

# Law and Society in Korea

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Law and Society in Korea  
*Edited by Hyunah Yang*

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*Edited by*

**Hyunah Yang**

*Professor of Law, Seoul National University, Korea*

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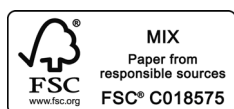
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# Abbreviations

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ANSP	Agency for National Security Planning
AEPOPEM	Act on the Election of Public Officials and the Prevention of Election Malpractices
CCEJ	Citizens' Coalition for Economic Justice
DLP	Democratic Labor Party
DP	Democratic Party
GNP	Grand National Party
JRTI	Judicial Research and Training Institute
KCIA	Korean Central Intelligence Agency
KFEM	Korea Federation for Environmental Movement
NDP	New Democratic Party
NEIS	National Education Information System
NGO	Non-Governmental Organizations
NLF	National Liberation Front of South Korea
PSDJR	People's Solidarity for Democratic Judicial Reform
PSPD	People's Solidarity for Participatory Democracy
RoL	Rule of Law
USAMGIK	US Army Military Government in Korea

## Preface<sup>1</sup>

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While the law has seldom been a central object of analysis in the sociological study of South Korea, its importance has grown steadily. In the context of planned economic development during the 1960s and 1970s, with the sacrifice of human rights causes and the rule of military authoritarianism lasting until 1987, the rule of law in South Korean society at that time was questionable. Diverse social movements seeking political freedom, class and gender equality, and the restoration of justice from historical wrongdoings, blossomed in the 1990s after the removal of the authoritarian regime provided a highly conducive environment for socio-legal studies. *Law and Society in Korea* will introduce panoramic views of law and society studies in this postcolonial war-ridden society that operated under the conditions of truce, and yet was both economically and politically relatively successful. The ten chapters in this volume examine these societal and historical conditions reflected in the law – or that were shaped by the law – in various terms: law and development, law and politics, colonialism and gender, past wrongdoings and legal culture, public interest lawyering and judicial reform, particularly of legal education. In dismantling the historical specificity of Korean and, perhaps, East Asian societies and the universal frames of the field, these chapters will provide novel views, theorisation and information about South Korean law and society.

Dai-kwon Choi's chapter reviews the Korean experience via a law and development approach in response to the puzzle of how and why authoritarianism is counter to the rule of law. He attempts to trace the link between Korean economic development and that of the law. During its authoritarian period, Korea (the Republic of Korea) might be characterised as having a dual legal structure consisting of a series of instrumental special legislations (e.g., presidential decrees, The Foreign Capital Inducement Act 1966) to support the government-led economic development policy along with the authoritarianism that was a deviation from the fully-fledged rule of law and of a limited rule of law. It is generally known that authoritarianism tends to respect autonomies in areas other than politics for the sake of its image unless its power base is threatened. In this respect, the kind of legal stability that allowed for future planning

in Korea which would be favourable for business enterprises (savings and investment) may well have been fostered, even under authoritarianism. It was the administrative officials, armed with instrumental special legislation – administrative guidance, for instance, to support the government-led, import-substituting, export-orientated heavy chemical industry – and other government-led development policies, rather than lawyers, who actually led Korea's rapid industrialisation and economic development. Today, following democratisation, the gap between the written liberal democratic constitution and authoritarian political practices has been erased and a fully-fledged substantive rule of law is finally in place in Korea.

Chulwoo Lee's chapter offers a theoretical outline for explaining the social foundations of the rule of law in South Korea and East Asia. It proposes to explicate the conditions for the rule of law in terms of the play of power, and to conceive the rule of law as a product of the interplay between different forms of power instead of being as a result of the withdrawal of power. In addition to the two forms of power that have been identified in existing social theory (politico-juridical power and disciplinary power), the study advances a third notion of power, which the author terms 'relational power'. The notion is constructed to signify the amorphous force emanating from fluid personal relations and interpersonal commitment, a force that operates beneath various forms of traditional affective ties in East Asia, such as *guanxi* in China. The study maps permutations linking rule by law and the rule of law with each of the three kinds of power, and shows how these different kinds of power complement and cancel out one another in strengthening or obstructing rule by law and the rule of law.

