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PLAYING WITH TEMPORALITY: SOUTH KOREA'S FLAWED DEPLOYMENT OF PROSPECTIVE OVERRULING AT CONSTITUTIONAL LAW

ALDEN WORDSWORTH **NG***

Unlike in common law jurisdictions, prospective overruling is the rule rather than the exception for decisions of unconstitutionality in many civil law jurisdictions. But most of these civil law jurisdictions do not go so far as South Korea in mandating the operation of pure prospective overruling when a court overturns its prior ruling of constitutionality. The operation of this prior ruling qualification, a 2014 addition to the remedial straitjacket placed upon the Constitutional Court of Korea, is complicated by South Korea's international law obligations which enshrine the principle of lex mitior and perversely undermines the very desiderium of legal stability it purports to preserve. To rectify matters, a modification of the law on the effect of an unconstitutional decision is proposed and an explanation is forwarded to rationalise the status quo.

I. INTRODUCTION

When a common law court declares that a statutory provision violates the constitution it operates under, it is understood—in the absence of further particularisation in the court's declaration—that the court is declaring the provision unenforceable. While the provision remains on the statute books, and the declaration technically only applies to the specific case for which it was made, the doctrine of *stare decisis* operates to nominally oblige courts to adhere to prior rulings when deciding on similar cases on the provision. Thus, the provision itself is commonly regarded to be rendered virtually void *ab initio* or void *ex tunc* – as having no legal effect from its inception.[1] Hence, a common law court's decision of unconstitutionality can be generally said to be "unbound by time

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[1] Jonathan F. Mitchell, "The Writ-of-Erasure Fallacy" (2018) 104:5 Va L Rev 933 at 934-937.

and operates both retrospectively and prospectively"[2] such that it effectively voids government actions under the provision that occur *before* and *after* the decision.

With that said, provisions within the Republic of Korea's ("South Korea") Constitutional Court Act[3] ("CCA") instructs the Constitutional Court of Korea ("CCK") to deviate from this common law understanding: Article 47(2) of the CCA states that a decision declaring a provision unconstitutional will only cause the provision to "lose its effect from the date on which the decision is made."[4] The consequent effect of following this legislative schema is that when the CCK declares that a statutory provision violates the Constitution of the Republic of Korea[5] ("Korean Constitution"), the Court's overruling of the offending statutory provision only has prospective effect by default. Only one exception exists: With respect to decisions concerning "any statute or provision thereof relating to criminal punishment"[6], the CCK's decisions of unconstitutionality are to have an additional retroactive effect pursuant to the first clause of Article 47(3) of the CCA.

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[2] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661; [2014] SGHC 171 ("*Hue An Li*") at [100].

[3] Constitutional Court Act, 1988 (South Korea), art 47 [CCA]: "제 47 조 (위헌결정의 효력) 1 법률의 위헌결정은 법원과 그 밖의 국가기관 및 지방자치단체를 기속(羈束)한다. 2 위헌으로 결정된 법률 또는 법률의 조항은 그 결정이 있는 날부터 효력을 상실한다. < 2014.5.20.> 3 제 2 항에도 불구하고 형벌에 관한 법률 또는 법률의 조항은 소급하여 그 효력을 상실한다. 다 만, 해당 법률 또는 법률의 조항에 대하여 종전에 합헌으로 결정한 사건이 있는 경우에는 그 결 정이 있는 날의 다음 날로 소급하여 효력을 상실한다. < 2014.5.20.> 4 제 3 항의 경우에 위헌으로 결정된 법률 또는 법률의 조항에 근거한 유죄의 확정판결에 대하여 는 재심을 청구할 수 있다. < 2014.5.20.> 5 제 4 항의 재심에 대하여는 「형사소송법」 을 준용한다. < 2014.5.20.>"[Article 47 (Effect of Decision of Unconstitutionality) (1) Any decision that a statute is unconstitutional shall bind ordinary courts, other State agencies, and local governments. (2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made. <Amended by Act No. 12597, May 20, 2014> (3) Notwithstanding paragraph (2), any statute or provision thereof relating to criminal punishment shall lose its effect retroactively: *Provided*, That where a decision of constitutionality has previously been made in a case to which any such statute or provision thereof applies, such statute or provision thereof shall lose its effect from the day following the date on which the decision was made. <Newly Inserted by Act No. 12597, May 20, 2014> (4) In cases referred to in paragraph (3), a retrial may be requested with respect to a conviction based on the statute or provision thereof decided as unconstitutional. <Amended by Act No. 12597, May 20, 2014> (5) The Criminal Procedure Act shall apply mutatis mutandis to the retrial referred to in paragraph (4).] [translated by author].

[4] *Ibid*: "(2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made. <Amended by Act No. 12597, May 20, 2014>".

[5] The Constitution of the Republic of Korea was adopted on 17 July 1948. It has been amended 9 times and revised 5 times, most recently on 29 October 1987. The 1987 Constitution was approved on 29 October 1987 and entered into force on 26 February 1988. It is the Constitution of the Sixth Republic.

[6] CCA, *supra* note 3, art 47(3): "Notwithstanding paragraph (2), any statute or provision thereof relating to criminal punishment shall lose its effect retroactively…".

It is apposite to note here that the legislative imposition of such a default prospective overruling mechanism is not unique to South Korea. It is fair to say that the mechanism is a prominent feature in civil law jurisdictions that adopt Hans Kelsen's centralised model of constitutional review which consolidates the power of constitutional interpretation in a constitutional court independent from the judiciary.[7] For example, in the Federal Republic of Germany, the Federal Constitutional Court – from which the architects of the CCK took inspiration[8] – is likewise constrained to only invalidate court decisions based on unconstitutional statutory provisions prospectively by default, with a similar exception carved out for decisions of unconstitutionality concerning criminal law.[9]

However, the remedial straitjacket that is woven around the CCK by its implementing legislation takes it one step further: The second clause of Article 47(3) of the CCA—which qualifies the first—provides that "where a decision of constitutionality has previously been made in a case to which any … [provision relating to criminal punishment] thereof applies, such […] provision

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[7] Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution" (1942) 4:2 J. POL. 183 at 185, 187 [Kelsen].

[8] Dae-Kyu Yoon, "The Constitutional Court System of Korea: The New Road for Constitutional Adjudication" (2001) 1:2 J Korean L 1 at 5:"The Second Republic (1960-1962) adopted the Constitutional Court system inplace of the Constitutional Committee, a decision influenced by the successful history of the then West German Constitutional Court.".

[9] *Bundesverfassungsgerichtsgesetz* (Germany) [Act on the Federal Constitutional Court 1951] , ss 79(1), 79(2):["(1) Gegen ein rechtskräftiges Strafurteil, das auf einer mit dem Grundgesetz für unvereinbar oder nach § 78 für nichtig erklärten Norm oder auf der Auslegung einer Norm beruht, die vom Bundesverfassungsgericht für unvereinbar mit dem Grundgesetz erklärt worden ist, ist die Wiederaufnahme des Verfahrens nach den Vorschriften der Strafprozeßordnung zulässig. (2) Im übrigen bleiben vorbehaltlich der Vorschrift des § 95 Abs. 2 oder einer besonderen gesetzlichen Regelung die nicht mehr anfechtbaren Entscheidungen, die auf einer gemäß § 78 für nichtig erklärten Norm beruhen, unberührt. Die Vollstreckung aus einer solchen Entscheidung ist unzulässig. Soweit die Zwangsvollstreckung nach den Vorschriften der Zivilprozeßordnung durchzuführen ist, gilt die Vorschrift des § 767 der Zivilprozeßordnung entsprechend. Ansprüche aus ungerechtfertigter Bereicherung sind ausgeschlossen." [(1) A case based on a legal provision which was declared to be incompatible with the Basic Law or which was voided pursuant to section 78, or which was based on the interpretation of the legal provision which the Federal Constitutional Court declared to be incompatible with the Basic Law may be reopened pursuant to the provisions of the Code of Criminal Procedure to challenge a final conviction. (2) In all other cases, but subject to section 95(2) or a specific statutory provision, non-appealable decisions based on a legal provision which was voided pursuant to section 78 shall remain unaffected. Execution of such a decision is not permissible. If compulsory enforcement is governed by the provisions of the Code of Civil Procedure, section 767 of the Code of Civil Procedure shall apply accordingly. Claims arising from unjust enrichment shall be barred.] [translated by author].

