

Chun and Rhoe Case Before Korean Supreme Court and Judicial Passivism

Jibong Lim*

(Professor of Law at Konkuk University)

< INDEX >

I. INTRODUCTION	C. Weighing of Offenses
II. DEFINING JUDICIAL ACTIVISM AND JUDICIAL PASSIVISM	IV. COMPARISON WITH AMERICAN AND JAPANESE CASES ON ISSUES
A. Former Definitions of Judicial Activism and Passivism	A. Successful Coup d'etat and Political Question
B. New Definition of Judicial Activism and Passivism Under the Separation of Power Doctrine	B. Judicial Activism and Inconsistency in Legal Decisions on the Same Case
III. FORMER PRESIDENTS CHUN AND RHOE CASE IN KOREA	C. Pardon
A. Fact and Background of the Case	V. CONCLUSION: ASSESSMENT ON CHUN-RHOE CASE AND JUDICIAL PASSIVISM
B. Reasoning and Judgments: The Crimes	

I. INTRODUCTION

The role and status of the courts in the society are different in each country. The courts especially - the Supreme Court or Constitutional Court - play active roles and act

* Professor of Law, Konkuk University(Seoul/Korea). LL.B. 1991, Seoul Nat'l University; LL.M. 1993, Seoul Nat'l University Graduate School; LL.M. 1996, U.C.Berkeley School of Law; J.S.D. 1999, U.C.Berkeley School of Law. I make clear that this paper is mainly based on and developed from some portions of my JSD Dissertation entitled 'A Comparative Study on the Judicial Activism Under the Separation of Power Doctrine.' For this paper, I would like to give my special thanks to Professor Martin Shapiro, my advisor at U.C. Berkeley School of Law, who inspired me with brilliant ideas and astounding guidance in developing the arguments in this paper, Dean Daniel B. Rodriguez who was a law professor at Boalt Hall and now is a Dean at University of San Diego School of Law for his helpful and detailed comments on the theme of this paper at the early stage of research, and Professor In-Sup Han at Seoul Nat'l University College of Law for his early help with Korean materials on this topic including his writings on 5.18(May 18th) Democratization Movement and his insightful comments that largely contributed to framing of this paper.

as a policy-maker through their judgments in some countries. On the contrary, in other countries, the courts play very passive roles in that they frequently hide themselves behind the shield called "judicial self-restraint" in some politically sensitive cases. By and large, Korean judiciary has belonged to the second category until near past. Korean courts having had Korean Supreme Court on its top, rested on an extremely passive position for a long time. There were few invalidations of law in the whole period of Third Republic(1962-1972) of Korea when judicial review was left to the Korean Supreme Court.

However, in 1988, separate from the general court line, Korean Constitutional Court was established according to the Constitution of 1987. The sudden appearance of the Korean Constitutional Court itself was stimulating enough to awaken the Korean judiciary from its extreme inactiveness, and, furthermore, the fact that Korean Constitutional Court was much more active than expected and applauded by many Korean people for that, roused the general courts in Korea into activeness. In addition, the change in political situation in Korea strengthened this tendency; since the end of military regime and start of civil government in early 1990s, various changes in the Korean courts have been observed in many places. The general courts in Korea began to make very active decisions and declared many rules and regulations unconstitutional that had been made by the administrative branches.¹⁾ The active decision by Korean Supreme Court on former presidents Chun and Rhoe case which declared the illegality of their military coup, ruthless oppression of Kwangjoo Democratization Movement and bribery of enormous amount of money, could be one of the best examples for the change. Many Koreans gave their applause to Korean courts represented by Korean Supreme Court, praising them as a manifestation of "judicial activism". Thus, judicial activism began to be in everybody's mouth in Korea in this context.

1. In Korea, the power of judicial review on the law belongs to Korean Constitutional Court with the other powers in impeachment, dissolution of a political party, jurisdictional disputes and constitutional complaints: Art.111 Sec.1 of Korean Constitution reads, The Constitutional Court shall adjudicate the following matters: 1. The unconstitutionality of law upon the request of the courts; 2. Impeachment; 3. Dissolution of a political party; 4. Disputes about the jurisdiction between national agencies, between national agencies and local governments and between local governments, and 5. Constitutional complaint as prescribed by law. However, when the constitutionality or legality of administrative rules, regulations or actions is at issue in a trial, the general courts have the power to review its unconstitutionality or legality, and especially the Supreme Court has power to give a final decision for this: Art.107 Sec.2 of Korean Constitution reads, "The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative rules, regulations or actions, when their constitutionality or legality is at issue in a trial."

II. DEFINING JUDICIAL ACTIVISM AND JUDICIAL PASSIVISM

A. Former Definitions of Judicial Activism and Passivism

The concept of judicial activism has been frequently used by many legal scholars and social scientists in the world to explain a certain attitude, behavior pattern or philosophy of judiciary. However, the meaning of judicial activism that they have used, was fairly different according to the contexts in which the term was used. Although the term has been so frequently used, its exact meaning does not seem to have been definitely decided. In a sense, we are using the term without knowing its exact definition. As reconsideration on this, there have been some attempts to define the term, and, roughly speaking, the attempts could be categorized as follows.

First, there is definition of "judicial activism that emphasizes the aspect of breaking precedent by refusing to follow stare decisis. According to Black's Law Dictionary, judicial activism is defined as judicial philosophy that motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters."²⁾ Here, to analyze this definition, non-adherence to judicial precedent, decisions calling for social engineering, intrusion into legislative and executive matters could be the features of judicial activism. Among them, this definition seems to particularly emphasize the non-adherence to judicial precedent more than decisions calling for social engineering, and intrusion into legislative and executive matters because those two features are just signals of judicial activism that are "commonly" or "occasionally" appear. It continues to define judicial self-restraint as the opposite concept of judicial activism rather than defining judicial passivism.³⁾

Steven H. Gifis's definition of judicial activism also belongs to this category that emphasizes the judicial attitude of non-adherence to precedents; "the theory of judicial

2 . HENRY CHAMPBELL BLACK, BLACK'S LAW DICTIONARY 847 (6th ed., St. Paul/Minnesota: West Publishing Co., 1990).

3 . Id. at 849.

behavior that advocates basing decisions not on the judicial precedent but on achieving what the court perceives to be for the public welfare, or what the court defines to be fair and just on the facts before it.”⁴⁾ He continues to define judicial passivism – judicial restraint – in the same perspective; “the theory of judicial behavior that advocates basing decisions on grounds that have been previously defined by judicial precedent rather than on the basis of achieving some public good, which is viewed as the proper role of the legislature.”⁵⁾ Therefore, definitions of judicial activism belonging to this group understands judicial activism as the active attitude of judiciary towards the former judiciary itself based on “progressive and new social policies” or “public good.”

Second, there are groups of people who understand judicial activism in terms of the way to interpret the constitution, statutes or precedents. For them, judicial activism is the judicial attitude venturing beyond any plain meaning of the constitution, statute and precedent by controversially and loosely construing them. Michael J. Perry’s definition that is mainly focused on the context of constitutional law belongs to this category. He says, “A court is activist if, and to the extent that, it exercises noninterpretive review – i.e. supplanting policy choices made and presumably enacted by electorally accountable governmental officials with policy choices of its own –, and passivist if, and to the extent that, it confines itself to interpretive review – i.e. making no policy choices of its own, but simply safeguarding policy choices constitutionalized by the framers. Of course, there are degrees of activism and passivism, and a court that is activist...with respect to one matter may be passivist...with respect to another.”⁶⁾ He characterizes judicial activism as noninterpretive review supplanting policy choices of the other branches, and judicial passivism as interpretive review making no policy choice, and adds that it is a matter of degree.

John Hart Ely, the author of “Democracy and Distrust,” falls in this category. He articulates in his book, “Activism and self-restraint are categories that cut across interpretivism and non-interpretivism, virtually at right angles.”⁷⁾ And he identifies interpretivism with “strict constructionism.” Furthermore, he continues to apply

4 . STEVEN H. GIFIS, LAW DICTIONARY 258 (3rd. ed., New York : Barron’s, 1991).

5 . Id. at 259.

6 . MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 7n (New Haven: Yale Univ. Press, 1982).

7 . JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (Cambridge, Massachusetts and London, England: Harvard University Press, 1980).

interpretivism and non-interpretivism to the existing positivism and natural law debate, and connects interpretivism with "positivism" and "non-interpretivism" with natural law idea by saying, "The interpretivism-noninterpretivism dichotomy stirs a long-standing debate that pervades all of law, that between positivism and natural law. Interpretivism is about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism."⁸⁾ Accordingly, to summarize, he identifies judicial activism with non-interpretivism and natural law while identifying judicial passivism with interpretivism, strict constructionism and positivism.

What attracts our attention is that this group of definitions of judicial activism is even developed into identifying judicial activism with judicial liberalism, and judicial passivism with judicial conservatism. Ely points this out in his book explaining non-interpretivism(judicial passivism) concerned with the political situation of the United States and U.S. Supreme Court under Nixon administration; "Unfortunately, it has been used more often, perhaps most notably in recent years by President Nixon, to signal a quite different thing, a proclivity to reach constitutional judgments that will please political conservatives."

B. New Definition of Judicial Activism and Passivism Under the Separation of Power Doctrine

Different from the above definitions, I would like to define judicial activism and judicial passivism connected with the separation of power doctrine. According to this position, judicial activism is the attitude or philosophy of courts that raises an objection to the will and decision of the other two governmental branches - the executive and the congress -, and actively checks the abuse of power by the two governmental branches so as to realize the ideal of checks and balances on which the separation of power doctrine is based. On the contrary, judicial passivism could be the judicial philosophy or attitude that usually chooses judicial deference rather than judicial intrusion for legislative or executive decision or power by frequently using judicial self-restraint. Accordingly, under judicial passivism in this definition, the judiciary extremely restrains its intervention into the decision of the other two branches and remains cooperative, and never stands against the other governmental branches in separation of power structure.

8. *Id.* at 1.

Thus, there cannot be the checks from the judiciary to the legislature and executive through its decisions. Furthermore, balances among the three branches cannot be accomplished because there is no checks. Imbalance among three powers results because the judiciary loses power and the power moves to and concentrates on either the legislature or the executive.

Shortly speaking, in this definition, judicial activism and passivism is divided according to the criterion of whether the judiciary tend to refuse to take an attitude of judicial deference for legislative or executive decision or power. There are some similar definitions that have this criterion in the distinction of judicial activism and passivism, but they also have other factors in their standards of distinction. Thus, judicial deference for the decisions of the other governmental branches is just one of the several criteria and usually the emphasis is not put on the criterion of judicial deference but on other factors.⁹⁾ I will stick to the definition whose criterion of distinction between judicial activism and passivism is only judicial deference for the other governmental branches. That is because, by taking only one criterion that is closely related to separation of power doctrine, we can consistently stick to one perspective in observing and comparing judicial activism in different countries. Besides, I think this definition of judicial activism and passivism could have strength when we try to examine the role of judiciary in the big frame of separation of power structure. It keeps us away from a short sighted view in our observation and enables us always to see the judiciary in the big picture that has all three governmental branches in it.