In the third chapter, I attempt to shed light on the historical condition of the law in Korea from a different angle. Thematising the system of the family-head (*hoju*) instituted in the former Civil Code and Family Registration Act, this chapter interprets the system of the family-head as the mutated product of colonial legal imposition and the domestic (as well as Japanese) patriarchy. Although the legal institution with family registration itself was imposed during Japanese colonialism (1910–45), it is ironic to see how forcefully and persistently this system was purported to be the 'tradition' of Korea. It was indeed the postcolonial legislature in Korea that passed the statutes of the family-head. The vague notion of 'tradition', which was not compatible with the Constitution in its protection of gender equality and human dignity, has prevailed until as recently as 2005, when the Constitutional Court in Korea made a decision. The family-head system systematically discriminates against women in its modes of succession and bestowing of the family-headship,

which occur in conjunction with marriage and divorce. In this light, the 'invention of tradition' in Korea seems political in multiple senses: when tradition was claimed, the colonial legacy seems to have been forgotten, yet this amnesia seems half-intentional since the state took advantage of male-centred family and registration systems, which many ordinary citizens would have accepted as ones based on Korean culture such as Confucianism.

Ilhyung Lee's chapter examines the Korean perception(s) of equality (*pyungdeung*) through empirical research. As pointed out in previous work by Choi, Korea has been a constitutional democracy for just 25 years, after decades of authoritarian rule, therefore 'equality' is a relatively new concept to the average Korean citizen. Perceptions of equality and equal protection are often shaped by societal culture. Two competing forces affect the Korean setting. First, Korea is a society with a long social history, with deeply embedded Confucian norms that shape and guide contemporary attitudes and practices. Second, Korea has recently undergone a radical social transformation, resulting in changing norms. Aiming to reach a more informed understanding of how Koreans perceive equality and equality rights, this chapter reports the results of a survey of Korean reactions to a hypothetical case that suggests disparate treatment by a commercial airline. The survey assesses whether participants view the airline's action as (1) discriminatory and (2) unlawful, and (3) what actions they would take. The vast majority saw the action as discriminatory; a significantly smaller majority viewed it as illegal. Respondents offered various actions they would take in response to the given scenario. In explaining the results, this chapter takes account of cultural norms attributed to Korea, the society in transformation and changes in Korea's legal institutions during democratisation.

The next chapter also employs the empirical method in analysing the normative phenomenon of the public sector. Unlike the previous chapter by Ilhyung Lee which embarks on empirical research in a hypothetical setting, Jeong-Oh Kim utilises the pre-existing statistics on crime. For the last 50 years, Korean society has experienced tremendous changes in its economic, political and social arenas, which influence people's legal consciousness and behaviour, and the legal culture at a fundamental level. Kim investigates criminal instances and basic social order, and also people's attitude towards public officers. From his study, we can see how rapidly crimes have increased and the remarkable characteristics in the pattern of the growth of criminal instances in society. For example, Kim shows that the number of criminal cases has increased almost five times, from 5.02 per 1,000 citizens in 1965 to 24.26 per 1,000 in 2010. His findings confirm the explicit relationship between the social changes and

normative phenomenon. His study will be a starting point to extend the social scientific approach to the changing normative phenomenon in Korea and to compare it with those of other countries.

Mainly based on the theories of Habermas and Teubner, the chapter by Sangdon Yi and Sung Soo Hong examines whether Western theories can be simply applied to Korean legal development. Their observations are that because of the reception of modern law through Japanese Imperialism and the Korean cultural tradition, the Korean legal system has the 'dual structure' of the liberal and welfare paradigms: on the one hand, the liberal paradigm is not yet fully developed, but on the other hand, Koreans have to suffer from the original problems of the juridification of the welfare state. This dual structure inevitably leads to a worsening of the problems brought about by juridification in Korea. As a strategy to solve these problems in Korea, the authors suggest that proceduralisation, which was put forward as an alternative for regulatory dilemmas in Western countries, can be useful in the Korean context. More importantly, because of the rapid industrialisation and modernisation of Korean society, it is no longer justifiable to say that 'Koreans need more liberalism', which is the statement frequently quoted to prescribe the status quo of Korean society. This means that debates on juridification in Western countries should be considered in order to approach regulatory problems arising from juridification in Korea.

