

South Korea: Legal and Political Overtones of Defensive Democracy in a Divided Country

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South Korea has already passed Samuel Huntington's two-turnover test for democratic consolidation, which occurred with the peaceful transitions of power in 1992 and 1996. This occurred despite the enduring military tension on the divided Korean peninsula. Huntington said that when a nation transitions from an "emergent democracy" to a "stable democracy," its ruling parties must undergo two democratic and peaceful turnovers.¹

However, there still exists heated controversy over whether the executive power violates democratic rule and human rights in the name of national security. This is despite the fact that the military authoritarian regime perished in 1987 and subsequent civilian governments have accomplished democratic reform.

On November 6, 2013, the Ministry of Justice in South Korea petitioned to the Constitutional Court to rule on dissolving the minor Unified Progressive Party (UPP) for violating the "basic rules of democracy."² The ministry's filing comes after the prosecution of indicted lawmaker, Lee Seok-ki of the UPP on September 5, 2013, on charges of conspiracy to stage a rebellion, incitement and sympathizing with North Korea, and infringement of the

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¹ Samuel P. Huntington, "The Third Wave: Democratization in the Late Twentieth Century." Norman: University of Oklahoma Press 14 (1991): 26.

² See South Korean Const. Art. 8 (4) If the purposes or activities of a political party are contrary to the fundamental democratic order, the Government may bring an action against it in the Constitutional Court for its dissolution, and the political party shall be Dissolved in accordance with the decision of the Constitutional Court.

National Security Law.³

“Defensive democracy” or “militant democracy” is the philosophy, originating in post-war Germany, that members of a democratic society believe it necessary to limit some rights and freedoms to protect the institutions of the democracy.⁴ In other words, the concept of “defensive democracy” denotes the capacity of modern constitutional democracies to preserve themselves against the political breakdown of their regime as democracies.⁵

Defensive measures for national security often have side effects on the human rights and liberties of the people: “immigration control; intensified security checks at airports; video surveillance of public places and public transport vehicles; automatic vehicle monitoring; biometric control devices; individual observation; or sneaking access to electronic data processing systems and personal computers.”⁶ Such measures could be continued practically endlessly, and they have inspired fear and apprehension among citizens.⁷

The forgoing event is the first case of “defensive democracy” in South Korea, and it will likely apply not only to violations of this philosophy, but also to the National Security Law (NSL). Unleashed on a congressman facing treason charges, the ramifications of this case may also encroach upon civil liberties and parliamentary democracy in the name of national security. Since democratically elected leaders have replaced the country’s past military despots, who often used the National Security Law to file sedition charges to silence

³ Choe Sanghun, "South Korean Lawmakers Back Arrest of Colleague in Treason Case," *The New York Times*, September, 4 2013.

⁴ David Landau, Abusive Constitutionalism, *UC DAVIS LAW REVIEW Fall* (2013).

⁵ Markus Thiel, 2009. The militant democracy principle in modern democracies [electronic resource] / edited by Markus Thiel. n.p.: Farnham, Surrey [UK]; Burlington, VT : Ashgate Pub., c2009., 2009. IUCAT (library catalog), EBSCOhost (accessed November 26, 2013).

⁶ Ibid.

⁷ Ibid.

and even execute dissidents, there remains a tension between whether this use of NSL/defensive democracy is a force for good or, perhaps, even evil. Even procedural and constitutional democrats believe that democratic institutions are not justified if they do not produce morally acceptable consequences, rejecting the outcomes of institutions that deny freedom of speech or other basic rights.⁸ If South Korea is a democratic government, why do the South Korean people accept these overwhelming restrictions for national security? Of course, no value is absolute because the nature of the ideal requires striking the balance between the two. While human rights can never justify harm to national security as an absolute value against national destruction, national security does not confer unlimited authority to violate individual rights.⁹

Especially of note, since half of the Korean peninsula was democratized, the democratic fabric of South Korea has an inherent internal tension between liberal democracy and defensive democracy that is deeply rooted by a real threat of war because of the separation between the South and the North. The history of national security concerns in South Korea can be seen as a continuing pragmatic attempt to balance fundamental democratic values and ideals against elements of their defense that have at times intruded upon the rule of law, individual freedoms, and popular participation in policy debate and decisionmaking by an informed citizenry. The balancing of national security and democracy is an ongoing process, but the long-term trend in South Korea seems to be toward an increasing emphasis on the democratic process. In the end, this matter suggests that the tension between liberal democracy and defensive democracy should not be taken as mere

⁸ Amy Gutmann and Thompson Frank Dennis, *Democracy and Disagreement*, Harvard University Press, 1996.

⁹ Emanuel Gross, "Defensive democracy: Is it possible to revoke the citizenship, deport, or negate the civil rights of a person instigating terrorist action against his own state." *UMKC L. Rev.* 72 (2003): 51.

antipodes but should be developed as competitive and complementary relations, culminating in the complicated question of balancing freedom and national security. In other words, the values of national security and democracy are sometimes necessarily in conflict, and one may be compromised in defense of the other.

Whatever the outcome, this case shows that the upcoming struggle to reconcile liberal democracy and defensive democracy will be an important and affirmative experience for South Korea's democracy. Probably, this case will have two possible results: Either the Constitutional Court will reach a decision or major parties will reach a political compromise such as withdrawing the case. Separately, there are conditions under which recognition of national security concerns would be compatible with a well-functioning democracy. These relations are always being put into question and no conclusion can be final in the political world. The "big questions" of describing the scope of national security cannot be resolved by "extensive debate and democratic resolution."¹⁰ Nevertheless, I believe that if national security provisions were embedded in the Constitution and statutes with sufficient procedural hurdles and other exit costs were enacted, the danger I have just articulated might be reduced to acceptable proportions.

¹⁰ Bruce A. Ackerman, *Before the next attack: Preserving civil liberties in an age of terrorism*. Yale University Press, 2006.