This definition of judicial activism also keeps us away from a typical confusion that judicial activism is same as judicial liberalism and judicial passivism as judicial conservatism, which the second definition above has made. Because judicial activism means judicial non-deference to the other two branches, under the liberal executive and legislature, active judiciary means not liberal but conservative one. We could find this example in the American history. In 1880s and 1890s, the Supreme Court packed with conservative Justices, threatened the new regulatory and welfare laws made by progressive legislature and executive. However, applying our definition, the conservative Court showed judicial activism because it stood against the decisions and powers of the

9 . For example, Sterling Harwood explains judicial activism with four phenomena in adjudication: "first, refusing to take an attitude of judicial respect for legislative or executive power or judgment; second, relaxing requirements for justiciability such as standing to sue; third, failing to follow stare decisis; fourth, loosely or controversially construing constitutions, statutes or precedents." STERLING HOWARD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE 2 (San Francisco, London and Bethesda: Austin & Winfield, 1996).

other liberal governmental branches.¹⁰⁾ In addition, in the 1930s, the decisions of U.S. Supreme Court were severely criticized by many liberals in the U.S. as well as in Europe. By using its power of judicial review, the Court declared unconstitutional some important proposals of President Franklin D. Roosevelt, and, accordingly, almost destroyed his program for fighting the economic depression. This time, the conservative Supreme Court showed judicial activism by opposing liberal executive and legislature. If the other branches are conservative, judicial activism means judicial liberalism. In the Warren Court period (1953-1969), the Justices followed a more liberal line, making several rulings favorable to underprivileged minority groups such as the blacks.¹¹⁾ Here, liberal judiciary showed judicial activism under inactive and conservative legislature and executive.

This definition on the judicial activism and judicial passivism is becoming prevalent in modern constitutional jurisprudence as its new definition. In modern countries, the power is more and more concentrating on the executive rather than the congress and the judiciary. In these modern countries, so-called administrative states, the intensification of the concentration of power on the executive has threatened the important classic constitutional doctrine, separation of power doctrine, in one way or another. This definition on the judicial activism and judicial passivism under the separation of power doctrine would have much more strength in analyzing the status and function of the judiciary in such modern countries where the proclivity to be an administrative state is getting intensified.

In this study, based on the definition of judicial activism under the separation of power doctrine, we will examine and characterize the new change in Korean courts focusing on Korean Supreme Court by analyzing its one epochal case. In addition, this study will also reveal the problems in the Court decisions and explore ways toward the desirable change in Korean courts by comparing with the attitudes and responses of the courts in the United States and Japan in similar cases. As I believe that comparative law is "not the comparison consisting of presenting descriptions of a number of legal systems side by side with no particular end in view,"¹²⁾ the comparison will be tried issue-by-issue and

10 . According to Prof. Martin Shapiro at Boalt Hall, it was then that "the elaborate doctrines of judicial self-restraint based on the conflict between review and democracy were first spelled out by academic spokesmen for the Populists and Progressives." Martin Shapiro, *The United States*, infra note 369 at 46.

11 . According to H.J. Abraham, "this development strongly enhanced the reputation of the Court and of judicial review, inside and outside the United States." H.J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 393 (5th ed., Oxford: Oxford Univ. Press, 1988).

12 . MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* at vii (Univ. of Chicago Press, 1981).

country-by-country after analyzing the Korean case.

This study analyzes the case involving former presidents Chun and Rhoe, which many Korean people think a remarkable example of judicial activism of changed Korean Supreme Court. This gives comparatively detailed description of the case including its background, and, brings up the issues of successful coup d'état and the political question doctrine, inconsistency in legal decisions on the same case, and presidential pardon. All the issues are compared with the similar Japanese and American cases. In the conclusion, we will apply our definition of judicial activism under the separation of power doctrine, and try to reveal whether the decisions of the Chun-Rhoe case is an example of judicial activism or passivism.

III. FORMER PRESIDENTS CHUN AND RHOE CASE IN KOREA

After many twists and turns, Korean Supreme Court¹³⁾ came to decide a very controversial case in Korea where former military authorities including former presidents Doo Whan Chun and Tae Woo Rhoe who had carried out coup d'état in December 12, 1979 and taken power. Because the case had two former presidents as its defendants, it created a stir in Korean society and the decision of the Korean Supreme Court easily became the center of public interest in Korea. From now, let's call it Chun-Rhoe case for convenience' sake.

The so-called "salient case of the century" dealing about 12.12(Dec. 12th) military rebellion, 5.18(May 18th) insurrection and bribery of two former presidents, finally, came to an end, one and a half year after the Prosecution started the investigation for this case, 115 days after it was appealed to the Supreme court. They say that thirteen Justices of the Supreme Court gathered seven times for this case and a very vehement debate took place every time for the each issues of this case. It proves the weight of this case in modern Korean history.¹⁴⁾

13 . Republic of Korea v. Chun et al., 96 Do 3376 (Korean Supreme Court, April 17, 1997) appeal from Republic of Korea v. Chun et al., 96 No 1982 (Seoul Higher Court Criminal Division No.1, December 16, 1996).

14 . For details of the process, refer to *CHOSEON ILBO*[Choscon Daily News], April 18, 1997, at 4; *DONG-A ILBO*[Dong-A Daily News] April 18, 1997, at 38.

A. Fact and Background of the Case

This case was decided by the Supreme Court on April 18, 1997 as the final decision, and Seoul Higher Court on Dec. 16, 1996 as the second instance. The first decision for this case had been made by the Seoul District Court on August 26 in 1996, but both sides - the prosecutors and all the defendants - appealed. This case was also appealed by the prosecutors to the Supreme Court who were not satisfied with the decision of the Higher Court while the defendants abandoned the appeal. The defendants are fifteen former military officers including Doo Whan Chun and Tae Woo Rhoe who were the presidents of Korea in 5th (1980-1987) Republic and first term of 6th Republic (1988-1993) one after another. Except for the two former presidents, the rests became Cabinet Ministers or Congressmen in Korea during the two Presidents' tenure. All of them were highly ranked military officers in Korea - actually, most of them were generals - when the then President Jung Hee Park was shot to death by his subordinate, Jae Gyu Kim, on Oct. 26 of 1979. General Doo Whan Chun took charge in the assassination investigation as 'Chief of the Public Security' Division in military under the martial law declared by the successor of President Park, President Gyu Wha Choi. On Dec. 12(12. 12) of 1979, General Chun and the defendants arrested 'Chief Martial Law Administrator' named Seung Wha Chung in suspicion of being the conspirator of the assassination without obtaining pre-sanction by the President Choi. In the process of the arrest, several military officers and guarding soldiers who were in the side of the Chief Martial Law Administrator Chung was killed and injured. Just after the arrest, the defendants took possession of the Military Headquarters in Seoul disarming the generals including the Deputy Chief of the General Staff and were appointed to the key positions of the Military by the President Choi who unwillingly gave them the post-sanction of the arrest. After that, as a matter of fact, they took the initiative in the military and even in the government. The defendants were indicted for the military rebellion, their first charge, by their acts so far.

Afterwards, there were a series of nationwide demonstrations in Korea protesting against the military rebellion by the defendants and the demonstrations by the citizens in Kwangjoo, a big city in Southernwest part of Korea, was one of them. On May 18(5. 18) of 1980, the military in which the defendants took the leadership started to excessively suppress the demonstration by Kwangjoo citizens under the name of riot mobilizing

soldiers there and shooting the demonstrators including innocent citizens. The shooting aggravated the Kwangjoo citizens and became a clue to be developed into a bloody battle between the military and the citizens in which many citizens in Kwangjoo were killed and injured. The suppression over the Kwangjoo citizens was just the start of a series of suppressions by the defendants who wished to solidify their power. They suppressed the press by reducing its numbers and Congress by blockading the entrance of Congress Building with military forces. Besides, the defendants arrested many political magnates making false charges against them. All these conducts by the defendants were indicted as composing the insurrection, their second charge.

After the defendants firmly took the power as a result of their rebellion and insurrection stated above, general Doo Whan Chun and general Tae Woo Rhoe became President one after the other. Especially, Chun and Rhoe got tremendous amount of bribes - around three hundred million dollars each - during their term of Presidency. The bribes were from the heads of big business groups in Korea such as Samsung, Hyundai and Daewoo. Chun and Rhoe even kept the money after their retirement. Therefore, the bribery was added to the charges of Chun and Rhoe in the indictment as the third crimes by the two defendants.

There have been seven decisions by courts and prosecution office for this case. The first legal decision was made not by courts but by the Prosecution in early 1995. At that time, the Prosecution made 'the disposition not to prosecute the accused,' on the ground that the coup d'etat made a success and a successful coup d'etat cannot be judged legally, rather it should be left to the judgment of history. The second decision was made by the Constitutional Court soon after the Prosecution's decision. The Court accepted that the 12.12 Incident was a military rebellion, but it declared that the rebellion was legalized at the time when the President Doo Whan Chun took the presidential oath in the inaugural ceremony.¹⁵⁾

After that, the situation changed very much as this case connected with bribery. In July of 1995, a Minister of Government Administration¹⁶⁾ said in an informal occasion that a former president is keeping about \$500,000,000 as hidden money. It was enough to arouse big interest of Korean people. The Prosecution made the third legal decision for this case, here. However, the Prosecution gave up the search for the case very soon,

15 . 12. 12 Incident case, 94 *Hun-Ma* 246[constitutional case-c](Korean Constitutional Court, January 20, 1995)

16 . His name was Seok-Jae Seo. He was the President Young-Sam Kim's confidant who was very good at information.

alleging that there are no evidences supporting his statement and the Minister himself clarified the statement that it was not more than his own conjecture which was made in an informal occasion. This third decision did not last long. It did not go further than the stage of fact-finding, so, strictly speaking, it was missing something to be called as a legal decision.

On October 19th in 1995, a congressman¹⁷⁾ revealed that he found out unidentified deposit of around \$37,500,000 that was supposed to be a part of former President Rhoe's hidden money, \$500,000,000. Finally, Tae Woo Rhoe was arrested with a blitz on suspicion of bribery during his presidency.¹⁸⁾ Soon after that, President Young-Sam Kim made the declaration titled '*Yuksa Baro Seugi*[Correcting the History]'. In response to this, the Congress enacted '5.18 Special Act'¹⁹⁾ to punish the defendants of this case for their insurrection in the course of suppressing the movement under the name of putting down Kwangjoo rebellion, in November of 1995. Art. 2 of this Act provided the suspension of prosecution prescription for punishing the offender against the movement.²⁰⁾ The fourth decision on this case was made by the new Constitutional Court(It was the second term of the Court) on the decision of the constitutionality of Art.2 of the Act on Feb. 16, 1996. The court declared the article constitutional by the reason that it is not a retrospective legislation.

The decision of the Seoul District Court on this case can be classified as the Fifth decision of this case. It decided in favor of the plaintiff and sentenced Doo Whan Chun to death and Tae Woo Rhoe to penal servitude for life. What draws our attention is the logic of the court on the consummated point of the rebellion and insurrection because it generally becomes the starting point of prescription of the crimes. Seoul District Court regarded the point of time, January 24 in 1981, when the martial law was lifted.

17 . He was a congressman named Park Gae-Dong from an opposition party. For details of his statement, see *DONGA ILBO*[Dong-A Daily News], Oct. 19, 1995, at 1.

18 . It was very shocking enough to stir up the whole nation, in the point that the Prosecution arrested a former President. For details, see *CHOSEON ILBO*[Chosun Daily News] Oct. 19, 1995, at 1.

19 . Its full name is "A Special Act for 5.18 Democratization Movement and So On." May 18th is the day when Kwangjoo Democratization Movement. For details on Kwangjoo Democratization Movement, see *infra* Part II, B. 2. b.

