he who decided on the exception but instead had its power externally conferred (a procedure which can be described as “heteroinvestiture”).

The other constitutional traditions in which features of the Roman dictatorship can be found are identified by Manin as the Anglo-American liberal tradition of suspension of *habeas corpus* and martial law on the one hand, and the continental tradition exemplified by the French state of siege on the other hand. The suspension of the writ of *habeas corpus* (i.e., the injunction that any individual under arrest be presented before a court, otherwise his or her detention is unlawful) is a clear example of emergency institution limited in time and scope. The suspension always has to be justified by special circumstances, be authorized by the parliament, and only amounts to a temporary deviation from the ordinary criminal process. For instance, the United States Constitution asserts in section 9, clause 2 of its article 1 dedicated to the legislative branch that:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Against the letter of the constitution, the writ of *habeas corpus* was unilaterally suspended by President Abraham Lincoln during the Civil War (1861-1865), first on April 27, 1861 in parts of the territory, and then nationwide on September 24, 1862 when martial law was declared - that is to say, military tribunals proclaimed in place of regular courts. However, Lincoln’s very decision was subject to the review of courts, which illustrates another dimension of the Anglo-saxon liberal approach to constitutional emergency institutions, namely that the judiciary can exercise *ex-post* controls and therefore validate or invalidate the use of emergency measures. The actions of President Lincoln were first upheld by the U.S. Supreme Court when they were reviewed in the course of the Civil War,¹⁸ only to be partially

¹⁷ *Ibidem*, p.158.

¹⁸ *Ex parte Vallandigham*, 68 U.S. 243 (1864).

nullified after peace was restored.¹⁹ In the frame of the American response to terrorism after 9/11, neither Congress nor the president formally decided to suspend the writ of *habeas corpus*, but the issue of whether prisoners detained at Guantánamo could avail themselves of the writ was raised and settled in the affirmative by the U.S. Supreme Court following a protracted struggle between the judiciary and the political branches.²⁰

The potential controls exercised by courts on the use of emergency institutions distinguish the liberal tradition from the continental model, but the two still present essential commonalities. Similarly to the Anglo-American martial law, the French state of siege does not correspond to an unchecked delegation of power that would amount to establishing a government by the military. Repeatedly declared throughout the 19th century and from 1914 to 1919, the French state of siege also abides by conditions of time limitation which are as important as in the Roman and Anglo-American constitutional traditions.²¹ A general “emergency paradigm” can therefore be outlined from the converging features displayed by these various constitutional systems in their institutional response to crises. It illustrates the feasibility of regulating deviations from the “normal” (or regular) operations of the legal order, while remaining within the “normative” framework of the rule of law, which never ceases to exist and apply. Against Carl Schmitt and Giorgio Agamben, the “emergency paradigm” disproves claims of an impossible constitutional response to exceptional circumstances.

South Korean emergency institutions

Constitutions, written and unwritten, vary in the degree of precision and thoroughness that accompanies their emergency institutions. While the suspension of *habeas corpus*, from which is derived the possibility to implement martial law, is parsimoniously alluded to in the constitution of the United States, emergency provisions are laid out with a greater wealth of details in other documents, such as article 115a of the 1949 German basic law on the state of

¹⁹ *Ex parte Milligan*, 71 U.S. 2 (1866). In this decision, the U.S. Supreme Court ruled that Lincoln’s unilateral suspension of *habeas corpus* was lawful, but that military tribunals could not apply to citizens in states where civilian courts were still operating.

²⁰ This episode and the corresponding judicial rulings are analyzed later in the chapter.

²¹ Bernard Manin, “The Emergency Paradigm and the New Terrorism,” p.158.

defense,²² or article 16 of the 1958 French constitution on the exceptional powers of the president.²³ Article 16 is often thought to be the defining emergency institution of the French tradition, but it was used only once, in reaction to a 1961 failed putsch attempted by a clique of generals to overthrow President Charles De Gaulle during the Algerian War (1954-1962). This isolated invocation contrasts with the regular proclamation of the state of siege from the French Revolution until the end of World War I, an institution which still features in the 1958 constitution under article 36 even though it has never been used since then.²⁴ Another departure from the continental tradition of parliamentary, rather than judicial, supervision of exceptional powers was introduced by a 2008 reform of the French constitution. Were they to be exercised again, the emergency powers of article 16 could now be subject to an *ex-post* control by the constitutional council after thirty days of use, in order to determine whether the conditions that led to article 16's activation still apply.

²² “(1) Any determination that the federal territory is under attack by armed force or imminently threatened with such an attack (state of defense) shall be made by the Bundestag with the consent of the Bundesrat. Such determination shall be made on application of the Federal Government and shall require a two-thirds majority of the votes cast, which shall include at least a majority of the Members of the Bundestag.

(2) If the situation imperatively calls for immediate action, and if insurmountable obstacles prevent the timely convening of the Bundestag or the Bundestag cannot muster a quorum, the Joint Committee shall make this determination by a two-thirds majority of the votes cast, which shall include at least a majority of its members.

(3) The determination shall be promulgated by the Federal President in the Federal Law Gazette pursuant to Article 82. If this cannot be done in time, promulgation shall be effected in another manner; the determination shall be printed in the Federal Law Gazette as soon as circumstances permit.

(4) If the federal territory is under attack by armed force, and if the competent federal authorities are not in a position at once to make the determination provided for in the first sentence of paragraph (1) of this Article, the determination shall be deemed to have been made and promulgated at the time the attack began. The Federal President shall announce that time as soon as circumstances permit.

(5) If the determination of a state of defense has been promulgated, and if the federal territory is under attack by armed force, the Federal President, with the consent of the Bundestag, may issue declarations under international law respecting the existence of the state of defense. Under the conditions specified in paragraph (2) of this Article, the Joint Committee shall act in place of the Bundestag.”

(Article 115a of the Basic Law for the Federal Republic of Germany).

²³ “(1) Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Houses of Parliament and the Constitutional Council.

(2) He shall address the Nation and inform it of such measures.

(3) The measures shall be designed to provide the constitutional public authorities as swiftly as possible, with the means to carry out their duties. The Constitutional Council shall be consulted with regard to such measures.

(4) Parliament shall sit as of right.

(5) The National Assembly shall not be dissolved during the exercise of such emergency powers.

(6) After thirty days of the exercise of such emergency powers, the matter may be referred to the Constitutional Council by the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators, so as to decide if the conditions laid down in paragraph one still apply. The Council shall make its decision publicly as soon as possible. It shall, as of right, carry out such an examination and shall make its decision in the same manner after sixty days of the exercise of emergency powers or at any moment thereafter.”

(Article 16 of the Constitution of the Fifth French Republic).

²⁴ “A state of siege shall be decreed in the Council of Ministers. The extension thereof after a period of twelve days may be authorized solely by Parliament.” (Article 36 of the Constitution of the Fifth French Republic).

Similarly to the German basic law or the French constitution, the South Korean revised constitution of 1987 contains elaborate provisions about emergency powers in its articles 76 and 77. Both are located in chapter four, section one of the document dedicated to the powers of the executive. Article 76 sets the conditions under which the president can issue orders which have the effect of legislative acts: “in time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis,” as well as “in case of major hostilities affecting national security.”²⁵ Such executive orders must be notified to the unicameral parliament - the National Assembly - and its retrospective approval has to be obtained, otherwise “the actions or orders shall lose effect forthwith.”

As with article 16 of the French constitution, the extraordinary powers of the presidency are not however conferred upon it by an external source of power (i.e., the parliament is not in charge of determining whether the conditions to declare a state of emergency are fulfilled, as in the German case). In a strict sense, the South Korean article 76 and the French article 16 do not conform to the condition of “heteroinvestiture” (or *ex-ante* authorization) found in the Roman dictatorship. Nonetheless, the decisions taken in the course of a crisis are subject to a variety of continuing and *a posteriori* controls in both cases. Moreover, the president’s freedom to interpret emergency institutions and declare the exception is counterbalanced by the parliament’s freedom to interpret the crime of treason for which the head of state can be criminally charged.²⁶ Consequently, neither the French article 16 nor the South Korean article 76 allows the executive to construe the exception at will.

However, the focus of institutional controls slightly varies between the two cases. In the French text since 2008, the constitutional council determines whether the conditions that led to the declaration of emergency continue to apply, while in the South Korean document

²⁵ “(1) In time of internal turmoil, external menace, natural calamity or a grave financial or economic crisis, the President may take in respect to them the minimum necessary financial and economic actions or issue orders having the effect of Act, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly.

(2) In case of major hostilities affecting national security, the President may issue orders having the effect of Act, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly.

(3) In case actions are taken or orders are issued under paragraphs (1) and (2), the President shall promptly notify it to the National Assembly and obtain its approval.

(4) In case no approval is obtained, the actions or orders shall lose effect forthwith. In such case, the Acts which were amended or abolished by the orders in question shall automatically regain their original effect at the moment the orders fail to obtain approval.

(5) The President shall, without delay, put on public notice developments under paragraphs (3) and (4).” (Article 76 of the Constitution of the Republic of Korea).

²⁶ This argument is advanced for the French case by Michel Troper, *Le droit et la nécessité*, Paris: Presses universitaires de France, 2011, p.106. Troper’s analysis can be applied to the South Korean case and the reading of article 76 on the emergency powers be paired with article 84 of the constitution: “The President shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.”

the National Assembly has to retrospectively approve all the measures taken by the executive in response to a crisis. This important parliamentary check imposed on the presidential power to act during exceptional circumstances was quickly agreed upon by the ruling and opposition parties during the political negotiations preparing the constitutional revision of October 1987.²⁷ The 1980 constitution was indeed characterized by an unrestricted system of presidential emergency measures. Ruling by emergency decrees was also a well-tried practice of Park Chung-hee's regime in the 1970s, and three of them (Decrees No.1, 2 and 9) were recently declared unconstitutional by the Constitutional Court of Korea.²⁸

In addition to presidential emergency powers, martial law represents another device used and abused by South Korean authoritarian regimes, hence the attempt of the 1987 constitution to regulate its applicability in article 77.²⁹ Most importantly, the new provision introduces the requirement that the president complies with the decision of the National Assembly "when [it] requests the lifting of martial law with the concurrent vote of a majority of [its] total members." Here again, the absence of *ex-ante* authorization is compensated by the role of potential censor attributed to the parliament. Even though the South Korean president does not enjoy unchecked powers in the face of exceptional circumstances, he remains unmistakably designated by the 1987 constitution as the actor with preeminent impulse in "matters relating to the national destiny," which necessarily includes national security. For instance, sections 2 and 3 of article 66 proclaim that, as head of state:

- (2) The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.
- (3) The President shall have the duty to pursue sincerely the peaceful unification of the homeland.

²⁷ Jung-Kwan Cho, "The Politics of Constitution-Making During the 1987 Democratic Transition in South Korea," *Korea Observer*, Vol.35, No.2, 2004, p.189.

²⁸ 2010Hun-Ba70.132.170, March 21, 2013. The decisions are analyzed in chapter four.

²⁹ "(1) When it is required to cope with a military necessity or to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency, the President may proclaim martial law under the conditions as prescribed by Act.

(2) Martial law shall be of two types: extraordinary martial law and precautionary martial law.

(3) Under extraordinary martial law, special measures may be taken with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or the powers of the Executive and the Judiciary under the conditions as prescribed by Act.

(4) When the President has proclaimed martial law, he shall notify it to the National Assembly without delay.

(5) When the National Assembly requests the lifting of martial law with the concurrent vote of a majority of the total members of the National Assembly, the President shall comply."
(Article 77 of the Constitution of the Republic of Korea).

Moreover, article 72 makes possible for him to bypass the legislature and directly seek approval of his policies from the people on issues which are considered to fall within his privileged realm of action:

The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.

When it comes to the distribution of war powers, the South Korean arrangements resemble the American scheme where the president is commander in chief of the armed forces,³⁰ while the parliament has “the right to consent to the declaration of war, the dispatch of armed forces to foreign states, and the stationing of alien forces in the territory of the Republic of Korea.”³¹ This last element echoes the strength of the United States’ military presence which has been very significant in South Korea since the armistice of 1953, with U.S. troop levels currently reaching 28,500. Moreover, the ROK does not have the full operational control of its own troops as the Korea-U.S Combined Forces Command is still scheduled to retain the wartime operational control of the South Korean armed forces until 2015.

Disuse and inadequacy of constitutional emergency powers

The prominence of the legislative model

In his analysis of the emergency paradigm, Bernard Manin raises the question of the threats for which the use of constitutional emergency provisions constitutes an adequate response. Indeed, the fact that such institutions are designed for temporary and national dangers, rather than perils diffuse in both time and space, seems to make “the emergency

³⁰ “The President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act” (Article 74, section 1 of the Constitution of the Republic of Korea) and “The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United State” (Article 2, section 2 of the U.S. Constitution). It should be stressed that broad provisions concerning the executive in the U.S. Constitution (such as his role as commander in chief) have led to the affirmation that “inherent powers” are vested in the presidency. This doctrine was notoriously defended by John Yoo, the George W. Bush administration’s legal adviser, to justify a series of extra-legal actions by the executive (including torture) in the course of the “war on terror.” Kent Roach, *The 9/11 Effect. Comparative Counter-Terrorism*, New York: Cambridge University Press, 2011, p.175.

³¹ Article 60, section 2 of the Constitution of the Republic of Korea. Under article 2, section 2 of the U.S. Constitution, “the Congress shall have power to declare war,” a provision which has been seldom respected in American history.

paradigm [...] fundamentally inappropriate for confronting the present terrorist threat.”³² As a matter of fact, constitutional emergency institutions fell into desuetude a long time before the rise of the “new global terrorism,” whose manifestations preceded the 9/11 attacks. According to John Ferejohn and Pasquale Pasquino, contemporary democracies have responded for more than half a century to the challenges of domestic and international violence without resorting to the emergency powers inspired by the classical model of the Roman dictatorship:

Advanced democracies do not necessarily need to use constitutional powers when confronting emergencies. They often prefer to deal with emergencies through ordinary legislation. Such legislation may delegate a great deal of authority to the executive and may be enacted for temporary periods. And there may be a sense that the legislation is in some ways exceptional. But, however unusual it may be, emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence. Such legislation is, in the postwar constitutional systems, reviewable by the constitutional court (if there is one) and is regulated in exactly the same manner as any other legislative act. For example, in Britain we see the succession of Defense Against Terrorism acts and the United States has the PATRIOT Act. Each is ordinary though time-limited legislation. Many antiterrorist laws have been passed in the same way by the German and Italian parliaments in the 1970s and the 1980s.³³

According to Ferejohn and Pasquino’s analysis, the legislative response presents the distinctive advantage to provide contemporary democracies with more flexibility to adjust to the particular and actual circumstances of the crises they face, while fulfilling their need for legitimation through the legislature’s “democratic support for the executive’s actions.”³⁴ In this scheme, *ex-post* or continuing control can potentially be exercised through both legislative supervision of the parliament and judicial review of the courts.³⁵ Yet, the latter can only be triggered if constitutional adjudication is set into motion. For instance, no challenge was brought against the constitutionality of the U.S. Patriot Act, nor against the Authorization for Use of Military Force which was passed by Congress on September 14, 2001 and grants

³² Bernard Manin, “The Emergency Paradigm and the New Terrorism,” p.168.

³³ John Ferejohn and Pasquale Pasquino, “The Law of Exception. A Typology of Emergency Powers,” *International Journal of Constitutional Law*, Vol. 2, No.2, 2004, p.215.

³⁴ “It must be realized, however, that if Congress has already recognized an emergency and authorized executive action to deal with it, then attempting to temper executive actions within the bounds of the legislative model will be politically difficult.” *Ibidem*, p.220.

³⁵ *Ibidem*, p.236.

the president the power “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”

In conjunction with the doctrine of the “inherent powers” vested in the presidency,³⁶ the Authorization for Use of Military Force has constituted the basis for all the executive actions taken by the George W. Bush administration in the course of the “war against terror,” including extra-legal policies such as torture during investigations and indefinite detention on military bases. Since 2008, the Obama administration solely relies on this congressional authorization to pursue counter-terrorist strategies such as extraordinary renditions or targeted killings.³⁷ None of these policies has been examined by the courts, besides the issue of whether detainees at Guantánamo Bay - and there alone - were entitled to *habeas corpus* rights and could therefore have the basis of their detention as “enemy combatants” reviewed before being tried.³⁸ The fact that major aspects of national security policies can evade the scrutiny of courtrooms demonstrates the vicissitudes of the judiciary’s role in shaping the politics of enmity.

The most serious and prolonged threats experienced by a majority of democratic regimes after 1945 relate to terrorism, today mostly international but domestic for a long time, either deployed by challengers of the territorial integrity of the state (such as the Irish, Basque, or Corsican independence movements), or by opponents of democratic institutions (such as the West German Red Army Faction, the Italian Red Brigades, or the French Action Directe). The South Korean case displays similarities with the predicament of “unsettled states, disputed lands” found in cases characterized by a conflict of sovereignty, such as the United Kingdom and Northern Ireland until recently, or Israel with the West Bank and Gaza to

³⁶ See note 30 for an introduction to the “inherent powers” doctrine.

³⁷ Kent Roach, *The 9/11 Effect*, p.175.

³⁸ In *Hamdi v. Rumsfeld* (2004), the Supreme Court recognized the *habeas corpus* rights of American citizens detained at Guantánamo and their corresponding right to challenge the basis of their detention as “enemy combatants,” therefore affirming the government’s duty to create a mechanism to review their detention. In *Rasul v. Bush* (2004), *habeas corpus* rights were also recognized to alien “enemy combatants” detained at Guantánamo. In response to the rulings, the Department of Defense set the Combatant Status Review Tribunals (CSRT) to determine whether detainees were properly classified as “enemy combatants” before being tried by military commissions. The system of military commissions was invalidated by the court in *Hamdan v. Rumsfeld* (2006), for it lacked congressional approval. The Congress therefore passed the Military Commissions Act of 2006, which also prevented detainees to challenge their detention before federal courts through *habeas* petitions. In *Boumediene v. Bush* (2008), the Supreme Court held that federal courts could hear such petitions but that “except in cases of undue delay, such as the present, federal courts should refrain from entertaining an enemy combatant’s *habeas* petition at least until after the CSRT has had a chance to review his status.”

date.³⁹ In these two situations, terrorist violence has been a strategy deployed by non-state actors involved in a struggle over territorial sovereignty against the state. These features hardly suit the reality of the Korean conflict. Its specificities thus need to be delved into in order to comprehend the nature of South Korea's national security fears and of its responses to them.

The prolonged crisis of the Korean division

North and South Korea are technically in an ongoing state of war as the three-year long conflict that ravaged them was concluded by an armistice on July 27, 1953, but never sealed by a peace treaty. The division into two separate states of what had been a politically unified territory since the unification of the peninsula by the *Koryŏ* dynasty in 935 AD proceeded in two major steps. Korea recovered its independence from Japan on August 15, 1945, toward the end of World War II on the Pacific front, only for its sovereign destiny to be confiscated again a few weeks later. In early September 1945, the peninsula was *de facto* split between two zones of military occupation along the 38th parallel, with its northern and southern halves under the respective control of the Soviet Union and the United States. Three years later, two separate states contesting each other's legitimacy were established: the Republic of Korea in August 1948, and the Democratic People's Republic of Korea in September 1948.

The conflictual nature of the state of affairs in the Korean peninsula has both endured and yet transformed throughout the past sixty years. On the macro scale of historical events, a radical shift of power has occurred between the North and the South, with the latter being at a definite economic comparative disadvantage in 1945, when most infrastructures and mineral resources were concentrated in the North, a pivotal region in Japan's war economy.⁴⁰ Despite the massive destructions suffered by the DPRK in the Korean War as a result of American bombings, the North continued to be more industrialized and affluent than the South until the ROK entered a period of accelerated export-led economic development in the mid-1960s. The

³⁹ Ian Lustick, *Unsettled States, Disputed Lands. Britain and Ireland, France and Algeria, Israel and the West Bank-Gaza*, Ithaca: Cornell University Press, 1993.

⁴⁰ "After the division, 80 percent of heavy industry, 76 percent of mining, and 92 percent of electricity-generating capacity lay in the North, while light manufacturing and agriculture dominated in the South. The North Koreans literally turned off the electricity in the South in 1948, but even before the Korean War the South had faced serious power shortages. Its agricultural production could not meet the food requirements of the population, and the country survived on bulk grain shipments from the United States into the 1960s." Michael Robinson, *Korea's Twentieth-Century Odyssey*, Honolulu: University of Hawai'i Press, 2007, p.120.

South now enjoys a level of prosperity which contrasts with the North's collapse following decades of mismanagement and the breakdown of its Soviet patron. The repercussions of communism's fall in Russia and Europe were also political, as North Korea became increasingly isolated and marginalized in the international community.⁴¹ In September 1991, the two Koreas' concurrent accession to the United Nations symbolized a form of mutual recognition, as did the "Agreement on Reconciliation, Non-Aggression, and Exchanges and Cooperation" or "Basic Agreement" ("*nambuk kibon habŭisŏ*") signed on December 31 of the same year. On that occasion,

The two Koreas agreed that their relationship is not a relationship between states but "a special one constituted temporarily in the process of unification." Both sides want to differentiate their relationship from standard relationships between foreign countries. Such differentiation seems to have been aimed at emphasizing the common goal of unification to come. However, since both Koreas are members of the United Nations and have respective sovereignty, the inter-Korean agreements are thus similar in character to that of agreements between two separate states.⁴²

The very use of the term "agreement" ("*habŭiso*") instead of "treaty" ("*choyak*") illustrates the will of both parties to distinguish inter-Korean compacts from settlements concluded between two foreign countries. This semantic nuance was however abandoned for the two inter-Korean summits that took place in Pyongyang and were referred to by the South as "*nambuk ch'ŏngsang hoedam*," with the expression "*ch'ŏngsang hoedam*" connoting an inter-state summit. The first meeting took place in June 2000 (between North Korean leader Kim Jong-il and South Korean president Kim Dae-jung) and the second in October 2007 (between Kim Jong-il and his counterpart Roh Moo-hyun) as a result of the "Sunshine Policy" ("*haetpyŏt chŏngch'aek*")⁴³ followed by the "progressive" governments of Kim and Roh between 1998 and 2008. As stressed by Charles Armstrong, the term "progressive" is the

⁴¹ Charles Armstrong, *Tyranny of the Weak. North Korea and the World, 1950-1992*, Ithaca, New York: Cornell University Press, 2013.

⁴² Dae-kyu Yoon, *Law and Democracy in South Korea. Democratic Development since 1987*, Seoul: Kyungnam University Press, 2010, p.267.

⁴³ Besides the two inter-Korean summits and the creation of joint projects such as the Kaesŏng industrial complex or the Kŭmgangsan tourist site (closed in 2008), both located in North Korea, the foreign policy fruits of the "Sunshine Policy" have been meager. The "socio-spatial boundaries" of the peninsula have nonetheless been importantly affected during this period, as illustrated by the exponential involvement of South Korea in the foreign trade of the North or the growing number of North Korean refugees in the South since the late 1990s. See Valérie Gélézau, "Espoirs et désillusions de la décennie du 'rayon de soleil'," *Critique internationale*, No. 49, 2010, pp.12-13.

one favored by the Korean left but all “progressive” administrations have largely embraced neoliberal policies in the socioeconomic realm.⁴⁴

Notwithstanding apparent changes in inter-Korean relations at the turn of the new millennium, hostility has not waned in the peninsula. Since the end of the Korean War, threats from the North have taken many forms, from targeted attacks against the South Korean leadership (most conspicuously with an aborted attack against the Blue House in 1968 and the failed assassination of President Chun Doo-hwan in Rangoon in 1983) to incursions by infiltrators, kidnappings, and incidents along the Demilitarized Zone (or DMZ, which serves as a border heavily guarded by each side’s military forces), as well as naval conflicts (the last instance being the sinking of a South Korean naval vessel on March 16, 2010, in which forty-six sailors died).⁴⁵

In the aftermath of South Korea’s transition to democracy, the bombing of the Korean Air Flight 858 on November 29, 1987 caused the death of 104 civilian passengers and 11 crew members, leading the United States State Department to qualify the attack as a “terrorist act” and to inscribe North Korea on the list of states sponsoring terrorism, from which it was removed in 2008. More commonly a strategy in the hands of non-state actors without the traditional resources of armies, terrorism as the use of indiscriminate violence against civilian targets⁴⁶ has not been central to the arsenal of threats deployed by the North.⁴⁷ Military provocations have been comparatively more important, even when they resulted in no casualties. This has been the case with the repeated ballistic missile and nuclear tests that have intensified tensions in the Korean peninsula and the Northeast Asian region since the early 1990s.

The Korean crisis born out of the division and the continued aggressiveness of the Democratic People’s Republic of Korea explains that national security be such a deep concern and priority in the South, as reflected by the constitution of 1987. The many references to the military dispersed in the document also allude to the tension between the language of national security and the rhetoric of peace which coexist in the constitution. Their cohabitation is best exemplified by article 5 in which the Republic of Korea’s commitment to “international

⁴⁴ Charles Armstrong, “Contesting the Peninsula,” *New Left Review*, Vol.51, 2008, p.117.

⁴⁵ U.S. Congressional Research Service, *North Korean Provocative Actions. 1950-2007*, Washington: U.S. Library of Congress, 2007.

⁴⁶ Michael Walzer, *Arguing About War*, New Haven: Yale University Press, 2004.

⁴⁷ If local and random violence through terrorist attacks is a resource of relatively weak groups, the deployment of mass and systematic terror requires means that are often associated with a state apparatus. Domestically, the Democratic People’s Republic of Korea puts in force a regime of state terror.

peace” neighbors the “sacred mission of national security and the defense of the land” entrusted to the armed forces. Most significantly, this “sacred mission” entails the constitutional obligation for all Korean young men to serve in the military:

- (1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.
- (2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.⁴⁸

Compulsory conscription has aroused litigation in the Constitutional Court of Korea on several occasions. In practice, the eighteen-month-long military service is only performed by males between 18 and 35, which has ignited contestation on the basis of an unconstitutional violation of the right to equality. The first case against discrimination in relation to the military service was brought before the court by female students challenging the automatic extra-points attributed to discharged soldiers in all civil service exams. The constitutional court stroke down the extra-point system in a 1999 decision which deemed that the sacred duty of serving in the military was not a special sacrifice that should be compensated by favorable treatment.⁴⁹ The court articulated its decision in terms of formal and substantive equality, considering in rather paternalistic terms conform to the letter of the constitution that the very categories of person exempted from military service - women and disabled men - deserved special protection.⁵⁰

Women and the handicapped are the weak of our society. The Constitution professes in several instances the state’s duty to affirmatively protect them in accordance to the principle of substantive equality and social state.⁵¹

⁴⁸ Article 39 of the Constitution of the Republic of Korea.

⁴⁹ “Article 39 (1) of the Constitution imposes duty of national defense on people in order to protect national independence and land from direct or indirect aggression from external hostile forces. Serving in the military pursuant to the Military Service Act is merely discharge of a sacred duty, and cannot be considered a special sacrifice that the state imposes on individuals for public interest. People’s discharge of their constitutionally imposed duties is indispensable to national integrity and livelihood. Each instance of such discharge cannot be considered a special sacrifice that requires compensation,” 11-2 KCCR 770, 98Hun-Ma363, December 23, 1999, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I (1998-2004)*, Seoul: Constitutional Court of Korea, 2006, p.600.

⁵⁰ “Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages and working conditions” (Article 32, section 4 of the Constitution of the Republic of Korea). “The State shall endeavor the welfare and rights of women” (Article 34, section 3 of the Constitution of the Republic of Korea). In both cases, each provision is followed by a similar protection relating to children.

⁵¹ The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.603.

The issue of the discrimination against men caused by the absence of female military service was raised before the constitutional court in 2010. The present system was upheld by a majority of six justices (including the two concurring opinions of three judges). However, the ruling reveals highly polarized arguments among justices about how to construe gender categories and relations in South Korea. Indeed, the majority decision went so far as to advance a series of patriarchal reasons preventing the enlistment of women, such as:

In light of the physical capability required for conducting combat operations, men, who are superior in their physical strength needed for carrying and activating a weapon or war equipment, are more likely to have proper physical capabilities than women.⁵²

[...]

Even a woman with excellent physical capability may have a hard time in conducting her duties of training or war drills during around one-week menstrual period in every month. [...]

In addition, women rather than men are more likely to be exposed to a danger including sexual abuses when they are taken prisoner in wartime so that dispatching a woman to a real battle such as military operation is more demanding.⁵³

[...]

In addition, we are not convinced that, if we also make women to have full-scale duties of military service under current male-oriented military organization and its facilities, crimes like sexual harassment based on power and dominance within the military or the slack military discipline caused by relationships between men and women would not happen.⁵⁴

Justices Cho Dae-hyen and Kim Jong-dae concurred by stressing how the incorporation of female forces in the army could harm the objective of training military troops of the best quality.

In light of physical characteristics of women and other concerns in case of women's enlistment in military service as explained above, the legislature decided that it is proper for it to make only men to be subject to the military service duties for the sake of preserving the best troops through the Instant Provision. We find that such legislative decision was reasonable and fair, considering the legislative intent of the imposition of national defense duties, constant maintenance of the best combat efficacy, and particularly our nation's national defense circumstances which, as the only divided country under a ceasefire in the world, constantly requires effective preparations for the mobilization of the best military forces due to currently

⁵² 22-2(B) KCCR 446, 2006Hun-Ma328, November 25, 2010, in *The Constitutional Court of Korea, Constitutional Court Decisions. 2010*, Seoul: Constitutional Court of Korea, 2011, p.227.

⁵³ *Ibidem*, p.228.

⁵⁴ *Ibidem*, pp.229-230.

continuous armed conflict between South and North Korea whatsoever local war or all-out war.⁵⁵

In opposition to the sexist arguments mobilized by the majority, Justices Lee Kong-hyun and Mok Young-joon reasoned that differential treatment between men and women may be justified under the constitution, but cannot be based on such “archaic generalizations” and “stereotype of gender roles” as those upon which rested the majority’s defense of the current male-oriented military service. Claims of gender discrimination are not the only challenges raised against conscription. The most critical debate over it revolves around the difficulty to reconcile today’s system with fundamental rights such as the freedom of conscience. Indeed, conscientious objection is not accommodated under the present constitutional and legislative scheme, by contrast with article 12a of the Basic Law for the Federal Republic of Germany:

(1) Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defense organization.

(2) Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service. The duration of alternative service shall not exceed that of military service. Details shall be regulated by a law, which shall not interfere with the freedom to make a decision in accordance with the dictates of conscience, and which shall also provide for the possibility of alternative service not connected with units of the Armed Forces or of the Federal Border Police.

No alternative to serving in the army is offered in South Korea and conscientious objectors - most of whom are Jehovah Witnesses - are sent to jail for the corresponding amount of time (eighteen months).⁵⁶ All the above-mentioned patterns of military mobilization (gender discrimination and the criminalization of conscientious objection) have perdured after the 1987 transition to democracy. This resilience suggests how the modalities, and even the functionality, of conscription are far from being determined by the issue of the national division only, but are also importantly shaped by domestic dynamics of inclusion and exclusion in the body politic of the South.

Going back to the argument formulated by John Ferejohn and Pasquale Pasquino on the disuse of constitutional emergency institutions, the language of military preparedness that

⁵⁵ *Ibidem*, p.237.

⁵⁶ The Constitutional Court of Korea’s 2004 ruling on conscientious objection will receive an in-depth analysis in chapter eight.

permeates South Korea's constitution does not exhaust the scope of its response to the threat posed by the North. Indeed, focusing on constitutional provisions overshadows the fact that the national division is also construed outside the framework of war and peace embedded in the constitution, which synoptically envisions both the risk of military conflict and the prospect of peaceful reunification. Ferejohn and Pasquino's legislative model seems to provide a better point of entry into South Korea's politics of enmity, most prominently exemplified by the National Security Act of 1948. The security legislation evidences that the partition of the Korean peninsula into two states ideologically antagonistic has engendered a more insidious line of separation than the 38th parallel, a separation not only between but inside both Korean states as each became obsessed with eliminating its enemies within. The great figure of enmity in this configuration is not embodied by the hostile soldier, the conventional and "external" enemy in warfare, but the infiltrated spy, the domestic "thought criminal" - he who praises or sympathizes with the other "side" - and, since the late 1980s, the adversary of the constitutional order.

Confronting the enemy of the constitutional order: meaning and means of militant democracy

Interwar legislative militancy

The concept of militant democracy comes from a series of two articles written in 1937 by the German political scientist Karl Loewenstein.⁵⁷ His argument and call for democracy to become militant were formulated in the context of the interwar collapse of European liberal regimes under the blows of fascism. To Loewenstein, democracies could not let themselves be destroyed by the hand of their enemies - the very individuals or parties who were abusing the institutions and principles of the democratic order to overthrow it.⁵⁸ Instead, democracies had to turn militant and restrict the use of the rights and freedoms formally granted to all for the sake of their own survival.

⁵⁷ Karl Loewenstein, "Militant Democracy and Fundamental Rights I," *The American Political Science Review*, Vol.31, No.3, 1937, pp.417-432; "Militant Democracy and Fundamental Rights II," *The American Political Science Review*, Vol.31, No.4, 1937, pp.638-658.

⁵⁸ As pointed out by Melissa Schwartzberg, the general fear of "democratic autophagy" or "the concern that democracy, perhaps through its tolerance of antidemocratic forces, will harbor the forces of its own destruction" can be traced to Plato. Melissa Schwartzberg, *Democracy and Legal Change*, Cambridge, New York: Cambridge University Press, 2007, p.7.

Democracy and democratic tolerance have been used for their own destruction. Under cover of fundamental rights and the rule of law, the anti-democratic machine could be built up and set in motion legally. Calculating adroitly that democracy could not, without self-abnegation, deny to any body of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary participation, fascist exponents systematically discredit the democratic order and make it unworkable by paralyzing its functions until chaos reigns. They exploit the tolerant confidence of democratic ideology that in the long run truth is stronger than falsehood, that the spirit asserts itself against force. Democracy was unable to forbid the enemies of its very existence the use of democratic instrumentalities. Until very recently, democratic fundamentalism and legalistic blindness were unwilling to realize that the mechanism of democracy is the Trojan horse by which the enemy enters the city. To fascism in the guise of a legally recognized political party were accorded all the opportunities of democratic institutions.⁵⁹

In essence, political actors who only exploit the rules of the democratic game to subvert them should not be entitled to play in the first place. Therefore, outlawing extremist parties and behaviors had to be the primary purpose of militant legislation according to Loewenstein. Of course, the sagacious analyst that he was knew very well that militant legislation was a necessary, but insufficient, condition to defeat fascism. It could only be efficient in conjunction with the political will of all constitutional parties to unite against anti-democratic forces and the commitment of law-enforcing bodies to execute the law. By the late 1930s, Loewenstein could estimate that militant legislation or “prophylactic measures” had been established in “all democratic countries except France,”⁶⁰ and were featuring a strong degree of resemblance across cases.

The means of democratic militancy were more legislative - with the enactment of special anti-extremist legislation - than constitutional - through the use of emergency powers. Indeed, emergency institutions were not absent from interwar constitutions but did not necessarily help democratic regimes to resist as illustrated by the notorious example of the Weimar constitution. Its article 48 did include provisions that could have been deployed to militantly defend the democratic institutions of the Weimar Republic,⁶¹ but the use that was

⁵⁹ Karl Loewenstein, “Militant Democracy and Fundamental Rights I,” pp.423-424.

⁶⁰ *Ibidem*, p.430.

⁶¹ “If public security and order are seriously disturbed or endangered within the German Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of the armed forces. For this purpose he may suspend for a while, in whole or in part, the fundamental rights provided in Articles 114, 115, 117, 118, 123, 124 and 153. The President of the Reich must inform the Reichstag without delay of all measures taken in accordance with Paragraphs 1 or 2 of this Article. These measures are to be revoked on the demand of the Reichstag.” (Article 48 of the Constitution of the Weimar Republic).

made of them contributed to condemn rather than save the regime.⁶² As noted by Oren Gross and Fionnuala Ni Aolain,

Between 1919 and 1932, article 48 was invoked more than 250 times. It became a constitutional source for the promulgation of an extensive array of executive decrees, most frequently in the context of economic disturbances. The extensive use of article 48 during the Weimar years led to a broad construction of the range of circumstances in which article 48 powers could be employed so as to encompass crises that did not fall within the traditional understanding of threats “endangering the public safety and order.” [...] And so it came to be that when Hitler became the chancellor in 1933, article 48 was ready to be used by the Nazis in order to finish off the republic.⁶³

Therefore, the existence of emergency powers in a democracy’s constitution is only a poor test of its militancy, best captured by the legislative means of defense that the regime deploys and which require enough political will and union to be both enacted and effectively implemented. In interwar Europe, such measures centered on the indiscriminate prohibition of all subversive movements and the reaffirmation of the state’s exclusive monopoly over violence through the ban of military bands and private party militias. Anti-fascist policies were part of what Karl Loewenstein referred to as an “authoritarian” or “disciplined” version of democracy, one in which fundamental rights could neither be considered as absolute nor universally distributed. Loewenstein also recognized that the curtailment of some categories of rights (especially those related to the freedom of expression) would prove more delicate than restraints on political association and participation.

Perhaps the thorniest problem of democratic states still upholding fundamental rights is that of curbing the freedom of public opinion, speech, and press in order to check the unlawful use thereof by revolutionary and subversive propaganda, when attack presents itself in the guise of lawful political criticism of existing institutions.⁶⁴

[...]

As happens frequently in anti-fascist legislation, the border-line between unlawful slander and justified criticism as lawful exercise of political rights is exceedingly dim, and the courts of

⁶² After the February 27, 1933 arson attack on the Reichstag, fomented by the Nazis but blamed on the Communists, President von Hindenburg was persuaded by Hitler to issue on the basis of article 48 an emergency decree which curtailed most constitutional rights.

⁶³ Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis. Emergency Powers in Theory and Practice*, Cambridge: Cambridge University Press, 2006, pp.84-85.

⁶⁴ Karl Loewenstein, “Militant Democracy and Fundamental Rights II,” p.652.

democratic states are called upon to decide on legal grounds what in fact is a political problem for which a new *ratio decidendi* is yet to be discovered.⁶⁵

Restrictions on freedoms such as speech and association are indeed characteristic of European democracies' militancy against their enemies - be they extremist political parties or terrorists. In his analysis of comparative counter-terrorism after 9/11, Kent Roach insists on the existence of "a European constitutional culture that is much more willing to accept limits on speech and association in the name of the ability of militant democracies to protect themselves than more libertarian North American constitutional cultures."⁶⁶ However, this cleavage is not merely the product of differences in the civic and legal cultures of both continents, but largely results from diverging historical experiences. The European approach to counter-terrorism is indeed indissociable from a long "history of internal violence and terrorist acts by extreme left-wing groups [...] and regional separatist groups advocating independence or greater autonomy."⁶⁷

Both during the interwar and today, the means of democratic militancy in European societies have been primarily legislative. However, its principle has also been enshrined in some fundamental texts following the Second World War, such as the Basic Law for the Federal Republic of Germany or the European Convention on Human Rights. It should come as no surprise that Germany stands as the paradigmatic militant case given the trauma left by the breakdown of the Republic of Weimar in 1933, considered by Loewenstein and others as a democracy which failed because it did not resist. The principle of democratic militancy is also consecrated in South Korea's constitution since the revision of 1960 which established the Second Republic (1960-1961) and heavily borrowed from the provisions of the German model to protect - in vain - its new and precarious democratic order.

Post-war constitutional militancy

Emergency powers are not the only constitutional provisions to deal with threats. After World War II, the Federal Republic of Germany translated into its basic law measures that were typical of the interwar militant legislation that the Weimar Republic itself did not adopt

⁶⁵ *Ibidem*, pp.653-654.

⁶⁶ Kent Roach, *The 9/11 Effect*, p.241.

⁶⁷ Judith Sunderland, *Preempting Justice. Counterterrorism Laws and Procedures in France*, New York: Human Rights Watch, 2008, p.4.

or enforce. Contrary to emergency institutions which can mainly operate when the territorial integrity of the state and the security of the nation are endangered, constitutional militant institutions are designed to operate in normal times against the enemies of the democratic order. In the name of preserving democracy, they deprive subversive actors of fundamental rights such as the freedoms of speech, political activity, or participation.

Militant measures' iconic constitutional manifestation lies in four articles of the German basic law. Article 18 strips of the freedom of expression whoever abuses it "to combat the free democratic basic order."⁶⁸ The freedom to form and to belong to a political organization is similarly curtailed by article 21 which bans as unconstitutional political parties "that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."⁶⁹ As for article 20, it recognizes in its section 4 the right of all Germans "to resist any person seeking to abolish this constitutional order, if no other remedy is available."⁷⁰ Finally, article 19 confirms the possibility consecrated in all constitutional systems to restrict basic rights, by principle inviolable and inalienable.⁷¹ Even such fundamental rights as the

⁶⁸ "Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court." (Article 18 of the Basic Law for the Federal Republic of Germany).

⁶⁹ "(1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.

(2) Parties that, by reason of their aims or the behavior of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.

(3) Details shall be regulated by federal laws."
(Article 21 of the Basic Law for the Federal Republic of Germany).

⁷⁰ "(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."

(Article 20 of the Basic Law for the Federal Republic of Germany).

⁷¹ "(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph."

(Article 19 of the Basic Law for the Federal Republic of Germany).

right to life and physical integrity may therefore be interfered with, albeit “only pursuant to a law.”⁷² In this scheme, the protection of basic rights entrusted to constitutional courts concretely means for them to review whether the interference with a fundamental right is legal (i.e. has an appropriate basis in law) and whether it is excessive or not (i.e., does not affect the “essence” of the basic right). In practice, courts have elaborated concrete tools and modes of reasoning to conduct this type of analysis.

As this study contends, the conditionality of basic rights is an essential element to understand the discursive possibilities of courts when they address constitutional issues in general, and national security matters in particular. In other words, there is no “rights’ absolutism” in the jurisprudence of contemporary courts. Restrictions on basic rights can always be tolerated provided that they have a proper legal ground and that the “essence” of the basic right itself is not affected. The legal ground of rights’ conditionality is usually known as the “derogation clause.” It exists in both national law (see article 37 of the South Korean constitution and article 19 of the German basic law) and supranational law, as exemplified by article 15 of the European Convention on Human Rights⁷³ and article 4 of the International Covenant on Civil and Political Rights.⁷⁴ The countries whose constitutions are silent over the issue of rights’ restriction (as in the United States, with the exception of the suspension clause for the writ of *habeas corpus*), or without a codified constitution (like Israel

⁷² “Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.” (Article 2, section 2 of the Basic Law for the Federal Republic of Germany).

⁷³ “(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.” (Article 15 of the European Convention on Human Rights).

⁷⁴ “(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

(2) No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

(3) Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

(Article 4 of the International Covenant on Civil and Political Rights).

or the United Kingdom) abide by this doctrine of rights' conditionality as demonstrated by their high courts' rulings.

Although generally possible, the restriction of fundamental rights is however subject to a number of conditions and controls. First of all, some texts (mostly international conventions) stipulate articles that cannot be derogated: article 2 (right to life), article 3 (prohibition of torture), article 4, paragraph 1 (prohibition of slavery and servitude), and article 7 (no punishment without a law) under the European Convention on Human Rights; article 6 (right to life), article 7 (prohibition of torture), article 8, paragraphs 1 and 2 (prohibition of slavery and servitude), article 11 (no imprisonment on the ground of inability to fulfill a contractual obligation), article 15 (no punishment without a law), article 16 (right to be recognized everywhere as a person before the law), and article 18 (right to freedom of thought, conscience, and religion) under the International Covenant on Civil and Political Rights. These exceptions still leave a vast array of basic rights susceptible of limitations. In practice, democratic regimes and their constitutional courts even allow such supranational "absolute" rights to become conditional, as repeatedly articulated by the jurisprudence of the Supreme Court of Israel sitting as High Court of Justice.

Israeli constitutional law has a consistent approach to human rights in periods of relative calm and in periods of increased fighting. We do not recognize a clear distinction between the two. We do not have balancing laws that are unique to times of war. Naturally, human rights are not absolute. They can be restricted in times of calm and in times of war.⁷⁵

The Constitutional Court of Korea engaged in similar reasoning when it upheld the constitutional validity of capital punishment against the right to life in 2010.

[O]ur Constitution does not recognize absolute fundamental rights and Article 37 Section 2 of the Constitution prescribes that any kind of people's freedom and right may be restricted by Act to the extent that it is necessary to protect national security, public order, or public welfare. [...] The right to life, like any other rights, may be subject to the general statutory reservation under Article 37 Section 2 of the Constitution.⁷⁶

This judicial understanding of rights as never being absolute does not entail that they are reduced to mere fiction. As summarized by the Israeli supreme court,

⁷⁵ H CJ 7052/03, *Adalah v. Minister of Interior* (2006).

⁷⁶ 22-1(A) KCCR 36, 2008Hun-Ka23, February 25, 2010, in The Constitutional Court of Korea, *Constitutional Court Decisions. 2010*, p.21.

Admittedly, human rights are not absolute. It is possible to restrict their realization. But there are limits to the restriction of the realization of human rights.⁷⁷

This discursive order is critical not only to draw similarities between the jurisprudence of diverse institutions, but also, and maybe more importantly, to overcome the traditional dichotomy between liberal (or progressive) and conservative (or repressive) decisions. Actually, the two have much more in common than is usually thought given the shared discursive boundaries in which they operate. This “epistemic commonality” does not leave constitutional courts powerless to make significant and differential choices. While the distinction between liberal and conservative decisions should be relativized, it is not completely abolished by the realization of their joint premises - the fact that basic rights can always be restricted, provided that certain conditions are met. The intervention of constitutional courts therefore focuses on the determination and/or examination of the necessary conditions to limit fundamental rights, and not on the issue to decide if they can be restricted or not.⁷⁸

Given the militant character of the German basic law, the court of Karlsruhe has a role which apparently goes beyond that of corresponding institutions in other democracies. The institution indeed appears as the ultimate authority in charge of identifying who the enemies of the “free democratic basic order” are. This empowerment stems from the belief that the mission of protecting the constitutional order needs to be entrusted to an independent, apolitical guardian. Therefore, when the basic rights related to the freedom of expression (including the freedoms of the press, teaching, assembly, association, and privacy of correspondence) are abused for non-democratic purposes, the constitutional court is the sole authority competent to declare the forfeiture of the rights and its extent.⁷⁹ Likewise, it has to determine whether the existence and activities of a political party endanger the “free democratic basic order” and should be ruled unconstitutional.⁸⁰ Among other prerogatives associated with the defense of the constitutional order, the German constitutional court

⁷⁷ H CJ 7052/03, *Adalah v. Minister of Interior* (2006).

⁷⁸ While the absence of rights’ absolutism can be claimed from the viewpoint of an empirical theory of constitutional and jurisprudential discourse which this study adopts, it can however be contested from the perspective of a normative theory of law in which rights are construed as universal and categorical norms not susceptible to derogation. See Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977; Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge: MIT Press, 1996.

⁷⁹ Article 18 of the Basic Law for the Federal Republic of Germany.

⁸⁰ Article 21 of the Basic Law for the Federal Republic of Germany.

decides cases of impeachment against the president for “willful violation of this Basic Law or any other federal law” brought before it by the Bundestag or the Bundesrat.⁸¹ The same power is granted to the court “if a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially.”⁸²

Militant democracy’s exclusionary logic

There unmistakably exists a post-war German matrix for constitutional militancy, paralleled by similar provisions in other texts such as the European Convention on Human Rights, whose article 17 prohibits activities aimed at the destruction of the rights and freedoms granted by the document.⁸³ This model has also inspired militant measures in other constitutions as well as the development across constitutional courts of a “basic structure” jurisprudence, defining the fundamental values and features which ought to be defended in a given polity. As underlined by Melissa Schwartzberg, foundational elements such as the republican or democratic form of government are often entrenched in constitutional texts, that is to say, insulated from the possibility of being altered through amendments. This protection however raises a double dilemma according to Schwartzberg, as the arrangements in question may have been shaped by specific interests and as constitutional courts become the sole actors in charge of interpreting them.

Entrenchment reifies a particular formulation of rights that, emerging from political processes of deliberation, negotiation, and bargaining during constituent assemblies, may be normatively

⁸¹ “(1) The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for willful violation of this Basic Law or of any other federal law. The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.

(2) If the Federal Constitutional Court finds the Federal President guilty of a willful violation of this Basic Law or of any other federal law, it may declare that he has forfeited his office. After the Federal President has been impeached, the Court may issue an interim order preventing him from exercising his functions.” (Article 61 of the Basic Law for the Federal Republic of Germany).

⁸² “(1) The legal status of federal judges shall be regulated by a special federal law.

(2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed. [...]” (Article 98 of the Basic Law for the Republic of Germany).

⁸³ “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention” (Article 17 of the European Convention on Human Rights).

attractive or unattractive, adequate to their challenges or inadequate. Further, instead of inhibiting legal change altogether, entrenchment shifts the authority to alter the law away from legislatures and towards courts. That is, entrenched rights are not, in fact, immutable because they remain subject to interpretive change by judges - and these alterations may be both substantial and themselves immutable except through subsequent decisions, given the inability to revise these norms through the amendment process.⁸⁴

Similarly, the act and language of defending the constitutional order may not only help to protect democracy against political threats, but can contribute to fashion a certain kind of order from which some actors will be excluded: Nazis and Communists in post-war West Germany; the forces behind the popular democratization movement (particularly students and workers) in post-1987 South Korea as this dissertation contends.

The rhetoric of militant democracy which the Constitutional Court of Korea has appropriated is supported by the militant attributions expressly bestowed upon the court. Article 8, section 4 of the South Korean constitution, closely modeled on article 21 of the German basic law, states that:

If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court.⁸⁵

As discussed in chapter two, no case has yet been decided by the Constitutional Court of Korea on the ground of article 8,⁸⁶ in contrast with the two rulings rendered by the Federal Constitutional Court of Germany against subversive political parties: on October 23, 1952, when justices outlawed the neo-Nazi Socialist Reich Party, and on August 17, 1956, when they censored the Communist Party of Germany on the basis of the court's commitment to "fortified democracy" ("*streitbare Demokratie*"). The absence of litigation before the

⁸⁴ Melissa Schwartzberg, *Democracy and Legal Change*, p.22.

⁸⁵ "(1) The establishment of political parties shall be free, and the plural party system shall be guaranteed.

(2) Political parties shall be democratic in their objectives, organization, and activities, and shall have the necessary organizational arrangements for the people to participate in the formation of the political will.

(3) Political parties shall enjoy the protection of the State and may be provided with operational funds by the State under the conditions as prescribed by Act.

(4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be dissolved in accordance with the decision of the Constitutional Court."
(Article 8 of the Constitution of the Republic of Korea).

⁸⁶ A request to dissolve the minor and left-wing Unified Progressive Party was however filed on November 5, 2013.

Constitutional Court of Korea does not imply that South Korean democracy after 1987 has been more tolerant of the activities of political parties than was West Germany in the 1950s. On the contrary, South Korean politics have been characterized by a ban on leftist ideology since the 1945 division. Both freedoms of speech and association are still very restricted under the National Security Act. Its article 7 criminalizes praising or sympathizing with an “anti-state organization,” which encompasses activities such as disseminating or merely possessing certain materials interpreted as including the works of Marx and Engels until the late 1980s.

After the Korean War, not just socialist politics but also academic studies on Marx were severely repressed in South Korea under the anti-communist dictatorships of Rhee Syngman (1948-60), Park Chung Hee (1961-79), and Chun Doo Hwan (1980-87). Even just carrying Marx’s books was punished by more than two years in prison. Progressive scholars who wanted to study Marxism in this period had no way but to do so under such rubrics as dependency theory, the Frankfurt School, or alienation in “early Marx.” Marxism flourished in Korea after the Kwangju People’s Uprising in 1980 and the Great Democratic Struggles of 1987. The Anti-Communist Law could not prevent the sudden and explosive growth of publication of Marxist literature which began in the mid-1980s. The government’s arrest and acquittal of Kim Tae-Gyeong, president of the publisher of the first volume of *Capital* in 1987 was the turning point. About 70 Korean versions of various works of Marx and Engels were published during 1987-1991.⁸⁷

If Marx’s writings are no longer prohibited readings, how to interpret and apply the National Security Act in general, and its article 7 in particular, is still a contentious issue in democratic South Korea, and one which raises the question of who is considered as included or not in the post-transition order. As a result, what appears problematic and at stake through the National Security Act goes beyond the possibility to restrict fundamental rights *per se*, since such limitation is authorized in all democratic societies and regulated by article 37, section 2 of the South Korean constitution:

The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

⁸⁷ Seongjin Jeong, “Marx in South Korea,” *Socialism and Democracy*, Vol.24, No.3, 2010, p.199.

This provision is construed by South Korean jurists as the legal ground for the application of the proportionality test.⁸⁸ The principle of proportionality is supposed to find its jurisprudential roots in German constitutional law, where it was first employed in the *Lüth* decision of 1958, that is to say, almost ten years after the creation of the Federal Constitutional Court.⁸⁹ As a method of balancing between competing constitutional interests (such as the protection of national security and of fundamental rights), proportionality has been refined into a four-step process which is employed by courts such as the European Court of Human Rights and the Supreme Court of Israel: (1) there should be a legitimate aim to the restriction of a basic right, (2) the means to achieve this aim (i.e., the concrete restriction) should be appropriate, (3) the means should be necessary, in the sense that it should be the least restrictive means to achieve the pursued aim, and (4) the balance between the concerned legal interests has to be proportionate. While the first three stages deal with the legitimacy of the aim and the adequacy of the means, the last step represents a proportionality test in the narrow sense, assessing whether the overall advantages of the restriction outweighs its disadvantages.

The fact that basic rights are not unconditional, and never stand as absolute, in the different constitutional and jurisprudential orders does not imply that democracies are arbitrary regimes in disguise. Their limitation of basic rights does not resuscitate the paradox of law suspending itself. Indeed, limitations, like derogations, remain within the confines of the normative framework in which they are explicitly envisioned. The absence of paradox does not entail that restricting fundamental rights is an easy matter, but it is permitted when justified by the pursuit of alternative democratic goods such as the preservation of public order or national security. How to balance and reconcile apparently contradictory constitutional interests remains a delicate endeavor, all the more since the criteria of what is a

⁸⁸ Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

⁸⁹ BVerfGE 7, 198 (1958). Mr. Lüth had petitioned the court of Karlsruhe after an ordinary tribunal found that section 826 of the Civil Code prohibited him from making appeals to boycott the movies produced after 1945 by Veit Harlan, a prominent Nazi film director. According to the ordinary court, his appeal to boycott was contrary to public policy and to “the democratic convictions of law and morals of the German people” since Harlan had already been sentenced in a criminal proceeding for having committed Nazi crimes. In its decision, the constitutional court argued that it was not enough to determine the scope of Lüth’s freedom of expression in relation to the rules of civil law that allow its restriction. Instead, the court held that his freedom of expression had to be weighed against “competing constitutional considerations” and, as a result of this balancing, concluded that it should be given priority to. According to Robert Alexy, “the lesson of the Lüth decision that is most important for everyday legal work runs, therefore, as follows: ‘A ‘balancing of interests’ becomes necessary.’ From a methodological point of view, the concept of balancing is the central concept in the adjudication of the Federal Constitutional Court, which has developed further the line first set out in the Lüth decision.” Robert Alexy, “Constitutional Rights, Balancing, and Rationality,” *Ratio Juris*, Vol.16, No.2, 2003, p.133.

necessary and just restriction of basic rights are generally not specified by constitutions. Instead, it has been left to the courts to clarify them.

The militant character of the South Korean constitution is also contained in article 65 concerning the impeachment of high officials. Contrary to the impeachment device that exists in the American constitution and is solely oriented toward the sanctioning of high crimes like treason,⁹⁰ the German basic law and the South Korean constitution additionally punish behavior deemed in violation of the constitution.⁹¹ This precaution may derive from the fact that, in the past, German and South Korean leaders alike have importantly contributed to the distortion of the constitutional order. For instance, the South Korean constitution was manipulated by both Presidents Rhee Syngman (in 1954) and Park Chung-hee in (1969) to extend the duration of the presidential term and allow them to stay in power while preserving a façade of legality.

As a result, the present version of the constitution states that the president, elected for five years, shall not be reelected (article 70). In addition, article 128, section 2 guarantees that article 70 cannot be revised and the presidential term prolonged to benefit the incumbent.⁹² Interestingly, similar provisions were already inserted in the 1980 constitution, in which the presidential office was defined as “a one-time, seven-year term, with no possibility for constitutional amendment to extend one’s term or seek a second term.”⁹³ According to Yoon Dae-kyu, “this was an important redeeming grace for the new military leadership, which

⁹⁰ “The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.” (Article 2, section 4 of the United States Constitution).

⁹¹ “(1) In case the President, the Prime Minister, members of the State Council, heads of Executive Ministries, justices of the Constitutional Court, judges, members of the National Election Commission, the Chairman and members of the Board of Audit and Inspection, and other public officials designated by Act have violated the Constitution or other Acts in the performance of official duties, the National Assembly may pass motions for their impeachment.

(2) A motion for impeachment prescribed in paragraph (1) may be proposed by one third or more of the total members of the National Assembly, and shall require a concurrent vote of a majority of the total members of the National Assembly for passage: Provided, That a motion for the impeachment of the President shall be proposed by a majority of the total members of the National Assembly and approved by two thirds or more of the total members of the National Assembly.

(3) Any person against whom a motion for impeachment has been passed shall be suspended from exercising his power until the impeachment has been adjudicated.

(4) A decision on impeachment shall not extend further than removal from public office: Provided, That it shall not exempt the person impeached from civil or criminal liability.” (Article 65 of the Constitution of the Republic of Korea).

⁹² “Amendments to the Constitution for the extension of the term of office of the President or for a change allowing for the reelection of the president shall not be effective for the president in office at the time of the proposal for such amendments to the Constitution.” (Article 128, section 2 of the Constitution of the Republic of Korea).

⁹³ Dae-kyu Yoon, *Law and Democracy in South Korea*, p.19.

lacked legitimacy” after having seized power through a military coup d’état in December 1979, the nationwide imposition of martial law, and the bloodshed of Kwangju.⁹⁴

Obviously, the term limit introduced in 1980 was not a sufficient guarantee against undemocratic rule since the indirect mode of election for presidency remained, ensuring that General Chun Doo-hwan and his associates would continue to monopolize power even after the end of Chun’s term. In 1987, the one-term limit was retained, not only to avoid the constitutional abuses characteristic of the previous regimes, but out of a compromise between the three candidates of the coming presidential election: Roh Tae-woo, Kim Young-sam, and Kim Dae-jung. Indeed,

[N]one of the three prospective candidates was a sure bet to win. Everyone knew this. For each candidate to minimize the risk of not gaining office, a compromise would have to be reached. This “compromise” came in the form of constitutional reform, that is, the amendment that would restrict a president to a single five-year term. Thus whoever won would be out of the running come the next election.⁹⁵

The one-term limit did produce some of its intended effects as the three rivals of 1987 succeeded one another at the head of the Republic of Korea. This outcome was made possible by the institutional mechanism established in articles 70 and 128, but was not predetermined by it. As discussed in chapter two, the logic of strategic and self-interested choices on the part of constitution-makers is a powerful, yet non-exhaustive one to account for the birth and development of institutions. Moreover, all the provisions instituted in the 1987 revised constitution may not be readable through the prism of a clear compromise between the ruling elite and the opposition. On many issues, both parties - and especially the opposition - had to settle for a less preferred option than their initial choice, which happened for the reform of the judiciary.

More importantly, institutional design only opens a set of possibilities without conditioning a given trajectory. An institution may function the way it was intended to for other reasons than the ones initially envisioned, but it can also deviate from the course that may have been more or less anticipated at the time of its conception. When it comes to the Constitutional Court of Korea, what strikes most is not the ability but rather the difficulty of

⁹⁴ *Ibidem*.

⁹⁵ *Ibidem*, p.27.

actors to picture both its potential and future role, during the constitution-making process and beyond.

The militant powers of the Constitutional Court of Korea in action: adjudicating the 2004 motion for impeaching President Roh Moo-hyun

As a result of the militant character of the South Korean constitution, the constitutional court can dissolve political parties and impeach officials, including the President of the Republic of Korea. Actually, two distinct procedures exist against potential abuses of power committed by the chief of state: prosecution for treason (article 84 of the constitution) and impeachment for violation of the constitution (article 65). Article 65 does not explicitly attribute a role to the constitutional court, but article 111 includes impeachment in the jurisdiction of the institution.⁹⁶ While no dissolution of a political party has yet been pronounced, the impeachment procedure was activated on one occasion. In 2004, the Constitutional Court of Korea ruled on the impeachment case filed against President Roh Moo-hyun by Kim Ki-chun (Kim Ki-ch'un), chairman of the National Assembly Legislation and Judiciary Committee.⁹⁷

The impeachment decision of 2004 provides a rare example of the Constitutional Court of Korea's use of its militant powers. As with all judicial actions, such intervention was triggered as the result of a procedure set into motion by another actor, the parliament. Indeed, courts can never impulse the disputes that they have to settle, and are therefore acting only reactively. In the matter at hand, the impeachment case against President Roh Moo-hyun was brought before the court after 193 members of the National Assembly (out of 271 at the time) voted a motion for impeachment on March 12, 2004. The principal ground of the parliamentary resolution was the alleged violation of Roh's obligation to remain politically neutral in electoral times. By supporting a particular political party before the coming legislative elections, Roh was deemed to have acted "in contempt of the constitutional institutions" according to an overwhelming majority of the National Assembly.

⁹⁶ "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 111, section 1 of the Constitution of the Republic of Korea).

⁹⁷ 16-1 KCCR 609, 2004Hun-Na1, May 14, 2004.

The decision rendered by the constitutional court is enlightening in so far as it reveals features of the court's attitude vis-à-vis each of the two political branches. Moreover, it illustrates dynamics that are proper and internal to the institution itself. The petition for the impeachment adjudication was rejected by the constitutional court. Its ruling was justified through a fifty-page long reasoning which represents an affirmation of judicial independence toward both the executive and legislative powers.⁹⁸ First of all, the court refused to be bound by the National Assembly's narrow vision of its role in this case. Instead, the responsibility envisioned by the court for itself was much more comprehensive than the one ascribed to it by the parliament, which saw "the scope of the subject matter in the impeachment adjudication proceeding at the Constitutional Court" as "limited to the question of the constitutionality and legality of the impeachment procedures and to the question of whether or not the specific violations that allegedly constitute the grounds for impeachment in fact exist."⁹⁹

While the justices recognized that the subject matter of review was determined by the grounds for impeachment stated by the parliament, they also asserted their capacity to "determine the facts that led to the impeachment based on other relevant legal provisions" than the ones "which the petitioner alleges have been violated."¹⁰⁰ This reasoning enabled the court to find President Roh Moo-hyun guilty of some of the violations alleged by the National Assembly, but to construe these facts in light of other provisions than the ones invoked by the parliament. In the end, the court rejected the impeachment motion but its decision should not be read as demonstrating a bias in favor of the presidency. As mentioned above, the ruling did not amount to an absolute exculpation of the president. On the contrary, the court found that Roh Moo-hyun committed several infractions against the law, including the violation of his neutrality obligation in times of election. However, the court argued that not all violations of law justify a removal from office given the gravity of the effect of such a measure on democratic institutions themselves.

⁹⁸ 16-1 KCCR 609, 2004Hun-Na1, May 14, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, pp.289-341. This length corresponds to the translated English version of the ruling.

⁹⁹ *Ibidem*, p.297.

¹⁰⁰ "The Constitutional Court, as a judicial institution, is restrained in principle to the grounds for impeachment stated in the National Assembly's impeachment resolution. Therefore, no other grounds for impeachment except those stated in the impeachment resolution constitute the subject matter to be adjudicated by the Constitutional Court at the impeachment adjudication proceeding. However, with respect to the 'determination on legal provisions' the violation of which is alleged in the impeachment resolution, the Constitutional Court in principle is not bound. Therefore, the Constitutional Court may determine the facts that led to the impeachment based on other relevant legal provisions as well as the legal provisions which the petitioner alleges have been violated. Also, the Constitutional Court is not bound by the structure of the grounds for impeachment as categorized by the National Assembly in its impeachment resolution in determining the grounds for impeachment. Therefore, the question of in which relations the grounds for impeachment are legally examined is absolutely to be determined by the Constitutional Court." *Ibidem*, p.296.

[A] decision to remove the President from his or her office shall be justified in such limited circumstances as where the maintenance of the presidential office can no longer be permitted from the standpoint of the protection of the Constitution, or where the President has lost the qualifications to administrate state affairs by betraying the trust of the people.¹⁰¹

Since the specific acts by which President Roh violated the law “cannot be deemed as a threat to the basic order of free democracy since there was no affirmative intent to stand against the constitutional order therein,”¹⁰² the petition for impeachment was nullified. Interestingly, this outcome only represented the first part of a twofold conclusion. The last paragraphs of the ruling are indeed dedicated to the court’s justification for not disclosing the process and result of its deliberation. Contrary to the ordinary practice of the institution,

Here, non-disclosure of the deliberation by the Constitutional Court Justices means that neither the separate opinions of individual Justices nor the numbers thereof shall be disclosed, as well as the course of the deliberation.¹⁰³

Through defending its unanimous ruling, the court tacitly admitted a dual divergence among justices: over the very subject matter of review (some judges might have been in favor of a different outcome than the rejection of the impeachment resolution but how many of them was not divulged), and over the issue of whether or not judges’ individual opinions should be disclosed. It can be inferred from the present case that the court decided to reinforce the legitimacy of its ruling by presenting a united front, but that the adoption of this very strategic position was itself premised upon the existence of contentious views within the institution. The ruling was not the only decision involving highly political controversies that the court settled during its third term (from September 2001 to September 2007), when it also had to pronounce itself on the construction of a new “administrative capital” outside Seoul¹⁰⁴ and on the electoral system of proportional representation.¹⁰⁵

While the Third Term Court may be regarded as having reestablished the stature of the Court as the final defender of the Constitution through its peaceful and orderly adjudication of these

¹⁰¹ *Ibidem*, p.337.

¹⁰² *Ibidem*, p.339.

¹⁰³ *Ibidem*, p.340.

¹⁰⁴ 16-2(B) KCCR 1, 2004Hun-Ma554 et al., October 21, 2004.

¹⁰⁵ 13-2 KCCR 502, 2000Hun-Ma92 et al., October 25, 2001.

political cases, these decisions also stimulated fierce discussions on the proper relationship between the system of constitutional adjudication on the one hand, and the principles of representative democracy and majoritarian rule-making on the other hand. Fortunately, during its Third Term, the Court received consistently the highest mark in surveys conducted by the media asking the people's opinion on state agencies which they felt to be the most trustworthy and influential.¹⁰⁶

The fruits that can be yielded from an analysis of constitutional courts' militant powers are enriching, yet limited given these powers' infrequent use. This is true for both the Constitutional Court of Korea and its many counterparts, inscribing the relative disuse of constitutional militant powers in the pattern described by John Ferejohn and Pasquale Pasquino for constitutional emergency institutions. The role and rhetoric of protecting the constitutional order which the South Korean court has embraced is, however, irreducible to its militant functions. As will be examined in the rest of this dissertation, the institution has heavily mobilized the language of militant democracy to review the security instruments inherited from the authoritarian period and to justify their resilience in the post-transition era, thereby highlighting the ambivalence of its commitment as guardian of the constitutional order.

¹⁰⁶ The Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2008, p.205.

CHAPTER FOUR

The Paradox of Constitutional Empowerment

“MINBYUN was established during one of Korea’s most repressive regimes - the Roh Tae-Woo dictatorship of the Sixth Republic. This era was marked not only by a repression of basic human rights, but also by violence against those who publicly criticized the government. MINBYUN therefore sought to fill the critical gap in legal representation for activists, particularly those activists resisting the Roh dictatorship.”

Minbyun, Lawyers for a Democratic Society

“Spies such as Kim Nak-jung and his accomplices do not deserve the right to legal assistance while in detention for interrogation. Allowing lawyers of *Minbyun* (the Association of Lawyers for Democracy) to have an interview with Kim Nak-jung and the other spies is like giving a child a knife. [...]. When the arrested people return from their meeting with the lawyers they become like soldiers returning from a victorious battle, very bold and upright. Lawyers advise them not to make any confession. The flow of interrogation is interrupted from this moment. Furthermore, if an application for a review of legality of detention is recognized, then all investigation comes to nothing. If a review of legality of detention is held, then arrested people must be brought to the court. There are among the audience at the court members of their organization and the ensuing debate with the interrogators exposes all the information about the investigation. And this is inevitably reported in the media. Then it becomes impossible to carry on the investigation [...].”