thereof shall [only] lose its effect from the day following the date on which the decision [of constitutionality] was made."[10]

While the legislative prescription of prospective overruling in this manner sidesteps the threat of judicial activism that preoccupies common law judges – *à la* Associate Justice Scalia in *Harper v Virginia Department of Taxation*[11]– since the CCK is comprised of nine members with the legislative, judicial, and executive branches of government selecting three members respectively as prescribed under the Korean Constitution,[12] two obvious concerns arise from the prior ruling qualification. As Menon CJ put pithily in his coda on prospective overruling in *Public Prosecutor v Hue An Li*: "[a]bandoning retroactivity of judicial decisions would … arbitrarily draw a line between similarly-situated litigants"[13] and disincentivise the use of the CCK since, in traditional understanding, "[p]arties are incentivised to engage in the system of justice and put their best cases forward because they stand to benefit if they manage to persuade the courts to rule in their favour".[14]

Keeping the two concerns relating to equality and incentivisation that is engendered by the prior ruling qualification in mind, the stage is now set to discuss the qualification in greater detail. Part II of this Paper contextualises the prior ruling qualification by placing it in its theoretical and operational context and the conundrums that emerge therein. Finally, Part III of this Paper concludes with proposed reforms for South Korea's judicial experiment with time.

II. CONTEXT AND CONUNDRUMS

[10] *Supra* note 3, art 47(3):"…*Provided*, That where a decision of constitutionality has previously been made in a case to which any such statute or provision thereof applies, such statute or provision thereof shall lose its effect from the day following the date on which the decision was made.".

[11] 509 US 86 (1993) at 105:"Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis. It was formulated in the heyday of legal realism and promoted as a 'techniqu[e] of judicial lawmaking' in general, and more specifically as a means of making it easier to overrule prior precedent.".

[12] CCA, *supra* note 3, arts 111(2)-111(3)::"제 111 조...2 헌법재판소는 법관의 자격을 가진 9 인의 재판관으로 구성하며, 재판관은 대통령이 임명한다. 3 제 2 항의 재판관중 3 인은 국회에서 선출하는 자를, 3 인은 대법원장이 지명하는 자를 임명한다" [(2) The Constitutional Court shall be composed of nine Justices qualified to be court judges, and they shall be appointed by the President. (3) Among the Justices referred to in paragraph (2), three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court.] [translated by author].

[13] *Supra* note 2 at [107].

[14] *Ibid* at [106].

A. Article 47(2) of the CCA

Article 47(2) of the CCA provides that "[a]ny statue or provisions thereof decided as unconstitutional shall lose effect from the date on which such decision is made".[15] This provision, as noted by Jinsu Yoon, "is derived from Article 20 of the Constitutional Committee Act (Act No. 100 on February 21, 1950) at the time of the First Republic."[16] During that eleven-year period when South Korea was under the authoritarian control of Syngman Rhee, the Supreme Court of Korea ("SCK") took a textualist interpretation of the similarly worded provision. In its decision on 13 January 1953, the SCK established that a non-penal provision remains "valid and to be observed" by the Courts if the factual matrix of their case arose before a decision of unconstitutionality by the then Constitutional Committee.[17]

It is apposite to note here that South Korea's mechanism as plainly articulated by Article 47(2) of the CCA is not entirely faithful to Kelsen's proposed model of decentralised constitutional review which was first described in his 1918 memorandum, Design for the Activation of a Constitutional Court (*Entwurf eines Gesetzes ueber die Errichtung eines Verfassungsgerichtshofes)*, and

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[15] *Supra* note 3, art 47(2):" Any statute or provision thereof decided as unconstitutional shall lose its effect from the date on which the decision is made. <Amended by Act No. 12597, May 20, 2014>".

[16] Jin-Soo Yoon, "The Effect of Unconstitutional Laws" (1990) 1 Constitutional Court Journal of Constitutional Law 273 at 273. ["윤진수, 위헌법률의 효력, 헌법논총 제 1 집(1990), 273-321 at 273"원래 현행 憲法裁判所法 제 47 조 제 2 항의 규정은 제 1 공화국 당시의 憲法委員會法 (1950. 2. 21. 法律 제 100 호) 제 20 조에서 유래한 것이다."].

[17] Supreme Court, 13 January 1952,Sentence 4285 Min Sang 62 decision (Objection to the decision of the Farmland Committee),House 1 (2) Min, 046 (South Korea) ["대법원 1952. 1. 13. 선고 4285 민상 62 판결 [농지위원회결정에대한이의] [집 1(2)민,046]"]:"그러나 헌법위원회법 제 20 조에 의하면 위헌규정은 형벌조항을 제외하고는 장래에 향하여 효력을 발생한다 하였음으로 전시 농지개혁법 제 18 조 제 1 항 후단 및 동 제 24 조 제 1 항 후단의 규정은 전시 공고일인 단기 4285 년 10 월 26 일부터 위헌무효의 법률이라 할 것이요 그전에 있어서는 위헌성을 대유한다 할지라도 유효하여 이를 준수하여야 할 것으로 해석함이 타당하다 할 것이요 또 전시 공고일이후에 있어서는 농지개혁법 제 18 조 제 24 조 소정의 소송은 법원조직법의 원칙에 따라 3 심제로 복귀하였다 할 것이다" [However, according to Article 20 of the Constitutional Committee Act, unconstitutional provisions shall take effect in the future except for penal provisions. Therefore, the provisions of the latter part of Article 18, Paragraph 1 and the latter part of Article 24, Paragraph 1 of the Wartime Land Reform Act are the date of wartime announcement. In the short term, it will be considered unconstitutional and invalid from October 26, 4285, and before that, it is reasonable to interpret it as being valid and to be observed even if it is unconstitutional. Also, after the date of wartime announcement, Article 18, Article 24 of the Land Reform Act It can be said that Cho So-jeong's lawsuit returned to the three-trial system in accordance with the principles of the Court Organization Act.] [translated by author].

ultimately taken up by the Austrians with promulgation of their Federal Constitutional Law (*Bundes-Verfassungsgesetz*)[18] ("AFCL") on 1 October 1920.[19]

While Kelsen's ideal vision was for the effect of an unconstitutional decision to be a prospective one, he did not go so far to envision, as suggested by the plain wording of Article 47(2) of the CCA, a Constitutional Court which operates entirely on *pure* prospective overruling such that even the case which led the court to pronounce the legal change on a provision would be unaffected by it. As Kelsen writes of the AFCL:

> The rule that the decision of the [Austrian] Constitutional Court by which a statute was annulled had no retroactive force had, however, one exception. The statute annulled by the decision of the court was no longer to be applied to that case which gave occasion to the judicial review and to the annulment of the statute. Since this case occurred before the annulment, the latter was with respect to this case retroactive in effect.[20]

Akin to the incentivisation concern raised by Menon CJ's coda in *Hue An Li* and covered in Part I, this exception—known today as the 'catcher's premium' (*ergreiferprämie*) within Austrian doctrine[21]—was permitted by Kelsen as a matter of "technical necessity" within the AFCL he drafted:

> This retroactive force, exceptionally granted to the judgement of annulment, was a technical necessity, because without it the authorities charged with the application of the law (that is, the judges of the Supreme Court and of the Administrative Court respectively) would not have had an immediate and consequently sufficiently cogent interest to cause the intervention of the Constitutional Court. The

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[18] Austria, *The Federal Constitutional Law of 1920* [AFCL].

[19] Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)" (2012) 9:16 Co-herencia 273at 277.

[20] Kelsen, *supra* note 7 at 187.