20 . Art.2 of the Act is composed of two sections. Art.2 Sec.1 provides, "As for the criminal offenses destroying constitutional order prescribed in Art. 2 of 'Special Act for the prescription of the criminal offenses destroying constitutional order around Dec. 12, 1979 and May 18, 1980', the prescription is regarded to be suspended during the period when the obstacles in the execution of prosecution by the government existed." Art.2 Sec.2 reads, "The period when the obstacles in the execution of prosecution by the government" means the period from the date the criminal offenses were completed to Feb. 24, 1993."

The sixth decision was made by Seoul Higher Court. It was in favor of the plaintiff of the first instance as well, but the offenses of all the defendants were reduced compared with the first instance. Doo Whan Chun was sentenced to life imprisonment for the crime of leader of the rebellion. His offense was reduced compared with the death penalty in first instance, considering the old saying; "Surrendering generalissimo should not be killed." Tae Woo Rhoe was sentenced to 17 years' imprisonment that is reduced from life sentence in the first instance considering that he was the second man in the crime. All of the bribes they took was imposed as a penalty. Another difference with the decision of Seoul District Court is about the starting point of prescription of the rebellion and insurrection. Seoul Higher Court said their rebellion and insurrection was completed in June 29 in 1987 by '6.29 *Seonun*[Declaration on June 29]'. Therefore, the prescription starts from this point of time. This means that they are regarding the nearly whole period of 5th Republic as the crime period different from the District Court.

The last seventh decision on this case was made by the Supreme Court as a final one as follows.

B. Reasoning and Judgments: The Crimes

The crimes they committed are, by and large, divided into three categories - 12.12. Military Rebellion, 5.17 and 5.18 Insurrection, and Taking Bribes.

1. 12.12 Military Rebellion

We admit that the military officers led by Doo Whan Chun rose in military rebellion²¹⁾ to overthrow the government and take power in a legally-prohibited way. On Oct. 26 in 1979, the President Jung Hee Park²²⁾ was killed by his subordinate Jae Gyu Kim who was the president of 'Agency for National Security Planning' at that time. Prime Minister Gyu Wha Choi succeeded to the Presidency,²³⁾ declared martial law and

21 . Art.5 of Military Criminal Act prescribes on the military rebellion reading, "Any person who rebels in a group with arms shall be punished according to the following classification: 1.The leader of the rebellion shall be punished to death(prescription: 15 yrs). 2. Those who conspire together, direct or play the other important roles shall be punished to death, life sentence, or the imprisonment for more than 7 years. Those who commit murder, dilapidation, or plunder shall be same(prescription: 15 yrs). 3. Those who follow blindly or are simply involved in the rebellion only shall be punished to the imprisonment for less than 7 years(prescription 5 yrs)."

22 . The President Jeong-Hee Park got the power and became President through the military rebellion, too.

23 . Art.71 of the Constitution prescribes, "If the office of the presidency is vacant or the President is unable to

appointed Seung Hwa Chung to the chief martial law administrator. General Doo Whan Chun was in charge of the investigation of the murder case as the Chief of the Public Security Division in military under the martial law.

On Dec. 12 in 1976, General Chun arrested the chief martial law administrator Chung under the name of conspirator of the murder of President Park, based on the fact that the chief martial law administrator Chung was very near from the very spot where the murder occurred and he conspired and supported the murder. However, the arrest was illegal because General Chun did not obtain pre-sanction of the President that should be obtained before arresting chief administrator martial in law. The military officers led by General Chun moved their soldiers to Seoul and took possession of the Military Headquarters after small battles with guarding soldiers. They arrested the generals who were against them. During these arrest and battles, several officers and guarding soldiers were killed and injured. After their victory, they obtained the post-sanction of the President arresting the chief martial law administrator Chung, and they were appointed to the key positions of the Military which enabled them to take and maintain their power.

But, this is illegal at the points below.

First, the defendants insist that the sanction of the President justified the arrest. In order to arrest chief martial law administrator, pre-sanction of the President should have been obtained. The defendants allege that they had no time to get pre-sanction because it was an urgent situation and they got post-sanction which satisfies the requirement for the arrest. But, the post-sanction after the completion of the illegal arrest just can alleviate the degree of the blame for the crime which has already completed and cannot justify the illegal act.

When the defendant Chun requested to the President Choi the pre-sanction for arresting chief martial law administrator Chung around 18:20 on Dec. 12 in 1979, the President Choi did not even impliedly approve but refused, judging from the evidences. Even though the President gave sanction for the arrest around 05:10 on Dec. 13 in 1979, this sanction is nothing but a post-sanction after the Chief Chung was arrested, the Army Headquarters and the Department of Defense were occupied by the military forces the defendants called out, and the generals who tried to suppress the military rebellion forming a formal chain of command were brought under the defendants control. This

perform his duties for any reason, the Prime Minister or the members of the State Council in the order of priority determined by law shall act for him."

nothing but a post-sanction, cannot justify the arrest of the Chief Chung and the acts of illegal calling-out of the military forces.

Second, even though we acknowledge the legality of the post-sanction, it has the illegality in itself on the point that it was made by the duress. Around 20:20 on Dec. 12 in 1979, the defendant Chun mobilized military forces to the Prime Minister's official residence where the President Choi was staying at that time and disarmed the guarding soldiers of the residence and detained by force. After that, he had the residence at his command with his military force. He went to the President with other defendants and threatened the President Choi requesting again the arrest and investigation of the Chief Chung. This is the act defying the prerogative of supreme command of the President, and accordingly belongs to the military rebellion.

Third, the defendants allege that their mobilization of military forces is legal. According to the Military Constitution Act that was in force at that time, the Deputy Chief of the General Staff Seong Min Yoon had power to act for the Chief Chung who got the accident by the arrest of the rebellion group. The Deputy Chief ordered to set the Chief Chung free to the rebellion group, but they ignored the order and, rather, asked to cooperate with them. The Deputy Chief ordered the entire army not to move without his order or permission. They ignored the order and mobilized the military forces that were under their command to the Capital Defense Headquarters where the anti-rebellion generals gathered. They disarmed the generals including the Deputy Chief and arrested some who severely resisted them. It was evidently a revolt against seniors by the lower-class generals ignoring the order of the senior generals in order to take power.

Defendant Doo Whan Chun committed the crime of the leader of the rebellion, and the rests committed the crime of rebellion, murder and attempted murder.

2. 5.17, 5.18 Insurrection

There were a series of demonstrations in Kwangjoo which protested against the military coup d'état, the regional extension of martial law onto a nationwide scale and the establishment of Emergency Committee for National Defense approved by the State Council on May 17 in 1980, and the arrest of Dae Joong Kim²⁴⁾ who was the famous political leader from Kwanjoo under the name of insurrection. On May 18 in 1980, the

24 . He is now the President of Korea.

military began to excessively suppress the demonstration of Kwangjoo citizens under the name of riot. They moved soldiers to Kwangjoo and began to shoot to the members of the demonstration and even innocent citizens. It stimulated the citizens and made them rise in arms against the military. There were battles between the citizens and the military. In the course of the battle, many citizens were killed and injured.

The defendants plead that the suppression was indispensable to prevent extreme disorder in Kwangjoo for national security. But, the demonstration was just. Rather the reasons of the demonstrations were reasonable. The extension of martial law onto a nationwide scale had no justifiable reason because the situation was not such an extreme disorder that needs the extension of martial law. The arrest of political leaders was unnecessary things as well because they did not instigate people to violence. Therefore, the suppression was done illegally in the course of insurrection by the defendants in order to take power. The insurrection was continued after the 5.17 and 5.18 suppression. They oppressed the press and made them into small numbers to easily control the press. They also seized the Congress Building with military forces and prevented Congressmen to enter it. They arrested many political leaders illegally under the various reasons. All of these series of their conducts compose the insurrection prescribed in Art. 87 of Korean Criminal Code.²⁵⁾

First, to satisfy the requirements of the insurrection, it should have the purpose of "wresting the national territory or disordering the national Constitution." Whether the defendants had the purpose of disordering the national Constitution during their riot matters here because the purpose of "wresting the territory" does not fit in this case. The defendants allege that the regional extension of the martial law onto a nationwide scale and the establishment of the Emergency Committee for National Defense do not come under the purpose of "disordering the national Constitution." The defendants threatened the State Council members by surrounding the State Council Building with armed military force, and blocking the way of communication with the outside. The defendants illegally eliminated the deliberating power of the State Council. This belongs to the purpose of "disordering the national Constitution."

25. Art. 87 of Korean Criminal Code reads, "Anyone who rose in riot under the purpose of wresting the national territory or disordering the national Constitution shall be punished according to the following classifications: 1.The leader shall be punished to death or life sentence. 2.Those who conspire together, direct or play the other important roles shall be punished to death, life sentence, or the imprisonment for more than 5 years. Those who commit murder, dilapidation, or plunder shall be same. 3.Those who follow blindly or are simply involved in the riot only shall be punished to the imprisonment for less than 5 years."

The defendants allege the suppression of the Kwangjoo protest does not come under the purpose of "disordering the national constitution." As long as the people form a group and try to protect the Constitution as sovereign, it should be protected like a constitutional institution. Therefore, crushing the regimentation of the people who try to protect the Constitution with duress is same as crushing a constitutional institution with duress. The violent suppression of the demonstration of Kwangjoo citizen calling out military force, made, as a matter of fact, impossible the exercise of the citizen's power, so it belongs to the purpose of "disordering the national Constitution."

Second, another requirement of insurrection is showing a "riot" character. The defendants allege the regional extension of martial law onto a nationwide scale does not show any riot character. However, only the extension itself can give threat that the fundamental rights of people can be restricted. Further, it deprived the Defense Minister the power of controlling the chief martial law administrator, and the State Council of the deliberating power concerned with martial law things. With this, the degree of duress that the Defense Minister and members of the State Council got, increased. Accordingly, this belongs to the threatening act as a substance of riot that is one of the requirements for insurrection. The defendants insist that there be no riot character in suppressing Kwangjoo demonstration. However, according to the evidences, it is certain that the acts of soldiers violently suppressing Kwangjoo demonstration belongs to "violence and threat" as a substance of riot that is one of the requirements for insurrection. The soldiers were used as means by the defendants to accomplish the crimes of the defendants, so the defendants are "indirect chief criminal" for the illegal suppression of the demonstration.

Third, the defendants insist that they should not be punished or their penalty should be remitted because the acts suppressing the Kwangjoo citizens' demonstration are applicable to self-defense, excessive self-defense, emergency evacuation, or excessive emergency evacuation. To be the self-defense or excessive self-defense, the purpose and motive of the act should be legitimate. To satisfy the requirements of the self-defense, excessive self-defense, emergency evacuation, or excessive emergency evacuation, there should be the intention to defense or evacuate. However, neither of these is satisfied in this case.

The defendants did already anticipate the opposition and resistance of the citizens when they conspired the ruthless suppression under the purpose of disordering the national constitution. They planed to order the airlift troops in Kwangjoo beforehand. The troops

had been trained in ordinary days to suppress the demonstration with a strong crusher. The soldiers of the troops who were ordered in Kwangjoo under this plan cruelly put down the demonstration. They injured the citizens hitting with a butt plate of a rifle. They chased fleeing demonstrators up to the inside of a building to massively haul to the police station. The defendants evidently tried to take advantage of the soldiers' acts in order to accomplish their object of disordering the national Constitution. Accordingly, the purpose and motive of the defendants' acts are justifiable, and the defendants did not have the intention to defense and evacuate. Therefore, the defendants' acts do not come under the purview of self-defense, excessive self-defense, emergency evacuation, or excessive emergency evacuation.