Chong Hyong-kun, Deputy Director of the Agency for National Security Planning, 1992

This chapter questions the conditions which have led to the Constitutional Court of Korea’s empowerment after the 1987 change of regime. Indeed, the activation of judicial review did not result from political elites’ strategic design at the time of the transition, but was instead prompted by the mobilization of human rights lawyers representing the groups marginalized by the institutionalization of democracy and the continued deployment of security instruments. Their investment of constitutional justice as a site where to contest the non-inclusive legacy of the transition has presented the court with two tasks: undoing the politics of enmity’s effects in the present, but also addressing its abuses in the past. In this regard, the South Korean path to transitional justice - or its avoidance - illustrates how the definition of enmity has remained a deep object of contention in the post-transition period and how the role played by the constitutional court in relation to it has been ambiguous.

The 1987 transition and the displacement of enmity

“People are the masters of the country, and the people’s will must come before everything else.”¹ On June 29, 1987, this dramatic acknowledgment was pronounced in a nationally televised address by an unlikely voice for political reform: Roh Tae-woo. A few weeks earlier, Roh had been designated as the ruling Democratic Justice Party’s presidential candidate, a nomination which amounted to a succession choice by President Chun Doo-hwan as the 1980 constitution provided for the indirect election of the president, leaving the vote in the hands of an electoral college dominated by the ruling elite. Roh’s speech was all the more surprising since the incumbent regime, brought to power by a 1979 military coup d’état in which Roh himself participated, had firmly resisted the opposition parties’ demand for constitutional reform since the mid-1980s. As unexpected as his declaration was, it did not come out of nowhere but was prompted by the mass street protests ignited in Seoul and other cities throughout South Korea by Roh’s designation as the handpicked successor of Chun Doo-hwan on June 10.

The mobilization against Chun’s regime did not start in 1987, but the scale of the struggle for change dramatically amplified in the spring and summer of that year. During these few months, the contestation sustained by the longtime anti-regime forces (mostly students, workers, and church activists) was joined by the urban middle class, outraged by widely publicized abuses of power, such as the torture and death of Seoul National University student activist Park Jong-chul (Pak Chong-ch’öl) during his interrogation by the police.² It is believed that a combination of factors, from the very scale of the June demonstrations to the prospect of the Olympic Games to be held in Seoul in 1988, prevented the ruling elite from resorting to martial law and violence,³ which it had done in 1980 to restore order, resulting in the death of hundreds protesters in the city of Kwangju.⁴

¹ *The New York Times*, “Excerpts from Speech by Seoul Party Chief,” June 30, 1987.

² Michael Robinson, *Korea’s Twentieth-Century Odyssey*, Honolulu: University of Hawai‘i Press, 2007, p.167.

³ Jung-Kwan Cho, *From Authoritarianism to Consolidated Democracy in South Korea*, Unpublished doctoral dissertation, Yale University, New Haven, 2000, p.251.

⁴ Immediately after the incident, “estimates of casualties varied from the government’s figure of 191 killed (including 23 soldiers), to claims by dissidents that 2,000 or more perished.” James West, “Martial Lawlessness. The Legal Aftermath of Kwangju,” *Pacific Rim Law and Policy Journal*, Vol.6, No.1, 1997, p.93.

As repression did not appear a viable response to the mass rallies, now supported and fueled by the middle class, Roh's June 29 speech heralded a series of eight major concessions, starting with the promise to amend the constitution and to revise the electoral law in order to allow for the direct and competitive election of the president. Following these two points, Roh announced the amnesty of political prisoners, including the restoration of dissident leader Kim Dae-jung's civil and political rights, thus allowing him to take part in the race for the December 1987 presidential election. Roh's declaration also proposed reforms aimed at promoting human rights, the freedom of the press, local autonomy, free political parties, and social renovation to "build a clean and honest society."⁵

The impact of these promises was immediate and twofold. On the one hand, the above-mentioned concessions "satisfied the basic demands of the relatively conservative urban middle class that had tipped the balance in favor of popular reform," while relegating in the background the more substantive demands of students and union leaders - such as "the freedom to organize labor, the institution of distributive justice, the elimination of the National Security Law, and the creation of a social welfare system that had also been a part of the protest agenda since the 1960s."⁶ On the other hand, the political opposition instantly seized the opportunity for change opened by the announced reforms and concentrated its efforts on negotiating the revision of the constitution to transform the presidential election into a direct vote. Consequently,

The period from late June through December 1987 saw rapid implementation of political reforms in an unusual mood of compromise between the ruling and opposition parties. In July the government paroled 357 political offenders, amnestied more than 2,000 other prisoners, and restored full political rights to prominent opposition figure Kim Dae-jung. In August the National Assembly established a committee to study constitutional revision. Representatives of four parties took one month to negotiate and propose a draft constitution that incorporated most of the provisions long sought by the opposition parties: greater press freedom and protection for civil rights, a stronger National Assembly, and direct presidential elections.

⁵ *The New York Times*, "Excerpts from Speech by Seoul Party Chief."

⁶ Michael Robinson, *Korea's Twentieth-Century Odyssey*, p.167.

After the bill passed the National Assembly, more than 93 percent of the voters approved the new draft in a plebiscite on October 28, 1987.⁷

Whether political change is brought about by a “ruptured” transition (in which the old regime is defeated), or a “pacted” one (when reform is the product of negotiations between the ruling elite and the opposition), the amnesty of political prisoners is a preliminary and emblematic step in the effort to rectify the politics of enmity pursued in the authoritarian days. In most transitional settings, the release of political prisoners is a characteristic claim of the opposition and a symbolic measure implemented early on. According to Pierre Lascoumes’ study of Germany, Russia, South Africa, and Turkey in the 1990s, the prison population of each country significantly decreased within a few months after the process of regime change began, reflecting a “broad categorization” of the notion of “political prisoners” in order to signal a clear break with the past.⁸ As the rules and boundaries of political participation are redefined, yesterday’s opponents cease to be criminalized or persecuted for activities which become part of the routine political process. Some of them even accede to power after having spent years behind bars or in exile, like Nelson Mandela and Kim Dae-jung, respectively elected presidents in May 1994 and December 1997.

An important task upon which a new democratic regime has to concentrate is to redress the terrible unbalance between the government’s power to punish and the procedural rights that individuals enjoy against its arbitrary and discretionary exercise. For instance, article 12 of the South Korean constitution of 1987 details a series of procedural safeguards against unlawful arrest, detention, search, seizure, and interrogation. The prohibition of torture in the course of the criminal process is reaffirmed on two occasions: “no citizen shall be tortured or be compelled to testify against himself in criminal cases” (section 2) and “no confession obtained through torture or other coercive means shall be admitted as evidence of guilt” (section 7). These provisions are all the more meaningful in the post-1987 context since the repressive tactics of South Korean authoritarian regimes largely rested upon broad police powers to arrest and detain into custody for several weeks. If charges were eventually pressed,

⁷ Andrea Matles Savada and William Shaw (eds.), *South Korea. A Country Study*, Washington: U.S. Library of Congress, 1990, p.66. As was exposed in chapter two, the first stage of the constitutional negotiations was mainly bilateral, between the ruling Democratic Justice Party and the opposition Reunification Democratic Party. This scheme prevented substantial participation by minor parties, such as the Korea National Party and the formerly prominent New Korea Democratic Party from which Kim Young-sam and Kim Dae-jung had defected. It is only in the second stage, when the bipartisan proposal was submitted to the Special Committee for Constitutional Revision in the National Assembly, that minor parties were invited to contribute.

⁸ Pierre Lascoumes, “Ruptures politiques et politiques pénitentiaires. Analyse comparative des dynamiques de changement institutionnel,” *Déviance et société*, Vol.30, No.3, 2006, p.410.

most suspects would be prosecuted for violating political control laws (“*chǒngch’i kyujepǒp*”), i.e., the National Security Act and the Anti-Communist Act (“*pan’gongpǒp*”) which were merged in 1980.⁹ Torture at the pre-trial and interrogation stages was a common strategy to extract self-incriminating confessions on the basis of which convictions and sentences would be pronounced by tribunals.¹⁰

However, the reform of the criminal process is not as easy in practice as it may seem on the books. The same institutions infamously associated with the repressive apparatus (such as the police, prosecution, courts, prison administration) also have to be relied on to maintain public order and enforce the law after the change of regime. As a result, significant elements of structural continuity are the lot of most transitions.¹¹ In South Korea, not only the former institutions in charge of repression were not purged - including special security agencies involved in investigation and surveillance, such as the Agency for National Security Planning (“*kukka anjǒn kihoekbu*”) or the military Defense Security Command (“*kukkun kimu saryǒngbu*”) - but some of the legal instruments exemplary of the old regime’s oppression stayed in place. This resilience is most prominently embodied by the National Security Act, used for decades by non-democratic governments to suppress dissent, but whose maintenance after 1987 was justified in the name of the security concerns which endure on the divided Korean peninsula. The ideological conversion policy is another example of the numerous repressive tools which survived in the fabric of South Korean criminal law after 1987. This pattern of strong continuity does not mean that the notion of enmity has been left entirely intact in post-transitional South Korea, but its redefinition has only amounted to a partial displacement.

The redeployment of security instruments against pro-democracy activists

As soon as the transitional process is set in motion and efforts directed at undoing the repressive policies of the former regime (amnesty of political prisoners, protection of *habeas*

⁹ Gi-Wook Shin, Paul Chang, Jung-eun Lee, and Sookyung Kim, *South Korea’s Democracy Movement (1970-1993)*. *Stanford Korea Democracy Project Report*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2007, p.89.

¹⁰ Dae-Kyu Yoon, *Law and Political Authority in South Korea*, Boulder: Westview Press, Seoul: Kyungnam University Press, 1990, p.62.

¹¹ For instance, “as the example of Italy shows, failure to modify the centralized and militarized structures of the police forces emerging from an authoritarian or totalitarian regime can result in a circle of continuities, only broken by a complete generational turnover.” Donatella Della Porta and Herbert Reiter (eds.), *Policing Protest. The Control of Mass Demonstrations in Western Democracies*, Minneapolis: University of Minnesota Press, 1998, p.12.

corpus rights, etc.), limits can appear in the redefinition of enmity. In his comparative study of prison policies after political change, Pierre Lascoumes notes that the broad amnesty measures adopted in post-transitional Turkey, Russia, and South Africa were often restricted in practice by “domestic policy concerns (the struggle against groups identified as terrorists in Turkey) and the blurriness of the frontiers between common criminality and political actions (individuals convicted for economic motives in ex-USSR and nationalist groups from South African townships).”¹² Similar dynamics have been at stake in South Korea, where repressive instruments were revived against the continued mobilization of the forces advocating further political and social change after the transition: the people’s movement groups (“*minjung undong tanch’e*”), principally composed of “blue-collar laborers, peasants, the urban poor, anti-regime politicians, and students.”¹³ In particular, reunification between the two Koreas was a core claim of associations such as the National Alliance for Democracy and Unification of Korea (“*minjujuŭi minjok t’ongil chŏn’guk yŏnhap*” or “*chŏn’guk yŏnhap*”), founded in December 1991 as the result of a merger between twenty-seven pro-democracy organizations.

From the mid 1980s, reunification was considered as important as democratization, but the main focus was on democratization. Social movement groups generally believed that bringing about democratization would facilitate the discussion of reunification and other issues. After the June democracy movement in 1987, the breakdown of the authoritarian regime created a relatively free political atmosphere and thus encouraged social movement groups to engage in movements with a variety of issues. Students first displayed the courage to speak for reunification. By participating in ideological debates regarding democracy for the Korean peninsula throughout the 1980s, they had realized that genuine democracy was impossible without overcoming national division and reunifying North and South Korea. As the territorial and ideological division had provided an easy justification for authoritarian rule, it was imperative to bring peace to the peninsula in order to further democratize Korean society.¹⁴

However, while reunification imposed itself as one of the major issues after 1987, those promoting it very soon became targets of repression under the National Security Act. Indeed, although the relevance of the security legislation was “publicly debated right after the establishment of the Roh [Tae-woo] government,” the National Security Act was fully

¹² Pierre Lascoumes, “Ruptures politiques et politiques pénitentiaires,” p.410.

¹³ Hyuk-rae Kim, *State-Centric to Contested Social Governance in Korea. Shifting Power*, Abingdon: Routledge, 2013, p.62.

¹⁴ Gi-Wook Shin, Paul Chang, Jeun-eun Lee, Sookyung Kim, *South Korea’s Democracy Movement*, p.59.

“reinstated when Mun Ik-hwan visited North Korea in April 1989.”¹⁵ Reverend Mun Ik-hwan, a longtime pro-democracy and human rights activist, traveled to North Korea with two other persons in the spring of 1989 in order to meet with Kim Il-sung and discuss the issue of reunification. As their visit had not been authorized by the South Korean government, they were arrested upon their return for violating the National Security Act, whose article 6 forbids to “infiltrate from” (“*chamip*”) or “escape to” (“*t'alch'ul*”) “territory under the control of an anti-state organization” (“*pan kukka tanch'eüi chibaehae innün chiyök*”).

Throughout the security legislation, the expression “*pan kukka tanch'e*” stands for “anti-state organization” but actually refers to North Korea. The designation of the Democratic People’s Republic of Korea as an “anti-state organization” in the National Security Act expresses the vision harbored in article 3 of the constitution since 1948 that the territory of the Republic of Korea consists of the entire Korean peninsula. As a result, North Korea is not characterized as an “enemy country” but as a mere “anti-state organization” which “claims to be a government.” Since the South’s sovereignty extends to the northern part of the peninsula *de jure*, this portion of the national territory is described as being *de facto* “under the control of an anti-state organization.” Therefore, article 6 criminalizes visiting North Korea by punishing “infiltration from” or “escape to territory under the control of an anti-state organization” by up to ten years of imprisonment.

Immediately after Mun Ik-hwan’s unauthorized visit to North Korea, the Roh administration set up the Public Security Investigations Headquarters (“*kongan susa ponbu*”) in order to coordinate the work of police, intelligence, and national security agencies and crackdown more effectively on the anti-state activities criminalized under the security legislation.¹⁶

This organ, which was in existence from early April through late June 1989, investigated student union groups, dissident organizations, and an antigovernment newspaper, eventually arresting more than 500 persons [...] under the broad terms of the National Security Act. The [Public] Security Investigations Headquarters was disbanded in June under pressure from the National Assembly. Public prosecutors and the Agency for National Security Planning, however, continued making arrests and pursuing investigations into a variety of political activities on national security grounds. There also was a resumption of the quasi-legal or illegal practices common in national security cases before 1988: breaking into the campaign headquarters of an opposition candidate in a by-election in July; publishing lists of banned

¹⁵ *Ibidem*, p.91.

¹⁶ *Ibidem*, p.60.

“anti-state” books even after a civil court ruling that such a ban was illegal; arresting people for reading or possessing books considered to be pro-North Korean; arresting an antigovernment journalist for planning unauthorized coverage of North Korea; and ignoring court orders to allow arrested political detainees to meet with their attorneys. By the end of 1989, all people who had traveled to North Korea without authorization had been convicted and sentenced to lengthy prison terms.¹⁷

This included not only Reverend Mun Ik-kwan, but also Lim Su-kyung (Im Su-gyŏng), “a fourth-year undergraduate French major at the Hanguk Foreign Language University in Seoul, who traveled secretly and illegally to North Korea” in order to attend the Thirteen World Festival of Youth and Students (WFYS) held in Pyongyang in the summer 1989.¹⁸ While the number of individuals prosecuted under the National Security Act had dropped from over 400 in 1987 to about 100 in 1988, statistics peaked again in 1989-1990 to reach their pre-transitional level.¹⁹ Post-1987 repression centered on any activity connected to North Korea, even if it was obvious that the incriminated acts - such as a newspaper coverage on the country - did not pose a danger to national security.²⁰ The high number of people arrested in the early 1990s not only indicated a broad construction of the notion of “anti-state crimes” on the part of the government, but it also reflected that the confrontational relation between the state and the forces involved in the democratization movement persisted after 1987.

Rather than being a legacy of the old regime, the resilience of repressive patterns thus appears as an outcome of the transition and of democracy’s institutionalization by elites to the exclusion of the actors, demands, and alternative “national” imaginary of the popular democratization movement. As the continued mobilization of people’s movement groups has been answered by successive elected governments through the security instruments inherited from the authoritarian years on the ground of their radicalism,²¹ constitutional adjudication

¹⁷ Andrea Matles Savada and William Shaw (eds.), *South Korea*, p.68.

¹⁸ Charles Armstrong, *Tyranny of the Weak. North Korea and the World, 1950-1992*, Ithaca, New York: Cornell University Press, 2013, pp.265-266.

¹⁹ Gi-Wook Shin, Paul Chang, Jeun-eun Lee, Sookyung Kim, *South Korea’s Democracy Movement*, p.90. See also table 1 in chapter one.

²⁰ This also included the case of Kim Nak-jung (Kim Nak-chŏng), a political activist in favor of peaceful reunification referred to in the second quote which opens this chapter. In 1992, “Kim Nak-jung was one of 62 prisoners charged under the NSL [National Security Law] for involvement in a ‘spy ring’ allegedly operated by the North Korean Government, some 40 of whom have been sentenced to prison terms ranging from one year to life imprisonment.” Amnesty International, *South Korea. Prisoner of Conscience: Kim Nak-jung*, ASA 25/18/93, London: Amnesty International, 1993, p.3.

²¹ Jae Hoon Shim, “Radical Resurgence,” *Far Eastern Economic Review*, April 27, 1989.

has become invested by such groups as one of the only available sites where to contest the boundaries of enmity in contemporary South Korea. Far from being spontaneous and systematic, this strategic resort to the legal and constitutional stages has been made possible by the mediation of associations such as “Lawyers for a Democratic Society” or “*Minbyun*.”

For *Minbyun* and the interests that it represented, challenging the construction of enmity has not only implied to undo its effects in the present, but also to address the issue of past wrongdoings and wrongdoers. Indeed, a political transition does not imply that the pillars and supporters of yesterday’s regime automatically turn into enemies. This is particularly obvious for transitions which are negotiated and where the former ruling elite remains a regular actor of the new process (through an institutionalized political party for instance) and can stay in power if it wins elections (as was the case in South Korea with the presidential victory of ex-General Roh Tae-woo). Moreover, even where the temptation to treat the leaders and partisans of the old regime as public enemies exists, at least from certain segments of the population, the realization of this desire is likely to be incompatible with the very legal principles that the new democratic regime tries to uphold, such as the requirement that no crime be punished as a result of retroactive legislation.²² The South Korean path to transitional justice - characterized by the reluctance of political elites to come to terms with the past and by the mobilization of civil society to put it on trial - illustrates how the definition of enmity has remained a deep object of contention in the post-transition period and how the role played by the constitutional court in relation to it has been central but ambivalent.

Anticipated punishability and the “criminal law of enmity”

An interesting feature of the National Security Act is the dual continuity that it embodies. Indeed, the law not only survived the 1987 transition to democracy but originally derives from the security legislation established during the colonial era by the Japanese authorities. More specifically, it was based on the Peace Preservation Law enacted in 1925 against “radical social movements,” namely socialism, communism, and anarchism, which

²² “(1) No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall be placed in double jeopardy.

(2) No restriction shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation.

(3) No citizen shall suffer unfavorable treatment on account of an act not of his own doing but committed by a relative.”

(Article 13 of the Constitution of the Republic of Korea).

were not only active in Japan but fueled resistance in its colonies. As a result, the law was also “applied to Korea, Taiwan, and Karafuto through an imperial edict.”²³

The 1925 security legislation was not without precedent in Japan, but it was the first one to incorporate the notion of “*kokutai*” into law (that is to say, the idea of “national essence”), thus punishing “anyone who has formed a society with the objective of altering the national polity [“*kokutai*”] or the form of government or denying the system of private property” as well as “anyone who has discussed the execution of matters” relating to these three objectives.²⁴ Under this framework, “*anti-kokutai*” activities not only encompassed behaviors endangering the institutions in place but also crimes of ideological deviance against the “spirit” of the nation.

In the 1930s and early 1940s, the Japanese government and colonial authorities waged total war against such heretical thought trends and tried to secure the spiritual unity of the empire by combining ideological indoctrination, various forms of social control, and criminal justice. One characteristic of social and ideological control in this period was that the state was not satisfied with controlling behavior but was obsessed with mastering the minds of the subject as well.²⁵

The German legal scholar Günther Jakobs has evoked the notion of “anticipated punishability” to describe these measures which punish by anticipation a likely deviance from the law, instead of punishing by reaction a realized offense. Taken as a whole, they shape what Jakobs calls the “criminal law of enmity,” in which the criterion of dangerousness associated with the enemy replaces the criterion of culpability associated with the ordinary criminal. This displacement allows to justify the imposition of sanctions aimed at preventing a probable harm rather than punishing an accomplished act.²⁶ While it is highly questionable whether these measures should exist in democratic states since their existence contravene some of the fundamental principles of the rule of law, it cannot be contested that such

²³ Chul-woo Lee, “Modernity, Legality, and Power in Korea Under Japanese Rule”, in Gi-Wook Shin and Michael Robinson (eds.), *Colonial Modernity in Korea*, Cambridge: Harvard University Asia Center, 1999, p.45.

²⁴ Richard Mitchell, “Japan’s Peace Preservation Law of 1925. Its Origins and Significance,” *Monumenta Nipponica*, Vol.28, No.3, 1973, pp.339-340.

²⁵ Chul-woo Lee, “Modernity, Legality, and Power,” p.47.

²⁶ Günther Jakobs, “Aux limites de l’orientation par le droit. Le droit pénal de l’ennemi,” *Revue de science criminelle et de droit pénal comparé*, Vol.33, No.1, 2009, pp.7-18.

measures have already been inserted in the fabric of various legal orders, both procedurally and substantially.²⁷

Procedurally, the “criminal law of enmity” comprises curtailments of personal liberty which are not imposed as a form of retributive sentencing but on the basis of a presumption of dangerousness. They include security surveillance and preventive confinement, to which individuals can be subject before they are tried or after they have served their time in jail. Substantially, the “criminal law of enmity” comprises restrictions on civil liberties such as the freedom of expression or association in order to impede the realization of serious infractions. For instance, support to or membership in a “criminal association in relation to a terrorist undertaking” is criminalized in France, which “allows the authorities to intervene with the aim of preventing terrorism well before the commission of a crime.”²⁸ These provisions can be defended as sanctioning behaviors which are grave and dangerous enough to be considered as infractions on their own, whether or not they lead to the perpetration of acts of violence.

According to Günther Jakobs, this justification however amounts to concealing the logic of “anticipated punishability” behind restrictions which limit free speech and association to preempt the realization of further offenses. It is important to note that South Korea’s 1987 constitution authorizes a preemptive use of criminal law within the frame of its article 12, section 1:

No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures.

As a result, preventive restrictions *per se* cannot be, and never were, found contrary to the constitution by the Constitutional Court of Korea. Yet, the scope and the procedures surrounding them have been deemed excessive and inadequate on several occasions. Punishment by anticipation is not a resource used against designated national security enemies only. As underlined by Jakobs, it is also widely deployed against those who are identified as dangerous in the social sphere, such as certain categories of sexual offenders and recidivists.

²⁷ Günther Jakobs argues that such preventive measures are necessary in a democratic state given the dangers that it may face, but that they should be recognized for what they are: deviations from the fundamental principles of criminal law.

²⁸ Judith Sunderland, *Preempting Justice. Counterterrorism Laws and Procedures in France*, New York: Human Rights Watch, 2008, p.1.

In South Korea, the 1980 Social Protection Act (“*sahoe pohopŏp*”) was for instance enacted at the onset of Chun Doo-hwan’s authoritarian regime, to impose preventive confinement (“*poho kamho*”) on vagrants and repeat criminals, who were to be sent to the Samch’ŏng re-education camp created the same year. Article 5 of the Social Protection Act prescribed two forms of preventive custody: mandatory (i.e., under certain circumstances, judges were required to sentence to a ten-year period of preventive confinement, regardless of the likelihood of recidivism) and discretionary (i.e., judges could sentence to a seven-year period of preventive confinement if they found a likelihood of recidivism). In one of its earliest cases, the constitutional court unanimously ruled mandatory preventive confinement unconstitutional, while discretionary confinement was upheld by a majority of seven judges.²⁹ A blanket provision comparable to mandatory preventive confinement under the Social Protection Act could be found after 1987 in the Security Surveillance Act (“*poan kwanch’alpŏp*”), which made it impossible for anyone subject to a security surveillance measure to order an injunction against it.

A security surveillance disposition is issued against persons who committed such crimes as espionage or who violated certain statutes of the National Security Act. A person subject to security surveillance is required to report one’s principal activities for a three-month period, contents of meeting or communications with other persons, also subject to security surveillance, and matters relating to trips, and if the individual fails to report the aforementioned matters or does not follow the limitations imposed by the authority, he or she would be subject to criminal prosecution.³⁰

On April 26, 2001, the court concluded to the unconstitutionality of the absolute ban in a unanimous decision. While security surveillance itself was never called into question, the court reasoned that “an absolute ban on injunction was adopted not because it was inevitable, but rather because priority had been given to administrative convenience and efficiency in legislating the Act.”³¹

The National Security Act can also be read as displaying important elements of South Korea’s criminal law of enmity, both substantially (through article 7 which criminalizes the expression of any form of support to an “anti-state organization”) and procedurally (through

²⁹ 1 KCCR 69, 88Hun-Ka5 et al., July 14, 1989.

³⁰ 13-1 KCCR 799, 98Hun-Ba79, etc., (consolidated), April 26, 2001, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I, 1998-2004*, Seoul: Constitutional Court of Korea, 2006, p.873.

³¹ *Ibidem*, p.874.

article 19). Article 19 of the security legislation extends the maximum length of detention pending criminal charges from thirty to fifty days for individuals suspected of having engaged in anti-state activities. In the ordinary criminal process, suspects can be detained by the police for up to ten days before formal charges are filed, and then for up to ten days by the prosecutors' office before it determines whether or not to indict. This ten-day period can be renewed upon a request made by the public prosecutor to a court. In the case of national security suspects, custody can be extended by ten days for police investigation, and another ten days for prosecutors' investigation under article 19 of the security legislation.

Contrary to the ordinary criminal who is sanctioned for an instance of non-conform behavior based on his culpability, the enemy is he who is expected to have a durable non-conform behavior, justifying his punishment on the basis of a mere expectation or presumption of dangerousness. Jakobs' definition of enmity is therefore restricted to the idea that society considers as enemies the individuals who cannot be presumed to be willing to abide by the law. This operation of identification is illustrated by South Korea's conversion policy which required national security offenders to demonstrate their will to respect the legal order - through a confession until 1998, and through an oath until 2003 - in order to be released. As a result, he who did not pledge to abide by the existing laws - including the National Security Act - remained considered as dangerous and could not be freed.

In the 1990s, South Korean jails were therefore still holding a number of political prisoners sentenced before the transition, usually in the absence of due process and on the basis of dubious evidence (such as confessions extracted through torture). Not only had their convictions never been reviewed but many of them were excluded from the amnesty measures periodically and selectively granted by post-1987 governments. As a result, the world's longest-serving political prisoners could be found in the South at the end of the 1990s. They included Kim Sun-myung (Kim Sŏn-myŏng), released in 1995 after 45 years spent behind bars, and Woo Yong-gak (U Yong-gak) liberated in 1999 in the wake of a 42-year long stay in prison.³²

Their prolonged detention was attributed to their status as "*pijŏnhyang changgisu*," that is to say, "unconverted long-term prisoners." As these detainees refused to comply with the ideological conversion policy and recant their belief in communism, their liberation was postponed until they reached the year of their 70th birthday. Some of the "unconverted

³² Kim was born in 1925 in Gyeonggi-do (Kyŏnggi-to), the province surrounding Seoul, and was captured in 1951 after joining the Korean People's Army. As for Woo, he was born in 1929 in what would later become a part of North Korean territory and was arrested in 1959 during a commando raid into Southern waters.

prisoners” were serving time for crimes, such as espionage, which they always denied committing, and refused to submit conversion statements for beliefs they claimed to have never held. That was for instance the case of Cho Sang-rok (Cho Sang-nok), one of the detainees who challenged the conversion system before the constitutional court in 1998 and whose complaint is analyzed in chapter six.³³

The fate of the “*pijŏnhyang changgisu*” illustrates some of the deep ambiguities of the human rights situation under the presidency of Kim Dae-jung (1998-2003). On the one hand, Kim Sun-myung, Woo Yong-gak, and sixty-one fellow prisoners claiming loyalty to the North Korean government were repatriated to Pyongyang on September 2, 2000, in the wake of the summit meeting held between the two Koreas.³⁴ As symbolic and unprecedented as this dual crossing of the 38th parallel was (by the Kim Dae-jung in June, and by sixty-three “unconverted long-term prisoners” in September), it did not seal the end of South Korea’s politics of enmity. By 2000, individuals sentenced under the National Security Act were still subjected to a revised version of the conversion policy, transformed into a requirement to pledge obedience to the laws of South Korea in 1998. Moreover, the use of the National Security Act did not wane under the administration of Kim Dae-jung. Despite two prisoner amnesties in March and July of 1998 which liberated over 150 political detainees, 360 of them still remained incarcerated by the end of the year, including 270 individuals held under the NSA.³⁵

Those who have called for the abolition of the security legislation since 1987 do not deny the existence of security concerns justifying adequate legal instruments to deal with them. However, they contend that the law cannot fulfill such a purpose given the extensive definition of anti-state crimes that it allows and which has been made advantage of by surveillance and investigation agencies even in the post-transition period. This does not mean that anti-state threats have been inexistent and entirely fantasized by the actors in charge of thwarting them. At the time of the transition alone, their realness could not be doubted: on November 29, 1987, exactly a month after the revised constitution was adopted, two North Korean agents for instance succeeded in planting a bombing device on board of the Korean

³³ 14-1 KCCR 351, 98Hun-Ma425, etc., (consolidated), April 25, 2002.

³⁴ The North did not allow in return the coming back of Southern abductees.

³⁵ Amnesty International, *Questions and Answers about Amnesty International’s Work on South Korea*, ASA 25/30/98, London: Amnesty International, 1998, p.2.

Air Flight 858, making the aircraft explode in mid-air on its way to Seoul and killing all its passengers.³⁶

While the democratic transition made neither threats from North Korea nor problematic uses of national security fade away, the change of regime has however entailed that such uses can no longer go entirely unchecked. Indeed, one of the major impacts of the transition is the contention that it has unleashed around defining the contours of enmity, leading to the investment of constitutional adjudication as a site where to challenge the ways in which the boundaries of what counts as “national” or “anti-national” are drawn and implemented.

The investment of constitutional justice as a site of contestation against the non-inclusive bias of the transition

Human rights lawyers and the court's empowerment from below

Courts are neither initial nor primary actors in any policy issue, as conception and enforcement rest in the hands of the political branches. Moreover, the control exercised by constitutional courts is reactive, triggered by other actors requesting judicial review. Indeed, courts can solely pronounce themselves on matters that are brought before them. In the context of post-1987 South Korea, constitutional justice can be activated as a result of a request from the ordinary tribunals or by a direct petition from anyone who claims that one of his or her basic rights guaranteed by the constitution has been infringed. When introduced in the 1988 Constitutional Court Act, these mechanisms (and in particular direct constitutional complaints which account for 80% of the cases received by the court) were not destined to encounter the success which has accompanied them. As this dissertation contends, the strength of judicial review was not predetermined by political elites' calculations at the time of the court's design. Instead, the court's empowerment has proceeded from the investment of constitutional adjudication as a site of contestation by the forces politically marginalized in the post-transition era.

³⁶ U.S. Congressional Research Service, *North Korean Provocative Actions. 1950-2007*, Washington: U.S. Library of Congress, 2007, p.10.

This claim is for instance supported by the work of Patricia Goedde on public interest lawyering,³⁷ a term which she prefers to the concept of “cause lawyering” to describe the “[use of] legal skills to pursue ends and ideals that transcend client service - be those ideals social, cultural, political, economic, or, indeed, legal.”³⁸ In South Korea, the strategic resort to law to further democratization after 1987 has been the deed of a minority of actors among the legal profession, whose two main traditional characteristics can be identified as “state service and elitism.”³⁹

Table 10. The evolution of the Korean legal profession.

Year	Population	Judge	Prosecutor	Attorney	Total	Ratio population per legal professional
1971	32,139,000	387	350	748	1,485	21,642
1976	35,860,000	482	386	819	1,697	21,131
1981	38,693,000	571	409	1,013	1,993	19,414
1986	41,568,000	837	557	1,483	2,877	14,448
1990	42,869,000	1,124	787	2,742	4,653	9,213
1995	45,093,000	1,374	987	3,731	6,092	7,402
2000	47,008,000	1,724	1,287	4,699	7,710	6,097
2003	47,925,000	1,912	1,514	5,915	9,341	5,131

Source: Dae-Kyu Yoon, “The Paralysis of Legal Education,” p.41.

If the former trait - state service - has been subject to change with the increasing number of attorneys practicing in private firms (from 1,000 individuals in 1981 to almost 6,000 in 2003), the second feature - elitism - remains largely unaltered. According to Yoon Dae-kyu,

³⁷ Patricia Goedde, “From Dissidents to Institution-Builders. The Transformation of Public Interest Lawyers in South Korea,” *East Asia Law Review*, Vol.4, No.1, 2009, pp.63-89.

³⁸ Stuart Scheingold and Austin Sarat, *Something to Believe In. Politics, Professionalism, and Cause Lawyering*, Stanford: Stanford University Press, 2004, p.3.

³⁹ Patricia Goedde, “From Dissidents to Institution-Builders,” p.70.

One unique characteristic of Korea is that judges, prosecutors, and attorneys share a “guild mentality.” Along with the fraternities formed by the standardized education under the JRTI [Judicial Research and Training Institute], the fact that most judges and prosecutors join the bar before their retirement reinforces this *esprit de corps*.⁴⁰

As underlined by Yves Dezalay and Bryant Garth, the deep ties of the Korean legal profession are intensified by the importance of alumni relations nurtured in the country’s top universities (such as Seoul National University, Koryo, and Yonsei),⁴¹ and which will probably continue to structure the closed community of South Korean legal elites despite the introduction of a law school system adopted in 2007.

In the late 1980s, South Korea counted no more than 1,500 licensed attorneys. Out of them, a group of fifty-one “human rights lawyers” (“*inkwon byŏnhosa*”) active under the authoritarian regimes of Park Chung-hee (1961-1979) and Chun Doo-hwan (1980-1987) founded in 1988 the association “Lawyers for a Democratic Society”, or “*Minbyun*,” in order to advocate the cases of democracy activists sanctioned for their continued mobilization in the aftermath of the transition.⁴² According to the association’s own narrative, *Minbyun* was indeed established “during one of Korea’s most repressive regimes - the Roh Tae-Woo dictatorship of the Sixth Republic. This era was marked not only by a repression of basic human rights, but also by violence against those who publicly criticized the government.”⁴³

In this context, *Minbyun* “was immediately inundated with requests for legal defense, including the high profile torture-to-death case of Park Jong-Chul [Pak Chong-ch’öl], the sexual-torture case of Kwon In-Sook [Kwŏn In-suk] at Bucheon Police Station, and the unapproved visit to North Korea taken by Lim Soo-Kyung [Im Su-gyŏng] and Rev. Moon Ik-

⁴⁰ Dae-Kyu Yoon, “The Paralysis of Legal Education,” in Tom Ginsburg (ed.), *Legal Reform in Korea*, London, New York: RoutledgeCurzon, 2004, p.36.

⁴¹ Yves Dezalay and Bryant Garth, “International Strategies and Local Transformations. Preliminary Observations of the Position of Law in the Field of State Power in Asia: South Korea,” in William Alford (ed.), *Raising the Bar. The Emerging Legal Profession in Asia*, Cambridge: Harvard University Press, 2007, pp.94-96.

⁴² A decade later, *Minbyun* counted 550 members, which represented about 7% of the total population of lawyers numbering about 8,000 at the time. “Women account for 10 percent of *Minbyun* membership, which is a greater proportion than the percentage of women in the legal profession overall. Membership includes any attorney who works part-time (or even less) on social justice issues, so the number of those who work full-time voluntarily on social movement causes would be considerably less. Although many public interest lawyers are concentrated in *Minbyun*, it should be remembered that this is a professional association and that most of its members work in either small or large practices and offer their services on a *pro bono* basis.” Patricia Goedde, “From Dissidents to Institution-Builders,” p.76.

⁴³ *Minbyun*, “Inheriting the Spirit of Korea’s First Human Rights,” *Minbyun*’s website. Accessed on January 20, 2014, at: http://minbyuneng.prizma.co.kr/?page_id=186.

Hwan [Mun Ik-kwan].”⁴⁴ *Minbyun*’s lawyers also “defended a number of clients who violated the National Security Act, including the Socialist Workers Alliance of Korea, a group committed to creating a socialist society, and the Seoul Social Science Research Institute, which produced research on both Marxism and socialism.”⁴⁵ Thus,

Minbyun’s main area of focus was human (or civil) rights protection, especially defending those the government abused under the pretext of the National Security Law or laborers who protested their working conditions. Between 1988 and 1994, forty percent of *Minbyun*’s cases (over 580 in total) dealt with the National Security Law or the Law on Assembly and Demonstrations. On the whole, these lawyers were an anomaly within the legal profession. Representing political prisoners or laborers, these lawyers were stigmatized as troublemakers or even pro-communist by the state. Furthermore, despite the transition to democracy in the late 1980s, the “misfit” label lingered well into the early 1990s [...].⁴⁶

It is in the context of *Minbyun*’s mobilization to represent the forces politically marginalized from the post-transition order that constitutional adjudication came to be construed as a “center stage”⁴⁷ in the dispute over the boundaries of enmity after regime change. The empowerment of the constitutional court from below contradicts the argument which has been made that the introduction of a strong mechanism of judicial review was desired by all South Korean political parties in light of the electoral uncertainty that they faced in 1987.⁴⁸ What the new institution would be and do was indeed very indeterminate for most actors in the course and immediate aftermath of the constitution-making process, as contended in this dissertation’s chapter two. Rather than elites’ calculations, the strategy of human rights lawyers to invest the site of constitutional adjudication in order to challenge the uses made of national security, supported by the court’s liberal construction of the rules governing cases’ admissibility, have contributed to turn the institution into an actor most

⁴⁴ *Ibidem*. In particular, “the two cases - the mid-1986 sexual-torture case of Ms. Kwōn In-suk and the January 1987 torture-murder of Pak Chong-ch’ōl - have focused public attention on judicial independence and on attempted cover-ups of political bias in the highest levels of the procuracy and the police.” James West and Edward Baker, “The 1987 Constitutional Reforms in South Korea. Electoral Processes and Judicial Independence,” in William Shaw (ed.), *Human Rights in Korea. Historical and Policy Perspectives*, Cambridge: Harvard University Press, 1991, p.247.

⁴⁵ *Minbyun*, “Inheriting the Spirit of Korea’s First Human Rights.”

⁴⁶ Patricia Goedde, “From Dissidents to Institution-Builders,” p.75.

⁴⁷ Patricia Goedde, *How Activist Lawyers Mobilized the Law for Social and Political Change in South Korea. 1988-2007*, Unpublished doctoral dissertation, University of Washington, Seattle, 2008, p.27.

⁴⁸ Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*, Cambridge, New York: Cambridge University Press, 2003.

prominently involved in reforming the politics of enmity. This does not however imply that the Constitutional Court of Korea has necessarily lived up to the hopes of litigants as did its American counterpart in the 1960s.

The ambivalence of the court's response

Following Charles Epp's famous thesis, the "rights revolution" consecrated by the United States Supreme Court's jurisprudence in the 1960s should not be attributed to the activism of its judges but, instead, to the successful rights advocacy of civic groups. This strategic use of litigation was premised upon the development of an appropriate "support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing, particularly government-supported financing."⁴⁹

This support structure has been essential in shaping the rights revolution. Because the judicial process is costly and slow and produces changes in the law only in small increments, litigants cannot hope to bring about meaningful change in the law unless they have access to significant resources. For this reason, constitutional litigation in the United States until recently was dominated by the claims of powerful businesses; they alone commanded the resources necessary to pursue claims with sufficient frequency, acumen, and perseverance to shape the development of constitutional law. And for this reason, too, constitutional law and the courts largely ignored the potential constitutional rights claims of ordinary individuals. The rights revolution grew out of the growing capacity of individual rights advocates to pursue the forms of constitutional adjudication perfected by organized businesses, but for very different ends. The growth of the support structure, therefore, significantly democratized access to the Supreme Court.⁵⁰

In South Korea where access to constitutional adjudication has been facilitated by mechanisms such as direct constitutional complaints and the strategic advocacy of associations like *Minbyun*, the court has however embraced its role as guardian of the constitution in a double way. Its jurisprudence has yielded important gains for litigating forces, but only partial ones: while setting limits on the permissible uses of national security, the court's rulings have also fundamentally consolidated the mechanisms of exclusion

⁴⁹ Charles Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998, p.3.

⁵⁰ *Ibidem*.

enforcing the non-inclusive bias of the transition as will be discussed in the rest of this dissertation.

Similarly ambivalent dynamics have been described in other contexts, such as Israel. In his article on lawyering in the West Bank and Gaza, George Bisharat for instance introduces a distinction between the immaterial legitimation costs incurred by Palestinians when resorting to Israeli military courts in the Occupied Territories, and the tangible benefits achieved by lawyers for the cause of their clients.⁵¹ Overall, “although the victories of lawyers representing Palestinians have been decidedly modest, and their work has had some legitimation effects, nonetheless the benefits of their work have likely outweighed the costs” given the concreteness of the gains obtained for the concerned individuals, such as a reduced length of detention, or protection against torture.⁵²

In post-transition South Korea, the disagreement over the meaning of what counts as “national” and “anti-national” which security instruments have policed and suppressed in the public sphere has, instead, unfolded on the site of constitutional justice. Yet, the Constitutional Court of Korea has contributed to both stage and interrupt the political dispute over the boundaries of enmity in the democratic era. The trajectory of the institution therefore illustrates the part of contingency and absence of predestination that judicial empowerment can involve. Put differently, even if interests pervade constitutional and institutional design, they do not necessarily shape them in a causal way.

What has most contributed to empower the Constitutional Court of Korea is less the will of the elites who fashioned it than the investment of constitutional justice by politically marginalized forces to contest the mechanisms enforcing the non-inclusive legacy of the transition. Constitutional adjudication has been an important, yet limited, arena of contention. This dual logic is for instance exemplified by the repeated challenges to the National Security Act which the court has received since 1989 and settled in ways which have imposed constraints on the security legislation while also affirming its post-transition validity and relevance.

All cases but two (90Hun-Ma82 on article 19, decided in 1992, and 2002Hun-Ka5 on article 13, rendered in 2002) resulted in decisions of constitutionality, limited constitutionality, rejection, or dismissal. As underlined in chapter two, a decision of partial

⁵¹ George Bisharat, “Courting Justice? Legitimation in Lawyering Under Israeli Occupation,” *Law and Social Inquiry*, Vol.20, No.2, 1995, pp.349-405.

⁵² Stephen Ellmann, “Struggle and Legitimation,” *Law and Social Inquiry*, Vol.20, No.2, 1995, p.346.

constitutionality does not create an obligation for the legislature to amend the incriminated provisions but merely specifies the correct interpretation which has to be made of them.

Table 11. Challenges to the National Security Act before the Constitutional Court of Korea between 1989 and 2009.

Decision number	Decision date	Provisions of NSA under review	Outcome of the decision
89Hun-Ka8	January 28, 1992	Article 7 provisions 1 and 5	limited constitutionality
89Hun-Ka113	April 2, 1990	Article 7 provisions 1 and 5	limited constitutionality
90Hun-Ma82	April 14, 1992	Article 19	unconstitutionality
90Hun-Ka11	June 25, 1990	Article 7 provision 5	limited constitutionality
90Hun-Ba23	April 14, 1992	Article 9 provision 2	constitutionality
92Hun-Ba6	January 16, 1997	Article 4 provision 1 ; Article 6 provision 1 ; Article 7 provisions 1, 3, 5 ; Article 8 provision 1	limited constitutionality, constitutionality
92Hun-Ba26	January 16, 1997	Article 4 provision 1 ; Article 6 provision 1 ; Article 7 provisions 1, 3, 5 ; Article 8 provision 1	limited constitutionality, constitutionality
93Hun-Ba34	January 16, 1997	Article 4 provision 1 section 2 ; Article 7 provisions 1, 3, 5 ; Article 8 provision 1	limited constitutionality, constitutionality
93Hun-Ba35	January 16, 1997	Article 4 provision 1 section 2; Article 7 provisions 1, 3, 5 ; Article 8 provision 1	limited constitutionality, constitutionality
93Hun-Ba36	January 16, 1997	Article 4 provision 1 section 2 ; Article 6 provision 1 ; Article 7 provisions 1, 3, 5 ; Article 8 provision 1	limited constitutionality, constitutionality
95Hun-Ka2	October 4, 1996	Article 7 provision 1, 3, 5	constitutionality
96Hun-Ka8	June 26, 1997	Article 19	constitutionality
96Hun-Ka9	June 26, 1997	Article 19	constitutionality
96Hun-Ka10	June 26, 1997	Article 19	constitutionality
96Hun-Ma48	August 21, 1997	Article 19	rejection

96Hun-Ba35	July 16, 1998	Article 10	constitutionality
97Hun-Ba85	August 27, 1998	Article 6 provision 2	limited constitutionality
98Hun-Ba29	April 29, 1999	non specified, totality of the text	dismissal
99Hun-Ba12	April 29, 1999	non specified, totality of the text	dismissal
99Hun-Ba27	April 25, 2002	Article 6 provisions 1, 2 ; Article 7 provisions 1, 3, 5; Article 8 provision 1	limited constitutionality, dismissal
99Hun-Ba51	April 25, 2002	Article 6 provisions 1, 2 ; Article 7 provisions 1, 3, 5; Article 8 provision 1	limited constitutionality, dismissal
2000Hun-Ba33	May16, 2000	Article 13	rejection
2000Hun-Ba45	June 2, 2000	non specified, totality of the text	dismissal
2000Hun-Ba62	August 23, 2000	Article 4 provision 1 section 2	dismissal
2000Hun-Ba66	May 15, 2003	Article 8 provisions 1 and 3	constitutionality
2002Hun-Ka5	November 28, 2002	Article 13	unconstitutionality
2003Hun-Ba85	August 26, 2004	Article 7 provisions 1 and 5	constitutionality
2003Hun-Ba102	August 26, 2004	Article 7 provisions 1 and 5	constitutionality
2004Hun-Ma839	November 16, 2004	Declaration to abolish the NSA	dismissal
2004Hun-Ba28	July 31, 2008	Article 3 provision 1 section 2	dismissal
2005Hun-Ma109	February 15, 2005	Declaration to abolish the NSA	dismissal
2009Hun-Ma121	March 31, 2009	non specified, totality of the text	dismissal

Following the constitutional court's 1990 landmark judgment on the limited constitutionality of article 7 (89Hun-Ka113), several parts of the security legislation were amended by the National Assembly on May 31, 1991. This revision has not, however, put an end to the post-transition dispute over the construction of enmity, and the National Security Act has continued to be repeatedly challenged. Since 1991, the constitutional court has mostly contended itself to admit the presence of "remaining ambiguities in the new law" in general, and its article 7 in particular, without pronouncing it invalid. On two occasions only, the court concluded to the straight unconstitutionality of certain provisions: first, in relation to article 19 of the National Security Act extending the period of authorized detention from thirty to

fifty days to investigate anti-state crimes; and second, in connection to article 13 on aggravated punishment.⁵³ Yet, no legislative correction has been brought to the sanctioned elements by the parliament.

This resistance illustrates that constitutional courts do not have the last word over the issues that they settle. Indeed, their rulings may be final but they are not “self-executing.” They have to rely upon other institutions to be enforced, a dependency which led Alexander Hamilton to portray the judiciary at “the least dangerous” branch of government in Federalist Paper 78:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.⁵⁴

In the wake of Hamilton’s comments, several scholars have called into question the ability of constitutional courts to produce change. In its seminal 1957 article on the U.S. Supreme Court, Robert Dahl argued that the court, as a policy-maker, is by itself, “almost powerless to affect the course of national policy.”⁵⁵ Indeed, “the Court is least effective against a current lawmaking majority - and evidently least inclined to act” because its policy choices are likely to be reversed by congressional action.⁵⁶ In the early 1990s, Gerald Rosenberg articulated a general theory of judicial efficacy - or lack thereof. Given that “legal victories do not automatically or even necessarily produce the desired change” while judicial action cannot be assumed to be completely ineffective, the aim of Rosenberg’s study is to

⁵³ Rulings on the National Security Act, including 89Hun-Ka113, 90Hun-Ma82, and 2002Hun-Ka5, are examined in further detail in chapter five.

⁵⁴ James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers*, New York: Mentor, 1999 (c1788), p.433.

⁵⁵ Robert Dahl, “Decision-Making in a Democracy. The Supreme Court as a National Policy-Maker,” *Journal of Public Law*, Vol.6, No.1, 1957, p.293.

⁵⁶ *Ibidem*, p.294.

identify the conditions under which courts can successfully bring about social reform.⁵⁷ Rosenberg thus demonstrates how a number of institutional and structural constraints have to be overcome for change to take place.⁵⁸ Consequently, courts are but unconstrained and isolated institutions free to shape policies as they wish. As pointed by Ran Hirschl,

Once a system of constitutional review is put in place, powerful political stakeholders continue their quest to control the composition of courts and to ensure jurisprudential support for their agendas. And when, occasionally, courts issue rulings that threaten to alter the political power relations in which they are embedded, the political sphere responds to quell unfavorable judgments or to hinder their implementation. As the recent history of comparative constitutional politics tells us, recurrent manifestations of unsolicited judicial intervention in the political sphere in general - and unwelcome judgments concerning contentious political issues in particular - have triggered significant political backlashes aimed at clipping the wings of overactive courts. [...] Overactive courts and judges do learn the lesson. A wide array of empirically grounded studies suggest that harsh political responses to unwelcome activism or interventions on the part of the courts, or even the credible threat of such a response, can have a chilling effect on judicial decision-making patterns. [...] The boundaries of judicialization are captured by what has been termed “relative autonomy.”⁵⁹

The rulings of the Constitutional Court of Korea which have most heavily sanctioned the National Security Act did meet such resistances, not only from the political branches but also from law enforcement agencies, as will be described in chapter five. Although the court has embraced its role as guardian of the constitution in a double way, its efforts at reforming and constraining the uses made of national security have therefore been less efficient than the effects produced by its jurisprudence when it comes to reinforcing the relevance of security tools. Yet, this imbalance has not discouraged the forces contesting the non-inclusive legacy of the transition from resorting to the constitutional stage. If their mobilization to invalidate the repressive instruments deployed in the name of national security has failed to date, the

⁵⁷ Gerald Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change*, Chicago: University of Chicago Press, 1991.

⁵⁸ The institutional constraint (or the fact that “courts depend on political support to produce reform”) is lifted as political hostility to judicial action decreases, whereas the structural constraint (or the fact that courts lack implementation powers) is removed when one of the four following conditions comes into play: other actors than the courts (such as the executive or the legislative branches) (1) offer incentives (2) or impose costs to induce compliance; (3) market means of implementation are available; or (4) the judicial decision provides a cover that enables actors crucial to the implementation process, and willing to act, to take the necessary steps .

⁵⁹ Ran Hirschl, “The Realist Turn in Comparative Constitutional Politics,” *Political Research Quarterly*, Vo.62, No.4, 2009, p.827.

pressures that they have exerted over the issue of transitional justice in the mid-1990s have been crowned with greater success.

The popular demand for judging the past

Missed opportunities for transitional justice before 1987

The role of the Constitutional Court of Korea in recasting enmity has not been limited to the review of repressive laws inherited from the authoritarian regime. The court has also been centrally involved in the issue of how to deal with past wrongdoings, a question which was constantly raised, but frustrated, following episodes of political liberalization in South Korea. In 1948, a majority of representatives in the first parliament was in favor of holding accountable those who had acted in support of, or benefited from, Japanese colonial rule. The Special Act on Punishing Anti-National Conducts was consequently passed and a corresponding committee set up to investigate the acts committed by pro-Japanese collaborators. However, the political configuration supported by the United States in the wake of Korea's independence and the *de facto* division of the peninsula instead led to the permanence of administrative colonial structures and personnel in the late 1940s. Indeed,

The Rhee government, which was established under the protection and guidance of the United States, had a policy of re-hiring officials who previously worked with the Japanese colonial government. In order to strengthen their political position in Korea, the United States and the Rhee government employed pro-Japanese officials rather than punishing them for their past wrongdoings. As a result, the committee's activities were hindered, and they were eventually disbanded by the Rhee government. This allowed bureaucrats, policemen, and military officials who cooperated with Japanese colonialism to maintain their power and influence during the Rhee government and through the subsequent military regimes.⁶⁰

In addition, President Rhee Syngman and the anti-communist conservatives gathered around him conspired to eliminate politically, if not physically, the “progressive” nationalists who not only advocated the liquidation of the colonial past, but also promoted peaceful reunification between the two Koreas, such as Kim Ku, a preminent leader of the independence movement assassinated in 1949. At the onset of the Korean War, Rhee

⁶⁰ The Truth and Reconciliation Commission of the Republic of Korea, *Truth and Reconciliation. Activities of the Past Three Years*, Seoul: Truth and Reconciliation Commission of the Republic of Korea, 2008, p.6.

Syngman did not hesitate to order the execution of alleged leftists held in prisons, for fear that they might be liberated by the invading North Korean army and join its ranks. As the ROK's forces were retreating southward, large scale massacres were not only directed against prisoners but also members of the National Guidance League or "Bodo League" ("*kungmin podo yŏnmaeng*"). As described in a 2008 report by the Truth and Reconciliation Commission of Korea ("*chinsil hwahae rŭl wihan kwagŏsa chŏngni wiwŏnhoe*" or "*chinsil hwahae wiwŏnhoe*"), established in December 2005 to investigate "past incidents":

Immediately after the start of the Korean War, between the end of June and the beginning of July 1950, the Korean government arrested, detained, and executed members of the Bodo League. The year prior, in June 1949, the Korean government organized the Bodo League with the intention of encouraging those associated with the leftists to turn themselves in so that they could be loyal ROK citizens. Around 300,000 people across the nation applied for membership at this time. The Korean government set a target quota for recruitment in each region, which led to many people applying for membership without ever having had any relations with leftists or leftist activities. With the start of the Korean War however, the government began arresting and killing Bodo League members, fearing that they may collaborate with the North.

The Bodo League massacres were the largest mass killings during the Korean War period. Most of the Bodo League massacres occurred simultaneously across the nation. According to the Commission's investigation result to date, each incident seemed similar in terms of the procedures and the chain of command. For this reason, the Commission investigated the massacres to determine whether the government was involved in the systematic and intentional massacre of civilians. The scale, planning, and organization of the massacres reveal the Korean government's systematic policy to remove Bodo League members, potential enemies' life.⁶¹

While a special investigation committee on the civilian massacres which occurred before and during the Korean War was created by the National Assembly of the short-lived parliamentary Second Republic (1960-1961), the coup d'état of General Park Chung-hee quelled the demands for exposing the history of state repression under Rhee Syngman which had erupted after his regime's collapse. At the founding of the Second Republic,

[T]he cry for identifying and punishing those responsible for rigged elections, corruption, and misappropriation of public property was overwhelming. The National Assembly responded by revising the constitution to provide constitutional grounds for *ex post facto* penalties and the

⁶¹ *Ibidem*, pp.69-70.

creation of a special tribunal and special prosecutor, and then enacted laws necessary to ensure these offices were afforded the powers they would require. However, the post-Rhee parliamentary government of the Second Republic of Korea, headed by Prime Minister Chang Myon, was fragile and reluctant to proceed. It made little progress in its investigations. There were also strong demands to uncover the truth about civilian massacres committed during Rhee's rule, including during the Korean War. But investigations broke off suddenly after Prime Minister Chang was ousted by a military coup led by Army General Park Chung-hee in May 1961.⁶²

The decades of military rule under Park Chung-hee (1961-1979) and Chun Doo-hwan (1980-1987) did not only leave unaddressed the issue of how to deal with the wrongdoings committed by pro-Japanese collaborators or the Rhee government; they also added their share of abuses to this dismal record. According to the Truth and Reconciliation Commission, over 800 democratic activists died in the process of democratization, a number which includes the victims of the Kwangju uprising as well as the targets of “death sentences, assassinations and torture, and those who performed self-immolation to protest against the government.”⁶³ While deathly methods were part of the repertoire used by the authoritarian regimes of Park and Chun, they made a relatively small proportion of victims compared with the state's main repressive strategy during these years: arrest and custody on a very large scale.

As a result of these arrests, approximately 6,000 individuals were prosecuted under the National Security Act and the Anti-Communist Act between 1970 and 1987.⁶⁴ In particular, the making of espionage cases was a common ploy. This tactic required investigative agencies such as the Defense Security Command or the Korean Central Intelligence Agency (“*chungang chǒngbopu*,” renamed the Agency for National Security Planning in 1981) not only to fabricate false charges against targeted individuals, but also to manufacture evidence of guilt in order for courts to pronounce prison sentences. Such evidence usually rested on confessions obtained through torture. The practice of illegal detention did not merely imply that innocents would spend years in prison for security crimes that they had not committed and had been forced to admit through coerced statements. An additional device ensured that national security convicts could not be automatically released at the end of their time in jail. This program was known as the ideological conversion policy and originated in the Japanese

⁶² Dae-kyu Yoon, *Law and Democracy in South Korea. Democratic Development since 1987*, Seoul: Kyungnam University Press, 2010, pp.173-174.

⁶³ The Truth and Reconciliation Commission, *Truth and Reconciliation*, p.7.

⁶⁴ Gi-Wook Shin, Paul Chang, Jeun-eun Lee, Sookyoung Him, *South Korea's Democracy Movement*, p.90.

administration's struggle against "thought criminals" during the colonial era.⁶⁵ It is one of the security instruments which, like the National Security Act, have actually survived not one, but two transitions, illustrating the limits of South Korea's decolonization and democratization processes in the mid-1940s and late 1980s respectively.

Elites' delay to confront the authoritarian past after the change of regime

In 1987, regime change was triggered by mass mobilization against the Chun Doo-hwan government but the transition process itself was very much handled by the incumbent elite, led by Roh Tae-woo, through negotiations with the opposition forces of Kim Young-sam and Kim Dae-jung. With the victory of Roh in the first direct presidential election, it should come as no surprise that the challenge of confronting past abuses for which Roh and Chun could be held responsible was not met. At the beginning of Roh's term, Chun Doo-hwan still retained an influential position in national politics as a member of the Democratic Justice Party and as chairman of the Advisory Council of Elder Statesmen ("*kukkawŏnno chamunhoeŭi*"). This office was designed by article 90 of the 1987 revised constitution to be occupied by the former president, thereby ensuring that Chun would continue to be involved in state affairs.⁶⁶

The parliamentary elections of April 1988 however upset this equilibrium based on a strong continuity with the previous regime. While remaining the largest party in the National Assembly with just 34% of the vote (which translated into 125 seats out of 299), the Democratic Justice Party lost its absolute majority. Its representatives could even be outnumbered by the combined forces of the two main opposition parties, the Peace Democratic Party of Kim Dae-jung (with 70 seats for 19.3% of the vote) and the Reunification Democratic Party of Kim Young-sam (with only 59 seats for 23.8% of the vote).

In the wake of the elections, the opposition prompted the holding of fact-finding hearings on the uprising which took place in the city of Kwangju in May 1980 to protest

⁶⁵ Richard Mitchell, *Thought Control in Pre-War Japan*, Ithaca: Cornell University Press, 1976.

⁶⁶ "(1) An Advisory Council of Elder Statesmen, composed of elder statesmen, may be established to advise the President on important affairs of State.

(2) The immediate former President shall become the Chairman of the Advisory Council of Elder Statesmen: *Provided*, That if there is no immediate former President, the President shall appoint the Chairman.

(3) The organization, function and other necessary matters pertaining to the Advisory Council of Elder Statesmen shall be determined by Act."

(Article 90 of the Constitution of the Republic of Korea).

against the nationwide imposition of martial law by the newly installed military junta, led by Chun Doo-hwan.⁶⁷ The uprising ended in the killing of at least 200 protesters after Chun ordered the military troops to suppress the insurrection. During the constitutional negotiations of August 1987, the ruling party of Chun and Roh, who held prime responsibility for the massacre, and the opposition camp had agreed that “neither the Fifth Republic [1980-1987] nor the Kwangju struggles would be cited, and the preamble would convey the people’s right to resist by invoking the April 1960 revolution.”⁶⁸ With this balance of power being altered in the spring of 1988, Chun Doo-hwan was forced to apologize to the nation and to resign from both the Advisory Council of Elder Statesmen and the ruling Democratic Justice Party. He subsequently retreated to a Buddhist temple for two years. On March 1990, a special law was enacted to compensate those involved in the Kwangju uprising but this measure did not alleviate the demand for a full investigation of the incident and the punishment of the officials liable for the massacre.

Civil society’s mobilization to put the past on trial became instrumental after Kim Young-sam won the December 1992 election, thus becoming the first civilian president of South Korea in three decades. His victory marked a major, yet incomplete, rupture with the previous administration. Indeed, in order to ensure his electoral success against his rival Kim Dae-jung, Kim Young-sam - whose entire political career had been in the opposition - allied with Roh Tae-woo’s ruling party to form the main conservative Democratic Liberal Party.⁶⁹ As a result of this merger, Kim resisted the idea to formally bring Chun Doo-hwan and Roh Tae-woo to justice.

In its inception, the Kim Young-Sam government was hesitant to pursue punishment against the two former presidents because he entered the Blue House with support from many politicians with military origins. Although President Kim strongly criticized the military leaders and praised the May 18 Uprising of 1980, he was reluctant to resort to criminal punishment, “arguing that the truth should be reserved for historical judgment in the future.”⁷⁰

⁶⁷ Andrea Matles Savada and William Shaw (eds.), *South Korea*, p.67.

⁶⁸ Jung-Kwan Cho, “The Politics of Constitution-Making During the 1987 Democratic Transition in South Korea,” *Korea Observer*, Vol.35, No.2, 2004, p.186.

⁶⁹ The Democratic Liberal Party was renamed the New Korea Party in 1995, and became the Grand National Party in 1997. In 2012, its name was changed to the *Saenuri Party*, or New Frontier Party.

⁷⁰ Kuk Cho, “Transitional Justice in Korea. Legally Coping with Past Wrongs After Democratization,” *Pacific Rim Law and Policy Journal*, Vol.16, No.3, 2007, p.581.

In 1993 however, a complaint for treason was submitted to the Seoul District Prosecutors' Office (“*sŏul chibang kŏmch'alch'ŏng*”) against Chun Doo-hwan, Roh Tae-woo, and other leading generals, by petitioners who claimed to be victims of the 1979 coup d'état through which the military junta seized power. In line with the new administration's official position, the Seoul District Prosecutors' Office decided in 1994 not to indict the leaders of the 1979 military coup. “Although it recognized that the December coup of 1979 involved crimes of mutiny, insurrection, and murder, and [that] the suppression of the May 18 Uprising of 1980 constituted treason and murder,” the prosecutors reasoned that “a victorious coup should not be punished after a substantial lapse of time” since “legally speaking, the democratic-civilian government was a legal successor to the previous Chun and Roh governments.”⁷¹ The decision not to indict was appealed by the petitioners to a higher prosecutors' office, where it was denied, leading them to file a complainant before the Constitutional Court of Korea on the ground that the non-prosecution of the leaders of the military coup violated the victims' basic rights.

The ambiguous intervention of the constitutional court

Procedurally, the initiative did not stand out since an overwhelming majority of the constitutional court's docket consists of complaints against abuses of state power (80% of all cases), and especially against prosecutors' decisions to indict or not. Substantially, the judgment delivered by the court on January 20, 1995 was the first of a series of three major cases responding to the intertwined issues of whether the perpetrators of the December 1979 military coup and of the violent suppression of the Kwangju uprising could be punished.⁷² In its ruling of January 1995, the Constitutional Court of Korea concluded that the prosecutors' decision not to prosecute Chun Doo-hwan, Roh Tae-woo, and other members of the military junta for their involvement in the coup of December 1979 was not arbitrary. This position was reached after the court weighed “two countervailing sets of facts” for which there could be no easy balancing in its eyes:

On the one hand, the Court recognized the importance of the reasons for prosecution, i.e., rectifying the past, deterring similar acts in the future, restoring justice, and fulfilling the

⁷¹ *Ibidem*, pp.581-582.

⁷² 7-1 KCCR 15, 94Hun-Ma246, January 20, 1995; 7-2 KCCR 697, 95Hun-Ma221, December 15, 1995; and 8-1 KCCR 51, 96Hun-Ka2, February 16, 1996.

people's prevailing sense of justice. On the other hand, the Court did not treat lightly the reasons for non-institution of the prosecution such as avoiding prolonged social confrontation and polarization, saving national resources, and preserving national pride.⁷³

Despite its attention to the social polarization (“*sahoejök taerip*”) and conflict (“*kaltŭng*”) surrounding the issue of the 1979 military coup, a majority of the court therefore deemed the prosecution's choice justifiable. Yet, consensus itself rarely prevails within the institution as exemplified in this case by the separate dissenting opinions of Justices Cho Seung-hyung and Koh Joong-suk. Both found that the decision not to indict should be cancelled, respectively considering that it deviated from the reasonable scope of the prosecution's discretion and that the reason not to prosecute was not based on objective grounds, thereby infringing upon the petitioners' right to due process and equal treatment before the law.

Rather than bringing an end to the controversy over how to confront the past, this episode fostered the anger and determination of civic groups committed to make change happen through legal channels. As a second petition to prosecute the individuals behind the violent suppression of the Kwangju uprising was rejected by the Seoul District Prosecutors' Office, the human rights lawyers of *Minbyun* appealed again to constitutional justice. As the association “continued to dispute the government's handling of past atrocities” through the courts, it “was concurrently promoting the passage of the Special Act on the May Democratization Movement, which suspended the statute of limitations for those who led the massacre against the protesters.”⁷⁴

On December 15, 1995, the Constitutional Court of Korea examined the complaint filed against the decision of the Seoul District Prosecutors' Office not to prosecute the persons responsible for the repression of the Kwangju rebellion. The judgment released by the court is unusual in so far as a majority of justices decided to terminate the proceedings after the petitioners chose to withdraw their constitutional complaint. The complainants' retraction was motivated by President Kim Young-sam's announcement that a Special Bill on the May 18th Democratization Movement would be proposed before the legislature in order to remove the statute of limitations for the criminal acts committed in the course of the repression. Indeed,

⁷³ The Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2008, p.195.

⁷⁴ *Minbyun*, “Inheriting the Spirit of Korea's First Human Rights.”

whether the statute of limitations had already expired or not for acts carried out more than fifteen years earlier represented a crucial issue in the debates of the time.

While President Kim Young-sam proved at first reluctant to let former presidents Chun and Roh be criminally punished, his attitude shifted following the revelation of the colossal amount of money amassed by them through their respective slush funds (nearly \$900 million for Chun and \$650 million for Roh).⁷⁵ As the proposed special law was pending in the National Assembly, the complainants before the constitutional court withdrew their petition to prevent a possible interference between the court's upcoming decision and the announced retroactive legislation. As a result, a majority of justices ruled that the proceedings should be terminated whereas four others dissented, arguing that judicial review was not about the "subjective protection of complainants' rights," but the objective defense and protection of the constitutional order. Furthermore, the dissenting opinion of Kim Chin-woo, Lee Chae-hwa, and Cho Seung-hyung made clear that, before the proceedings were terminated, a prevailing number of justices had agreed that:

Even if a successful coup makes it practically impossible to punish the perpetrators during their incumbency, they can always be punished whenever the legitimate state institutions recover their proper function and thereby regain the *de facto* power to punish them. However, if treasonous activities were the means to create a democratic civil state and to restore the people's sovereignty previously suppressed and excluded under a feudal autocratic regime or a dictatorship, they can be justified before or after the fact by the will of all people.⁷⁶

In essence, the court recognized the possibility to either punish the perpetrators of the coup or justify their "treasonous activities" "by the will of the people." The first path was eventually taken with the Special Act on the May 18th Democratization Movement ("5.18 *t'ŭkpyŏlpŏp*") being enacted on December 21, 1995. This law provided that the period for prosecution of the crimes committed between December 12, 1979 (the military coup) and May 18, 1980 (the Kwangju massacre) was to start in February 1993, that is to say, at the time when Kim Young-sam replaced Roh Tae-woo as president. The constitutionality of the special legislation was immediately challenged by the accused, on the basis that the suspension of the period of limitation from 1979 to 1993 constituted a form of *ex post facto* legislation.

⁷⁵ Nicholas Kristof, "Seoul Indicts Ex-President on Bribery Charges," *The New York Times*, January 13, 1996.

⁷⁶ 7-2 KCCR 697, 95Hun-Ma221, December 15, 1995, in *The Constitutional Court of Korea, Twenty Years*, pp. 266-267.