[21] Attila Vincze, András Jakab & Gábor Schweitzer, "The Influence of the 1920 Austrian Constitution and Austrian Constitutional Thinking on Hungary" (29 Oct 2020) online: *IACL-AIDC Blog* (blog)<https://blog-iacl-aidc.org/100th-anniversary-of-the-austrian-constitutional-court/2020/10/29/the-influence-of-the-1920-austrian-constitution-and-the-austrian-constitutional-thinking-on-hungary>.

> authorities making an application to the Constitutional Court for the judicial review of a statute had to know that their application, if it succeeded in annulling the statute, had an immediate effect on their own decision in the concrete case [(the so called "*Anlassfall*")] in which they interrupted the procedure to obtain the judgment of annulment.[22]

That said, it is important not to overstate the similarities. As immediately apparent from the extract above, Kelsen was more concerned about the incentivisation of a legal system's Supreme Court than to the incentivisation of litigants. In this respect, Kelsen appeared to not regard to the latter as a serious concern:

> If the case which gave occasion to the judicial review of the statute was decided before the annulment came into force, the annulled statute had to be applied to this case. Then the annulment had no retroactive force with respect to this case either.[23]

Beyond demonstrating that the 'catcher' in the 'catcher's premium' contained within Articles 139(6)[24] and 140(7)[25] of the AFCL refers to the judge instead of the litigant, the preceding extract

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[22] Kelsen, *supra* note 7 at 186.

[23] *Ibid* at 187.

[24] AFCL, *supra* note 18, art 139(6): "Artikel 139(6) Ist eine Verordnung wegen Gesetzwidrigkeit aufgehoben worden oder hat der Verfassungsgerichtshof gemäß Abs. 4 ausgesprochen, dass eine Verordnung gesetzwidrig war, so sind alle Gerichte und Verwaltungsbehörden an den Spruch des Verfassungsgerichtshofes gebunden. Auf die vor der Aufhebung verwirklichten Tatbestände mit Ausnahme des Anlassfalles ist jedoch die Verordnung weiterhin anzuwenden, sofern der Verfassungsgerichtshof nicht in seinem aufhebenden Erkenntnis anderes ausspricht. Hat der Verfassungsgerichtshof in seinem aufhebenden Erkenntnis eine Frist gemäß Abs. 5 gesetzt, so ist die Verordnung auf alle bis zum Ablauf dieser Frist verwirklichten Tatbestände mit Ausnahme des Anlassfalles anzuwenden." [If an ordinance has been rescinded as lacking a basis in law or if the Constitutional Court has pursuant to para 4 above pronounced an ordinance to have lacked a basis in law, all courts and administrative authorities are bound by the Constitutional Court's decision, the ordinance shall however continue to apply to the circumstances effected before the rescission, the case in point excepted, unless the Constitutional Court in its rescissory ruling decides otherwise. If the Constitutional Court has in its rescissory ruling set a deadline pursuant to para 5 above, the ordinance shall apply to all the circumstances effected, the case in point excepted, until expiry of this deadline] [translated by author]..

[25] AFCL, *supra* note 18, art 140(7): "Artikel 140(7) Ist ein Gesetz wegen Verfassungswidrigkeit aufgehoben worden oder hat der Verfassungsgerichtshof gemäß Abs. 4 ausgesprochen, dass ein Gesetz verfassungswidrig war, so sind alle Gerichte und Verwaltungsbehörden an den Spruch des Verfassungsgerichtshofes gebunden. Auf die vor der Aufhebung verwirklichten Tatbestände mit Ausnahme

illustrates that Kelsen's disregard for the incentivisation of individual litigants was informed by an overriding desire for legal certainty. Kelsen's fear was that if litigants understood that there was a possibility that they could retroactively annul newly enacted laws by securing an unconstitutional verdict down the line, there was a heightened risk that they would be emboldened to not obey these former in the first place "in reliance on the retroactive effect of the expected decision".[26] It is in this manner that Kelsen's fear eludes the "patchwork of competing considerations"[27] that is covered by Menon CJ's coda. While Menon CJ did consider the benefit of legal certainty, this was solely in the Raz-ian sense in that "all laws should be prospective, open and clear in order to be able to guide conduct"[28] which gives primacy to perspective of the litigant rather than the legislator.

Within this patchwork, the modern South Korean judiciary appears to be alive to Kelsen's and CJ Menon's framing of the incentivisation concern and CJ Menon's framing of the equality concern. While Article 47(2) of the CCA plainly emphasises the aspect of legal stability in relation to the temporal effect of a decision on unconstitutionality of a law by stipulating the operation of pure prospective overruling,[29] this textualist interpretation from the First Republic is no longer followed.[30] In a 1993 decision,[31] the CCK recognised that the pure prospective effect of Article

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des Anlassfalles ist jedoch das Gesetz weiterhin anzuwenden, sofern der Verfassungsgerichtshof nicht in seinem aufhebenden Erkenntnis anderes ausspricht. Hat der Verfassungsgerichtshof in seinem aufhebenden Erkenntnis eine Frist gemäß Abs. 5 gesetzt, so ist das Gesetz auf alle bis zum Ablauf dieser Frist verwirklichten Tatbestände mit Ausnahme des Anlassfalles anzuwenden." [If a law has been rescinded on the score of unconstitutionality or if the Constitutional Court has pursuant to para 4 above pronounced a law to be unconstitutional, all courts and administrative authorities are bound by the Constitutional Court's decision. The law shall however continue to apply to the circumstances effected before the rescission the case in point excepted, unless the Constitutional Court in its rescissory ruling decides otherwise. If the Constitutional Court has in its rescissory ruling set a deadline pursuant to para 5 above, the law shall apply to all the circumstances effected, the case in point excepted until expiry of this deadline.] [translated by author]

[26] Kelsen, *supra* note 7 at 191.

[27] *Supra* note 2 at [111].

[28] *Ibid* at para 109.

[29] Jin-Yeong Park, "Limiting the Retroactive Effect of Decisions on the Unconstitutionality of Penalty Provisions" (2015) 50:3 Kyung Hee Law Journal 107at 108. ["박진영, 형벌조항에 대한 위헌결정의 소급효 제한 -형벌조항에 대하여 합헌결정후 위헌결정 또는 헌법불합치결정이 이루어진 판례를 중심으로, 경희법학 50 권 3 호, 2015 년 09 월, 10-148 at 108."].

[30] See, albeit in the context of variational-type declarations of unconstitutionally, Jongcheol Kim, "Some Problems with the Korean Constitutional Adjudication System" (2001) 1:2 J Korean L 17 at 34-36.

[31] Constitutional Court 1993. 5. 13. Judgement 92Heon-ga10, 91Heon-ba7, 92Heon-ba24, 50 All-member judgment [Article 47, Paragraph 2, Paragraph 2 of the Constitutional Court, etc. Host Collection 5-1, 226.]

47(2) of the CCA was problematic. Bringing Menon CJ's equality concern to the fore, the CCK noted that Article 47(2) of the CCA reflects a legislative choice to "to value legal stability more highly"[32] over ensuring "justice and equality in individual cases"[33] and noted that this choice as implemented by Article 47(2) of the CCA could lead to "unfair results".[34]

Thus, while the CCK came to the defence of Article 47(2) of the CCA in the 1993 decision by reasoning that full recognition of a decision of unconstitutionality's retroactive effect may "disturb the trust or vested interests of well-meaning citizens who believe it to be a valid law under the

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["헌법재판소 1993. 5. 13. 선고 92 헌가 10,91 헌바 7,92 헌바 24,50 全員裁判部 [憲法裁判所法제 47 조제 2 항 違憲提請등] [헌집 5-1, 226]"].