Fourth, some defendants allege that they did not conspire and participate in the whole series of the insurrection. As long as they partly conspired and took part in each act that forms insurrection as a whole, they are in charge of the whole acts that form insurrection.²⁶⁾

3. The Common Parts of the Military Rebellion and Insurrection

There are illegal points that commonly belong to both military rebellion and insurrection.

First, the defendants allege that because the defendants succeeded in coup d'état they cannot be punished. Although the charges on the defendants belong to the military rebellion and insurrection, the defendants seized power for certain through the rebellion and insurrection, and succeeded in destroying old legal order and establishing new legal order through the revision of the Constitution. Therefore, the acts of the defendants cannot be punished under the new legal order. Under the constitutional order of our Constitution, the act that made impossible the exercise of power of constitutional institutions and take power based not on the democratic procedures prescribed in the Constitution but on the violence, cannot be approved under any circumstances.

The defendant Chun was elected as a President under the procedure of the Constitution,²⁷⁾ which was revised after he took power through the military rebellion and

26 . This means that the court regarded the defendants not as an accomplice but as a chief criminal, based on the theory of "indirect chief criminal."

27 . Under the Constitution, the president was elected through the 'indirect' election by the electoral college which was elected by the people.

insurrection. During defendant Chun's presidency, the Constitution was revised again under the procedure prescribed in the Constitution and defendant Rhoe was elected as a President under that Constitution²⁸⁾ and finished his presidency. The defendants insist that a chain of these events prove that the defendants formed new legal order and - further - national consensus impliedly which decided that the past acts of the defendants would not be punished.

However, there was not any explicit consensus in the course of constitutional revision that might leave the acts of the defendants unnoticed. Further, in order to punish their acts, "5.18 Special Act" was enacted and the Constitutional Court decided that the Act is constitutional.²⁹⁾ All these situations prove that the defendants cannot evade the criminal responsibility on the pretext of the establishment of new legal order and implicit national consensus.

Second, the defendants allege that as Art.2 of 5.18 Special Act is unconstitutional it should not be applied to this case and the prescription for the rebellion and insurrection was already completed. Both of the military rebellion in Korean Military Criminal Act and the insurrection in Korean Criminal Code, belong to the "crime for death penalty" prescribed in Art.249 Sec.1 Item 1 of Korean Criminal Procedure Act which prescribes on the length of prescription, so the prescription is 15 years.³⁰⁾ The point here is when the starting point of this prescription is. Art.252 Sec.1 of Korean Criminal Procedure Act provides, "The prescription starts from the point when the criminal act was consummated."

The District Court regarded it as January 24 in 1981 when the martial law had been lifted and the Higher Court understood June 29 in 1987 when 6.29 Declaration³¹⁾ had been

28 . The Constitution is the current Constitution that is providing the direct election of the President.

29 . For more details, see, *supra* Part III. A. 1.

30 . Art.249 Sec.1 of Korean Criminal Procedure Act reads, "The prescription is completed with the lapse of the following period of time. 1. the crime for death penalty: 15yrs, 2. the crime for life sentence: 10yrs, 3. the crime for the imprisonment of more than 10 years in long-term: 7yrs, 4. the crime for the imprisonment of less than 10 years in long-term: 5 yrs, 5. the crime for the imprisonment of less than 10 years in long-term, qualification suspension of more than 10 years in long-term, or monetary penalty of more than 10,000 won(about \$10) at large sum: 3yrs, 6. the crime for qualification suspension of more than 5 years in long-term: 2 years, 7. the crime for qualification suspension of less than 5 years in long-term, monetary penalty of less than 10,000 won(about \$10) at large sum, detention, fine, or forfeiture: 1yr."

31 . The 6.29 Declaration was announced by Tae-Woo Rhoe who was the candidate for presidency in majority party - named "*Minjeongdang*[Democratic Justice Party]." It was declared to alleviate the national protest against the defendants who tried not to revise the Constitution into direct election system. But, nearly all the Korean people wanted the revision of the Constitution provision from indirect election system into direct election system of the President. The 6.29 Declaration admitted the revision and extended the scope of civil liberty in various areas - for example, the absolute prohibition of prior restraint of the press. The declaration is estimated as the surrender of the coup d'etat power - here, the defendants - to the people.

announced by Tae Woo Rhoe which had symbolized the surrender of coup d'état force to the people and start of the democratic regime free from military regime. The Supreme Court agrees with the decision of the District Court on this point³²⁾; the Court sees that the military rebellion and insurrection was consummated on January 24 in 1981 when the emergency situation was ended with lifting the martial law. Generally speaking, so January 24 in 1981 should be the starting point of the prescription. But, in this case, the starting point of prescription is exceptionally different from the consummated point of the criminal act due to the application of 5.18 Special Act.

Art.2 Sec.1 of 5.18 Special Act is specifying the application of the Act to "the criminal offenses destroying constitutional order"³³⁾ which occurred around Dec.12 in 1979 and May 18 in 1980. On this article, the Constitutional Court declared it constitutional, so the crimes which belong to the scope of the Art.2, should be regulated not by the general Criminal Procedure Code³⁴⁾ but by 5.18 Special Act in their prescriptions. Art. 2 of 5.18 Special Act provided that the prescription shall be suspended until Feb. 24 of 1993 on the crimes within the boundary of the Art.2.

The crimes of the defendants certainly belong to the crimes prescribed in Art.2 of 5.18 Special Act that was declared constitutional by Korean Constitutional Court. Therefore, for the crimes in this case, the prescription starts from Feb. 25 of 1993. The Prosecution made a prosecution for the military rebellion part on Feb. 28 of 1996, for the insurrection part on January 23 of 1996 and Feb. 7 of 1996 each. Accordingly, the prescription - 15 years - of the military rebellion and insurrection has not yet completed.³⁵⁾

Third, the defendants insist that 5.18 Special Act be unconstitutional because the

32 . This is the only difference between the decision of the Supreme Court and Seoul Higher Court. The Supreme Court accepted all the other things from the decision of the Higher Court. See, *CHOSEON ILBO*[Choson Daily News], April 18, 1997, at 1.

33 . On "the crimes destroying constitutional order," Art.2 of the Particular Instances Act on the crimes destroying constitutional order, is providing its definition. Both the crime of military rebellion prescribed in Part 2 Chapter 1 of the Military Criminal Code, and the crime of insurrection prescribed in Part 2 Chapter 1 of the Criminal Code, belong to the scope of this, "the crimes destroying constitutional order."

34 . If the general provisions of Criminal Procedure Act are applied, the starting point of the prescription becomes the consummated time of the rebellion and insurrection. So, if January 24, 1981 becomes the starting point of the prescription as well as the consummated time of the rebellion and insurrection. Then, it becomes through the calculation that the prescription was completed on January 24, 1996. It was before they were prosecuted.

35 . This logic in starting point of prescription is exactly the same as that of Seoul District Court. On the contrary, the higher court used different logic. It decided that the consummated time of the rebellion and insurrection was on June 29 of 1987, and the prescription stated from this point of time by the general provision of Criminal Procedure Act. Therefore, the prescription of 15 years comes to be completed in June 29 of 2002. It did not apply 5.18 Special Act that had room of unconstitutionality. Instead, it regarded the period of 5th Republic as the time when the crimes have been continued and put the consummated time of the crimes far behind, June 29 of 1987 when the June 29 Declaration was made.

declaration of constitutionality of the Act was made by Korean Constitutional Court and one of the Justices of the Court who took part in the decision is the very one who participated in the cleanup drive in officialdom, which falls within the application boundary of Art.2 of 5.18 Special Act. Even though what the defendants insist is true, this does not come under Art.24 Sec.1 of Korean Constitutional Court Act that prescribes on the requirements for the exception against the Justice.³⁶⁾ Although Korean Supreme Court would assume that it comes, just such a cause could not make the decision of Korean Constitutional Court void.

Fourth, the defendants allege that the prosecution in this case is the abuse of the right of arraignment. According to the documents, a prosecutor made non-prosecution disposition on the military rebellion and insurrection part of this case. Later, things have changed greatly in this case. Namely, the new suspicion appeared and the Special Act was enacted by Congress concerned with this case. With this reason, the Prosecution resumed investigation and prosecuted this case based on the result of the new investigation. Therefore, it does not seem to be the abuse of the right of arraignment and we cannot admit the allegation of the defendants.³⁷⁾

4. The Crime of Taking Bribes

Doo Whan Chun and Tae Woo Rhoe took enormous amount of money as bribes during their term of office. Doo Whan Chun took \$275,625,000 and Tae Woo Rhoe \$338,624,500. All of them were given by the heads of big business groups in Korea. Generally speaking, the purpose of the bribes could be classified into the following three types.

First, asking preferential treatment or at least no disadvantage compared with the other business groups in deciding economic policies and managing finance and tax systems. For example, bribe for the help of the government in obtaining loaning from banks that are practically under the government's control.

36 . Art.24 Sec.1 of Korean Constitutional Court Act reads, "Any Justice who falls under the following category shall be excluded from the case. 1. when the Justice is a party, the spouse of a party, or former spouse of a party. 2. when the Justice is a relative, family, former relative, or former family of a party. 3. when the Justice has testified or been an expert witness concerned with the case. 4. when the Justice has been a legal representative of a party concerned with the case. 5. and the other occasions in which the Justice has been involved with the case ex-officio."

37 . For military rebellion and insurrection part, there is a dissenting opinion by Justice Man-Ho Park who says that a successful coup d'etat cannot be legally judged. That is similar with the reasoning of the Prosecution that made disposition of non-prosecution in 1990.

Second, asking preferential treatment compared with the other business groups in deciding economic policies and managing finance and tax systems, and, especially, asking to exercise influence over the choice of the undertaker of national policy business which will be made in the future. For example, bribe for having given a chance to monopolize delivering military supplies.

Third, asking preferential treatment compared with the other business groups in deciding economic policies and managing finance and tax systems, and, especially, asking to exercise influence over choosing the undertaker of national policy business which will be made in the future or at least no disadvantage in choosing. For example, bribe for receiving an order to build submarine base.

First of all, the two defendants allege that the money was just given in the name of "political money" - by the defendant Chun - or "ruling money" - by the defendant Rhoe - which was needed for their ruling without any consideration concerned with their office, and actually there were no exercises of their influence for the return. The President is in the position where he or she can exercise ex-officio or actual influence over the businesses of the companies. Besides, the choice of the undertaker of national policy where the bribing companies are concerned, belongs to or is deeply connected with the duty of the President. Therefore, if the President received the money, the crime of bribery is established.

Second, the presidents of companies who gave bribe to the two defendants allege that there have been no specified ex-officio acts of the President in return of their money, so it does not satisfy the requirement - the character of return - for the crime of giving bribe.³⁸⁾ In this case, the bribery is enough to be given concerned with the duty of the President, and need not to be in return with each specified duties. That comes from the specialty of the position and duties of the President. If money is given to the President, it satisfies the "character of return" with general duties of the President.