Enacting *ex post facto*, or retroactive, criminal legislation is indeed in contradiction with a fundamental principle of the rule of law, namely the prohibition that there be a crime without a law (“*nullum crimen, nulla poena sine lege*”). This principle not only implies that “no person shall be arrested, detained searched, seized or interrogated except as provided by Act,”⁷⁷ but it also ensures that “no citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed.”⁷⁸ The passage of retroactive legislation to prosecute the crimes of the former regime is always a problematic move for new democracies because it undermines the very principles upon which they claim to be based, such as legal security. In the case at hand, the constitutional court was split on the issue of whether *ex post facto* legislation could be validated. On the one hand, all the justices agreed that the Special Act on May 18th would be constitutional if the period of limitations had not expired at the time of enactment. On the other hand,

Four justices, Kim Chin-woo, Lee Jae-hwa, Cho Seung-hyung, and Chung Kyun-sik, stated that they would still uphold [the law] even if the period had expired at the time of enactment. Five other justices, Kim Yong-joon, Kim Moon-hee, Hwang Do-yun, Koh Joon-suk, and Shin Chang-on, stated that they would find it unconstitutional to a limited extent in that case.⁷⁹

The issue of whether the statute of limitations had already expired at the time of the law’s enactment was not decided by the constitutional court, but instead left to the ordinary tribunals to settle. The constitutional ruling nonetheless signaled that a supermajority of six justices (the necessary quorum for a decision of unconstitutionality) could not be gathered against the validity of the act if the ordinary tribunals were to find it retroactive. Indeed, four justices out of nine were ready to defend that “although genuine retroactive legislation is prohibited in principle by the rule of law, it can be allowed exceptionally” when there is “a public interest overwhelmingly more important” than protecting criminals’ expectation of legal certainty.⁸⁰ In the wake of the judgment, sixteen persons were arrested and prosecuted, including Chun Doo-hwan and Roh Tae-woo. The two former presidents were respectively sentenced to death and a twenty-two-and-a-half-year prison sentence in August 1996, after a four-month televised trial at the Seoul District Court. Their sentences were later commuted to

⁷⁷ Article 12 of the Constitution of the Republic of Korea.

⁷⁸ Article 13 of the Constitution of the Republic of Korea.

⁷⁹ 8-1 KCCR 51, 96Hun-Ka2, February 16, 1996, in *The Constitutional Court of Korea, Twenty Years*, p.269.

⁸⁰ *Ibidem*, p.270.

life imprisonment and seventeen years of imprisonment by an appellate court, and confirmed by the Supreme Court of Korea in April 1997. On December 22 of that same year, Chun and Roh were both released after Kim Young-sam granted them a presidential pardon before he retreated from office, a gesture which was agreed to by his successor Kim Dae-jung two days after his election.⁸¹

The three above-mentioned decisions highlight major features of the Constitutional Court of Korea's subtle and often divided approach to the issue of transitional justice. In each case, the jurisdiction engaged in a balancing of interests in which competing reasons were given serious consideration. While the overall position of court evolved through the three cases, no precedent was overturned. The court did not shift from opposing to allowing the punishment of Chun Doo-hwan, Roh Tae-woo, and their accomplices. Its first ruling found compelling reasons both in favor and against their prosecution, and therefore did not judge arbitrary the public prosecutor office's decision not to indict the accused. By the time of its third decision a year later, the court was presented with a piece of legislation meant to lift all legal obstacles (namely, the statute of limitations) preventing Chun, Roh, and other military officials, from being tried.

In the meantime, the climate surrounding the issue of punishment had clearly changed under the pressure of civil society's heightened mobilization. The Special Act on the May 18th Democratization Movement was proposed by President Kim Young-sam in response to the growing popular outrage over the abuses committed by the two former presidents. The fact that the law's validity was challenged before the constitutional court by the very perpetrators of the coup and of the Kwangju massacre made it very risky for the court to hold the legislation unconstitutional. Only a minority of four justices however went as far as to accept distorting the rule of law to satisfy the demand for substantive justice through retroactive criminal punishment. Yet, this minority would have been sufficient to uphold the constitutionality of the special legislation had the ordinary tribunals found the statute of limitations already expired at the time of the enactment - a matter of statutory interpretation that the constitutional judges deferred to the judiciary.

The court's prevailing minority position and general cleavage on the issue of retroactive justice can be contrasted with the firmly legalistic stance of judicial institutions such as the Constitutional Court of Hungary after the transition from communism or the German tribunals in the wake of reunification. In 1990, the first elected Hungarian parliament

⁸¹ Andrew Pollack, "New Korean Leader Agrees to Pardon of 2 Ex-Dictators," *The New York Times*, December 21, 1997.

passed a law providing that the statute of limitations for criminal offenses such as treason, voluntary manslaughter, and infliction of bodily harm resulting in death, committed between 1944 and 1990, would start again on May 2, 1990, the date when the new legislature took office. The law was immediately referred by President Göncz, a former regime opponent, to the constitutional court. This institution was a product of the Roundtable negotiations between the communist elite and the opposition, and, as a result, its members represented almost all the different political factions present in the parliament. Yet, the court's concordance and unity on the matter were entire.

The Constitutional Court in its unanimous decision, 11/1992 (III.5) AB h., struck down the parliament's first attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. [...] The basic principles of criminal law - that there shall be no punishment without a crime and no crime without a law - were clearly violated by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the court said, are those changes that work to the benefit of defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law state and that there can be no punishment without a valid law in effect at the time, the court declared the law to be unconstitutional and sent it back to the president.⁸²

In the process of reunifying the Federal and Democratic Republics of Germany, the prohibition against retroactive legislation also took on an important, yet slightly different, dimension. The emphasis did not primarily lie on the fact that crimes for which the statute of limitations had expired could not be prosecuted, but on the requirement that only those acts which constituted crimes under East German law could be punished.

The architects of German unity were so attentive to this prohibition on *ex post facto* lawmaking that they deliberately incorporated the principle into the Unification Treaty of 1990. The accord expressly stipulated that crimes committed before the date of national unification could be adjudicated only according to the East German penal code.⁸³

⁸² Gábor Halmai and Kim Lane Scheppele, "Living Well Is the Best Revenge. The Hungarian Approach to Judging the Past," in James McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame: University of Notre Dame Press, 1997, pp.160-161.

⁸³ James McAdams, "Communism on Trial. The East German Past and the German Future," in *Ibidem*, p.244.

While this precaution was by no means a guarantee, it was made effective by German judges' "adherence to the stricture of the Basic Law" and their consequent exclusive reliance on codified East German law to settle the cases before them.⁸⁴ In doing so, the courts contributed to construe "the forty-year history of the GDR in more exacting terms than those allowed by the ambiguous concept of the *Unrechstaat*," that is to say, East Germany envisioned as a lawless state.⁸⁵ This effect of judicial intervention is also verified for the Constitutional Court of Korea in its approach to the former authoritarian regime, recognized as constituting a coherent institutional and legal order of its own. As once stated by the court,

Whether to a small or large extent, whether to our liking or not, the order established during that time became an integral part of our history and formed the foundation of the present political, economical, and social order.⁸⁶

Moreover, the fact that four justices of the constitutional court were inclined to find the Special Act on the May 18th Democratization Movement valid even if it represented retroactive legislation did not imply that those same judges would have been ready to extend this exception to other cases. As a matter of fact, further efforts to enact broad *ex post facto* provisions in order to prosecute past crimes were undertaken in 2002 (with the Bill for Revision of the Criminal Procedure Code) and 2005 (with the Special Bill for Statutory Limitations to the State Crimes against Human Rights), but they both failed to pass in the National Assembly. As underlined by Korean legal scholar Cho Kuk,

Procedural legality is required even to punish those who violated human rights under the authoritarian-military rule. If the new democratic regime weakens procedural legality to serve substantive justice, it may satisfy the popular demand but undermine the new regime's commitment to the rule of law. This is the academic reason why the two bills to cease or exclude the application of the statute of limitations did not pass. Ironically, procedural legality, which grew in Korean society after democratization, prevented the retrospective punishment of the perpetrators under the old regime after the limitation period had already expired. The National Assembly was not sure if such an act could pass constitutional review by the Constitutional Court. As a result, it was hesitant to fully advance retroactive justice in criminal cases.⁸⁷

⁸⁴ *Ibidem*, p.255.

⁸⁵ *Ibidem*.

⁸⁶ 7-1 KCCR 15, 94Hun-Ma246, January 20, 1995, in The Constitutional Court of Korea, *Twenty Years*, p.263.

⁸⁷ Kuk Cho, "Transitional Justice in Korea," p.589.

Although the Constitutional Court of Korea has been centrally involved in the process of making possible the criminal punishment of two former presidents, this episode does not exhaust the ways in which the Republic of Korea sought to “rectify past wrongs.” From 2000 onward, the emphasis shifted from the prosecution of a small number of prime wrongdoers to the broad rehabilitation of victims, as exemplified by the 2000 Act for Restoring the Honor of Democratization Movement Involvers and Providing Compensation for Them, the 2000 Special Act on the Cheju April 3rd Incident to Restore the Reputation of Victims, the 2004 Special Act to Restore the Reputation and Compensate the Victims of the Samch’ong Re-education Camp, and the 2004 Special Act to Restore the Reputation of Nogŭn-ri Victims.⁸⁸ In parallel, special laws were enacted to “uncover the truth” about particular categories of abuses, as illustrated by the 2000 Special Act to Investigate Suspicious Deaths or the 2004 Special Acts to Investigate Forced Mobilization and Pro-Japanese Collaboration Under Japanese Rule. The ensuing proliferation of *ad hoc* committees to investigate wrongdoings and compensate victims resulted in the establishment of the comprehensive Framework Act on Clearing up Past Incidents for Truth and Reconciliation in May 2005. It led in turn to the founding of an independent Truth and Reconciliation Commission in December of that year.

From 2005 to 2009, the commission’s work embodied a non-judicial approach to dealing with the past, as its truth-finding activities could only lead it to recommend remedies to the government on the basis of its investigations. After President Lee Myung-bak from the conservative Grand National Party (“*hannaradang*”) came to power in February 2008, the activities of the Truth and Reconciliation Commission as well as all the other special committees largely came to a halt. In particular,

The effectiveness of the TRCK [Truth and Reconciliation Commission of Korea] was particularly compromised, it is said, by President Lee’s nomination of a new chairperson and other commissioners who were less enthusiastic about the commission’s activities. Not only the military and police, but also state officials, became uncooperative with TRCK requests for the documents. The TRCK also had its budget for the last year cut significantly by the government [...].⁸⁹

⁸⁸ The Cheju and Nogŭn-ri incidents refer to two massacres of civilians which respectively occurred on April 3, 1948 (by the South Korean army crushing a rebellion on Cheju island) and July 26 to 29, 1950 (by the U.S. army during the Korean War). As for the Samch’ong Re-education Camp, it was created in 1980 with the official purpose of rehabilitating repeat or organized crime offenders through harsh labor and dangerous military training. In fact, 40% of the 60,000 people sent to the camp had no criminal record. See *The Hankyoreh*, “South Korean Junta Punished Civilians With Military Camp in Early 1980s,” November 11, 2006.

⁸⁹ Hun Joon Kim, “Transitional Justice in South Korea,” in Renée Jeffery and Hun Joon Kim (eds.), *Transitional Justice in the Asia-Pacific*, New York: Cambridge University Press, 2014, p.254.

As a result of the commission's disempowerment, the responsibility to settle the past seems to have shifted back to the Constitutional Court of Korea in recent years. For instance, the court delivered an important ruling in August 2011 on the issue of "comfort women," forced to serve as sex slaves for the Japanese army during the Pacific War. The court held that the government's lack of effort to resolve their compensation claims was an unconstitutional non-exercise of state power, infringing upon the dignity of victims.⁹⁰ In particular, the court found that the "disruption of diplomatic relations" with Japan "cannot be viewed as a national interest that must be considered seriously," while it reasoned that the issue had to be addressed urgently given the advanced age of the victims "making recovery impossible in the event of a delay."⁹¹

In March 2013, the court ruled three emergency decrees of Park Chung-hee's era (Emergency Decrees No.1, 2, and 9) unconstitutional, a decision which intervened after the accession of Park's daughter - Park Geun-hye - to the presidency a month earlier.⁹² As pointed out by Marie Seong-hak Kim,

In the Emergency Decree cases, both the Supreme Court and the Constitutional Court ruled that the Decrees mandated by Article 53(4) were unconstitutional because they conflicted with other constitutional articles grounded on superior norms. The two courts' treatment of the Emergency Decrees as well as the Yusin Constitution revealed their shared belief that the validity of legal norms could not only be judged by superior positive law - constitutional law - but also by the consideration of the fundamental "constitutional order of liberal democracy" that underlies the evolving languages of the written constitutions. This position reveals a growing activist tendency of the judiciary. Judicial emphasis on fundamental rights tends to place the subjective criterion of justice over legal certainty; in this framework, legal validity is to be tested by certain minimum standards of justice, presumably by the court.⁹³

From the late 1980s up to date, constitutional adjudication has been invested as a site where to dispute the construction of enmity, in relation to both the democratic present and the authoritarian past of South Korea. While the constitutional court has come to adopt an active stance in the latter arena, its position was not initially the one that the institution embraced in

⁹⁰ 23-2(A) KCCR 366, 2006Hun-Ma788, August 30, 2011.

⁹¹ *The Hankyoreh*, "Government's Responsibility Toward Comfort Women," August 31, 2011.

⁹² 2010Hun-Ba70.132.170, March 21, 2013. In 2010, the three decrees had already been invalidated by the Supreme Court of Korea.

⁹³ Marie Seong-hak Kim, "Constitutional Jurisprudence and the Rule of Law. Revisiting the Courts in Yusin Korea (1972-1980)," *Hague Journal on the Rule of Law*, Vol.5, No.2, 2013, p.197.

the mid-1990s. Moreover, the “constitutional order of liberal democracy” (literally, “the basic order of free democracy” or “*chayuminjujŏk kibonjilsŏ*”) which its jurisprudence has recently referred to as a ground for invalidating a number of decrees from the Park Chung-hee regime should not be understood as expressing the court’s absolute commitment to fundamental rights. Instead, the concept has also been deployed by the constitutional court to justify the resilience and relevance of mechanisms of exclusion such as the National Security Act, as will be explored in the following chapter.

CHAPTER FIVE

Reviewing How the Enemy is Defined

“The National Security Act still has value, so should exist independently. [...] It will be necessary for the National Assembly when it deals with the security law issue to reflect on public opinion and the constitutional court’s ruling.”

The Constitutional Court of Korea, August 26, 2004

“Just because there are exchanges and cooperation between the two Koreas, the Supreme Court cannot see that North Korea’s anti-state character has disappeared and that the National Security Act has lost its legal power. [...] Under such conditions, we must be careful not to disarm ourselves.”

The Supreme Court of Korea, September 3, 2004

“The National Security Act has been used mostly to oppress people who opposed the government rather than to punish those who threatened to throw the country into crisis. During this process, tremendous human rights abuses and inhumane acts have been conducted. It is part of Korea’s shameful history and an old legacy of dictatorships which we are unable to use now. [...] The National Security Law should be abolished and provisions necessary for national defense addressed by revisions to clauses of the criminal code.”

President Roh Moo-hyun, September 5, 2004

“The abolishment of the National Security Act as a symbol and practical stronghold of the free democratic system would shake the national identity and deliver a serious blow to the national security and economy. Thus, it is sufficient to revise some laws of concern that may infringe on human rights and there is no reason for voluntary disarmament.”

The Grand National Party, September 7, 2004

“South Korea has entered on a state of ideological civil war over the National Security Act.”

Tong-A Daily, September 7, 2004

This chapter interrogates how the notion of enmity has been reshaped by the Constitutional Court of Korea in the aftermath of the transition, focusing on rulings delivered in relation to the National Security Act. The analysis revisits the traditional understanding made of these decisions as landmarks of the court’s commitment to protect fundamental rights. While the court has indeed sanctioned abusive interpretations and excessive clauses of the National Security Act, its jurisprudence has also profoundly enhanced the post-transition relevance and legitimacy of the law by construing it as a means to confront not only the activities which threaten the state, but also those endangering the “basic order of free democracy.” The debate over the abolition of the National Security Act which erupted in 2004

has provided the court with the opportunity to strongly reaffirm its position in support of the legislation and the non-inclusive bias that it enforces.

“Anti-state organization” as a resilient category of enmity: continuities and changes behind it

Formation in the context of the two Koreas’ conflictual political foundation

The core legal notion of South Korea’s politics of enmity is the category of “anti-state organization” (“*pande kukka tanch’e*”), enshrined in the National Security Act. The expression itself did not appear in the first version of the NSA, enacted on December 1, 1948 and directed against “groups which violate the national constitution (“*kukhŏn*”) by claiming the title of government or by having the purpose to disrupt the state (“*kukka*”).” On June 10, 1960, these same groups were defined as “anti-state organizations,” a category which has remained in place throughout all the subsequent revisions of the National Security Act. In 1980, the description of “anti-state organizations” was refined by making reference to both external and internal enmity, as encapsulated in the expression “groups and associations from inside and outside” (“*kuknae oeŭi kyŏlsa ttonŭn chiptan*”). As of today, an “anti-state organization” is thus a group or association which operates within or outside South Korea for the purpose of “assuming the title of government” or “disrupting the state.”

The anti-state organization claiming the title of government designates North Korea, which is denied the status of sovereign state in the National Security Act and is, therefore, never openly mentioned. This is in conformity with the original spirit of article 3 of the constitution, construing the Republic of Korea’s territory as encompassing the whole peninsula instead of its southern half. In turn, the portion of the country north of the 38th parallel is depicted as “territory under the control of an anti-state organization” by article 6 of the NSA, which criminalizes escaping to, or infiltrating from, such area. The congruence between both texts stems from the fact that the first versions of the constitution and the security legislation were adopted at the time of the two Koreas’ conflictual political foundation.¹

¹ The South Korean constitution was enacted on July 17, 1948, a month before the proclamation of the Republic of Korea on August 15. On September 9 of the same year, the Democratic People’s Republic of Korea was established.

In 1948, the formation of the two separate states was not only contentious because of their respective claims to represent the only legitimate Korean government along antagonistic ideological lines. Each regime was also born in a context of domestic unrest and violence. In the southern half of the peninsula, socialism was a particularly powerful force after 1945 as a result of the social transformations brought about by the colonial era and the war. On the one hand, Korean communists, despite their factionalism, had formed the principal resistance movement against Japanese rule since the 1930s and therefore “planted a deep core of Communist influence among the Korean people, particularly the students, youth groups, laborers, and peasants.”² On the other hand, the colonial and wartime experiences of these groups also drew them to support socialism.³ For instance, millions of peasants had been pushed away from the countryside in the late 1930s and forced to take part in Japan’s mobilization of labor for total war effort after 1941. They returned home hoping for a redistributive land reform and sweeping decolonization process, the two being intimately connected since the Korean landlord class had largely collaborated with the colonial regime to defend its own interests and privileges.

Both demands - land reform and decolonization - were supported by the grassroots people’s committees formed under the Committee for the Preparation of Korean Independence (“*chosŏn kŏn’guk chunbi wiwŏnhoe*”) in the immediate aftermath of the Liberation (August 15, 1945). As the peninsula was partitioned by the joint military occupation of Soviet and American forces in the following weeks, the committees were only recognized in the North, which proceeded to the advocated reforms. The transition to communism forced “all Korean social elements that might either have sought the perpetuation of the old or the obstruction of the new system” to seek refuge in the South, where they numbered 1,800,000 by 1948.⁴ There, the authority of the people’s committees was dismissed by the USAMGIK (the United States Military Government in Korea), and none of the desired structural reforms carried out. More specifically, “the process of ousting the people’s committees in the Korean countryside [...] was long and painful. It took a full year to

² Dae-sook Suh, *The Korean Communist Movement. 1918-1948*, Princeton: Princeton University Press, 1967, p. 132.

³ “Given contemporary South Korea’s staunch anti-Communism, it is hard to imagine socialism’s popularity in the 1940s Korea. But in the period after the Liberation, socialists drew tremendous support from the landless, intellectuals, and factory workers.” Michael Robinson, *Korea’s Twentieth-Century Odyssey*, Honolulu: University of Hawai’i Press, 2007, pp.102-103.

⁴ Gregory Henderson, “Human Rights in South Korea. 1945-1953,” in William Shaw (ed.), *Human Rights in Korea. Historical and Policy Perspectives*, Cambridge: Harvard University Press, 1991, p.127.

eliminate them, and it was not without major violence.”⁵ In this struggle, conservative elements of society such as landlords and businessmen could be relied upon, as well as the colonial repressive apparatus, whose institutions and Korean personnel largely remained in place in the absence of decolonization process.⁶

By the time of the Republic of Korea’s founding in August 1948, “the leftist groups capable of challenging the regime were driven underground,”⁷ but contestation was still strong and even turned into rebellion in regions such as South Chōlla and Cheju Island. Between September 4, 1948 and April 30, 1949, 89,000 arrests were reportedly conducted by the government of Rhee Syngman.⁸ It is in this tumultuous context that the National Security Act “was rushed through the Assembly” and promulgated on December 1, 1948. By the spring of 1950, the new law had been used to imprison some 58,000 individuals.⁹ Since its inception, the security legislation has therefore embodied more than the reality of the national division. Its genealogy highlights how the division itself has given birth to a more insidious line of separation than the 38th parallel, a division not only between both Koreas, but inside each. In the South,

The real or presumed existence of an enemy, ubiquitous and unrelenting, was not geographically specific or bound. [The] discourse of anticommunism and national security was projected not only toward the “real” enemy, the north, but also toward anyone who harbored the notion of a radical transformation of society, in other words, toward all progressive elements in South Korea. The progressive and non-cooperative elements of society were thus made into enemies of the state through legal measures such as the NSL [National Security Law] and the Anti-Communist Law.¹⁰

According to political scientist Choi Jang-Jip, part of this non-inclusiveness still endures in contemporary South Korea given the “conservative path” of its democratization process. Indeed, “one of the most notable characteristics of Korean democracy is the

⁵ *Ibidem*, p.107.

⁶ Bruce Cumings, *The Origins of the Korean War. Vol.1. Liberation and the Emergence of Separate Regimes, 1945-1947*, Princeton: Princeton University Press, 1981.

⁷ Namhee Lee, “Anticommunism, North Korea, and Human Rights in South Korea. ‘Orientalist’ Discourse and Construction of South Korean Identity,” in Mark Philip Bradley and Patrice Petro (eds.), *Truth Claims. Representation and Human Rights*, New Brunswick: Rutgers University Press, 2002, p.45.

⁸ Gregory Henderson, “Human Rights in South Korea,” p.149.

⁹ *Ibidem*, p.150.

¹⁰ Namhee Lee, “Anticommunism, North Korea, and Human Rights in South Korea,” p.51.

estrangement between the forces that dismantled the old system, on the one hand [such as students and workers], and those that institutionalized democracy, on the other [the elites of the ruling and opposition parties].”¹¹ As this dissertation contends, it is in the context of these two sides’ asymmetric confrontation and disagreement over what counts as “national” and “anti-national” that the groups marginalized by the transition have resorted to the site of constitutional adjudication as an arena where to question and challenge the mechanisms of exclusion (such as the National Security Act) deployed against them by successive democratic governments.

In the name of the state: “kokutai,” “kukhōn,” “kukka”

Like most of South Korea’s repressive apparatus, the National Security Act finds its roots in the colonial era. More specifically, the law enacted in 1948 was modeled after the Peace Preservation Law which was passed in Japan in 1925, and extended to Taiwan and Korea. The Peace Preservation Law was not the first security legislation adopted in Japan, but it became a notorious element of its interwar politics. Article 1 provided that:

Anyone who has formed a society with the objective of altering the national polity or the form of government or denying the system of private property, and anyone who has joined such a society with full knowledge of its object, shall be liable to imprisonment with or without hard labor for a term not exceeding ten years. Any attempt to commit the crime in the preceding clause will [also] be punished.¹²

The law remains famous for its articulation of the new expressions “national polity” (“*kokutai*”) and “form of government” (“*seitai*”). Their introduction was interpreted as signaling that the Peace Preservation Law was not only aimed at protecting the security of the state but also the spiritual unity of the nation, supposedly threatened by the radical ideologies of anarchism, socialism, and communism which had all developed in early 20th-century Japan. As such, the legislation was part of a broader apparatus of “thought control” which was progressively elaborated during the 1930s to repress “ideological crimes.” Therefore, “the new peace law was only one of the tools utilized by the state to control its

¹¹ Jang-Jip Choi, *Democracy After Democratization. The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2012, p.92.

¹² Richard Mitchell, “Japan’s Peace Preservation Law. Its Origins and Significance,” *Monumenta Nipponica*, Vol.8, No.3, 1973, p.339.

opponents. In addition to this law, the government devised a complex and interesting system for the conversion of ideological criminals; once they were sufficiently purified they were permitted to reenter the imperial tent.”¹³

Such tools were not only replicated in colonial Korea, where the domestic independence movement was mostly composed of communist insurgents after the failure of moderate nationalists in the late 1920s¹⁴; they also survived Japanese rule. In 1945, the conversion policy (“*tenkō*” in Japanese, “*sasang chŏnhyang*” in Korean) was abolished by the U.S. provisional government in Japan but maintained in South Korea, albeit not formally. It was again institutionalized in 1956,¹⁵ and later became an integral part of Park Chung-hee’s *Yusin* system (1972-1979). With the enactment of the 1975 Social Security Act (“*sahoe anjŏnpŏp*”), “those who had refused to convert even under torture” were systematically kept in detention while “those who had been released” could be monitored and even preventively confined again.¹⁶ The institutional isomorphism therefore seems robust between Japan’s 1925 Peace Preservation Law and South Korea’s 1948 National Security Act, each complemented by the system of ideological conversion. However, their resemblance does not entail that both sets of mechanisms were actually operating in the same manner.

In fact, Japanese authorities controlling Korea and post-1945 South Korean governments alike appear to have been more concerned with the coercion of “subversive” elements, rather than the reform of ideological deviance. In a sense, the conversion policy as deployed in Korea was never about ideology, but violence.¹⁷ Both in the colonial and post-colonial eras, it was never intended to truly redeem “thought criminals” and reintegrate them in the social body, but was more abruptly meant to break down anyone labeled as such. This reality is confirmed by the motivation behind the program’s intense reactivation in the 1970s, which was not to reincorporate leftists in the fabric of society, but to prevent the looming release of some 500 individuals whose long-term prison sentences were coming to a close.

¹³ *Ibidem*, p.318.

¹⁴ Michael Robinson, *Cultural Nationalism in Colonial Korea. 1920-1945*, Seattle: University of Washington Press, 1988.

¹⁵ Namhee Lee, “Anticommunism, North Korea, and Human Rights in South Korea,” p.55.

¹⁶ *Ibidem*, p.56. In 1972, Park Chung-hee declared martial law and imposed the *Yusin* (i.e., “revitalization”) constitution. “At that time, the direct presidential election process was suspended, repressive practices became entrenched, and human-rights abuses grew pervasive.” James West and Edward Baker, “The 1987 Constitutional Reforms in South Korea. Electoral Processes and Judicial Independence,” in William Shaw (ed.), *Human Rights in Korea*, p. 225.

¹⁷ Personal communication with Professor Han Hong-koo, Seoul, June 30, 2011.

The reason why the government reinforced the ideology conversion project was that the majority of leftist prisoners were due to be released upon expiration of their sentences, in the mid-1970s; almost all of such long-term prisoners arrested during the [Korean] war were sentenced to life imprisonment, but their sentences were reduced to 20 years' imprisonment just after the April Revolution of 1960, making them due to be released in the middle of the 1970s.¹⁸

The conversion policies implemented in Japan during the interwar years and in Korea before and after 1945 therefore appear to have operated in distinctive ways. Similarly, the two countries' security legislations present important nuances despite their kinship. Indeed, the 1925 Peace Preservation Law was largely a response of the powerful Japanese state to radical movements which were otherwise politically weak.¹⁹ It criminalized their activities for being “anti-*kokutai*,” that is to say, for endangering the spirit of the nation more than the security of the state. As a result, leftists were only one of the law's targets, the other being the emperor's subjects to which the government addressed a moral message.²⁰ No such loaded word could be appealed to in the 1948 National Security Act, where the notion of “altering the national polity” (“*kokutai*”) was replaced by expressions such as “violating the national constitution” (“*kukhōn*”) or “disrupting the state” (“*kukka*”).²¹ In the context of the contentious formation of the South Korean state, both within the South and in the scheme of the inter-Korean division, the National Security Act did not primarily focus on defending an essence of the Korean nation. Instead, it professed to safeguard the national constitution, itself tied to the existence and permanence of a doubly contested political entity: the Republic of Korea.

The rhetoric of “anti-communism” which the new state adopted had been deployed since 1945 under the auspices of the U.S. military government, but its construction as the core

¹⁸ Presidential Truth Commission on Suspicious Deaths of the Republic of Korea, *A Hard Journey to Justice: First term report by the Presidential Truth Commission on Suspicious Deaths of the Republic of Korea*, Seoul: Samin Books, 2004, p.152.

¹⁹ Richard Mitchell, “Japan's Peace Preservation Law,” p.317.

²⁰ “By its inclusion of ‘*kokutai*’ the government was telegraphing to all subjects its intention to preserve the Japanese way of life in the face of rapid change. Therefore, the new peace law should be viewed as a strong effort toward integration. It had a political purpose (to suppress leftists and other ‘thought criminals’) and a moral one, as indicated by the use of ‘*kokutai*.’ This potent term appealed not only to the general society, which was suffering from anomie, but also to the severely divided elite itself” as it ‘symbolized everything worth protecting.’” *Ibidem*, p.343.

²¹ These three words share one Chinese character: 國, pronounced “*koku*” in Japanese or “*kuk*” in Korean and standing for “country” or “nation.” The second character which composes each of them however varies: 體, that is to say “body” or “substance” for “*kokutai*” (the organic “national polity”); 憲, “statute” or “constitution” for “*kukhōn*” (the “national constitution” in a legal sense); and 家, “home” or “family” for “*kukka*” (the “state,” “nation,” or “country” in a political sense).

of South Korean national identity only fully intervened with the eruption of the Korean War in 1950: “Whereas before the war, the South Korean state had a weak local base of support, the war gave the state an ideological basis for building its legitimacy. Anticommunism, articulated and experienced in everyday life, became the premier motif for ideological legitimization of the South Korean state.”²² The “anti-communist” motto and project of the South, which remained “vague” and “symbolic” under Rhee Syngman (1948-1960), were institutionalized through the Anti-Communist Act in force between 1961 and 1980,²³ after which the law was fused with the National Security Act.

The radicalization of anti-communism as a national discourse and policy under the Park Chung-hee regime (1961-1979) has to be seen in light of its efficacy at the service of the state’s goal of economic growth, to which civil society in general, and labor in particular, have been harshly subordinated. As underlined by Hagen Koo,

From Park’s Yushin [*Yusin*] period (1972-1979) to the end of the Chun era (1980-1987), the state’s consistent policy was to forestall the emergence of any independent union movement outside the government-controlled union structure, and to prevent the development of any connections between labor and opposition movements. Thus any sign of organized resistance was ruthlessly repressed, allowing no channel for the release of the mounting tensions and resentments on the shop floor. The Korean state’s labor control had been more repressive than corporatist, more direct and physical than bureaucratic or ideological, and more blatantly anti-labor than subtle and disguised.²⁴

As will be explored later in the chapter, labor’s participation in politics has remained illegal until 1998, when the Kim Dae-jung government formally allowed its integration in exchange for large concessions in the context of South Korea’s economic depression, prompted by the 1997 East Asian financial crisis. In spite of this process, the National Security Act has continued to be intensively resorted to under the Kim administration to deal with labor struggles. Therefore, it appears that an important and resilient meaning of what constitutes “anti-stateness” remains tied to the preservation of a certain “national” trajectory,

²² Jang-Jip Choi “Political Cleavages in South Korea,” in Hagen Koo (ed.), *State and Society in Contemporary Korea*, Ithaca: Cornell University Press, 1993, p.22.

²³ Namhee Lee, “Anticommunism, North Korea, and Human Rights in South Korea,” p.48.

²⁴ Hagen Koo, “Engendering Civil Society. The Role of the Labor Movement,” in Charles Armstrong (ed.), *Korean Society. Civil Society, Democracy, and the State*, New York: Routledge, 2007, p.78.

premised for decades on the “link between political stability and economic development,” and therefore the domination rather than incorporation of participating social forces.²⁵

The National Security Act, informal constitution of South Korea?

It is interesting to note the close parallelism between revisions of the National Security Act and the political ruptures recorded in the text of the constitution. Not only were both documents originally drafted in 1948, but they were subsequently and concomitantly amended in: 1960, in the wake of the uprising which ousted Rhee Syngman from power and brought about the short-lived Second Republic; 1962, after the coup d'état of Park Chung-hee leading to the establishment of the Third Republic; 1980, with the founding of the Fifth Republic presided by Chun Doo-hwan; and eventually 1987, coinciding with the transition to procedural democracy. The 1987 revision of the security legislation was however minor, and the law was further amended in 1991. The synchrony between the two texts presents another exception, as the National Security Act was not amended in 1972, when Park Chung-hee hardened his rule under the motto of “revitalization” with the passage of the *Yusin* constitution. The fact that the National Security Act was then left unaltered may indicate the reliance of the regime on other repressive tools, such as the Anti-Communist Act in force since 1961, and the various emergency decrees issued in the mid-1970s.

Throughout the 1970s, the number of prosecutions under the Anti-Communist Act (around 3,200 between 1970 and 1980, including 500 for 1972 alone) exceeded those under the National Security Act (less than 1,100).²⁶ These figures do not reflect the more intense pattern of arrests conducted under the two laws, leading tens of thousands of protestors, dissidents, and labor activists to be detained from several hours up to thirty days before being released without having charges leveled against them.²⁷ Until the 1980s, the security legislation did not explicitly define anti-state activities and organizations in relation to communism. The abolition of the Anti-Communist Act in 1980 led to the integration of its provisions into the framework of the National Security Act. In addition to groups claiming the title of government and aiming at disrupting the state, internal and external entities politically

²⁵ Namhee Lee, “Anticommunism, North Korea, and Human Rights in South Korea,” p.60.

²⁶ Gi-Wook Shin, Paul Chang, Jung-eun Lee, and Sookyung Kim, *South Korea's Democracy Movement (1970-1993)*. *Stanford Korea Democracy Project Report*, Stanford: Walter H. Shorenstein Asia Pacific Research Center, Stanford University, 2007, p.90. See also table 1 in chapter one.

²⁷ Thirty days is still the regular period of custody permitted before indictment, and can be extended to fifty days under the National Security Act. This system is discussed later in the present chapter.

affiliated with communism were now considered anti-state organizations as well. The Anti-Communist Act's punishment of "any person who has praised, encouraged, or sided with anti-state organizations or members thereof on foreign communist lines or benefited the same in any way through other means"²⁸ became article 7 of the NSA. As a result, "students engaged in ideological debates regarding how to carry out the democracy movement based mainly on Marxist ideas" became a privileged target of the security legislation in the 1980s and many of them were arrested for "simply organizing a small book club for the discussion of Marxist [materials]."²⁹

The mention of communism did not disappear in 1987 but 1991, when it was completely erased from the National Security Act alongside other significant revisions. As a result, the law ceased to prohibit "contact with communist organizations or governments in countries other than North Korea. Provisions of Article 6, 7 and 8 which provided penalties for people praising or communicating with communist parties or governments were also repealed, so that contacts with communist countries are now permitted, except with North Korea."³⁰ In addition, a rhetorical safeguard was introduced in the first article, providing that "the interpretation and application of this law shall be confined to the minimum extent necessary to achieve its purpose. The law shall not be loosely interpreted or otherwise misapplied to unreasonably restrict the basic human rights of citizens."³¹ This reform of the text intervened after a ruling of limited constitutionality was delivered by the Constitutional Court of Korea on article 7 of the NSA in April 1990. This landmark judgment was highly critical of the abuses made of the provision, denouncing the risk that a literal reading would "merely intimidate and suppress freedom of expression without upholding any public interest in national security."³²

The ruling can be seen as an attempt by the constitutional court to disentangle two possible interpretations of the law which have been confused since its birth: one limited to the activities which endanger the security of the state, and the other encompassing all the activities deemed to threaten the stability of the socio-political and economic order. In trying

²⁸ Namhee Lee, "Anticommunism, North Korea, and Human Rights in South Korea," p.49.

²⁹ *Ibidem*, p.91.

³⁰ Amnesty International, *South Korea. Prisoners Held for National Security Offences*, ASA 25/25/91, London: Amnesty International, 1991, pp.6-7.

³¹ Article 1, section 2 of the National Security Act.

³² 2 KCCR 49, 89Hun-Ka113, April 2, 1990, in The Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2010, p.215.

to provide a correct and restrictive understanding of the National Security Act, the constitutional court has nonetheless reframed the concept of enmity in ways which have also contributed to consolidate it. In particular, the court's efforts to restrain the scope of the security legislation have paradoxically resulted in transforming the NSA into a militant instrument for protecting the "basic order of free democracy" and, in its name, some of the most entrenched non-inclusive arrangements of the post-transition period.

Old and new distortions in defining enmity

From 1948 to 1987, only three leaders have succeeded one another at the head of the Republic of Korea: Rhee Syngman (1948-1960), Park Chung-hee (1961-1979), and Chun Doo-hwan (1980-1987), if one excludes the short-lived Second Republic under Premier Chang Myon (1960-1961). Throughout these decades, the amalgamation between anti-state and anti-regime activities was remarkably strong and supported by the National Security Act's broad criminalization of groups acting from outside or within South Korea to disrupt the state. Since its very inception, the National Security Act has therefore been deployed for a dual purpose: defending the state's security and, in its name, uprooting opposition against the regime in place. From the 1960s onward, national security has also become inseparable from the project of modernizing the nation through state-led industrialization, i.e., of building "a wealthy and (militarily) strong nation as the embodiment of modernity."³³

The process of mass mobilization required by this transformation called for both men and women to participate in it as "dutiful nationals," albeit differentially: while men's military mobilization through conscription and economic mobilization as the primary labor force in the industrializing economy were "intimately intertwined," "this combination contributed to the consolidation of the modern gender hierarchy, organized around the division of labor between man as provider and woman as housewife."³⁴ In the meantime, the entire national security apparatus was reshaped and made to play an integral part in the process of economic development, as illustrated by the functions of the Korean Central Intelligence Agency founded in 1961.

³³ Seungsook Moon, *Militarized Modernity and Gendered Citizenship in South Korea*, Durham, London: Duke University Press, 2005, p.2.

³⁴ *Ibidem*, p.12.

In fact, in Park [Chung-hee]'s regime, the role of the national security organizations was as absolute in the economic policy area as it was in other policy areas. The authoritarian state security organizations did more than simply play the role of watching and suppressing labor and anti-government activities in the name of economic stability. They were the core decision-makers in major policy decisions. It was the national security agents who controlled the vast set of bureaucratic rules and regulations instituted by the regime; they became an extension of the president, allowing him to rule effectively as the chief commander of state authority. Furthermore, as Korean companies expanded their businesses overseas, the security agencies provided information on overseas investment conditions to individual companies, prepared in advance the terms of investments, and supported these business activities. In this way, they played a broad spectrum of economic roles.³⁵

Security instruments have therefore always been irreducible to the threat of North Korea and the national division, displaying political and socio-economic functions of their own in the Southern context. Indeed, to be labeled as “anti-state,” South Korean groups still need less than material political ties with the North. Instead, alleged kinship with its “*chuch'e*” ideology has been a sufficient ground for repression and a category under which anything from being critical of the South Korean government to rejecting capitalism, advocating peaceful reunification and accommodation between the two Koreas, or condemning the policy of the United States in the peninsula, could be falling.

The intentional confusion of activities threatening the security of the state and challenging the existing political or socio-economic order has been a fundamental characteristic of South Korea's politics of enemy since 1948. In this respect, the democratic transition of 1987 has not coincided with a clear redefinition nor a thorough shift in the definition of enmity. In early July of that year, 562 political prisoners were liberated as a result of the amnesty promised by Roh Tae-woo in his Eight-Point Declaration, but 1,300 others remained incarcerated.³⁶ In addition, “political arrests during the first eighteen months of Roh's rule - even adjusted for increased arrests for violence - exceeded those for the Chun Doo Hwan years.”³⁷ Importantly, this trend extended beyond the initial phase of Roh Tae-

³⁵ Jang-Jip Choi, *Democracy After Democratization*, p.66.

³⁶ *Ibidem*, p.232.

³⁷ William Shaw (ed.), *Human Rights in Korea*, pp.21-22.

woo's presidency: the number of persons prosecuted under the National Security Act was higher between 1988 and 1992 (reaching 1,529) than it was between 1980 and 1986 (1,093).³⁸

The sustained use of the National Security Act under the presidency of Roh and beyond does not imply that the politics of enmity remained entirely unchanged in the aftermath of the transition. In a sense, the post-1987 period can be said to have made the apprehension of enmity not clearer but more complex. On the one hand, the Inter-Korean Exchange and Cooperation Act ("*nambuk kyoryu hyömnnyök-e kwanhan pömnnyul*") was enacted in August 1990 to enable contacts between the two halves of the Korean peninsula, making it possible for South Korean citizens to visit the North and meet with North Koreans upon receiving the approval of the government. On the other hand, the legal framework prohibiting these very contacts and reducing North Korea to an "anti-state organization" was maintained. The contradictory nature of this definition was reinforced after the concurrent accession of both Koreas to the United Nations General Assembly, where they sit as two separate sovereign member states since September 1991. Yet, "joint membership in the United Nations [...] did not change the enemy status of North Korea until the summit meeting in June 2000," held in Pyongyang between Kim Jong-il and Kim Dae-jung.³⁹ If North Korea is now recognized as a partner of reunification, the peninsula continues to be technically in a state of war, and emphasis on one aspect to the detriment of the other has varied depending on the orientation of the administration in power.

The common picture of South Korea's political landscape is that of a successful democratization process. The elections of December 1992 and 1997 successively brought to power Kim Young-sam, the first civilian president in thirty years and former opposition leader whose party merged with the ruling Democratic Justice Party of Roh Tae-woo in 1990, and Kim Dae-jung, a longtime dissident whose victory coincided with the first political alternation - the key test of democracy when defined as a system in which parties lose elections. In the context of the utmost prevalence of regionalism in South Korean politics, Kim Dae-jung was also a figure from the Chölla province, the southwestern part of Korea, "systematically

³⁸ See table 1 in chapter one. It should be noted that the last years of Chun Doo-hwan's regime saw a relaxation of the political climate, "allowing anti-government university professors and students to return to their schools, withdrawing the military police from university campuses, pardoning or rehabilitating political prisoners, and lifting the ban on political activities of hundreds of former politicians." This partial liberalization, which aimed at legitimizing the regime, contrasted with the severe state of repression in the first half of the 1980s and brought about, against the expectations of its engineers, a revitalization of the pro-democracy movement which the military junta tried to resist until the large-scale protests of the spring 1987. Sunhyuk Kim, "Civil Society and Democratization," in Charles Armstrong (ed.), *Korean Society*, p.54.

³⁹ Namhee Lee, "Anticommunism, North Korea, and Human Rights in South Korea," p.48. These contradictions are further developed in chapter six.

discriminated against throughout the entire process of industrialization under the preceding authoritarian regime.”⁴⁰

This trajectory was however not predetermined, but rather surrounded with uncertainties at the time of the transition and the beginning of the Constitutional Court of Korea’s operations in September 1988. Moreover, espousing a teleological vision of the country’s political path obscures the reality conveyed by the enforcement patterns of the National Security Act after 1987. A decade after the change of regime, high levels of arrests and convictions persisted under the security legislation. These trends were not confined to the presidency of Roh Tae-woo but endured under the administration of Kim Young-sam and, maybe more surprisingly, of Kim Dae-jung, a former victim of state repression. His appointment of Kim Jong-pil, founder of the Korean Central Intelligence Agency, as prime minister in 1998 immediately betrayed hopes of a radical rupture with the past.

The mid-1990s were even accompanied by a period of deterioration of the human rights situation, a process which continued through the end of the decade marred by the East Asian financial and economic crisis. As a result, the South Korean context presents us with a contrasted picture, that of a consolidating electoral democracy still heavily resorting to the National Security Act as a political resource by the late 1990s, that is to say, even after the alternation of political forces in power. The numerical continuity between the pre- and post-1987 eras does not however imply that the uses made of the security legislation during each period were congruent. Rather than being a legacy of the authoritarian era, the resilience of the law’s application for more than a decade after the change of regime appears as an outcome of the transition and of democracy’s institutionalization by political elites to the exclusion of the popular democratization movement. Throughout the 1990s, both the political and business spheres, as well as the conservative mass media and part of civil society itself (the moderate “citizens’ movement groups” or “*simin undong*”), have continued to show intolerance toward the claims, mobilization, and alternative “national” imaginary (or “*minjung*” narrative) of the “people’s movement groups,” portrayed as “radical” and violent.

In fact, the state publicly and consistently demonstrated a strong negative view about people’s movements after the democratic transition. In May 1990, Prime Minister Kang Young-Hoon reported to President Roh about people’s movements, arguing, “the government should exercise its power to control illegal labour strikes and mass protests” (*Chosun Ilbo*, May 4, 1990). President Roh also stated in a Cabinet meeting that “it was necessary to punish the

⁴⁰ Sunhyuk Kim, “Civil Society and Democratization,” p.63.

violent forces who sought to destroy democracy” (*Chosun Ilbo*, June 23, 1991), pointing at the anti-government demonstrations that people’s movements organised after riot police lynched and killed a college student. The government’s media reports in the same period emphasised that students and pro-democracy activists were subversive, fundamentally left-wing and extremely violent (Bureau of Public Information 1993, 695).

In addition, the conservative media supported the government’s view by encouraging citizens’ movements and denouncing people’s movements. *Chosun Ilbo*, which is one of the most conservative newspapers in Korea, published an editorial about the creation of the CCEJ, the harbinger of citizens’ movements. The editorial recommended two strategies for its prosperity and public support: first, draw a line between itself and the prior movements; second, exemplify peaceful movements (*Chosun Ilbo*, July 15, 1989). In the early 1990s, similar threads of arguments kept appearing in the media, which openly promoted citizens’ movements as a better way of engaging in activism. On the contrary, the conservative media heavily criticised people’s movements. An editorial denounced the student movement by saying, “the radical movement by some segment of students is not just a problem in each college but a problem of the whole nation” (*Kukmin Ilbo*, June 6, 1991). The media condemned the pro-democracy groups as well, speculating that “most people have developed a dislike for most of the pro-democracy activists” (*Seoul Sinmun*, December 11, 1992). People’s movements were stigmatised as radical, violent and anachronistic, which clearly mirrored the state’s perspective.⁴¹

As demonstrated by Lee Jung-eun, the mobilization of “people’s movement groups” triggered repression no matter the tactics they employed (violent or non-violent) and the size of their protests in the post-transition period. In other words, authorities tended to act upon their perceptions of “categorical traits of protest groups” rather than “situational aspects of protests” in policing differentially the people’s and citizens’ movements.⁴² In this context, the National Security Act has remained a central tool in the hands of the state. Supposedly justified by the permanence of the security dilemma in which the Korean peninsula is caught (a situation which did not manifest signs of betterment at the time of the transition, with the bombing of a civilian airplane in 1987 and the beginning of the nuclear crisis in the early 1990s), the law has been consistently deployed to enforce the non-inclusive legacy of South Korea’s transition to democracy.

⁴¹ Jung-eun Lee, “Categorical Threat and Protest Policing. Patterns of Repression Before and After Democratic Transition in South Korea,” *Journal of Contemporary Asia*, Vol.43, No.3, 2013, pp.487-488.

⁴² *Ibidem*, p.488.

The National Security Act has remained a relevant instrument of policing in post-1987 South Korea. This first testifies to the conservative nature of the transitional process. As pointed out by Charles Armstrong, “South Korean democracy remains ‘minimalist’ and conservative, not expressing the true range of political options and opinions among its citizens. [...] It may be precisely because of the conservative nature of democratic transition to date that civil society and social movement organization remain active and visible in South Korea.”⁴³ As a result, repressive trends and practices after the demise of authoritarianism cannot be studied in isolation from the resilient patterns of mobilization in civil society, which in turn have been fueled by the frustrating modalities and outcomes of democratization. While the change of regime was made possible by the long-term mobilization of various social movements such as workers and students, their role was confiscated and their demands for structural reforms evaded in the process of negotiating the transition and institutionalizing procedural democracy.⁴⁴ This process was instead monopolized by traditional political forces from both the ruling elite and opposition parties, sharing two common premises despite their dissensions: “Cold War anti-communism and development ideology.”⁴⁵

In reaction, mobilization endured from the parts of civil society which, having been actively involved in challenging the authoritarian state before becoming marginalized in the elite-led political phase of the transition, did not see the promise of democracy fulfilled.

[A]fter the inauguration of Roh Tae Woo, civil society groups remobilized themselves and resumed their pro-democracy campaign with a vigor comparable or even stronger than that during the 1985-1987 period. [...] To most of the movement groups that had led the “June Uprising” in 1987, the Roh regime was viewed as a mere extension of authoritarian rule. Thus civil society groups often pejoratively characterized Roh as “Chun with a wig,” likening him to the previous military ruler who was bald. At best, Roh’s regime seemed to be a liberalized authoritarianism (*dictablanda*), and the need to continue the pro-democracy struggle appeared vital. Furthermore the grand party merger in 1990 offered glaring evidence that the Roh Tae Woo regime was just a continuation of the past authoritarianism and that the opposition parties were unreliable.⁴⁶

⁴³ Charles Armstrong, *Korean Society*, p.5.

⁴⁴ Jang-Jip Choi, *Democracy After Democratization*, p.99.

⁴⁵ *Ibidem*, p.121.

⁴⁶ Sunhyuk Kim, “Civil Society and Democratization,” pp.58-59.

In 1991, Amnesty International estimated that 200 national security prisoners, including 30 prisoners of conscience, were detained in South Korean jails, a number which had jumped to 500 by 1994, with 70% of them being incarcerated under the National Security Act.⁴⁷ This clear deterioration of the human rights situation in the second year of Kim Young-sam's term can first be attributed to the resurgence of mass mobilization which had abated after the election of Kim, the first civilian president in thirty years, but was revived by the national controversy which erupted "during 1994-1995 over one of the most difficult yet important issues of the consolidational politics - the 'liquidation' of the authoritarian past."⁴⁸ This episode of confrontation between civil society and the government over making the former regime accountable for its crimes, in which the constitutional court was involved as analyzed in chapter four, led to an ambivalent outcome: former presidents Chun Doo-hwan and Roh Tae-woo were arrested, prosecuted, tried, and respectively sentenced to death and life imprisonment, but subsequently pardoned by Kim Young-sam before he left office.

Meanwhile, hundreds of new arrests took place in 1996.⁴⁹ Toward the end of the year, the ruling party railroaded two controversial bills in the National Assembly one early morning, in the absence of the parliamentary opposition. The bills included a labor reform to facilitate layoffs and an initiative to expand the investigative power of the Agency for National Security Planning, in charge of inquiring into alleged anti-state crimes. The two laws' passage and the conditions of their adoption unleashed nationwide demonstrations and anti-government protests, especially from student organizations and labor unions. In particular, they "characterized the Kim Young-sam government as a civilian dictatorship and led a series of strikes, including a general strike in January 1997, the first such strike since the Republic of Korea was founded in 1948."⁵⁰ The continued militancy of these two groups in the aftermath of the transition should not however mask some of the transformations that South Korean civil society underwent after 1987, both in its modes of mobilization as well as modalities of discourse.

⁴⁷ Amnesty International, *South Korea. Prisoners Held for National Security Offences*, ASA 25/25/91, London: Amnesty International, 1991, p.1; *Summary of Amnesty International's Concerns*, ASA 25/36/94, London: Amnesty International, 1994, p.2.

⁴⁸ Sunhyuk Kim, "Civil Society and Democratization," p.60.

⁴⁹ According to Amnesty International, there were more than 300 new arrests for the first nine months of 1996. Amnesty International, *Amnesty International Appeals to Government to Halt Deterioration of Human Rights Situation*, ASA 25/24/96, London: Amnesty International, 1996, p.1.

⁵⁰ Sunhyuk Kim, "Civil Society and Democratization," pp.101-102.

The dominant framework of the 1980s was the “*minjung*” ideology, where “*minjung*” stands for the “common people” or “the masses.” Primarily articulated by the student movement, the notion captured more than the political struggle against authoritarianism, encompassing the project to create an alternative social order emancipated from two additional sources of oppression: on the one hand, capitalism and the domination of conglomerates, that is to say, the forces behind the model of development promoted by the authoritarian state and seen as industrialization to the detriment of labor and the economic independence of the country in “*minjung*” lenses; on the other hand, the dictates of foreign powers, particularly the United States, held responsible for the Korean division’s coming into being and permanence.

Construed as an artifact imposed on a single nation and therefore frustrating its genuine aspirations, the division occupied a privileged place in “*minjung*” rhetoric, which embraced a reunification discourse dissenting from the South Korean state’s official policy. Under the authoritarian years, the “*minjung*” repertoire provided a platform for the student movement to form an alliance with labor, while fusing three types of challenges - or threats from the rulers’ point of view - to the existing order: against the political nature of the regime; against the socio-economic model of “corporatism without labor”; and against the very legitimacy of the South as the only sovereign Korea.

This triptych of claims however dissolved in the late 1980s. Within a few years following the transition, anti-government contestation largely re-centered on the democratic deficiencies of the new political system, thereby being increasingly disconnected from the issue of the North-South division. Overtime,

[T]he discourse of unification has lost a great deal of its attraction within the South Korean social and political movements of the post-democratization era. Whereas the 1960 “Student Revolution” that led to the downfall of Syngman Rhee upheld “Unification Now!” as one of its key slogans, and North-South reconciliation remained near the top of the agenda for many critics of the authoritarian regimes in the South through the late 1980s, in the 1990s the South Korean social movements have given relatively less priority to reunification as a major goal. Part of the reason for this is the sobering lesson of German unification, which entailed a greater financial and social costs than many had predicted.⁵¹

⁵¹ Charles Armstrong, *Korean Society. Civil Society, Democracy and the State*, New York: Routledge, 2002, p.5. The quoted excerpt is from the first edition of the book published in 2002, while the other references are from the second edition released in 2007. Indeed, Charles Armstrong’s introduction was rewritten for the occasion and the selected passage altered.

In other words, post-1987 South Korean civil society has experienced a “great paradigmatic shift from people (*minjung*) to citizen (*simin*),” from the revolutionary struggle of the masses to the reformist and moderate advocacy of citizens’ movements.⁵² Fostered by the middle-class and educated segments of the population, citizens’ movements have been committed to the advancement of specific causes, such as environmental protection or the transparency of elections. Early on, they manifested “widespread fatigue and even disgust with the culture of dissent,” feelings which had generalized by the late 1990s.⁵³ This evolution of civil society ironically contributed to make mobilization and demands by groups such as students and workers even more marginalized than they already were after the regime change.

One of the main targets of the National Security Act between 1998 and 2002 was indeed labor, and more specifically the union leaders or activists most involved in the wave of struggles which erupted in response to the recession of South Korean economy toward the end of 1997. To cope with “the worst economic crisis since the Korean War,” the exiting Kim Young-sam administration received from the International Monetary Fund a rescue loan of \$57 million, which was “accompanied by a stringent financial and restructuring program” necessitating the cooperation of labor to be successfully implemented.⁵⁴ As a result, a “Labor-Management-Government Tripartite Council” (“*no-sa-chǒng*”) was formed early 1998 by the newly-elected Kim Dae-jung administration. This initiative formally enabled labor participation in politics for the first time in South Korea, in exchange for vast economic concessions.⁵⁵ However, the role and bargaining power recognized to labor remained limited, and the agreement reached by the tripartite commission was soon contested. According to Choi Jang-Jip,

⁵² Namhee Lee, “The South Korean Student Movement. *Undongkwǒn* as a Counterpublic Sphere,” in Charles Armstrong (ed.), *Korean Society*, p.119.

⁵³ “The ‘civil society’ debate which burst on the intellectual scene in the 1990s effectively declared that South Korean society was no longer susceptible to the kind of ‘apocalyptic, Jacobin vision of revolution’ of which the student movement was to be the vanguard. [...] Students’ once unique role has been replaced by the mushrooming of such citizens’ movements as the Citizens’ Coalition for Economic Justice (*Kyǒngsillyǒn*) and the Korean Federation for Environmental Movements (*Hwan’gyǒng Undong Yǒnhap*).” Linda Lewis, “Commemorating Kwangju. The 5.18 Movement and Civil Society at the Millenium,” in Charles Armstrong (ed.), *Korean Society*, p.152.

⁵⁴ Hagen Koo, “Engendering Civil Society,” in Charles Armstrong (ed.), *Korean Society*, pp.84-85.

⁵⁵ “After tough negotiations Kim got labor to agree to large layoffs (which ultimately quadrupled the pre-crisis unemployment rate, albeit from 2 to 8 percent, not a high rate by Western standards) in return for the right to exist legally and to participate in politics and field candidates for elections.” *Ibidem*, pp.27-28.

The exclusion of labor from party politics did not change under the Kim Dae-jung government. The tripartite commission remains in name but not in function. Participation of labor at the enterprise level, at the level of political representation, and at the policy decision-making level has been closed off. Consequently, when it became clear that the labor policy under the Kim Dae-jung administration was meaningful only as an extension of neo-liberal economic policy, the mainstream labor movement, the KCTU [Korean Confederation of Trade Unions], confronted the government. The government responded to the situation only as a matter of maintaining law and order. In the process, the administration's labor policy regressed to that of the authoritarian regimes of the past.⁵⁶

Indeed, hundreds of labor union members were arrested for their militancy between 1998 and 2002, for offenses such as organizing "illegal" strikes or "obstructing company business."⁵⁷ As pointed out by Bruce Cumings,

Kim Dae Jung has never been a radical, and has not had a strong base in labor for two reasons: first, until 1998 it was illegal for labor to involve itself in politics; second, over the years Kim has been much more a champion of the southwestern region and of small and medium business than he has of labor (and, of course, supporting labor was ticket to political oblivion in Korea's McCarthyite milieu). It is true that he is more sympathetic to labor demands than previous leaders, and labor clearly prefers him to the past run of dictators. But that isn't saying much, given the harsh anti-labor environment of the past fifty years.⁵⁸

Between 1998 and 2002, arrests were still numerous but levels of imprisonment under the security legislation eventually fell. Not only had all political long-term prisoners convicted before the change of regime progressively been liberated toward the late 1990s, but most trade unionists apprehended during these years were not criminally prosecuted.⁵⁹ Overall, a total of 990 people were arrested between February 1998 and July 2002 through the National Security Act but the number of prisoners held under the law had dropped to 39 as

⁵⁶ Jang-Jip Choi, *Democracy After Democratization*, p.156.

⁵⁷ "Under Kim Dae-jung's presidency, harassment and arrests of trade union leaders who organized strike action and demonstrations to protect their basic rights has continued. The trade unions were protesting against restructuring leading to mass redundancies, inadequate social welfare provision, failure to prosecute employers engaging in illegal termination of employment contracts and the lack of effective consultation between the government, employers and trade unions. At least 850 trade unionists were detained between February 1998 and October 2002 for their involvement in general strikes and other demonstrations. In October 2002, at least 39 trade unionists were in prison. Between January and October 2002, at least 165 trade unionists had been arrested." Amnesty International, *Summary of Concerns and Recommendations to Candidates for the Presidential Elections in December 2002*, pp.7-8.

⁵⁸ Bruce Cumings, "Civil Society in West and East," in Charles Armstrong (ed.), *Korean Society*, p.27.

⁵⁹ Let us recall that a suspect can be detained for thirty days by the police and prosecution before he is charged with a crime under South Korea's Criminal Procedure Code, and fifty days under the National Security Act.

2002 was coming to a close,⁶⁰ reflecting a shift in terms of the NSA's enforcement - with still many arrests but fewer prosecutions and convictions.

Throughout the first decade of the new millennium, the number of people sentenced to imprisonment under the security legislation has remained relatively low.⁶¹ After 2008 and the coming to power of a new conservative administration under Lee Myung-bak, investigations of suspected anti-state activities have however increased (46 in 2008, 90 in 2011),⁶² especially due to a stricter policing of the Internet.⁶³ In 2011, no less than 106 were persons charged with violating the National Security Act, a trend which has attracted considerable criticism. The resurgence of concerns about undemocratic practices under Lee Myung-bak's government extended to the state's handling of the mostly peaceful 2008 candlelight protests against U.S. beef imports, which highlighted the continued restrictive nature of current demonstration laws in South Korea.⁶⁴

In post-1987 South Korea, the National Security Act's resilient deployment has not implied the regime's struggle against any kind of social mobilization, but the use of the security legislation to contain the political demands and alternative "national" discourse of the forces contesting the channeled, and limited, modes of participation imposed by the successive elected governments. As security tools have prevented this dispute about the boundaries of inclusion and exclusion in democratic South Korea from unfolding in the public sphere, constitutional adjudication has been invested as one of the only available sites where to contest, legally, the contours of enmity. Yet, although the court has tried to disentangle some of the ambiguities historically attached to the notion of enmity, its jurisprudence has

⁶⁰ Amnesty International, *Summary of Concerns and Recommendations to Candidates for the Presidential Elections in December 2002*, ASA 25/007/2002, 2002, p.3.

⁶¹ 39 in 2002, 24 in 2003, 11 in 2004, 4 in 2006, 8 in 2008 according to Amnesty International. See respectively, Amnesty International, *Summary of Concerns and Recommendations to Candidates for the Presidential Elections in December 2002*, ASA 25/007/2002, London: Amnesty International, 2002; *Amnesty of Political Prisoners. A Step in the Right Direction*, ASA 25/002/2003, London: Amnesty International, 2003; *Open Letter to All Leaders of Political Parties. An Important Duty to Revitalise Efforts to Fundamentally Repeal or Review the National Security Law*, ASA 25/009/2004, London: Amnesty International, 2004; *2006 Elections to the Human Rights Council: Background Information on Candidate Countries*, IOR 41/006/2006, London: Amnesty International, 2006; *Repeal or Fundamentally Reform the National Security Law*, ASA 25/011/2008, London: Amnesty International, 2008.

⁶² Amnesty International, *Human Rights Concerns in the Republic of Korea. Amnesty International Submission to the UN Universal Periodic Review*, ASA 25/001/2012, London: Amnesty International, 2012, p.4.

⁶³ For instance, a blogger named Park Jung-geun (Pak Chŏng-gŭn) was arrested for having satirically re-sent North Korean propaganda posts on social media, including the message "Long Live Kim Jong-il." See Sang-un Choe, "South Korean Gets Suspended Sentence in Twitter Case," *The New York Times*, November 21, 2012.

⁶⁴ "During demonstrations in 2008 against the resumption of US beef imports, at least 1,258 civilians were prosecuted for illegal protest, mostly under the Assembly and Demonstration Act." Amnesty International, *Human Rights Concerns in the Republic of Korea*, p.5.

also contributed to fundamentally reinforce the relevance of the security legislation as a mechanism enforcing the conservative legacy of the transition.

The constitutional court's contribution to the redefinition of enmity

The paradox of defending constitutionalism

Since 1987, the Constitutional Court of Korea has participated to the process of redefining who the enemy is. Although the institution has clearly aimed at uncoupling and narrowing some of the constructs attached to enmity, its commitment has been circumscribed by important internal limits. First of all, the court's efforts have not borne on the National Security Act as a whole, but on individual articles of the security legislation only. For instance, a 2009 challenge against the integrality of the law was dismissed on the ground that the complainant lacked a justiciable interest, failing to specify which of his basic rights were concretely infringed, and how, by attacking the totality of the act.⁶⁵ This narrow filtering of cases has been an important resource used on the side of caution, but it does not entail that the court has been uncritical of the law and unwilling to shape its understanding. On the contrary, the constitutional court has endeavored early on to restrict some of the possible interpretations which could be made of the notion of enmity.

In doing so, the court has however also contributed to duplicate the definition articulated in the National Security Act, by introducing a new type of threat against which the legislation is directed: activities which not only endanger the safety of the state, but also the "basic order of free democracy." The language of democratic militancy which the constitutional court inserted in its 1990 ruling on article 7 of the NSA was later appropriated by the legislature, and generalized throughout the law following its revision in May 1991. By turning the security legislation into an instrument relevant for the preservation of the democratic constitutional order, the court's jurisprudence has contributed to the law's consolidation, rather than to its undermining.

Moreover, it should be underlined that the reference to democracy is not absolutely neutral in the context of South Korea's politics of enmity, both in the words of the constitutional court and those of the legislature. On the one hand, such an emphasis can be interpreted as a way of reframing the ideological dimension of the struggle against the

⁶⁵ 2009Hun-Ma121, March 31, 2009. The absence of record number (X KCCR X) comes from the fact that the case was dismissed by a small bench of three justices.

paradigmatic “anti-state organization,” i.e., North Korea. This displacement is manifest in the court’s equation of the “activities impairing the basic order of free democracy” with the promotion of “one-person or one-party dictatorship,” which underscores the illegitimacy of the North Korean regime. In this perspective, the 1991 amendment of the National Security Act which generalized the language of democratic militancy throughout the law also coincided with the withdrawal of any explicit mention of communism from the text.

On the other hand, the fundamental values which the court has derived from its unpacking of the “basic order of free democracy” also have to be analyzed in light of the struggle about what counts as “national” and “anti-national” in post-transition South Korea. As highlighted by Melissa Schwartzberg, leaving it to courts to define and shape such entrenched constructs as “democracy” and the “constitutional order” entails the double risk that judges may solidify a particular and selective vision of them, in ways which cannot be altered through ordinary legislative change.⁶⁶

The exacerbation of “anti-state” enmity

In late 1989, the constitutionality of article 7, sections 1 and 5 of the National Security Act was challenged before a lower court (the Masan Local Court, located in the southeastern corner of the peninsula) by three defendants prosecuted and tried “for possessing and distributing books and other expressive materials for the purpose of benefiting an anti-state organization.” Their request for review was granted by the president of the tribunal and referred to the constitutional court in accordance with the mechanism of incidental judicial review described in chapter two. The petitioners’ presumption of unconstitutionality was based on their claim that article 7, sections 1 and 5 of the NSA was both ambiguous and excessively broad.

Under article 7, section 1, “any person who praises, encourages, sympathizes with, or benefits through other means, an anti-state organization, its members, or any person under its direction” could be punished by imprisonment for up to seven years, while section 5 criminalized “the production, importation, duplication, possession, transportation, distribution, selling or acquiring of a document, a drawing or any other expressive article” for the purpose of performing acts mentioned in section 1. No additional elements of context than this rudimentary information about how and why the case reached the constitutional court are

⁶⁶ Melissa Schwartzberg, *Democracy and Legal Change*, Cambridge, New York: Cambridge University Press, 2007, p.22.

provided in the decision that the institution rendered on April 2, 1990. Indeed, it is a characteristic of the court's rulings to expose only briefly the facts which form the background of a given case and to examine the legal issues raised before it mostly in the abstract, although this tendency seems to have slightly waned over the years.⁶⁷

Sanctioning any use of the freedom of expression deemed favorable to North Korea or domestic "anti-state" groups, article 7 has empirically served to imprison students or intellectuals acquainted with Marxist literature, people writing about the North Korean system even from a scientific or journalistic viewpoint, as well as anyone articulating ideas considered to belong to the ideological repertoire of the Democratic People's Republic of Korea, such as criticizing the South's capitalist structures or the presence of the U.S. armed forces on its territory. At the time when the constitutional court's ruling was delivered on April 2, 1990, it was clear that the charge of benefiting the enemy through expressive materials continued to be interpreted extensively by law-enforcing institutions - including the ordinary courts - against individuals whose activities were far from endangering national security, such as artists, publishers, and academics.⁶⁸

The Constitutional Court of Korea was unanimously firm in denouncing such abuses, holding that if "interpreted literally," article 7 would "merely intimidate and suppress freedom of expression without upholding any public interest in national security," thereby "infringing freedom of speech, freedom of press, and freedom of science and arts, and ultimately violating the principle of rule of law and the principle of *statutory punishment*."⁶⁹ Despite the acuteness of these criticisms, the court did not however invalidate the provisions under review. Instead, it deemed them constitutional to the extent that they were construed narrowly, as covering and sanctioning only those expressive activities which pose a "clear threat to the integrity and the security of the nation and the basic order of free democracy."⁷⁰

On the one hand, this formulation forcefully demonstrated the court's intention to

⁶⁷ Contrary to the practice of courts in which the parties lend their surnames to a case, claimants before the Constitutional Court of Korea are even made anonymous (the middle syllable of their names is erased from the judgment).