[32] *Ibid*.:"["결국 우리의 입법자는 법 제 47조 제 2항 본문의 규정을 통하여 형벌법규를 제외하고는 법적 안정성을 더 높이 평가하는 방안을 선택하였는바, 이에 의하여 구체저 타당성이나 평등의 원칙이 완벽하게 실현되지 않는다고 하더라도 헌법상 법치주의의 원칙의 파생인 법적안정성 내지는 신뢰보호의 원칙에 의하여 정당화된다 할 것이고, 특단의 사정이 없는 한 이로써 헌법이 침해되는 것은 아니라 할 것이다." [Ultimately, our legislator has chosen a plan to value legal stability more highly through the provisions of Article 47, Paragraph 2 of the law, excluding criminal laws. Even if the concrete validity or principle of equality is not perfectly realized by this, it can be justified by the principle of legal stability or trust protection, which is derived from the principle of constitutionalism in the constitution. Unless there are special circumstances, it would not be considered a violation of the constitution.].].

[33] *Ibid*: "다시 말하면 위헌결정에 소급효를 인정할 것인가를 정함에 있어 "법적 안정성 내지 신뢰보호의 원칙"과 "개별적 사건에 있어서의 정의 내지 평등의 원칙"이라는 서로 상충되는 두 가지 원칙이 대립하게 되는데, 개별적 사건에서의 정의 내지 평등의 원칙이 대립하게 되는데, 개별적 사건에서의 정의 내지 평등의 원칙이 헌법상의 원칙임은 물론 법적 안정성 내지 신뢰보호의 원칙도 법치주의의 본질적 구성요소로서 수호되어야 할 헌법적 가치이므로(헌법재판소 1989.3.17. 선고, 88 헌마 1 결정; 1989.12.18. 선고, 89 헌마 32, 33(병합) 결정 등 참조), 이 중 어느 원칙을 더 중요시 할 것인가에 관하여는 법의 연혁·성질·보호법익 등을 고려하여 입법자가 자유롭게 선택할 수 있도록 일임된 사항으로 보여진다." [In other words, in deciding whether to recognize the retroactive effect of a constitutional decision, two conflicting principles, "the principle of legal stability or trust protection" and "the principle of justice or equality in individual cases," come into conflict. In individual cases, the principle of justice or equality is not only a constitutional principle, but the principle of legal stability or trust protection is also a constitutional value that must be protected as an essential component of the rule of law (see the Constitutional Court's decision on March 17, 1989, 88Hun-Ma1; December 18, 1989, 89Hun-Ma32, 33 (consolidated)). As for which principle to prioritize, it seems to be a matter left to the legislator to freely choose, considering the history, nature, and protected legal interests of the law.] [translated by author].

[34] *Ibid*:"생각건대, 일률적인 소급효의 인정이 부당한 결과를 발생시키듯이 일률적인 소급효의 완전부인도 부당한 결과를 발생할 수 있다고 할 것이다." 다음으로 원시적 위헌법률이라 하여도 소급효로 말미암아, 합헌추정의 원칙에 의하여 제대로 된 법률로 믿은 선의의 국민의 신뢰 내지 기득권을 동요시키고 이미 형성된 법률관계의 안정을 해치는 경우가 생길 수 있다." [I think that just as the recognition of a uniform retroactive effect can lead to unfair results, the complete denial of a uniform retroactive effect can also lead to unfair results. Next, even if it is a primitive unconstitutional law, due to its retroactive effect, it can disturb the trust or vested rights of good citizens who believed in the proper law by the principle of constitutional presumption, and it can damage the stability of already formed legal relationships.] [translated by author].

principle of presumption of constitutionality, and harm the stability of already established legal relations"[35] and that the risk of the resulting "revolutionary shocks and social chaos … would have a deterrent effect that would make the court hesitate to declare the law unconstitutional",[36] the CCK's defence was partial, as they also carved out an additional exception to Article 47(2) of the CCA despite its clear and unambiguous wording. Justifying and defining the scope of the exception on purposive grounds, the CCK stated that:

> In the case where there is no risk of infringing on legal stability and the vested interests which formed under the old law are not harmed, the denial of retroactive effect is rather contrary to the constitutional ideals of justice and equality. Thus, recognition of retroactive effect in such a case is permitted as it does not go against the fundamental purpose of Article 47(2) [of the CCA].[37]

As summarised by Jinsoo Yoon[38] and generally affirmed by Dae-kyu Yoon,[39] this 1993 decision along with another line of other precedents,[40] is treated today as having extended the retroactive effect of a decision of unconstitutionality in two ways: First, they establish that the retroactive

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[35] *Ibid*:"다음으로 원시적 위헌법률이라 하여도 소급효로 말미암아, 합헌추정의 원칙에 의하여 제대로 된 법률로 믿은 선의의 국민의 신뢰 내지 기득권을 동요시키고 이미 형성된 법률관계의 안정을 해치는 경우가 생길 수 있다." [Next, even if it is a primitive unconstitutional law, due to its retroactive effect, it may disturb the trust or vested interests of well-meaning citizens who believe it to be a valid law under the principle of presumption of constitutionality, and harm the stability of already established legal relations.] [translated by author].

[36] *Ibid*:"만일 그렇지 않고 소급효의 전면인정은 기히 형성된 구질서를 뒤엎는 혁명적 충격과 사회혼란을 우려하지 않을 수 없는 것이고, 그 때문에 위헌선언을 주저하는 억제효과를 빚을 것이며, 그리하여 헌법에 보장된 국민의 재판청구권의 파생인 헌법재판을 받을 권리를 오히려 제약하는 결과가 될 것이다." [If not, the full recognition of retroactivity could overturn the established order, causing revolutionary shocks and social chaos, which cannot be ignored. Because of this, it would have a deterrent effect a deterrent effect that would make the court hesitate to declare the law unconstitutional, and thus it would result in restricting the right to receive a constitutional trial, which is a derivative of the right to claim a trial guaranteed by the Constitution.] [translated by author].

[37] [또 다른 한가지의 불소급의 원칙의 예외로 볼 것은, 당사자의 권리구제를 위한 구체적 타당성의 요청이 현저한 반면에 소급효를 인정하여도 법적 안정성을 침해할 우려가 없고 나아가 구법에 의하여 형성된 기득권자의 이익이 해쳐질 사안이 아닌 경우로서 소급효의 부인이 오히려 정의와 형평 등 헌법적 이념에 심히 배치되는 때라고 할 것으로, 이 때에 소급효의 인정은 법 제 47 조 제 2 항 본문의 근본취지에 반하지 않을 것으로 생각한다.] [translated by author].

[38] Jinsoo Yoon, *The Weight of Precedent* (Seoul: Park Youngsa, 2020) at 165-166 [Jinsoo Yoon, *The Weight of Precedent*] [윤진수, 판례 의 무게, 박영사, 2020].

[39] Dae-Kyu Yoon, "The Constitutional Court of the Republic of Korea: Its Role and Activities" (1996) 71:1 Philip LJ 121 at 132, n 21.

[40] Jinsoo Yoon, *The Weight of Precedent*, *supra* note 38 at 165.

effect extends to "the case pending in the Court at the time of the unconstitutionality" and to so-called 'general cases' as the Court may determine.[41] Second, they establish that a decision of unconstitutionality on a non-penal provision can have a retroactive effect in extraordinary cases where the denial of such would seriously contradict the principle of justice and equality.[42]

However, it should be noted that while the SCK's modification of Article 47(2) of the CCA in this manner resolves the incentivisation (*à la* Menon CJ and Kelsen) and equality (*à la* Menon CJ) concerns, the modifications are by no means purposive. In fact, they clearly run counter to the legislative intention. Recounting the statement of a practitioner who was involved in the drafting of the 1988 CCA, Jinsoo Yoo writes:

> In the first half of the enactment work at the time, the issue of Article 47 [of the CCA] was not specifically reviewed, but in the second half, it was discovered that there was a problem with the expression and interpretation of Article 47 [of the CCA]. It was considered that the position of natural nullity was premised, and therefore, the West German Basic Law and the West German Federal Constitutional Court Act, which also took the natural invalidity theory for the issue of Article 47, Paragraph 2 of the Act, were referenced; The recently frequently cited Austrian Constitution was hardly considered. However, to eliminate the legal instability of the nullity argument, the working-level members stipulated the same provisions as Article 79(1) and (2) of the West German Federal Constitutional Court Act, so that finalized trials or administrative dispositions are not affected by the nullity decision. A draft was even made to allow for re-examination only for criminal judgments, but also to exclude the right to claim for return of unjust enrichment, to ensure that execution based on invalid laws is no longer permitted, but that at that time, it was difficult and cautious to enumerate exceptions. Therefore, a draft was prepared with the decision to use the expression that had been practically used in the previous Constitutional Committee Act, and this draft became the current law after deliberation by the National Assembly.[43]

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[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid* at 161-162:"그러면 현행 헌법재판소법의 제정자는 이 문제에 관하여 어떤 의도를 가졌는 가? 이에 관하여, 당시 헌법재판소법의 제정에 관여하였던 실무자의 다음과 같 은 진술이 있다. 즉 당시 제정작업의 전반부에는

Interpretating Article 47(2) of the CCA *contra legem*—contrary to the provision's text—and contrary to legislative intent in this manner brings with it two conundrums: First, and most evident, is the competency concern that raises the spectre of judicial activism. As noted by Justice Jae Hyung Kim:

> [C]aution should be taken here regarding routine acts of interpretation beyond the legal text simply because rationality or morality dictates so under the circumstances. Otherwise, the law may well lose its reason for being. Whether the law should consider any fabric of morality or reason and, if so, what should be considered moral or reasonable under a particular enactment, is better left to the legislature. The lawmaker's will or resolve may well be denigrated if a court were to hand down a decision squarely refuting the statutory text before it based on the court's own moral compass.[44]

Second, and rather ironically given Article 47(2) of the CCA's legislative object to uphold legal stability, is the textualist concern that relates to legal certainty. If courts are permitted to interpret laws in a manner that contrary to both the provision's pain meaning and legislative intent, the certainty of meaning behind existing statues is cast into question, since no observer can rely on a concrete positive base (i.e., semantic meaning or legislative intention interpreted from parliamentary records) to guide their conduct. Hence, it can be argued that in its bid to achieve

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제 47 조의 문제는 특별히 검로 되지 못하였으나, 후반기에 와서는 제 47 조의 표현과 해석에 문제가 있음이 발견되었지만, 당시 실무위원들의 의견은 대부분 현행 헌법은 위천법률에 대하여는 당연무효라는 입장을 전제하고 있었다고 보았고, 따라서 법 제 47 조 제 2 항의 문 제에 대하여도 당연무효설을 취하고 있는 서독기본법과 서독연방현법재판소법 이 참고되었을 뿐 근래 자주 인용되고 있는 오스트리아 헌법 등은 거의 고려되 지 않았다고 한다. 다만 실무위원들은 당연무효설이 가지고 있는 법적 발안정성 을 제거하기 위하여 서독연방헌법재판소법 제 79 조 제 1 항 • 제 2 항과 동일한 규정 을 두어, 확정된 재판이나 행정처분 등은 무효결정에 의하여 영향을 받지 않도 록 하고, 부당이득반환청구권도 배제되며 무효인 법률에 기한 집행은 더 이상 허용되지 않도록 하고 형사판결에 대하여만 재심을 허용하는 초안까지 작성하였 으나, 그 당시로서는 예외적 열거의 어려움과 조심스러움 때문에 결국 서독법 제 79 조 제 1 항 • 제 2 항을 포괄하는 개념으로서 종래 헌법위원회법 등에서 실정적 으로 계속 사용하여 오던 표현을 그대로 사용하기로 하여 초안이 작성되었고 국 회의 심의를 거쳐 현행법에 이르게 된 것이라고 한다." [translated by author].

[44] Justice Jae Hyung Kim, "Formulating the Korean Supreme Court's Stature and Roles: with a Focus on the Relationship Between Legislation and Precedents", translated by I.Y. Joseph Cho (2019)14:2 U Pa Asian L Rev 136 at 142-143.

justice in the individual case, the SCK has inadvertently opened the floodgates to the unconstrained interpretation of legislative provisions.

B. Art 47(3) of the CCA

That said, Article 47(2) of the CCA is not the end of the problem: As described in Part I, Article 47(3) of the CCA's second clause modifies the first and creates what this Paper refers to as the prior ruling qualification. The first clause provides that: "Notwithstanding [Article 47(2) of the CCA] any statute or provision thereof relating to criminal punishment shall lose its effect retroactively"[45], while the second clause establishes "[t]hat where a decision of constitutionality has previously been made in a case to which any such statute or provision thereof applies, such statute or provision thereof shall lose its effect from the day following the date on which the [prior] decision was made".[46]

As indirectly recognised by the SCK though their acknowledgement that Article 47(3) of the CCA reflects the "distinct characteristics of penal provisions instituted under the [Korean] Constitution and criminal law",[47] Article 47(3) of the CCA's first clause articulates the legal doctrine of *lex mitior* ("the milder law"), which mandates that where there is a change in a penal law in between the accused's criminal act and the their sentencing for the same, accused persons should be given the benefit of the more lenient penal regime, even if that regime would have to be applied retroactively.

The retroactive effect of the doctrine finds its justificatory footing on two grounds: first, on the grounds of moral luck that is based on fact that an accused person has no control over when they will be sentenced. Second, on the consequentialist ground that is expressed in the idea that it would

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[45] *Supra* note 3, art 47(3):"Notwithstanding paragraph (2), any statute or provision thereof relating to criminal punishment shall lose its effect retroactively…".

[46] *Ibid:*"…*Provided*, That where a decision of constitutionality has previously been made in a case to which any such statute or provision thereof applies, such statute or provision thereof shall lose its effect from the day following the date on which the decision was made. <Newly Inserted by Act No. 12597, May 20, 2014>".

[47] Supreme Court Decision 2010Do5605,14 April 2011 at [1]:"Violation of the Act on Aggravated Punishment, etc. of Specific Economic Crimes (Acceptance of Property, etc.). Violation of the Act on Aggravated Punishment, etc. of Specific Economic Crimes (Acceptance of Property through Mediation)"..

make no sense to subject an accused person a punishment that has been more recently determined by the legislature as being overly harsh. While the latter ground has received some criticism as being unnuanced since there can be other reasons for the legislative change beyond lessening the penalty to better reflect an accused's moral culpability,[48] it is generally held that, outside of those exceptions, *lex mitior* should apply. As noted by Peter Westen:

> [*Lex mitior*] appears to be widely accepted in international law … [I]n addition to the protection that *lex mitior* now enjoys under [the International Covenant on Civil and Political Rights] and [European Convention on Human Rights], it enjoys similar protection under the European Union's "Charter of Fundamental Rights," the American Convention on Human Rights, and the Rome Statute of the International Criminal Court. It is also part of the constitutional or statutory law of at least sixty-eight nations, or more than a third of U.N. members, including France, Germany, and Italy.[49]

In this respect, it is submitted that the prior ruling qualification encapsulated in Article 47(3) of the CCA's second clause pays no respect to either ground. This is problematic as it is contrary to South Korea's existing protections to accused persons under its Penal Code ("KPC")[50] and its

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[48] Peter Westen, "Lex Mitior: Converse of Ex Post Facto and Window into Criminal Desert" (2015) 18:2 New Crim L Rev 167 at 195: "Whether defendants deserve unmitigated penalties as opposed to lessened penalties depends upon why the legislature lessened penalties for conduct that it continues to criminalize. If a legislature lessens penalties because it believes that the lessened penalties have long been the maximum that any person deserves for the respective conduct, defendants should be given the benefit of the reduced penalties, whether they act before or after penalties were reduced. However, there are at least two classes of cases in which a defendant can justly be subjected to the hard treatment that was prescribed at the time he acted: (1) where jurisdictions lessen penalties because changes in condition induce them to conclude that such conduct is now less heinous than they previously regarded it, e.g., where hoarding food in wartime remains a crime, but where the extreme conditions that obtained when the defendant acted have since improved, resulting now in lessened penalties; and (2) where jurisdictions lessen penalties not because they regard offenders as deserving lesser penalties but for reasons that are independent of desert.".