In addition, the two defendants even kept the money privately after their retirement. Therefore, it is evident that the money was the bribe to the public servicemen that is prohibited by Korean criminal law.³⁹⁾

38 . To be the crime of bribery in Korean Criminal Code, the character of return between taking money and specified ex-officio act by the recipient should exist. The Korean Criminal Code has fairly detailed provisions for the crime of taking and even giving bribe from Art.129 to Art.135. Among them, Art.129 Sec.1 stipulates on the basic requirements for the crime of bribery. It reads, "Any public serviceman or arbitrator who takes, asks, or is promised to take bribe concerned with his/her ex-officio act shall be punished to the imprisonment for less than 5 years or qualification suspension for less than 10 years."

39 . The problem of political money, bribery and corruption in Korean politics is deep-rooted. Nowadays, Korea is

C. Weighing of Offenses

They committed plural crimes, but some of them are punished as the biggest one because the other crimes are immersed.⁴⁰⁾ The offenses of all the defendants are same as those in the second instance. Doo Whan Chun is sentenced to life sentence for the crime of leader of the rebellion. His offense was reduced compared with the death penalty in the first instance, considering the oriental old saying, "the surrendering generalissimo should not be killed." Tae Woo Rhoe is sentenced to 17 years' imprisonment that is reduced from life sentence in the first instance considering that he was the second man in the crime⁴¹⁾.

All of the bribes they took are imposed as a penalty.⁴²⁾ The other defendants' offenses are 8(3 defendants), 7(3 defendants), 6(1 defendants), 5(1 defendants), 3 and half(4 defendants) year imprisonment each.

stirred up by taking bribery of President Young-Sam Kim's son from the presidents of private companies. This seems to me that the problem is caused by the evil of the institution, not that of the individuals.

40 . Art.38 Sec.1 of the Korean Criminal Code is prescribing on the concurrent crimes and their sentencing. It reads, "Concurrent crimes, when simultaneously sentenced, shall be punished according to the following classification. 1. If the punishment for the biggest crime is death penalty or life sentence, the criminal shall be sentenced to the punishment for the biggest crime only. 2. If the punishments for each crimes are same kind except for death penalty and life sentence, the criminal shall be sentenced up to the one and a half of the maximum punishment for the biggest crime, but the punishment shall not exceed the total of the maximum punishments for each crimes. However, fines and forfeitures shall be added up each. 3. If the punishments for each crimes are different kind except for life sentence, they shall be added up."

41 . According to the 'Act on the Honorable treatment of Former Presidents,' the former presidents receive the amount of 95% of the incumbent president's salary. There are many other treatments and subsidies for maintaining their dignity - for example, the cost of maintenance for his officer and car, post and telephone subsidy, the cost for books newspapers and magazines, and the cost of social activity. All these honorable treatments are stopped when more than imprisonment is fixed. See, CHOSEON ILBO[Chosun Daily News] April 18, 1997, at 2; DONG-A ILBO[Dong-A Daily News] April 18, 1997, at 4.

42 . It was getting more difficult to collect the penalty from them. Even though the Supreme Court imposed penalty of \$275,625,000 to the defendant Chun and \$338,624,500 to the defendant Rhoe that were the amount of money they had got as bribes, the money from the two defendants the Prosecution was keeping, was much less than the amount. The prosecution was keeping \$48,625,000 from the defendant Chun and \$287,500,000 from the defendant Rhoe. These were just 17.6% for Chun and 87.5% for Rhoe compared with the amount of penalty. Moreover, the prescription of imposed penalty was nothing but 3 years, so if the Prosecution had failed to take the full amount of penalty within 3 years, the defendant Chun and Rhoe could legally own the remained hidden money. They were presumed to hide the money and obstinately maintained that they had no more money. Because of this, the Prosecution urged that although the President would give them pardon it should be after they pay the penalty. See, CHOSEON ILBO[Chosun Daily News], April 18, 1997, at 31.

IV. COMPARISON WITH AMERICAN AND JAPANESE CASES ON ISSUES

A. Successful Coup d'état and Political Question

Can a successful coup d'état be legally punished? Isn't that beyond the boundary of legal decision? Isn't it political question rather than legal question? We can ask these kinds of questions for this Korean case.

The coup d'état that was once decorated by the defendants themselves as the decision for saving the nation, changed its epithet later as a successful coup d'état, and finally decided to be the crimes - insurrection, rebellion and murder for insurrection. It means that the coup d'état became the eternally-failed coup d'état in the end. This case is based on politically sensitive matters - military rebellion and insurrection. However, all the issues are not political matters. In this case, by and large, they deal with the rebellion, insurrection and bribery. If the former two is about the crime that destroys the constitutionalism and trample on the human dignity, the last is the declaration of corruption and money-grubbing using the power as crimes. As the power starts with violence ended with corruption, the relevance of the two - violence and corruption - is indispensable. This case which deals with both the violence and corruption - the two weapons of military dictatorship - simultaneously, gives us a good chance to look over the nature of military dictatorship at once, and makes us think about thorough liquidate of the past in the sides of practice and system.⁴³⁾

Summarizing the character of this case, some regard this as the struggle between the defendants who try to call themselves the scapegoat of the age and the power who tries to punish them with criminalizing a political case. However, this viewpoint is possible only when we see the courtroom as a game place. Even though both sides struggle for victory in the courtroom, the important thing is not strategy for triumph but the voice of the truth and justice. Although they seek to flaw the case in the course of the trial, their crimes cannot be converted from legal issues to political issues, and the Court itself did not admit the defendants' allegation that this is a political case out of the reach of judicial power.⁴⁴⁾ A concerned person with the Supreme Court estimated this case saying

43 . In Sup Han, '5.18 Salsang' Chinsilgyoomyunguin Ijebooteo[Finding out the Truth of '5.18 Murder' Is From Now], SHINDONGA, Oct. 1996, at 602.

that this is the first judicial decision in the world that punishes a successful coup d'état.⁴⁵⁾

If we regard the coup d'état as a successful one that this is a political case, does political question doctrine apply to this Korean case? Justiciability is preconditions that should be satisfied for a case to be decided in federal courts. It comes from the limitations of "cases and controversies" in Art.3 Sec.2 of U.S. Constitution⁴⁶⁾ and prudential considerations. Justiciability is the broad concept that includes the concept of standing, mootness, ripeness and political questions. Accordingly, if issues of a case belong to political questions, the justiciability is denied; because the issues in the case has political character, it is better to be deferred to political organ - the Congress. The political question doctrine played very important role after the factors to be a political question were announced by Baker v. Carr case in 1962.⁴⁷⁾ However, it became less important today than it was in prior periods in the United States because only two cases⁴⁸⁾ in the last twenty years has the Court admitted an issue to be non-justiciable political question.⁴⁹⁾ Furthermore, there are some negative viewpoints to this doctrine.⁵⁰⁾ There were debates on the political question doctrine. Debate between Prof. Henkin and Prof. Redish can be a famous example. Prof. Henkin argues that the Court never invokes the political question doctrine without either reaching the merits of the claim at issue, however subtly, or disposing of that claim on procedural or equitable grounds. The political question doctrine does not therefore exist. It is an unnecessary, deceptive packing of several established doctrines that has misled lawyers and courts to find in it things that were never put there and make it far more than the sum of its parts.⁵¹⁾ Prof.

44 . Id. at 603.

45 . He said, "There has not been a case in the world that legally punished a successful coup d'état. Maybe this would be the first judicial decision punishing a successful coup d'état in the world. There has been many inquiries about what would be the direction and result of this judgment, from many Latin American and African countries where the political situation is unstable." See, *CHOSEON ILBO* [Choson Daily News], April 18, 1997, at 30.

46 . Art.3 Sec.2 of U.S. Constitution limits federal court jurisdiction to "cases" and "controversies." Hence, the federal courts are prevented from issuing opinions on abstract and hypothetical questions.

47 . Charles W. Baker et al., Appellants, v. Joe C. Carr et al., 369 U.S. 186, 82 S.Ct.691 (1962).

48 . The two cases are Gilligan v. Morgan 413 U.S. 1 (1973), and Goldwater v. Carter 444 U.S. 996 (1979).

49 . For history of the political question doctrine, see Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 642-69 (Spring 1989).

50 . For example, "The only sensible attack on judicial review is a wholesale attack that would deny the power in its entirety. Any piecemeal excepting of certain issues is an argument directed to the decision to be made in particular cases. That is why the political question doctrine is nothing other than a subterfuge for masking explicit review on the merits of particular claims that come before a court. It avoids nothing except the basis for the court's holding. Moreover, it limits the debate value of a provision or principle by making future decisions seem purely political and therefore not bound by law." Wayne McCormack, *The Political Question Doctrine: Jurisprudentially*, 70 U. D. MERCY L. REV. 793, 822 (Summer, 1993).

Redish disputes Prof. Henkin's conclusion that the political question doctrine does not exist. Nonetheless, he shares important premises with Prof. Henkin, taking the critique of the doctrine one step further in the same direction. For Prof. Redish, any exception to the rule of justifiability is inconsistent with the place of judicial review in our constitutional jurisprudence.⁵²⁾ Besides, this doctrine is difficult to define and summarize into one overarching principle.⁵³⁾

Baker v. Carr case gives us the clue to understand the definition and scope of the political question doctrine. The fact of Baker case is as follows. In Tennessee, no reapportionment law had passed for sixty years since 1901 even though the Tennessee State Constitution allocated representation based on the "population." Some members of the Tennessee electorate including Baker brought an action in federal court to make the apportionment scheme⁵⁴⁾ be declared in violation of the Equal Protection Clause in Fourteenth Amendment. The action also sought equitable relief including a court-ordered reapportionment plan if necessary. A three-judge District Court for the Middle District of Tennessee, entered an order dismissing the complaint on the basis of non-justiciable political question doctrine, and plaintiffs appealed. The Supreme Court decision written by Justice Brennan concluded, "complaint containing allegations that a state statute affected an apportionment that deprived plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment presented a justiciable constitutional cause of action, and the right asserted was within reach of judicial protection under the Fourteenth Amendment, and did not present a non-justiciable political question."⁵⁵⁾

Before the case, the Court consistently had refused to adjudicate claims concerning legislative apportionment by reason of political question doctrine. The Court changed its way in Baker case. It pointed out that the plaintiffs' assertion - the mal-apportionment violated the Equal Protection Clause - did not present a political question. To get to the conclusion, the Court started to distinguish political questions from political cases by saying, "The doctrine of which we treat is one of political questions, not one of political

51 . For details of his arguments, see, Louis Henkin, *Is There a Political Question Doctrine?* 85 YALE L.J.597, 625 (April, 1976).

52 . For details of his argument, see Martin H. Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV 1031, 1059-60 (December, 1984).

53 . On the failure to define political questions, see J. Peter Mulhen, In Defense of the Political Question Doctrine, 137 U. PA. L. REV. 97, 118 (November, 1988). He tried to redefine the political question doctrine using 'shared responsibility assumption.' See id. at 162-75.

54 . Under the apportionment scheme, 37% of the voters elect 20 of the 33 Senators whereas 40 % of the voters elect 63 of the 99 House members.

55 . 369 U.S. 186, 82 S.Ct. 691.

cases.”⁵⁶⁾ Through this statement, the Court clarified, the mere fact that a case has political stakes or generated political controversy, does not make it non-justiciable under the political question doctrine.⁵⁷⁾ Then, the Court announced series of factors, at least one of which must exist so as to make an issue a non-justiciable political question by saying, “Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.” Six factors were enumerated, which were commitment to another branch, lack of standards, unsuitable policy determination, lack of respect for other branches, already-made political decision and multiple pronouncements: “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”⁵⁸⁾ Each of these factors, the Court argued, relates in some way to the separation of powers.