⁶⁸ Amnesty International, *Prisoners Held for National Security Offences*, ASA 25/25/91, London: Amnesty International, 1991, p.6.

⁶⁹ "The expressions such as 'member,' 'activities,' 'sympathizes with,' or 'benefits' used in the challenged provisions are too vague and do not permit a reasonable standard for ordinary people with good sense to visualize the covered types of conduct. They are also overly broad to determine the contents and boundaries of their definitions. Interpreted literally, they will merely intimidate and suppress freedom of expression without upholding any public interest in national security." 2 KCCR 49, 89Hun-Ka113, April 2, 1990, in The Constitutional Court of Korea, *Twenty Years*, p.215.

⁷⁰ *Ibidem*, p.216.

restrict the activities susceptible to be criminalized under article 7 by introducing a “clear threat” standard reminiscent of the “clear and present danger test” found in U.S. jurisprudence.⁷¹ Yet, on the other hand, the addition of a reference to the “basic order of free democracy” had the effect to alter the scope of the National Security Act and of the concept of “anti-state organization,” converting them into militant instruments to protect not only national security, but the constitutional order. In doing so, it can be argued that the Constitutional Court of Korea did more than prescribe an understanding of the law which made it compatible with the constitution. It not only created a relation of compatibility, but of solidarity, between the National Security Act and the post-1987 constitutional order which the court has to defend.

When the court proceeded to refine the notion of “clear threat to the integrity and security of the nation and the basic order of free democracy,” its reasoning highlighted both the distinction and intimate connection between threats against the security of the state and the stability of the constitutional order.

The activities jeopardizing the integrity and the security of the nation denote those communist activities, coming from outside, threatening the independence and infringing on the sovereignty of the Republic of Korea and its territories, thereby destroying constitutional institutions and rendering the Constitution and the laws inoperative. The activities impairing the basic order of free democracy denote those activities undermining the rule of law pursuant to the principles of equality and liberty and that of people’s self-government by a majority will in exclusion of rule of violence or arbitrary rule: in other words, one-person or one-party dictatorship by an anti-state organization. Specifically, they are the efforts to subvert and confuse our internal orders such as respect for basic rights, separation of powers, representative democracy, multi-party system, elections, the economic order based on private property and market economy, and independence of the judiciary.⁷²

The definition of “activities impairing the basic order of free democracy” owes much to the one articulated by the Federal Constitutional Court of Germany in the 1952 Socialist Reich Party case. The “basic order of free democracy” was then described “as an order

⁷¹ The “clear and present danger test” was introduced in American jurisprudence by the *Schenck v. United States* decision of 1919. In this case, Justice Holmes famously wrote for the unanimous court that: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Interestingly, the Constitutional Court of Korea did not choose to resort to the more recent standard elaborated by the U.S. Supreme Court in its *Brandenburg v. Ohio* ruling of 1968, which makes restrictions on the freedom of speech only possible in the event of an “imminent lawless action.”

⁷² 2 KCCR 49, 89Hun-Ka113, April 2, 1990, in The Constitutional Court of Korea, *Twenty Years*, p.216.

which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties.”⁷³

The Constitutional Court of Korea’s definition of the threats which endanger the “basic order of free democracy” is more tortuous, encompassing “those activities undermining the rule of law,” as well as “the efforts to subvert and confuse our internal orders” (“*naebu ch’ejae*” in the original text, which is also translatable as “internal system” or “structures”). The institutions which support this “internal system” are however clearly differentiated from their antithesis, “the rule of violence or arbitrary rule” which characterizes “one-person or one-party dictatorship by an anti-state organization.” The notion of anti-state enmity articulated by the constitutional court thus appears both restricted and exacerbated at the same time. If fewer activities are defined as endangering the state in accordance with the clear danger test, a new category of threats is also introduced, comprising the activities which jeopardize the institutions upon which the democratic constitutional order is premised - including the “economic order based on private property and market economy” absent from the German definition.

Justice Byun’s dissenting opinion: divergences and commonalities with the majority

The 1990 judgment rendered by the court on the limited constitutionality of article 7 was not unanimous. Justice Byun Jeong-soo dissented arguing that “the provisions of the law [were] so clearly unconstitutional [that they] cannot be cured merely by interpreting it narrowly and should simply be stricken down.”⁷⁴ Byun was the one judge recommended by Kim Dae-jung’s opposition party (the Peace Democratic Party) among the three nominees chosen by the parliament in 1988. Even though Byun and the majority diverged on the adjudication outcome that should be adopted by the court, their respective opinions also

⁷³ 2 BVerfGE 1 (1952), in John Finn, *Constitutions in Crisis. Political Violence and the Rule of Law*, New York: Oxford University Press, 1991, p.190.

⁷⁴ 2 KCCR 49, 89Hun-Ka113, April 2, 1990 (personal translation).

shared a lot in common, starting with how they interpreted the ongoing inter-Korean conflict and the threat that it poses to the South's safety.

From a comparative perspective, courts usually appear to formulate an uncontentious vision of the background security crisis under which they operate, unanimously recognizing its severity and intensity - terrorism in countries like the United States and Israel, or the continued "hostility of North Korea" in the South Korean case. This neither implies that their common framing of the wider security context - common to the extent that it is shared between majority and dissenting judges, as well as with other state institutions involved in litigation - is undisputed in society at large, nor that disagreements about the matter of review are precluded. In the jurisprudence of the Constitutional Court of Korea, understandings of the national security situation are strongly uniform not only among the justices but throughout the court's twenty five years of adjudication, all reaffirming the "incomparability" of the Korean division and the extraordinary plight that it creates on the South. However, this uniformity does not prevent divergences about how basic rights and national security have to be reconciled.

In the case at hand, the court's nine justices concurred to recognize the excessive character of article 7 of the National Security Act while upholding the necessity to protect South Korea's national security. Justice Byun himself cited in his opinion the possibility to restrict basic rights when necessary for national security, pursuant to article 37, section 2 of the constitution. Yet, it was clear to all in the present case that the challenged provisions, interpreted literally, did not serve "any public interest in national security" while hurting alternative fundamental goods such as the freedom of expression, the rule of law, and the pursuit of reunification. In the end, what the majority ruling and the dissenting opinion appear to have disagreed about was not a conflict of interpretation over article 7 of the NSA but different visions of the role bestowed upon the court and its jurisprudence. Indeed, Justice Byun stressed in his conclusion that it was the task of the institution to denounce as such provisions that it found unconstitutional, arguing that the "objective" interpretation of article 7 put forth by the court would not prevent investigative and law-enforcing agencies to persevere in their "subjective" and problematic understanding of the National Security Act.⁷⁵ On the contrary, the majority asserted its duty to interpret polysemic legislative provisions as being consistent with the constitution to the maximum extent possible.

⁷⁵ *Ibidem.*

As will be explored later in the chapter, neither the will of the court, nor the ensuing amendment of the National Security Act, has indeed been sufficient to make effective a restrictive interpretation of the law. The revision of the security legislation which was unilaterally passed by the ruling party on May 10, 1991 nonetheless brought about a variety of changes.⁷⁶ First of all, the reference to the “basic order of free democracy” introduced by the court was adopted and generalized throughout the law. Second, a new provision was inserted in its article 1, guaranteeing that “the law shall not be loosely interpreted or otherwise misapplied to unreasonably restrict the basic human rights of citizens.” Third, the designation of all communist groups (including foreign parties and governments) as “anti-state organizations” was withdrawn, alongside the provisions prohibiting to praise or contact them. Fourth, an intentionality requirement was inserted in several parts of the text, including article 7, to ensure that only an anti-state act committed “with the knowledge that it will endanger the nation’s security and existence, or the basic order of free democracy” could be punished. Finally, the vague crime of “benefiting an anti-state organization through other means” was suppressed. Yet, the notion of “clear threat” advocated by the constitutional court was not retained. As a standard of interpretation and safeguard against abuses, its adoption has not only been resisted by political elites but by institutions in charge of law enforcement, including the ordinary courts.

Consolidation effects through unconstitutionality decisions

The Constitutional Court of Korea paradoxically contributed to further consolidate the National Security Act by declaring two of its features unconstitutional. This first proves that the attitude of the court is not one of intrinsic deference or subservience when it comes to national security matters. Indeed, the court has been able to engage in more than prudential criticism, not limiting itself to rulings upholding the validity of the security legislation. The two decisions of unconstitutionality that it rendered did not, however, contradict the fact that the court usually acts with caution. Moreover, they exemplify some of the consolidation effects which can be produced by constitutional intervention, even when it overturns existing policies. This finding importantly shows that the judicial outcome of a case merely tells a limited part of a broader story: not only can rulings always be ignored or distorted by other actors, but they can also yield a variety of effects.

⁷⁶ The Constitutional Court of Korea, *Twenty Years*, p.217.

In 1992, South Korea's constitutional court unanimously found article 19 of the National Security Act unconstitutional for offenses falling under articles 7 and 10 of the law.⁷⁷ The point of article 19 is to extend the period of custody when anti-state crimes are investigated. The regular length of detention provided for by the Criminal Procedure Code is thirty days, which means that the police and prosecution can hold a suspect in detention for a month, from the time when an arrest warrant is issued, until the moment when the concerned individual is indicted (i.e., formally charged with a crime) or has to be released. Within this period, the first ten days are dedicated to investigation by the police, followed by ten days for the prosecution, with the possibility to prolong custody by another ten days with a judge's permission.

Article 19 of NSA increases this period by another twenty days for all the anti-state activities covered by the law - ten supplementary days for the police and ten for the prosecution, which brings the total length of custody to fifty days.⁷⁸ This extension was considered excessive by the constitutional court for those offenses which it deemed "not particularly difficult to investigate," such as "praising, encouraging or sympathizing with an anti-state organization" (article 7) and "failing to report" anti-state crimes (article 10).⁷⁹ In doing so, the court however confirmed the legitimacy of the derogation for all the other offenses covered by the security legislation, a position which was explicitly reaffirmed in a 1997 ruling.

The second unconstitutionality decision invalidating a provision of the National Security Act was rendered in 2002, against article 13 on the special aggravation of punishment in case of recidivism.⁸⁰ Article 13 upgrades the maximum penalty to capital punishment for any individual who, having been imprisoned for violating the NSA or other serious criminal statutes, commits a new offense against national security within five years. In 2002, the court deemed the application of article 13 excessive when the crimes involved are the expressive activities covered by article 7, and article 7 only (failure to report crimes under article 10 was already excluded from the scope of this provision). The aggravation of punishment was therefore implicitly validated for all the other offenses. Together with the

⁷⁷ 4 KCCR 194, 90Hun-Ma82, April 14, 1992.

⁷⁸ As will be explored in chapter seven, the major actor actually involved in the investigation of activities falling under the NSA is the once omnipotent Agency for National Security Planning, formerly known as the KCIA (1961-1981) and, since 1999, as the National Intelligence Service.

⁷⁹ 9-1 KCCR 578, 96Hun-Ka8, June 26, 1997 (personal translation).

⁸⁰ 14-2 KCCR 600, 2002Hun-Ka5, November 28, 2002.

1992 precedent on the authorized length of custody and the 1990 decision prescribing a restricted interpretation of the crime of “praising and encouraging an anti-state organization,” this new ruling expressed the court’s concerns about the scope of article 7 and the various abuses which can result from its broad construction on a par with other anti-state crimes.

However, by adopting a form of narrow control focused on article 7, the three judgments also had the effect to validate the rest of the security legislation. This anticipates the pattern which will be described in chapter seven for criminal rights, with the court’s strict review of the conditions in which they can be suspended implying a legitimation of the very possibility of their suspension. These dynamics of consolidation are not specific to the jurisprudence of the Constitutional Court of Korea, although their forms and extent vary depending on cases. For instance, in its famous series of cases decided against the policies of the George W. Bush administration and Congress between 2004 and 2008, the U.S. Supreme Court has progressively recognized the right of both Americans and foreigners detained at Guantánamo to have a fair opportunity to challenge the basis of their confinement before a federal district judge, i.e., their very designation as “enemy combatant.”⁸¹ In ruling so, the court reshaped the meaning of this disputed status, while also accepting its general validity and confirming the government’s power to detain individuals under it.

Those can be seen as underlying effects which accompanied, and maybe impaired, the “great victory” celebrated by Ronald Dworkin in the wake of the 2008 *Boumediene v. Bush* ruling.⁸² They illustrate that judgments which overturn aspects of the policies designed by the political branches to confront enemies can also contribute to solidify the very constructs upon which the politics of enmity is premised, such as the category of “enemy combatant” and the related notion of “war on terror” in the American context. The jurisprudence of the Supreme Court of Israel, which sits as High Court of Justice when it performs its functions of constitutional adjudicator, also fits this pattern. While the court is often described as activist, its decisions can be read as conveying a unilateral vision of Palestinian violence and as

⁸¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸² Ronald Dworkin, “Why It Was a Great Victory,” *The New York Review of Books*, August 14, 2008.

sustaining the occupation's legality, even - or especially - when they set limits on the actions of military authorities in the West Bank and Gaza.⁸³

In the case of South Korea, the three rulings on the National Security Act analyzed in this chapter have also ultimately reinforced both the law and its article 7, despite - or through - the court's own criticisms. In particular, the constitutional court has contributed to strengthen the *raison d'être* of this provision by proclaiming its relevance not only to preserve the security of the state but the integrity of the "basic order of free democracy." This actualization of the security legislation's functionality demonstrates that the law in general, and its article 7 in particular, cannot be reduced to being a legacy of the authoritarian period, as portrayed by their detractors.

On the one hand, regulating the uses which can be made of the freedom of expression and punishing certain forms of advocacy is actually a practice permitted in most contemporary democracies, albeit to varying degrees. On the other hand, the fact that the overwhelming majority of the individuals prosecuted under the security legislation has been incriminated for violating article 7 (1,791 persons during the administration of Kim Young-sam between February 1993 and February 1998; 971 under the government of Kim Dae-jung from February 1998 to February 2003) testifies to the centrality of the law as a mechanism of exclusion enforcing a certain distribution of what counts or not as permissible speech in the post-transition order.⁸⁴

Eventually, the three above decisions have something else in common than the consolidation effects attached to them. They also shared the fate of having been largely ignored by the actors involved in the defense of society. At first sight, the 1990 ruling of limited constitutionality was conclusively followed by an important legislative revision of the National Security Act which appropriated the language of democratic militancy and introduced new safeguards. Yet, the court's push for a narrow interpretation of the legislation was not sufficient to induce compliance from the very law-enforcing institutions whose discretion the judgment explicitly condemned. Defiance has not only come from special investigators and prosecutors persevering in a broad understanding of the National Security Act, but also from the judiciary, and more specifically from the Supreme Court of Korea.

⁸³ See for instance David Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories*, Albany: State University of New York Press, 2002; Nimer Sultany, "The Legacy of Justice Aharon Barak. A Critical Review," *Harvard International Law Journal*, Vol.48, No.43, 2007, pp.83-92; George Bisharat, "Courting Justice? Legitimation in Lawyering Under Israeli Occupation," *Law and Social Inquiry*, Vol.20, No.2, 1995, pp.349-405.

⁸⁴ See table 2 in chapter one.

Resistance to NSA-related constitutional verdicts has been even more flagrant when it comes to the two decisions of unconstitutionality rendered in 1992 and 2002, for which no revision of the incriminated provisions ensued.

Resistances to the court's redefinition

Hostility to unconstitutionality decisions from the political branches

The only two decisions of unconstitutionality ever delivered by the constitutional court in relation to the National Security Act have been disregarded by the political branches. As a result, article 13 on the aggravation of punishment and article 19 on the extension of custody still apply to the offenses for which the court tried to nullify their effects. In other words, the crimes of “praising, encouraging, and sympathizing with an anti-state organization” (article 7) and “failing to report anti-state acts” (article 10) can be investigated for fifty days and any suspect be detained for that long before charges are leveled against him (by opposition to thirty days as prescribed by the court), while recidivism within five years under article 7 can technically be punished by death.⁸⁵ While both rulings were overlooked, their existence and substance are however mentioned at the end of articles 13 and 19 in the official version of the National Security Act to be found on South Korea's official legal database.⁸⁶

The political branches' resistance to amend the elements of unconstitutionality lodged in the security legislation cannot be easily interpreted as an adverse response to the court's aggressiveness. On the contrary, the two decisions are very symptomatic of the court's caution. Never has the Constitutional Court of Korea considered the possibility to invalidate the totality of the Nationality Security Act, not even to censure articles 13 and 19 in their integrality. The two provisions were only found unconstitutional in so far as they applied to the expressive activities covered by article 7 and, in the case of article 19, to the additional act of not reporting anti-state crimes under article 10. Concretely, the court mainly determined

⁸⁵ “The most recent executions in South Korea took place in December 1997. However, at the end of 2011 at least 60 people were on death row and death sentences continue to be handed down. The death penalty remains applicable for a wide range of criminal and political offences under approximately 20 different laws. In recent years, most death sentences have been imposed for convictions of multiple murders. There is no official moratorium on executions and legislative moves to abolish the death penalty have come to nothing.” Amnesty International, *Human Rights Concerns in the Republic of Korea. Submission to the UN Universal Periodic Review*, ASA 25/0012012, 2012, p.5. As evoked in chapter three, the Constitutional Court of Korea upheld the constitutionality of capital punishment in a 2010 decision: 22-1(A) KCCR 36, 2008Hun-Ka23, February 25, 2010.

⁸⁶ National Security Act, official legal database of the Republic of Korea. Accessed on May 14, 2013 at: <http://www.law.go.kr/lsSc.do?menuId=0&p1=&subMenu=1&nwYn=1&query=국가+보안법&x=0&y=0#liBcolor0>.

that an individual suspected of “praising, encouraging, or sympathizing with an anti-state organization” through the production, distribution, or possession of supportive materials should not be held in custody for more than thirty days before being indicted. Likewise, the court merely considered that the maximum penalty in case of recidivism should not be upgraded to the death penalty when the concerned anti-state crimes fall under article 7.

More than the court’s activism, these two decisions of unconstitutionality ironically illustrate the restraint displayed by judges on issues of national security, an attitude which equates neither quiescence nor subservience vis-à-vis the political branches. This apparent paradox may however represent a rule rather than an anomaly of judicial action. Indeed, elements of caution and deference are often present in rulings of unconstitutionality, even when they go far in contradicting the policy preferences of the executive and/or the legislature. This is for instance true of the U.S. Supreme Court’s concluding ruling on enemy combatants held at Guántanamo, in which the majority warned that “this holding should not be read to imply that a *habeas* court should intervene the moment an enemy combatant steps foot in a territory where the writ runs.”⁸⁷ In the case of the Constitutional Court of Korea’s two discarded decisions against the National Security Act, constraints were first self-imposed. In each decision, the parts invalidated only covered very limited aspects of the law, never a full article, let alone the totality of the legislation. Despite this moderation, the political branches overlooked the constitutional verdicts, both in 1992 and 2002, demonstrating a clear unwillingness to let the court shape further aspects of the security legislation after its 1990 judgment.

Refusing the “judicial duty to rectify names”

Although the decision of limited constitutionality rendered in 1990 over article 7 of the National Security Act was followed by a legislative revision of the law in 1991, the constitutional court has had no means at its disposal to ensure that the restrictive understanding it advocated would be respected in practice. As a matter of fact, the ways in which the National Security Act continued to be enforced in the 1990s demonstrated the resilience of the notion of anti-state enmity and its distortions. Importantly, resistance to a narrow interpretation of the legislation did not only come from the successive administrations in power and law enforcement actors such as the police, the Agency for National Security

⁸⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Planning, or the prosecution, but also from the judiciary - that is to say, from both the ordinary courts and the Supreme Court of Korea.

Despite the command of the constitutional court to construe the National Security Act as sanctioning only those activities which pose a “clear threat” to the state’s security and to its democratic institutions, ordinary courts initially turned down their “judicial duty to rectify names” and to distinguish real threats from symbolic ones. As underlined by James West and Edward Baker, the precondition for South Korean judges to engage in such rectification process was twofold: that they neither experienced nor perceived any cost in ruling impartially in political cases, such as being labeled as “enemies” themselves when acquitting a defendant charged with anti-state crimes.

Democratization of the South Korean legal system entails a thoroughgoing “rectification of names”: Non-violent critics of the ruling party must no longer be stigmatized as “impure” enemies of the state. The judicial duty to rectify names can be impartially discharged only if acquittals of political defendants no longer expose judges to personal risks. Judicial perceptions of conceivable risks can be as effective as unambiguous threats in distorting legal protections of civil and political rights. Past bias in the administration of justice has reflected an authoritarian scorn for the basic principle that decisions of judges in a professional capacity not only need not, but ought not to, register judges’ personal choices among constitutionally permitted political alternatives.⁸⁸

During the authoritarian years, the personal risks incurred by the quest for judicial independence and fairness were known and felt by the legal profession. The latter consisted of a “closed and relatively small fraternity” counting no more than 837 judges, 557 public prosecutors, and 1,483 licensed attorneys for a population of over 41 million by the late 1980s, that is to say, a lawyer for about 27,000 inhabitants.⁸⁹ The control and possible sanctions to which jurists were subjected made it very difficult for them to challenge the political bias which characterized the administration of justice under the military regimes.

Compulsory political indoctrination of jurists, along with constant surveillance, have contributed to an atmosphere of intimidation and self-censorship within the profession. Deference to authority is deeply ingrained in Korean society at large, and in the legal

⁸⁸ James West and Edward Baker, “The 1987 Constitutional Reforms in South Korea,” p.246.

⁸⁹ *Ibidem*, p.245. By 2010, the ratio of lawyers to the overall population had improved to one per 5,178 South Korean inhabitants, a proportion which was still scarce compared to one to 265 in the United States, one to 326 in Brazil, one to 401 in Britain, or one to 593 in Germany. *The Korea Herald*, “Too Many Lawyers,” December 9, 2010. See also table 10 in chapter four.

profession the disincentives to dissent are compounded by the risk of forfeiting a hard-earned niche in a highly privileged elite. [...] Protest resignations have occurred and some individuals have had their judicial careers cut short by punitive non-reappointment because they followed their consciences. Other judges have simply adapted and maintained a safe silence, even when adaptation meant convicting political defendants based on confessions coerced by torture.⁹⁰

As judges were appointed for a fixed period of ten years and thus needed to have their tenure periodically renewed, the threat or use of punitive non-reappointment was a major resource in the hands of the state to quell judicial independence.⁹¹ For instance, 52 judges (or 18 percent of the profession) were dismissed in 1961, 56 (12 percent) in 1973, and 37 (6 percent) in 1981.⁹² In this context, judges were strongly disinclined to perform their duties impartially in political cases, most of which were tried on the basis of confessions obtained through torture. This does not mean that there have been no episodes of resistance from the judiciary throughout the authoritarian years. In the summer 1971 for instance, 151 judges resigned *en masse* after arrest warrants were requested against two colleagues by prosecutors displeased with their handling of a National Security Act case.

This clash intervened amidst growing tension between the courts and the increasingly repressive government of Park Chung-hee at the turn of the 1960s-1970s. Between 1969 and 1972, “the courts on the whole went along with the executive branch, but sometimes they asserted judicial independence; and lived up to their proper role of curbing the executive branch.”⁹³ This attitude climaxed in 1971, when the supreme court rendered a rare decision of unconstitutionality against a legislative provision exonerating the state from compensating members of the armed forces and civilian employees of the military dead or injured in the performance of their official duties.⁹⁴ Response came under the form of the *Yusin* constitution which stripped the supreme court from its otherwise largely dormant power of constitutional review, bestowed this function upon an impotent committee, and opened an era which

⁹⁰ James West and Edward Baker, “The 1987 Constitutional Reforms in South Korea,” pp.245-246.

⁹¹ “This system has been abused through use of the appointing powers by the President or Chief Justice: a judge can be refused reappointment for political reasons at the end of his term; indeed it has often happened.” Dae-Kyu Yoon, *Law and Political Authority in South Korea*, Boulder: Westview Press, Seoul: Kyungnam University Press, 1990, p.140. The system of fixed tenure and reappointment every ten years still exists, but has not been considered a major impediment to the judiciary’s independence after the transition. Besides, it is more favored than resisted by judges themselves, since it allows them to leave the bench and finish their careers as attorneys, a more lucrative and less time-consuming profession in contemporary South Korean society.

⁹² *Ibidem*.

⁹³ *Ibidem*, p.147.

⁹⁴ The Constitutional Court of Korea, *Twenty Years*, p.82.

weakened more than ever courts' independence. Throughout the 1970s and 1980s, the supreme court was particularly known for its conservatism and for overturning the rulings of lower courts whenever they contradicted the government's wishes.

The transition of 1987 and the general elections of April 1988 brought about changes, allowing the opposition parties to play a role in the composition of the supreme court. Since then, its jurisprudence has however reflected conflicting leanings. On the one hand, the supreme court and the constitutional court have allied in their struggle for enhanced procedural fairness throughout the criminal justice system. This movement has incidentally benefited the rights recognized to enemies as criminal suspects and defendants, a point which is elaborated in chapter seven. The two courts have, however, embraced rival positions over other matters relating to enmity, in particular over how much protection is due to the freedom of expression in relation to national security. For instance, the constitutional court has bitterly described how its 1990 decision on article 7 of the National Security Act was undermined by the jurisprudence of the supreme court.

With this decision the [Constitutional] Court expected that the previous expansive and unconstitutional interpretation of the National Security Act would cease. However, in subsequent decisions of the Supreme Court which reviewed the trials involving violations of the National Security Act, [the Supreme Court] merely recited the above language to affirm the equally broad interpretations of the statute, substantially eviscerating the meaning of the decision of limited constitutionality.⁹⁵

This defiant attitude on the part of the supreme court was also espoused by lower tribunals, at least in the first years following the change of regime. From 1994 onward, “a notable change” however occurred as lower courts started to refer to the “constitutionally consistent interpretation” articulated in the 1990 ruling on article 7, and “began energetically restricting abuses” of the security legislation.⁹⁶ This led them to refuse arrest warrants unreasonably requested by prosecutors, or to acquit defendants charged with anti-state crimes for which evidence was lacking.⁹⁷ To do so, courts could also rely on the 1992 dissenting opinion of three supreme court judges writing in favor of setting free suspects in a NSA case

⁹⁵ *Ibidem*, p.131.

⁹⁶ Kuk Cho, “Tensions Between the National Security Law and Constitutionalism in South Korea,” *Boston University International Law Journal*, Vol.15, No.1, Spring 1997, p.169.

⁹⁷ The year 1994 indeed witnessed a deterioration of the human rights situation marked by the “extensive use of the National Security Law to detain prisoners of conscience.” Amnesty International, *South Korea. Summary of Amnesty International's Concerns*, ASA 25/36/94, London: Amnesty International, 1994, p.1.

involving materials deemed to benefit the enemy. The contents of the incriminated publications (two of which were entitled *Basic Theory of Wage* and *America, America for Who?*) were characterized by the supreme court's majority as "active and aggressive expression threatening the security of the state and the liberal democratic system, going beyond the limit of the freedom of expression."⁹⁸ Three dissenting judges reasoned otherwise, distinguishing between the "symbolic" and "real" danger posed by expressive contents identified with North Korean ideology, such as anti-capitalism and anti-Americanism.

Even if a conduct is to praise, encourage, or align with the North Korean government's propaganda which has been used as a method of the so-called policy of indirect invasion of the South, it should not be held illegal if it may not be seen as a conduct with a concrete and possible danger of destroying the existence and security of the Republic of Korea and the liberal democracy system. Fettered by the fact that it accords with the propaganda that North Korea has carried on, we must not conclude it illegal expression because of the symbolic danger which the tabooed materials of expression have. [...]. It is true that such expressions embarrass us. However, such embarrassment results from the fact such kinds of expressions [...] have been so thoroughly prohibited by reason of guarantee of national security, that the symbolic danger of the tabooed materials of expression is felt to us stronger than their real danger. The right way of a liberal democracy system is to remove the symbolic danger by daring to permit such expressions and making them go through competition of ideas.⁹⁹

These early 1990s developments illustrate the complexity in which judicial dynamics are embedded, a complexity which stems from divergences between institutions - the constitutional court, the supreme court, and the lower courts have indeed adopted different, and at times rival, positions over how to interpret the scope of anti-state enmity under the National Security Act - and disagreements within each of them, as revealed by splits among judges. The fact that the 1990 decision of the constitutional court was first defeated by the practice of ordinary courts, but later appropriated and reactivated by some of them, exemplifies the non-linearity and contingency of judicial processes. To be analyzed properly, the institutional contention between courts over the correct understanding and application of the National Security Act should neither be underestimated nor exaggerated.

⁹⁸ Supreme Court of Korea, 90 Do 2033, 1, May 31, 1992, in Kuk Cho, "Tensions Between the National Security Law and Constitutionalism in South Korea," p.170.

⁹⁹ *Ibidem*, p.171.

The constitutional and supreme courts' rivalry has not been limited to the issue of national security. Indeed, the Supreme Court of Korea has proved consistently reluctant to abide by any decision of limited constitutionality, not solely the one related to article 7 of the security legislation. The constitutional court has been at a disadvantage in this confrontation since it cannot review the constitutionality of judgments by ordinary tribunals. Indeed, these are explicitly excluded from the scope of constitutional petitions, and therefore from the court's jurisdiction, contrary to German practice as exposed in chapter two.¹⁰⁰ In late 1997, the constitutional court however reaffirmed the binding force of all its unconstitutionality holdings.¹⁰¹ This ruling was pronounced after a complainant who was initially favored by a decision of limited constitutionality, but later sanctioned by the supreme court's verdict in a taxation case, filed a constitutional petition against the validity of article 68, section 1 which prevents the constitutional court from reviewing the judgments of the ordinary courts.

In its decision, the supreme court had explicitly argued that "a limited constitutionality decision does not bind on the ordinary courts because the decision merely specifies the meaning and scope of application of the provision and leaves intact the statutory language."¹⁰² In reaction to this affront, the constitutional court reasoned that article 68, section 1 could not be interpreted as prohibiting the review of judgments which continue to apply laws in a manner already censored as inconsistent with the constitution. The institution strongly asserted that "unconstitutionality decisions of the Constitutional Court could take such forms as unqualified unconstitutionality, limited constitutionality, limited unconstitutionality, and nonconformity to the Constitution, and [that] the decisions in all these forms are binding."¹⁰³ This ruling was moreover justified as "unavoidable" "in light of other previous judgments by the Supreme Court that defied the decisions of the Constitutional Court," including the noncompliant interpretation of article 7 of the National Security Act.¹⁰⁴

¹⁰⁰ "Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court; *Provided*, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes" (Article 68, section 1 of the Constitutional Court Act).

¹⁰¹ 9-2 KCCR 842, 96Hun-Ma172 et al., December 24, 1997.

¹⁰² Supreme Court of Korea, 95Nu1405, April 9, 1996, in *The Constitutional Court of Korea, Twenty Years*, p. 533.

¹⁰³ 9-2 KCCR 842, 96Hun-Ma172 et al., December 24, 1997, in *Ibidem*, p.534.

¹⁰⁴ *Ibidem*, p.537.

The extent of the two institutions' antagonism over the security legislation should not, however, be radicalized. Indeed, the courts have always remained tied by shared premises in the construction of enmity. Their disagreement over the interpretation of article 7 and the kind of expressive materials which should be considered dangerous for the state cannot mask the constitutional and supreme courts' convergence over construing the National Security Act as a valid and relevant instrument of South Korea's post-transition order - not incompatible with constitutional values, but instead at the service of their defense.

The two courts have actually sided together against the political forces in favor of abolishing the law during the intense debate prompted by President Roh Moo-hyun in 2004. One of the arguments advanced by Roh in support of repealing the law was its continued misemployment for political purposes, rather than to address genuine security threats. If distorted uses of the National Security Act have indeed persisted beyond the 1987 change of regime, their scope has however been far more extensive than suggested by the pro-abolition camp.

The National Security Act in debate

The constitutional court's apparent reversal

Throughout the 1990s, while levels of arrest and imprisonment under the National Security Act remained high, the Constitutional Court of Korea had several occasions to review new challenges against the law.¹⁰⁵ In particular, the justices were repeatedly presented with the possibility to reexamine the constitutionality of article 7 limiting the freedom of expression. The court has consistently reiterated the provision's validity, as long as it is conceived narrowly - that is to say, as punishing only those activities which pose a "clear danger" to national security or the "basic order of free democracy." Leaving unaddressed the ordinary tribunals' non-compliant application of article 7, the constitutional court has found that the revisions introduced in the security legislation in 1991 "made interpretations deviating from the legislative intent nearly impossible."¹⁰⁶ Although it admitted the presence of "remaining ambiguities" in the amended law, the court reasoned that "terms such as

¹⁰⁵ See table 11 in chapter four.

¹⁰⁶ 8-2 KCCR 283, 95Hun-Ka2, October 4, 1996 and 9-11 KCCR 1, 92Hun-Ba6 et al., January 16, 1997, in The Constitutional Court of Korea, *Twenty Years*, p.217.

‘members,’ ‘activities,’ and ‘sympathizes with’ would no longer be vague when they are interpreted narrowly as forming one element of the crime together with the revisions.”¹⁰⁷

In the immediate aftermath of the transition, the Constitutional Court of Korea’s commitment to prevent abusive interpretations of the notion of anti-state enmity clearly positioned it at the vanguard of the necessary effort for regulating inherited mechanisms of repression. By the early 2000s however, the constitutional court could difficultly be described as belonging to the progressive side on the map of public attitudes about reforming the national security apparatus. In April 2002 for instance, a majority of justices deemed valid the revised version of the conversion policy requiring inmates sentenced under the National Security Act - and them alone - to pledge obedience to the laws of South Korea in order to qualify for parole review.¹⁰⁸ The decision was nullified a year later, in July 2003, when the pledge was abolished by the Ministry of Justice (“*pöpmubu*”) under the newly elected administration of Roh Moo-hyun.

This redistribution of forces appeared confirmed in 2004, when President Roh declared his support in favor of repealing the National Security Act while its validity was again upheld by the constitutional court. Although the court’s position over the security legislation seems to have evolved toward greater conservatism throughout time, the institution has in fact remained highly consistent with its earlier jurisprudence. After all, even its most critical rulings (such as the 1990 decision of limited constitutionality on article 7 and the two decisions of unconstitutionality from 1992 and 2002) never challenged the continued relevance of the security legislation, nor its persistent characterization of North Korea as an anti-state organization. Instead, the court’s jurisprudence has overall contributed to consolidate, rather than undermine, major aspects of South Korea’s politics of enmity by construing the National Security Act as a relevant tool to preserve the state’s safety and democratic institutions’ stability - including “the economic order based on private property and market economy.”

Without proceeding from a radical shift of position, the constitutional court’s apparent conservative reversal has to be attributed to a reconfiguration of forces in the political debate about the National Security Act. The fact that its abolition was fully endorsed in 2004 by the administration in power was an unprecedented event. While Kim Dae-jung had denounced the

¹⁰⁷ *Ibidem*.

¹⁰⁸ 14-1 KCCR 351, 98Hun-Ma425, etc., (consolidated), April 25, 2002. This case is analyzed in chapter six.

“poisonous clauses” of the security legislation in the past,¹⁰⁹ the law had been heavily relied upon by the Kim government to deal with the mobilization of workers during the socio-economic crisis of the late 1990s and early 2000s, demonstrating the resilient solidarity between national security and a certain model of development premised on growth-first policy and the political exclusion of labor. This dimension of the National Security Act was not however the one called into question by the Roh Moo-hyun administration. As pointed out by Charles Armstrong,

[N]either the administration of Kim Dae Jung nor that of Roh Moo-hyun were as “progressive” (the term favored by the Korean left) as they initially have appeared. In the case of Roh in particular, there was an acute contradiction between his core support base and political background on the one hand, and on the other, the neoliberal economic agenda he advanced.¹¹⁰

Roh Moo-hyun was indeed a former *Minbyun* attorney, the “Lawyers for a Democratic Society” group founded in 1988 which, as detailed in chapter four, has invested the site of constitutional adjudication as an arena to challenge the non-inclusive bias of the post-transition period. Once in office, “President Roh proceeded to fill top government posts with close colleagues who were also *Minbyun* lawyers, for example, Ko Yeong-ku [Ko Yöng-gu] as head of the National Intelligence Service and Kang Keum-sil [Kang Kŭm-sil] as the first female Minister of Justice, thereby drastically raising the profile of *Minbyun*.”¹¹¹ These nominations also had the effect to unleash a wave of conservative backlash within the National Assembly, as demonstrated by the 2004 motion voted to impeach Roh Moo-hyun for having violated the constitution. The debate over the abolition of the National Security Act thus intervened at a very specific moment in the context of South Korean politics, after Roh Moo-hyun emerged victorious from this episode of intense confrontation with the parliament.

Cartography of forces and arguments in debating abolition

Roh Moo-hyun’s political win was double. On the one hand, the Constitutional Court of Korea had rejected the impeachment motion voted by a majority of representatives against

¹⁰⁹ Amnesty International, *Summary of Concerns for 1999*, ASA 25/01/99, London: Amnesty International, 1999, p.1.

¹¹⁰ Charles Armstrong, “Contesting the Peninsula,” *New Left Review*, No.51, 2008, p.117.

¹¹¹ Patricia Goedde, “From Dissidents to Institution-Builders. The Transformation of Public Interest Lawyers in South Korea,” *East Asia Law Review*, Vol.4, No.1, 2009, p.83.

the president in March 2004;¹¹² on the other hand, Roh's minority "Uri Party" ("*yöllin uridang*") had obtained a landslide share of the vote in the general elections of April. With less than 50 seats in the National Assembly before the elections, the Uri Party now enjoyed 152 seats, against 9 for its rival Millennium Democratic Party ("*sae ch'önnnyön minjudang*") and 121 for the conservative Grand National Party.¹¹³ It was in this context of perceived political strength and large popular support that Roh pushed for the debate over the abolition of the National Security Act.

The apparent transformation of the political landscape prompted by these events should not be overestimated. The overall reforms advocated by the Roh administration did not mean a fundamental subversion of the narrow ideological base shared by South Korean political parties. In other words, "the Uri Party has not internalized the notion of 'economic democracy'; neoliberalism became the key economic policy of the Kim Dae-jung and Roh Moo-hyun governments [...]. These governments' mantle of higher moral authority, relative to the previous regimes, has helped vindicate their embrace of neoliberalism."¹¹⁴ Under this consensus, the conflict between progressive and conservative forces in the political sphere has tended to crystallize on the "national question" in the context of the inter-Korean division.¹¹⁵ Framed in this sole light, the debate over the abolition of the National Security Act has been utterly divisive, without however putting into question the full scope of the mechanisms of exclusion deployed in the name of national security since the 1987 change of regime.

In early September 2004, President Roh Moo-hyun propelled such debate by strongly arguing for the abolition of the law in an evening TV program of the popular MBC channel. Roh declared that the law altogether deserved to be relegated to a museum for having been a systematic tool of oppression against those who opposed the government, rather than an instrument to protect the state against actual threats.

The National Security Law has been used mostly to oppress people who opposed the government rather than to punish those who threatened to throw the country into crisis. During

¹¹² On March 12, 193 Assembly members out of 271 voted for Roh's ousting, alleging that the president had violated election laws by publicly endorsing a given party before the general elections of April 2004. This decision is analyzed in chapter three.

¹¹³ The Uri Party was formed in November 2003 by Roh's closest followers who seceded from the ruling Millennium Democratic Party, deemed overly resistant to the reforms advocated by the new administration.

¹¹⁴ Namhee Lee, *The Making of Minjung. Democracy and the Politics of Representation in South Korea*, Ithaca: Cornell University Press, 2007, p.302.

¹¹⁵ Jang-Jip Choi, "Democracy in Korea. The Politics of Extreme Uncertainty," Paper presented at the Walter H. Shorenstein Asia-Pacific Research Center, Stanford, October 5, 2012.

this process, tremendous human rights abuses and inhumane acts have been conducted. It is part of Korea's shameful history and an old legacy of dictatorships which we are unable to use now [...]. The National Security Law should be abolished and provisions necessary for national defense addressed by revisions to clauses of the criminal code.¹¹⁶

The constitutional and supreme courts were highly involved in the controversy unleashed around the issue at the time, delivering a variety of rulings which reaffirmed the validity and significance of the security legislation for contemporary South Korean society. In doing so, the courts not only resisted the position of Roh but that of other institutions, such as the National Human Rights Commission.¹¹⁷ On August 26, 2004, the constitutional court confirmed the constitutionality of article 7 on the basis that it could no longer be used to suppress activities such as academic research and artistic expression which do not pose a danger to the state and the constitutional order, thanks to the language introduced in the 1991 revision of the National Security Act and carved by the court's own jurisprudence. In addition, the court accompanied its decision by a press release warning lawmakers that "it will be necessary for the National Assembly when it deals with the security law issue to reflect on public opinion and the constitutional court's ruling."¹¹⁸

Beyond the freedom of expression, the status of North Korea and its very characterization as an "anti-state organization" were also at the heart of the dispute about the contemporary relevance of the National Security Act. In the case adjudicated by the constitutional court, the complainants argued that the law could no longer be seen as a valid framework in the context of changing North-South relations and increased political, economic, and cultural exchanges between the two countries since the inter-Korean summit of June 6, 2000.¹¹⁹ The petitioners also claimed that the activities endangering national security should be dealt with through new or existing provisions in the criminal code. This position was widely embraced by the abolitionist camp, demonstrating that its aim was never to disarm

¹¹⁶ Asian Center for Human Rights, *Time To Go. NSL of Republic of Korea*, New Delhi: Asian Center for Human Rights, 2004.

¹¹⁷ Created in 2001, the NHRC had recommended to dispose of the security legislation to the chairman of the National Assembly and the Minister of Justice in August 2004. Its president Kim Chang-kuk then stated that "the current National Security Law has caused constant disputes over its acts against human rights due to its arbitrary application and the shortfalls of its regulations themselves. [...] Amendments on certain texts could not heal the human rights violations on a large scale done by the National Security Law." *Ibidem*.

¹¹⁸ Jae-sik Ha, "Top Court Says Security Law Is Still Necessary," *JoongAng Ilbo*, August 27, 2004.

¹¹⁹ 16-2 KCCR 297, 2003Hun-Ba85,102 (consolidated), August 26, 2004.

the South Korean state, but instead to ensure its defense through other means than those inherited from the authoritarian years.

By contrast, the constitutional court estimated that “there was no clear sign that North Korea had renounced to overthrow our basic order of free democracy,” and that this “basic order” being exposed to the menace of the North’s “great military strength,” the National Security Act could not be interpreted as violating the constitution.¹²⁰ The supreme court adopted a very similar reasoning on August 30, 2004, a few days before Roh Moo-hyun’s televised declaration. Its decision affirmed the necessity of retaining the National Security Act by upholding the conviction of members from the student union “*Hanchongnyŏn*,” an outlawed “anti-state organization.”¹²¹ As of August 2004, at least six of the eleven prisoners detained under the NSA were affiliated with *Hanchongnyŏn*, considered an anti-state organization because it “adopts violent revolutionary policies commensurate with North Korea’s policy of reunification by communizing the South, thereby aiming to praise, encourage and publicize such activities and sympathize with such acts, and is therefore an organization benefiting the enemy as defined in Article 7 of the NSL.”¹²² In 1997, the supreme court had confirmed the illegal nature of the organization but found it necessary that its characterization as “enemy benefiting” be reviewed every year given that new representatives were elected annually.¹²³ Since then, prosecutors have asked the courts to continue defining *Hanchongnyŏn* as an anti-state, and therefore illegal, entity.¹²⁴

On August 30, 2004, the supreme court confirmed the conviction of two members of the organization, found guilty of praising North Korea and sentenced to thirty months of imprisonment by a lower court. Defending the contemporary relevance of the National Security Act, the supreme court strongly called into question the assumption that increasing contacts between the two Koreas, such as the inter-Korean summit of June 2000, meant a pacification of their relations.

¹²⁰ *Ibidem* (personal translation).

¹²¹ The Supreme Court of Korea, 2004Do3212, August, 30, 2004.

¹²² Amnesty International, *Open Letter to All Leaders of Political Parties*, p.2.

¹²³ Supreme Court of Korea, 96Do2696, May 5, 1997.

¹²⁴ Amnesty International, *Open Letter to All Leaders of Political Parties*, pp.2-3. In 2001 for instance, “the Supreme Public Prosecutor’s Office (SPPO) maintained [...] that ‘Hanchongnyon,’ a national federation of university students’ association, is still an outlawed organization supporting North Korea, although it has already abandoned its platform of making itself a ‘federation for unification.’” *The Dong-A Ilbo*, “‘Hanchongnyon’ still an outlawed body,” April 25, 2001.

Just because there are exchanges and cooperation between the two Koreas, the Supreme Court cannot see that North Korea's anti-state character has disappeared and that the National Security Act has lost its legal power. [...] Under such conditions, we must be careful not to disarm ourselves.¹²⁵

The supreme court's statement was clearly perceived as a political gesture directed against the Roh Moo-hyun administration in the context of the debate over the National Security Act. One indicator revealing the intensity of the controversy can be found in the fact that the very constitutionality of Roh's statements in favor of repealing the law was challenged before the constitutional court. A small bench of three justices however dismissed the case on the procedural ground that the position embraced by Roh on TV did not constitute an exercise of governmental power, and therefore did not represent a proper subject matter for review.¹²⁶

The antagonistic positions articulated by both pro- and anti-NSA forces reflected not only the strong polarization generated by the issue, but also the boundaries of the discursive space in which arguments were exchanged. Debates were not confined to the political sphere but shaped by the intense mobilization of conservative elements in civil society, such as veterans' associations, as well as powerful business groups and mainstream media's opposition to the repeal. Despite Roh's Uri Party having a majority of seats in the National Assembly, months of bitter political conflict and pressure in and outside the parliament prevented the National Security Act from being abolished. While the terms of the political debate about the repeal remained limited, the vast array of interests galvanized to resist reform could be seen as the strongest evidence to the law's continued significance.

¹²⁵ Supreme Court of Korea, 2004Do3212, August, 30, 2004, in Asian Centre for Human Rights, *Time To Go*.

¹²⁶ 2004Hun-Ma839, November 16, 2004.

CHAPTER SIX

Reviewing the Contours of the National Community

Article 2

- (1) Nationality in the Republic of Korea shall be prescribed by Act.
- (2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.

Article 3

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

Article 4

The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.

The Constitution of the Republic of Korea

This chapter complements the analysis of how the Constitutional Court of Korea has redefined enmity by looking at the ways in which the contours of the national community have been delineated by its jurisprudence. The court has indeed reviewed a variety of laws which highlight criteria of inclusion in, and conditions of exclusion from, the collective body partly contradicting the National Security Act. These tensions arise from the fact that the constitutional negation of North Korea's sovereignty yields another legal and political consequence than its designation as an "anti-state organization": it also implies that North Koreans are considered as belonging to the imagined community of Korean nationals defined on the basis of "shared blood and ancestry." While the contours of the national community can thus be projected beyond the territory of the South, the court's decisions however indicate at least three challenges to this inclusiveness.

First, the theoretical incorporation of North Koreans in the national body has not translated into full integration for the thousands of individuals which have successfully relocated in the South. Second, the outward projection of the national community is selective, extending to North Koreans in principle while discriminating against other groups, such as ethnic Koreans from China. Third, modes of insertion in and rejection from the collective body are also projected inward, as illustrated by the ideological conversion policy, a mechanism of exclusion inherited from the colonial period by which those refusing to pledge allegiance to the definition of the "national" prescribed by state authorities have remained identified and detained as "thought criminals" in the post-transition era.

“Us” in the mirror of “them”

Who a democratic regime designates as its enemies and how it confronts them are the most salient part of the politics of enmity - that is to say, the fundamental categories and means through which a given society commits to defend itself against perceived threats. The defense of society is however as much geared toward opposing a “*them*” as protecting a sense of “*us*.” Through the looking glass of enmity can therefore appear the contours of the national body. The definition of the former and the delineation of the latter are indeed highly correlated. The comprehension of how enmity is construed can thus be enriched by an analysis of how the national community is envisioned, and *vice versa*. Immigration and nationality laws are thus a site from which the politics of enmity can also be approached.

For instance, the most severe regulations of current national anti-terrorist laws often deal with aliens, and some go as far as authorizing their indefinite administrative detention - i.e., arrest and internment without a trial - in case of security concerns. Kent Roach has thus described Section 412 as “perhaps the most draconian provision in the Patriot Act” enacted by the U.S. Congress in the wake of 9/11, resembling the “administrative detention schemes used in Singapore, Israel, Canada, and the United Kingdom.”¹ In the UK, Part IV of the 2001 Anti-Terrorism, Crime, and Security Act indeed “provided for the indeterminate detention of non-citizens suspected of involvement in terrorism who could not be deported because of the United Kingdom’s international agreements or a ‘practical consideration.’”² Part IV of the law represented a revival of the internment measures widely used by the British government in Northern Ireland during the 1970s, while limiting their scope to foreigners. In 2004, the House of Lords found the statute both discriminatory and disproportionate, therefore declaring it “incompatible” - a decision which neither struck down the law nor released any of the detainees.³

The congruence between the tasks of defining the enemy and the national body is particularly reinforced when security threats are associated with a conflict of sovereignty, as

¹ Kent Roach, *The 9/11 Effect. Comparative Counter-Terrorism*, New York: Cambridge University Press, 2011, p.183.

² *Ibidem*, p.271.

³ *A and others v Secretary of State for the Home Department*, UKHL 56 (2004). The House of Lords’ judicial functions were bestowed upon the newly created Supreme Court of the United Kingdom in 2009. Like its predecessor, the UK Supreme Court does not have the power to overturn legislation enacted by the British Parliament. Under the Human Rights Act of 1998, British courts can however make a declaration of incompatibility if a law is found to contradict one of rights consecrated in the European Convention on Human Rights.

the very boundaries of the state are put at stake. In this case, if the enemy is always constituted as “*other*,” he is not necessarily an “*alien*.” On the contrary, he can even be included in the contours of the national imaginary. This ambivalence is intensified in cases where two states claim to be the only legitimate political incarnation of the entire but divided nation - as illustrated by the Northern Democratic People’s Republic of Korea and the Southern Republic of Korea. In such a context, the making of enmity and identity is interrelated but the two constructs can also be at odds. Their relation is characterized by convergences as well as contradictions: present and concrete enemies from the “other side” provide a source of differentiation while also being potential and future fellow-members of the (re)unified national community.

Membership and dangerousness beyond and below the 38th parallel

Inward and outward projection of enmity

The legal conceptualization of North Korea as the paradigmatic anti-state organization does not exhaust the South’s construction of the division. From the viewpoint of the constitution, ambiguity is more pronounced than in the National Security Act alone. Not only is “peaceful unification” projected as a goal and desired horizon under article 4, but the Republic of Korea’s territory is defined as encompassing the whole peninsula in article 3.⁴ The contours of the national body which arise from this claim make the notion of enmity complex. Indeed, it suggests a possible disjunction between two entities whose threatening character goes unquestioned under the security legislation which criminalizes any contact or relation with either of them: North Korea and North Koreans. The potentially equivocal status of North Koreans will be this chapter’s point of departure to interrogate, through constitutional jurisprudence, the way(s) through which the national community is imagined and circumscribed in the South.

In substance, the decisions of the constitutional court in relation to nationality laws reveal both the strength and limits of “Koreanness” - i.e., ethnic identification - as a factor of integration and solidarity in the political body of the ROK. Although ethnic homogeneity is

⁴ Western languages translate as “reunification” what in Korean is only expressed as “unification” (“*t’ongil*”), similarly to Chinese where the word “*tongyi*” is used by both the People’s Republic of China and the Republic of China (Taiwan). See Françoise Mengin, *Fragments d’une guerre inachevée. Les entrepreneurs taiwanais et la partition de la Chine*, Paris: Karthala, 2013, p.13.

considered as the substratum of Korean nationalism,⁵ constitutional rulings highlight selective patterns of inclusion and discrimination between different groups of ethnic Koreans living outside South Korea based on political, economic, and security motivations. Likewise, being a citizen of the South does not necessarily imply to remain embraced as a legitimate member of the national community.

In his study of Korean nationalism, Shin Gi-Wook formulates the argument that “in-group identity is constructed not only in contradistinction to the out-group but involves active suppression of differences *within* the in-group in the promotion of an overall positive, unitary identity.”⁶ As a result, Shin argues that both Korean states were born “wedded to a vision of ethnic unity in which the greatest threat to that level of identity is not out-group members but internal ‘traitors’ (unlikeable in-group members, that is, Kim [Il-sung] and his Communist followers from the South Korean perspective, and Rhee [Syngman], Park [Chung-hee], and their supporters from the North Korean perspective).”⁷

Within each regime however, “unlikeable in group-members” have not been solely associated with “traitors” from the other half of the peninsula, but also domestic groups. In the South, anti-communism has been the state’s central instrument to reject as enemies undesirable elements of society - many of whom have had no relation to North Korea, nor even to leftist ideology. According to Choi Jang-Jip, anti-communism has been - and still is - associated with the continuation of a certain model of development based on the state’s pursuit of growth-first policy, the power of “*chaeböl*” (South Korean conglomerates, whose first among all is Samsung nowadays), and the exclusion of labor.⁸

Since 1987, labor has not been the only part of society discriminated against. In post-transition South Korea, the security instruments inherited from the authoritarian period (such as the National Security Act and the ideological conversion policy) have primarily remained deployed against the groups “which played a crucial role in facilitating the authoritarian breakdown and democratic transition.”⁹ In the name of defending national security, security tools have thus operated in the defense of a non-inclusive and contentious way of envisioning

⁵ Gi-Wook Shin, *Ethnic Nationalism in Korea. Genealogy, Politics, and Legacy*, Stanford: Stanford University Press, 2006.

⁶ *Ibidem*, p.158.

⁷ *Ibidem*, p.159.

⁸ Jang-Jip Choi, *Democracy After Democratization. The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, 2008.

⁹ Sunhyuk Kim, “Civil Society in Democratizing Korea,” in Samuel Kim (ed.), *Korea’s Democratization*, Cambridge: Cambridge University Press, 2003, p.86.

the “national.” Construed as a site where to challenge the mechanisms enforcing the non-inclusive bias of the transition, constitutional adjudication has nonetheless produced ambivalent outcomes. Indeed, while conceptual distortions of the notion of national security have been denounced by the court since the late 1980s, the full scope of their domestic effects has been left unaddressed.

Overall, a topography of membership and dangerousness irreducible to the frontier marked by the 38th parallel will therefore emerge from this part of the research. First of all, the division between the North and the South does not appear insurmountable in constitutional jurisprudence. The court has reaffirmed that, in the eyes of the law, North Koreans are merely residents of the North - which is not treated as a different state but a territory upon which the South’s sovereignty extends; as a result, they are not recognized as citizens of a foreign country but potential nationals. The ascription of enmity is therefore ambivalent: not only can North Korea simultaneously be a partner for reunification and an anti-state organization, but North Koreans are both fellow nationals and individuals with whom contact is prohibited without governmental authorization under the National Security Act.¹⁰ These paradoxes have not been deeply affected by the shift in inter-Korean relations generated by the June 2000 summit held in Pyongyang between Kim Jong-il and Kim Dae-jung. The official recognition by the two leaders of each Korea’s existence as a legitimate regime has been registered neither in constitutional law and jurisprudence, nor in the security legislation.

Second, the cases reviewed in this chapter show that the status of diasporic Korean populations is not fixed either. Their likely contribution to the pursuit of national interests - in terms of security and economic prosperity - has justified the creation of discriminating categories between, and among, regional groups. These categories have been appropriated by the constitutional court, to expand or restrict the rights of the concerned groups. The court has for instance invalidated the differential treatment of ethnic Koreans from China (“*chosŏnjok*” in Korean or “*chaoxianzu*” in Chinese), deprived from the employment and investment opportunities reserved to Korean migrants residing in Western countries (mostly in the United States, in which case they are referred to as “*chae’mi kyopo*” or “Korean-Americans”). The court has however confirmed that the inter-Korean division extends beyond the peninsula and

¹⁰ “The South Korean government insists that it should be the main party to negotiations about reunification with North Korea and it regards initiatives by private citizens or non-governmental organizations, particularly those critical of government policy, to have such discussions with the North as disruptive and liable to favour North Korea. It therefore has refused to grant authorization to people deemed to be dissidents to meet with North Koreans.” Amnesty International, *South Korea. Prisoners Held for National Security Offences*, ASA 25/25/91, London: Amnesty International, 1991, p.4.

has been displaced within the community of ethnic Koreans living in Japan (known as “*chae’il kyopo*” in Korean or “*zainichi*” in Japanese), presented in 1948 with the choice of opting for the nationality of either of the two Korean republics, the ROK and the DPRK. According to recent constitutional jurisprudence, the rights susceptible to being enjoyed by those Korean Japanese identifying with the South, such as the right to vote, can legitimately be denied to the part of the community affiliated with the North in virtue of security reasons.

Table 12. Korean diaspora populations per region.

Region	Country	2005	2007	2009	%
Sum Total		6,638,338	7,044,716	6,822,606	100
Asia, Oceania	Total	3,590,411	4,040,376	3,710,553	54.39
	Japan	901,284	893,740	912,655	13.38
	China	2,439,395	2,762,160	2,336,771	34.25
	Other	249,732	384,476	461,127	6.76
America	Total	2,392,828	2,341,163	2,342,634	35.65
	USA	2,087,496	2,016,911	2,102,283	30.81
	Canada	198,170	216,628	223,322	3.27
	Other	107,162	107,624	107,029	1.57
Europe	Total	640,276	645,252	655,843	9.61
	CIS	532,697	533,976	537,889	7.88
	Europe	107,570	111,276	117,954	1.73
Middle East	Total	6,923	9,440	13,999	0.2
Africa	Total	7,900	8,485	9,577	0.14

Source: Korean Ministry of Affairs and Trade.

Third, the mechanisms of inclusion in - and exclusion from - the political national body are not only projected onto groups living outside South Korea. They are also, and maybe more importantly, operating within. As will be analyzed through the constitutional court’s review of the conversion policy, not addressing the broader domestic functions of the security apparatus - namely its role in policing and enforcing a certain distribution of who is recognized or denied a part in the post-transition order - has also meant for the court to leave security tools largely unreformed and even to reinforce their contemporary relevance.

Two groups emerge from the Constitutional Court of Korea’s approach to defining the national body: “deterritorialized” ethnic Koreans (i.e., Koreans living outside South Korea) and disloyal Southern citizens. They are respectively associated with outer and inner projections of national identity, operating both outside and within South Korea’s physical boundaries. When it comes to the outer projection of national identity in relation to North Korea and North Koreans, the constitutional court appears to abide by - and thus to reinforce - the 1948 framework put in place at the time of the two Koreas’ antagonistic founding. Its conception of North Koreans’ status is still premised on the principle that North Korea is not a state of its own, but an anti-state organization in the South, the only sovereign and legitimate republic in the peninsula. This position has also been reiterated by the Supreme Court of Korea in its recent jurisprudence:

North Korea is a partner of conversation and cooperation for the peaceful unification of our country. Nonetheless, despite changes in the South/North Korea relationship, it also has the characteristic of an anti-government organization which plots to overturn our system of free democracy while adhering to the line of unification by communism. Thus, the Supreme Court’s established opinion holds that the power of the National Security Act as the rule regulating an anti-government organization, etc. continues to be valid. And freedom of conscience, freedom of speech and the press, freedom of academic research, and etc., are not without any restriction, although they are fundamental rights guaranteed by the Constitution.¹¹

Both the supreme and constitutional courts thus contribute to maintain a vision of the division, with its related contradictions, from which the political leadership of each Korea has distanced itself since 2000. Beyond the issue of North Korea and North Koreans, constitutional jurisprudence also illustrates the many differentiation patterns permissible between, and among, various groups of overseas Koreans (in particular ethnic Koreans from China, Japan, and the United States) despite the belief in their ethnic commonality. Such patterns of selective inclusion and discrimination are diffused throughout concrete policies whose unequal outcomes - but not legitimacy - have been sometimes contested by constitutional judges.

As for the inner projection of national identity, a major and underlying product of the court’s intervention is its narrow construction of anti-communism, which does not take into

¹¹ Supreme Court of Korea, 2007Do10121, December 9, 2010.

account the full mechanisms of exclusion generated in its name in contemporary South Korean society. In the 2002 pledge to abide by the law case reviewed below, the system of ideological conversion implemented against national security prisoners was treated by both the majority and dissent as if it only targeted genuine communist supporters. This problematic assumption was not even valid for the lead complainant in the case. If the constitutional court recognized in 1990 that scientific and artistic activities could be impaired by too broad a construction of the National Security Act, it has however failed to acknowledge the rest of the law's extensive effects. This imperceptiveness is illustrated by the court's very partial analysis of the conversion policy and its uses.

Both parts of the analysis - on nationality cases and ideological conversion - thus draw a more subtle and complex picture of the division than that of a fine line stretching along the 38th parallel. Indeed, the institutional mechanisms of inclusion and exclusion at work in the South are not limited to the inter-Korean border. Inclusion can be projected beyond the frontier, albeit selectively, while certain forms of political exclusion are entrenched underneath it. The latter are probably more powerful than commonly thought and do not simply replicate the ideological division between the North and South. Their domestic effects have always exceeded containing the political threat posed by North Korea or indigenous leftists. As contended by this dissertation, security tools have also taken on a new efficacy and relevance of their own in the aftermath of the transition, enforcing the non-inclusive legacy of democracy's institutionalization by political elites.

In this perspective, the intervention of the constitutional court in construing what counts as "national" and "anti-national" should be understood as taking place in a contested field. Indeed, "although its ethnic base was taken for granted, the political notion of the Korean nation was hotly debated" throughout the 20th century.¹² Since the 1980s in particular, contestation has taken place not only among the two Koreas, but also between South Korean state and society. In this process, conflict has however remained framed within a fixed language: that of "us" ("the true incarnation of the Korean nation") v. "them" (fellow citizens but "the nation's traitors"). In this sense, the binary structuration of the real in terms of foe v. friend and the "culture of enmity" have not been monopolized by the state.¹³ Conflict over the definition of national identity has thus amounted to a "*mésentente*" or disagreement in the sense defined by Jacques Rancière:

¹² Gi-Wook Shin, *Ethnic Nationalism in Korea*, p.227.

¹³ Namhee Lee, *The Making of Minjung. Democracy and the Politics of Representation in South Korea*, Ithaca: Cornell University Press, Ithaca, 2007.

Disagreement is not the conflict between one who says white and another who says black. It is the conflict between one who says white and another who also says white but does not understand the same thing by it or does not understand that the other is saying the same thing in the name of whiteness.¹⁴

Prompted to intervene in this underlying dispute by the very forces left at a disadvantage by the state's monopoly over the legitimate use of violence, the constitutional court has however discharged its role in a paradoxical way, contributing to both stage and interrupt the fundamental disagreement over who is recognized or denied a "part" in the order of the post-transition era.

Enmity, territoriality, and ethnicity

The primary basis for defining enmity in South Korea seems to be a territorial one, materialized by the frontier that weaves along the 38th parallel.¹⁵ Things are however more complex as soon as the notion of enmity is measured against the way in which the national community is defined. In the context of the division and from the viewpoint of the supreme and constitutional courts' jurisprudence, North Korea is both an anti-state organization and a partner of reunification. North Koreans therefore appear as figures of the other and the same, members of the imagined national community with whom communicating is nonetheless forbidden without governmental authorization. Indeed, North Korean nationality is not recognized by the South as a result of its legal negation of the North's statehood. This negation remains inscribed in article 3 of the constitution which equates the "territory of the Republic of Korea" with the entire "Korean peninsula." Yet, this claim has recently disappeared from the official discourse and position of both states on inter-Korean relations and unification.

Throughout the 1990s, the legitimacy of "the other" Korean state continued to be denied by each government despite the two Koreas' concurrent accession to the United Nations in 1991. Their mutual recognition only occurred with the joint summit of the summer

¹⁴ Jacques Rancière, *Disagreement. Politics and Philosophy*, Minneapolis: University of Minnesota Press, 1999, p.x.

¹⁵ The 38th parallel was the original boundary used in 1945 to split the Korean peninsula into two zones of occupation, respectively under Soviet guidance (north of the 38th parallel) and American control (south of it). The present frontier has been slightly displaced from its initial path, and corresponds to the curves of the front line when the Armistice Agreement ending the Korean War was signed on July 23, 1953. Called the "demilitarized zone," this no man's land is heavily guarded on both sides and its maritime outline is still contested by North Korea.

2000 held in Pyongyang between Kim Jong-il and Kim Dae-jung. This illustrates that the constitutional framework does not capture the only way through which North Korea can be envisioned in the South. Yet, constitutional law and jurisprudence still operate within, and reactivate, the 1948 approach to the division: North Korea not being construed as a sovereign state, North Koreans cannot be its citizens. This view has been reaffirmed by the constitutional court in a 2000 case on the Nationality Act (“*kukchökpö*”):

Our Constitution has stated since the Founding Constitution, *The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands* (Article 4 of the Founding Constitution; Article 3 of the current Constitution). The Supreme Court has ruled accordingly that North Korea is part of the Korean peninsula and therefore subject to the sovereignty of the Republic of Korea, and therefore that North Korean residency should not interfere with the acquisition of the nationality of the Republic of Korea.¹⁶

Historically, the view that “the other side was simply the northern half or southern half and a lost territory to be recovered”¹⁷ has been coextensive with the right defended by each republic (the ROK and the DPRK) to “sole representation of the entire (ethnic) community.”¹⁸ Now that the two Korean states have politically proceeded to each other’s recognition, the belief in ethnic homogeneity and the idea that the people of both countries form a single nation sharing a common bloodline and ancestry continue to inform the project of unification, but as a future and distant horizon rather than as an imperative to be accomplished soon and on unilateral terms.

Territoriality is not however irrelevant to the definition of this national imaginary supposedly encompassing anyone belonging to the Korean “race” (“*minjok*”). The primary frame through which the Korean nation is projected remains the peninsula, a conception that ventures beyond the 38th parallel but not outside its physical confines. The transcendence of the inter-Korean frontier is thus accomplished in the name of the common ethnic nation but in the space of the unified and sovereign Korean state which existed before its annexation by Japan in 1910. Ethnic nationalism is therefore a force of inclusion which overcomes the division, but largely remains territorially-based, confined to the peninsula’s boundaries.

¹⁶ 12-2 KCCR 167, 97Hun-Ka12, August 31, 2000, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I, 1998-2004*, Seoul: Constitutional Court of Korea, 2006, pp.665-666 (original emphasis).

¹⁷ Gi-Wook Shin, *Ethnic Nationalism in Korea*, p.154.

¹⁸ *Ibidem*, p.152.

Ethnic Koreans located outside this frame are therefore not integrated in the national imaginary the way peninsular Koreans are.

Ethnic nationalism is captured by the term “*minjok*,” a term which conflates the three concepts of nation, ethnicity, and race.¹⁹ Although ethnic homogeneity is often treated as an inherent characteristic of Korea, Shin Gi-Wook has demonstrated how the ethnicization of the notion of nation has been the contingent result of particular historical processes. The first description of Korean national identity through racial lenses is usually attributed to the historian Shin Chae-ho (Sin Ch’ae-ho, 1880-1936). In his 1908 *New Reading of Korean History* (“*toksa sillon*”), Shin offered a version of Korean history severed from the conventional dynastic histories which had prevailed until then. In their place, Shin told - and thus shaped - a narrative about the Korean nation as endowed with historical agency of its own, an enterprise which implied “rediscovering” the country’s particularistic origins.²⁰

According to Shin, “the Korean people, despite repeated attacks on their national sovereignty by foreign powers, had nevertheless maintained an identifiable racial and spiritual ‘core’ that had been preserved intact throughout the ages ever since the founding of Tan’gun Chosŏn nearly 5,000 years ago.”²¹ The “task of the historian” was therefore to restore this essence, “to unearth the true record of the Korean race, its origins, genealogy, and history of struggles so that an autonomous, unique (racial) Korean identity (*chuch’ejŏk chongjok*) could be reestablished.”²² Shin’s ideas appeared and found resonance in the specific context of the late 19th century, at a time when, “with the decline of China, rise of Japan, and increasing presence of the West in the East Asian region, Koreans were struggling with how to position their country vis-à-vis a rapidly changing regional and world configuration.”²³ The ethnic conception of nationalism formulated by Shin only fully triumphed over competing categories of collective identity and accessed to prominence in the following decades of the 20th century, as a reaction to the experience of Japanese colonial rule and its assimilationist, yet discriminatory, policies.

¹⁹ *Ibidem*, p.4.

²⁰ At the turn of the 20th century, this way of conceiving nationality was not distinctively Korean, but represented the mainstream of thinking on the subject. Shin was thus largely expressing a cosmopolitan consensus more than developing a uniquely Korean perspective.

²¹ Sheila Miyoshi Jager, “Women, Resistance and the Divided Nation. The Romantic Rhetoric of Korean Unification,” *The Journal of Asian Studies*, Vol.55, No.1, 1996, p.16.