[49] *Ibid* at 169, 170.

[50] Korea, Criminal Act, arts 1(2), 1(3):"형법의 제 1 조 (범죄의 성립과 처벌) (1) 범죄의 성립과 처벌은 행위 시의 법률에 따른다. (2) 범죄 후 법률이 변경되어 그 행위가 범죄를 구성하지 아니하게 되거나 형이 구법(舊法)보다 가벼워진 경우에는 신법(新法)에 따른다." [(2) Where a statute is changed after the commission of a crime, and the relevant act thereby no longer constitutes a crime under the new statute or the punishment therefor under the new statute becomes less heavy than under the previous one; the new statute shall apply. (3) Where a statute is changed after the sentence for a crime has become final and conclusive and the relevant

obligations under international law that carry domestic legal weight, given that South Korea employs a monist legal system.[51] This problem arises because the prior ruling qualification preoccupies itself almost exclusively and myopically with the issue of legal stability which is founded upon South Korea's experience with heavy administrative burdens arising from decisions of unconstitutionality. As Seokim Lee explains:

> The [legislative aim of] the [prior ruling qualification] was to avoid an excessive burden on legal stability and on the judicial branch. Criminal courts had experienced overwhelming numbers of retrial cases as a result of [a decision of] unconstitutionality before. That experience was caused by the decision of the [CCK] which struck down Criminal Act Article [304 that criminalises] 'obtaining sex under false promises of marriage'. A day [a]fter [26] November 2009, the day the relevant provision was declared as unconstitutional, all persons who had been convicted by the criminal clause until that time had made appeals to have a retrial and criminal indemnity was to be given to each one of them. To avoid [a repeat of] such congestion and burden on the judiciary, the [qualification] was legislated to limit the scope of [a decision of unconstitutionality's] retroactive effect.[52]

It should be noted that prior to the 2009 decision of unconstitutionality,[53] the CCK had previously upheld the constitutionality of Article 304 of the KPC[54] which criminalises obtaining

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act thereby no longer constitutes a crime, the execution of the punishment shall be remitted.] [translated by author].

[51] See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 15(1) (entered into force 23 March 1976, accession by South Korea 10 April 1990):"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby." [*ICCPR*]; CCA, *supra* note 3, art 6:"Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.".

[52] Seokmin Lee, "Adultery and the Constitution: A Review on the Recent Decision of the Korean Constitutional Court on 'Criminal Adultery'" (2016) 15:2 J Korean L 325 at 351 [Lee].

[53] Constitutional Court, 26 November 2009, 2008 Hŏn-Ba 58.

[54] For a brief historical sketch of CCK grappling with the issue of sexual self-determination in general, seeHannes B. Mosler, "The Constitutional Court as a Facilitator of Fundamental Rights Claiming in South Korea, 1988–2018" in Celeste L Arrington & Patricia Goedde, eds, *Rights Claiming in South Korea*(Cambridge:

sex on the false promise of marriage in 2002. It was this series of events, along with the CCK's experience of first upholding the constitutionality of Article 5(4)(1) of the Aggravated Punishment of Specific Economic Crimes Act[55] in 2005[56] and then subsequently declaring it unconstitutional less than one year later[57] that eventually led to the enactment of the prior ruling qualification.

In a 2011 SCK decision[58] that concerned a requested acquittal whose gravamen was founded upon the CCK's latter decision of unconstitutionality, the SCK remarked that legislative intervention was needed to solve the "substantially irrational results" that emerge from a "unconditional recognition" of the retroactive effect a decision of unconstitutionality has regarding a criminal provision.[59] In the SCK's view, the notion that a decision of unconstitutionality on a criminal provision can be so fully retroactive that it can undo a prior decision of constitutionality

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Cambridge University Press, 2021) 126 at 139-141. For coverage of Article 304 of the KPC specifically, see *ibid*at 140-141: "In November 2009, the [CCK] had already resorted to a similar reasoning regarding sexual autonomy when, with a six to three vote, it struck down Article 304 of the Criminal Code that had punished a person for inducing a woman who was not prone to an obscene act (*eumhaengui sangseup eomneun bunyeo*) into sexual intercourse under false promises of marriage or engagement fraud (*honinbingjaga-neumjoe*)... In a seven-to-two vote seven years previously, the Court had ruled the provision constitutional on reverse premises.".

[55] For more context, see Sung-Hyun Kim, "Constitutional Court's decision on Specific Crimes Act changes sentencing expectations" (23 May 2017) online: *In-House Community* (blog) <https://www.inhousecommunity.com/article/constitutional-courts-decision-specific-crimes-act-changes-sentencing-expectations/>:"The [CCK] found [Article 5(4)(1) of the Aggravated Punishment Of Specific Economic Crimes Act] ["which provided that a person who habitually committed crimes under Article 329 (Larceny) of the [KPC] was subject to imprisonment of not less than three years, up to life in prison"] be unconstitutional because these aggravated punishments were being excessively imposed without sufficiently considering special circumstances of the individual criminals involved.".

[56] Constitutional Court, 30 June 2005, 2004 Heonba 4.

[57] Constitutional Court 27 April 2006, 2006 Hunga 5.

[58] Supreme Court, 14 April 2011, 2011 Gong 956"대법원 2011.4.14. 선고 2010 도 5605 판결 [특정경제범죄가중처벌등에관한법률위반(수재등)·특정경제범죄가중처벌등에관한법률위반(알선수재)[공 2011 상,956]"].

[59] *Ibid* at para 1:"그럼에도 형벌조항에 대한 위헌결정의 경우, 죄형법정주의 등 헌법과 형사법하에서 형벌이 가지는 특수성에 비추어 위헌결정의 소급효와 그에 따른 재심청구권을 명시적으로 규정한 법률의 문언에 반하여 해석으로 그 소급효 및 피고인의 재심에 관한 권리를 제한하는 것은 허용되기 어렵다 할 것이고, 그에 따른 현저한 불합리는 결국 입법에 의하여 해결할 수밖에 없을 것이다." [Even so, in the case of a constitutional decision on a penal provision, considering the uniqueness of punishment under the constitution and criminal law, such as the principle of legality of punishment, it would be difficult to allow the interpretation that limits the retroactive effect of the unconstitutional decision and the right to retrial of the defendant against the wording of the law that explicitly stipulates the retrial claim right according to it. The substantially irrational results resulting from this unconditional recognition can only be resolved by legislation.] [translated by author].

on the same provision "would seriously harm the constitutional principles of justice and equity" after considering the problems such a notion will create to the concept of legal certainty, the legitimacy of the old legal order, and the harmonisation of the present legal order with the same.[60]

Spurred on by the SCK's request, the National Assembly amended the CCA on 29 April 2014 to include the prior ruling qualification. Echoing the SCK's request, the amendment was said to be done to "prevent indiscriminate re-examination of final judgments prior to the [decision of unconstitutionality] and to respect the legal sentiments and considerations of the times [of the initial] decision [of constitutionality]".[61]