Applying these factors to Korean case, I think some of these factors exist in this Korean case. Because there is no provision in Korean Constitution that textually grants power to try presidents for insurrection, rebellion and murder for insurrection in another branch of government, this case doesn’t have first factor. Second factor does not exist either because judicially discoverable and manageable standards are found in the provisions of Korean Criminal Code. As undertaking of this case by the Court does not mean lack of the respect due co-ordinate branches of government, fourth factor does not exist in this case. Because there had not been multifarious pronouncements by various departments on the issues of this case, it lacks the sixth factor. However, I think third and fifth factors above exist in this case; Whether the Court accepts a successful coup d’etat, is clearly “a policy determination of a kind clearly for non-judicial discretion.” Hence, the third factor exists in this case. In addition, there is an unusual need for

56 . 369 U.S. 186, 217, 82 S.Ct. 691, 710.

57 . For the difference of political questions and political cases, see RICHARD H. FALLON, DANIEL J. MELTZER AND DAVID L. SHAPIRO, *THE FEDERAL COURTS AND FEDERAL SYSTEM* 292 (4th ed. University Casebook Series, Foundation Press, Inc., 1996)

58 . 369 U.S. 186, 217, 82 S.Ct. 691, 710

unquestioning adherence to a political decision already made, and fifth factor exists because there have been so many political decisions that were based on the premise that the government by Chun and Rhoe are not illegal government established by illegal insurrection and rebellion but legal one. That premise had continued for more than 10 years during the regime of Chun and Rhoe. Therefore, I think this Korean case has factors for political question doctrine to be applied, applying the factors specified in Baker case.

This Korean case has many similarities with Luther v. Borden case(1849)⁵⁹⁾ in the United States. This case grew out of a rebellion by some dissatisfied Rhode Island citizens. They challenged the franchise provisions under the Rhode Island constitution whose property requirements excluded more than half the state population from the franchise. Under the young leadership of Thomas W. Dorr, a constitutional convention was called and a new constitution establishing adult manhood suffrage was written, and Dorr was elected Governor under the new State Constitution. The regular government refused to recognize the new State Constitution and took actions to put down the insurrection. Luther who was a follower of Dorr, was arrested in his home for insurrection by Borden who were members of state militia acting under orders of existing charter government. Luther moved to Massachusetts and sued Borden for illegal trespass on the ground that the charter government's declaration of martial law was void since the Dorr government supported by the majority of the people, was the rightful government. Making federal courts decide on the defendant's liability on trespass, this case ultimately required the federal courts to decide which of the two competing governments was the lawful government of the state; the challenge was brought under Art.4 Sec.4 of U.S. Constitution, which guarantees "a republican form of government to every state in the union." A federal circuit court decided in favor of Borden, and Luther appealed.

The Supreme Court opinion written by Chief Justice Taney affirmed the lower court's holding that the defendants were not liable for trespass.⁶⁰⁾ It denied jurisdiction over questions arising under the republican form clause of Art.4 of the Constitution, on the ground that questions about the meaning of "republican form" are political, so not

59 . Luther v. Borden, 7 Howard 1 (1849).

60 . There is an article that contrasts the positivist analysis and formalist analysis on the interpretation of Luther case. See, Note: *Political Rights as Political Questions - The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125, 1128-45 (March, 1987).

suitable for resolution by the Judiciary by saying, "whether they have changed it or not by abolishing an old government and establishing a new one in its place, is a question to be settled by the political power." Considering this part, the Court seems to have been based, at least, in part upon the political question doctrine. If we apply the factors to be a political question in *Baker* in 1962 to this case in 1849, the Court in this case seems to have used "lack of judicially manageable standards" by which a court could determine which form of government was republican. Besides, the Court affirmed both the defendants' assertion that political rights are inherently subjective and the defendants' conclusion that the supposed subjectivity of political rights commands judicial deference to the prescriptions of the political department. Justice Woodbury was alone in dissent.⁶¹⁾ Shortly speaking, the *Luther* case had already used political question doctrine at the time when the factors to be a political question were not formulated in *Baker* case.

Compared with this Korean case, the *Luther* case has many similarities in the fact. It is same in that Rhode Island citizens committed military rebellion against chartered government just as the defendants in Korean case were accused to have committed insurrection and military rebellion against the interim government by the then President Choi. Also the incidents happened when martial law was declared, as the insurrection from the military coup d'état to the oppression of Kwanjoo Democratization Movement under the martial law. Besides, the prescription of private right is argued in *Luther* case as the prescription of rebellion and insurrection was the most crucial issue in the Korean case.

On the contrary, the two cases have some differences as well. First, whereas the Korean case involves criminal rights and crimes, the *Luther* case involves private property rights; Professor Martin Shapiro at Boalt Hall analyzed "as *Luther* involves private property rights, however one argument frequently used to excuse Court inactivity could not be employed - the notion that the court will deal only with personal rights and not with sovereign prerogatives."⁶²⁾ Second, more than the first difference, *Luther* case is

61 . He held that the imposition of martial law by the charter government was illegal regardless of the underlying legitimacy of the government and hence could not serve as a defense to the trespass. Chief Justice Taney who wrote the opinion of the Court, equated the political power with the legislative power to recognize legitimate constitutional change. On the contrary, Justice Woodbury defined the political power as that belonging to "the people, independent of the legislature." However, Justice Woodbury joined the Court in concluding that the adjustment of these questions belongs to the people and their political representatives, either in the State or general government. Therefore, in conclusion there is no difference between that of the other Justices and Justice Woodbury. On Chief Justice Taney's reasoning in this part, see *Luther* 7 Howard 1, 35. On Justice Woodbury's reasoning in this part, refer to *Luther* 7 Howard 1, 51.

62 . MARTIN SHAPIRO. LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL

mainly about the relationship between federal government and state government.⁶³⁾ Luther case is the best-known case, not for political question doctrine but for the so-called "Guarantee Clause" of the Constitution that guarantees the republican form of state government. This is focusing federalism that Korea, as a unitary state, does not know through its history.

Therefore, we cannot say the Luther case is exactly same as the Korean case in spite of its various similarities in fact. Important thing is the U.S. Supreme Court did evade the judicial decision on rebellion case that is asking which one is legitimate state government based on the rationale that is seemingly similar to political question doctrine. As analyzed before, I think this Korean case has some factors enumerated in Baker case for the political question doctrine to be applied. Therefore, the Korean Supreme Court had much room for applying political question doctrine to this case. However, it did not apply the doctrine but thoroughly dealt with all the issues in the case. For the similar case in the fact pattern, U.S. Supreme Court evaded direct decision by using political question doctrine. Considering this point, we can say that the Korean Supreme Court in 1997 is more active than the U.S. Supreme Court in 1849 before the two cases sharing the similar fact pattern.

This Korean case is also similar to U.S. v. Nixon Case⁶⁴⁾ in the United States as well. The U.S. v. Nixon case is not about political question but about "executive privilege doctrine" justifying the President's refusal to disclose information that the President claimed to be confidential.⁶⁵⁾ However, it has many similarities with the Korean case in

JURISPRUDENCE 182 (Free Press of Glencoe, 1964).

63 . For the relationship between Luther case and federalism, refer to Deborah Jones Meritt, *The Guarantee Clause and State Autonomy : Federalism for a Third Century*, 88 COLUM L. REV. 1, 70-71 (January, 1988).

64 . United States, Petitioner, v. Richard M. Nixon, President of the United States, et al., 418 US 683, 94 S.Ct. 3090 (1974).

65 . This is so-called the famous "Watergate Tapes" case. There are another Nixon v. U.S. case - Walter L. Nixon, Petitioner v. United States et al. 506 U.S. 224, 113 S.Ct. 732 (1993) - which can be easily confused with this Watergate Tapes case. Here, Walter Nixon, a federal judge whom the house had impeached and the Senate convicted based on bribery charges, challenged the procedures used by the Senate. Judge Nixon argued that the Senate violated the requirement of Art.I Section 3 Clause 6 that the Senate "try all impeachments". However, the Supreme Court held that Nixon's argument presented a non-justiciable political question. The Court relied mainly on the plain text of the Senate Impeachment Clause that provides, "the Senate shall have sole power to try all impeachment." The Court interpreted this reference to "sole power," along with the history behind the provision, to mean that the Senate, nor the courts, should determine what procedures could validly constitute a trial. It is essentially different from the Korean case that the plaintiff is judge not the President, but similar that the case is about political question doctrine. Shortly speaking, the Court refused to make a legal decision on the ground that the main issue in this case presented a political question. On the connection with political question doctrine of this case, refer to RICHARD H. FALLON ET AL. supra note 52 at 270-280. An article is analyzing this case approaching from the concept of ordered liberty. See, Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP.CT.

the factual part. A federal grand jury indicted seven presidential advisors on charge of conspiracy to defraud the United States and obstruct justice. The President Nixon was named as co-conspirator, although not indicted. The Watergate Special Prosecutor then persuaded the federal trial court to issue a subpoena duces tecum to Nixon requiring him to produce various tapes and documents relating to certain meetings involving him. These documents and tapes were to be used during the trial of the indictments. President Nixon released transcripts of some of the tapes, but refused to produce the tapes themselves, and moved to quash the subpoena.⁶⁶⁾

Chief Justice Burger held in this case that dispute was justiciable after considering the following as District Court did; "District Court was not shown to have erred in determining that special prosecutor's showing of relevancy, admissibility, and specificity was sufficient to warrant issuance of order; and that President's generalized interest in confidentiality, unsupported by claim of need to protect military, diplomatic, or sensitive national security secrets, could not prevail against special prosecutor's demonstrated, specific need for the tape recordings and documents."⁶⁷⁾ The Supreme Court rejected the President's claim that the separation of power doctrine precludes judicial review of a President's claim of privilege.⁶⁸⁾ The Court quoted Justice Marshall's statement in *Marbury v. Madison* that it is the duty of the judicial branch to say "what the law is." Thus the Court, not the President, must evaluate claims of presidential privilege. However, this does not mean that the Court denied the existence of the "executive privilege." As shown above, the Court held that there was indeed a privilege for confidentiality of presidential communications in the exercise of Art.2 powers, but it rejected the President's claim that the executive privilege was an absolute one. At least where the claim of privilege was a general one as in this case, and not related to a particular need to protect "military, diplomatic, or sensitive national security secrets," the Court held that the Privilege was merely a qualified one. As such, it was outweighed by the need to develop all relevant facts in a criminal trial. President Nixon was, therefore,

REW. 125, 127-34 (1993). There is also an article that dealing about the status of the political question doctrine in the aftermath of this case. See, Michael J. Gerhart, *Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon*, 44 DUKE L. J. 231, 241-48 (November, 1994).

66 . For details on the fact of this case and its background, refer to PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 34-52 (Univ. of Chicago Press, 1978).

67 . 418 U.S. 683, 94 S.Ct. 3090.