²² *Ibidem*, pp.16-17.

²³ Gi-Wook Shin, *Ethnic Nationalism in Korea*, pp.223-224.

In contemporary South Korea, both ethnicity and territoriality therefore appear relevant to the definition of membership in the national community. Indeed, sharing the same ethnic identity is only a selective factor of integration, which functions differentially depending on the regional origins and local characteristics of the Korean groups considered. Incorporation in the imaginary of the (Korean) nation, and inclusion in the socio-economic and political life of (South Korean) society are also two separate matters. While North Koreans automatically belong to the former, they are most obviously rejected from the latter as long as they reside across the frontier. The condition of those who have come to the South testifies to the difficulties of the conceptual and actual transition from one realm (the imagined nation) to the other (the realized community of South Korean citizens). In addition, North Koreans are not alone in being considered as a special and problematic category of ethnic Koreans - residents of Japan with pro-North Korean ties and Koreans from China also share this plight.

North Koreans: never fully belonging

Examining the construction of these “problematic” categories of Koreans calls for engaging with the Confucian task of “rectifying names,” for South Korean nationality and immigration laws abound with them. Citizens of the Republic of Korea (“*kungmin*”) are distinguished from “overseas Koreans” (“*chaeye tongp’o*”),²⁴ who can either be nationals residing outside South Korea, or Koreans with foreign nationalities. North Koreans are considered as pertaining to the first category, that is to say as being nationals residing abroad - and not foreigners - as long as they remain outside the South (i.e., in North Korea or in a third country like China). They are fully recognized as citizens of the Republic of Korea after entering its territory and going through an intensive screening process. This territorial criterion is essential as argued by the government in the case on the Nationality Act adjudicated by the constitutional court in 2000:

²⁴ The 1997 Overseas Koreans Foundation Act (“*chaeye tongp’o chaedanbŏp*”) initially defined “overseas Koreans” as 1/ persons who have nationality of the Republic of Korea, and stay in a foreign country for a long term or obtain permanent residency in a foreign country; and 2/ persons who have Korean lineage, regardless of their nationality, and reside and make a living in a foreign country. The 1999 Act on the Immigration and Legal Status of Overseas Koreans construes this category more narrowly, as being composed of 1/ nationals of the Republic of Korea who obtain permanent residency in a foreign country or are residing in a foreign country with a view to living permanently there; and 2/ persons who have held nationality of the Republic of Korea (including Koreans who had emigrated to a foreign country before the Government of the Republic of Korea was established) or their lineal descendants and who obtain the nationality of a foreign country. Legal information service of the Republic of Korea’s website, accessed on August 15, 2013, at: <http://oneclick.law.go.kr/CSM/CcfMain.laf?csmSeq=505>.

Our country does not recognize the nationality of North Korea. Therefore, a resident of North Korea can be considered as having our nationality. It may cause a diplomatic problem with a third country if we recognize as our nationals those North Koreans residing in the third country outside the reach of our effective control. There is no diplomatic problem in recognizing the nationality of a North Korean resident who already entered our country.²⁵

When it comes to ethnic Koreans with foreign nationalities, these same “diplomatic problems” have been advanced by the South to justify that claiming to belong to the imagined realm of “Koreanness” does not imply a correlative right to automatic membership in the actual community of South Korean nationals. The immigration of ethnic Koreans from abroad is not welcomed by the government in the way that it officially is for North Koreans.²⁶ In other words, North Koreans enjoy a special status not only in the national imaginary of the South, but in the framework of its immigration laws. Sarah Son has pointed out that, “unlike the ethnic immigration policies of Germany and Israel which accepted ethnic Germans and Jews regardless of where they came from, defector settlement policy only applies to those of North Korean origin and excludes ethnic Koreans of other origin, such as *chosŏn-jok* (ethnic Korean Chinese) and *zainichi* (ethnic Korean Japanese).”²⁷ By contrast with those two countries, South Korea appears to practice a narrow understanding of the criteria of eligibility to become a national.

In Israel, the “Law of Return” enables not only Jews from anywhere but, since 1970, “a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew” to resettle in the Hebrew state and be automatically entitled to citizenship.²⁸ Yet Israel and South Korea are not fundamentally opposed if one takes into consideration that their immigration laws are tied in both cases to specific state-building imperatives. Moreover, the nationality framework of Israel is but insensitive to security concerns. In 2003 for instance, the Citizenship and Entry in Israel Act was adopted to prevent the possibility of reunification between an Israeli Arab and his or her spouse or child living in

²⁵ 12-2 KCCR 167, 97Hun-Ka12, August 31, 2000, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, pp.663-664.

²⁶ “The South Korean government welcomes the entry of all dislocated North Koreans who desire to enter South Korea.” Ministry of Unification, “Settlement Support for Dislocated North Koreans,” Ministry of Unification’s website. Accessed on August 23, 2013 at: <http://eng.unikorea.go.kr/CmsWeb/viewPage.req?idx=PG0000000536>.

²⁷ Sarah Son, “The Making of South Korean Citizens. Identity and Policy in the ‘Micro-Unification’ of North Korean Defector Settlement,” Paper presented at the 10th Korean Studies Graduate Students Convention in Europe, University of Helsinki, Helsinki, July 16, 2013.

²⁸ “Law of Return 5710-1950,” Israel Ministry of Foreign Affairs’ website. Accessed on August 23, 2013 at: <http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/law%20of%20return%205710-1950.aspx>.

the Occupied Territories under certain conditions of age, a scheme which was upheld by a majority of the Supreme Court of Israel in 2006.²⁹

The family model, and its rupture, are frequently referred to as embodying the kinship ties upon which Korean national solidarity is supposedly built, especially in the context of the division. The image of the two Koreas as a single but separated family is not merely a metaphor, as thousands of actual families were split by the Korean War (1950-1953) - before its eruption, the frontier was indeed relatively porous. The lack of reliable information makes estimates precarious, but according to James Foley's research on the topic, there were 500,000 to 750,000 surviving members of divided families in 1990.³⁰

In the romantic vision of reunification exalted by the dissident "*minjung*" movement of the 1980s, the two Koreas were often depicted as separated lovers (or more exactly a married couple whose unity had been forcibly broken), longing for reconciliation.³¹ This rhetoric conveyed a number of strategic implications: reversing the distribution of roles in the official narrative about the division (no longer blamed on the North, now a fellow victim, but on the United States, the new "evil power") and turning the two Koreas into protagonists - not "passive victims of history but active redeemers of it."³² Another recurring motif is the metaphor of brotherhood, captured by the emblematic iconography of the "Statue of Brothers" erected in the War Memorial of Korea.³³ There, in this state-sponsored but post-transition version of the division,

The story of national reunification is written as a narrative of brotherly reunion. Significantly, the meeting between the two brothers - one strong and one weak, one older and the other younger - is portrayed in such a way that the genealogy of the ancestral blood "line" was never questioned: South Korea is the oldest son, the legitimate "heir" of Korea's patriotic

²⁹ H CJ 7052/03, *Adalah v. Minister of Interior* (2006).

³⁰ James Foley, *Korea's Divided Families. Fifty Years of Separation*, London, New York: RoutledgeCurzon, 2003.

³¹ Sheila Miyoshi Jager, "Women, Resistance and the Divided Nation," p.7.

³² *Ibidem*, p.8. Jager does not debate whether the characteristics of femininity and masculinity tended to be allocated to one Korea rather than the other, but instead analyzes the perceptions and expectations produced by the romantic narrative in relation to South Korean women. In particular, "resistance to the division, and the virtuous struggle for reconciliation that it implied, took the allegorical form of resistance to the foreign male." *Ibidem*, p.13.

³³ Conceived in 1988, the War Memorial is located in central Seoul and open to the public since 1994.

warrior tradition, whose forgiveness of his weaker, wayward brother becomes the condition upon which North Korea is finally allowed to return to the “arms” of the family/nation fold.³⁴

The notions of shared bloodline and common ancestry do not necessarily fuel a vision of nationhood based on strict equality as implied by the significant connotations of status based on gender and seniority in the above-mentioned narratives. The condition of North Koreans living in the South provides another illustration of this reality. Upon arriving in the South, North Koreans are seldom treated as fellow nationals. They are first and foremost considered as escapees or refugees,³⁵ and therefore subjected to both special security screening and adaptation programs. To be eligible to become full citizens of the South, North Koreans have to prove that they hold North Korean nationality according to North Korean laws. In other words, possessing a non-existing citizenship paradoxically represents the legal requirement to be stripped of it.

At the end of 2011, the Ministry of Unification (“*t’ongilbu*”) estimated that about 23,000 North Koreans had defected to the South. While refugees numbered less than 1,000 before 1998, the flow accelerated in reaction to the famine of the mid to late 1990s: “The number of North Koreans entering the South has increased steadily since 1998 and the aggregate number exceeded 10,000 in February 2007. In 2002, the number of women surpassed that of men for the first time and the number has increased rapidly. In 2007, women accounted for 78 percent of North Korean defectors.”³⁶ In addition, most of them come from the regions of North Korea neighboring China.

Table 13. Number of North Korean refugees entering South Korea before and since 1989.

Year	1948-89	90-93	94-98	99-01	02	03	04	05	06	07	08	09	10	11	Total
Male	564	32	235	564	513	468	625	422	509	570	612	666	578	765	7116
Female	43	2	71	479	625	813	1269	961	1509	1974	2197	2261	1798	1767	15776

³⁴ Sheila Miyoshi Jager, *Narratives of Nation Building in Korea. A Genealogy of Patriotism*, New York: M.E. Sharpe, 2003, pp.135-136.

³⁵ “The traditional term for a person fleeing North Korea is ‘defector.’ It is translated from *gwi-sun-ja*, literally meaning ‘a person who used to be an enemy, who voluntarily surrenders and defects, and obeys his new country.’ ” More recent terms have been introduced, such as “*nanmin*” (“refugee”) in the 1990s, or “*saetōmin*” (“new settler”), “*pukhanit’alumin*” (“North Korea migrant” or “escapee”), and “*t’albukcha*” (“North Korean refugee” or “defector”) after 2000. Brittan Heller, “Terms of Endangerment. Evolving Political and Legal Terminology for North Koreans,” *Oxford Monitor of Forced Migration*, Vol.1, No. 1, pp.14-15.

³⁶ Ministry of Unification, “Settlement Support for Dislocated North Koreans.”

Year	1948-89	90-93	94-98	99-01	02	03	04	05	06	07	08	09	10	11	Total
Total	607	34	306	1043	1138	1281	1894	1383	2018	2544	2809	2927	2376	2532	22892
% of women	7	6	23	46	55	63	67	69	75	78	78	77	76	70	69

Source: Ministry of Unification.

Upon arriving in the South, refugees go through an intensive security screening process carried out by several state agencies, including the Ministry of Unification, the National Intelligence Service (“*kukka chǒngbowǒn*,” formerly the Agency for National Security Planning), and the National Police Agency (“*kyǒngch’alch’ǒng*”). In 1999, nine defectors were granted compensation for physical and psychological damage after having been tortured by the intelligence agency during their interrogations.³⁷ Once examination has established that refugees are neither spies nor ethnic Koreans from elsewhere (particularly China), their custody is transferred to *Hanawǒn*, the resettlement and support center for “social adaptation” (“*sahoe chǒkyong*”) which has operated a twelve-week program of adjustment to life in the South since 1999.³⁸ Many studies have however reported the difficulties encountered by North Koreans, especially in terms of socio-economic, rather than political, accommodation. The socio-economic dimension appears to carry more and more weight not only in the orientation of support policies toward defectors, but in South Korean society’s approach to reunification in general. Attitudes about such prospect are strongly influenced by generational factors, with younger South Koreans perceiving the potential cost of the process as an unwanted burden.

According to Sarah Son, “negative collective identification has become a much more prominent tendency in the South Korean national narrative, as evidenced in policy discourses.”³⁹ Son’s analysis further identifies “two distinct varieties of negative collective identification evident in the policy discourses”:

³⁷ Kyong-hwa Seok, “North Korean Defectors Sue South Korea,” *Associated Press*, February 19, 1999.

³⁸ “The ultimate objective of the course is to instill confidence in the newcomers, narrow the cultural gap, and motivate them to achieve sustainable livelihoods in a new environment. The course has four blocks: 1) 27 hours on mental and physical health; 2) 130 hours of vocational training and counseling in collaboration with the Ministry of Labor; 3) 90 hours of education on the South’s democracy and market economy; and 4) 33 hours on preparations for resettlement and moving out on their own. Furthermore, the government provides them with a variety of financial and non-financial support to assist them with resettlement. The newcomers receive, for example, an initial cash payment, incentives related to employment and education, medical support, and favorable terms for leasing apartments. The government also creates a new family registry as they are South Korean citizens with all rights and privileges under the Constitution.” Ministry of Unification, “Settlement Support for Dislocated North Koreans.”

³⁹ Sarah Son, “The Making of South Korean Citizens.”

One sees North Koreans in the South as carrying undesirable, enemy characteristics of the North Korean regime, and they are thus untrustworthy members of the “other side,” while the other sees them as culturally different strangers and somewhat inferiors. Negative collective identification has had both positive and negative repercussions for defectors: on the one hand it posits them as refugees in need of help necessitating a generous package of settlement support, while on the other they are viewed as foreigners who are deemed to pose a threat to societal security in the context of integration.⁴⁰

Interestingly, the administrations of Kim Dae-jung’s and Roh Moo-hyun’s commitment to a policy of engagement with the North (known as “Sunshine Policy” from 1997 to 2007) did not translate into favorable outcomes for refugees in the South.⁴¹ As far as this research is aware, no constitutional complaint alleging a violation of basic rights has ever been filed by North Korean defectors, which is not the case for one of the two other categories of ethnic Koreans construed as “problematic”: *chosŏnjok*, that is to say, ethnic Koreans from China.

Ethnic Koreans from China: amalgamation of security and economic reasoning

Constitutional jurisprudence has established that a foreigner can be “the bearer of basic rights,” although some benefits and privileges can only be enjoyed by a citizen, such as becoming a public official or having the right to vote.⁴² Many opportunities are however granted to ethnic Koreans with foreign nationalities who wish to come to the South to engage in economic activities. The scheme designed by the National Assembly in 1999 to facilitate these activities, the Overseas Koreans Act (“*chaeye tongp’opŏp*”), established a distinction between the Koreans who emigrated before the Republic of Korea’s founding in 1948, and the

⁴⁰ *Ibidem*.

⁴¹ “The Sunshine Policy era from 1997-2007 was not the best time for defectors in policy, as the Southern government’s discourse of self-identification with the North was partly at the expense of the defectors themselves. A better solution to welcoming defectors, it was thought, was to help North Korea help itself, and to stop the flow of defectors in the first place. In addition, the governments of Kim Dae Jung and Roh Moo Hyun were active in prohibiting defectors from giving press interviews and forming lobby groups. Yet despite conservative support for a defector voice and greater focus on helping defectors in preference to engagement with North Korea, the inception of the conservative government of Lee Myun Bak in 2008 did not mean a complete reversal in the previous government’s approach and there continues to be significant obstacles to reaching South Korea.” *Ibidem*.

⁴² 6-2 KCCR 477, 480, 93Hun-Ma120, December 29, 1994.

ones who only left afterwards.⁴³ Embedded in the choice of this temporal marker was the possibility to further differentiate between “ethnic Koreans living in China or the former Soviet Union” (most of whom emigrated before 1948) and “Korean Americans” (whose majority departed after 1948).

The constitutionality of this provision was soon raised before the constitutional court, by complainants described in the case as “ethnic Koreans with Chinese nationality [who] currently reside in the [People’s] Republic of China.”⁴⁴ They not only argued that their human dignity, right to happiness, and right to equality had been violated, but that granting special advantages to “those who emigrated after the establishment of the [1948] Korean Government [was] tantamount to negating the legitimacy of the Provisional Republic of Korea Government” or “*taehanmin’guk imsijongbu*,” which was formed in exile during the Japanese colonial era and operated in Shanghai after 1919.⁴⁵

In response to the petition, counter-arguments were presented by the Minister of Justice who justified this discrimination for a number of reasons relating to national and economic security - two intertwined motifs in the defense of South Korean society. His opinion also contested the very ability of the petitioners to challenge the contentious provision, alleging that “there is no evidence that the complainants are ethnic Koreans who emigrated to a foreign country or their lineal descendants (The only evidence regarding qualification of the complainants is a copy of passports proving that the complainants are Chinese nationals).”⁴⁶ This reasoning exemplifies the burden of proof which falls upon individuals claiming to belong to the community, and category, or overseas Koreans as they need to demonstrate that they, or one of their parents, once held South Korean citizenship. Alleging Korean lineage is indeed not sufficient for ethnic Koreans from foreign countries to qualify as overseas Koreans.

⁴³ “The legislative purposes of Overseas Koreans Act regarding ethnic Koreans with foreign nationalities are as follows (Gazette of the Korean Government 8-9, September 2, 1999). The Act has been legislated to promote globalization of the Korean society by encouraging more active participation of ethnic Koreans living abroad in all spheres of the Korean society. The Act aims to encourage investment in Korea by simplifying regulations with regards to entry and exit, acquisition of real estate, financial transaction, and foreign exchange dealings of ethnic Koreans.” 13-2 KCCR 714, 99Hun-Ma494, November 29, 2001, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.688.

⁴⁴ *Ibidem*, p.679. Although the English translation only makes reference to the “Republic of China,” the original Korean version mentions the People’s Republic of China (“*chunghwa inmin konghwaguk*”).

⁴⁵ The provisional government in Shanghai (headed by future South Korean president Rhee Syngman between 1919 and 1925) only represented one of the groups which disparately composed the Korean independence movement.

⁴⁶ 13-2 KCCR 714, 99Hun-Ma494, November 29, 2001, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.683.

In the case at hand, the complainants' inclusion in this very category was contested by the government, which further defended that all ethnic Koreans are not entitled to an equal treatment given considerations of economic and national security. Granting to ethnic Koreans from China the same employment and investment opportunities as Korean Americans was defined as entailing three main risks: destabilizing the labor market due to an influx of low-waged workers; opening a new route of infiltration for North Korean agents; and engendering potential "diplomatic frictions."

Simplification of regulations on entry and exit of ethnic Koreans who emigrated before the establishment of the Korean Government could lead to an influx of ethnic Koreans with Chinese nationality, relatively low-waged workers, into the nation's labor market and cause a significant number of social problems. Under the ongoing South-North confrontation, there is also the risk of it being used by North Koreans as a route for infiltration, thereby causing immediate security threats. It is also very likely that the State will face diplomatic frictions with China who is extremely sensitive to nationalism among racial minorities within its border if the Act were to include ethnic Koreans who emigrated before the establishment of the Korean Government as potential beneficiaries of the Act.⁴⁷

These motivations were not found to make discrimination against pre-1948 migrants reasonable according to six of the nine constitutional judges. The provision was actually deemed all the more unfair since the Koreans disadvantaged under the law already suffered from a dual misfortune: presently enjoying a lower socio-economic status than other diasporic groups; and having been "forced to leave their motherland" in the past.⁴⁸ Therefore, the majority held the law neither valid "from a humanitarian perspective" (i.e., from the standpoint of protecting vulnerable populations), nor from a "national" one (i.e., in light of the state's duty vis-à-vis the "patriots" who have served its cause).

The State [is] requiring those ethnic Koreans who have emigrated before the establishment of the Korean Government, mostly ethnic Koreans living in China or the former Soviet Union who were forced to leave their motherland to join the independence movement, or to avoid military conscription or forced labor by the Japanese imperialist force, to prove that they were explicitly recognized as Korean nationals before obtaining foreign citizenship. Legislation of an act discriminating ethnic Koreans who were involuntarily displaced due to historical turmoil sweeping over the Korean peninsula cannot be justified from a humanitarian perspective, let alone from a national perspective, in the sense that no country on earth has

⁴⁷ *Ibidem*, p.684.

⁴⁸ *Ibidem*, p.694.

legislated an act to discriminate against such compatriots, when it seems only appropriate to assist them. The public interest to be achieved by this legislation is too minor compared to the injury inflicted on individuals being discriminated by the Act.⁴⁹

Construing not only history, but the national narrative, is often a strategic resource and source of contention in constitutional intervention. From the viewpoint of the critical analysis that this dissertation undertakes, what is being staged as historical truth by courts appears as telling as what is being distorted or silenced by them. South Korea's constitutional discourse on the independence movement remains constrained by two blind spots: on the one hand, the refusal to acknowledge that resistance to colonial rule was only the deed of a minority of Koreans; on the other hand, the political impossibility to concede that the independence movement's most active elements abroad and at home were leftists, especially after the 1920s.⁵⁰ Instead, emphasis has been placed on the "Provisional Republic of Korea Government born of the March First Independence Movement of 1919," as expressed in the preamble of the constitution, thus obstructing unsettling historical realities.

This narrative can be seen at work in the court's account of pre-1948 migrations. Koreans who left the peninsula during the colonial era are all inevitably described as opponents to Japanese imperialism, having either joined independence fighters abroad or evaded military conscription and forced labor. This clearly amounts to discounting the fact that most displacements took place as a result of Koreans' mobilization under these two processes. In addition, the small portion of those who joined the independence movement did not necessarily rally the cause of the provisional government in Shanghai. The factions which operated in exile from other parts of China and the former Soviet Union largely identified with communism, such as the group which future North Korean leader Kim Il-sung was heading in Manchuria.

The court's affirmation that most ethnic Koreans who emigrated before 1948 were necessarily "patriots" and independence fighters is thus highly dubious. Yet, it should not be inferred from our refutation of the court's account that the South Korean government had a legitimate basis to discriminate against ethnic Koreans from China. Rather than drawing new jurisprudential conclusions, the point of the present analysis is to interrogate the type of "national" narrative and imaginary which the constitutional court has adhered to, deployed,

⁴⁹ *Ibidem.*

⁵⁰ Dae-sook Suh, *The Korean Communist Movement. 1918-1948*, Princeton: Princeton University Press, 1967.

and thus contributed to reinforce. In the case at hand, a progressive decision was reached based on a very conservative approach to colonial history. As a result of the ruling,

The National Assembly revised the OKA [Overseas Koreans Act] according to the Constitutional Court's mandate, and the revised version of the law, which discarded the controversial "former nationality" criterion, was passed on February 9, 2004. Even so, some key issues, especially the inclusion / exclusion of different overseas Korean groups, have not been effectively and practically resolved and disagreements surrounding the law still linger.⁵¹

The problematic categories of ethnic Koreans dealt with by the constitutional court do not only include residents from North Korea and Koreans from China, both of whom are considered through the lenses of national and economic security in policy-making. The community of Koreans residing in Japan also represents a group apprehended with caution as the division of the peninsula is displaced within it.

Ethnic Koreans from Japan: the division displaced

The status of ethnic Koreans from Japan was touched upon by the constitutional court in 2007, when the justices reviewed the right to vote of nationals residing abroad. Similarly to Koreans with foreign citizenships, nationals living outside South Korea may be divided into subgroups to which selective rights and benefits can be differentially attributed. Within this category, North Koreans are not the only ones under scrutiny. The Korean community from Japan is also suspiciously dealt with. Indeed, the division of the peninsula finds another incarnation on Japanese territory. Like migrations to China, the settlement of Koreans in Japan has been anterior to 1945 and catalyzed by colonial dynamics. The 1910 annexation treaty turned all Koreans into subjects of Japan's empire, even though they retained a special and inferior status as "*chōsenjin*." By the late 1930s, Koreans were intensively mobilized in order to contribute to Japan's war effort through forced labor and conscription.⁵²

In the wake of Japan's surrender in 1945 and Korea's subsequent liberation, "almost two-thirds of the over two million Koreans residing in Japan returned to the Korean

⁵¹ Jung-sun Park and Paul Chang, "Contention in the Construction of a Global Korean Community. The Case of the Overseas Korean Act," *The Journal of Korean Studies*, Vol.10, No.1, 2005, p.2.

⁵² Japan invaded Manchuria in 1931, entered into war against China in 1937, and against the United States in 1941. "More than 700,000 Koreans were drafted to Japan for forced labor or military conscription following the passage of the National Manpower Mobilization Act in 1939." Erin Aeran Chung, *Exercizing Citizenship. Korean Identity and the Politics of Nationality in Japan*, Unpublished doctoral dissertation, Northwestern University, Evanston, 2003, p.142.

peninsula.”⁵³ Those who stayed in the archipelago numbered approximately 600,000, constituting Japan’s largest minority. Having emigrated during the colonial era for social and economic reasons rather than forced military displacement, they chose not to repatriate in 1945 and were considered by Japanese authorities as “stateless” Korean nationals. In 1948, Koreans from Japan were faced with the choice to opt for the nationality of the South or that of the North, exporting the division outside the peninsula.

In debating whether to grant the right to vote to nationals residing abroad, the constitutional court reasoned that security considerations - namely, “our special situation of continuing confrontation with the North” - justified to prevent North Koreans and pro-North residents in Japan from exercising such right. These two groups correspond to “nationals” of the Republic of Korea living overseas (and not ethnic Koreans with foreign nationalities), since both of them identify with a citizenship that South Korea does not legally recognize. Contrary to their counterparts in other countries or to pro-South residents in Japan, they do not hold passports. This was a major fact advanced by the court in countering the “vague and abstract danger” that North Koreans and Koreans from Japan affiliated with the North would be easily able to influence elections under false identities if the right to vote was given to other nationals living abroad.

[E]ven if we were to allow our nationals living abroad to enjoy the right to vote, in our special situation of continuing confrontation with the North, it would seem that certain restrictions on the right to vote of North Korean residents or the Koreans residing in Japan aligned with the General Association of Korean Residents in Japan (*Chae Ilbon Chosŏnin Ch’ongryŏnhaphoe* or *Joch’ongryŏn*: hereinafter, “pro-*Joch’ongryŏn* Koreans residing in Japan”) will be acceptable. There is also concern about North Korean residents or *pro-Joch’ongryŏn* Koreans residing in Japan exercising the right to vote under false identities, but it is not impossible to utilize the registration policy under the current “Registration of Korean Nationals Residing Abroad Act” as well as the domestic domicile report system under the “Act on the Immigration and Legal Status of Overseas Koreans” to prevent such an event. Also, as the Korean nationals residing abroad who are not North Korean residents or *pro-Joch’ongryŏn* Koreans residing in Japan possess passports, unlike the North Korean residents or *pro-Joch’ongryŏn* Koreans residing in Japan, it is possible to differentiate the two. Therefore, the vague and abstract danger of North Korean residents or *pro-Joch’ongryŏn* Koreans residing in

⁵³ *Ibidem*, p.141.

Japan affecting the elections cannot justify depriving Korean nationals residing abroad of their right to vote completely.⁵⁴

The “General Association of Korean Residents in Japan” (“*chae ilbon chosŏnin ch’ongnyŏnhaphoe*” or “*ch’ongnyŏn*”) mentioned in the above excerpt was organized in 1955 in opposition to the pro-South “Korean Residents Union in Japan” (“*chae ilbon taehan min’guk mindan*,” or “*mindan*.”) *Mindan* was formed in 1946, after having made secession from the main “League of Koreans in Japan” (“*chae ilbon chosŏnin yŏnmaeng*” or “*choryŏn*”) created in October 1945 with leftist leanings - many of its leaders “were communist activists recently released from prison.”⁵⁵ *Choryŏn* naturally aligned with the Democratic People’s Republic of Korea in 1948, a choice which was then supported by a majority of the Korean community in Japan and has been perpetuated by its successor organization, *Ch’ongnyŏn*.

After the establishment of the two separate Korean regimes (South Korea, or *Kankoku* in Japanese, and North Korea, or *Kita Chōsen*), *Choryŏn* declared its solidarity with the DPRK and referred to the Rhee government established in the ROK as an American puppet regime. *Choryŏn*’s position was most likely consistent with that of the majority of the Korean community. From the onset, the Japanese government encouraged Koreans in Japan to change their existing *Chōsen* nationalities to *Kankoku* because *Chōsen* now referred only to North Korea. Nevertheless, as many as two-thirds of the Korean population maintained their *Chōsen* nationalities, which, by default, made them North Korean nationals despite the fact that most first-generation Koreans in Japan had come from southern Korea. Although some kept their *Chōsen* nationalities because they did not support either the North or South Korean government, for others, allegiance to North Korea was the nationalistic choice.⁵⁶

Throughout the 1970s and no matter their affiliation, Koreans from Japan fell prey to security laws in the South and were one of the target groups of ideological conversion.⁵⁷ It is estimated that “between April 1971 to February 1976, some thirty-six second-generation Koreans from Japan were arrested for their alleged links with the ‘pro-North Korean’

⁵⁴ 19-1 KCCR 859, 2004Hun-Ma644, 2005Hun-Ma360 (consolidated), June 28, 2007, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume II, 2005-2008*, Seoul: Constitutional Court of Korea, 2009, pp.238-239.

⁵⁵ Erin Aeran Chung, *Exercizing Citizenship*, p.147.

⁵⁶ *Ibidem*, pp.148-149.

⁵⁷ Presidential Truth Commission on Suspicious Deaths of the Republic of Korea, *A Hard Journey to Justice: First term report by the Presidential Truth Commission on Suspicious Deaths of the Republic of Korea*, Seoul: Samin Books, 2004, p.152.

community in Japan and for violating South Korea's National Security Law."⁵⁸ The case of the Suh brothers is emblematic of this bias. In 1971, Suh Sung [Sö Sŭng] and Suh Jun-sik [Sö Chun-sik], two second-generation Korean residents in Japan, were arrested while re-entering South Korea where they were pursuing their studies. The Suh brothers were detained until 1990 and 1988 respectively, in virtue of their refusal to ideologically convert and renounce beliefs which they never held.⁵⁹ The 1987 change of regime did not signify the end of the conversion system, whose validity was challenged before the constitutional court in 1998. The verdict rendered in 2002 sheds light upon the mechanisms of exclusion operating inside South Korea to reject as enemies members of its political community.

Constitutional lessons

The constitutional cases reviewed above should not be read as a mere testament to the complexities of Korean history. Constitutional jurisprudence is not simply a reflection of the fact that markers of political inclusion and exclusion in the Korean peninsula are irreducible to the national division. The constitutional court's intervention should rather be seen in a dynamic perspective, as taking place in a field of contention and as advancing propositions which do not exhaust the various ways in which the national body can be envisioned - a variety which is however not infinite and grows out of shared postulates, such as collective identification on an ethnic basis. The latter is not incompatible with regimes of differentiation among ethnic Koreans depending on the imperatives of the existing South Korean state, in terms of national and economic security.

While the jurisprudence of the constitutional court in nationality cases can be described as rather progressive (against the discrimination of Koreans from China or for an extension of the right to vote to all nationals living abroad but North Koreans and pro-North residents in Japan), it has also contributed to consolidate a number of conservative premises when it comes to defining who belongs or not to the national community. In construing the status of North Korea and North Koreans, the court's jurisprudence has indeed reinforced the 1948 antagonistic framework embedded in the constitution - a very approach to the division whose demise seemed announced by the inter-Korean summit of June 2000. By ruling in favor of equality in employment opportunities for ethnic Koreans with Chinese nationality or

⁵⁸ Erin Aeran Chung, *Immigration and Citizenship in Japan*, New York: Cambridge University Press, 2010, p.93.

⁵⁹ See the autobiography written by one them. Sung Suh, *Unbroken Spirits. Nineteen Years in South Korea's Gulag*, Lanham: Rowman and Littlefield, 2001.

for most citizens residing abroad to exercise their right to vote, the court has paradoxically confirmed the validity of differential categories of Koreans and the legitimacy of their selective activation in light of “national” interests. In framing the “national,” the constitutional court has moreover often relied on a conservative vision of history, especially in relation to the colonial era.

The cases reviewed above therefore emphasize both the potencies that characterize judicial action and the ambivalence with which the South Korean court has embraced its role as guardian of the constitution and of a certain way of envisioning the nation.

Enmity and ideology

Contesting the “pledge to abide by the law”: from hunger strike to constitutional complaint

In 1998, the Constitutional Court of Korea celebrated its first decade of adjudication. As of January of that year, 3,720 cases had been filed since the beginning of its operations and 617 new requests reached the institution between January and December.⁶⁰ Among them was a constitutional complaint challenging the “pledge to abide by the law” (“*chunbŏp sŏyakche*”), formerly known as the ideological conversion system, on the basis that it violated the freedom of conscience, right to pursue happiness, and right to equality of inmates sentenced under the National Security Act or the Assembly and Demonstration Act (“*chiphoe mit siwi-e kwanhan pŏmnyul*”). In 1999, two other separate cases were filed on similar grounds and all were consolidated under the title of “pledge to abide by the law case.”⁶¹

Very little about the complainants and their cases was recollected in the constitutional judgment. The facts that motivated the petitioners’ condemnations under the National Security Act were never mentioned, removing both the crimes and their authors from the scope of the ruling. Moreover, as is common practice in the constitutional court’s decisions, the names of the complainants were made anonymous by replacing their middle syllables with the letters “O/○”: Cho O-rok (조○록), Cho O-won (조○원), and Lee O-chul (이○철) whose last petition was filed along with twenty-eight additional prisoners. This identity erasure resulted

⁶⁰ Statistics from the Constitutional Court of Korea’s website. Accessed on August 26, 2013 at: <http://english.court.go.kr>.

⁶¹ 14-1 KCCR 351, 98Hun-Ma425, etc., (consolidated), April 25, 2002, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, pp.12-43.

in a very partial overview of the three cases challenging the pledge, summarized by the court as follows:

(1) 98Hun-Ma425

The complainant was detained for violation of the National Security Act on February 2, 1978, and a sentence of life imprisonment was finalized on December 26, 1978. He was serving his term at Andong Correctional Institution when he was excluded from parole release on August 15, 1998 for refusing to submit the pledge to abide by the law. On November 26, 1998, the complainant filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review requiring inmates imprisoned for violation of the National Security Act to submit the pledge to abide by the law for parole review, alleging that the provision infringed on his freedom of conscience, the right to pursue happiness, and the right to equality.

(2) 99Hun-Ma170

The complainant was detained for violation of the National Security Act in February, 1993, and received an eight year sentence. He was serving his term at Chunchon Correctional Institution when he was excluded from parole release on August 15, 1998 and again on February 25, 1999 for refusing to submit the pledge to abide by the law. On March 25, 1999, the complainant filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review for the reasons cited in the above case.

(3) 99Hun-Ma498

The complainants received one and a half year to five year sentences for violation of the National Security Act between 1996 and 1998, respectively. The complainants were excluded from parole on February 25, 1999 for refusing to submit the pledge to abide by the law. On August 24, 1999, the complainants filed a constitutional complaint against Article 14(2) of the Ordinance for Parole Review for the reasons cited in the above case.⁶²

This lack of factual texture is customary in the constitutional court's rulings; yet, it also represented a revealing silence about the order of discourse in which the justices operated. Indeed, the issue to know who was subjected to ideological conversion in the first place, and for which crimes, was left entirely unaddressed by both the majority and dissenting sides of the court, while the legitimacy of such categories as "thought criminals" and "ideological enemies" was only partially called into question. The very circumstances surrounding the case which triggered the process of constitutional review posed, however, a

⁶² *Ibidem*, p.17.

deep challenge to judges' shared assumption that all the conversion's targets were genuine communist believers and national security offenders.

The first anonymous petitioner was in fact Cho Sang-rok (Cho Sang-nok), a national security inmate who received public attention in human rights circles after Amnesty International adopted him as a prisoner of conscience in the late 1990s. In 1999, the organization launched an appeal calling for his immediate and unconditional release. The letter of the appeal provided the following description of Cho's case, which can be contrasted with the paucity of the overview given by the constitutional court.

Cho Sang-nok, aged 53, was arrested in January 1978 by the Agency for National Security and Planning (South Korea's intelligence service) and held for 17 days without access to a lawyer or his family. During this time he says he was subjected to electric shocks, water torture and beatings in order to force him to confess to charges of espionage. He was convicted under the National Security Law of passing "state secrets" to North Korean agents in Japan and sentenced to life imprisonment. Amnesty International believes the charges were politically motivated and that the main evidence used to convict him was his own confession, extracted under torture. In spite of many appeals by Amnesty International and other human rights organizations, the South Korean authorities have provided no concrete evidence to substantiate the charges of "espionage." He was excluded from a recent prisoner amnesty because he refused to sign an oath pledging respect for the law in South Korea (including the National Security Law). Cho Sang-nok is held in solitary confinement and is reported to be in poor mental and physical health following a series of hunger strikes staged to protest against the law-abiding oath and to demand an investigation into past human rights abuses.⁶³

Cho Sang-rok's story was but an accident, illustrating hundred other cases of political imprisonment justified by the rhetoric of national security, but motivated by alternative concerns. In 1970s authoritarian South Korea, Cho's fate was exemplary of an entire subclass of incidents in which South Koreans who visited Japan for study, business, or family meetings were arrested after returning home and accused of having been in contact with North Korean agents and pro-North Korean organizations during their stay abroad. As evoked earlier, the same was true for ethnic Koreans from Japan traveling between the two countries. Cho's case was therefore but one of the many cases of espionage fabricated during the regimes of Park Chung-hee (1961-1979) and Chun Doo-hwan (1980-1987). Sentenced for the most serious offense under the National Security Act, spying, Cho and other fellow victims were subjected to the ideological conversion policy while fostering no belief in communism.

⁶³ Amnesty International, *Amnesty International Appeal. Prisoner of Conscience: Cho Sang-nok*, ASA 25/08/99, London: Amnesty International, 1999, p.1.

This paradoxical reality highlights the deep ambiguity that has characterized South Korean governments' use of national security and anti-communism before, as well as after, the country's transition to procedural democracy: the threat of North Korea, no matter its intensity, has consistently been mobilized to broadly construe enmity and to include in it individuals or activities that did not endanger the safety of the state. The breadth of national security's domestic uses and anti-communism's effects appears as a blind spot of the constitutional court's decision on the pledge to abide by the law. Indeed, the judges' reasoning rested on the consensual premise that South Korea's conversion policy only targeted very "real enemies" against which the country still ought to protect itself in the early 2000s - such consensus did not however prevent disagreements over the means necessary to realize this end. An additional source of implicit convergence can be found in the silence reigning over the colonial genealogy of the conversion system, an attitude characteristic of the conservative nationalist narrative embraced by the constitutional court.

Colonial origins and authoritarian reactivation of conversion

As exemplified by the pledge's origins, Korea's experience under Japanese rule has produced institutional legacies which have endured after 1945. Acknowledging and analyzing the colonial roots of Korea's "modernity" still represent a challenge in light of the "relentless politicization of the historical record that emerged after the division."⁶⁴ Indeed, the complex dynamics inherent to the colonial situation cannot be subsumed under the dichotomy of "colonial repression and exploitation versus Korean resistance" deployed in the linear and teleological flow of nationalist narratives, North and South. To them, colonialism and modernity are bound to be mutually exclusive, assuming that "colonial rule either destroyed or distorted Korea's effort to modernize."⁶⁵

The notion of ideological deviance and the correlated conversion program designed to reeducate "thought criminals" ("*sasang pŏmch'oeŭi*") were introduced by Japanese authorities in the mid-1920s, both at home and in colonial Korea. In Japan, they served to counter the radical movement which had developed in the second decade of the 20th century, emphasizing the necessity of its anarchist, socialist, or communist partisans' reintegration in

⁶⁴ Gi-Wook Shin and Michael Robinson (eds.), *Colonial Modernity in Korea*, Cambridge: Harvard University Asia Center, 2000, p.2.

⁶⁵ *Ibidem*, p.5.

the “national body” (“*kokutai*”) of subjects loyal to the emperor.⁶⁶ Those mechanisms were exported to Korea around the same time, and in the process transformed, to confront the domestic independence movement, which was mostly composed of leftists after the failure of the pacific strategy of the “March First Independence Movement” (“*samil undong*”) in 1919 and the dissolution of the united front between radicals and gradualist moderates in the early 1930s.⁶⁷

The instrument designed to oppose resistance in Japan and colonial Korea, the conversion policy, can be described as a technology of coercion, surveillance, and discipline of real or so-called left-wing political activists which operated in and outside prisons. Officially aimed at making them recant and profess their obedience to the existing institutional and legal order, the system worked in Korea through subjugation by a tailored and rationalized exercise of state violence. The inability of the independence movement to reproduce itself in prison - an ordinary site of recruitment, formation, and propagation for dissidence in other contentious contexts - testifies to the effectiveness of the device and of the larger apparatus in which it was deployed.⁶⁸

In 1945, the conversion policy was abolished by the U.S. provisional government in Japan but was maintained in South Korea, albeit not formally.⁶⁹ Again institutionalized in 1956 through a regulation order of the Ministry of Justice, the system of ideological conversion only became an integral part of the state repressive apparatus under Park Chung-hee’s *Yusin* system (1972-1979), a period of exacerbated social mobilization and repression under the motto of “revitalization” and anti-communism. In 1973, “ideological conversion

⁶⁶ Richard Mitchell, *Thought Control in Pre-War Japan*, Ithaca: Cornell University Press, 1976.

⁶⁷ The declaration of independence and nation-wide demonstrations of the 1919 “March First Independence Movement” were bloodily repressed by colonial authorities. While a provisional government was founded in exile, the nationalist cause in Korea split along ideological lines in the early 1920s, “between moderate nationalist leaders who advocated gradualist reformist solutions to the problem of independence and a younger, more radical group who advocated social revolution and overt resistance to Japanese imperialism.” The latter had become prominent by the 1930s. Michael Robinson, *Cultural Nationalism in Colonial Korea. 1920-1925*, Seattle: University of Washington Press, 1988, p.6.

⁶⁸ Leading figures of the early independence movement, such as Ch’oe Nam-sŏn and Yi Kwang-su, later became prominent collaborators and gave literary accounts of the dehumanization experienced during their time in jail. Their trajectory contrasts with the usual role of prisons as a site of reproduction for independence movements in a variety of other contentious contexts - as in colonial India and Vietnam, or during the civil rights movement in the United States. Justine Guichard, *La prison de Seodaemun, lieu de mémoires. La renaissance d’une prison sud-coréenne en mémorial de la résistance anti-coloniale*, Unpublished Master thesis, Sciences Po, Paris, 2009.

⁶⁹ While U.S.-sponsored political reforms were aimed at turning occupied Japan into a democracy, the priority of the American military administration in South Korea was the struggle against communism.

task forces” were set up in the five prisons were approximately 500 unconverted prisoners were being kept (Taejŏn, Kwangju, Ch’ŏngju, Taegu, and Mokp’o).⁷⁰

Rather than being motivated by ideological concerns, the revival of the conversion policy in the 1970s coincided with the regime’s determination to prevent the looming release of national security offenders whose long-term prison sentences were coming to a close.⁷¹ In this respect, reinsertion in the fabric of society was never the system’s objective. On the contrary, the Social Security Act was enacted in 1975 to strengthen the conversion program and authorize public prosecutors to prolong the custody of individuals deemed dangerous, even if they had signed a conversion statement.

The conversion policy was based on the classification of prisoners (both political and non-political) into four categories to which a differential treatment was associated.

Class A includes the prisoners who can be rehabilitated; Class B includes the prisoners whose rehabilitation is considered difficult; Class C includes prisoners whose rehabilitation is deemed very difficult, including recidivists and political prisoners who have “converted.” Political prisoners who have not converted belong to Class D and are not entitled to the benefits granted to the other classes. According to testimonies of former political prisoners, in order to show that they had “converted” they were required to write a statement explaining (a) how they became communists, (b) the activities they carried out to promote communism, (c) the reasons why they wanted to give up communism, and (d) what they proposed to do in the future. The prisoners then appeared before a committee of prison officials who decided whether to accept the statement as evidence of a true “conversion.”

Released political prisoners have testified that during the 1970s and 1980s many prisoners were tortured to force them to “convert.” At present, however, the main pressure on prisoners is said to be a psychological one, including the denial of early release on parole. Prisoners who have not “converted” are also reportedly unable to receive and send regular correspondence, to meet visitors without guards being present, to have extra items of furniture in their cells, to work, watch television or to attend religious worship.⁷²

⁷⁰ Sung Suh, *Unbroken Spirits*, p.56.

⁷¹ “The reason why the government reinforced the ideology conversion project was that the majority of leftist prisoners were due to be released upon expiration of their sentences, in the mid-1970s; almost all of such long-term prisoners arrested during the [Korean] war were sentenced to life imprisonment, but their sentences were reduced to 20 years’ imprisonment just after the April Revolution of 1960 [which opened a one-year long episode of political liberalization in South Korea], making them due to be released in the middle of the 1970s.” Presidential Truth Commission on Suspicious Deaths of the Republic of Korea, *A Hard Journey to Justice*, p. 152.

⁷² Amnesty International, *South Korea. Amnesty International’s Concerns*, ASA 25/14/92, London: Amnesty International, 1992, p.12.

Out of the 500 detainees subjected to the conversion program in the 1970s, those who refused to recant came to be known as “*pijŏnhyang changgisu*” - literally, the “unconverted long-term prisoners.” Numbering close to a hundred, most of them remained in detention until the 1990s, and sometimes until the very end of the decade like Cho Sang-rok, the lead complainant in the pledge to abide by the law case. Although the prison conditions and method of ideological conversion started to evolve in the mid-1980s,⁷³ the policy endured through the first decade of South Korea’s transition to democracy. It was substituted with the pledge to abide by the law in July 1998. This very same year, the issue of the pledge’s constitutionality was raised before the Constitutional Court of Korea. No mention of the colonial origins of the program, neither by the majority opinion nor the dissenting camp, was made in the court’s 2002 verdict which upheld the validity of the pledge. The echo of this historiographical silence resonated all the stronger since the ruling could be read as a divided judgment on the conversion system’s history, albeit framed in a limited way.

Majority ruling and minority opinion: divergences within a shared order of discourse

The constitutional issue addressed in the decision was framed as twofold: firstly, whether requiring inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act to submit a pledge to abide by the national laws of the Republic of Korea before they could be considered for parole release violated the freedom of conscience guaranteed by article 19 of the constitution; and secondly, whether the differential treatment introduced by the obligation that those inmates alone sign the pledge violated their right to equality. Yet, what the majority and dissent actually engaged in through their respective reasonings was a judgment on the history of the ideological conversion system itself: Had sufficient change been introduced to legitimize its resilience after the 1987 political transition, or had excessive continuity prevailed and therefore compromised the nature of South Korea as a “free democratic society”?

The fact that the pledge neither imposed a “standardized form of expression” nor an actual conversion statement was presented by the majority as a decisive element of its compatibility with the freedom of conscience guaranteed by the constitution.

⁷³ Suh Sung evokes the improvement of material conditions in 1983-1984 as a “prison spring,” which translated into an incentive-based approach to conversion through promises of release and special treatment. Sung Suh, *Unbroken Spirits*, pp.145-150. The period of the mid-1980s coincided with Chun Doo-hwan’s promotion of political liberalization under control, which eventually reverted against the regime by strengthening the pro-democracy movement that brought about its demise.

Contents of the pledge to abide by the law required by the instant provision [Article 14 of the Ordinance for Parole Review] include the “vow to respect the national legal order of the Republic of Korea.” An inmate needs to fill out his name, Korean identification number, convicted crime, circumstance of conviction as well as sentence, pledge to abide by the established legal order of the Republic of Korea, future life plan, and other statements if desired. There is no standardized form of expression for the pledge, and in practice, most inmates simply write that “they will abide by the laws of Korea.”⁷⁴

As the majority recalled, the pledge to abide by the law was precisely introduced to “silence criticism on the past ideological conversion program” and to neutralize the charge that it violated the freedom of conscience of national security offenders. By requiring them not to explicitly abjure their belief in communism but only to state their commitment to respect the laws of South Korea, the pledge was construed by the judges as distinct enough from the pre-1998 device. Indeed, the act of submitting the pledge was described as merely “reconfirming the duty to abide by the law that is duly required of all citizens,” thereby neither intruding on the domain of conscience nor injuring the right to equality of anti-state criminals.⁷⁵

Among the complainants are some long-term prisoners who have refused to renounce their beliefs in communism. They may be convinced that the contents of the National Security Act are contrary to their political beliefs or that the free democratic regime is against their ideologies, and their such beliefs may be known to others. However, as long as the contents of the pledge used for parole review require nothing more than what has been described above, such pledge does not touch upon the domains of conscience. Basically, the Constitution does not protect anyone's right to overthrow the existing legal order or a free democratic order using such unconstitutional means as force or violence with vehement disrespect for the Constitution or other laws of the land. Requiring submission of a pledge to abide by the existing legal order or to respect the extant constitutional regime does not violate any constitutionally protected freedom or right, including the freedom of conscience.⁷⁶

On the contrary, two dissenting justices, Kim Hyu-jong and Choo Sun-hoe, argued that the formal difference between the new pledge and the old conversion system only masked the

⁷⁴ 14-1 KCCR 351, 98Hun-Ma425, etc., (consolidated), April 25, 2002, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, pp.24-25.

⁷⁵ *Ibidem*, p.25.

⁷⁶ *Ibidem*.

underlying continuity existing between them, since “both are used to effectively separate and isolate individuals with particular ideological beliefs.”⁷⁷ This reasoning further led the minority to raise the fundamental issue of the means available to democratic societies in order to protect their existence without betraying their principles.

In a free democratic society, the rights of even opponents of free democracy are protected; only their specific actions can be restrained when they are deleterious to the public interest. The government must protect itself against extremists trying to overthrow the government via violence and force. In a free democratic society, however, the government can only penalize the opponents of democracy for their “actions”; it should not force them to renounce their ideology or make them pledge to abide by the law against their beliefs using any form of direct or indirect means of coercion. This is what distinguishes a free democratic society from a communist regime.⁷⁸

The dissenting judges therefore identified a dual process of differentiation for South Korea to qualify as a “free” or “liberal” democratic regime (“*chayu minjujuui*”): differentiation from its authoritarian past, and differentiation from a communist regime - namely, North Korea - in which not only political acts, but thoughts, are likely to be criminalized. Even in its rejection of the pledge, the minority nonetheless adhered to the postulates assumed by the rest of the court: that contemporary South Korea’s national security apparatus is used to confront real ideological enemies, that is to say, individuals who oppose both the existence of the state and of its democratic order. These individuals are unquestionably identified as communists, although both the minority and majority recognized that they need not be affiliated with North Korea.

North Korea still endeavors to bring about the communist revolution in the entire peninsula, and to protect itself against such external threats, the government of South Korea has no choice but to defend against North Korea’s attempts at radical revolution in South Korea. Illegal activities by individuals aiming to disturb the basic order of free democracy or overthrow the government, either in alliance with the North Korean government or through independent decision of [their] own, have largely been dealt with either by the National Security Act or by the Assembly and Demonstration Act because of the nature of such activities. It is under such circumstance that the parole review board examines, in addition to things ordinarily taken into consideration to determine eligibility for parole, whether inmates imprisoned for violation of the National Security Act or the Assembly and Demonstration Act are willing to observe the national laws once released on parole. Thus, differential treatment of

⁷⁷ *Ibidem*.

⁷⁸ *Ibidem*, p.37.

such inmates is not without a reasonable basis, and is appropriate as a means to achieve the policy objectives.⁷⁹

The critical analysis of the limits associated with constitutional discourse does not entail that the South Korean court has always been blind to the misuses of security laws. In its landmark 1990 decision on the partial constitutionality of the National Security Act, the court recognized multiple abuses which could be made of the legislation if interpreted too broadly.⁸⁰ It consequently indicated that the security legislation could only apply to those activities clearly endangering the state or the “basic order of free democracy.” As revealed by subsequent cases which confirmed the validity of the law thus understood, one of the main concerns of the court in the 1990s was to prevent the National Security Act from being used in order to restrict “the freedom of science and arts” (“*hakmun /yesul chayū*”), that is to say academic research and artistic creativity.⁸¹

The full scope of exclusion

If the constitutional court has been able to conceptualize some misuses of the National Security Act, it has been beyond its reach so far to analyze their full extent. Indeed, the distortions of notions such as security and anti-communism cannot be viewed as accidental, or as the mere product of law-enforcing actors’ discretion. These distortions have instead been embedded in the functionality of repressive tools, whose scope appears wider than is even recognized by South Korean political forces in favor of abolishing the National Security Act. For instance, when President Roh Moo-hyun defended the repeal of the law in 2004 because of its tarnished legacy as a tool of oppression against dissidents, his discourse amounted to a limited recognition of the range of effects, past and present, produced by the security legislation.

While the National Security Act is still in force, the pledge to abide by the law was withdrawn in 2003, during Roh’s presidency. This reform does not mean that individuals convicted under the law are now treated on an equal footing with other criminals. In particular, being released does not absolutely clear former national security convicts from

⁷⁹ *Ibidem*, p.30.

⁸⁰ 2 KCCR 49, 89Hun-Ka113, April 2, 1990.

⁸¹ 8-2 KCCR 283, 95Hun-Ka2, October 4, 1995.

suspicion. For instance, the Security Surveillance Act, which was enacted in 1989 to replace the 1975 Social Security Act, transformed prosecutors' prerogative to prolong inmates' custody for security reasons into the power to place them under surveillance, without confinement. Surveillance therefore applies to people convicted for security offenses "in order to prevent the danger of their recommitting crime and promote their return to normal sound social life, and thereby to maintain national security and social peace."⁸² Surveillance measures take the form of an obligation to periodically report one's schedule to a local police station, which includes providing detailed information about "political activities, meetings, trips and other matters as deemed appropriate by the police station chief," and they can also entail the prohibition from having contacts with former fellow inmates and from participating to certain events or demonstrations.⁸³

This dissertation's investigation into the National Security Act's enforcement patterns since 1987 has demonstrated a clear correlation between the law's deployment and the post-transition mobilization and discourse associated with certain segments of society, such as students, "progressive" intellectuals, and workers. Such evidence corroborates Choi Jang-Jip's analysis about anti-communism's persistence in contemporary South Korean politics as the expression of a consensus around a form of "conservative democracy," in which the masses are socio-economically mobilized by the state but excluded from substantial political participation.⁸⁴ According to Choi, this exclusion means that underlying cleavages in society - most fundamentally "the interests and demands of the poor and the working class" - are not politically represented in South Korea's party system, which is "conservatively biased."⁸⁵

The constitutional court, which has the power to dissolve political parties whose aims or activities are incompatible with the democratic order, did not contribute to "liberalize" this arena - in the sense of introducing more plurality in it. On the contrary, the court for instance ruled in 2006 against the registration of the minor Socialist Party ("*sahoedang*") by upholding the requirements set by the Political Parties Act ("*chōngdangpōp*"), originally enacted in 1962. These requirements prescribe that a political party, to qualify as such, must commit to "democratic organization and activities" and "procure an organization sufficient to participate in people's political will-formation" by having local representation in at least five

⁸² Amnesty International, *South Korea. Amnesty International's Concerns*, p.17.

⁸³ *Ibidem*.

⁸⁴ Jang-Jip Choi, *Democracy After Democratization*, p.151.

⁸⁵ *Ibidem*, p.6.

cities or provincial branches, and no less than 1,000 members in each of them.⁸⁶ In a very short and unanimous decision rendered in 2006, the court assimilated the Socialist Party to a regional organization which could be legitimately denied the status of a political party for failing to meet the above conditions.

Representative democracy under our Constitution, in order to function properly, requires a stable majority in the parliament. Therefore, there is a legitimate interest in exclusion of minor parties. One may contest the legitimacy of excluding regional parties. However, exclusion of regional parties representing the political wills of only certain regions cannot be said to be of an illegitimate purpose under the Constitution when party politics depending excessively on regional affiliation has become problematic in our political reality.⁸⁷

According to Choi Jang-Jip again, construing regionalism as a fundamental cleavage in South Korean politics - which the court did - is in itself a symptom of the structural distortions affecting political representation. Indeed, “regionalism emerged as the dominant element in party politics after the democratic liberalization and as a result of the political representation system modeled largely by Cold War anti-communism,” because “political competition based on the expression and mobilization of professional, class, or any other conflicts, interests, or passions was difficult.”⁸⁸ Rather than regionalism,

The most serious problem of democracy in Korea is the ideologically narrow base of political representation, which in fact represents only conservatives. In substance, this structure of conservative bias has only become reinforced after democratization, despite changes in the overall political landscape. When a nation is ideologically fettered, that is to say, when Cold War anti-communism still functions as the dominant language of the nation’s politics, democracy does not become a mechanism for building consensus to solve the various problems that the nation faces as a society. Instead, it serves to justify vested interests and special privileges “in the name of democracy.”⁸⁹

In a 2001 case, the constitutional court recognized that “there is little, if any, difference between the existing political parties in their ideologies, policies, and party platforms,” and that, as a result, “many voters assert that they do not support any political

⁸⁶ 18-1 (A) KCCR 402, 2004Hun-Ma246, March 30, 2006, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume II*, p.219.

⁸⁷ *Ibidem*.

⁸⁸ Jang-Jip Choi, *Democracy After Democratization*, p.95.

⁸⁹ *Ibidem*, pp.5-6.

party.”⁹⁰ The court has not however ventured into the causes or consequences of this diagnosis. In the political sphere, this uniformity particularly translates into an absence of dissensus over socio-economic policies, subordinated to the “national” objective of pursuing a neoliberal growth-first and pro-*chaebŏl* strategy.

The fact that South Korea’s politics of enmity has been rooted in more than the division could be a source of optimism and skepticism alike: on the one hand, the dismantlement of resilient mechanisms of exclusion does not appear completely premised on the collapse of the North Korean regime, implying that further democratization of the political sphere could maybe be achieved independently from this prospect; on the other hand, reunification on South Korean political and socio-economic terms would not necessarily be a guarantee of profound and structural change. Furthermore, if greater inclusion in the South’s democratic order is only bound to come from within, the possibility that the constitutional court will be resisting rather than prompting its advent cannot be easily discounted.

Enmity as a shared modality of national imagination

According to Lee Namhee, the discourse of enmity articulated by the South Korean state since its founding has penetrated the fabric of society in at least two ways. On the one hand, anti-communism became largely internalized among Southern nationals with the experience of the Korean War from 1950 to 1953, and through the state-sponsored campaigns of education and mobilization which were initiated in the 1960s.⁹¹ As a result, not only a majority of the population, but most of the pro-democracy movement until the 1980s, adhered to a construction of enmity which was thus both “official” and “hegemonic.” On the other hand, even when such construction started to be contested, the representational strategies through which it was challenged did not subvert the notion and language of enmity itself. In other words, the actors who were apparently reversing the paradigm imposed by the state to think the division - thereby turning the United States into a foe and North Korea into a friend - continued to operate within the demonizing logic and binary terms structuring the discourse of the forces that they opposed.

⁹⁰ 13-2 KCCR 77, 2000Hun-Ma91, etc. (consolidated), July 19, 2001, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, p.206.

⁹¹ “South Korea’s postwar anticommunism was not only state policy but also deeply internalized and pervasive, ‘bewitching [people’s] psyche and warping their perspective’ to such an extent that Koreans became ‘self-divisional.’” Namhee Lee, *The Making of Minjung*, p.3.

Moreover, if state institutions were the major motor in creating and perpetuating a shared sense of anti-communism in South Korean society, especially through educational policies, additional groups contributed to its diffusion and entrenchment. Indeed, “anti-communism in South Korea has been promoted and sustained not only by the state but also by the mass media, Christian and veterans’ organizations, and various civil groups.”⁹² Conservative interests continue to assume this role in contemporary South Korea, as demonstrated by their mobilization during the debate over the abolition of the National Security Act. In particular, the press has been “the fortress of Cold War anti-communism” since the transition, a function which was first imposed upon it during the 1970s but which it has subsequently served voluntarily.⁹³

Anti-communism’s deep internalization during the authoritarian years was for instance expressed in the hostile feelings fostered toward any individual suspected or convicted of an anti-state crime under security laws - as well as toward his or her family members, who would become “subjected to life-long scrutiny and harsh treatment by the state and society.”⁹⁴ In addition, “human rights advocates have long argued that the public at large accepted torture as necessary when applied to North Korean agents and political prisoners who had violated the National Security Law. When Park Jong-chul, a third-year Seoul National University student, died as a result of torture in 1987, some journalists reporting the incident suggested that the detective who tortured Park must have been confused about whether Park was involved in a national security incident (*kongan sakŏn*) or in a more common antigovernment protest (*siguk sakŏn*). The implication was that torture would have been less controversial if Park had violated the NSL.”⁹⁵

This general hostility was not only confined to ordinary people but also shared by regime opponents and pro-democracy activists, for whom not being labeled as “pro-communist” could be a matter of survival. As analyzed by Lee Namhee, “the rhetoric of anti-communism” embraced by the student movement (or “*undongkwŏn*”) until the 1980s “might have been a strategic ploy” to avoid the irreversible consequences of such accusation for one’s life and family. Yet, their desire for separation went as far as to extend to prison life,

⁹² *Ibidem*, p.74.

⁹³ “In return for accepting the role, news companies grew to be giant corporations with government favor, while at the same time journalists quickly emerged as a special group of intellectuals with a high salary range, a variety of fringe benefits, and access to power and resources.” Jang-Jip Choi, *Democracy After Democratization*, p.80.

⁹⁴ Namhee Lee, *The Making of Minjung*, p.107.

⁹⁵ *Ibidem*, p.85.

where “through the 1970s and into the mid-1980s, some *undongkwōn* political prisoners avoided talking to the long-term political prisoners and refused to share the same cell, and some even refused to share with those prisoners the privilege of a two-hour exercise time for which they had fought.”⁹⁶

These long-term political prisoners were the inmates which the ideological conversion program was targeting through a variety of means - seclusion from other prisoners and any prison activity (labor, reading, correspondence, visits, etc.), physical mistreatments, pressures to convert by family members, and above all starvation as their portion sizes could be reduced by half. Because “it was dangerous for individuals or groups to support those with a presumed connection to North Korea, regardless of the nature or the extent of such connection,” long-term political prisoners remained invisible in the public realm until the late 1980s.⁹⁷ By then, the pro-democracy movement’s longtime solidarity with anti-communism had nonetheless been undone.

According to Henry Em, “it was the 1980 people’s uprising in Kwangju [...] and the massacre perpetrated by government troops, which broke the state’s ideological hold over the democratic movement.”⁹⁸ The discursive shift undergone by the movement was characterized by widespread anti-Americanism (the United States being seen as an accomplice of the military junta in the Kwangju massacre) and enthusiasm for North Korea’s “*chuch’e sasang*” (or ideology of self-reliance). Challenging anti-communism amounted to a reconfiguration of the “national” imaginary, one in which the “*minjung*” (the “masses” or “common people”) became the true incarnation of the nation against the adverse forces forcibly maintaining its division - that is to say, the United States and South Korean authoritarian regimes. What took place in this process of contestation was however a mere inversion in the ascription of enmity, rather than an overcoming of its logic.

The South Korean *minjung* movement’s construction of itself as a counter-public sphere involved the establishment of “new norms and hierarchies” that consigned all other forces considered to be inimical to *minjung* as anti-*minjung*, antidemocratic, and antinational. The strategy of dichotomization, exalting the *minjung* while “othering” and at times demonizing

⁹⁶ *Ibidem*, p.107.

⁹⁷ *Ibidem*, pp.102-103. “It was not until 1986 that an organized effort on behalf of these prisoners began in South Korea, when *Minjuhwa Silch’ōn Kajok Undong Hyōbūihoe* (*Min’gahyōp*, Council of Family Members for Democracy), an organization of family members of political prisoners, initiated a campaign to release the long-term political prisoners.”

⁹⁸ Henry Em, “‘Overcoming’ Korea’s Division. Narrative Strategies in Recent South Korean Historiography,” *positions: east asia cultures critique*, Vol.1, No. 2, 1993, p.463.

the state, corporate conglomerates, and foreign powers, served to shore up their oppositional identity.⁹⁹

The South Korean pro-democracy movement's failure to escape the paradigm of enmity did not merely rest on its inability to think outside dichotomies (which may be impossible given that identity may hardly be conceived without alterity), but on its inability to envision itself outside certain prescribed forms of identification and otherness. In this respect, its espousal of the categories of "national" and "anti-national" appears as fundamentally problematic. As argued by Henry Em or Shin Gi-Wook, the notion of nation is not condemned to produce exclusion. It can instead carry a liberating and subversive potential, as it has in Korean history in the late 19th century or during the colonial era. While both authors call for contemporary South Korean nationalism to revive this dimension, a precondition to its reactivation may be abandoning the idea that a genuine incarnation of the nation exists - an idea that the "*minjung*" movement instead contributed to reinforce and which will continue to haunt the concept of "*minjok*" (or the nation as race) as long as the belief in its true essence remains.

Democracy and loyalty in comparative perspective

The concern with the "loyalty" of citizens expressed in the pledge to abide by the law case, and the broader project to determine who can be counted in the political community, have not been specific to the case of South Korean democracy. For instance, a Public Servant Loyalty Decree or "*Berufsverbot*" was implemented in West Germany in 1972 to ban "radicals" from becoming civil servants.¹⁰⁰ The adoption of this controversial measure intervened in the context of the anti-terrorist struggle against the Red Army Faction. While German courts upheld the *Berufsverbot*, the European Court of Human Rights' 1995 jurisprudence found disproportionate the dismissal of a public secondary school teacher who had joined the German Communist Party in the 1970s.¹⁰¹

More infamous than the *Berufsverbot* is the American precedent set by Executive Order 9066 of February 1942, commanding that all Japanese Americans on the West Coast, regardless of their citizenship, be confined in internment camps due to fears of "espionage"

⁹⁹ Namhee Lee, *The Making of Minjung*, pp.295-296.

¹⁰⁰ John Finn, *Constitutions in Crisis. Political Violence and the Rule of Law*, New York: Oxford University Press, 1991, p.210.

¹⁰¹ *Vogt v. Germany* (1996) 21 EHRR 205, (17851/91).

and “sabotage” in the wake of Japan’s attack on Pearl Harbor in December 1941. The successive measures directed against citizens and residents of Japanese ancestry (curfew, evacuation, and confinement) were challenged before the U.S. Supreme Court in a series of cases: *Hirabayashi* (1943), *Korematsu* (1944), and *Ex parte Endo* (1944) - the last two having been decided on the same day. The issue of loyalty - and how to verify it - was at the heart of these rulings.¹⁰² In *Korematsu*, the most notorious of these three cases, the government argued that the impossibility to administer individual loyalty tests to the entire suspect population (which involved approximately 112,000 persons of Japanese ancestry, including 70,000 American citizens) made it necessary to first evacuate all of them from the West Coast, place them in detention centers, and only release afterwards those whose allegiance to the United States could not be doubted.

This approach was validated by the court but rejected by three dissenting justices, who each called into question the majority’s reasoning from a different angle. However, none of them challenged a number of postulates which thus delineated the court’s order of discourse: the basic dichotomy between what is allowed in times of peace and permissible in times of war; the necessary deference due to military authority in the latter context; and the possibility - if not legitimacy - of preventively detaining individuals whose loyalty would be found wanting. In this perspective, one of the most fervent critics of the measures inflicted upon Japanese Americans, Justice Frank Murphy, was particularly attached to stress the need to differentiate between individual and group disloyalty, whose confusion he equated with the “abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy.”

No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that, under our system of law, individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to

¹⁰² *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Endo*, 323 U.S. 283 (1944).

encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.¹⁰³

The split and government-oriented *Korematsu* ruling has been considered quite difficult to reconcile with the unanimous and rights-oriented *Ex parte Endo* decision delivered on the same day and ordering the immediate release of Mitsuye Endo, an American citizen of Japanese ancestry, from the “war relocation center” where she was detained. The two cases however shared important underlying commonalities. Read together, they illustrate the full meaning and consequences of the court’s consensus over the possibility of preventive confinement based on loyalty. While the majority in *Korematsu* did not argue for the indefinite administrative detention of all Japanese Americans, the dissenting camp did not disagree with the confinement of those whose disloyalty could be established - provided that their loyalty would be tested “on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.”¹⁰⁴ As a result, *Ex parte Endo* unanimously conceded that loyal citizens of Japanese ancestry evacuated from their places of residence on the West Coast could not be legitimately kept in detention and prevented from returning home.

Highlighting the two decisions’ common discursive order does not amount to contending that disagreements within the court were minor or merely a matter of technicality. Important principles were articulated and clashed in the cases reviewed above; yet, antagonisms were not absolute. Instead, they were largely premised on shared understandings about war necessities - including the need to “separate the loyal from the disloyal” elements of society - and about the court’s role in such circumstances: even if military discretion ought to be wide, it cannot be entirely left without restraint; although civil liberties can be curtailed, they cannot be so arbitrarily, that is to say, without a reasonable basis.

These axioms of judicial action are largely self-referential, leaving it to the court to determine what qualifies as excessive in one case and reasonable in the other. From this perspective, the opinion that went the furthest in subverting the order of discourse in which the court operated can be attributed to Justice Robert Jackson. Jackson argued for the court to altogether abstain from reviewing the constitutionality of the challenged actions. His position

¹⁰³ *Korematsu v. United States*, 323 U.S. 214 (1944). Justice Owen Roberts called for a similar process of differentiation from the practices of the United States’ enemies in World War II when he pointed out that terms such as “assembly center” and “relocation center” were mere euphemisms for “prison” and “concentration camp.”