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[60] *Ibid*at para 1:"그런데 이러한 입법적 결단에도 불구하고 그 효력이 다양할 수밖에 없는 위헌결정의 특수성 때문에 예외적으로 부분적인 소급효의 인정 또는 소급효의 제한 가능성을 부정할 수는 없다. 따라서 당사자의 소급적 권리구제를 위한 구체적 타당성의 요청, 소급효 인정에 따른 법적 안정성 또는 신뢰보호의 침해 우려, 구법에 의하여 형성된 법적 질서 혹은 기득권과 위헌결정에 따른 새로운 법적 질서의 조화 등 제반 이익을 종합적으로 고려하여 맹목적인 소급효의 인정이나 부인이 오히려 정의와 형평 등 헌법적 이념에 심히 배치되는 것으로 인정될 때에는, 법문의 규정에도 불구하고 그 소급효의 범위를 달리 정할 필요성이 인정된다고 할 것이다. 이미 대법원과 헌법재판소는 비형벌조항에 대한 위헌결정의 소급효와 관련하여 이와 같은 법리를 명시적으로 채택하고 있다(대법원 2003. 7. 24. 선고 2001 다 48781 전원합의체 판결, 대법원 2009. 5. 14. 선고 2007 두 16202 판결, 헌법재판소 2008. 9. 25. 선고 2006 헌바 108 전원재판부 결정 등 참조)." [However, despite such legislative decisions, due to the uniqueness of the constitutional decision, whose effects can only be diverse, it is impossible to deny the possibility of recognizing partial retroactive effects or limiting retroactive effects. Therefore, when it is recognized that blind recognition or denial of retroactive effects would seriously harm the constitutional principles of constitutional ideals of justice and equity, considering various interests such as the request for specific validity for the party's retroactive right to remedy, legal stability or trust protection concerns due to the recognition of retroactive effects, the harmony of the legal order or vested rights formed by the old law and the new legal order according to the unconstitutional decision, etc., it is recognized that there is a need to differently determine the scope of its retroactive effect regardless of the provisions of the law. The Supreme Court and the Constitutional Court have already explicitly adopted such a legal principle in relation to the retroactive effect of the unconstitutional decision on non-penal provisions (refer to the Supreme Court's decision on July 24, 2003, 2001Da48781 Full Bench Decision, the Supreme Court's decision on May 14, 2009, 2007Du16202 Decision, the Constitutional Court's decision on September 25, 2008, 2006HunBa108 Full Bench Decision, etc.) [translated by author].

[61] Constitutional Court Act Partial Amendment Bill (Introduced by Representative Jin-tae Kim),10 April 2013 at 2 ["헌법재판소법 일부개정법률안 (김진태의원 대표발의)"]:" "서, 헌법재판소가 이미 합헌으로 결정하였던 경우에는 그 합헌결정 이후에 한하여 소급효가 미치도록 하여 종래의 합헌결정 이전의 확정판결에 대한 무분별한 재 심청구를 방지하고 합헌결정에 실린 당대의 법감정과 시대상황에 대 한 고려를 존중하고자 하려는 것임." [Therefore, in cases where the Constitutional Court has already made a constitutional decision, the proposed amendment intends to respect the consideration of the legal sentiment and the situation of the times contained in the constitutional decision by allowing the retroactive effect to apply only after the constitutional decision, thereby preventing indiscriminate retrial claims against the final judgments before the previous constitutional decision.] [translated by author].

While this amendment has received commendation in academic circles, with Seokim Lee praising the National Assembly's insertion of the prior ruling qualification as one which has "avoid[ed much] ... congestion and burden on the judiciary ... [and enabled the CCK to] no longer ha[ve] to worry much about the burden of unlimited retrials and indemnities whenever some criminal law clause is struck down",[62] the prior ruling qualification remains incredibly problematic: beyond the violation of *lex mitior* and fact that the two concerns relating to equality and incentivisation are resurrected from the qualification's promulgation into law, the problem of legal stability rears its head yet again, since existing jurisprudence concerning Article 47(2) of the CCA, as covered in Part II(A), demonstrates the Courts willingness to interpret provisions like the prior ruling qualification *contra legem*.

This risk of another *contra legem* exercise is real. Although the CCK has issued a precedent[63] upholding the constitutionality of the prior ruling qualification after the 2014 amendment, significant questions remain about the scope of its operation given how it contradicts other materially related provisions within the CCA. As argued by Ju-Baek Jung:

> [T]he eligibility of a petition for retrial cannot be construed to require as a necessity the invalidity of the applied punitive provision [as suggested by Article 47(3) of the CCA]. The two are [implicitly] separate and independent. This is attested by [Article 75(6) of the CCA] which explicates that a petition for retrial can be granted even when the applied non-[penal] provision has not been deprived of its validity.[64]

III. CONCLUSION: WHITER LEGAL STABILITY & EQUALITY?

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[62] Lee, *supra* note 52 at 351-352.

[63] Constitutional Court, Decision of 28 April 2016, 2015 Constitutional Court No. 216 [Constitutional Court Act, Article 47(3), unconstitutionality petition] [Constitutional Court 28-1, 30] ["헌법재판소 2016. 4. 28. 선고 2015 헌바 216 결정 [헌법재판소법 제 47 조 제 3 항 단서 위헌소원] [헌집 28-1, 30]"].

[64] Ju-Baek Jung, "Scope of Review Following Unconstitutionality Decision of a Penal Provision: Focusing on Issues Relating to the New Article 47(3) of the Constitutional Court Act" (2018) 29:1 Chungnam Law Review at 131 ["정주백, '형벌조항에 대한 위헌 결정으로 인한 재심의 범위 - 헌법재판소법 제 47 조 제 3 항 단서의 신설과 관련된 문제를 중심으로' (2018) 忠南大學校 法學硏究 第 29 卷 第 1 號."]:"그러나, 재심청구의 적법성이 필요적으로 적용 형사법조의 무효를 요하는 것이라고 볼 수는 없다. 이는 법 제 75 조 제 6 항으로써도 뒷받침되는바, 동항은 적용된 비형벌조항이 그 효력을 상실하지 않은 경우임에도 재심청구가 허용된다고 명시하고 있다. 제 47 조 제 3 항이 재심청구의 범위에 제한을 가하려는 의도로 도입되었다는 점은 의심할 바 없으나, 입법의도가 해석의 유일한 기준이 될 수는 없는 것이다"] [translated by author].

As it is clear from Parts II(A) and II(B), Article 47 of the CCA was meant to ensure the continued maintenance of legal stability in the South Korean legal system in the face of decisions of unconstitutionality. Yet, as these both Parts demonstrate, poor drafting by an inattentive legislature and an unwisely narrow judicial request for legislative intervention have built new problems atop old conundrums.

With respect to Article 47(2) of the CCA, whose prospective effect is meant to ensure legal stability by limiting the effect of a decision of unconstitutionality to be purely prospective in nature, the legislature's poor drafting in 1988 has forced the SCK to interpret the provision *contra legem,* which ironically harms the stability of legal system since the precedent opens the floodgates for the application of the incredibly normative interpretative exercise in other areas of law.

Further, with respect to the prior ruling qualification, which aims to safeguard legal stability by limiting the retroactive effect of decisions of unconstitutionality on penal provisions, the SCK's narrow request for legislative intervention in 2011 has led to legislative amendments that not only deepens the existing conundrum by resurrecting the twin concerns of equality and incentivisation that were initially resolved by Article 47(2) of the CCA's *contra legem* interpretation, but also injects new normative and international law problems, along with increased uncertainty regarding the effects of a decision of unconstitutionality on penal provisions, given the prior ruling qualification's implicit inconsistencies with other CCA provisions.

Above all, the concern of fairness looms over the prior ruling qualification: Why should two similarly charged individuals face different punishments due to something as arbitrary as their date of conviction? To resolve these issues, the power to determine the effect of a decision of unconstitutionally ought to be vested solely in the CCK. Accordingly, Article 47 of the CCA should be revised to state that:

> **Proposed Constitutional Court Act Article 47 (Effect of Decision of Unconstitutionality)**
>
> (1) Any decision that a statute is unconstitutional shall bind ordinary courts, other State agencies, and local governments.

(2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the date and in the manner determined by the Constitutional Court in its decision.