Patricia Goedde's work introduces the main activities of public lawyering in South Korea such as *Minbyun*, People's Solidarity for Participatory Democracy (PSPD) and *Gonggam*. This chapter charts the development of public interest law in South Korea by following shifts in discourse and activities through several legal advocacy organisations: Lawyers for a Democratic Society (*Minbyun*), the PSPD and the public interest lawyers' group, *Gonggam*. It poses several questions: What is meant by 'public interest law'? What particular institutional forms has public interest law taken? Why does public interest law discourse emerge more earnestly in the 1990s? The chapter finds that public interest law in South Korea emerges as a concept with *Minbyun* but develops as an explicit discourse in the 1990s with the creation of PSPD, as it increasingly employed legal measures on behalf of 'the public interest' for social reform issues. Since then, the concept continues to mature under *Gonggam*'s prerogative to focus on minority rights by providing direct legal aid, alongside calls for a deeper commitment to pro bono service by the legal profession.

The following chapter by Dohyun Kim discusses the recent reforms in legal professions and education in Korea. This study describes the background and history of judicial reform in Korean society since the mid-1990s until the late-2000s, especially focusing on the introduction of

the graduate-level law school system, which was set in motion in 2009 at 25 universities and which produced the first graduates in 2012. The author analyses the shift of key players in the legal education reform debate with the change of times. In the 1990s, elite law professors initiated the debate and proposed the introduction of a law school system in Korea, which then failed due to a counterblow from legal professionals. In the first half of the 2000s however, legal professionals (and especially elite judges) took over the leading role and submitted a draft bill for a law school system to the National Assembly. Blocked by the bottleneck of the legislative process for about two years, the bill led to civil society actively participating in the debate from 2005 under the banner of ‘justice for the people’, successfully amending and passing the law school bill through the National Assembly. The author expects that this activism of civil society will eventually bring about the dismantling or weakening of the judicial monopoly held by legal professionals in Korea.

Kuk-Woon Lee’s chapter enlightens the readership on the law and society in Korea from yet another angle – the law or the judiciary in terms of politics. In following the author’s lead, a type of ‘constitutionalisation of politics’ has been taking place in Korea since her dramatic transition from military dictatorship towards democracy in 1987. As an indication of this, the Korean Constitutional Court functioned significantly to stop many unconstitutional political regulations of the past and to encourage institutional reform efforts for the future. This chapter takes a look at some Korean Constitutional Court decisions related to the reform of the representative political system in order to sketch out Korean constitutional politics. Those decisions represent a tremendous political achievement for the Korean Constitutional Court over the past 20 years. Nevertheless, they are also tokens representing the characteristics and limits of the original design of Korean constitutional democracy. In this regard, the constitutionalisation of Korean politics after 1987 was the effort to return and/or restore the normal government that was established before the Korean War. This is a key reason why the constitutionalisation of politics in Korea has faced a legitimacy problem of judicial guardianship in recent years.

Kuk Cho’s work concerns transitional justice in Korea. For more than a decade, Korean society has taken legal steps to rectify past wrongs under the authoritarian-military regime. A cleansing campaign has developed since the ‘Civilian Government’ was launched in 1993. With strong pressure from civil society, the legislature, the judiciary and several committees and commissions have played their own unique roles in attempting to rectify past wrongs and re-evaluate the past. The Korean



way of dealing with past wrongs may be summarised as follows: (1) retroactive criminal sanctions are limited to the core perpetrators who acted under the authoritarian regime; (2) retroactive civil sanctions are given broadly to the victims of the authoritarian rule; (3) the contribution by past activists for the democratisation of Korea is officially recognised; (4) counter-violence by them is leniently examined; (5) even home-grown leftist movements are embraced, despite the current ideological and military tension between the two Koreas; and (6) uncovering past wrongs without criminal sanction is extended beyond the period of the authoritarian regime to include the Japanese Occupation and the Korean War. This process has certainly not been free from political struggle in the current political terrain. Ultimately, facing the past wrongdoings and the efforts for resolving them will continuously redefine the present time and space.

## NOTE

1. A note on the romanization:

This book contains various Korean words, which had to be romanized for those readers who are not familiar with the Korean language. Romanization of Korean words in this book followed the McCune-Reischauer system in principle. There were, however, certain types of words for which we had to make the following exceptions: (1) names of provinces, cities and other local districts follow the names officialised by Korean government as of 2012 (e.g. Seoul, Incheon, Busan); (2) names of organizations with their own romanization are respected (e.g. *Minbyeon*, *Gonggam*); (3) names of politicians and academics are based on their own usages or, if not available, the most common romanization for each name (e.g. Rhee Syngman, Park Chung Hee, Roh Moo-hyun); (4) the authors' own romanization for certain key words are respected (e.g. *pyungdeung*).