¹⁰⁴ *Ibidem*.

was not articulated out of deference for the executive or the military authorities, but out of fear for the power of legal rationalization that can be unleashed by judicial opinions.

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.¹⁰⁵

Jackson’s opinion exposes a fundamental part of the dynamics at work when courts intervene: the fact that constitutional discourse produces strong consolidation effects and carries transformative power, such as turning a mere rationale into a legal principle. Mark Tushnet has inferred from this point that “it is better to have emergency powers exercised in an extraconstitutional way, so that everyone understands that the actions are extraordinary, than to have the actions rationalized away as consistent with the Constitution and thereby normalized.”¹⁰⁶ Jackson’s and Tushnet’s argument for leaving emergency measures outside the realm of constitutional discourse however largely presupposes that emergency is contained in time and that a clear separation can be drawn between regular seasons of peace and temporary days of crisis.

The desirability and risks of abstaining from judicial review in contexts which experience a protracted security crisis thus deserve to be interrogated. In his analysis of the Supreme Court of Israel’s rulings about the Occupied Territories, David Kretzmer raises the issue of whether the restraint imposed by judicial scrutiny on the actions of military

¹⁰⁵ *Ibidem*.

¹⁰⁶ Mark Tushnet, “Defending Korematsu? Reflections on Civil Liberties in Wartime,” *Wisconsin Law Review*, Vol.23, No.2, 2003, p.305.

authorities has not paradoxically contributed to perpetuate the occupation by making it more acceptable:

Is it possible that in the medium or long term, the very lack of restraint that would have resulted from the absence of judicial review would have made the occupation less palatable for Israeli elites, and that the pressure to end the occupation by political settlement, which began after the *Intifada* started in 1987, would have been felt much earlier?¹⁰⁷

Although the present analysis' approach to constitutionalism in South Korea is similarly critical, it does not entail a normative assessment about what the court should have done. One of the reasons why the research refrains from this judgment stems from our belief that courts such as the South Korean one and its Israeli counterpart may not have had the possibility to act much differently than they did. Ultimately, the Constitutional Court of Korea indeed appears constrained by the very nature of the paradox in which it has been caught: that of defining and defending the constitutional order when the foundations that it sets institutionalize a durable bias against certain segments of society. Undoing such bias alone may be, and remain, beyond the court's reach.

¹⁰⁷ David Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories*, Albany: State University of New York Press, 2002, p.198.

CHAPTER SEVEN

Reviewing How the Enemy Is Treated

Article 12

- (1) All citizens shall enjoy personal liberty. No person shall be arrested, detained searched, seized or interrogated except as provided by Act. No person shall be punished, placed under preventive restrictions or subject to involuntary labor except by Act and through lawful procedures.
- (2) No citizen shall be tortured or be compelled to testify against himself in criminal cases.
- (3) Warrants issued by a judge through due procedures upon the request of a prosecutor shall be presented in case of arrest, detention, seizure or search [...].
- (4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.
- (5) No person shall be arrested or detained without being informed of the reason thereof and of his rights to assistance of counsel [...].
- (6) Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention.
- (7) In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimidation, unduly prolonged arrest, deceit or etc., or un a case where a confession is the only evidence against a defendant in a formal tribunal, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such confession.

The Constitution of the Republic of Korea

“A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth [...]. At times, the price of truth is so high that a democratic society is not prepared to pay it. To the same extent however, a democratic society, desirous of liberty seeks to fight crime and to that end is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary [...] Our concern, therefore, lies in the clash of values and the balancing of conflicting values.”

The Supreme Court of Israel, 1999

This chapter is dedicated to the special procedures - or lack thereof - deployed against national security suspects and defendants in the criminal justice process. The rulings delivered by the Constitutional Court of Korea in this area illustrate the firmness of its commitment to impose the rule of law and to dismantle several of the authoritarian legacies associated with the criminal handling of national security, whose invocation is not construed by constitutional jurisprudence as a justification in front of which the rights of suspects and defendants always and automatically have to bend. Such activism demonstrates that the constitutional order which the South Korean court has sought to define and defend after 1987 did not amount to

the preservation of the arbitrary and discretionary practices associated with law enforcement institutions. The court's attempt to undo these practices therefore complements our analysis of the paradoxical way in which it has embraced its role as guardian of the constitution: trying to reform some of the old regime's remains, while reinforcing the non-inclusive bias of the transition to democracy.

Do enemies also have rights?

Policies are usually administered far away from the place where they were conceived and elaborated. As a result, they are not only shaped by general rules and guidelines, but also by the local practices without which they would never be implemented. The actors to whom policy enforcement is delegated always enjoy some discretionary power, whether there exist or not effective mechanisms to ensure their compliance. The present chapter ventures into a variety of sites where the state's power to punish operates locally and concretely: in interrogation rooms, police stations, and detention centers. These are the sites where essential aspects of the politics of enmity are effected through the actual encountering of two unequal parties: on the hand, state actors - such as investigators from intelligence agencies, police officers, public prosecutors, or prison staff - confronting; on the other hand, an individual suspected, accused, or convicted of national security offenses.

The materiality of this encounter is almost palpable, taking place in a concrete space between particular actors whose relation is characterized by an imbalance of power. Its physicality is reinforced by the deprivation of liberty experienced by one of the two sides. In a democratic society, a defendant or culprit however remains a person, that is to say, a subject endowed with rights. These rights constitute some of the guarantees meant to redress the asymmetry of power that marks the criminal process. They are principally enumerated in articles 12 and 27 of the South Korean constitution, affirming the right of *habeas corpus* (i.e. the right to have the legality of one's arrest and detention reviewed), the presumption of innocence, the prohibition against torture, the right to counsel, the right to trial, as well as the obligation for all criminal procedures to be legal and lawful (i.e., the principles of rule of law and due process). Yet, the same constitution also permits that any of the "freedoms and rights of citizens" be restricted "when necessary for national security."¹ Therefore, the contours and limits of the criminal rights granted to suspected national security enemies are not clear, with

¹ Article 37, section 2 of the Constitution of the Republic of Korea.

South Korean law-enforcing actors having assumed the possibility of a systematic departure from common rules as soon as potential anti-state offenses are involved. Since the early 1990s, the Constitutional Court of Korea has played a critical role in clarifying the rights that apply “even for” or “except in” national security circumstances. The conditions and limits of the court’s activism against abuses of state power by law enforcement institutions are the object of the present chapter.

In essence, the institution’s commitment to make the criminal process more fair, even for enemies, belongs to what this study identifies as the paradox of the court’s role since the 1987 change of regime: while its jurisprudence has reinforced the post-transition relevance of inherited mechanisms of exclusion such as the National Security Act and the ideological conversion policy, its decisions have also strived to undo a variety of authoritarian legacies. This effort has however met a fundamental obstacle, as the actors traditionally involved in the criminal process have constrained the effectivity of constitutional rulings. To understand the nature of the court’s relationship with the institutions in charge of confronting enemies, an overview of law-enforcing agencies’ development after the transition will first be provided.

Cycles of continuities at the level of national security actors

In the South Korean constitution, the first constitutional guarantee against the state’s power to punish lies in its subordination to the rule of law and respect of due process throughout the criminal justice system. This obligation commands that “no person shall be arrested, detained, searched, seized or interrogated except as provided by Act” and following lawful procedures (article 12, section 1). As a result, “any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention,” which forms the essence of the right of *habeas corpus* (article 12, section 6). Moreover, the burden of proof does not rest on the defendant but on the prosecution, which implies that “the accused shall be presumed innocent until a judgment of guilt has been pronounced” (article 27, section 4). In addition to these procedural safeguards, criminal defendants are recognized the right to be promptly assisted by counsel and the right to be informed that they are entitled to receive such assistance (article 12, sections 4 and 5). The reason why an individual is arrested or detained also has to be communicated to him and his family, who “shall be notified without delay of the reason and time and place of the arrest or detention” (article 12, section 7).

A cardinal protection enshrined in the South Korean constitution is the prohibition against torture, which serves as a buffer between the state's power and the individual's body. It is aimed at preventing that a suspect be coerced to commit self-incrimination: "No citizens shall be tortured or be compelled to testify against himself in criminal cases" (article 12, section 2). This prohibition echoes how far the successive authoritarian regimes went in the depersonification of suspected or convicted criminals. The imbalance of power that characterizes the criminal process was then primarily manifested through an imbalance of forces. Although "the state did not adopt a 'Chilean solution' towards internal opponents, namely the physical liquidation through extra-judicial means of generously defined subversives," its security services were known for widely resorting to physical and psychological abuse.² More specifically, mistreatments were part of a quasi-systematic strategy to extract confessions on the basis of which sentences for violating security laws would be pronounced. As a result, the revised South Korean constitution contains detailed provisions about the use of confessions:

In a case where a confession is deemed to have been made against a defendant's will due to torture, violence, intimation, unduly prolonged arrest, deceit or etc., or in a case where a confession is the only evidence against a defendant in a formal trial, such a confession shall not be admitted as evidence of guilt, nor shall a defendant be punished by reason of such a confession.³

In the aftermath of the transition, these lines could not be merely read as a symbolic reminiscence of the abuses committed by the state and its agents in the past, but also as a horizon to urgently concretize. Indeed, political ruptures - such as South Korea's 1987 democratization - do not usually translate into immediate or momentous institutional change. The reform of institutional practices is always slow and difficult, *a fortiori* when they are associated with law-enforcing actors embedded in the old regime's repressive order and staying in place after the transition. In many respects, the type of change introduced by the enactment of new constitutional safeguards is only superficial. It does not ensure that further legal reform will automatically ensue, as was for instance the case in Italy where "fascist

² Jonathan Moran, "The Role of the Security Services in Democratization. An Analysis of South Korea's Agency for National Security Planning," *Intelligence and National Security*, Vol.13, No.4, 1998, p.4.

³ Article 12, section 7 of the Constitution of the Republic of Korea.

police laws remained on the books until the mid-1950s, effectively obstructing legal popular protest and facilitating a wide range of police interventions.”⁴

Even when legal reform takes place, it can prove incomplete and/or insufficient in prompting change. In South Korea, the Criminal Procedure Code (“*hyöngsa sosongpö*”) was amended as soon as 1988 but still contained various legacies from the former regimes whose constitutionality was subsequently challenged before the Constitutional Court of Korea. After 1987, core mechanisms of the authoritarian politics of enmity were not abolished but only partly modified, such as the 1948 National Security Act (revised in 1991 following a decision of partial constitutionality), the 1975 Social Security Act (replaced in 1989 by the Security Surveillance Act and reviewed by the court in 2001), or the 1980 Social Protection Act (amended in 1989, a few months before some of its old provisions were found constitutionally invalid). The security apparatus itself did not undergo any major transformation until 1994, when the National Security Planning Agency Act (“*kukka anjön kihoekpu pö*”) was enacted following six years of tensions and negotiations between the opposition and the government.⁵

The Agency for National Security Planning

The Agency for National Security Planning (ANSP) was founded in 1981 in replacement of the Korean Central Intelligence Agency (KCIA), itself established in 1961 to centralize both domestic and international intelligence.⁶ In 1988, the Agency for National Security Planning was forced to remove its agents from a variety of public facilities, including the National Assembly, the Seoul Criminal Court, and the Supreme Court of Korea.⁷ Yet, the

⁴ Donatella della Porta and Herbert Reiter (eds.), *Policing Protest. The Control of Mass Demonstrations in Western Democracies*, Minneapolis: University of Minnesota Press, 1998, p.11.

⁵ Jonathan Moran, “The Role of the Security Services in Democratization,” p.6.

⁶ Before 1961, intelligence activities were distributed among a variety of services. The KCIA’s first director was Kim Jong-pil, who later became Kim Dae-jung’s prime minister (an alliance which seemed ironical given that the KCIA kidnapped Kim Dae-jung in 1973, when he was a regime dissident). The agency’s last director, Kim Chae-kyu, assassinated President Park Chung-hee in 1979. Two years later, the KCIA was transformed into the Agency for National Security Planning. It became the National Intelligence Service in 1999. Another intelligence agency is the army’s Defense Security Command, whose security screening has been aimed both at military and non-military government personnel. “The DSC (and its predecessors) was created to deal with the real question of loyalty within a military on a divided peninsula. It was inspired by the Guomindang model, in which political officers monitored the military services for subversion or disloyalty. [...] The end of the Fifth Republic brought the DSC under even more pressure than the ANSP to cut back on its domestic political activities,” in Andrea Matles Savada and William Shaw (eds.), *South Korea. A Country Study*, Washington: U.S. Library of Congress, 1992., p.177.

⁷ *Ibidem*, p.176.

ANSP has remained deeply involved in domestic politics following democratization. Indeed, “the political imperative of controlling the transition in the interests of conservatives led to excessive ANSP involvement in the political process,” through collecting political funds in favor of the ruling party or heavily intervening in its 1992 presidential candidate selection process by pressuring unfavored aspirants.⁸ The reform of the agency in the mid-1990s aimed at better containing its role, and the ANSP was eventually transformed into the National Intelligence Service in 1999. Its functions still include “investigation into the crimes of insurrection and treason under the Criminal Act, crimes of mutiny and illegal code use under the Military Criminal Act, crimes prescribed by the Military Secret Protection Act, and crimes provided for by the National Security Act.”⁹ The power to investigate crimes falling under the security legislation’s article 7 (praising or sympathizing with an “anti-state organization”) and article 10 (failing to inform the authorities of certain anti-state activities) was briefly withdrawn from the competences of the agency in 1994, before being reintroduced in late 1996.¹⁰

The National Police Agency

When it comes to other law-enforcing actors, the “political impartiality of public officials” has been constitutionally guaranteed since 1960,¹¹ but post-transition institutions have been seriously criticized for falling short from this ideal. In 1991, the National Police Agency did replace the National Security Headquarters (“*ch’ian ponbu*”), but the Police Act failed to realize the new organization’s complete structural autonomy from the Ministry of Interior (“*naemubu*”). As a result,

The chief of police was still a political appointment and the Korean police remains susceptible to political pressure. Furthermore, citizens’ confidence in the police did not improve because of the continuing police corruption and violations of citizens’ civil rights. In a 1999 public

⁸ Jonathan Moran, “The Role of the Security Services in Democratization,” p.8. A new scandal about the National Security Intelligence’s involvement in elections erupted in the wake of Park Geun-hye (Park Chung-hee’s daughter)’s presidential victory in December 2012, as it was revealed that NSI agents mounted a mass campaign of slandering on the Internet against opposition candidates. See Sang-hun Choe, “South Korean Agents Accused of Tarring Opposition Before Election,” *The New York Times*, July 14, 2013.

⁹ Article 3, section 1 of the National Intelligence Service Act.

¹⁰ Jonathan Moran, “The Role of the Security Services in Democratization,” p.18.

¹¹ Dae-Kyu Yoon, *Law and Political Authority in South Korea*, Boulder: Westview Press, Seoul: Kyungnam University Press, 1990, p.40.

opinion survey, more than one-half of the citizens recognized police as the most corrupted organization.¹²

Serious efforts to improve the police's image and accountability were only undertaken more than a decade after the change of regime. In 2000, a separate and independent unit, the Office of Hearing and Inspection ("*ch'öngmun kamsagwan*"), was established to investigate citizens' complaints and reported acts of police misbehavior, implementing a zero-tolerance policy on corruption. Indeed,

Taking bribery, embezzlement of funds, and illegal arrest are the examples of misconduct that would result in dismissal. The value of the item taken or accepted is not relevant; officers disciplined for bribe acceptance are fired automatically, even if the bribe amounts to a single dollar. There is a well-known case of a police officer who took a bribe worth the equivalent of 5 dollars for not issuing a ticket. Once officially processed, he was dismissed and arrested.¹³

Other highly symbolic, but less effective, initiatives were subsequently promoted to enhance public trust in the police, such as the 2005 creation of the Human Rights Committee of Police ("*kyöngch'alch'öng inkwön wiwönhoe*") and the Civilian Review Committee ("*min'gan simüi wiwönhoe*"): "While the HRCP is entrusted to supervise police work related to human rights, such as arrest and confinement, the CRC is expected to investigate potential misconduct by highly-ranked officers."¹⁴ The two are, however, mere advisory bodies lacking investigative capacities of their own.

One of the disputed issues around which police reform still gravitates comes from the institution's claim for more autonomy vis-à-vis the prosecutors. Since 1954, prosecutors are legally empowered to investigate crimes by directing the work of the police or conducting their own investigation. Contrary to judges, prosecutors are not independent from the executive but placed under the authority of the Ministry of Justice. They are bound by strict hierarchical ties: "The prosecutor, functioning within the executive branch, is under the direct control of the Prosecutor General, through whom political pressure may be applied."¹⁵ As in most civil law jurisdictions, prosecutors and judges are however recruited through the same

¹² Sanja Kutnjak Ivković and Wook Kang, "Police Integrity in South Korea," *Policing: An International Journal of Police Strategies and Management*, Vol.35, No.1, 2012, p.77.

¹³ *Ibidem*, p.83.

¹⁴ *Ibidem*, p.80.

¹⁵ *Ibidem*, p.124.

channel, a national judicial examination (“*sapŏp sihŏm*”), whose successful candidates have to attend for two years the Judicial Research and Training Institute (“*sapŏp yŏnsuwŏn*”) run by the Supreme Court of Korea. Until recently, Korean attorneys were also selected and trained through the same process, although traditionally a law student would first pass the judicial exam, serve as a judge or prosecutor, and then turn to private practice as an attorney.¹⁶

The prosecution

Historically, prosecutors occupy a central place in the Korean criminal justice system: “The duties of prosecutorial office cover not only criminal investigation and indictment, but indeed the execution of a sentence as adjudged - a comprehensive power over criminal justice. Police in charge of criminal investigation are required by law to operate under the supervision of the prosecutor.”¹⁷ This relation of subordination contrasts with the American system in which prosecutors can request that a crime be investigated but hold no authority to monitor the investigation. In European civil law jurisdictions where the criminal justice system is “inquisitorial,” by opposition to the “adversarial” system of the common law tradition, public prosecutors are actively involved in discovering the truth. However, the judicial investigation can either be ultimately supervised by an “investigating judge,” who also controls the judicial police for the search of evidence (as in France), or by a prosecutor who is absolutely independent (like in Italy).¹⁸

The diversity of prosecution systems is the product of singular historical trajectories weighing heavily on both institutional structures and professional attitudes. In South Korea, law-enforcing actors were crucial supports of the repressive colonial and authoritarian orders for most of the 20th century. Since the democratization process started, the prerogatives of prosecutors have fallen precociously and consistently under the scrutiny of the constitutional court, in relation to national security crimes as well as ordinary cases. This visibility of the

¹⁶ Dae-Kyu Yoon, *Law and Political Authority in South Korea*, p.113. South Korean legal education underwent substantial reform after the Graduate Law School Act was passed in 2007, implementing a new “American-style” system of legal education under which only graduates of the freshly created twenty-five professional law schools (whose number is controlled by the government) are eligible to take the bar exam (distinct from the judicial exam prepared by future judges and prosecutors) and become licensed if they pass it. Matthew Wilson, “U.S. Legal Education Methods and Ideals. Application to the Japanese and Korea System,” *Kyung Hee Law Journal*, Vol.44, No.3, 2009, p.496.

¹⁷ Dae-Kyu Yoon, *Law and Political Authority in South Korea*, pp.123-124.

¹⁸ Each of these categories and roles is deeply embedded in socio-historical processes and therefore local configurations. The office of prosecutor is not intrinsically synonymous with a lack of judicial independence. In Germany for instance, the figure of the mighty investigating judge has slowly waned while that of the public prosecutor, being associated with greater impartiality, has correlatively risen.

prosecution in the court's jurisprudence reflects the hegemony granted to prosecutors in the criminal process for decades.

The rulings of the court manifest two types of concerns with the strength of prosecutorial powers: preventing their arbitrary use against individual rights, and restoring the role of independent judges. Indeed, several post-1987 provisions of the Criminal Procedure Act still permitted prosecutors' decisions to prevail over the authority of ordinary tribunals, thereby undermining a number of principles associated with the fairness of criminal justice. Until 1992, if a first trial court or an appellate court determined to release a defendant, the person proven innocent could still be detained until the supreme court's verdict, provided that the prosecutor had demanded the death penalty, a life sentence, or a prison sentence of at least ten years. Consequently, "many defendants used to live in captivity until the Supreme Court's final decision even after they were acquitted or received suspension of punishment in the lower court," which the Constitutional Court of Korea considered an excessive restriction of their freedom.¹⁹ Likewise, prosecutors could immediately challenge a judge's decision to release an accused on bail until 1993, when the statute authorizing this form of prosecutorial ascendancy was struck down by constitutional justices.²⁰

Twenty-five years after South Korea's change of regime, the reproduction of certain continuities can be attributed to particular organizational arrangements - such as prosecutors' conspicuous lack of independence in sensitive cases - which cannot solely be "broken by a complete generational turnover."²¹ Such continuities have been regularly denounced by constitutional jurisprudence. The possibility of resilient abuses, including torture, is registered in several of the court's decisions. This potentiality is not merely theoretical as illustrated by the 2002 case of a murder suspect who was tortured to death during his interrogation at the Seoul District Prosecutors' Office. Indeed, as long as obtaining confessions remains a central method of investigation, the risk that law-enforcing actors resort to intimidation or violence will irreducibly persist according to constitutional judges:

¹⁹ 4 KCCR 853, 92Hun-Ka8, December 24, 1992, in The Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2010, p.509.

²⁰ 5-2 KCCR 578, 93Hun-Ka2, December 23, 1993.

²¹ Donatella della Porta and Herbert Reiter (eds.), *Policing Protest*, p.12.

As obtaining the confession of a suspect through interrogation is utilized as an important method of investigation, there is an increased possibility that the human rights of the suspect might be infringed during such process.²²

Disagreements however exist within the court about whether the existing constitutional safeguards (prohibition against torture and self-incrimination, right to counsel, etc.) and the current legislative framework represent a sufficient and effective protection against potential abuses. These very concerns over violence by government officials in general, and the use of confessions in particular, are far from being specific to the context of post-1987 South Korea or transitioning societies in general. Similar issues were for example at stake before the U.S. Supreme Court in the 1960s. In its notorious *Miranda v. Arizona* decision of 1966, the court held that confessions obtained during police interrogation are not admissible in a trial unless the suspect has been “clearly informed” of his right to remain silent and be assisted by a lawyer.

The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. [...] If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. [...] If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.²³

This ruling was part of a series of cases mostly decided by the Warren Court - thus named after Chief Justice Earl Warren (1953-1969) - and described as having engendered a “criminal rights revolution” in the American legal system. Change indeed spread in four directions: tightening the rules for police’s search and seizure,²⁴ while defending the rights of

²² 16-2(A) KCCR 543, 2000Hun-Ma138, September 23, 2004, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I, 1998-2004*, Seoul: Constitutional Court of Korea, 2006, p.841.

²³ *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* decision lends its name to the corresponding warning given by the police upon arresting a criminal suspect.

²⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

criminal defendants,²⁵ juvenile defendants,²⁶ and prison inmates.²⁷ This so-called court-led “revolution” was not however solely the deed of nine justices. The sites which came under the scrutiny of the court were brought before it as the result of strategic litigation, especially due to the activism of mobilized civil society groups.²⁸ In South Korea, corresponding sites (interrogation rooms, police stations, prison facilities) have also reached the constitutional court since it began to operate in the late 1980s. One mechanism in particular appears to have been associated with this accessibility and activated by associations such as *Minbyun* (“Lawyers for a Democratic Society”) in national security cases: the opportunity for anyone who claims that his or her basic right has been infringed to file a direct constitutional complaint.

From interrogation rooms, police stations, and prison cells to the constitutional court

The existence of protective constitutional provisions does not guarantee that a criminal defendant will be treated as a person endowed with rights, especially when it comes to national security cases. This is not only because general rules and local practices always diverge, but because most constitutions provide that the rights they recognize may be restricted when justified. Article 37, section 2 of the South Korean constitution establishes the ground for such limitation:

The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

In practice, derogations from the ordinary criminal process have been extensive in South Korean national security cases. Since the early 1990s, the constitutional court has been importantly involved in shaping the contours and limits of the rights that individuals can claim when they are suspected, accused, or convicted of crimes against the state. The court’s

²⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁶ *In re Gault*, 387 U.S. 1 (1967).

²⁷ *Cooper v. Pate*, 378 U.S. 546 (1964); *Wolff v. McDonnell*, 418 U.S. 539 (1974). This last ruling established that “there is no iron curtain drawn between the constitution and the prisons of this country.” Gerald Rosenberg, *The Hollow Hope. Can Courts Bring About Social Change*, Chicago: University of Chicago, 1991, p.305.

²⁸ Charles Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998.

activism on this issue has been part of a broader jurisprudential trend toward strengthening the protection of individual rights against violations taking place in interrogation rooms, police stations, and detention facilities. Before outlining the main patterns of South Korea's constitutional approach to the means available against enemies, it is necessary to consider how such cases were able to reach the court in the first place, a prerequisite for its role to unfold.

As described in chapter two, the main channel for cases to be brought before the Constitutional Court of Korea consists of the mechanism of constitutional complaints. Its workings were however only progressively elaborated, demonstrating that institutional design rarely proceeds through a straightforward path that would be laid out in advance, once and for all. This echoes the argument that institutional outcomes seldom are the intended product of reforms, which is one of the core lessons drawn by Gretchen Helmke and Julio Ríos-Figueroa from their comparative study of courts in Latin America. The unanticipated success of the Constitutional Court of Korea in general, and of its mechanism of direct complaints in particular, appears analogous to the trajectory of the Constitutional Chamber of the Costa Rican Supreme Court analyzed in Helmke and Ríos-Figueroa's volume by Bruce Wilson. Indeed,

[A]lthough the powers granted to Costa Rica's new Constitutional Court in 1989 would prove to be among the most far reaching for any Latin American high court, Wilson argues that at the time, no one, including the politicians who passed the reforms, comprehended their magnitude. Very quickly, however, the court came to occupy a central role, both in moderating interbranch conflict and in advancing individual rights. Among the most important institutional changes underpinning this rights revolution were the chamber's operating rules for standing. As we mentioned earlier, that anyone at any time can file a claim before the constitutional chamber created, in Wilson's language, a significant new legal opportunity for multiple actors to turn to the court to resolve conflicts.²⁹

A comparably broad legal opportunity also exists in South Korea, where it was gradually consolidated by the constitutional court rather than granted from the beginning. As a matter of fact, the revised constitution of 1987 only nominally introduced constitutional complaints in the jurisdiction of the new court, without specifying any details about the scope

²⁹ Gretchen Helmke and Julio Ríos-Figueroa (eds.), *Courts in Latin America*, New York: Cambridge University Press, 2011, p.20.

of the procedure.³⁰ This gap was partly filled by section 5 of the 1988 Constitutional Court Act, which regulates the adjudication of constitutional complaints and outlines both the causes for request and conditions for admissibility. Following article 68, section 1 of the Constitutional Court Act,

Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the Constitutional Court: *Provided*, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes.

Several requirements therefore condition the admissibility of a request. First of all, a complaint must have an admissible cause, that is to say, be based upon the infringement of a basic right by “an exercise or non-exercise of governmental power,” notions left undefined and therefore potentially open to various interpretations. Second, a ruling by an ordinary court cannot be construed as an “exercise or non exercise” of state power which can be challenged through a constitutional petition. Third, a complaint must only be filed after all available remedies have been exhausted. Taken together, these last two constraints “led many to believe that in reality the range of state power amenable to constitutional complaints would be extremely limited.”³¹ An additional procedural requirement is to abide by the time frame fixed in article 69, section 1 of the Constitutional Court Act: a complaint must be filed “within ninety days after the existence of the cause is known, and within one year after the cause occurs,” or, if other remedies have to be exhausted, “within thirty days after the final decision in the processes is notified.” Eventually, counsel has to be appointed for a written request to be addressed to the court.³² Failing to meet one of the above conditions technically leads to the immediate dismissal of the case.

Practically, a constitutional complaint can be filed and deposited at the court’s “Public Service Center” (“*miwõnsil*”) - where request forms are available and staff assistance is provided - or online since 2002. The relative simplicity of the filing process is part of a sustained effort by the court to make constitutional justice more accessible. This effort is

³⁰ “The Constitutional Court shall have jurisdiction over [...] constitutional complaint as prescribed by Act” (Article 111, section 5 of the Constitution of the Republic of Korea).

³¹ The Constitutional Court of Korea, *Twenty Years*, p.100.

³² Counsel can be court-appointed upon request “if a person who desires to file a constitutional complaint has no financial resources to appoint an attorney as his counsel” (Article 70, section 1 of the Constitutional Court Act). The appointment of counsel is a prerequisite to file a complaint.

reflected in the institution's expansive construction of the justiciable interests admissible for constitutional complaints. Indeed, the opening section of the court's rulings is always dedicated to reviewing whether the legal prerequisites of the case are fulfilled, which includes confirming the existence of a justiciable interest. An important dimension of this phase is to check that the petitioner "directly" and "presently" suffers an infringement of his or her own basic right.

Since the early 1990s, the court has however considered it possible to review the constitutionality of a situation which no longer exists, provided that the issue raised by the complaint is critical for the defense and maintenance of the constitutional order, and that the alleged violation is likely to recur. As a result, the court uses variations of the following standard formula to review complaints challenging past infringements of basic rights :

[A] constitutional complaint has not only a subjective function of providing relief but also an objective function of defending and maintaining the constitutional order. Even if the subjective justiciable interest has evaporated during the review, when the infringement on the basic rights is likely to repeat and its resolution has an important meaning for the defense and maintenance of the constitutional order, our Court has by precedent recognized the justiciable interest.

The substance of the above reasoning was first articulated in a 1991 minority opinion written by Byun Jeong-soo, the judge in favor of declaring article 7 of the National Security Act unconstitutional a year before, and Cho Kyu-kwang, president of the constitutional court at the time. The case in which they dissented together was triggered by the constitutional complaint of three suspects detained in police custody for violating the National Security Act.³³ Their complaint was filed on the ground that investigators from the judicial police and the Agency for National Security Planning, in charge of investigating crimes falling under the NSA, had prevented them from meeting with a lawyer in the course of their detention. A majority of justices dismissed the request, holding that the right of a suspect or defendant in custody to meet with his attorney was not a matter for constitutional review.

On the contrary, President Cho and Justice Byun affirmed that the right at stake was constitutionally protected. Moreover, they defended that the case should be reviewed even though the infringement had ceased, given the significance of clarifying the scope of the right to counsel and the "danger that its violation would be repeated" ("*panbok wihömsöng*").³⁴

³³ 3 KCCR 356, 89Hun-Ma181, July 8, 1991, in *The Constitutional Court of Korea, Twenty Years*, pp.175-176.

³⁴ *Ibidem* (personal translation).

The arguments then put forth by the minority to permit the review of past abuses have since become the common justification for the court to adjudicate complaints challenging infringements on basic rights committed in police stations, interrogation rooms, or detention centers, but only reported after the concerned individuals were no longer held by law-enforcing actors.

Early on, the court has thus adopted a broad conception of justiciable interests for complaints, thereby contributing to the accessibility of constitutional justice in post-transition South Korea. The institution has also affirmed itself in this direction by progressively determining and extending the scope of the violations defined as “an exercise or non-exercise of governmental power.” While judgments rendered by ordinary tribunals are statutorily excluded from this scope, the court has included in it a variety of executive or administrative decisions and behaviors. For instance, the justices ruled in 1989 that they could declare unconstitutional a prosecutor’s arbitrary decision not to indict a suspect.³⁵ In 1992, the court considered a proper subject of review the conduct of six agents from the Agency for National Security Planning who attended a visit between a suspect and his attorney, an issue which had been dismissed a few months earlier.³⁶ This 1992 ruling is both a generative and illustrative case, shedding light upon the Constitutional Court of Korea’s approach to the means used by law-enforcing institutions to confront enmity, and highlighting the contours and limits of the rights recognized by the court to suspected anti-state criminals.

Contours and limits of enemies’ criminal rights: a case-study of the right to assistance of counsel, even for national security suspects

National security left in the background

One of the fundamental issues that the constitutional court has had to resolve since its creation has been to clarify the rights recognized to criminal defendants and convicts, and on several occasions to determine whether these rights also applied in national security cases. The matters on which it has pronounced itself over the years include the right to counsel (1992 and 2004), the authorized length of police and prosecutorial custody (1992 and 1997), the right to access criminal records (1997), or the use of physical restraints during

³⁵ 1 KCCR 31, 88Hun-Ma3, April 17, 1989.

³⁶ 4 KCCR 51, 91Hun-Ma111, January 28, 1992.

interrogation (2005). These rights are closely tied to the investigative practices of prosecutors and officers from the Agency for National Security Planning (renamed the National Intelligence Service in 1999).

On June 14, 1991, a suspect arrested for violation of the National Security Act and detained in a police station received a one-hour visit from his wife and attorney. The meeting was attended by six agents from the Agency for National Security Planning, who not only listened to the conversation but took notes and pictures during the exchange. The lawyer objected to their conduct, and demanded that the visit stopped being attended and recorded, to which the ANSP agents responded that he and his client should feel free to talk as much as they wanted. Upon being released, the former suspect filed a constitutional complaint on the ground that the agents' behavior had infringed on his right to be assisted by counsel, which is protected by article 12, section 4 of the South Korean constitution. His case was brought before the court and defended by attorneys from *Minbyun*, including Lee Seok-tae [Yi Sök-tae], one of the founders of the association and its secretary-general at the time.³⁷

A few months later, the constitutional court rendered a decision which is considered a landmark of its jurisprudence on the protection of citizens' criminal rights. Contrary to their majority verdict in an earlier ruling, the nine justices agreed this time that the issue raised was of constitutional nature and that the petition could be reviewed. Although the right allegedly violated was no longer being infringed upon, they derived the existence of an "objective justiciable interest" from the risk that the violation be repeated and the importance of clarifying the right to counsel for the constitutional order. Judging on the merits, the court unanimously held that the presence of investigators from the Agency for National Security Planning, or any other "government agent" ("*kongmuwǒn*"), at a meeting taking place between a lawyer and his or her detained client was an unconstitutional exercise of state power.

The right to assistance of counsel guaranteed by Article 12 Section 4 is intended to protect the suspects and defendants, presumed innocent, from various evils arising out of the fact of incarceration and to make sure that the incarceration does not exceed the scope of its purposes. Therefore, assistance of counsel means sufficient assistance. The indispensable content of right to assistance of counsel is the detainee's right to communicate and visit with his attorney. In order to provide sufficient guarantee of that right, the confidentiality of the contents of the conversations must be completely protected, and the detainee and attorney must be allowed to

³⁷ While the name of the defendant is made anonymous in the case records by replacing its middle syllable with the letter O/ㅇ, the name of the main lawyer, Lee Seok-tae, is fully reported.

freely converse with each other free of any limitation, influence, coercion, undue interference. Such free visit will be possible only when it takes place outside the presence of a correction officer, an investigator, or any concerned government agent.³⁸

The court derived from this reasoning the momentous conclusion that national security could not be invoked to restrict the right of a suspect or defendant held in custody to freely meet with his or her lawyer.

This right to free visit with his attorney is the most important part of a detainee's right to assistance of counsel and cannot be restricted even for reason of national security, maintenance of order or public welfare.³⁹

In the ten-page long Korean version of the ruling, the above fragment appeared twice.⁴⁰ No other mention of national security was made throughout the text, except when the judgment referred to the Agency for National Security Planning, which was also the respondent in this case (seven mentions), and the National Security Act, for the alleged violation of which the petitioner was held in custody (two mentions). The above conclusion therefore masked that national security was only marginally evoked in the reasoning, even though the case stemmed from the complaint of a former suspect detained under the National Security Act.

In other words, the ruling did not primarily rest on balancing the constitutional interest in protecting national security versus the basic right to counsel. The two were not explicitly weighed against each other as the former was largely ignored throughout the decision. This led to the creation of a paradoxical legal stage, one on which an issue raised in a national security context was extracted from its original background to be considered in a more neutral light.

³⁸ 4 KCCR 51, 91Hun-Ma111, January 28, 1992, in *The Constitutional Court of Korea, Twenty Years*, pp. 506-507.

³⁹ *Ibidem*, p.507.

⁴⁰ Such length (short by American standards but more extensive than the practice of courts such as the French Constitutional Council) used to be customary in the first years of the Constitutional Court of Korea's operations. Overtime, its rulings have tended to become longer, which reflects the institution's self-proclaimed aspiration toward greater professionalism. Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

The case's significance

A major implication resulting from the decision was that even individuals who have potentially committed anti-state crimes should be presumed innocent and protected from the “various evils arising out of the fact of incarceration” identified by the constitutional court. While some of these “evils” (“*p'yehae*”) were treated as unavoidable - such as experiencing “psychological disorders” (“anxiety, fear, despair, worry”) and suffering material or social costs (including a loss of income or having one’s reputation harmed) - the court reasoned that the risk of being tortured and coerced to make a confession could only be effectively prevented if the suspect or defendant was sufficiently assisted by counsel, that is to say, able to consult with his or her lawyer free of any state interference.⁴¹

The significance of the case from the viewpoint of suspected national security offenders was not however the one upon which the constitutional court insisted in its ruling. The “focalization” it adopted was a much more inclusive one, encompassing all criminal suspects and defendants as the targeted beneficiaries of the judgment. National security was only dealt with marginally, as illustrated by the extreme infrequency of the term’s mention in the ruling. Instead, the perspective embraced by the court was the fairness of the criminal justice system in general, and not the rights of potential anti-state enemies in particular.

The lasting substratum of this 1992 ruling in the jurisprudence of the Constitutional Court of Korea is that national security considerations neither systematically nor automatically outweigh individual basic rights. Yet, the two are not openly balanced in most of the court’s decisions on issues related to the criminal process. In the case at hand, “national security reasons” were left unspecified. The anti-state crimes allegedly committed by the petitioner were also silenced in the court’s presentation of the case’s background. As a result, the focus of the reasoning was entirely shifted away from the issue of national security, while defining the rights of potential enemies appeared only construed as the discreet wellspring and veiled horizon of the ruling.

Making national security considerations irrelevant could nonetheless be in itself a strong message sent by constitutional judges to law-enforcing actors. It may have been the clearest possible refutation against their assumption that investigating anti-state activities mechanically fell outside the rules of the ordinary criminal system. Seen in this light, the justices’ priority was to undo the “national security blanket provision” which has

⁴¹ 4 KCCR 51, 91Hun-Ma111, January 28, 1992 (personal translation).

characterized South Korean authoritarian regimes, that is to say, the systematic resort to exceptional rules - or lack of - as soon as loosely defined “national security reasons” were invoked. In the case about the right to counsel, the judges essentially considered national security irrelevant and marginal to the issue of whether suspects and defendants could meet with their attorney free of governmental interference.

Still, while the right to meet with one’s attorney without governmental interference cannot be restricted “even for” national security reasons, it should not be deduced from it that other criminal rights may not be limited when such considerations come into play. For instance, the court held unanimously that the investigation of serious national security crimes justified a possible extension of the period spent by a suspect in police and prosecutorial custody before being formally charged with a crime (the regular period is thirty days, the extended period under the National Security Act reaches fifty days).⁴² Other criminal rights, such as the right to access one’s criminal records, can also be restricted under national security circumstances, but their limitation is not permitted just because law-enforcing actors carry suspicions that an anti-state crime has been committed.⁴³

Moreover, even rights supposedly insensitive to national security reasons cannot be considered as absolute and are instead susceptible of being curtailed. Such pliancy was demonstrated for the right to counsel by a follow-up case to the initial 1992 ruling. This more recent ruling, decided in 2004, built on the 1992 precedent to extend the right to counsel for suspects or defendants who are not in custody. However, the decision also made clear that there could exist circumstances under which the right of a suspect to be assisted by a lawyer would be limited: for instance, when consultation with the attorney “obstructs the suspect interrogation or divulges the investigatory secrets.”⁴⁴

The lessons which can be drawn from the judgment on the right to counsel are many and confirmed by a broader selection in the Constitutional Court of Korea’s jurisprudence. First of all, the case is useful to study the conditions under which the court has proved assertive, shaping the criminal rights of suspected national security enemies against the practices of law-enforcing actors. The early and sustained assertiveness of the court in this area first needs to be analyzed in light of a broader scheme of interactions with other actors. Indeed, it is a core assumption of the realist literature to see judicial action as bounded by

⁴² 4 KCCR 194, 90Hun-Ma82, April 14, 1992.

⁴³ 9-2 KCCR 675, 94Hun-Ma60, November 27, 1997.

⁴⁴ 16-2(A) KCCR 543, 2000Hun-Ma138, September 23, 2004, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, p.835.

important strategic constraints deriving from the fact that “constitutional courts and their jurisprudence are integral elements of a larger political setting.”⁴⁵ As a result, courts in general - and especially such a young institution as the Constitutional Court of Korea in the early 1990s - are expected to demonstrate caution and deference on issues salient for the political branches and likely to ignite an adverse reaction if the court rules against the other powers’ preferences. Matters relating to national security policy are thought to paradigmatically fall within this category.

While defining the contours of enemies’ rights is always controversial, the Constitutional Court of Korea has largely displaced its jurisprudence away from this perilous ground. As a result, one of the factors behind the court’s activism could be its avoidance of the contentious potential of the cases it had to decide. Instead, the court has chosen to construe these cases as raising a set of general procedural challenges in the context of South Korean criminal justice’s post-authoritarian reform. In doing so, the constitutional court has not acted alone but in cooperation with the rest of the legal profession (including national security suspects’ lawyers) and with the judiciary (most importantly the supreme court). Yet, and despite this alliance, a verdict is not sufficient in itself to make change happen, especially when it comes to transforming the behaviors of law-enforcing institutions and the inertias inherent to the repressive apparatus.⁴⁶ Resistances to comply with judicial rulings have therefore posed a major limit to the constitutional court’s ability to shape the criminal procedures deployed to deal with enemies.

Finally, constraints on judicial action are not only coming from relations between the court and other actors. The intervention of modern courts is also inherently bounded by their commitment to protect both the constitutional and physical integrity of the state. This commitment does not preclude them from controlling the concrete policies and means through which enemies are confronted, but it does circumscribe the possibilities which are theirs in doing so. For instance, the Constitutional Court of Korea’s recognition that criminal rights do not necessarily recede for national security reasons does not imply that basic rights are construed as limitless. On the contrary, the absence of rights’ absolutism constitutes a fundamental characteristic and invariant of judicial discourse, no matter the type of decisions examined. In other words, even rulings regarded as progressive jurisprudential landmarks

⁴⁵ Ran Hirschl, “The Realist Turn in Comparative Constitutional Politics,” *Political Research Quarterly*, Vol.62, No.4, 2009, p.825.

⁴⁶ Pierre Lascoumes, “Ruptures politiques et politiques pénitentiaires. Analyse comparative des dynamiques de changement institutionnel,” *Déviance et société*, Vol.30, No.3, 2006, pp.405-419.

operate within this discursive boundary and therefore bear ambivalent effects, such as consolidating the constitutional readiness to prevent rights from being used in the wrong way.

Premises and consequences of the court's intervention

i. Conditions for assertiveness: reframing the stakes

The 1992 ruling on the right to counsel highlights a number of conditions which have allowed the Constitutional Court of Korea to be assertive on procedural issues raised in relation to national security cases. Interestingly, these issues have not been construed as affecting the criminal rights of enemies - which they nonetheless did - but as concerning the general fairness of criminal justice in post-1987 South Korea. The court's assertiveness seems to have been permitted by the relatively non-polemical nature of the claims thus framed, that is to say, removed from the ground of a debate about enemies. Instead, criminal rights were discussed in light of the necessity to realize the principles of rule of law and due process for all suspects, defendants, and offenders after the transition. This displacement did not mean that the issues at hand were absolutely uncontroversial - otherwise they would not have been the object of a judicial dispute to begin with - but it apparently contributed to successful litigation in favor of protecting the criminal rights of anyone in South Korea.

It should be emphasized that the controversial or uncontroversial character of a given legal question does not stem from any essence that would be attached to it. Procedural matters are not ontologically consensual, or less contentious, than other legal issues or dimensions in the politics of enmity. For instance, the Guantánamo cases adjudicated by the U.S. Supreme Court between 2004 and 2008 were part of a deep struggle over the scope of the *habeas corpus* rights available to the "enemy combatants" detained in the camp. This struggle took place between the court and the political branches, within the judiciary, as well as among American society more broadly (or at least its academic and intellectual circles). The supreme court first faced the puzzle of deciding whether prisoners, held at Guantánamo without charges, could have the legality of their detention reviewed. After having settled this question in the affirmative for both U.S. citizens and foreigners, the court also had to determine the appropriateness of the review process open for them to challenge their internment. Those were, and still are, procedural issues of a paramount political sensitivity.

The issue of the legal treatment due to national security suspects and offenders is *a priori* no less disputed in South Korea. As a result, the advances that were promoted by the constitutional court against the existing framework and the practices of law-enforcing actors were probably made possible because they were not claimed from the viewpoint of enemies' rights. On the contrary, the cases brought before the court by individuals apprehended for alleged violations of the National Security Act were adjudicated from the standpoint of the overall fairness of the criminal justice system. As argued by the court to justify its ruling on the right to counsel, "our practices, laws, and rules concerning investigation and execution of punishment have not reflected properly the constitutional ideals in criminal procedures."⁴⁷

An important indicator of non-controversy displayed in this case was the unanimous vote of the justices. Of course, this absence of rift only concerned the court and not necessarily forces outside its walls. While unanimous decisions are far from being prevalent in the jurisprudence of the court, they have been quite frequent when it comes to distortions of due process principles: protecting the right to meet with one's attorney, guaranteeing the presumption of innocence, or restoring the imbalance of powers between prosecutors and judges. A second, but maybe greater, indicator of non-controversy in these cases rests on the fact that the constitutional court has not been acting on its own, but in alliance with the supreme court. Here again, the convergence of both courts is not a rule governing their interactions.

On the contrary, the two have been more rivals than partners struggling for institutional preeminence throughout the 1990s. Moreover, the South Korean supreme court is not particularly known for being a progressive actor. For instance, it has long resisted the restrictive interpretation of article 7 of the National Security Act advocated by the constitutional court in 1990. Despite these divergences, the two courts seem to have joined efforts in the interest of promoting the fairness of criminal justice - and, by the same token, their role as relevant institutions in the new democratic order. By the time the constitutional court ruled against governmental interferences with a detained suspect or defendant's right to freely meet with an attorney, the supreme court had already stepped in related matters on at least two occasions.

In two National Security Act violation cases [settled in 1990], the Supreme Court [...] made landmark decisions, which may be called the Korean version of *Massiah*. In these cases, the defendants requested to meet with their attorney when they were detained but the National

⁴⁷ 4 KCCR 51, 91Hun-Ma111, January 28, 1992, in The Constitutional Court of Korea, *Twenty Years*, p.505.

Security Planning Agency officers rejected their request. Then the defendants were referred to and interrogated by the prosecutor. The Court held that “the limitation of the right to meet and communicate with counsel violates the constitutionally guaranteed basic right, so the illegally obtained confession of the suspect should be excluded, and the exclusion means a substantial and complete exclusion.”⁴⁸

The very timing of these assertive decisions by both courts, rendered in the early 1990s, probably acted as a source of judicial activism rather than restraint. Criminal rights represented an important, yet limited, arena where to challenge some of the most conspicuous legacies of authoritarianism, sustained by the practices of law-enforcing actors as well as unmodified legislative provisions. The national security dimension of the cases before both the supreme and constitutional courts was largely eschewed, receding in the background of facts. As a result, the rulings became about criminal rights in general, allowing their incidental recognition “even for” those suspected of anti-state crimes under the National Security Act. This consequential effect was not dealt with frontally. A decision such as the one on the right to counsel featured no reasoning about the rights of enemies.

Such silence may have been more than a form of strategic muteness on the part of judicial institutions or a ruse to rule about enemies without saying so. Instead, it can be postulated that the courts actually pronounced themselves upon what they wanted to, namely persistent distortions of due process principles across the South Korean criminal system. Discarding national security was also in itself a strong response to law-enforcing and intelligence agencies’ own abuse of the notion. As will be explored later in the chapter, the courts’ assertiveness on certain criminal matters did not mean however that all pre-1987 legacies were censored, nor that rights were now construed as worthy of absolute protection. It did not imply either that any issue related to reforming the past could be framed in a non-controversial light.

Therefore, what the Constitutional Court of Korea has done in relation to criminal rights illustrates the paradox in which the institution has been caught in playing its role as guardian of the constitutional order: although the court has reinforced the relevance and validity of national security tools, it has also tried to undo a variety of authoritarian legacies and reflexes attached to them. These two dimensions do not contradict each other. Indeed, constitutional jurisprudence’s effort to bring security instruments into conformity with the

⁴⁸ Kuk Cho, “The Ongoing Reconstruction of the Korean Criminal Justice System,” *Santa Clara Journal of International Law*, Vol.5, No.1, 2006, pp.101-102.

requisites of the rule of law has contributed to ensure their compatibility with the new democratic order. The court's attempt at uprooting some authoritarian remains has nonetheless yielded an additional effect: that of igniting adverse reactions from the law-enforcing institutions.

ii. Limits in terms of enforcement: resistances to judicial verdicts

The 1992 decision on the right to counsel did not merely declare unconstitutional the behavior of the investigators from the Agency for National Security Planning, who attended a meeting between a detained national security suspect and his attorney. The ruling also struck down a provision of the Criminal Administration Act (“*haenghyōngpōp*”) permitting that a correction officer be present at the visits received by detainees pending appeals or trial. The provision was eventually revised by the National Assembly, but only three years after the court's verdict was pronounced and on a minimal basis.⁴⁹ Both the constitutional ruling and the delayed legislative revision which ensued have however failed to put a close to the issue of defining the right to counsel's scope. Indeed, neither of them has been interpreted by law-enforcing actors as implying that lawyers were authorized to participate in interrogation.

The momentum for reform in this direction was only built after the 2002 revelation that a murder suspect had been tortured to death during interrogation in the Seoul District Prosecutors' Office.⁵⁰ In the wake of the “incident,” the Ministry of Justice introduced new regulations allowing counsel's participation during interrogation, while providing for many exceptions under which assistance could be refused. The opportunity was in particular denied to alleged offenders of the National Security Act, until the Supreme Court of Korea determined otherwise. In 2003, the supreme court recognized that the “right to have a lawyer present during interrogation” was nowhere to be explicitly found - neither in the constitution, nor in the Code of Criminal Procedure - but nonetheless concluded that the “participation should be allowed from the standpoint of ‘due process’ principles.” In addition, the high court defined “much narrower exceptions not to permit counsel's participation,” holding that

⁴⁹ The revision was enacted on January 5, 1995, and reads as: “A detainee pending appeal's visit with his attorney (or one seeking to be his attorney) cannot be attended, listened in, or recorded by a correction officer. Nevertheless, he can observe the inmate from a distance within a visibility range.” The Constitutional Court of Korea, *Twenty Years*, pp.507-508.

⁵⁰ The public officials involved were criminally punished. The prosecutor received an 18-month prison sentence and the three investigators who had committed torture served prison sentences of 24 to 30 months. However, two other investigators indicted for assisting in the act of torture were granted a suspension of sentence. United Nations Committee Against Torture, *Second Periodic Report of the Republic of Korea*, CAT/C/SR.711, Geneva: United Nations, 2006, pp.8-9.

restrictions should be only possible “when there is probable cause that the counsel would ‘obstruct interrogation’ or ‘leak the secret of investigation.’ ”⁵¹

According to Cho Kuk, this decision of the supreme court eventually implemented the Korean version of *Miranda*, the 1966 ruling which set the requirements for statements made during an interrogation to be admissible as evidence in a trial.⁵² Specifically, the U.S. Supreme Court determined in *Miranda* that statements made without the person under arrest being informed of his or her rights could not be used in a trial, in virtue of the Fifth Amendment’s prescription that no person “shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”⁵³ While the South Korean constitution provides that statements obtained through “torture, violence, intimidation, unduly prolonged arrest, deceit, or etc.” are inadmissible, the Korean supreme court added that such statements cannot be taken into account if a defendant has not been informed of his right to remain silent (1992) and to have an attorney present during interrogation (2003).

Resistances by law-enforcing institutions to put into effect these protections, theoretically guaranteed even in national security cases, have represented a major and enduring impediment to the post-transition efforts at reforming criminal justice. Yet, the possibilities of the courts to regulate the means used against enemies have also been limited in another way. Indeed, even decisions which uphold basic rights and define them expansively contribute to construe them as never being absolute.

iii. Limits in terms of discursive effects: no unlimited basic rights

In 1992, the constitutional court upheld the right to assistance of counsel for a suspect or defendant held in custody, no matter whether national security reasons could be invoked or not. In 2004, the justices were presented with the issue to determine whether this right also applied to a suspect or defendant interrogated without being in custody. A majority of six justices answered this last question in the affirmative, apparently consecrating an unlimited

⁵¹ Supreme Court of Korea, 2003Mo402, November 11, 2003, in Kuk Cho, “The Ongoing Reconstruction of the Korean Criminal Justice System,” pp.103-104.

⁵² *Ibidem*.

⁵³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

right to counsel for all suspects and defendants regardless of the case's circumstances.⁵⁴ While extending the reach of the right to counsel, the ruling did not however construe it as entirely absolute. This should not come as a surprise for it confirms that the absence of rights' absolutism constitutes a fundamental characteristic and invariant of judicial discourse, no matter the type of decisions examined. In other words, even rulings regarded as progressive jurisprudential landmarks operate within this discursive boundary, accepting the premise that basic rights can always be restricted. In the context of this chapter, progressive decisions can be defined as strengthening procedural rights even for national security defendants or criminals. Yet, such rights are not unlimited. Curtailment can always take place, provided that there is a strong justification for it.

Indeed, the more a right is protected, the stronger the justification has to be to alter it. In its 1992 and 2004 jurisprudence on the right to counsel, the Constitutional Court of Korea argued that the subsumption of a case under the category of "anti-state crime" did not constitute a sufficient justification for restricting legal assistance, including attorney's participation to interrogation. Yet, the court never reasoned that enemies were strictly entitled to the same due process rights as ordinary suspects - which they are not.⁵⁵ Moreover, the constitutional court did recognize the possibility to restrict attorney's participation during interrogation. Following the standard defined by the supreme court, assistance is permitted unless "it obstructs the suspect interrogation or divulges the investigatory secrets."

Here, even though the right to have an attorney present and to seek the advice and the consultation of the attorney during the suspect interrogation directly applies to the criminal procedure as an essential content of the right to assistance of counsel, the above advice and consultation is not permitted when it obstructs the suspect interrogation or divulges the investigatory secrets. This is because the right to obtain the assistance of counsel by way of advice and consultation means the right to obtain "lawful" assistance of the attorney, and not the right to obtain unlawful assistance as well.⁵⁶

Interestingly, the above 2004 ruling cannot be considered as the "repressive" corrective of the initial 1992 decision. Instead, both decisions firmly contributed to advance

⁵⁴ 16-2(A) KCCR 543, 2000Hun-Ma138, September 23, 2004, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, p.834.

⁵⁵ For instance, the period of authorized custody before charges are pressed against a suspect is extended from thirty to fifty days under the National Security Act.

⁵⁶ 16-2(A) KCCR 543, 2000Hun-Ma138, September 23, 2004, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, p.835.

the criminal rights of suspects and defendants. Still, they also exemplify that basic rights are never conceived as absolute, even by progressive decisions. The possibility of curtailment may not always be explicitly stated, but it is embedded in judicial discourse. This shared and invariant element of discursivity does not mean that there cannot be disagreements about rights' scope, but it shifts the locus of where such disagreements occur. Indeed, while basic rights are never absolute, there can always be divergences about whether or not the concrete restrictions imposed on them are legitimate and reasonable.

Two methods of judicial reasoning can be used to formulate criteria to restrict basic rights: the determination of an exception to a rule (a method generally adopted by the U.S. Supreme Court) or the balancing between conflicting constitutional interests (a method prominently used by the German constitutional court, the Israeli supreme court, or the European Court of Human Rights).⁵⁷ As the Constitutional Court of Korea selectively borrows from different legal traditions (especially from both the European model, after which it was shaped, and the influential American doctrine), it has alternatively resorted to the two methods, although it now defines the systematic application of balancing - through the "proportionality test" - as a source of greater legal rigor.⁵⁸

In the 2004 case on the right to counsel outside custody, the majority defended the possibility to restrict this fundamental right based on a "rule and exception to the rule" mode of analysis: the right is always guaranteed except if there is a risk of "unlawful assistance" (obstruction of the interrogation, divulgation of investigatory secrets, etc.). This type of reasoning characterizes American jurisprudence. For instance, the *Miranda* decision of 1966 established that a suspect's statements to the police or other investigative actors are not admissible as evidence in a trial if the suspect has not been warned prior to interrogation of his right to remain silent and to be assisted by a lawyer. In its *New York v. Quarles* ruling of 1984, the U.S. Supreme Court however introduced a "public safety exception" to *Miranda*, permitting that unwarned statements be admissible as evidence in a trial when there exists an

⁵⁷ Kent Roach, *The 9/11 Effect. Comparative Counter-terrorism*, Cambridge: Cambridge University Press, 2011, p.233.

⁵⁸ Research Institute of the Constitutional Court of Korea, personal communication, September 2012.

urgent concern for public safety (a suspect can therefore be interrogated for 48 hours before being “mirandized”).⁵⁹

In contrast to the “rule and exception to the rule” method of reasoning adopted by a majority of the Constitutional Court of Korea in 2004, two dissenting judges framed their argument in terms of balancing. Justices Song In-jun and Choo Sun-hoe, two former prosecutors, thus denied that the right to have an attorney participate in the interrogation of a suspect not in custody was a legitimate and proportionate restriction given the public interests that it serves.

Guaranteeing the right to have the attorney participate in the suspect interrogation might cause difficulty for the investigative authority in obtaining the confession from the suspect, hindrance with the investigatory activities by the attorney beyond defense activities, or hardship in maintaining investigatory secrets demanded for the purpose of the investigation due to the exposure of the investigation. That is, permitting the participation of the attorney in the suspect interrogation might undermine the investigatory activities by the investigative authority.⁶⁰

To be sure, each mode of reasoning (the formulation of an exception to the rule on the one hand, and the balancing of conflicting interests on the other hand) can accommodate any type of arguments, either progressive or conservative. Despite their idiosyncratic features, both techniques share the premise that basic rights are not unlimited and provide methods to assess existing restrictions, or to formulate permissible ones. In the more recent jurisprudence of the Constitutional Court of Korea, proportionality has been used to control excessive bodily searches by the police (2002), as well as the use of physical restraints during detention (2003) and interrogation (2005). It is a tool which has allowed the court to be assertive and to criticize the practices of law-enforcing actors in the specific circumstances of a case, without however invalidating such practices’ overall legitimacy. This type of “tailored” reasoning therefore represents both a strategic resource for, and limit to, the court’s activism, as it

⁵⁹ *New York v. Quarles*, 467 U.S. 649 (1984). The relevance of the “public safety exception” has been revived since 9/11 and the arrests of American terrorist suspects on U.S. soil, where their constitutional rights are guaranteed. In 2010, the F.B.I. authored a memorandum which advocated a large interpretation of “public safety-related questions” in terrorist cases, arguing that the “magnitude and complexity” of the threat justified “a significantly more extensive public safety interrogation without Miranda warnings than would be permissible in an ordinary criminal case.” Charlie Savage, “Delayed Miranda Warning Ordered for Terror Suspects,” *The New York Times*, March 24, 2011.

⁶⁰ 16-2(A) KCCR 543, 2000Hun-Ma138, September 23, 2004, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, pp.856-857.

involves only a form of narrow contestation of the policies designed and implemented to deal with enmity.

Premises and consequences of the court's intervention beyond the right to counsel

Depoliticizing and judicializing procedural issues in other national security cases

The context in which the Constitutional Court of Korea upheld a number of rights even for suspected anti-state criminals differs from the situation of courts in democratic societies where a debate about the scope and extent of enemies' rights arises while a well-established criminal justice system, with effective guarantees, is already in operation. In post-1987 South Korea, this configuration was somewhat reverse. Procedural cases initially brought before the court against a national security backdrop were not framed as engaging with the issue of whether enemies were entitled to the process due to ordinary criminals. As a matter of fact, neither the court nor the complainants and their lawyers framed the matters under review in such a way, which appears to have been the key to litigation successes. Consequently, most of the court's jurisprudence on procedural rights cannot be read as directly questioning the legitimacy of deviations from common criminal law and ordinary practices in the name of national security. On the contrary, the point of departure of the court seems precisely to have been that derogations to due process were the rule rather than the exception across the entire Korean criminal justice system, and not only for anti-state criminals.

As mentioned earlier, this approach was probably less a stratagem than the result of a genuine prioritization of interests on the part of the court. In the aftermath of the transition, distortions and abuses of the "constitutional ideals" protected by the court were prevalent in criminal justice. Moreover, building a fair system was a horizon susceptible of rallying support, within and outside the court. In concrete terms, promoting fairness in the criminal system meant two principal tasks upon which jurists (not only judges, but all legal practitioners) could easily agree: on the one hand, redressing the imbalance between the state's power to punish and the protection of individual rights; on the other hand, counterbalancing the supremacy vested in the prosecution to the detriment of independent judges.

The assertiveness of the Constitutional Court of Korea can therefore be described as a movement to “bridge the gap” between “constitutional ideals” and the existing framework, and one around which a variety of legal interests could coalesce. As a result, it should come as no surprise that the court was able to act early on, capitalizing on an opportunity activated by constitutional litigation from below, especially under the pressure of actors such as *Minbyun*, whose role has been described in chapter four. Indeed, “between 1988 and 1994, forty percent of *Minbyun*’s cases (over 580 in total) dealt with the National Security Law or the Law on Assembly and Demonstrations.”⁶¹ By framing the debate on procedural rights from the standpoint of the overall fairness of criminal justice, and not national security, these lawyers succeeded in putting the arguments of law-enforcing actors at a plain disadvantage.

Still, concerns such as investigative efficiency were never discarded by the constitutional court and have instead been importantly recognized as possibly justifying restrictions on rights when necessary. The court has however made clear that the demonstration of this necessity created a burden of proof which fell on law-enforcing actors, and not suspects or defendants. The court’s jurisprudence thus gave early signals to the Agency for National Security Planning and public prosecutors that investigating alleged anti-state activities did not authorize any conduct on their part.

For instance, the constitutional court determined in 1997 that the right to access one’s criminal records (which usually include interrogation transcripts, witnesses’ affidavits, and a suspect’s confession) could be restricted if there was “a danger of leakage of national security secrets, tampering of evidence and witnesses, breach of privacy, or any hindrance to the investigation.”⁶² The court provided however that such risks had to be established. In the national security case under review, a majority of justices held unconstitutional the decision of the prosecutor to limit access to the defendant’s criminal records because the motivations for his refusal had not been exposed.

The decision on the right to access criminal records was an important ruling against prosecutors’ discretion on another account. Indeed, the court considered in it that constitutional complaints were likely to be the only available effective remedy against prosecutorial actions, thereby upholding a major exception to the requirement that all prior processes be exhausted before a complaint could be admitted.

⁶¹ Patricia Goedde, “From Dissidents to Institution-Builders. The Transformation of Public Interest Lawyers in South Korea,” *East Asia Law Review*, Vol.4, No.1, 2009, p.75.

⁶² 9-2 KCCR 675, 94Hun-Ma60, November 27, 1997, in *The Constitutional Court of Korea, Twenty Years*, p. 531.

Even if [a prosecutor's decision] can be reviewed judicially under [the Administration Litigation Act], the likelihood of relief is nil. Requiring exhaustion of prior remedies to the complainant amounts to an unnecessary demand of detour. The circumstances justify an exception to the rule of exhausting of prior remedies.⁶³

A similar exception to the requirement that prior remedies be exhausted can be found in a 1999 decision on the wearing of prison uniforms forced upon defendants during interrogation and trial. In this case, the court deemed likely that the existence of a justiciable interest would be denied through administrative or judicial review, once more construing the mechanism of constitutional complaints as the only available effective remedy. The issue under review was raised by defendants forced to wear prison uniforms in confinement as well as during investigation and trial by correctional officers.

One of the two petitioners was Suh Jun-sik, well-known to human rights organizations since the 1970s. Their reports have to be relied on to reconstruct the circumstances behind the case since the Constitutional Court of Korea usually gives a very parsimonious account of facts. In the early 1970s, Suh, an ethnic Korean from Japan arrested for espionage, had been adopted as "prisoner of conscience" by Amnesty International. When he was released from jail in 1988 after seventeen years spent behind bars, Suh continued to promote human rights in South Korea. In 1997, he was arrested under article 7 of the National Security Act after having organized a human rights film festival. According to a brief published by Amnesty International following his arrest,

The main charges against Suh Jun-sik relate to a human rights film festival organized by *Sarangbang* human rights group, of which he is the director. The organization had refused to allow government censorship of the films shown and the authorities declared that the screening of one film, "Red Hunt," constituted a violation of the National Security Law. This documentary film, about mass killings on Cheju Island in 1948, had been shown to at least one other festival without the organizers facing prosecution. Other charges against Suh Jun-sik include the possession of poetry books alleged to "benefit" North Korea and failing to report to the police about his overseas trips, including a visit to the International Secretariat of Amnesty International in May 1997.⁶⁴

⁶³ *Ibidem*, p.530.

⁶⁴ Amnesty International, *Suh Jun-sik, Aged 49, Human Rights Activist*, ASA 25/01/98, London: Amnesty International, 1998.

As explored in previous chapters, patterns of enforcement of the National Security Act remained high well into the late 1990s, demonstrating the resilience of a narrow understanding of the activities permitted in post-transition South Korean democracy. In this context, the paradox of the case involving Suh Jun-sik and the wearing of prison uniforms was precisely that its national security dimension became completely eclipsed in the constitutional judgment. This could in part be attributed to the fact that the requirement to wear prison uniform during investigation, trial, and confinement applied to all detained defendants, although theoretically presumed innocent. Still, the court did not accord any special or separate consideration to individuals accused under the security legislation, implicitly considering the “human dignity” of potential enemies as worthy of being protected as that of other suspected criminals.

The detainees, prevented from wearing plain clothes and forced to wear inmate uniforms, will feel insulted and ashamed. Their free manifestation of individual personality is suppressed, and their human dignity and worth is infringed.⁶⁵

From the viewpoint of realizing a fair criminal justice system, protecting the rights of criminal defendants is not the only necessary aspect. Another important dimension of fairness has been for the South Korean constitutional court to check the scope of prosecutorial powers. Since the late 1980s, the court has deemed unconstitutional a number of powers granted to the prosecution at the expense of independent judges, such as the prevailing force given to a prosecutor’s decision to detain over a judge’s decision to release. Some of the invalidated measures favoring the prosecution unmistakably had their roots in authoritarian attempts at distorting criminal justice.

For instance, the pretrial witness examination scheme (allowing a witness for the prosecution to be examined before the opening of a trial, therefore precluding the opportunity of cross-examination by the defense) was adopted in January 1973, in the aftermath of Park Chung-hee’s regime radicalization following the implementation of the *Yusin* constitution. In 1996, the constitutional court invalidated this practice on the ground that “it merely facilitates investigative activities of the state.”⁶⁶ The same year, it reviewed another legacy from the *Yusin* period, the Act on the Special Measures for the Punishment of Persons Involved in Anti-

⁶⁵ 11-1 KCCR 653, 97Hun-Ma137, etc., (consolidated), May 27, 1999, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.777.

⁶⁶ 8-2 KCCR 808, 94Hun-Ba1, December 26, 1996, in The Constitutional Court of Korea, *Twenty Years*, p.523.

State Activities (“*pankukka haengwijaeüi ch’öpöl-e kwanhan tŭkpyölpöp*”). This law permitted to hold a trial in the absence of the accused, while his attorney was not authorized to participate in the proceedings and the court could only pronounce itself on the basis of the facts and arguments stated by the prosecution. Although this law was designed and solely used against Kim Hyöng-uk, a former director of the Korean Central Intelligence Agency who had publicly criticized Park Chung-hee before vanishing in 1975, the constitutional court struck down the piece on the basis that it generally “contravened due process of law and the right to trial.”⁶⁷

It should not be inferred from the above decisions that issues about the past, and its “liquidation,” are never a source of controversy at the Constitutional Court of Korea. On the contrary, they have fueled intense disputes as analyzed in chapter four and as illustrated by the following conflict over the memory of the post-transition era. Let us recall that during the early 1990s, “civil society groups continued their prodemocracy campaign with a vigor comparable to or stronger than that which characterized the 1985-1987 period,” demanding substantive reforms and denouncing the continuity with the former regime embodied, in particular, by the Roh Tae-woo administration.⁶⁸

In the course of a confrontation between police forces and student protesters at Dong-eui [Tong-üi] University in May 1989, five policemen were kidnapped and locked in the university library building, which was set on fire by the students when more riot police members were sent to rescue their colleagues, making a total of seven police victims. While the leaders of the student group were convicted of homicide in the wake of the event, the government’s Review Committee for Restoring the Honor of Democratization Movement Involvers and Providing Compensation for Them (“*minjuhwa undong wallyönja myöngye hoebok mit posang simüi wiwönhoe*”) decided in 2002 to acknowledge them and some forty fellow students as “democratization movement involvers.”⁶⁹

The family members of the deceased officers appealed to the constitutional court, claiming that the initiative of the review committee infringed upon their right to pursue happiness. A majority of the court dismissed the case, arguing that the objective of restoring the honor and compensating those involved in the democratization movement aimed at

⁶⁷ 8-1 KCCR 1, 95Hun-Ka5, January 25, 1996, in The Constitutional Court of Korea, *Twenty Years*, p.515.

