Strasbourg, 09 March 2021

**CDL-JU (2020)001**
English only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# Online roundtable “Referral of cases to Constitutional Council by ordinary courts”
## 26 February 2021, 9:00-11:30 (CET)

## Experience of Constitutional Court of Korea

**Jung-Won KIM, Substitute Member of Venice Commission, Deputy Secretary General of the Constitutional Court of the Republic of Korea**

*This document will not be distributed at the meeting. Please bring this copy.*
www.venice.coe.int

It's my great pleasure to be able to discuss on the matters of Constitutional Justice of Kazakhstan.

I would like to share the experiences of the Constitutional Court of Korea.

Relevant to the matter on the motions of the parties, the Constitutional Court of Korea has jurisdiction over the constitutionality of a law upon the request of the courts (Article 111, paragraph 1 of the Constitution) and the Constitutional Court Act makes it clear that ordinary courts shall address adjudication of constitutionality of the law to the Constitutional Court, ex officio or by their decision upon a motion of a party (Article 41, paragraph 1).

The motion of the party shall be in writing, stating matters on the content of the law and the reason why the party think unconstitutional. The reason need not be specifically stated. It is only necessary to point out which right such as freedom of speech, or which constitutional principle such as equality has been violated.

In Korea, Nearly all the cases that have been referred to the Constitutional Court by ordinary courts were made upon the parties' initiative. Without a motion of a party, it would be hard to find the necessity of reviewing constitutionality of a law.

When an ordinary court refers to the Constitutional Court on the basis of the motion of the party, the ordinary court's written request shall include the specific matters such as reasons why the statute is interpreted as unconstitutional. From this point on, the judge's worries begin. This is because there is a burden to write the unconstitutional argument fairly convincingly.

Let me talk about a joke. In case of the motions of the parties to request the referral to the Constitutional Court, the case remains asleep in the briefcase until another case would be solved. Of course, we should not remain asleep, but it takes time for full consideration.

In case of a referral to the Constitutional Court of the Korea, the proceedings stay in the ordinary court until the Constitutional Court makes a decision on the constitutionality of the law.

Since the structure of the Constitutional Court Act of Korea differs from those of other countries, it would be at the disposal of the authorities to find a desirable way. To this end, a profound examination of the Law on the Constitutional body and related procedural laws would be needed.

I will move on to the issue on the refusal of ordinary courts.

In Korea, there is no means of appeal to a higher court against a lower court's refusal of the motion to referral to the Constitutional Court, but in the event of a refusal, there is an open way for the applicant to file a constitutional complaint directly to the Constitutional Court.

If a motion is denied by an ordinary court, the party may request adjudication on a constitutional complaint directly to the Constitutional Court. In this case, the party cannot file a motion to another court, for example higher court. The party has an only one chance. It is needed to alleviate the legal complexity of procedures before otherwise reaching the Supreme Court. Therefore, sometimes the Constitutional Court of Korea can declare the law unconstitutional after final decision of an ordinary court. In that case, the party comes to have a right to reopen the trial to the ordinary court.

Next, I will talk about the effect of the decision of the Constitutional Court of Korea.
In Korea, a law found unconstitutional by the Constitutional Court loses legal force from the date on which the decision is made. (erga omnes) The decision comes into effect at 0 o'clock (00:00) on the day of the ruling regardless of whether the ruling was made, am or pm. It gives a kind of retroactive effect.
In case of a decision found not conforming to the constitution, the law loses legal effect after a specific period of time specified by the Constitutional Court. The Constitutional Court of Korea urges the Parliament periodically (twice per year). Such measures are not mandatory, but has the nature of a notice or reminder.
The Parliament in Korea is always keeping an eye on the decisions of the Constitutional Court.

Respect and cooperation would be needed.

To be, or not to be, that is the question. To refer, or not to refer, that is the question.
The Venice Commission has dealt with this issue in Revised Report on Individual Access to Constitutional Justice [CDL-AD(2021)001]. We all know that.
The Venice Commission considers that ordinary courts should be able to request preliminary decisions to challenge a norm before the constitutional court, when they are convinced of the unconstitutionality of a provision. The Commission further notes that, when individuals have no direct access to a constitutional court, it would be too high a threshold condition to limit preliminary requests to circumstances in which an ordinary judge is convinced of the unconstitutionality of a provision. In these circumstances, serious doubt should suffice. (par. 53)

On this occasion ordinary courts may be usually concerned with two things. One is the risk of delay of the judicial system, and the other is the fear of application of unconstitutional laws on their cases. We would not have to worry about overburdening ordinary courts with so many preliminary requests on the parties' initiative because the parties themselves would also be aware of the risk of delay in their cases.

Let me take an example. Last year (2020), 20 cases have been referred to the Constitutional Court of Korea by ordinary courts. And 744 cases have been directly requested to the Constitutional Court of Korea after denying the motions of the parties by ordinary courts. The Constitutional Court of Korea was established on 1 September 1988 and 1 case had been directly requested that year, 15 cases in 1989. It is not numbers that matter. What matters is what remedies exist.

In this regard, it would be helpful to introduce the attitude of the Constitutional Court

of Korea. The Constitutional Court of Korea requires a reasonable suspicion beyond a simple doubt on the unconstitutionality (Case no. 93Hun-Ka2). This attitude can be understood as an intermediate position between a simple doubt and the conviction required by German Federal Constitutional Court.

The difference seems to stem from their jurisdiction. In Germany, final judgments of ordinary courts can be challenged in the form of constitutional complaint. Therefore, in case of the ordinary court's refusal of the request to address to the Constitutional Court, there is still a room for constitutional review in the Constitutional Court.

On the contrary, judgments of ordinary courts themselves are not subject to challenge in Korea.

Above all, respect and cooperation are needed for both judicial and constitutional organizations to increase confidence in the judicial system.

The increase in the number of cases referred to the Constitutional Council is not an issue. An active request of ordinary courts for constitutional review is a crucial factor to revitalize the constitutional adjudication.

Two viewpoints exist in two state bodies, an ordinary court and a Constitutional Court.

My 20-year experience as an ordinary judge and current position as a constitutional expert for 10 years are telling me that two different functions eventually come from one body. However, there are possibilities that they may cause conflict on legal issues. The reality shows it could happen.

I wish that this conference today will contribute the development of the Constitutional Justice of Kazakhstan.

Thank you for listening.