68 . For details of reasoning of the Court on this case, see WILLIAM B. LOCKHART, YALE KAMISAR, JESSE H. CHOPER AND STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS* 210-12 (7th ed. American Casebook Series, West Publishing Co., 1991).

ordered to deliver the subpoenaed tapes and documents to the federal district court. However, the district court was ordered to perform a close in camera examination⁶⁹⁾ of all of the materials. Through this reasoning, the Nixon court made it clear that "military, diplomatic, or sensitive national security secrets" would be placed upon a different footing from a mere "general" claim of confidentiality as in Nixon case itself. It remains to be seen how such state secret matters will be handled. In cases where external evidence demonstrates to the court's satisfaction that a state secret is indeed involved, the court may well decide that the presidential privilege outweighs the needs of the judicial system, even without an in camera inspection. Where a court is not satisfied from external evidence that a state secret is really involved, an in camera inspection may be necessary. This case can be summed up in the well-known saying, "No man is above the law."⁷⁰⁾

Compared with the Korean case, first, Nixon case is same at the point that presidents are a party of the case, even though in the Korean case the defendants are former presidents and not incumbent. Second, both cases are about criminal crimes. In the Korean case, the two former presidents were charged of military rebellion, insurrection and bribery, as in Nixon case he was in suspicion of coconspirator to defraud the United States and obstruct justice. In Nixon case, the Court was active enough to order delivering the subpoenaed tapes and documents to the federal district court. The Court did not apply executive privilege doctrine through balancing with the importance of criminal justice, although it admitted the existence of the doctrine. It is one example of judicial activism in the U.S. Supreme Court. However, strictly speaking, this case is not about political question doctrine, but about executive privilege doctrine. Therefore, it is not exactly same with the Korean case concerning the object of judicial activism.

In addition, *Nixon v. Administrator of General Services Case*⁷¹⁾ also has some points to be compared with this Korean case. In a subsequent case after *U.S. v. Nixon*, which was also related to Richard Nixon, the Court held that the qualified privilege could also be asserted by a non-incumbent. That is *Nixon v. Administrator of General Services case* in 1977.⁷²⁾ Former president Nixon brought action challenging constitutionality of the

69 . This means non-public examination. Hence, statements that were both admissible and relevant to the criminal prosecution were to be isolated, and all other statements were to be disregarded and kept secret.

70 . For the analysis of Nixon case from the political science perspective, refer to Charles M. Lamb and Lisa K. Parshall, *United States v. Nixon Revisited: A Case Study in Supreme Court Decision-Making*, 58 U. PITT. L. REV. 71, 72-106 (Fall, 1996).

71 . *Richard M. Nixon, Appellant, v. Administrator of General Services et al.*, 433 US 425, 97 S.Ct. 2777 (1977).

"Presidential Recordings and Materials Preservation Act." A three-judge court for the District of Columbia upheld the Act and Nixon appealed. The Supreme Court decision written by Justice Brennan held, "the Act did not violate principle of separation of powers; did not work an impermissible intrusion on the doctrine of presidential privilege; did not impermissibly infringe on former president's privacy interests; did not infringe on former president's First Amendment right of association, and did not constitute a bill of attainder."⁷³⁾ If we analyze the decision, first of all, the Court admitted that Nixon could assert executive privilege with respect to his presidential papers, which were to be entrusted to succeeding administrations for archiving under congressional prescribed guidelines. However, the Court emphasized that the guidelines did not violate his executive privilege, at least so far as they permitted an Executive Branch employee to screen the materials and return items of a personal nature to the former President. The Supreme Court's decision was influenced in part by the fact that neither of the two succeeding administrations supported Nixon's claim of privilege, thus suggesting that the functioning of the Executive Branch was not threatened by the archiving and screening process.

This case is exactly same with the Korean case at the point that non-incumbent President is a party. In the Korean case, the two former presidents had no privilege to assert to the court or succeeding administration concerned with the case. However, here, the Court acceded Nixon's executive privilege with respect to his presidential papers entrusted to succeeding administrations for archiving under congressional prescribed guidelines. But, in the result, it did not apply the privilege in this case on the ground that the guidelines did not violate his executive privilege.

Compared with the U.S. Supreme Court that decided the American cases above, except for Nixon v. U.S. case, the Supreme Court in this Korean case seems to be more on the side of judicial activism than the U.S. Supreme Court. In U.S. Supreme Court, there have been different attitudes towards similar fact of cases. The attitudes were different in different time and society.

In Japan, concerned with the political question doctrine, there were some cases in which the application of the doctrine was seriously considered.⁷⁴⁾ For example, the

72 . For details on the Court's reasoning, refer to WILLIAM COHEN AND JONATHAN D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS 464-65 (9th ed. University Casebook Series, Foundation Press, Inc., 1993).

73 . 433 U.S. 425, 97 S.Ct. 2777.

74 . For details on the development of case law concerning political question doctrine, see Kisaburo Yokota,

Japanese Supreme Court first took the chance to consider an apportionment controversy in 1964, in a case concerning the House of Councilors - Koshiyama v. Chairman, Tokyo Metropolitan Election Comm'n case.⁷⁵⁾ In this case, the issue was very delicate in that the controversy revolved around the particular issue of how to consider prefectures as constituency units. The majority opinion of the Court made a great deal of the Diet's ability to frame constituency units and upheld the constitutionality of the law under attack, emphasizing the broad extent of legislative discretion.⁷⁶⁾ Therefore, the Court relied not on the American doctrine of "political question," but on the legislature's wide discretion.⁷⁷⁾ On the contrary, the political question doctrine was emphasized in separate supplemental opinion by Justice Saito Kitaro who argued that the case was non-justiciable, adopting arguments similar to those in Justice Frankfurter's 1962 dissenting opinion in *Baker v. Carr* above.⁷⁸⁾ It appears that elements of traditional and limited concept of judicial power remain and control both the judiciary's way of thinking and its way of operation in Japan. Needless to say, when it comes to constitutional litigation, this trend is more problematic because the infringement of a citizen's fundamental right is involved more frequently than in other cases. In summary, the Japanese Supreme Court has relied more on the judicial restraint using the weapons such as political question doctrine than Korean Supreme Court in this Korean case.

B. Judicial Activism and Inconsistency in Legal Decisions on the Same Case

Looking over the Korean case, there have been the changes into the opposite direction in the legal decisions (decisions of the Prosecution, Constitutional Court, Seoul District Court, Seoul Higher Court, and Supreme Court) on the same case. The legal decisions on the same case are totally different one another as the Presidents are changed. And even

Political Questions and Judicial Review: A Comparison, 43 WASH. L. REV. 1031, 1036-50 (June, 1968).

75. Koshiyama v. Chairman, Tokyo Metropolitan Election Comm'n, 18 Minshu[civil case collection] 270 (Sup. Ct. G.B., Feb. 5, 1964) as quoted in H.ITOH & L.BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN 53-57 (Seattle : University of Washington Press, 1978).

76. However, later in a similar case concerning the constitutionality of the apportionment of seats for the House of Representatives, the Japanese Supreme Court declared for the first time that the seat allocation for the House of Representatives prescribed in the Public Officials Election Act violated the constitutional guarantee of equal protection under the law. See Kurokawa v. Chiba Prefecture Election Comm'n, 30 Minshu[civil case collection] 223 (Sup. Ct., G.B., April 14, 1976).

77. For detailed discussion on the legislative discretion and political question doctrine, see Taisuke Kamata, *Adjudication and the Governing Process: Political Questions and Legislative Discretion*, JAPANESE CONSTITUTIONAL LAW (Percy R. Luney, Jr., and Kazuyuki Takahashi ed., 1993) at 151, 156-72.

78. Yasuhiro Okudaira *infra* note 206 at 19.

the third decision that started to punish them, was begun couple of years after President Young Sam Kim has taken the presidency. Isn't there any consistency in the legal decisions? Are the legal decisions the outcome of political dealings? Are the current Korean courts based on activism, reflected on the definition of judicial activism?

In 1980s, when the two defendants were in presidency, the courts mass-produced many evil decisions that will be recorded as stigma. That was because the defendants took advantage of the courts and the Prosecution to justify their coming into power. It was the court at this time that convicted former chief martial law administrator Seung Wha Chung of aiding and abetting rebellion, Dae Joong Kim - actual leader of opposition party - of conspiracy of insurrection and victims of 5.18 of insurrection and murder for insurrection. The defendants emphasized this point. As long as the conviction for Seung Wha Chung for aiding and abetting rebellion is settled, the fact of aiding and abetting insurrection cannot be contended due to the effect of res judicata. Accordingly, the arrest of Chung is legal and mobilization of military force concerned with the arrest can be justified based on this. On this, the Court defended that the effect of res judicata for Seong Wha Chung does not reach this case because the crime of Chung and 12.12 military rebellion are different in defendant and crime facts.

Only on this case, there have been different positions in legal decision as I stated above. Among the seven legal decisions, the non-prosecution by the Prosecution in 1995, the Korean Constitutional Court's decision in 1995 that the rebellion was legalized when the President Doo Whan Chung took the presidential oath in the inaugural ceremony, the Prosecution's decision that there is no evidence for the two former president's hiding money, these three decisions are standing on the position of a sort of judicial passivism that a successful coup d'etat cannot be legally judged. These decisions played a role to paradoxically become the target that collected people's wrath.

On the contrary, Korean Constitutional Court's decision in 1996 that Art.2 of 5.18 Special Act is constitutional, the district court's decision, the higher court's decision and finally the Supreme Court's decision are based on the active position that even a successful coup d'etat should be legally decided. However, the problem was that the crimes already completed their prescription if general prescription provisions of Criminal Procedure Act are applied. The courts invented various reasonings to solve this problem in prescription matter.

Hasn't the prosecution prescription(15 years for rebellion and insurrection) already been

ended counting from December, 1979? The Higher Court said their rebellion and insurrection was ended in June 29, 1987 by the 6.29 declaration. Therefore, the prescription starts for this point of time. They are regarding the nearly whole period of 5th Republic as the crime period. But, Korean Supreme Court and Seoul District Court regarded the starting point, January 24, 1981, the time when the martial law was lifted. The defendants alleged that the insurrection be consummated with the riot act, and the maintenance of martial law after that is no more than the existence of state of crime. Accordingly, calculated from the consummation of each riot act, it passed 15 years, the prescription for insurrection and military rebellion. On the contrary, the Prosecution regarded the declaration of martial law and its maintenance insurrection as a whole, so each riot becomes a part of an insurrection.

Seoul District Court and Korean Supreme Court is adopting the reasoning of the Prosecution in this part. They theorized the relationship between riot acts with connected crime theory on the ground that each acts are same at the point that they violate the basis of national existence or constitutional order and the purpose disordering national constitution and malice on riot are continued. Therefore, the lifting day of martial law that can be regarded as the riot is finally consummated(January 24, 1981), becomes the starting point of prescription. The important thing here, is all these reasonings were invented in the course of the efforts to punish the defendants of this case putting on armor named the judicial activism.

In the United States, the attitude of the Judiciary to the other two branches has been wavered, and this appeared inconsistency in the trend of judicial decisions. However, it was not changed in a blink like in Korea, but slowly affected mainly by the character of Justices who were composing the Supreme Court at that time from judicial restraint to judicial activism or from judicial activism to judicial restraint.

Within two decades of the republic's inception, some two hundred years ago, the U.S. Supreme Court emerged as a powerful political actor. It began with *Marbury v. Madison* case in 1803. The Court led by its Chief Justice John Marshall, dramatically claimed for itself the judicial review - an authority not explicitly bestowed on the judiciary by the Constitution - and invalidated, as repugnant to the basic law, portions of the Judiciary Act of 1789. In the 1950s and 1960s, however, the Court boldly undertook a new mission that resulted in judicial policy-making of unprecedented scope and impact.