⁶⁸ Sunhyuk Kim, “State and Civil Society in South Korea’s Democratic Consolidation. Is the Battle Really Over?,” *Asian Survey*, Vol.37, No.12, 1997, p.1136.

⁶⁹ 17-2 KCCR 311, 2002Hun-Ma425, October 27, 2005, in The Constitutional Court of Korea, *Twenty Years*, pp. 303-304.

“enabling a conciliatory, future-oriented and positive understanding of the sad history of Korea’s recent past” and, therefore, “does not (and is not intended to) cast any negative judgment on the policemen who died in the line of duty.”⁷⁰ Three justices, Kwon Seong, Kim Hyo-jong, and Choo Sun-hoe, however responded with a virulent dissent, which contested the possibility to designate as democracy activists the students responsible for the policemen’s death without debasing the reputation of the officers and the legitimate nature of their duties.

In short, the committee’s decision has made it no longer possible for the petitioners to maintain their dignity and identity as “family members of law enforcement officers who gave their lives to protect law and order.” They must now suffer the disgrace of being labeled “family members of instruments of illegitimate state power who oppressed democracy movement.”⁷¹

Rifts over judging history have divided the Constitutional Court of Korea on several occasions. The consensus that could prevail in the 1990s (from a unanimity or majority of justices) over issues of criminal procedure did contribute to undo many legacies from the authoritarian years, but it was not primarily achieved from the standpoint of putting the past on trial.

Consistent alignment with the Supreme Court of Korea

One of the indicators that various legal interests converged over improving the fairness of criminal justice in the post-transition era is the alignment between South Korea’s constitutional and supreme courts on procedural rights. This solidarity is all the more worthy of attention since the two institutions have been in a sustained relation of rivalry over the preeminence of their rulings, with the high court resisting to abide by decisions of limited unconstitutionality for at least a decade.⁷² When it comes to the practices of law-enforcing actors, a jurisdictional conflict could have deleteriously opposed the two courts, as “the Supreme Court at first insisted that it had the ultimate authority to review the constitutionality of rules and regulations.”⁷³ By contrast, the constitutional court held firm onto its assertion that constitutional complaints were likely to provide the only effective remedy against such

⁷⁰ *Ibidem*, p.404.

⁷¹ *Ibidem*, p.305.

⁷² *Ibidem*, p.537.

⁷³ *Ibidem*, p.172.

law enforcement procedures and behaviors as prosecutors' decisions, even when other review processes were available.

Despite these jurisdictional skirmishes, both institutions have largely converged in their rulings on criminal rights' scope and content. Indeed, several of the procedural issues dealt with by the constitutional court were also reviewed by the supreme court, sometimes in the first place. For instance, as early as 1990 did the supreme court rule on the inadmissibility of a national security suspect's statements "made while he was not allowed to consult with an attorney," thereby "curbing the police's prevalent, illegal practice of not permitting communication with counsel."⁷⁴ In 1992, the court held that "statements elicited without informing [the suspect] of the right to silence in interrogation are illegally obtained evidence, and so should be excluded, even if they are disclosed voluntarily."⁷⁵

The supreme court's early 1990s criminal jurisprudence clearly went against the grain of its traditional role. The high court was particularly known to be a conservative institution under authoritarian rule - in contrast to some lower courts, which proved more progressive. On the eve of the transition, its position was still to exculpate any use of violence and brutality by the police during interrogation. In a 1987 suit filed against police officers accused of torture, the supreme court determined that law-enforcing actors were expected to respect human rights, but that the incriminated officers should be excused for abuses committed out of their "devotion" to serving the state.

True, we acknowledge that the police used means which were not legal in their investigation. In consideration of their lengthy intelligence services and their devotion to the state, we feel it was proper for the prosecution to have acquitted the police.⁷⁶

The court's radical change of mindset between this 1987 decision and the rulings made in the early 1990s can be attributed to the judiciary's move toward greater independence after the regime change. This regeneration was largely prompted from within, with one-third of South Korean judges demanding in June 1988 the resignation of the supreme court's chief justice, Kim Yong-ch'ol, tainted by his support for the old regime.

⁷⁴ Supreme Court of Korea, 90Do1586, September 25, 1990, in *Ibidem*, p.505.

⁷⁵ Supreme Court of Korea, 90Do2033, 1, May 31, 1992, in Kuk Cho, "The Ongoing Reconstruction of the Korean Criminal Justice System," p.102.

⁷⁶ Dae-Kyu Yoon, *Law and Political Authority in South Korea*, p.62.

Two weeks after the chief justice resigned in disgrace, the two major opposition parties abstained from the National Assembly vote to confirm Roh [Tae-woo]'s first choice for the vacancy, thereby causing the nomination to fail. This action resulted in the nomination of Yi Il-kyu, a more independent-minded figure known for not bending to political pressure. A Supreme Court justice during the Chun presidency - until his appointment was not renewed in 1986 - Yi had won wide public respect for overturning lower court rulings in political cases. Yi's appointment as chief justice led to the National Assembly approval of thirteen new Supreme Court justices and a major reshuffle of the judiciary in July that affected some thirty-five senior District Court and High Court judges.⁷⁷

In the 1990s, the supreme court became a proactive element of the “criminal rights revolution” in which various legal actors joined forces to advance the overall fairness of the South Korean criminal system, plagued by important distortions of the rule of law and due process principles. In theory at least, national security suspects and defendants benefited from this movement, often being at the source of litigation while receding from the locus of argumentation. This marginalization of procedural issues' national security dimension may have been what permitted advances to take place. Conversely, both the supreme and constitutional courts have proved very cautious on questions restricted to anti-state crimes and enemies, with the former showing itself more conservative than the latter. When the national security dimension of an issue could not be diluted into the general fairness of the criminal system, constitutional assertiveness has therefore been more difficult, either negatively responded to by the supreme court or not pursued by a majority of constitutional judges.

Assertiveness through “tailored” reasoning in recent cases

The activism of the Constitutional Court of Korea against the practices of law-enforcing actors has not been limited to its first ten years of adjudication. With the coming of the 2000s, new sites have been brought to the court's attention, all the way to the lavatories of police detention facilities whose “open structure” was deemed incompatible with human dignity by a unanimity of justices in 2001.⁷⁸ In most cases, the court seems to have displaced the ground of its criticisms compared with its 1990s rulings, now reviewing whether or not the incriminated behaviors were excessive in the specific circumstances of the case rather

⁷⁷ Andrea Matles Savada and William Shaw (eds.), *South Korea*, p.67.

⁷⁸ 13-2 KCCR 103, 2000Hun-Ma546, July 19, 2001, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, pp.876-878.

than in the abstract. This technique has permitted the institution to maintain a firm stance against law enforcement actors' wrongdoings, while also limiting the scope of its decisions. In essence, the control of constitutionality exercised by the court over abuses of state power now appears to be less about the general legitimacy of a given type of conduct or measure, and more about its appropriateness and proportionality in light of the particular context of a given case.

This "tailored" approach was for example deployed in rulings involving corporeal intrusions by the police (through bodily search), public prosecutors (using physical restraints during interrogation), as well as prison wardens (resorting to physical restraints in detention). Two of these cases were settled unanimously by the court, and all of them were solved on the basis that they coincided with an excessive restriction of petitioners' basic rights in the instance before the judges, and in this instance only. As a result, none of the verdicts deemed unconstitutional the general possibility of thoroughly searching or imposing restraints on the body of a suspect, defendant, or convict.

In the police search case, the complainants were two women "arrested as flagrant offenders in violation of the elections laws" and subject to a comprehensive bodily search by a female officer, during which they had to pull their clothes and underwear up to their armpits and down to their knees, while repeating the process of squatting down and standing up three times. Although the court recognized that so detailed a bodily search could be allowed "when it is likely that the inmate would hide and carry dangerous materials such as deadly weapons or other disallowed goods in their inner body," it held that conducting such procedure was not justified in the particular circumstances of the case.

Forcing the complainants to repeat the process of squatting down and standing up with their clothes off damaged the sense of honor and self-respect of the complainants. Such bodily search is obviously out of the limits permitted under the Constitution, and it brought insult and humiliation to the complainants.⁷⁹

Similarly, the court reviewed in 2003 and 2005 the use of physical restraints by prison wardens on inmates and by prosecutors on suspects during interrogation. While employing devices such as binding ropes and handcuffs was recognized as having a legitimate purpose and being an appropriate means to prevent flight, violence, or suicide, their use was not found constitutional in the specific context of the two complaints. The first request came from an

⁷⁹ 14-2 KCCR 54, 2000Hun-Ma327, July 18, 2002, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.887.

inmate detained at Kwangju Prison and maintained under constant handcuffing for 392 days, thereby being impeded from “perform[ing] daily life in a normal fashion, as the complainant was forced to eat, excrete and sleep under such state.”⁸⁰ As a result of its excessive nature, the prolonged and unchecked act of the prison warden was unanimously deemed a violation of the petitioner’s human dignity by the constitutional court.⁸¹

In 2005, the court reviewed the petition of a “sociology professor residing in Germany” and arrested for violation of the National Security Act upon his return to South Korea in 2003. Although the name of the complainant is made anonymous through the erasure of its middle syllable, it is not difficult to identify “Song O Yul” as being Song Du-yul (Song Tu-yul) due to the international mobilization inspired by his arrest and trial. As usual, the court appeared little concerned with the facts that were not directly relevant to the matter of review. The national security charges raised against Song were thus left unmentioned and have to be reconstituted from other sources. Song was accused by the prosecution of “acting as a non-standing Politburo member of the North’s ruling Workers’ Party, which he has consistently denied, spreading North Korean ideology abroad and visiting the communist state on more than 20 occasions since 1973 [when he exiled himself from South Korea] on orders from Pyongyang.”⁸²

Rather than these facts, the court concentrated its attention on the conditions of Song’s interrogations at the Seoul District Prosecutors’ Office, where his body was constantly restrained by handcuffs and ropes during each episode of questioning. The court found that this treatment could only be justified in the event of “exceptional situations.”

In principle, when prosecutors interrogate suspects in their interrogations rooms, suspects should be allowed to exercise their right of defense without feeling pressured physically or

⁸⁰ 15-2(B) KCCR 562, 2001Hun-Ma163, December 18, 2003, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, p.905. The complainant in this case was an ordinary criminal who stabbed a prison officer in the courtroom during his trial.

⁸¹ In the wake of the decision, the Ministry of Justice designed new rules providing that “the use of leather handcuffs on the detainee [under restraint] is prohibited, and, instead, belt-handcuffs are introduced; chains are prohibited; medical examination [...] is reinforced; use of prohibitory devices may be temporarily suspended during meal or cleaning; protective facial mask is redesigned in a modern fashion considering the convenience of the wearer; respective prisons should review daily the need for the use of prohibitory devices to reduce the harm caused by constant wearing of prohibitory devices; and, use of prohibitory devices for over seven consecutive days is subject to the control of an immediately higher authority.” *The Constitutional Court of Korea, Twenty Year*, p.576.

⁸² Asian Human Rights Commission, *Scholar Song Du-yul Indicted for Violating the National Security Law*, Hong Kong: Asian Human Rights Commission, 2003.

emotionally, and the use of restraints should be allowed only in exceptional situations when a clear and concrete risk of flight, violence, disturbance, self-injury or suicide is present.⁸³

On the one hand, the court did not contest that the use of physical restraints could be authorized in certain circumstances, but, on the other hand, the justices disagreed about whether such extraordinary context was met in the case at hand. While a majority of justices reasoned that the complainant had been inappropriately maintained “into a substantively unequal position in responding to interrogation,” with his right to defense therefore being infringed upon, Justices Song In-jun and Choo Sun-hoe dissented. They invoked that employing handcuffs and ropes was justified since “they were used on a petitioner interrogated on charges of National Security Act violations, the allegations of which were being hotly disputed.”⁸⁴ The dissent of Song and Choo, who started their judicial career as prosecutors, however appears to have been less motivated by national security *per se*, than calling attention to the hardships faced by public prosecutors in doing their work.

There was a dire need for the use of the restraints in order to prevent unpredicted events such as flight or self-injury, protect the petitioner’s and other’s lives and limbs, and maintain order within the facilities. In light of the inadequacy in personnel and equipment available in prosecutorial interrogation rooms, the respondent had to supervise, restrain and protect the complainant using ropes and handcuffs.⁸⁵

Recognizing the legitimacy of given practices while controlling the adequacy of their use in light of each case’s circumstances represents a resource and condition of assertiveness for the Constitutional Court of Korea, but also a limit to its intervention. The court is far from being the only institution caught in this apparent contradiction.⁸⁶ The Supreme Court of Israel

⁸³ 17-1 KCCR 754, 2004Hun-Ma49, May 26, 2005, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume II, 2005-2008*, Seoul: Constitutional Court of Korea, 2009, p.790.

⁸⁴ *Ibidem*.

⁸⁵ *Ibidem*, pp.790-791.

⁸⁶ As argued by David Kretzmer about the Supreme Court of Israel, “in adopting the three-pronged test of proportionality in order to assess military necessity the Court has introduced a novel notion into international humanitarian law. While this notion allows for judicial supervision of the way in which military commanders use their discretion in occupied territory, and in the Israeli case has on occasion been employed in order to restrain use of such discretion, the notion may be overused and abused. The Court may employ the notion where it would be more appropriate to examine questions of legal authority. It may also widen the interests to be considered in assessing proportionality, thereby also widening the powers of the commander in occupied territory. David Kretzmer, “The Law of Belligerent Occupation in the Supreme Court of Israel,” *International Review of the Red Cross*, Vol.94, No.885, 2012, p.232. For instance, the Israeli supreme court has recognized the legality and legitimacy of building separation fences for security reasons (but not political ones) in the Occupied Territories, while ruling against the specific route of some of the separation fences designed by the Commander of the Israel Defense Forces in Judea and Samaria. H CJ 2056/04, *Beit Sourik Village Council v. Government of Israel* (2004).

or the European Court of Human Rights also derive a lot of argumentative strength from grounding their progressive rulings in a similar case-by-case or “tailored” control of excessiveness, while leaving intact the validity of general policy choices.

Persistent practical challenges from beneath

Concerning the “criminal rights’ revolution” supported by the U.S. Supreme Court in police stations, courtrooms, and prisons, Gerald Rosenberg pessimistically concluded that the court was “unable to achieve its stated goals” even when the political branches did not resist them. Indeed, “what was overlooked was that organizations, be they prison systems, police department, or lower courts, are often unwilling to change.”⁸⁷ Rosenberg’s analysis uncovers a fundamental obstacle to the effectivity of judicial intervention. Even constitutional rulings which are not opposed by the political branches can be defeated by institutional inertia.

The records of the Constitutional Court of Korea reveal that concerns about abuses in interrogation rooms and prison cells still existed almost two decades after the transition, despite the ban on torture and the inadmissibility of statements made unwillingly or without a suspect being informed of his right to remain silent and to be assisted by a lawyer.⁸⁸ In a 2005 case which was referred to the constitutional court by a lower tribunal questioning the credibility of prosecutor-made interrogation dossiers, the lower court for instance argued that:

The easy but powerful admissibility of the protocol prepared by prosecutor, acknowledged by the Instant Provision, induces prosecutors to conduct investigations and public prosecution to particularly focus on obtaining confessions at the investigation stage, and it is highly probable that, in the actual process, they violate the Constitutional ban on torture, the right to remain silent and the defendant’s right to life and bodily freedom.⁸⁹

By contrast, the Ministry of Justice and the Prosecutors’ Office recognized that “cruel treatments” might still be happening in the course of interrogation, but contended that “the possibility of human rights infringement such as torture is comparatively low.”⁹⁰ Overall, change has therefore been slow to come. On many issues, the criminal reforms advocated by

⁸⁷ Gerald Rosenberg, *The Hollow Hope*, p.334.

⁸⁸ United Nations Committee Against Torture, *Second Periodic Report of the Republic of Korea*.

⁸⁹ 17-1 KCCR 558, 2003Hun-Ka7, May 26, 2005, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume II*, pp.701-702.

⁹⁰ *Ibidem*.

the constitutional court came late or partially. Moreover, even when the political branches have encouraged the type of change promoted by the judges, their support has not guaranteed that the sites where the power to punish is effected through the discretion of law-enforcing actors were affected.

In the 2000s, the executive and legislature took an active stance in favor of a greater protection of individual rights in the criminal process. The National Human Rights Commission was created in 2001 upon the recommendation of the United Nations, and its activities included conducting field investigations in correctional and detention facilities. The years under the administration of Roh Moo-hyun (2003-2008) were characterized by a proliferation of committees to stimulate a broad renovation of the law-enforcement apparatus: the Police Reform Committee under the Korean National Police Agency was established in 2003; the Advisory Joint Committee to Adjust the Investigative Power between the Prosecutors and Judicial Police was created in 2004 under the Supreme Prosecutors' Office (*"taegömch'alch'ōng"*) and the National Police Agency; the Committee for Investigative System and Practice to Respect Human Rights was set in 2004 under the Supreme Prosecutors' Office ; the Judicial Reform Committee was founded in 2003 under the Supreme Court of Korea before a subsequent task force organization, the Presidential Committee on Judicial Reform, took over in 2004.⁹¹ As a result, a number of amendments were introduced in the Criminal Procedure Code and Criminal Administration Act, reflecting ongoing concerns with human rights violations in the different places where the state's power to punish secludedly operates.⁹²

The subtleness of courts' discursivity

Predictably, the decisions of the Constitutional Court of Korea do not provide a comprehensive solution to the issue of how potential enemies should be treated throughout the criminal process, from interrogation rooms to prison facilities. The court's interventions are located on a much narrower and concrete scale, producing an apparent multiplicity of outcomes. The contours and limits of the rights recognized "even" to national security suspects or offenders only make sense if the court's rulings are not treated as definitive and exhaustive answers to a unique question. Indeed, the overriding issue of how democracies

⁹¹ Kuk Cho, "The Ongoing Reconstruction of the Korean Criminal Justice System," p.101.

⁹² Transparency was for instance enhanced through introducing the video recording of interrogations, thereby implementing a check on prosecutors' use of their powers.

should confront their enemies is never treated as such by constitutional courts. On the contrary, their mode of action is confined to reviewing dispersed fragments of wider security policies which are themselves plural and may never exist as a coherent whole.

Therefore, the mapping of courts' security jurisprudence in general, and of enemies' criminal rights in particular, can only be an impressionistic one. The issues that reach constitutional courts through concrete *a posteriori* review are not only segments of a larger policy framework, they are also wrapped in facts. As mentioned earlier, the contextual specificity of each case can be both a resource and limit for judicial assertiveness. In addition, courts' answers are themselves dispersed, and a single ruling can hardly be approached as totalizing the jurisprudence which may exist on a given issue. Often, clusters of precedents have to be taken into account in order to properly reconstitute the position of a court. For instance, the security jurisprudence of the U.S. Supreme Court is often reified to one prominent decision for each period of crisis (such as its *Korematsu* ruling upholding the constitutionality of detaining Japanese Americans from the West Coast during World War II), but this monism rarely exhausts the intricacies of the court's case law.

Positions can also be complex, not only within the jurisprudence of a single court, but also at the level of judges' individual votes. The patterns of dissent at the Constitutional Court of Korea reflect how uneasy simplifications are. For example, Justice Choo Sun-hoe, a former prosecutor, dissented with the court's majority on several issues between 2001 and 2007. Choo was in favor of: limiting the right to counsel for suspects or defendants not in custody; considering that policemen killed in the course of their duties were disgraced by the designation of the students responsible for their death as "democratization activists"; or ruling that physical restraints were justified during the interrogations of Song Du-yul. Yet, Choo also filed in 2002 a momentous dissent against the requirement that national security prisoners be forced to submit a pledge to abide by the law prior to their release, holding that this measure infringed upon their freedom of conscience. This apparently highly conservative judge was therefore the one who defended that even the rights of those who oppose the constitutional order ought to be protected in a free democratic society.⁹³

Engaging with enemies' rights was precisely avoided by both the court and litigants' lawyers in most cases about the procedural guarantees due in criminal justice. On a few rare occasions, the national security dimension of issues could not, however, be evaded. This happened with article 19 of the National Security Act extending the period of custody from

⁹³ 14-1 KCCR 351, 98Hun-Ma425, etc. (consolidated), April 25, 2002, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume I*, p.12.

thirty to fifty days before a suspect be released or charges pressed against him, as discussed in chapter five. On the one hand, the court deemed in 1992 that extending the period of custody up to fifty days was unconstitutional for the anti-state offenses which are not so difficult to investigate, that is to say, praising or sympathizing with an anti-state organization (article 7) and failing to report national security crimes (article 10).⁹⁴ On the other hand, the court ruled in 1997 that the prolongation was justified for the more serious violations falling under articles 3 to 6 and 8 to 9 of the security legislation, such as “creating, joining, or inducing to join an anti-state organization,” “infiltrating from or escaping to territory under the control of an anti-state organization,” or “communicating with its members.”⁹⁵

Both the 1992 and 1997 rulings on article 19 of the National Security Act were decided unanimously by the constitutional court. This illustrates the absence of radical camps in the process of weighing basic rights against national security. Even when disagreements take place, their occurrence does not materialize the struggle between an absolute pro-state and national security side diametrically opposed to a pro-rights faction. Such crystallization of forces would actually be structurally impossible, not only at the Constitutional Court of Korea but throughout corresponding institutions in other democratic societies. Indeed, a fundamental invariant of judicial discourse is that basic rights are not unlimited. This assumption shared by all decisions - whether “progressive” or “conservative” - expresses that judicial intervention is never aimed at weakening the state, although different definitions of where its ultimate strength resides may be articulated and compete.

In conformity with this dissertation’s interpretive approach, the present chapter has tried to identify underlying sources of agreement and disagreement in the Constitutional Court of Korea’s discourse - or silence - over enemies’ criminal rights. A discursive premise shared by all decisions is the absence of rights’ absolutism, or the postulate that basic rights are not unlimited, which is neither circumscribed to the South Korean court nor to security issues. Although rights can always be restricted, an additional source of jurisprudential concord rests on the agreement that limitations are only permissible if necessary. Since the late 1980s, necessity has been narrowly interpreted by constitutional justices. Indeed, it no longer corresponds to the broad national security exception invoked by authoritarian regimes to construe as threats against the state any activity not tolerated by the government in place. Yet, a third element characterizing the court’s discursive order is its recognition of the continued

⁹⁴ 4 KCCR 194, 90Hun-Ma82, April 14, 1992.

⁹⁵ 9 KCCR 578, 96Hun-Ka8.9.10, June 26, 1997.

abuses committed by law-enforcing actors in their handling of suspected enemies since the transition, which testifies not only to the political but institutional limits of the 1987 change of regime.

CHAPTER EIGHT

Reviewing the Rights and Duties of Citizens vis-à-vis War and Peace

Article 5

- (1) The Republic of Korea shall endeavor to maintain international peace and shall renounce all aggressive wars.
- (2) The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality shall be maintained.

Article 39

- (1) All citizens shall have the duty of national defense under the conditions as prescribed by Act.
- (2) No citizen shall be treated unfavorably on account of the fulfillment of his obligation of military service.

Article 10

All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Article 19

All citizens shall enjoy freedom of conscience.

The Constitution of the Republic of Korea

This chapter analyzes the role of the Constitutional Court of Korea in cases calling into question the exigencies of national defense. The dispute over the “national” which constitutes the subtext of the court’s intervention has indeed led various South Korean military initiatives (such as the 2004 participation to the war in Iraq or the annual conduct of joint operations with the United States) to be constitutionally challenged on the ground that they represented aggressive and unfavorable behavior towards North Korea and the perspective of reunification. While these issues reflect that constitutional adjudication has been increasingly invested as a site of political contention, they also highlight how the court has prevented a dispute about competing “national” imaginaries from unfolding on its stage. Indeed, the court has either refused to recognize as justiciable the claims articulated by litigants in military cases, or confirmed the relevance of censoring modes of contesting the “national” such as conscientious objection to the mandatory military service, thereby reinforcing the functionality of conscription as one of the central mechanisms of mobilization and discrimination in modern South Korean history.

The constitutional possibility of war and peace

Some constitutions' pacifist vocation is reinforced by an expressed renouncement to maintaining a standing army, like in the 1949 Costa Rican text¹ or the 1947 Japanese document.² By contrast, South Korea's principled commitment to peace does not obstruct its constitutional readiness for war, as expressed by the basic norm's fifth article where both possibilities coexist. National defense is construed by the constitution not only as a "sacred mission" entrusted to the armed forces, but also as a fundamental duty which falls upon all citizens (article 39). The latter is one of the few obligations explicitly recognized in the text, along with compulsory education, the duty to work, and the duty to pay taxes. Article 39 is considered to provide the ground for the mandatory military service which all South Korean males have to perform between 18 and 35 years of age.

South Korea's active military forces number more than 600,000 soldiers, making it one of the largest armies in the world.³ War powers are principally vested in the President, the commander-in-chief of the armed forces, who can "declare war and conclude peace."⁴ Yet, the National Assembly is endowed with "the right to consent to the declaration of war, the

¹ "(1) The Army as a permanent institution is abolished. There shall be the necessary police forces for surveillance and the preservation of the public order.

(2) Military forces may only be organized under a continental agreement or for the national defense; in either case, they shall always be subordinate to the civil power: they may not deliberate or make statements or representations individually or collectively."
(Article 12 of the Constitution of the Republic of Costa Rica).

² "(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."
(Article 9 of the Constitution of Japan).

With the outbreak of the Korean War (1950-1953) and most of the occupation troops which ensured the military protection of Japan leaving the country, a National Police Reserve was however established in 1950, becoming Japan Self-Defense Forces in 1954. Their constitutionality was upheld on several occasions by the Supreme Court of Japan. In the *Sunakawa Case* decided in 1959, the supreme court recognized that "article 9 is an embodiment of the concept of pacifism which characterizes the Constitution of Japan" but held, nonetheless, that "it goes without saying that this does not in the least negate the inherent right of self-defense of this country as a sovereign state." The Supreme Court of Japan, 1959(A)No.710 (1959), in Alfred Oppler, "The Sunakawa Case. Its Legal and Political Implications," *Political Science Quarterly*, Vol.76, No.2, June 1961, p.247.

³ The armed forces are currently undergoing a reform aimed at increasing their capabilities while downsizing troop numbers. From 681,000 in 2005, they are expected to decrease to 517,000 by 2020. They are organized into four branches: the Army, the Navy, the Marine Corps, and the Air Force. Ministry of National Defense, "Defense Reform," Ministry of National Defense's website. Accessed on May 20, 2013 at: http://www.mnd.go.kr/mndEng_2009/DefensePolicy/Policy12/Policy12_10/index.jsp.

⁴ "The President shall conclude and ratify treaties; accredit, receive or dispatch diplomatic envoys; and declare war and conclude peace" and "The President shall be Commander-in-Chief of the Armed Forces under the conditions as prescribed by the Constitution and Act" (Article 73 and article 74, section 1 of the Constitution of the Republic of Korea).

dispatch of armed forces to foreign states, or the stationing of alien forces in the territory of the Republic of Korea.”⁵ This framework nonetheless conceals how matters of war and peace in South Korea seldom are a determination of national policy alone. South Korea’s security is indeed closely connected to its military alliance with the United States, dating from the aftermath of World War II and reinforced in the wake of the Korean War (1950-1953). Since the armistice which ended the conflict was signed, American troops have remained stationed in the southern half of the peninsula. In return, South Korea has assisted the United States in most of the theaters where its military was deployed, prominently in Vietnam, between 1964 and 1973 (where more than 300,000 South Korean soldiers served), and Iraq, from 2003 to 2008 (where approximately 20,000 troops were sent).

The frontier between the two Koreas and heavy American presence in the region are often referred to as the last vestige of the Cold War. This depiction obscures the significance of domestic forces irreducible to international politics which contributed to make possible not only the division, but its permanence. The post-1945 Korean frontier thus deserves to be understood and analyzed beyond the paradigm of the Cold War. Its dynamics did have an immense influence, but as far as they interacted with interests and processes otherwise homegrown. The political and ideological forces underlying the division were not imported and transplanted on the peninsula by the U.S. and Soviet Union during their respective post-war occupation. Instead, violently antagonistic interests (between property owners v. peasants and the working class, between pro-Japanese v. nationalists, between conservatives v. revolutionaries) were formed throughout the decades preceding the liberation, thus being deep-rooted in the profound societal changes and contrasted experiences born of the colonial era (1910-1945). If the fixation of rival left-right forces into two separate states north and south of the 38th parallel was a product of the struggle between the two superpowers, these forces’ own coming into being originated in the unfolding of Korean history during the first half of the 20th century.⁶

⁵ Article 60, section 2 of the Constitution of the Republic of Korea.

⁶ This historiographical view of the division emerged in the early 1980s following the publication of Bruce Cumings’ first volume on *The Origins of the Korean War* (Bruce Cumings, *The Origins of the Korean War. Vol. I. Liberation and the Emergence of Separate Regimes, 1945-1947*, Princeton: Princeton University Press, 1981). It has been described by Henry Em as a “critical-interactive” framework, contrasting with the approaches that solely focus on domestic factors or international variables (such as the “orthodox-international” narrative of South Korea’s official historiography blaming the Korean partition and war on Soviet ambitions, supported by the “puppet” government of North Korea; or the “liberal-international” view seeing the USSR and the United States as equally responsible). Henry Em, “ ‘Overcoming’ Korea’s Division. Narrative Strategies in Recent South Korean Historiography,” *positions: east asia cultures critique*, Vol.1, No. 2, 1993, pp.453-456.

Seen beyond the lenses of international dynamics, the resilience of the inter-Korean division no longer appears as a legacy which anomalously survived the Cold War era. It may be better understood as a continuation of the separate process of state-building in which each Korea engaged after 1948, and that the Korean War contributed to solidify, providing both regimes with an enduring source of legitimacy. Indeed,

Whereas before the war, the South Korean state had a weak local base of support, the war gave the state an ideological basis for building its legitimacy. Anti-communism, articulated and experienced in everyday life, became the premier motif for ideological legitimization of the South Korean state. For this reason, no other event comes close to the Korean War in terms of its determining force on the establishment of that relationship. The Korean War transformed the South Korean state from an extremely unstable and fragile anti-communist state into a powerful bureaucratic one ruled by an authoritarian regime. This regime, in turn, was supported by a military force that was huge relative to the population and the size of the economy. The size of the Republic of Korea (ROK) Army grew from a mere 150,000 before the war, to over 600,000 at the time of the cease-fire.⁷

Because no peace treaty was concluded after the armistice, the peninsula remains in a *de facto* state of war. As the present chapter will explore, this factor is not however the only relevant one to understand how the rights and duties of South Korean citizens are negotiated when it comes to the necessities of national defense. The jurisprudence of the constitutional court appears instead preoccupied with a dual concern: not only the disintegration of the state - which implies to be ready for war in order to guarantee both peace and the existing institutional order; but also the disintegration of the national community, that is to say, the community of citizens recognized as loyal members whose unity may be threatened by alternative ways of envisioning the nation.

Overview of the military cases before the court

The plurality of values present in the constitution, including its ambivalence between the language of war and peace, has fueled various challenges to South Korea's military policies before the constitutional court. On several occasions, petitioners argued that some of the state's choices - such as participating to the war in Iraq in 2004 or conducting joint military

⁷ Jang-Jip Choi, "Political Cleavages in South Korea," in Hagen Koo (ed.), *State and Society in Contemporary Korea*, Ithaca: Cornell University Press, 1993, p.22.

exercises with the United States - frustrated its engagement to “contribute to lasting world peace” (preamble) and to “renounce all aggressive wars” (article 5), as well as contradicted the constitutional responsibility to “formulate and carry out a policy of peaceful unification” in the peninsula (article 4). South Korea’s involvement in foreign conflicts like Vietnam and Iraq (the two post-1945 U.S.-led wars to which it most heavily cooperated) has indeed had resonance in the context of the Korean division - Vietnam was part of the South’s struggle against communism, while the invasion of Iraq followed its designation by the George W. Bush administration as forming an “axis of evil” with Iran and North Korea.

The validity of South Korea’s defense policy has also been questioned in terms of its compatibility with basic rights such as the freedom of conscience (article 19), the right to happiness (article 10), or the right to peaceful livelihood whose existence has been under debate. Contrary to the German basic law,⁸ the South Korean constitution does not acknowledge the right to conscientious objection. Those who refuse to serve in the military following the dictates of “the powerful and earnest voice of one’s heart” (as conscience is described by the Constitutional Court of Korea) expose themselves to imprisonment for up to three years. In practice, hundreds of young men are annually condemned to spend eighteen months behind bars for declining to enlist - the vast majority of them being Jehovah’s Witnesses; while a minority of privileged ones goes unpunished for dodging the draft. Both issues have been carefully addressed by the court and demonstrate that the burden of national defense, being embedded in dynamics proper to South Korean society, carries meaning independently from the division.

In theory, reviewing matters of national security and defense policy, including reversing military orders or overturning such a momentous political decision as going to war, is not beyond the possibilities of judicial action. By contrast, making the state weaker and more vulnerable is outside the discursive order of courts’ intervention. Even judgments which seemingly restrain the state’s capacity to take certain military steps are envisioned by courts as acting in the state’s interests rather than against them. The potential which exists for judicial resistance is therefore not infinite. Moreover, its existence does not entail its realization. Courts have instruments at their disposal to review military issues or to avoid doing so. Rulings by the Constitutional Court of Korea over matters of war and peace epitomize a strong inclination for the latter. In the present chapter, cases typical of this attitude deal with the dispatch of South Korea’s armed forces to Iraq, the relocation of an American

⁸ Article 4, section 3 and article 12a, section 2 of the Basic Law for the Federal Republic of Germany recognize the constitutional right to conscientious objection. They are reproduced later in the chapter.

military base on the national territory, and the conduct of a joint military exercise between the U.S. and ROK armies. The complaints challenging them were dismissed as non-justiciable by the constitutional judges, thereby preventing the alternative “national” imaginary articulated by litigants from fully accessing to the constitutional stage. Yet, none of the above-mentioned military initiatives was completely left without blame by the constitutional court.

This form of prudential criticism is not confined to war-related matters. The court is also circumspect as soon as controversies of societal magnitude come to the fore, as revealed by its rulings upholding capital punishment, the criminalization of adultery, or the outlawing of abortion. The issue of mandatory conscription appears at the crossroads of both military and societal interests given its significance in contemporary South Korea. The cases associated with it illustrate how the constitutional court’s deference vis-à-vis the political branches does not manifest an absolute subservience on its part. For instance, a majority of justices reviewing the compulsory military service system demanded that the parliament seriously consider the possibility of creating an alternative service to conciliate the duty of national defense and the freedom of conscience. In the end, the court nonetheless recognized the continued relevance of the ban on conscientious objection, not because of the security necessities brought about by the division of the peninsula, but given the risk of social disintegration associated with the tolerance of minorities potentially endangering South Korea’s prescribed “national” narrative.

Judgments on war and peace

Military operations on and off trial: a comparative perspective

Constitutional courts are not particularly known for reviewing the national security decisions of the political branches and the armed forces critically, especially when such decisions touch upon resolutions about the making of war and peace. The ability to intervene in military matters is not however inherently outside the possibilities of judicial action, as exemplified by the 2004 ruling of the Sala IV, the constitutional chamber of Costa Rica’s supreme court, which declared unconstitutional the country’s support to the war in Iraq. The activism of the Costa Rican court is far from being an isolated exception. In the United States, “the notion that courts are poorly suited to decide issues of war power and foreign affairs [did] not emerge until after World War I,” when a legal literature on the limits of “judicial

cognizance” over matters of foreign policy, war, and peace started to develop.⁹ Until then, courts had not particularly construed their role as limited by these issues’ very nature. The first war-related questions decided by the American supreme court involved the so-called “Quasi-war” which took place, undeclared, between the United States and France from 1798 to 1800. According to Louis Fisher,

At no time from [its initial 1800] decision to the Civil War did the Court express a reluctance to handle these cases, either because of a lack of competence or a fear that in deciding such disputes it might collide with the other branches. The cases involved such sensitive questions as deciding whether France was an “enemy,” conflicts between presidential war proclamations and statutory policy, suspension of the writ of *habeas corpus*, calling forth the militia, annexing territory as the result of military conquest, and protecting American lives and property abroad. Those cases came to the courts and were decided there.¹⁰

This first national security crisis also coincided with the creation of instruments to confront “enemies” from within which were in fact directed against the political opposition. A series of four bills known as the Alien and Sedition Acts were passed in 1798 and “quickly became weapons to silence Thomas Jefferson’s emerging pro-French Republican Party.”¹¹ They were repealed in the wake of the 1800 election which brought Jefferson to the presidency.

In the contemporary world of constitutional politics, Israel’s supreme court embodies a renowned exception to the idea that courts cannot interfere in military matters. Since the Israeli state took control over the West Bank and the Gaza Strip as a result of the Six-Day War fought against Egypt, Jordan, and Syria in 1967, the supreme court has reviewed orders of the military in the Occupied Territories. First petitioned by Palestinian residents of these areas in the early 1970s, the court has come to recognize that its writ “extends to reviewing the legality of all acts and decisions of governmental authorities, including the IDF [Israel Defense Forces], wherever they may be performed.”¹²

⁹ Louis Fisher, “Judicial Review of the War Power,” *Presidential Studies Quarterly*, Vol.35, No.3, 2005, p.468.

¹⁰ *Ibidem*, p.469.

¹¹ Seth Waxman, “The Combatant Detention Trilogy Through the Lenses of History,” in Peter Berkowitz (ed.), *Terrorism, the Laws of War, and the Constitution. Debating the Enemy Combatant Cases*, Stanford: Hoover Institution Press, 2005, p.5.

¹² David Kretzmer, “The Law of Belligerent Occupation in the Supreme Court of Israel,” *International Review of the Red Cross*, Vol.94, No.885, 2012, p.209.

In South Korea, issues of war-making have largely been dismissed by the constitutional court. Rulings which decline to decide a case are however no less “positive” and telling than the judgments which strike down or validate legislation. Alexander Bickel has thus famously described the American supreme court as wielding a “threefold power”: censoring, legitimating, or abstaining. This last role corresponds to “the point at which the Court gives the electoral institutions their head and itself stays out of politics” and it is precisely “where the Court is most a political animal” according to Bickel.¹³ To withhold its constitutional judgment, the supreme court has developed over time an “inexhaustible arsenal of techniques,” including the political question doctrine following which issues of a political rather than legal nature fall outside the scope of judicial review.¹⁴

A lot can therefore be learned from the Constitutional Court of Korea’s decisions to abstain, and in particular from its justifications for why the military issues raised before it - South Korea’s participation to the war in Iraq, the relocation of a U.S. base on the national territory, the conduct of an annual joint military exercise with the American army - were not found justiciable. No consistent set of arguments has been used by the court to dismiss these cases. For instance, a version of the political question doctrine was invoked by a majority of justices on only one of these three occasions. While reviewing military matters is not inherently beyond the possibilities of judicial action, the Constitutional Court of Korea has used various tools to decline doing so on a number of occasions.

The reluctance or inclination to decide issues of war and peace differ from one court to another, as exemplified by the comparison between the Sala IV’s and Constitutional Court of Korea’s respective rulings on Iraq; but they also vary throughout time as illustrated by the evolution of American jurisprudence. The Israeli case duly demonstrates that the existence of an intense and prolonged national security threat does not take away the likelihood of reviewing military issues. Israeli judges have repeatedly contended that the “security of the state” is not a “magic word” which makes judicial review disappear.¹⁵ This does not however entail that the supreme court construes the security plight of the nation differently or less seriously than the political branches or the defense forces. On the contrary, its judgments have consistently recognized how “ever since it was established, the State of Israel has been

¹³ Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Haven: Yale University Press, 1986, p.132.

¹⁴ *Ibidem*, p.70.

¹⁵ H CJ 7015/02, *Ajuri v. IDF Commander in the West Bank* (2002).

engaged in an unceasing struggle for its security - indeed, its very existence,” while “terrorist organizations have set Israel’s annihilation as their goal.”¹⁶

Contrary to the common view that jurisprudence on cases from the Occupied Territories has been critical of governmental action and rights-minded,¹⁷ some authors have insisted on the legitimizing effects produced by the supreme court’s rulings. According to David Kretzmer, the institution’s “dominant narrative holds that the state is being attacked, the authorities are trying to protect it, and the ultimate duty of the Court is to assist them in this task.”¹⁸ As argued in chapter three, this type of discourse is not in contradiction with the *raison d’être* of constitutional courts, as the possibility of enmity and the correlative necessity to defend society are embedded in the constitutional order of contemporary democracies.

In that general sense, courts are not neutral arbitrators of the politics of enmity. Yet, they are also not neutral in a second and more specific way which varies depending on contexts. As argued by Stéphanie Balme and Michael W. Dowdle, “constitutionalism is ultimately about envisioning the state. And rightly or wrongly, every polity envisions its particular ‘state’ as a distinct phenomenon, one whose identity and character are uniquely of its own.”¹⁹ Yet, the vision of the state and the “national” which constitutionalism articulates is not specific to every polity in virtue of the cultural mold that fashions it, but because it is politically shaped in each instance by particular and selective forces. The Israeli case demonstrates the role played by the court’s perception of the unique “identity and character” of the state thus conceived in its constitutional jurisprudence.

Central to that perception is the notion of Israel as the state of the Jewish people. Although the Court has dismissed claims of a contradiction between this notion and the democratic principle, particularistic elements involved in the Zionist ideology of a Jewish state or state of the Jewish people are entrenched in its jurisprudence. The interests of the Jewish collective are seen as synonymous with the public good, or the interests of the state itself. These judges cannot be neutral in a case involving any act perceived as challenging these interests.²⁰

¹⁶ H CJ 5100/94, *Public Committee Against Torture in Israel v. State of Israel* (1999).

¹⁷ See for instance Seth Waxman, “The Combatant Detention Trilogy Through the Lenses of History.”

¹⁸ David Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories*, Albany: State University of New York Press, 2002, p.196.

¹⁹ Stéphanie Balme and Michael W. Dowdle (eds.), *Building Constitutionalism in China*, New York: Palgrave Macmillan, 2009, p.15.

²⁰ David Kretzmer, *The Occupation of Justice*, p.15.

Similarly, the Constitutional Court of Korea operates within an order of discourse where politics of enmity and politics of identity are deeply intertwined, with their respective ambiguities and possible contradictions. While the court can be seen as less assertive than some of its counterparts when war and peace are involved, its refusal to review a series of challenges to South Korea's military policies can also be interpreted as amounting to the projection of a certain "national" imaginary, by preventing competing ones from unfolding on the site of constitutional adjudication.

Going to Iraq: whose political judgment is to be trusted?

In 2003, a constitutional complaint was filed against the executive's decision to dispatch South Korea's armed forces to Iraq. It emanated from a single petitioner assisted by a court-appointed lawyer, since being represented by counsel is a prerequisite to any proceeding before the Constitutional Court of Korea.²¹ Notwithstanding the significance of the stake, the request was characterized by a strong lack of organizational support behind the petitioner's claim. The court even found itself forced to reformulate the subject matter raised by the complaint, which was not viewed as appropriately framed. Indeed, the petition originally challenged the "decision of the National Security Council of October 18, 2003 to dispatch private soldiers to Iraq," mainly on the ground that this initiative violated article 5 of the constitution by which South Korea "shall renounce all aggressive wars."²² As the National Security Council ("*kukka anjŏn pojang hoeŭi*") is no more than "the advisory organization established by the Constitution for the President to consult in forming foreign policies and military policies concerning national security," the court reasoned that its resolutions were not legally binding. It instead deemed the president's decision to send the national armed forces to Iraq as the proper matter of review in the case.²³

The inadequate formulation of the issue was not the reason why the court declined to review the request. While all the justices were in favor of its dismissal, they diverged over the justification of their common position. A minority of judges held that the complainant lacked

²¹ "If a person who desires to file a constitutional complaint has no financial resources to appoint an attorney as his counsel, he may request the Constitutional Court to appoint a court-appointed counsel. In this case, the time limit for request as prescribed by Article 69 shall be counted from the day on which such request is made." (Article 70, section 1 of the Constitutional Court Act).

²² The expression "private soldiers" corresponds to the English translation for the Korean "*ilban sabyŏng*," whose meaning is closer to "ordinary soldiers" or "ordinary enlisted men."

²³ 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I, 1998-2004*, Seoul: Constitutional Court of Korea, 2006, p.335.

“self-relatedness,” not having any of his basic rights directly infringed upon. Indeed, “the complainant is, as the complainant admits himself, not a party concerned who will be dispatched due to the detachment decision at issue in this case, nor is the complainant presently or is scheduled to be in military service.”²⁴ This procedural, and potentially surmountable, obstacle was not the one however identified by the rest of the court. Instead, the majority did not find the court qualified to settle the issue raised by the complaint in the first place. Claiming that “a decision to dispatch Armed Forces requires a resolution of highly political nature based upon the consideration of total circumstances concerning domestic and international political relations,” most justices reasoned that “such a decision is to be made by the institution representative of the constituents therefor, by way of prudent decision-making through an expansive and extensive deliberation with the experts in the relevant field.”²⁵

In ruling so, the Constitutional Court of Korea seems at first to have completely deferred to the wishes of the political branches, and in particular of the executive. The Roh Moo-hyun administration then in power (2003-2008) had clearly warned the court against an undue exercise of judicial review through the opinion filed by the Ministry of National Defense (“*kukpangbu*”), acting as respondent to the case. Its opinion affirmed that the decision to dispatch the armed forces to Iraq constituted an “executive prerogative action,” authorized by the constitution, premised upon “a determination of a highly political nature,” likely to receive the democratic legitimation of the parliament, and against which the constitutional court would have no means to enforce a decision of unconstitutionality. With this admonition, the government insisted on making the court aware that:

[S]hould the above detachment decision obtain the consent of the National Assembly, it would be inappropriate for the Constitutional Court, which is not on par with the legislative branch in terms of democratic legitimacy to determine the constitutionality of the above decision; and, should there be a decision holding the above decision unconstitutional, there is no legal method to enforce such a decision. As the judicial review over an executive prerogative action or political question should be restrained, the constitutional complaint in this case is unjustified.²⁶

²⁴ *Ibidem*, p.350.

²⁵ *Ibidem*, p.348.

²⁶ *Ibidem*, p.347.

A majority of justices conceded that “an utmost deference” was owed to the elected political branches in the case at hand, provided that the executive’s decision received the consent of the National Assembly. The court underlined that parliamentary approval was required by the constitution in order to “prevent arbitrary warfare or dispatch of Armed Forces by mandating prudence in exercising the prerogative of supreme command of military by the President.”²⁷ While the language of the present ruling was less authoritative than earlier jurisprudence on the necessity of reviewing “executive prerogative action,”²⁸ it nonetheless made reference to the possible arbitrariness of a decision taken by the presidency alone.

This was not the only source of criticism infused by the justices in their ruling. On the one hand, the court did not manifest much confidence in the capacity of any of the political branches to make the right judgment about the nature and consequences of the war. On the other hand, it confessed that the verdict which it could itself deliver on the matter was unlikely to “assertively be more right or correct than that of the President or the National Assembly” given the “limited materials and information” at the court’s disposal. The court was also concerned that its judgment “may not securely receive public trust.” In these conditions, “whether or not the dispatch at issue in this case is in violation of the Constitution, that is, whether such decision will ultimately benefit the interest of the citizenry and the nation by enhancing national security, and whether the war in Iraq is a war of aggression that is in violation of international norms, should be judged by the representative institutions of the President and the National Assembly, and may not be appropriately judged by this Court that is by nature in possession of no more than limited materials and information.”²⁹

Rather than an optimal solution, this choice appeared as the lesser of two evils. The court did not respect the decision of the political branches because it trusted the soundness of their discernment, but out of doubt for its own capacity to make a better judgment and to receive public support. In 2004, the year when the complaint was dismissed, the court gained unprecedented visibility after nullifying the impeachment motion voted by the parliament

²⁷ *Ibidem*.

²⁸ In a 1996 case on the presidential power to issue financial and economic emergency decrees, the court “had taken the view that while the concept of an executive prerogative action may be recognized, it must still be subjected to review.” 8-1 KCCR 111, 93Hun-Ma186, February 29, 1996, in the Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: Constitutional Court of Korea, 2010, p.208.

²⁹ 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, pp.348-349.

against President Roh Moo-hyun.³⁰ The impeachment case represented a turning-point as, “upon seeing the Court adjudicate the fall-out between the two political branches of the government, many citizens for the first time were alerted to the tremendous influence it could have on the political scene.”³¹ The case on the war in Iraq preceded the court’s decision on Roh’s impeachment by a few weeks, and while the court’s consideration for the public perception of its jurisprudence was not new, the salience that the institution enjoyed at the time could only reinforce its long-time concern for establishing itself as a non-partisan actor.

In the case about South Korea’s military participation to the war in Iraq, the court did not construe abstaining from judicial review as a desirable thing in itself, premised on the political nature of the issue under review. While the court was willing to trust neither the judgment of the political branches nor its own, it did identify one legitimate censor of the resolution to go to war: the electorate, who would eventually hold the responsible decision-makers accountable at the ballot box.³² Towards the very end of the ruling, the court’s deference was also justified in comparative light as the majority claimed that its position conformed to “judicial self-restraint over the matters concerning diplomacy and national defense that require a resolution of highly political nature in other nations with a long tradition of democracy.”³³

While the U.S. Supreme Court was not explicitly cited by the South Korean judges, there is little doubt that their allusion to issues “of a highly political nature” made reference to the “political question doctrine” associated with American jurisprudence. According to it, courts are expected to eschew reviewing questions which are by essence political, and not legal. However, the doctrine appears more as a resource forged and used by courts than as a limit which actually constrains their jurisdiction. In the United States, “the record from 1789 to the Steel Seizure Case of 1952 is replete with court cases that scrutinized presidential claims for emergency power and frequently found them wanting. It was only with the

³⁰ The adjudication of impeachment falls under the jurisdiction of the Constitutional Court of Korea as defined by article 111 of the constitution. The impeachment powers of the court and its 2004 decision on the case against Roh Moo-hyun are analyzed in detail in chapter three.

³¹ Chaihark Hahm, “Beyond ‘Law vs. Politics’ in Constitutional Adjudication. Lessons from South Korea,” *International Journal of Constitutional Law*, Vo.10, No.1, 2012, p.22.

³² “Although there may be concerns that such abstention of judicial review might leave arbitrary decisions intact, such decisions of the President and the National Assembly will ultimately be subject to the assessment and judgment of the constituents through elections.” 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.349.

³³ *Ibidem*.

Vietnam War that courts began to systematically avoid war power questions.”³⁴ Even after the jurisprudential turn of the Vietnam era, the courts did not completely abstain from reviewing issues of warfare and foreign relations. They only deferred to the decisions of authorities whenever they found them constitutionally empowered, an attitude which “needs no special doctrine” to be described and has been pursued through other instruments than the idea of non-justiciable “political questions.”³⁵ This is evidenced by the Constitutional Court of Korea’s own record of dismissing war-related matters without claiming that they raised issues “of a highly political nature.”

Courts can intervene in issues which are politically loaded and sensitive in the field of war and peace, but only some actually do. Even through this difference, which is in itself significant, they all continue to operate within a shared order of discourse in which possibilities are multiple, but not infinite. The limits met by courts which actively intervene in this policy area are not fundamentally different from those of the institutions which strategically opt for being more cautious, as exemplified when comparing the 2004 rulings on Iraq delivered by South Korea’s constitutional court and its counterpart in Costa Rica, the constitutional chamber of the supreme court or Sala IV. In both cases, the two courts reinforced a certain way of envisioning their respective states and national destinies.

Ruling on Iraq in Costa Rica and South Korea: from antithesis to mirror image

The constitutional chamber of the Supreme Court of Justice of Costa Rica was created in 1989, following a constitutional amendment, and it has since undoubtedly provided “the strongest, most consistent example of a court that regularly engages in both types of constitutional control” - namely arbitrating interbranch conflict and enforcing rights - in Latin America.³⁶ Its 2004 ruling against the presidential decision to support the war in Iraq is usually cited as one of the most eloquent demonstrations of the court’s assertiveness. Contrasting the Sala IV’s judgment of unconstitutionality with the Constitutional Court of Korea’s dismissal importantly sheds light upon differences as well as commonalities between the constraints and possibilities of the two institutions.

³⁴ Louis Fisher, “Judicial Review of the War Power,” p.467.

³⁵ Louis Henkin, “Is There a ‘Political Question’ Doctrine?,” *The Yale Law Journal*, Vol.85, No.5, 1976, p.598.

³⁶ Gretchen Helmke and Julio Ríos-Figueroa (eds.), *Courts in Latin America*, New York: Cambridge University Press, 2011, p.12.

Both countries first share a system of constitutional justice which is widely accessible, making it possible for individual complaints challenging the executive's endorsement of the war in Iraq to have directly reached each court. The system leading to the Sala IV is even more open than its South Korean equivalent since "under the new chamber's operating rules, anyone in Costa Rica (without regard for age, gender, or nationality) can file a case with the Sala IV at any time of day and any day of the year, without formalities, lawyers, fees, or an understanding of the point of law on which the claimant is appealing. Claims can be handwritten or typed on anything ["this has previously included a case written on a paper used to wrap bread"] and in any language, including Braille."³⁷ Moreover, the case on the war in Iraq reveals a broader conception of justiciable interests in Costa Rica than in South Korea when it comes to constitutional requests. While the Costa Rican constitution recognizes "the right to petition any public official or State entity,"³⁸ no prerequisite such as a present and direct infringement on the complainant's basic rights is necessary for his or her request to be admissible. Argument about petitioners' lack of "self-relatedness" - as advanced by the minority in the South Korean ruling - would have been irrelevant for the Sala IV, which considers as justiciable any "interest which concerns the collectivity as a whole."³⁹

The petition challenging the executive's decision to support the war in Iraq was brought before the court by a coalition of individuals, including a law student, the representative of the Lawyers' Association of Costa Rica, and the "Defender of the Inhabitants" - i.e., the country's *ombudsman*. They all alleged that the pacifist vocation of the country, affirmed in the constitution, was violated when the presidency declared that the country could not be neutral "in the conflict between peace and terrorism."⁴⁰ Contrary to the claims of the complainants, the court did not find that the executive's statements were tantamount to a war declaration against Iraq, but that they only expressed the administration's moral support toward the United States and its allies. In ruling so, the court followed the prosecution's argument that the executive never tried to deny that Costa Rica was

³⁷ Bruce Wilson, "Enforcing Rights and Exercising an Accountability Function. Costa Rica's Constitutional Chamber of the Supreme Court," in *Ibidem*, pp.59-60.

³⁸ "The right to petition any public official or State entity, either individually or collectively, and the right to obtain prompt resolution are guaranteed" (Article 27 of the Constitution of the Republic of Costa Rica).

³⁹ Sala Constitucional de la Corte Suprema de Justicia, Resolución 2004-09992. The judgment is available in Spanish on the court's website. Accessed on May 22, 2013 at: <http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Sentencias/2004/04-09992.htm>. All the translations in the following quotes are mine.

⁴⁰ "Our vocation in favor of peace should not be interpreted as indifference or tolerance for terrorism. Moreover, in the conflict between peace and terrorism, we are not neutral. Costa Rica is and will be a loyal, firm, and determined ally supporting those who search peace, freedom, democracy and the respect of international law." *Ibidem*.

constitutionally committed to peace and incapacitated to be at war given its renouncement to the maintenance of armed forces.

The Sala IV did not sanction the administration's support to the war in Iraq as a declaration of war violating the constitutional value of peace. Instead, its invalidation was pronounced in virtue of "the impossibility of our government to tie its foreign policy to belligerent actions outside or even parallel to the United Nations system - including of course those actions which consist in mere manifestations of 'moral support' - as the proper means to solve conflicts."⁴¹ In so far as military actions in Iraq were taken outside the frame of the United Nations, the constitutional judges concluded that the administration could not support them and should therefore request the exclusion of Costa Rica from the list of countries part of the U.S.-led coalition.

As underlined by the constitutional chamber itself, no party in the case contested the existence of peace as a constitutional commitment and valid standard by which to "confront and judge" the acts of the state. The court was however the only one to stress that peace cannot be construed as an absolute value prevailing in all circumstances. Its verdict thus affirmed that Costa Rica's fundamental vocation to pacifism "does not mean that the country is left with no possibility of defense, but instead that it has opted for the international system of institutions to provide the respect of its rights and its defense in case of necessity."⁴² If the possibility of war remains inscribed in the constitutional order, any action related to it - including mere moral support - is therefore unthinkable outside the frame of the United Nations upon which Costa Rica's security is ultimately premised.

In a sense, the South Korean context is the mirror image of this configuration. The country's security being historically anchored in its post-1945 alliance with the United States, participating to the war in Iraq was construed by the court as involving "various elements concerning national interest such as the relationship with the allies," itself tied to the perspective of an "amicable settlement of the nuclear situation in North Korea."⁴³ The connection between Seoul's role in the coalition and its strategy towards Pyongyang was clearly part of the political and public debate about Iraq in South Korea. Roh Moo-hyun, who took his presidential functions in February 2003 and endeavored to sustain the "Sunshine

⁴¹ *Ibidem*.

⁴² *Ibidem*.

⁴³ 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.349.

Policy” initiated by his predecessor Kim Dae-jung, saw no conflict between the two.⁴⁴ On the contrary, Roh defended that “the operation serves the larger interests of a country whose foreign policy is founded upon its alliance with the United States” and was associated with “signs of a softer line from America towards North Korea in talks aimed at dismantling Pyongyang’s nuclear-weapons program.”⁴⁵

In August 2003, a few months after the U.S.-led invasion of Iraq, the Six-Party Talks (“*6-cha hoedam*”) involving North Korea, the United States, South Korea, China (who hosted the negotiations), Japan, and Russia, had indeed been formally started in response to the crisis unleashed by the North’s withdrawal from the Nuclear Non-Proliferation Treaty in January of the same year. The South Korean administration’s paradoxical construction of the country’s support to the war in Iraq as potentially favoring “an amicable settlement of the nuclear situation in North Korea and the solidification of the South Korea - U.S. alliance” was insisted upon in the opinion which the Minister of Defense presented to the Constitutional Court of Korea, and which the institution largely endorsed.⁴⁶

Interpreted as emanating from the strategic and symbolic considerations given to each country’s ultimate alliances, the South Korean and Costa Rican rulings present a strong similarity, privileging the paradigm and structures which are eventually relied upon for national defense (the bilateral partnership with the United States on the one hand, the multilateral framework of the United Nations on the other hand). Discursively, the two decisions are also united by the relativity of peace as a constitutional value. Like any other fundamental interest or right in the constitutional order of contemporary democracies, the commitment to peace is prone to recede at the point where its preservation may endanger the state. In the end, both verdicts also share a common sense of restraint vis-à-vis judging the nature of the war in Iraq. None engaged with the issue of determining the legitimacy of the conflict, neither from a military point of view nor from the perspective of international law. Courts which intervene in military issues are always very cautious to define the confines, and correlative force, of their expertise. As contended by the Supreme Court of Israel in a different context,

⁴⁴ The “Sunshine Policy” refers to South Korea’s engagement policy vis-à-vis North Korea. It was pursued from 1998 to 2008 under the administrations of Kim Dae-jung and Roh Moo-hyun, and premised on accentuating cooperation rather than sanction vis-à-vis the North.

⁴⁵ *The Economist*, “South Korea and Iraq. Murder and Its Consequences,” June 24, 2004.

⁴⁶ 16-1 KCCR 601, 2003Hun-Ma814, April 29, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.347.

Judicial review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of the military activity. Therefore, we assume that the military activity that took place [...] was necessary from a military standpoint. The question before us is whether this military activity satisfies the national and international standards that determine the legality of that activity. The fact that the activity is necessary on the military plane, does not mean that it is lawful on the legal plane. Indeed, we do not substitute our discretion for that of the military commander's, as far as it concerns military considerations. That is his expertise. We examine the results on the plane of the humanitarian law. That is our expertise.⁴⁷

“If you want peace, and rights, prepare for war”

The idea that preparing for war may be a means for peace is a theme which permeates the jurisprudence of the Constitutional Court of Korea. The constitution's pacifism is not limited to a commitment in favor of “international peace,” but also includes the declaration that “the Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.”⁴⁸ Yet, the attitude of the North is largely construed as one of “hostile opposition” by the constitutional court, and peace as remaining an unrealized horizon. The voice of the institution should not however be analyzed as if it conveyed a metaphor or synecdoche for how South Korean society as a whole envisions the division. On the contrary, what cases before the constitutional court precisely point at is the presence of a fundamental disagreement, not only about the meaning of current dynamics in the peninsula but about the very modalities of envisioning the “national.”

For instance, a complaint was filed in 2007 against the annual joint military practice conducted between the United States and South Korea on the ground that it constituted a military provocation toward the Democratic People's Republic of Korea.⁴⁹ Contrary to the

⁴⁷ HCJ 4764/04, *Physicians for Human Rights v. Commander of the IDF Forces in Gaza* (2004).

⁴⁸ Article 4 of the Constitution of the Republic of Korea.

⁴⁹ 21-2(B) KCCR 769, 2007Hun-Ma369, May 28, 2009, in The Constitutional Court of Korea, *Constitutional Court Decisions. 2009*, Seoul: Constitutional Court of Korea, 2010, p.67. As exposed in the decision, the joint military practice in question consists of two yearly exercises: the RSOI or “Reception, Staging, Onward movement, and Integration” practice (renamed “Key Resolve” in 2008) meant to “secure movement route” in the event of extra U.S. forces landing on Korean soil; and the Foal Eagle conducted since 1961 which “focuses on military practice in anticipation of the infiltration of the North Korean special forces into the South Korean rear line.” The two exercises are operated under the Combined Forces Command, i.e., the U.S. - ROK “binational defense team” that replaced the United Nations Command in 1978. The CFC is headed by a four-star U.S. general who also serves as commander of the resilient United Nations Command and the U.S. Forces Korea, which counts 28,500 soldiers, sailors, airmen, and marines in the South. A four-star ROK Army general acts as the CFC's deputy commander.

request made by an isolated complainant against the decision to take part in Iraq, the present petition was brought by some ninety-eight individuals represented by a variety of law firms. Their request characterized the military exercise, operated once a year throughout the South's territory, as a "preemptive attack practice" against North Korea which "increases the possibility of war in the Korean peninsula and threatens the peace of North Asia as well as the world."⁵⁰

The complaint was unanimously dismissed by the constitutional justices, but on a different ground than its involvement of a question "of a highly political nature." The court first reasoned that the challenged practice could not be reviewed as an exercise of power by the South Korean government, thereby granting a special status to military initiatives with the United States but also, and paradoxically, reinforcing a vision of the state's sovereignty as incomplete. By contrast, the condemnation of the South's dependence vis-à-vis the United States has been at the heart of the alternative "national" imaginary promoted by the pro-democracy movement since the 1980s, which translated into the seduction exerted over activists by North Korea's "*chuch'e sasang*" or ideology of self-reliance.⁵¹ Indeed,

It was after the 1980 Gwangju [Kwangju] Democracy Movement that anti-Americanism emerged as an enduring theme in South Korea's social movements. In contrast to the preceding decades, anti-Americanism loomed as a prominent issue in the pro-democracy movement of the 1980s led by people's movement (*minjung undong*) groups (Henderson 1986). The anti-American movement in South Korea began to assume a strong and volatile character. Widespread public perception and suspicions that the United States had been involved in the consolidation of Chun Doo-hwan's authoritarian regime and the deadly suppression of the Gwangju Uprising fueled the dramatic shift of focus to anti-Americanism (Shin and Hwang 2003).⁵²

The post-transition period has remained characterized by waves of anti-Americanism, with peaks in 1988 (crystallizing around demands for an official investigation of Kwangju and for reunification in the wake of the regime change), 1995 (following the Seoul Public

⁵⁰ *Ibidem*.

⁵¹ "If the United States had long been the object of 'unrequited love' for many in postcolonial South Korea, North Korea had become the object of that unrequited love for a large number of the *undongkwŏn* in the 1980s. Their curiosity was roused by the lack of information about the North, the state's demonization of the North, the North's espousal of autonomy and independence, the movement's own previous silence on the subject of the North, and the movement's reevaluation of Kim Il Sung's anti-colonial armed movement." Namhee Lee, *The Making of Minjung. Democracy and the Politics of Representation in South Korea*, Ithaca: Cornell University Press, 2007, p.142.

⁵² Sunhyuk Kim and Eun Sun Lee, "'Dynamics of Contention' in Democratic Korea. The Role of Anti-Americanism," *Korea Journal*, Vol.51, No.2, 2011, p.235.

Prosecutors' Office's decision not to prosecute those responsible for Kwangju), 2002 (after two middle school girls were killed in a U.S. military armor vehicle accident), 2004 (coinciding with the Roh Moo-hyun administration's decision to dispatch troops in Iraq), and 2006 (over the Free Trade Agreement between the U.S. and Korea).⁵³ Over the years, protests have however morphed, with the "essential anti-Americanism" of the late 1980s decreasing in favor of "policy-level and [military] base-related anti-Americanism," the latter accounting for the majority of protest events in the early 2000s.⁵⁴

While the constitutional court eschewed the issue of the joint military exercise's potential negative impact on inter-Korean relations and peace in the Northeast Asian region, it nonetheless appreciated whether the petitioners' right to peaceful livelihood was being infringed. Earlier in its jurisprudence, the court had unanimously consecrated such a right after local inhabitants challenged the relocation of a U.S. military base nearby their place of residence. Although "prior to South Korea's democratic transition in 1987, social and environmental externalities derived from the U.S. bases attracted little attention from the public,"⁵⁵ mobilization started to coalesce in the 1990s against the relocation of a base near the city of Pyeongtaek (P'yöngt'aek), which led to the filing of a constitutional complaint in 2005.

While the complaint itself was dismissed in 2006, the existence of a right to live peacefully was nonetheless derived from the constitution on that occasion.

Today, being free from war, terrorism and violence are prerequisites for the realization of human dignity and value as well as for the pursuit of happiness. Although there is no express provision in the Constitution that states such fundamental rights, it is necessary to protect such rights as the rights to live peacefully, as we can draw from Article 10 and Article 37 Section 1 of the Constitution. The basic contents of such rights is to ask the country for peaceful livelihood which would not be forced upon by committing aggression.⁵⁶

In 2009, a majority of justices decided to overturn this precedent and negate the right to peaceful livelihood, holding that the latter was not guaranteed by the constitution and that

⁵³ *Ibidem*, p.238.

⁵⁴ *Ibidem*, pp.238-239.

⁵⁵ Andrew Yeo, "Local-National Dynamics and Framing in South Korean Anti-Base Movements," *Philippine Journal of Third World Studies*, Vol.21, No.2, 2006, p.41. To this list can be added the 2008 candlelight protests stirred by the Lee Myun-bak administration's lift over beef imports from the United States.

⁵⁶ 18-1(A) KCCR 298, 2005Hun-Ma268, February 23, 2006, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume II, 2005-2008*, Seoul: Constitutional Court of Korea, 2010, p.340.

the petitioners therefore lacked a justiciable interest to challenge the joint military practice.⁵⁷ Four justices concurred with the majority's dismissal of the case but contested its repudiation of the right to peaceful livelihood. Their discourse is interesting on several accounts. First of all, the right to live peacefully was defined as prohibiting "the state's act of drafting citizens to an aggressive war and leaving them under the threat of terror."⁵⁸ This reasoning demonstrates that making judgments about war and peace is not conceived as an impossibility within the Constitutional Court of Korea and that, under the above circumstances, warfare could be found unconstitutional by at least a minority of justices. Second, it is essential to note that this assertive position was never premised on construing peace as an absolute commitment. If it exists, the right to peaceful livelihood creates a number of obligations upon the state but does not imply an unconditional right to live without war.