While this proposed reform grants a measure legislative authority to the CCK, it should be noted once again that the risk of the CCK transforming into an "unelected mini legislature" that "arrogates to [itself] legislative powers"[65] is absent since two-thirds of the CCK is already, directly or indirectly, comprised of members of the legislature.[66]

Moreover, one can mount a compelling argument that the CCK ought to exercise such powers in any case. This is because the effect of an unconstitutional decision is clearly adjacent to the CCK's main competency of constitutional adjudication. As the CCK becomes intimately familiar with the case specific and downstream consequences of its decision either way during its adjudicative exercise, the CCK is naturally the institution best positioned to determine the effectual scope of a decision of unconstitutionality should it choose to render it. Furthermore, should the National Assembly object, it remains open for them to override or tailor the null effect of the CCK's decision of unconstitutionality for that statutory provision via the enactment of specific legislation.[67]By replacing the legislature's blunt hammer with a scalpel in the manner proposed above, the existing problems that rise from the present wording of Article 47 of the CCA's provisions can be resolved.

The simplicity of the problem and direction of proposed reform outlined above might lead one to ask how the prior ruling qualification fell prey to poor drafting in the first place such that there are inconsistencies between South Korea's constitutionalised obligations to *lex miltor* and its constitutional architecture. The answer perhaps lies in the historical underpinnings at the time of the CCK's creation. To borrow the language favoured by the Singapore judiciary, the construction of the modern CCK was something of a "political compromise".[68] As noted by Jonghyun Park:

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[65] *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26; [2014] SGCA 53 at [77].

[66] CCA, *supra* note 12. Of a total of nine judges, three are nominated by the National Assembly, and three more, including the President of the CCK, are nominated by unfettered discretion of the President.

[67] For further articulation, albeit focused on prospective overruling but generalisable to retroactive overruling as well, see Wen Xiong Zhuang, "Prospective Judicial Pronouncements and Limits to Judicial Law-Making" (2016) 28 Sing Ac LJ 611 at [13], [18]-[23], [25], and [47].

[68] *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347; [2022] SGCA 16 at [8].

> [T]he origin of the [CCK] is purely political. The talk of its establishment was brought up by an important political event, the People's Protest of June 1987. The essence of the talk was negotiation and bargaining between parties without any consideration of theoretical analysis of the meaning and effect of constitutional adjudication. Even the independent entity for constitutional review was made by compromise between the political parties. The core, however, of the political discourse regarding the [CCK] was the people's demand for democratization and protection of their basic rights. In sum, [one] cannot fully understand the origin of the [CCK] without knowledge of the political background, but the background should be comprehended through the politics as embodied by the People's Protest of June 1987. The origin of the [CCK] lies in the politics of the people.[69]

Indeed, theoretical jurisprudence has had a weak hand in the construction of South Korea's present constitutional adjudication architecture. As reflected by the lack of careful particularisation in Article 47 of the CCA, rather than being based upon a conscious adoption of the continental European conception of the separation of powers and the role of judicial precedent over the American alternative across the Atlantic Ocean, the decision to adopt Hans Kelsen's centralised model of constitutional review over the diffuse model created by the United States was a political one that was shaped by a ruling party's desire to retain their control of a population which had an appetite for democratisation.

In early July 1987, one month after the June Democratic Struggle that brought about South Korea's first direct presidential election after 16 years of military rule and democratic reforms which ultimately culminated in the establishment of the Sixth Republic – the present-day government of South Korea – the political parties of the Fifth Republic of South Korea,[70] agreed to draft a constitution for national referendum that would allow the SCK resolve constitutional disputes. In effect, everything pointed towards South Korea having the judicial architecture

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[69] Jonghyun Park, "The Judicialization of Politics in Korea" (2008) 10:1 Asian Pac L & Pol'y J 62 at 91 [Park].

[70] *Viz.* the Democratic Justice Party (the ruling military party), the New Democratic Party, the Democratic Korea Party, and the National Party.

required for their very own *Marbury* moment.[71] Yet, in a complete *volte-face*, the ruling Democratic Justice Party subsequently departed from this apparent consensus. As Park elaborates:

> The ruling party stressed that if the Supreme Court continued to participate in political issues, it could not be free from political intervention. Because it seemed inappropriate for the Supreme Court to intervene in political matters, the ruling party of the military government suggested the establishment of a special governmental institution for constitutional adjudication.
>
> It was fairly strange that the ruling party of the military government, which had controlled the judiciary and oppressed people, was concerned with the independency of the judiciary. Nonetheless, it advocated for a Supreme Court that would be free from any political intervention. The ruling party asserted that the establishment of a new institution for constitutional adjudication would protect basic rights of people effectively. The actual intention of the ruling party's proposal was to create a court that [it] could control easily. The small size of the special committee for constitutional adjudication, it was thought, would enable the government to control it.[72]

Since the political priority was placed on instituting some form of constitutional adjudication for the next South Korean Republic, the subtle question of what specific form of constitutional adjudication to adopt was not seriously entertained by those on the other side of the bargaining table for the 1987 Constitutional Amendments. Satisfied that the Democratic Justice Party's proposal contained a system of constitutional adjudication, this aspect of the proposal was accepted by the remaining political parties without much debate on the question of institutional design choice. It is from this political compromise that the CCK was born.

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[71] Steven Arrigg Koh, "Marbury Moments" (2015) 54:1 Colum J Transnat'l L 116.

[72] Park, *supra* note 69 at 90. For a deeper coverage of the CCK's negotiated formation, see Justine Guichard, *The Judicial Politics of Enmity: A Case Study of the Constitutional Court of Korea's Jurisprudence since 1988* (Ph.D. Dissertation, Institut d'études politiques de Paris - Sciences Po and Columbia University, 2014) [unpublished] at 61-65.

To implement the agreement after its passage in the National Assembly on 18 September 1987 and subsequent success at national referendum on 27 October 1987, reference, as mentioned in Part I, was taken from Germany's Federal Constitutional Court. Whether or not the CCK's constitutional adjudication function is a foreign transplant or an indigenous tradition is up for debate,[73] but as intimated in Part I, it is indisputable that there are remarkable textual similarities in the provisions that form the legal basis for the South Korean and German constitutional courts. For another example, the CCK's power to adjudicate constitutional petitions pursuant to Article 68(1) of the CCA has been said to be the direct importation of the German constitutional complaint (*Verfassungsbeschwerd*).[74]

As a result of these textual similarities and the consequent functionalist parallels between both constitutional courts, the birth of South Korea's Constitutional Court was accompanied by the importation of German doctrines. As argued by Jibong Lim, this most apparent in the analysis of competencies where, except for the doctrine of "abstract judicial review (*abstrakten Normenkontrolle)*, the present [CCK] has adopted nearly all the competen[cies] of German Constitutional Court."[75]

But as this Paper's treatment of Article 47(2) of the CCA illustrates, South Korea's importation of foreign constitutional architecture might not have been accompanied by a strong understanding of the legal philosophy behind their design. Indeed, tensions have been noted between South Korean's European constitutional architecture and its modern American legal attitudes. As observed by Chaihark Hahm who attempts to contextualise the CCK's operational history through the lens of American and European constitutional adjudication systems:

> [The CCK's] "European" origins have apparently failed to convey the sense that constitutional adjudication inevitably, and even properly, has political dimensions. On the contrary, [contemporary American style] demands for democratic control

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[73] Chaihark Hahm, "Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?" (2001) 1:2 J Korean L 151.

[74] Kun Yang, "The Constitutional Court in the Context of Democratization: The Case of South Korea" (1998) 31:2 Law and Politics in Africa, Asia and Latin America 160 at 162.

[75] Jibong Lim, "Comparative Study of the Constitutional Adjudication Systems of the U.S., Germany and Korea" (1999) 6:2 Tulsa J Comp & Int'l L 123.

> seem to have pushed the Court into a setting where it is more likely to be attacked for being unduly political.[76]

In this light, it is not so hard to imagine the prior ruling qualification as an impulsive overreaction of a South Korean state that is grappling with understanding itself and its people in the face of European and American influence. This image of unease perhaps best explains the theoretical conundrum that is South Korea's prior ruling qualification which appears to pull the law concerning the effect of a decision of unconstitutionality in two diametrically opposed directions.

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[76] Chaihark Hahm, "Beyond "Law vs. Politics" in Constitutional Adjudication: Lessons from South Korea" (2012) 10:1 Int'l J Const L 6 at 34.