The activism of the 1950s and 1960s precipitated a battery of scholarly attacks. What

the two basic criticisms voiced are that judicial policy-making is illegitimate in a democratic regime and that, even if it were proper for judges to formulate social policy, courts as adjudicative institutions lack the organizational capacity to gather data, weigh the costs and benefits of alternative courses of action, and fashion sound public policy.

The most striking growth in exercises of judicial power over legislation occurred between 1910 and 1919 and between 1970 and 1988.⁷⁹⁾ Although part of the growth was due to the increase in the number of bills enacted by Congress and the state assemblies and the sheer growth in government, much of it was due to a new perception by the Justices of their role that was possible by a new way of understanding the nature of law.

Prof. Kenneth M. Holland is dividing judicial activism history in the U.S. into three periods - the ante-bellum period when, generally speaking, judicial passivism prevailed (1789-1860), the period of right-activism(1865-1937) and the period of left-activism(1938-present).⁸⁰⁾ The U.S. Court has been wavered from judicial activism where presumably the position of Chun-Rhoe court is standing to judicial passivism where the Korean courts under the military regime was standing

C. Pardon

Almost all the Korean people predicted and the politicians said that Pardon by the then president Young Sam Kim would be given to the defendants. The Korean Constitution is prescribing two types of pardon in Art.79.⁸¹⁾ One is the special pardon and the other is general pardon. The former is given to the specified criminal and the latter is given in a lump to the criminals who committed a specified crime. Accordingly, the object of specification is different. Particularly, the general pardon needs the consent of the Congress while the special pardon doesn't need it.⁸²⁾ If President Young Sam Kim would give pardon, it would be a special pardon to the defendants of this case that specifies the pardonee. Therefore, it did not need consent of the Congress and it solely depended

79 . There was 31% and 62% increase respectively.

80 . Kenneth M. Holland, *Judicial Activism in the United States*, in JUDICIAL ACTIVISM IN COMPARATIVE PERSPECTIVE 12-32 (Kenneth M. Holland ed., Macmillan, 1991).

81 . Art.79 of Korean Constitution provides on the presidential pardon as follows: "Sec.1. The President may grant pardon, commutation, and restoration of rights as prescribed by law. Sec.2. The President shall receive the consent of the Congress in granting a general pardon. Sec.3. Matters pertaining to pardon, commutation and restoration of rights shall be determined by law."

82 . Art.79 Sec. 2 of Korean Constitution.

on the President Kim himself.

Although the President Young Sam Kim made no comment of this, rather, the politicians and some public opinions started to say about the pardon. Many of the politicians had one voice in the opinion that the President should give pardon to the two former presidents, regardless of whether he or she belonged to the ruling party or opposition party. In unison, they cited the President Ford's pardon to Nixon as the precedent. The only difference was when it should be given. Some said after the following presidential election and some said before it. Particularly, most of the presidential candidates wanted pardon in the near future. Why?

There could be many explanations for the reason. However, it was the most popular analysis that the politicians wanted pardon to get more votes from the area where defendant Chun and Rhoe had come from.⁸³⁾ Regionalism is widespread in Korean politics and it is a deep-rooted evil that spoils Korean politics.⁸⁴⁾ An official of the White House complained that the politicians were politically using the issue of pardon that exclusively belonged to the power of the President.⁸⁵⁾

Concerned with pardon, as stated before, there was a public opinion that pardon should be given after the full payment of Chun and Rhoe's monetary penalties which have not been fully paid yet even by now because they might be hiding the money in various ways.⁸⁶⁾

Pardon by the President can be the big threat to the separation of power doctrine.⁸⁷⁾ As pardon forgives the criminals who were decided to be guilty by the courts, it denies the force of the judicial decision, and incapacitates the decision just at once that was made after a long period of trials. The pardon undermines our criminal justice system by sending the message that persons close to the President are above the "law".

At last, on Dec.22 in 1997, a few months after this Korean case was decided by Korean Supreme Court, President Young Sam Kim pardoned the defendants of this

83 . They came from Northern *Kyungsang* province that is located in southeast of Korean peninsular. *Kyungsang* province has political and even emotional conflict with *Jeolla* province that occupies the southwest side of the peninsular.

84 . Especially, Howe Chang Lee, the presidential candidate of the majority party, had been asking the President Young Sam Kim to give pardon to the defendants many times. This can be understood as the example.

85 . *DONG-A ILBO*[Dong-A Daily News] April 18, 1997, at 4.

86 . A prosecutor said that the voluntary pay of the penalty should be demanded as an essential prerequisite of the pardon. Refer to *CHOSEON ILBO*[Choseon Daily News], April 18, 1997, at 31.

87 . There is an article that deals with presidential pardon connected with the notion of categorical separationism and checked separationism. See, Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and Separation of Powers*, 11 *YALE L. & POL'Y REV.* 361, 370-81 (1993).

Korean case including two former presidents.⁸⁸⁾ It was just after the new president - President Dae Joong Kim - was elected in the following presidential election as some politicians predicted.

In the United States, there was pardon of President Ford to his former president Nixon in Watergate. In this case President Ford granted pardon just after Nixon resigned presidency. However, this became a crucial reason Ford lost in the following presidential election.

There were controversies on the Bush's pardon to the six Iran-Contra defendants on Christmas Eve. They were former Secretary of Defense Caspar W. Weinberger, former Assistant Secretary of State Elliot Abrams and four others either accused or convicted of misleading Congress of the prosecutor's office.⁸⁹⁾ Prof. Harold Hongju Koh at Yale University understood it in a very negative way. By pardoning the last Iran-Contra defendants, he said, "George Bush violated a central norm of our National Security Constitution: that foreign policy exigencies do not authorize the President to nullify the rule of law for his own administration."

President Bush justified his Christmas Eve pardons on the ground that the defendants had suffered enough and were in any event motivated by patriotism and loyalty to their superiors. But these reasons seemed to wholly miss the mark to Prof. Koh; "Our executive officials swear oaths not of patriotism and personal loyalty, but of fidelity to our Constitution and laws. It is from that fidelity, not that loyalty that their authority derives." He continued "The prosecution would have answered, or at least cast light upon, these critical questions of constitutional fidelity. But at one fell swoop, the pardons ended judicial examination of Bush's role, switched the issue from legality to loyalty, and shifted the final decision from the courts to the President."⁹⁰⁾

There was another critique from another standpoint of view. Senator Carl Levin claimed, "The pardon also raised questions about the president's motivations, which the independent council law was designed to avoid. As far as we know, no other president has issued a pardon in a matter in which his own involvement was in question. Questions have not arisen about the president's own notes, whether the pardons will prevent the release of significant information that would have emerged at trial, and

88 . KYUNGHYANG SHINMOON [Kyunghyang Newspaper], Dec.21, 1997 at 1.

89 . For details on the fact, see Sen. Carl Levin, *The Iran-Contra Pardons: Yes, Above the Law*, 79-MAR A.B.A. J. 44 (March 1993)

90 . See, Harold Hongju Koh, *Begging Bush's Pardon*, 29 HUSTON L. REV. 889, 890 (Winter, 1992)

whether the president himself might have been called as a witness."⁹¹⁾ On presidential pardon, the presidential self-pardon⁹²⁾ has more problems.

We felt it for the first time through this Korean case that 'rule of law' is over 'rule of human' because this case showed us that any person who was even a former president when the crime was committed would be punished by law if he committed crime. However, pardon abolished all these results. Pardon deprived judicature of its strictness and basis of existence. That is pardon which makes the courts and the Prosecution always play villain and enables only the President to shine as 'God of Clemency.' In addition, pardon makes all Korean people indulged in nihilism and cynicism.

V. CONCLUSION: ASSESSMENT ON CHUN-RHOE CASE AND JUDICIAL PASSIVISM

Although the court tries hard to pursue truth, it is restricted to the evidences that are presented by the prosecutor and the defendant attorney. Especially, there is no way to declare guilty on the parts and the defendant who the prosecutor did not prosecute. With this reason, the decision of the court serves as a stepping-stone for inquiry into real state of affairs, but it cannot fully satisfy the pursuit of real truth.

In this Korean case, that kind of limitation clearly came to light. In many important issues, the Prosecution did not prosecute the defendants and made it impossible that the issues were contended in the courtroom. Above all, it did not examine the guiltiness of the soldiers and commanding officers who killed and wounded Kwangjoo citizens even before the order was made to them. The fact-finding was focused on proving the murder for insurrection of the five defendants including Doo Whan Chun. Therefore, killing and wounding before the invocation of self-defense power were not even prosecuted and,

91 . Sen. Carl Levin, *supra* note 84 at 44.

92 . On presidential self-pardon, Brian C. Kalt is asserting that self-pardon is unconstitutional. He makes the historical argument, examining original intent and the English history that informs it, and concludes that the Framers did not intend to allow self-pardons. He insists "As the law supposed it impossible that the king himself could act unlawfully or improperly, there was nothing that the King could do that would require a pardon. Of course, Parliament could, and occasionally did, exercise an extralegal option removing the king in response to which a self-pardon would have been useless." Refer to Brian C. Kalt, *Pardon me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 782-89 (December, 1996)

accordingly, could not be decided by the Court. This problem became the target of criticism that this case is target investigation and target judgment to punish only the defendants in this case, and the court was used for that kind of political retaliation. This viewpoint accords with the defendant's viewpoint understanding this case.

If this is true, the Chun-Rhoe court does not seem to stand on the position of judicial activism in a real meaning although many Korean people think it as a good example of judicial activism. Rather, applying the standard distinguishing judicial activism and judicial passivism that I clarified in the introduction part of this research, the Court in this Korean case stands on the judicial passivism. Judicial activism is different from judicial liberalism although we are apt to confuse the two different concepts. The judicial activism is the attitude of courts that raise an objection to the will and decision of the other two governmental branches - the Executive and the Congress -, and actively hold checks in the abuse of power by the two governmental branches so as to realize the ideal of checks and balances on which the separation of power doctrine is based. Here, Korean Supreme Court does not stand against either the policy-making by the Executive or law made by the Congress. Rather, the result of the decision in this Korean case is in accord with the will of politicians who were holding hegemony in the Korean Executive and Korean Congress at that time including the then president Young Sam Kim. The politicians clearly knew that many Koreans had antagonistic attitude towards the defendants in this case in that the defendants got power through military coup and ruthlessly oppressed Kwangjoo Democratization movement in the past. The politicians tried to take advantage of the antagonism of Korean people for their political interests, and fostered a climate that the defendants should be punished. The Korean Supreme Court's decision in this case corresponded to the will of the politicians in its conclusion.

As we have seen above, this Korean case has some factors to be applied by political question doctrine that were articulated in *Baker v. Carr* case in the United States. Accordingly, the Court had enough room to refuse to decide the case by using political question doctrine. Nevertheless, Korean Supreme Court did not rely on the political question doctrine but applied the necessary legal provisions one by one to punish the defendants. Furthermore, this attitude is very different from the previous attitude of Korean Supreme Court that had rested comfortably on judicial self-restraint by frequently using the weapons of justiciability such as political question doctrine in politically sensitive cases. Korean Supreme Court took a sudden turn in this case. It was really a

surprise even considering the fact that the Korean courts had begun to show signs of change after getting out of military regime. However, the changed attitude on this case coincides with the will of politicians holding the Executive and Congress in their control at that time. I think this is another form of subordination of the courts to the will of the Executive represented by the President and Congress that were led by the politicians. Therefore, I believe that the decision of this Korean case is characterized not as judicial activism but as judicial passivism from the other governmental branches.