Of course, peace without war cannot be achieved only by an individual country's will and efforts and, thus, the right to peaceful livelihood does not mean the right to live without any kind of war and the right to oppose any type of war operation and military practice. The basic rights of citizens exist contingent upon the existence of a state and its basic order of liberal democracy. Even for the citizens' basic rights, it is unavoidable to conduct a war and other military operation to protect land and citizens and to defend liberal democracy. Therefore, a state is allowed to: 1) impose the military duty on its citizens; 2) organize and maintain military force; and 3) conduct military practices for the above mentioned purpose.⁵⁹

The concept of readiness for war which emerges from these decisions is not only tied to preserving peace and the state, but also democracy and basic rights. As asserted by Kim Jong-dae in a separate concurring opinion to the ruling on the joint military practice, the existence of fundamental rights is conditioned by the permanence of a certain institutional order, without which civil liberties would never be effective.

The concept of basic right may not remain apart from the Constitution. The Constitution is premised [on] the existence of a state and therefore the basic right cannot be conceptualized apart from the existence of a state. Therefore, the existence of a state is the basis of the basic

⁵⁷ "Pacifism, as asserted by complainants in the name of the right to peaceful livelihood, is the goal and spirit of the Constitution and therefore is nothing more than an absolute concept which cannot be construed as an individual concrete right creating the right to demand not to be drafted to an aggressive war and to have a peaceful livelihood. For this reason, the right to peaceful livelihood is not a constitutionally guaranteed basic right." 21-2(B) KCCR 769, 2007Hun-Ma369, May 28, 2009, in *The Constitutional Court of Korea, Constitutional Court Decisions. 2009*, p.70.

⁵⁸ *Ibidem*, p.76.

⁵⁹ *Ibidem*, p.75.

right and it is the premise to the guarantee of the basic right. The existence of a state is threatened when a war erupts. A war is the fight for life against an enemy state (including anti-state organization or *de facto* state). Depending on the result of a war, the existence of a state and citizens' basic rights may not be promised. [...] Therefore, a state should not be negligent in the preparation of a war with continuous military practice.⁶⁰

This understanding of rights contrasts with the *jus naturalist* vision of them as being embedded in human nature rather than institutions. This divide somehow echoes the distinction between human rights and basic rights, the latter being institutionally guaranteed in the context of a state, through a constitution, and to citizens. It also illustrates the multiple possibilities of legal discourse depending on the place from which it emanates. The possibilities of a normative discourse on law are different from those of the institutionalized legal discourse articulated by constitutional courts and which the present study is concerned with.

The domestic functionality of war-waking: an illustration with South Korea's participation in Vietnam

Within the structural boundaries which all courts share and by which their jurisprudence is being shaped, what courts actually do also depends on how strongly or weakly their decisions are complied with by other relevant actors of policy-making. In this respect, a striking difference between the rulings of Costa Rica's constitutional chamber and its South Korean counterpart rested on the reaction of the political branches. While the administration openly warned the Constitutional Court of Korea that "there is no legal method to enforce" its judgment if adverse to the executive and legislature's policy on the war in Iraq, the Sala IV's activism has been characterized by "a surprising lack of an effective political backlash" since 1989.⁶¹ Following the decision against the country's backing of the war in Iraq, a diplomatic note was sent to the American Embassy in San José to request Costa Rica's withdrawal from the list of nations supporting the operation. As commented by then Foreign Minister Roberto Tovar, "the court has ordered me to get the country's name off that list, and that's what I'm doing."⁶²

⁶⁰ *Ibidem*, pp.72-73.

⁶¹ Bruce Wilson, "Enforcing Rights and Exercising an Accountability Function," p.74.

⁶² *The New York Times*, "Costa Rica Drops Out of Coalition," September 10, 2004.

By contrast, South Korean armed forces have participated to many of the military operations in which the United States has been involved in the past few decades. Most preeminently, South Korean troops were dispatched to Vietnam between 1964 and 1973. With more than 300,000 soldiers deployed, they represented the largest contingent after American forces.⁶³ The experience of the Vietnam War, which was not allowed to surface in South Korea's public memory realm until the 1990s, deserves to be mentioned for what it highlights of the country's military culture and, to some extent, of its anti-communist politics of enmity. Memories of Vietnam remained confined to the private sphere until the center-left magazine *Hankyoreh 21* published a series of articles on the topic in 1999,⁶⁴ an endeavor which "was not only the first large-scale journalistic treatment of the subject in Korea, but also the first Korean attempt to corroborate stories of ROK atrocities through investigation in Vietnam itself."⁶⁵

According to Charles Armstrong, a number of hypotheses can be explored in order to account for the crimes committed by the South Korean army in the course of the Vietnam War: its soldiers' own experience, mainly as children, of the devastating conflict which ravaged the Korean peninsula between 1950 and 1953; the hatred for "Reds" inculcated to them through state-sponsored education at school and training in the military; as well as "the difficult interstitial position of Koreans in a war with such glaring racial divides."⁶⁶

Most of the ROKs in Vietnam had been young boys during the Korean War and had seen at close range the inhumanity of that civil conflict. Educated all their lives to consider "Reds" as less than human, such men were well-suited for an anticommunist campaign of violence. The training of ROK frontline soldiers, partly because of the South Korean military's roots in the Japanese military, was - and to some extent remains - particularly harsh. Until recently all able-bodied South Korean men, with very few exceptions, were required to serve in the military for nearly three years, and basic training was a fearsome ordeal that could sometimes be fatal. It is not difficult to imagine these young soldiers, in the confusing conditions of war

⁶³ James Sterngold, "South Korea's Vietnam Veterans Begin to Be Heard," *The New York Times*, May 10, 1992.

⁶⁴ "It was only in 1999, the year after the first non-conservative administration in South Korean history took power, that the issue began to enter the public consciousness, due in part to a report in the *Hankyoreh 21* magazine. Ku Su-jeong, a contributor for *Hankyoreh 21* who was staying in Vietnam at the time, sifted through Vietnamese government documents and gathered testimony from people in the villages of the five central provinces (Khanh Hoa, Binh Dinh, Phu Yen, Quang Ngai, and Quang Nam) where the ROK military carried out its search-and-destroy operations against the Viet Cong. The Vietnamese government estimates that these operations resulted in 5,000 victims." Jong-young Nam, "Atrocities Committed by South Korean Soldiers Were Not Publicly Discussed Until the Late 1990s," *The Hankyoreh*, July 8, 2013.

⁶⁵ Charles Armstrong, "America's Korea, Korea's Vietnam," *Critical Asian Studies*, Vol.33, No.4, 2001, p.533.

⁶⁶ *Ibidem*, p.535.

far from their homeland, few able to speak French or English (much less Vietnamese), losing their sense of discrimination and control in combat.⁶⁷

The “harsh” three-year military training which Armstrong alludes to has been reduced to two years but remains an obligation for all South Korean young men. Interestingly, both mandatory conscription and the Vietnam War can enrich our understanding of the intimate solidarity between national security and a certain model of socio-economic development in South Korea’s post-war history. While this dimension of mandatory service will be analyzed in the next section, it can be pointed out for the Vietnam War that “the primary motivation for ROK participation, and perhaps its greatest long-term benefit to South Korea” was indeed an economic one.

Vietnam was a goldmine for South Korea. A decade earlier, Japanese prime minister Yoshida Shigeru had called the Korean War “a gift from the gods” for stimulating economic development in postwar Japan; without the Korean War, it is unlikely that the U.S. occupation would have ended as early as it did or that the Japanese economy would have taken off as dramatically. Similarly, the Vietnam War spurred the South Korean economy and helped sustain the Park dictatorship. South Korea’s economic takeoff in the mid-1960s would not have been possible without the profits gained by fighting for the United States in Vietnam. War-related income in the form of direct aid, military assistance, procurements, and soldiers’ salaries amounted to over \$1 billion. In 1967 alone war-related income accounted for nearly 4 percent of South Korea’s GNP and 20 percent of its foreign exchange earnings. In particular, South Korea’s emergent heavy industry sector - steel, transportation equipment, chemical exports, and the like - was given an enormous and invaluable boost by the Vietnam War. Major South Korean companies that took off during the war are now household names, including Hyundai, Daewoo, and Hanjin, the parent company of Korean Airlines. Park’s first five-year plan for Korean economic development was mapped out with Vietnam in mind; the war, for example, largely paid for the construction of South Korea’s first expressway, the Seoul-Pusan highway, built between 1968 and 1970.⁶⁸

Beyond the Vietnam War, the general primacy accorded to national security under Park Chung-hee has been indissociable from the modernization project pursued by the state

⁶⁷ *Ibidem*, p.534. As Armstrong indicates, the generation of ROK officers who served in Vietnam comprised future presidents Chun Doo-hwan and Roh Tae-woo, and “it was soldiers hardened by combat in Vietnam who led the bloody suppression of the Kwangju uprising in South Korea in May 1980, as General Chun consolidated his grip on power.” *Ibidem*, p.533.

⁶⁸ *Ibidem*, p.533.

since the 1960s and premised on the mass mobilization of Koreans, not only as workers but also as soldiers through mandatory conscription.

The duty of national defense

Discrimination, privileges, and social cohesion

Chapter II of South Korea's constitution is dedicated to the rights and duties of citizens, which include "compulsory education" (article 31, section 3), the duty to work (article 32, section 2), the duty to pay taxes (article 38), and the duty of national defense (article 39). Voting is only construed as a right in article 24, not as an obligation. Each of the four fundamental responsibilities identified by the basic norm falls on "all citizens" of the Republic of Korea. However, the duty of national defense is effected through the requirement that all men between 18 and 35 years of age perform a two-year-long compulsory military service. The issue of citizens' equality before this constitutional duty has been challenged on various grounds. Three types of differential treatment have been brought to the attention of the Constitutional Court of Korea, as direct or indirect matters for review.

As surveyed in chapter three, differential treatment based on gender came under the court's scrutiny several times. On the one hand, women are not mandated to serve in the military, an exemption which was examined and confirmed by the court in 2010.⁶⁹ On the other hand, female students have successfully objected to the extra points that discharged soldiers received in hiring examinations for positions in the civil service or in public and private companies until the late 1990s.⁷⁰ Differential treatment has also taken two more insidious forms than gender-based bias: a discriminatory one, as conscientious objection is neither allowed on religious nor moral grounds; and a preferential one, since the members (and especially sons) of the political and business elites often evade the military service, known for its severe conditions.⁷¹ These three phenomena are far from being unrelated, highlighting diverse shades of how South Korea's national community is imagined and realized through the duty of national defense.

⁶⁹ 22-2(B) KCCR 446, 2006Hun-Ma328, November 25, 2010.

⁷⁰ 11-2 KCCR 770, 98Hun-Ma363, December 23, 1999.

⁷¹ *The Economist*, "Conscription in South Korea. Hallyu Elvis and the Draft-Dodger," May 10, 2011.

In particular, the exemption of women and the continued heavy criminalization of conscientious objection can be interpreted in light of South Korea's prescribed "national" narrative, characterized by its masculinist imaginary and tendency to homogenization.⁷² In this respect, the constitutional court did not miss that reforming the military service directly raised the issue of South Korean democracy's ability to tolerate minorities, that is to say, of whether pluralism is conceived as a value or a threat to social cohesion. In this respect, the court's reluctance to invalidate conservative legislation about conscientious objection, adultery, or abortion does not simply highlight its caution vis-à-vis the political branches or public opinion.

Instead, this prudence illustrates the court's fundamental ambivalence toward the desirability of enhancing pluralism. According to Choi Jang-Jip, "the absence of pluralistic values or uniformity" that characterizes South Korean society is an outcome of the country's modern historical development, in particular of the hyper-concentration of political power and economic wealth that took place under the process of authoritarian industrialization in the 1960s-1970s, and which has been reinforced ever since.⁷³ The "great homogeneity in terms of ideology or value orientation" that this centripetal configuration has created between the political, bureaucratic, and corporate elites (all concentrated in Seoul) has also given rise to a system of special privileges and favors among them.⁷⁴ The evasion of conscription can be treated as falling under such system.

Variants of conscription and objection

The length of conscription in South Korea depends on the branch of the military where service is performed. Since 2008, it is undergoing a gradual reduction which is expected to be completed by 2016: from 24 to 18 months in the Army and Marine Corps, from 26 to 20 months in the Navy, from 27 to 21 months in the Air Force.⁷⁵ Under the Military Service Act ("*pyŏnggyŏkpŏp*"), punishment by up to three years of imprisonment awaits those who do not

⁷² Sheila Miyoshi Jager, *Narratives of Nation Building in Korea. A Genealogy of Patriotism*, New York: M.E. Sharp, 2003.

⁷³ Jang-Jip Choi, *Democracy After Democratization. The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2012, p.12.

⁷⁴ *Ibidem*, p.114.

⁷⁵ Ministry of National Defense, "Improvement of the Military Service System," Ministry of National Defense's website. Accessed on May 20, 2013 at: http://www.mnd.go.kr/mndEng_2009/DefensePolicy/Policy12/Policy12_3/index.jsp.

perform the service “without any justifiable reason.” In addition, their employment opportunities are strictly restricted as they cannot become civil servants or be hired in a public or private company for five years. While a diagnosed physical or psychological disability qualifies for accomplishing a non-active duty service lasting from 24 to 36 months, refusal to enlist for moral or religious reasons is not recognized as an acceptable justification. Since the 1990s, the number of imprisoned conscientious objectors has been dramatically on the rise. As of February 2011, “a total of 955 men nationwide were serving eighteen-month sentences for conscientious refusal to perform military service.”⁷⁶ Most of them are Jehovah’s Witnesses.

Table 14. Annual number of conscientious objectors imprisoned between 1992 and 2007.

Year	1992	1993	1994	1995	1996	1997	1998	1999
Number	220	277	233	427	355	403	474	513
Year	2000	2001	2002	2003	2004	2005	2006	2007
Number	642	804	734	705	755	828	901	764

Source: Korea Solidarity for Conscientious Objection (KSCO).⁷⁷

Imprisonment has only started to replace coerced enrollment in the military since the 1980s. It is estimated that 3,148 conscientious objectors served prison terms between 1980 and 1993, 4,058 between 1994 and 2000, and 8,295 from 2001 to 2012.⁷⁸ In 2009, the Presidential Truth Commission on Suspicious Deaths (“*taet’ongnyŏng sosok ūimunsa chinsang kyumyŏng wiwŏnhoe*”) recognized that five Jehovah’s Witnesses forcibly conscripted during the 1970s and 1980s died as a result of the violence unleashed against them for refusing to take part in drills and to carry guns.

The results of the commission’s inquiry are shocking even though the five men’s deaths occurred 20 to 30 years ago, during the Park Chung-hee and Chun Doo-hwan regimes. Men who refused to bear arms were tortured “by repeatedly dunking their heads in concrete water tanks,” and one witness even stated that at least one man was “hit with a pickaxe for an hour

⁷⁶ Ji-sun Lim, “With No Alternative, Conscientious Objectors Face Jail Time,” *The Hankyoreh*, February 14, 2011.

⁷⁷ Korea Solidarity for Conscientious Objection’s website. Accessed on December 2, 2013, at: <http://corights.net>.

⁷⁸ *The Korea Times*, “Conscientious Objectors. Time to Consider Introducing Alternative Service,” November 28, 2012.

and a half.” There was even an instance where one man was “put in a drum can and made to roll downhill for hours.” The treatment was horrific enough for one/some of them to have taken their own lives, though military officials would write up their deaths with statements like “death during training” or “suicide resulting from mental stress.”⁷⁹

Jehovah’s Witnesses, whose missionaries arrived in the Korean peninsula in 1914, were first persecuted during the colonial period. In the late 1930s, “the Japanese police went on a veritable rampage of arrests that spanned across Japan, Taiwan and Korea,”⁸⁰ being directed at both men and women in the community for their anti-war proselytism and resistance to pray at Shinto shrines. Besides their consistent objection to serving in the military, Jehovah’s Witnesses are not otherwise marginalized in contemporary South Korea’s tolerant religious landscape, fragmented into myriad organizations affiliated with Christianity - which entered Korea in the late 18th century - or Buddhism. Slightly more than half of South Koreans identify themselves with a religion today, with 22.8% declaring themselves Buddhists, 18.3% Protestants, 10.9% Catholics, 0.2% Confucians, 0.3% Won Buddhists, and 0.5% claiming another religious affiliation according to the 2005 census.⁸¹ As noted by the constitutional court, draft-dodging “has recently spread among the buddhists and the pacifists,” even though the figures are still scant - the court reported less than ten individuals objecting on the ground of their buddhist faith or pacifism between 2001 and 2003. This paucity does not prevent detractors of the alternative service to greatly fear that evading the military service would become a widespread phenomenon on religious and moral grounds if conscientious objection was allowed.⁸²

Rules shaping the military service - and correlated exemptions - are deeply embedded in national contexts. Since 1987, the United Nations Commission on Human Rights has repeatedly called for states “to recognize that conscientious objection to military service should be considered a legitimate exercise of the right to freedom of thought, conscience, and religion recognized by the Universal Declaration of Human Rights and the International

⁷⁹ *The Hankyoreh*, “Continued Denial of the Right to Conscientious Objection,” January 17, 2009.

⁸⁰ *The Hankyoreh*, “Korea’s Jehovah’s Witnesses Saw Deep Hardship,” April 30, 2007.

⁸¹ Don Baker, “The Religious Revolution in Modern Korean History. From Ethics to Theology and from Ritual Hegemony to Religious Freedom,” *The Review of Korean Studies*, Vol. 9, No.3, 2006, p.254.

⁸² Howard French, “South Korea Faces a Test of Conscience Over the Draft,” *The New York Times*, May 8, 2002.

Covenant on Civil and Political Rights.”⁸³ In the Federal Republic of Germany, where conscription ended in 2011, the right to conscientious objection has been inscribed in the basic law since 1949. According to article 4, section 3 dedicated to the “freedom of faith, conscience, and creed”:

No person shall be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by a federal law.

Article 12a, section 2 added that:

Any person who, on grounds of conscience, refuses to render military service involving the use of arms may be required to perform alternative service. The duration of alternative service shall not exceed that of military service. Details shall be regulated by a law, which shall not interfere with the freedom to make a decision in accordance with the dictates of conscience, and which shall also provide for the possibility of alternative service not connected with units of the Armed Forces or of the Federal Border Police.

The first statutes allowing conscientious objection were enacted in Switzerland, Norway, and Denmark around World War I. Such recognition has been “more difficult for the less pacific powers, which are under greater stress and involved in a more complex world of affairs,” but all France, Britain, and the United States had come to adopt the right to conscientious objection by the early 1970s.⁸⁴ Since then, each country has also renounced mandatory conscription. In the United States, ending the draft was a campaign promise of Richard Nixon and came into effect in 1973, after the U.S. army’s active ground participation in Vietnam was discontinued. Prior to it, the American supreme court had consecrated the legitimacy of conscientious objection for both religious and non-religious motifs,⁸⁵ while ruling against selective objection to specific wars.⁸⁶

In Israel, the military service is compulsory for both men and women above 18 years of age, but important segments of the population are excluded from its scope. Citizens who are Christians, Muslims, Circassians (i.e., Sunni Muslims), as well as ultra-orthodox Jews, are

⁸³ United Nations Commission on Human Rights, *Conscientious objection to military service*, E/CN.4/RES/1987/46, Geneva: United Nations, 1987.

⁸⁴ Edward Cain, “Conscientious Objection in France, Britain, and the United States,” *Comparative Politics*, Vol. 2, No.2, 1970, p.275.

⁸⁵ *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970).

⁸⁶ *Gillette v. United States*, 401 U.S. 437 (1971).

not required to serve in the army and may only join it voluntarily. Practically, all Arab citizens (who make up about 20% of Israel's population) are exempted, excepting Israeli Druzes, who were recognized as a distinct ethnic and religious community after the establishment of the Israeli state. During their time in the Defense Forces, Druzes, who are Arabic-speaking citizens, often serve as translators, especially in the military court system which operates in the West Bank and Gaza.⁸⁷ Ultra-orthodox Jews (who represent around 10% of the population) are also exempted, in virtue of the agreement established between religious and secular parties at the founding of the state.⁸⁸ For the rest and majority of the population, the conscript service obligation is long, lasting 36 months for enlisted men and 21 months for women. Apart from the exemptions granted to the ultra-orthodox community, no conscientious objection is allowed for Jewish males. Those who refuse to enlist in the military or to serve in the Occupied Territories risk a prison sentence handed by a military tribunal.

In his analysis of U.S. national security jurisprudence, Seth Waxman has contrasted the deferential attitude of American judges in times of crisis with the more right-protective approach of their Israeli counterparts, highlighting how the latter's service in the army could be a potential factor to understand why they "have been far less inclined to accept at face value claims of national security necessity."⁸⁹ Interestingly, students of South Korea's Judicial Research and Training Institute, in charge of preparing future judges and prosecutors, only undergo four weeks of military training after the completion of their studies at the JRTI. The case of one judicial trainee, Baek Jong-geon (Paek Chong-gön) became publicized in 2011 after he refused, as a Jehovah's Witness, to perform this abridged version of the draft, exposing himself to an 18-month sentence as well as an incapacity to be recruited as a judge or prosecutor, or to register as an attorney, for five years after his release.⁹⁰

The existence of a conflict of sovereignty, as experienced by Israel and South Korea, is not however an insuperable hurdle to recognize the right to conscientious objection, as illustrated by the case of West Germany and more recently, Taiwan. Article 20 of the Constitution of the Republic of China provides that "the people shall have the duty to render military service in accordance with law." Conscientious objection was nonetheless made

⁸⁷ Lisa Hajjar, *Courting Conflict. The Israeli Military Court System in the West Bank and Gaza*, Berkeley: University of California Press, 2005.

⁸⁸ The *Torato Omanuto* (literally "Torah study is his artistry") agreement of 1948 exempts young men enrolled in *yeshiva* academies to serve in the Israeli Defense Forces.

⁸⁹ Seth Waxman, "The Combatant Detention Trilogy Through the Lenses of History," p.19.

⁹⁰ Kaitlin Brush, "The Right to Conscientious Objection and How South Korea Falls Short," *Human Rights Brief*, Vol.18, No.3, 2011, pp.54-55.

possible by legislation in 2000, when a civilian service was introduced as an alternative to the draft concerning all men between 19 and 35 years of age. As a result, Taiwan became “the first Asian country with a compulsory military [service] to allow conscientious objectors a non-military option.”⁹¹ At the time of the enactment, twenty-four Jehovah’s Witnesses were serving lengthy prison sentences. In 2010, Taiwan started its transition to an all-volunteer force and is expected to complete it by 2015.⁹²

Areas of agreement and disagreement in the judgment on conscientious objection

On August 28, 2004, the Constitutional Court of Korea delivered its ruling on the constitutionality of article 88, section 1 of the Military Service Act criminalizing the failure to enroll for active military service with no justifiable cause. The verdict intervened only a few months after the Seoul Southern District Court’s unprecedented decision to acquit three Jehovah’s Witnesses objecting to serving in the army.⁹³ In its groundbreaking judgment, the tribunal argued that “the intention of the Constitution is a clear manifestation of not intervening in the inner freedom of individual conscience” and underlined that the right to refuse serving in the military was recognized in the international law of human rights.⁹⁴ Indeed, while the right to conscientious objection does not explicitly figure in the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights

⁹¹ Jehovah’s Witnesses Official Media Website, “Republic of China Passes Groundbreaking Legislation on Conscientious Objection,” January 24, 2010. Accessed on May 15, 2013 at: <http://www.jw-media.org/twn/2000124.htm>.

⁹² U.S. Central Intelligence Agency, *The World Factbook. Military Service Age and Obligation*. Accessed on May 15, 2013 at: <https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html>.

⁹³ A fourth accused was sentenced to imprisonment for his claim was found to lack authenticity.

⁹⁴ Sang-min Joo, “Seoul Court Allows Jehovah’s Witnesses to Skip Military Duty,” *The Korea Herald*, May 22, 2004.

which South Korea joined in 1990, it was first affirmed by the UN Commission on Human Rights in 1987, and later derived from article 18 of both the UDHR and ICCPR in 1989.⁹⁵

By the time the constitutional court rendered its decision, the verdict of the Seoul Southern District Court - the first judicial decision ever in favor of objectors to the compulsory military service in South Korea - had however been overruled by the supreme court.⁹⁶ It was in this heated context that the awaited constitutional clarification of the issue came. The 2004 constitutional decision consisted of a ruling endorsed by five members, the separate concurring opinions of two justices, and the joint dissenting opinion of another pair of judges. The majority's judgment can be characterized as a deferent defense of conscientious objection, taking to heart the meaning of the freedom of conscience and refusal to perform the military service, while not pronouncing the latter's criminalization unconstitutional. Below the surface question of whether punishing conscientious objection was constitutional or not, a fundamental source of disagreement between the judges stemmed from their conflicting visions of the legislature's responsibility and the court's role in relation to this issue.

In this respect, the majority ruling appeared to have more in common with the dissenting opinion than with the two concurring contributions. Both the majority and dissent importantly emphasized the duty falling upon the legislative branch to reconcile the freedom of conscience and the necessity of national defense. Moreover, their approach to conscientious objection stressed how reforming the compulsory military service involved major challenges for South Korea as a democratic society, such as determining "whether our society is now mature enough to understand and tolerate the conscientious objectors."⁹⁷ By contrast, Kwon Seong and Lee Sang-kyun, two parliament's nominees, wrote separate

⁹⁵ "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance" (Article 18 of the Universal Declaration of Human Rights).

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

(Article 18 of the International Covenant on Civil and Political Rights).

⁹⁶ The Supreme Court of Korea, 2004Do2965, July 15, 2004.

⁹⁷ 16-2(A) KCCR 141, 2002Hun-Ka1, August 24, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.127.

opinions in which they concurred with the majority's determination of constitutionality, but denounced its recommendations to the legislature as inappropriate under the separation of powers - a condemnation which *a fortiori* applied to the dissent's criticism and censure of the National Assembly's attitude.

While five justices upheld the constitutionality of the current system, they also declared their dissatisfaction with the heavy sacrifice imposed on the freedom of conscience and urged the legislature to seriously consider the possibility of creating an alternative to the present state of things. The dissent clearly situated itself in the continuity of the majority's reasoning, but advocated the invalidation of article 88, section 1 of the Military Service Act on the ground that the National Assembly failed to even try solving the existing antagonism between the constitutional values at stake - on the one hand, the duty of national defense provided for in article 39; on the other hand, the freedom of conscience consecrated in article 19 of the constitution, but limitable like any other basic rights "when necessary for national security, the maintenance of law and order or for public welfare" under article 37.⁹⁸ As written by the dissent,

We agree with the majority opinion with respect to the constitutional meaning and importance of national defense and the political and social reality of our nation. However [...] we are of the opinion that the legislators have failed to make the minimum of the effort that is necessary and possible notwithstanding the fact that we have reached the stage where we should search for an alternative for settling the conflict between the constitutional values of the freedom of conscience of the conscientious objectors and the duty of national defense.⁹⁹

Ironically, both Kim Kyung-il and Jeon Hyo-sook, the two dissenting judges, were nominated by the chief justice of the supreme court, an institution whose stance against conscientious objection was strongly reaffirmed when the Seoul Southern District Court's acquittal was overturned in 2004. Kim and Jeon's opinion was first and foremost directed against the parliament, showing no indulgence for its "failure to make the minimum effort" in favor of a "necessary and possible" alternative to conscription and sanctioning its negligence as an undue restriction of basic rights. The majority agreed that "if the legislators do not present an alternative while an alternative may be presented without obstructing the public

⁹⁸ The Constitution of the Republic of Korea separately guarantees the freedom of conscience and the freedom of religion: "All citizens shall enjoy freedom of conscience" (article 19) and "(1) All citizens shall enjoy freedom of religion. (2) No state religion shall be recognized, and religion and state shall be separated" (article 20).

⁹⁹ 16-2(A) KCCR 141, 2002Hun-Ka1, August 24, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, pp.127-128.

interest or the legal order, this may be unconstitutional as a unilateral compulsion of sacrifice upon the freedom of conscience.”¹⁰⁰ Yet, the five justices did not go so far as to assert that such alternative could be presented, finding arguments both in support and opposition to it. They made clear that the National Assembly had a responsibility to debate the possibility of a reform, which it would nonetheless be free to adopt or reject.

The difficulties identified in relation to the implementation of an alternative service were multiple. Importantly, they were not confined to the national security puzzle posed by the continued “hostile opposition” between the two Koreas, as the court described the situation in the peninsula. Two other issues were raised by the majority and dissent in relation to the meaning of recognizing conscientious objection in contemporary South Korean society: the protection accorded to the rights of minorities, and the demand for equality in sharing the burden of national defense. By addressing these questions, the constitutional court demonstrated that the duty of national defense is irreducible to the division in several ways.

Conversely, constitutional disagreements over conscientious objection remained premised upon a number of consensual postulates: that inter-Korean relations are characterized by the continued hostility between the North and the South, and that mandatory conscription itself is necessary and legitimate. This last viewpoint has been largely uncontested in society at large, including by the opponents to military rule under the regimes of Park Chung-hee and Chun Doo-hwan.

Despite their vociferous opposition to the NSDC [National Student Defense Corps, a government controlled student body organized as a paramilitary unit] and the compulsory military training at school and at military bases for male university students (known as *chōnbang ipso hullyōn*), protesting students remained silent about military conscription. Under the Military Service Law of 1949, which became effective in 1957, all South Korean men aged eighteen years or above, except for those considered “physically or socially undesirable,” were required to serve in the military. With the exception of a few Jehovah’s Witnesses and a very small number of other individuals who refused to serve on religious grounds, no student conscientiously objected to the military service. Intense anticommunist education, in addition to the repeatedly emphasized notion that military was “men’s national duty,” rendered the students unable to consider conscription in terms of individual freedom or conscience. [...] The student movement was highly nationalistic and its subculture - even as it opposed militarism in South Korean society - militaristic.¹⁰¹

¹⁰⁰ *Ibidem*, p.120.

¹⁰¹ Namhee Lee, *The Making of Minjung*, p.91.

The military service is not only connected to ways in which the South Korean nation is imagined (as strong and manly), but concretized (as non-pluralistic and discriminatory). These projections' compatibility with basic rights and democratic values have been questioned by constitutional jurisprudence. The examination undertaken by the court has however remained superficial, leaving aside the processes in which intolerance and inequality are rooted. These blind spots of constitutional discourse overlap with the ones identified in relation to the sources and functions of anti-communism in South Korean society. They not only constrain the discursive order in which the court operates, but shape the nature and extent of the consolidation effects produced by its jurisprudence.

Beneath upholding the ban: the court's contribution to a certain way of envisioning the "national"

First of all, it has to be underlined that assessing the security predicament of the Korean peninsula does not constitute an object of dispute in constitutional jurisprudence in general, and in the decision over conscientious objection in particular. Two features are consistently put forth by the court to characterize the division: the continued hostility between the North and the South on the one hand; and the incomparability of their crisis situation on the other hand. As argued by the majority in 2004,

Our nation is the only divided nation in the world that is under the state of truce, and the South and the North are still in a hostile opposition state based upon extremely strong military powers accumulated through the arms races in the past. Under this unique security situation, the duty of military service and the principle of equality in allocating the burden of military service have an important meaning that is incomparable to other nations. Although it is true that there has been a change in the concept of national defense and the aspect of modern warfare, the proportion of human military resources in the national defense power may still not be neglected, and the natural decrease in the military resources due to the decrease of birth-rate of these days should also be taken into consideration.¹⁰²

This depiction was agreed on by all the justices, including the dissenting ones. Consensus over construing national security did not prevent the existence of divergences on other grounds. Yet, never was conscientious objection defended at the expense of the state's

¹⁰² 16-2(A) KCCR 141, 2002Hun-Ka1, August 24, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.121.

safety - never could it have been. As affirmed by Kim Kyung-il and Jeon Hyo-sook, “we do not claim in this situation that the conflict [between the basic right to freedom of conscience and national security] should be resolved by choosing the side of the protection of conscience notwithstanding the debilitation of military power or injury to the equality in the burden of military service.”¹⁰³ Not disarming the state is indeed part of the discursive order shared by all judicial institutions and rulings, whether they tend to be “conservative” or “progressive.”

Even decisions which seemingly settle the balance between national security and basic rights in favor of the latter abide by this boundary of judicial action: no court intentionally seeks to make the state more vulnerable. Different visions may compete of where its ultimate strength resides, but consolidating the state is a common horizon of judgements. The following eloquent formula from the majority encapsulates the epistemic solidarity articulated by constitutional courts between basic rights and the stability of institutional structures: “No freedom that is a fundamental right may serve as the ground for disintegrating the state and the legal order.”¹⁰⁴

Neither the majority nor the dissent however reasoned that “peaceful coexistence” between the two Koreas was an absolute precondition for the legislature to adopt an alternative service system. Moreover, none identified inter-Korean relations as the only factor to be taken into consideration, illustrating that mandatory conscription raises questions independently from the division. According to the majority, recognizing the right to conscientious objection first required vast acceptance in South Korean society “that permitting the alternative service will harm neither the realization of equality in the burden of performing the duty of military service nor the social utility, through the widespread understanding and tolerance of the conscientious objectors.”¹⁰⁵ As of 2004, such consensus and tolerance were not found to reign by most of the court.

The court did not derive from this lack of social concord a source of legitimacy to rule against both the political branches and the dominant public opinion. While a classical argument against constitutional review consists in describing it as a counter-majoritarian and therefore undemocratic force,¹⁰⁶ it has also been argued that the limits which judicial review

¹⁰³ *Ibidem*, p.130.

¹⁰⁴ *Ibidem*, p.117

¹⁰⁵ *Ibidem*, p.124.

¹⁰⁶ This fundamental objection, first associated with Thomas Jefferson, rests on the claim that judicial review is contrary to the will of the majority and the principle of equal participation by giving to a court (which is also an unelected institution) the power to overrule legislation. Samuel Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review,” *Law and Philosophy*, Vol.9, No.4, 1990, p.334.

poses on majority decisions make its worth.¹⁰⁷ In particular, courts can exercise a beneficial check upon the rule of the majority and ensure that it does not drift into tyranny against the rights of the minority. The Constitutional Court of Korea did not miss this dimension of the case on conscientious objection, but a majority of justices did not infer from it the authority to invalidate the current compulsory military system.

Eventually, the question of the guarantee of the freedom to exercise conscience is the question of “how the state gives consideration to the minority of its citizens who think differently and intend to act differently from the decisions of the majority of the democratic community,” the question of national and societal tolerance towards the minority, and the question of “whether the state is capable of presenting an alternative that is protective of the conscience of the individuals while maintaining its existence and legal order.”¹⁰⁸

While the majority expressed its hope that “our society is now mature enough to understand and tolerate the conscientious objectors,” it did not envision its role as precipitating change knowing that such an initiative would not command widespread acceptance. As will be evoked later in the chapter, this caution has so far characterized the jurisprudence of the Constitutional Court of Korea on other issues of societal magnitude. At first sight, it seems that the institution may prefer to frustrate its own preferences and delay the realization of desirable but socially contentious outcomes, rather than to risk appearing as an actor stirring up conflict and division. In doing so, it could be said that the South Korean court has refused the responsibility which Alexander Bickel has assigned to its American counterpart: “to be the ‘shaper and prophet’ of a system of enduring values, one that does not merely reflect an existing national consensus but articulates a moral vision to which we may legitimately aspire.”¹⁰⁹

This difference between the two institutions may not solely be a matter of choice or perception, each being shaped by contrasting visions and expectations about their role. Rather than being embedded in distinct ways of envisioning themselves, the divergence between the American and South Korean courts could also rest on the distinct ways in which each

¹⁰⁷ “Constitutionalism refers to limits on majority decisions; more specifically, to limits which are in some sense self-imposed.” Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1993, p.2.

¹⁰⁸ 16-2(A) KCCR 141, 2002Hun-Ka1, August 24, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.119.

¹⁰⁹ Anthony Kronman, “Alexander Bickel’s Philosophy of Prudence,” *Yale Law Journal*, Vol.94, No.1, 1985, pp. 1580-1581.

envisions its nation's relation to pluralism. In that sense, the Constitutional Court of Korea's prudential approach is neither purely attitudinal (expressing conservative values) nor strategic (aimed at avoiding confrontation with the political branches or public opinion). Instead, its caution reveals, and contributes to consolidate, a fundamental anxiety about diversity which institutionally permeates South Korean society.

The issue of the compulsory military service is socially loaded on another ground than the tolerance of conscientious objectors as a "minority" voicing beliefs different from the majority. The particularly burdensome nature of the draft creates incentives for evasion which compromise the equality of citizens before the constitutional duty of national defense. According to the Seoul District Public Prosecutors' Office, which contributed an opinion to the case alongside other relevant parties, allowing conscientious objection through an alternative service would undoubtedly make "the number of those voluntarily performing military service [...] decline, which will cause a serious threat to the existence of the nation."¹¹⁰ Likewise, the Ministry of National Defense and the Military Manpower Administration ("pyŏngmuch'ŏng") argued that "in light of the reality of egregious service conditions in our Armed Forces, the adoption of the alternative military service would cause exponential increase of those evading military service."¹¹¹ It is worth recalling that harsh conditions were also invoked by a majority of the court to justify the exemption of women from the draft in a 2010 decision.¹¹²

As construed by the Constitutional Court of Korea, the risk associated with draft dodging is double-edged: it not only imperils the security of the nation, but also threatens to erode its cohesion. Highlighting "the past experience of our society that corruption and the trend to evade military service continued incessantly," the majority decision warned that:

In our society where the social demand for the equality in the burden of military service is strong and absolute, should the equality in performing the obligation become a social issue due to the permission of an exception to the duty of military service, the adoption of the alternative service system might cause a serious harm to the capacity of the nation as a whole

¹¹⁰ 16-2(A) KCCR 141, 2002Hun-Ka1, August 24, 2004, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.111.

¹¹¹ *Ibidem*, p.112.

¹¹² The majority cited women's lack of physical strength, menstruations, and exposure to sexual abuses if made prisoners as well as within South Korea's armed forces as factors justifying their exemption from the mandatory military service. 22-2(B) KCCR 446, 2006Hun-Ma328, November 25, 2010, in The Constitutional Court of Korea, *Constitutional Court Decisions. 2010*, Seoul: Constitutional Court of Korea, 2011, pp.227-228.

by crucially injuring the social unification and might further destabilize the backbone of the entire military service system based upon the mandatory conscription of all citizens.¹¹³

As stressed earlier, the debate over conscientious objection never led to call into question mandatory conscription itself, nor the values fostered by it in the South Korean context - such as manliness, the respect for hierarchies, and the primacy of state interests over individual ones.¹¹⁴ Rather than being naturally attributable to the cultural substrate of Korean Confucianism, such features can also be tied to concrete institutions which are embedded in history, such as the compulsory military training. Even arguments in favor of introducing an alternative service - as articulated by the dissenting judges in the 2004 case or by Roh Moo-hyun during his presidential mandate - have not fundamentally challenged the militarism upon which the project of building a strong and wealthy nation has been based since the 1960s.¹¹⁵ Moon Seungsook has advanced the notion of “militarized modernity” to capture the processes which have shaped South Korea’s socio-political and economic trajectory from 1963 to 1987: “the construction of the modern nation as an anti-communist polity, the making of its members as duty-bound ‘nationals,’ and the integration of the institution of male conscription into the organization of the industrializing economy.”¹¹⁶ Military service has therefore been integral to the process of mass mobilization required by state-led economic development and nation-building in the second half of the 20th century.

Accordingly, men were called on to perform mandatory military service and encouraged to become the primary labor force in the industrializing economy. In contrast, marginalized as a secondary workforce in the economy despite their economic contribution, women were exhorted to carry out birth control and the “rational management of the household.”¹¹⁷

¹¹³ 16-2(A) KCCR 141, 2002Hun-Ka1, August 24, 2004 in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume I*, p.122.

¹¹⁴ Namhee Lee, *The Making of Minjung*, p.91.

¹¹⁵ In September 2007, the Ministry of National Defense declared that an alternative service for conscientious objectors would be permitted as of 2009. However, “everything went back to square one in 2008 following the inauguration of the Lee administration. On December 24, 2008, a month ahead of the date for full implementation, the ministry announced that it was ‘putting a hold on all alternative service.’ A number of constitutional petitions from parties affected by the decision were subsequently lodged and are now being reviewed by the Constitutional Court.” Ji-sun Lim, “With No Alternative, Conscientious Objectors Face Jail Time.”

¹¹⁶ Seungsook Moon, *Militarized Modernity and Gendered Citizenship in South Korea*, Durham, London: Duke University Press, 2005, p.2.

¹¹⁷ *Ibidem*.

This original function of conscription, as supporting the dual militarization of the nation and the labor market, illustrates how national security in general, and the military service in particular, are irreducible to the issue of the division between the two Koreas. Although constitutional jurisprudence has left the domestic efficacy of this apparatus largely unaddressed, it importantly stressed how the duty of national defense connects to questions of social cohesion in post-transition South Korea. The solidarity between the military and economic mobilization of the masses also sheds light upon the system of special privileges which has permitted South Korean elites to evade conscription on a large scale up to date.

Dodging the draft: recognizing a social need for reform but resisting populist pressures

The issue of how far society can go in its demand for equality and transparency in relation to the duty of national defense reached the Constitutional Court of Korea in 2007. That year, the court adjudicated the complaint of a public official forced to disclose the name of the disease that prevented him from performing active military duty - in his case, the loss of vision in one eye. The requirement that public service personnels report information about their military service was implemented by the parliament in 1999. The initiative was prompted by a nation-wide scandal over the extent of draft dodging among South Korean elites which erupted in the summer 1998,¹¹⁸ when “it turned out that many influential members of society [were] implicated in significant amount of frauds or unjust preferential treatment of military duty.”¹¹⁹ The Act on Report and Disclosure of Military Service Records of Public Personnels and Others was subsequently passed by the National Assembly. It was expanded in 2004, when the obligation not only to report one’s exemption from the draft, but the exact cause behind it (i.e., the name of the disease responsible for incapacitation) was introduced. These pieces of information were to be published in the official gazette and made accessible on the internet.

¹¹⁸ *The Korea Times*, “Conscription-Related Allegations Continue To Be Exposed,” June 12, 1998; *The Korea Herald*, “Draft Scandal Involves 133 Army Officers, Including Seven Generals,” June 23, 1998.

¹¹⁹ 19-1 KCCR 711, 2005Hun-Ma1139, May 31, 2007, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume II, 2005-2008*, Seoul: Constitutional Court of Korea, 2010, p.52.

The disclosure scheme was invalidated by all the justices, despite divergences over the modalities of censure - the majority opted for an incompatibility decision leaving the unconstitutional provision temporarily applicable, while others judges argued for a decision of simple unconstitutionality or incompatibility with an immediate suspension of application. The various opinions were however united by their nullification of only part of the report system, the one concerning the divulgation of one's disease. As for the requirement to provide information about whether one had served or not in the military, it was found necessary and legitimate given the demand and need for transparency in relation to mandatory conscription in contemporary South Korean society.

The court recalled how “Korean people were shocked to find out the corruption scandals related to the duty of military service” in the late 1990s,¹²⁰ and how such concerns remained actual: “as the frauds and corruptions related to administration of the military service are not being rooted out, the society's need to eradicate such frauds and corruptions and restore equality in bearing the military duty is great.”¹²¹ In particular, the judges highlighted that “there is a growing national concern over the military duty of people in the leadership class such as high-level officials,”¹²² conceding that “one can easily admit, considering the reality of ours, the social need of renovating the ill custom prevalent in serving the military duty.”¹²³

With unanimity reigning over this side of the issue, the idea that there should exist limits to how far the social demand for transparency could go also dominated. As a result, while reporting information about one's service in the military was deemed proper, being forced to disclose the name of the disease responsible for one's disqualification was considered too strong a collision with the right to privacy recognized in the constitution.¹²⁴ Still, the court did not invalidate such obligation for all public officials and maintained it for those “few high-level public officials who can be inquired of additional responsibility and sacrifice.”¹²⁵

¹²⁰ *Ibidem*, p.49.

¹²¹ *Ibidem*, p.52.

¹²² *Ibidem*.

¹²³ *Ibidem*, p.56.

¹²⁴ “The privacy of no citizen shall be infringed” (article 17 of the Constitution of the Republic of Korea).

¹²⁵ 19-1 KCCR 711, 2005Hun-Ma1139, May 31, 2007, in The Constitutional Court of Korea, *Constitutional Court Decisions. Volume II*, p.56.

Resistance to pluralism in controversies of social magnitude

The caution displayed by the Constitutional Court of Korea on the military issues analyzed in this chapter should not be seen as confined to this policy area. Conversely, it should not be deduced from it either that the court has been unable to prove assertive, which it has done on many occasions, for instance through its early and sustained record of defending procedural fairness and basic rights in the criminal justice system. The court has also invalidated important policy choices closely associated with each of the political branches, censoring the National Assembly's redistricting plans in 2001,¹²⁶ or ruling in 2004 against the construction of a new administrative capital city outside Seoul, a project dear to President Roh Moo-hyun.¹²⁷ In addition, the deference that the court has manifested on various matters, such as judgments of war and peace, is often not synonymous with quiescence or subservience.

On the contrary, what emerges from constitutional jurisprudence is a strong pattern of prudential criticism, in the continuity of the court's ruling on the mandatory military service system. In this case and others, the court has preferred not to impose change upon the legislature while urging it to consider reform. This attitude could be seen as strategic, that is to say, adopted because it serves the court's self-interest: avoiding confrontation with other policy actors, or bolstering its reputation as a non-partisan institution. On issues deeply divisive in South Korean society, self-restraint has indeed been construed by the court as enhancing its credibility and legitimacy vis-à-vis public opinion. Yet, the caution of the Constitutional Court of Korea is also shaped by a deep reluctance over opening society to more pluralism and undoing the non-inclusive legacy of democracy's institutionalization by conservative interests.

When it comes to social mores and practices, the court has not hesitated to rule against customs widely perceived as outdated, such as the ban prohibiting marriage between two individuals with the same surname and ancestral seat which the court lifted in 1997,¹²⁸ or dismantling the patrilineal house head system as discriminating against men and women while prescribing a certain kind of family model in 2005.¹²⁹ In both cases, the court grounded its

¹²⁶ 13-2 KCCR 502, 2000Hun-Ma92 et al., October 25, 2001.

¹²⁷ 16-2(B) KCCR 1, 2004Hun-Ma554 et al., October 21, 2004.

¹²⁸ 9-2 KCCR 1, 95Hun-Ka6 et al., July 16, 1997.

¹²⁹ 17-1 KCCR 1, 2001Hun-Ka9 et al., Feb. 3, 2005.

decision of unconstitutionality on the scope of changes affecting private practices. However, the court usually opts for maintaining the *status quo* rather than pushing for reform whenever identifying the existence of social consensus is more difficult. This attitude is for instance illustrated by its rulings on the criminalization of adultery, which was examined for the first time in 1990. That year,

[T]he Court acknowledged that Article 241 of the Criminal Act punishing adultery by imprisonment of up to two years did restrict the people's right to sexual self-determination derivable from Article 10 of the Constitution. The Court, however, ruled that such restriction was justified by the public's interest in sound sexual ethics and maintenance of the system of marriage, and upheld the provision as not being an excessive restriction on the individual's sexual freedom.¹³⁰

The provision criminally punishing “adultery or fornication with a married person” was challenged again in 1993, 2001, and 2008. In this last instance, the case was formed by the consolidated requests of four lower tribunals demanding that the constitutional court clarified the issue anew. This growing pressure from below has also been accompanied by an important evolution of the justices' stance on the matter. In 1990, only one judge dissented on the ground that prohibiting adultery itself was unconstitutional. In 2001, a majority of justices still pronounced itself in favor of upholding criminal punishment but “called for serious approach by legislators over retention or abolition of the ban on adultery.”¹³¹ By 2008, only three judges wrote an opinion confirming the constitutionality of the ban, which was joined by the concurring opinion of a fourth one who called for “policy efforts to make remedies to relevant legislation based on positive and comprehensive consideration of the customs, social consensus, public legal awareness, etc.” By contrast, four judges pronounced themselves in favor of unconstitutionality, recognizing that the foundation for criminalizing adultery might not have completely crumbled but had nonetheless been “shaken to its roots to an extent that is no longer sustainable.”¹³² They were joined by the incompatibility opinion of a fifth one,

¹³⁰ 2 KCCR 306, 89Hun-Ma82, Sept. 10, 1990, in *The Constitutional Court of Korea, Twenty Years of the Constitutional Court of Korea*, p.190.

¹³¹ 20-2(A) KCCR 696, 2007Hun-Ka17.21, 2008Hun-Ka7.26, 2008Hun-Ba21.47 (consolidated), October 30, 2008, in *The Constitutional Court of Korea, Constitutional Court Decisions. Volume II*, p.756.

¹³² *Ibidem*, p.765.

producing a plurality in favor of the repeal, but falling short of the six votes necessary to render a decision of unconstitutionality.¹³³

The requirement that a super-majority of six judges be gathered to deliver a ruling of unconstitutionality is indeed a prudential mechanism embedded in the South Korean system of constitutional adjudication. A new challenge to the adultery law was brought in 2012, and is already characterized by a number of new features, such as the decision of associations formerly supportive of the ban not to take position before the court makes its new judgment known.

While the law applies equally to men and women, it is ostensibly the latter that the law was designed to protect. With no concept of alimony existing in Korea and many married women lacking financial independence, the criminalization of infidelity theoretically provides protection against a spouse's infidelity. But while the law enjoyed the support of women's rights advocates in the past, many have more recently turned against it, a shift that has coincided with more husbands bringing charges against adulterous wives. While previously quoted in media as being in favor of the law in recent years, The Korean Legal Aid Center for Family Relations told *The Korea Herald* that it would not take a public position until after the Constitutional Court had made its ruling. Likewise, Korean Women's Association United said it could not provide a unified stance on the issue in time for print as it is composed of numerous different organizations. Sue Kang, the KWAU representative that spoke to *The Korea Herald*, said that in her personal opinion, however, adultery should not be criminalized, calling it a matter of "personal choice, which the law or government should not be involved in."¹³⁴

This situation is interesting because it puts to the test Charles Epp's famous hypothesis about the support structure behind the rights revolution experienced by various common law societies. According to Epp, the growth of civil rights which is usually attributed to the activism of high courts, such as the U.S. Supreme Court in the 1960s, was instead mostly impelled from below, by the strategic rights advocacy of civic groups and associations providing multiple resources for litigation, such as the American Civil Liberties Union.¹³⁵

¹³³ "On the Instant Provision, four Justices voted for constitutional, other four for unconstitutional, and the remaining one incompatible with the Constitution. Although this makes the opinion holding the Instant Provision unconstitutional a majority, it is decided that the Instant Provision does not violate the Constitution as the quorum falls short of six persons required for a decision of unconstitutionality in the Constitution." *Ibidem*, p. 780.

¹³⁴ John Power, "Should Adultery Be A Crime?," *The Korea Herald*, May 13, 2012.

¹³⁵ Charles Epp, *The Rights Revolution. Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press, 1998.

Indeed, in systems where constitutional adjudication is decentralized and incidental, that is to say, where it can only be triggered in the course of a trial, litigation represents both a lengthy and costly process to go through.

In places like South Korea where constitutional adjudication is directly accessible to individuals, the necessary support structure identified by Epp may come into play in a different way. A system of accessible constitutional justice indeed appears more open to being invested by social forces as a channel to advocate change, although it may not have been conceived to that end. In post-transition South Korea, constitutional adjudication has largely been activated by the parts of civil society which the institutionalization of democracy has marginalized, turning the constitutional arena into a site where to contest the mechanisms enforcing the non-inclusive bias of the transition: the National Security Act, the ideological conversion system, and, as surveyed in the present chapter, mandatory conscription.

Yet, the Constitutional Court of Korea's intervention in response to this demand has been paradoxical. The dispute over the "national" which constitutes the subtext of the court's intervention in military issues in general, and over the ban on conscientious objection in particular, has not been permitted to fully unfold by the court, not because of the security necessities brought about by the division of the peninsula, but given the risk of social disintegration associated with the tolerance of minorities potentially endangering a certain way of imagining the nation.

CONCLUSION

Since the transition to democracy which South Korea experienced in 1987, constitutional justice has been construed as an arena where the actors politically alienated by the elite-led change of regime have challenged the national security instruments enforcing their exclusion. The Constitutional Court of Korea has consequently been preeminently involved in the struggle over the boundaries of enmity opposing the state and parts of civil society in the post-transition era. Constitutional adjudication has, however, revealed itself as a site where this dispute has been both staged and interrupted. The court has indeed performed its role as guardian of the constitutional order in a dual way. While its jurisprudence has strived to control the procedural legality of the security instruments inherited from the authoritarian period by reforming their most arbitrary and discretionary features, the court's decisions have also reinforced such tools' relevance and legitimacy to perpetuate the non-inclusiveness embedded in the new democratic order.

As this research has argued, the excluding function discharged by security tools after 1987 has to be understood as a legacy of the transition itself, that is to say, of the restrictive modalities and interests through which democracy was institutionalized by political elites to the detriment of the popular democratization movement and of the alternative "national" imaginary that it embodied. Although instruments such as the National Security Act, the ideological conversion policy, and the ban on conscientious objection have remained deployed in the name of protecting national security, they have primarily served to enforce a non-inclusive and contentious way of envisioning the "national." Throughout the 1990s, all administrations have indeed heavily resorted to the state's monopoly on the legitimate use of violence to confront proponents of a discordant "national" narrative: the "*minjung*" ideology articulated by so-called people's movement groups, especially students and intellectuals, mobilized against the conservative confines of the post-transition period.

In the context of this asymmetrical struggle between the state and civil society forces, constitutional adjudication has been invested as a site where the boundaries of enmity enforced by security tools have been recurrently challenged. Rather than instruments operating in the defense of national security, the various devices contested before the constitutional court can be conceptualized as mechanisms of exclusion participating to the distribution of who is recognized or denied "a place in the symbolic community of speaking

beings” in contemporary South Korea.¹ In this respect, the National Security Act and its article 7 criminalizing the act of “praising, encouraging, or sympathizing with an anti-state organization” represent central devices policing the partition of what counts or not as “national,” and of what is sayable or not in the post-transition era.

Yet, the ability to speak has also been at stake in all the other mechanisms of exclusion whose constitutionality has been called into question before the court: speech has been at the heart of cases not only filed against article 7 of the National Security Act, but against the ideological conversion policy, the criminal rights withdrawn from national security suspects and defendants, or the ban on conscientious objection to the compulsory military service. These security instruments actually amount to two distinct and complementary ways of circumscribing the partition of the sayable in democratic South Korea: by sanctioning certain kinds of statements (such as allegedly pro-North expressive materials under article 7 of the National Security Act or any declaration of conscience objecting to conscription under article 88 of the Military Service Act), and by forcefully requiring the production of other forms of discourse (such as pledging to abide by the laws under the conversion policy or making a confession in the course of a criminal interrogation).

Altogether, such mechanisms therefore correspond to two different ways of devaluating a voice: by making it speak against its will, and by discounting as noise, or rather as threat, what it truly wishes to say. Challenging the distribution of the sayable enforced by security instruments has thus fully given rise, in post-transition South Korea, to a disagreement in the sense defined by Jacques Rancière of “a dispute over the object of the discussion and over the capacity of those who are making an object of it.”² This conflict has gained access to the constitutional stage in so far as the mechanisms of exclusion preventing it from unfolding in the public sphere have been challenged before the Constitutional Court of Korea. Yet, constitutional adjudication has only represented a limited place of contention, one which has both contributed to stage and interrupt the disagreement about the boundaries of enmity.

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¹ Jacques Rancière, *Disagreement. Politics and Philosophy*, Minneapolis: University of Minnesota Press, 1999, p.25.

² *Ibidem*, p.xii.

In the course of the enduring dispute which has opposed the state and parts of civil society over drawing the boundaries of enmity, the Constitutional Court of Korea has stood both as an arbitrator and as a party. Indeed, any constitutional court finds itself tied, as an institution, not only to the defense of the state, but to the defense of a certain way of envisioning the “national.” In this sense, the possibilities available to courts may be inherently bounded. In the context of post-1987 South Korea where understanding the “national” has been a deep object of contention, the constitutional court has been caught in a paradox. Indeed, its commitment to safeguarding the constitution has not only entailed for the court to promote the rule of law and to protect basic rights, but also to reinforce the non-inclusive foundations upon which the constitutional order has been built with democracy’s institutionalization by political elites. Ironically, it is by playing its role as guardian of the constitution that the court has contributed to validate the mechanisms of exclusion enforcing the conservative legacy of the transition since the late 1980s.

The function which the constitutional court has come to embrace does not imply, however, that it was created for such a purpose. While the argument has been made that the introduction of a strong mechanism of judicial review was wanted by all South Korean political parties in the context of the electoral uncertainty that they faced in 1987,³ there seems to be little evidence that the post-transition activism of the Constitutional Court of Korea was the result of interest-based calculations on the part of its designers. What the new institution would be and would do was indeed very indeterminate for most actors in the course and immediate aftermath of the constitution-making process. Although constitutional jurisprudence has since confirmed the validity and relevance of existing security tools and policies, the court’s intervention has been more resisted than encouraged by those who seem to have eventually benefited from its verdicts.

Contrary to political elites’ liking, judicial review has largely been set into motion by the very forces which the institutionalization of democracy has marginalized. Under the impetus of human rights lawyers, constitutional litigation has thus become a site where to contest the dynamics of inclusion and exclusion after the regime change. The trajectory of the South Korean constitutional court therefore illustrates the part of contingency and absence of pre-determination that institutional design in general, and judicial empowerment in particular, can involve. In other words, even if particular and selective interests pervaded the process by which the court came into being, they did not necessarily shape the path on which the

³ Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases*, Cambridge: Cambridge University Press, 2003.

institution embarked in a causal way. Conversely, although the court has ultimately strengthened the excluding function of security instruments and the non-inclusive legacy of the transition, its decisions have also contradicted the immediate preferences of the political branches of government and law-enforcing agencies in a number of ways.

This ambivalence captures the double-edged role played by the court as guardian of the post-transition constitutional order, a role which was not preordained by the institution's crafters but unfolded as the constitutional arena was invested from below as a site of contention. From the perspective of comparative constitutional politics where heightened attention has been drawn to non-Western contexts and new democracies in recent years, the monographic study of South Korea undertaken by this dissertation thus not only makes an important empirical contribution by documenting a case considered as a model for democracy and judicial review in East Asia, but it also theoretically adds to the current body of knowledge in the field by critically exploring the subtle rather than mechanistic and pre-determined ways in which the South Korean court has not only safeguarded the constitutional order but, through its defense, has consolidated the non-inclusive legacy of the transition to democracy.

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As revealed by this dissertation's interpretive analysis of jurisprudence, the Constitutional Court of Korea's commitment to defending the constitution has led its decisions to both curb and strengthen existing security instruments. On the one hand, the court has clearly sought to dismantle a variety of arbitrary or extra-legal rules and practices associated with the security measures inherited from the authoritarian period; but on the other hand, its rulings have also reinforced these instruments' post-transition relevance and functionality by holding them constitutional. In ruling so, the court has strengthened the conservative dimension of the transition: that of a move away from authoritarianism, but toward a version of constitutional democracy that politically excludes certain segments of society, namely the actors, demands, and alternative "national" imaginary of the popular democratization movement. Excavating the two-sidedness of the Constitutional Court of Korea's intervention and disclosing how constitutionalism is not an institutional-discursive formation intrinsically tied to the promotion of liberal values have been made possible by the critical approach adopted by the present research.

As an in-depth reading of constitutional decisions has shown, the resilience of existing security instruments has not been primarily justified by the court in relation to the crisis situation experienced by the Korean peninsula in the context of the division and of the tensions chronically escalating between Pyongyang and Seoul. Instead of appealing to the exigencies of national security, the court has construed such tools as necessary to ensure the stability of the “basic order of free democracy.” As a result, the role of the court has not been one of mere reconfirmation vis-à-vis security devices. By shaping them in a way consistent with the procedural requisites of the rule of law, and by displacing the ground of their justification from national security to the defense of the “basic order of free democracy,” constitutional jurisprudence has profoundly reinforced the excluding efficacy of these instruments.

This outcome has not been produced by the court out of deference vis-à-vis the political branches in matters of national security as demonstrated by the prudential yet reproving language which the institution has been able to articulate. Instead, it is through its own affirmation as the ultimate protector of the constitutional order and thus largely as a result of its own doing that the Constitutional Court of Korea has consolidated the non-inclusive legacy of the transition. By establishing itself as a privileged actor in charge of safeguarding “the basic order of democracy,” the court has also endowed itself with the capacity to unpack the values and arrangements worthy of being upheld in the name of defending the constitutional order. This dimension of the court’s contribution has been more lasting and successful than its attempt to control and shape security instruments. On many occasions, the court’s more liberal efforts have indeed been constrained by the reluctance of other actors to abide by its dictates. By contrast, the constitutional arguments and language set forth by the court to justify the permanence of security instruments have gained authority outside the bench.

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Since the late 1990s, the receding application of existing mechanisms of exclusion such as the National Security Act and the ideological conversion policy (abolished in 2003) can be attributed to the formation of a new consensus over understanding the “national” and the corresponding defeat, rather than tolerance, of the alternative imaginary embodied in the “*minjung*” discourse and identity. Indeed, “the culture of dissent” associated with the

“*minjung*” had not only alienated the state but estranged the rest of civil society by the end of the decade following the transition, to be replaced by the mushrooming of middle-class citizens’ movement groups and associations.⁴ This shift from “*minjung*” to “*simin*” captures, for instance, the evolution undergone by “*Minbyun*,” the professional association of “Lawyers for Democracy” which first resorted to the constitutional court as a strategy to promote legal change but whose activities started to diversify beyond cases concerning political rights in the mid-1990s.⁵

With the fading of the “*minjung*” narrative, part of the disagreement over the boundaries of enmity in the post-transition era has disappeared. In the process, some of the claims associated with this imaginary, such as the demand for reunification, also vanished. The late 1990s which coincided with the East Asian crisis thus saw the emergence of a “new consensus on the market-driven politics of unification” and the idea of reconciliation through the mutual gains of economic cooperation across the Korean peninsula.⁶ In this sense, the policy of engagement with North Korea embraced by the Kim Dae-jung (1998-2003) and Roh Moo-hyun (2003-2008) administrations has remained inscribed within the parameters of neoliberalism and the pursuit of “*chaeböl*-biased and growth-first policy” as a “national” goal, making the conservative legacy of the transition endure as demonstrated by Choi Jang-Jip.⁷

Challenges to the “national” have, however, come from other fronts than the “*minjung*” discourse and identity which were articulated by students and intellectuals until the late 1990s. A different type of contestation has emanated from the refusal to perform the “duty of national defense,” a form of dissent which democratization forces never engaged in. By contrast to the “*minjung*,” religious minorities such as Jehovah’s Witnesses jeopardize a certain idea of the “national” not by formulating an alternative version of its contents, but by making a claim that situates itself beyond the realm of the nation-state. Having their profession of faith or pacifism recognized as speech, and not as noise or threat, is still at stake

⁴ Linda Lewis, *Laying Claim to the Memory of May. A Look Back at the Kwangju Uprising*, Honolulu: University of Hawai‘i Press, 2002, p.109.

⁵ Patricia Goedde, “Lawyers for a Democratic Society (*Minbyun*). The Evolution of its Legal Mobilization since 1988,” in Gi-Wook Shin and Paul Chang (eds.), *South Korean Social Movements. From Democracy to Civil Society*, Abingdon, New York: Routledge, 2011, p.233.

⁶ Hyun Ok Park, “The Politics of Unification and Neoliberal Democracy. Economic Cooperation and North Korean Human Rights,” in Sonia Ryang (ed.), *North Korea. Toward a Better Understanding*, Lanham: Lexington Books, 2009, p.110.

⁷ Jang-Jip Choi, *Democracy After Democratization, The Korean Experience*, Stanford: Walter H. Shorenstein Asia-Pacific Research Center, Stanford University, 2012, p.75.

for the hundreds conscientious objectors sent to South Korean prisons for dodging the draft every year.

The end of the year 2013 has also unveiled how the dispute over the boundaries of enmity is far from having reached a close, and how prominent a role the constitutional court is still expected to play in it. In November 2013, the constitutional court has indeed received its first request for the dissolution of a political party, the “Unified Progressive Party” (“*t’onghap chinbodang*”) on the ground that it constitutes a “revolutionary organization” whose activities or purposes contradict the “basic order of free democracy.” While the case is still pending, the intense debates which it has prompted demonstrate, as did the controversy over the possible abolition of the National Security Act in 2004, that the disagreement over the contours of inclusion and exclusion in contemporary South Korea is not settled yet and will continue to unfold on the constitutional stage. By contrast to the late 1980s and following decade, the resort to legal mobilization in general, and constitutional litigation in particular, no longer appears solely activated by the groups which the transition marginalized. Since the 2000s, conservative forces have increasingly invested the site of constitutional adjudication as a place where to preserve their understanding of the “national.”

South Korea has consequently been characterized by at least two important dynamics in the mobilization of civil society groups in recent years: on the one hand, some of the most active and powerful parts of civil society are conservatively-oriented today and thus militate against reform; on the other hand, the ability and opportunity of groups and individuals to practice the language of rights is more than ever unequally distributed. In particular, economic marginalization in capitalist society can be identified as hindering the emergence of citizenship, that is to say, the constitution of subjects into citizens endowed with rights which they can press against the state.⁸ As a result, those who are not only economically marginalized but politically underrepresented in South Korea’s post-transition order may as well be excluded from the stage of constitutional contention. Taking this site for what it is, with both its possibilities and limits, delineates *in fine* this dissertation’s objective.

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While the specifics of the disagreement which has led to the activation of constitutional justice in the late 1980s are idiosyncratic to the South Korean case, the paradox

⁸ Seungsook Moon, *Militarized Modernity and Gendered Citizenship in South Korea*, Durham, London: Duke University Press, 2005, p. 177.

of defending constitutionalism which its court instantiates is likely to be found in other contexts. Indeed, the Constitutional Court of Korea does not stand as the only institution which has performed its function of protecting the constitutional order in a double way, strengthening existing forms of non-inclusiveness through its commitment to define and defend so-called basic structures and fundamental values against the perils which endanger them. Yet, the South Korean case also illustrates how a given constitutional order can register and institutionalize dynamics of inclusion and exclusion distinct from tensions between religion and secularism, separatist and federalist nationalisms, or ethnocultural cleavages which tend to divide constitutional democracies such as Israel, Canada, or India.

As demonstrated by the present research, contention over the boundaries of enmity and the definition of what counts as “national” and “anti-national” may also be sustained by the very modalities and frustrations associated with the institutionalization of democracy. In this respect, the paradox in which the Constitutional Court of Korea has been caught could reveal itself as paradigmatic of transitions taking place by amendment rather than replacement of the constitution, due to the limited re-foundation of the political order to which they give rise. Conducting further research in this direction would provide a critical contribution to the field of constitutional politics and would highlight the full comparative scope of the ambivalent relations identified between constitutionalism and democracy in the case of South Korea.

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ABSTRACT

Among the countries which have experienced a political transition away from authoritarianism in the 1980s, South Korea is usually considered as a model of both democracy and judicial review. Relying on an interpretive reading of jurisprudence, the present research however uncovers the double-edged way in which the Constitutional Court of Korea has discharged its role as guardian of the constitution. A critical analysis of constitutional jurisprudence indeed reveals how the court's commitment to define and defend the post-transition constitutional order has translated into both liberal and illiberal outcomes. This ambivalent dimension of the court's role has unfolded as the institution came to intervene in the major dispute opposing the state and parts of civil society after the 1987 change of regime: reshaping the contours of enmity in the post-transitional period. Through the contentious issue of enmity, what has been put at stake in the constitutional arena is the very challenge of delineating the boundaries of inclusion and exclusion in South Korean democracy. In light of this task, constitutional justice has imposed itself as a paradoxical site, where the post-transitional disagreement about what counts as "national" and "anti-national" has been both staged and interrupted.

Parmi les sociétés ayant fait l'expérience d'une transition politique au cours des années 1980, la Corée du Sud est d'ordinaire tenue pour un modèle de "réussite" démocratique et constitutionnelle. L'analyse interprétative du corpus jurisprudentiel sur laquelle le présent travail de recherche repose révèle cependant l'ambivalence qui a caractérisé la manière dont la cour a endossé son rôle de défenseur de l'ordre constitutionnel dans la période post-transitionnelle. Cette ambivalence se traduit par la dualité d'effets, libéraux et illibéraux, produits par les décisions de la cour à mesure qu'elle est intervenue dans le conflit majeur ayant opposé l'Etat sud-coréen et une partie de la société civile depuis le changement de régime : redéfinir les contours de qui, et ce qui, constitue l'ennemi après la transition. A travers la question polémique de l'ennemi, ce sont les dynamiques d'inclusion et d'exclusion au sein de la démocratie sud-coréenne qui ont été mises en jeu sur la scène constitutionnelle. La Cour constitutionnelle de Corée a joué un rôle paradoxal au regard de cette dispute, ou "mésentente", que son intervention a contribué à mettre à la fois en scène et en sommeil.