## PART I

### History and culture



# 1. Law and development: the Korean experience

**Dai-kwon Choi**

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## I. INTRODUCTION

This chapter explores how law has been interrelated to economic development in Korea over the last 60 years. Korea is one of the few countries in the world that has successfully attained both democratization and rapid economic growth since the end of the Second World War. Korean per capita Gross Domestic Product (GDP) was less than a hundred dollars in the 1960s, but is around 20,000 dollars today (Statistics Korea 2011, p. 187; Chung 2007, p. 13). Korea has now become the world's thirteenth economic power in terms of gross domestic income (Chung 2007, p. 16). In only half a century, Korean society has achieved the political and economic developments that took the Western world at least a few centuries to achieve, with huge strides in economic development being taken during the authoritarian post-Korean War phase. Korean democratization then followed this economic development.

The central question of this chapter is whether Korean development can be attributed to law, and, if it can, in what way. Conceptually, it is difficult to relate law to economic development. Much of the literature on law and economic development invariably associates the rule of law with development,<sup>1</sup> following in the footsteps of the Weberian proposition: the 'formal-rational law' as a principal facilitating element or a prerequisite of economic development.<sup>2</sup> The Korean experience, however, seems to repudiate such an association, because Korea underwent a jumping pace development during its authoritarian regime, which appeared to contradict the rule of law. Consequently, it is necessary to analyse law and development in the context of the Korean experience. A related question is whether lawyers have ever been agents of change in the several decades of political and economic development in Korea.

Undoubtedly, law plays a role in any society, in liberal democratic societies as well as in totalitarian and authoritarian societies. For example, law played an important role even in the centrally controlled command economy of Soviet Russia's totalitarian regime. Yet there are many aspects and elements to the law, and what this chapter explores is what kind, sense, aspect or element of law may be associated with political and economic development. This inquiry is particularly important since many other factors – political, economic, social and cultural – are also able to account for development, perhaps even to a greater extent.

Among other things, the rule of law must be discussed in connection with both liberal democracy and market economy. Theoretically, liberal democracy is impossible without the rule of law, as attested to by the liberal democratic countries of the world today. Economic development, however, can be achieved to a certain extent in its early stages, even in a command economy such as in the former Soviet Union, and under an authoritarian regime, as demonstrated by the past Korean and the present Chinese experiences. By definition, a totalitarian or an authoritarian government contradicts the rule of law. Of course, this does not mean that law plays no role in the process of economic development; it is therefore necessary to discern the many roles of law and stages of the rule of law in societies, even though the terms 'law' and 'the rule of law' are often used interchangeably.

There are three stages of the rule of law. The first stage simply indicates any country that has law and a legal system. In fact, there is virtually no country without a rule of law: a country in any stage of development, even autocratic, needs law and a legal system as an indispensable institution for the country's rule. A country with an autocratic system would have a system of law which would be repressive and instrumental (for the authority) in its nature.<sup>3</sup> The second stage may indicate a country whose law and legal system are autonomous from politics, religion and so on, with power-restraining legal rules and principles as their indispensable ingredients (Nonet and Selznick 1978, pp. 53–72; Unger 1976, pp. 50–52).

Such legal systems have formal legal features such as general applicability of law, non-retroactivity, certainty, clarity and stability. This formal legality (the formal rule of law) nurtures individual freedom<sup>4</sup> and the kind of predictability and legal stability that facilitate investment and protection of property rights and contracts.<sup>5</sup> However, the formal rule of law may allow a country to be dictatorial. The third stage recognizes the substantive rule of law which includes justice, morality, human rights and 'higher law' ideas.<sup>6</sup> Judicial review of legislation is an outcome of the third-stage rule of law that is associated with liberal democracy.<sup>7</sup>

The three stages of the rule of law are delineated roughly in a sequential order of development towards liberal democracy more than as a contemporaneous classification. Each stage of the rule of law overlaps with the other stages to a large extent. Bearing the concept of law's developmental stages in mind, an attempt will be made below to explore primarily how market-based Korean economic development can be accounted for by law, and how its democratization was brought about only tangentially. Along the line of this analysis, the chapter will explore what stages of the rule of law Korea went through and how this process came about.

## II. STATE OF LAW AND ECONOMY BEFORE TAKE-OFF

Before discussing the law and economic development in Korea, it is useful to describe briefly the state of law and economy in Korea before the take-off stage in economic development in the 1960s (Choi, 1980). Korea was a centralized bureaucratic country with a king as its highest authority. Its law and legal system belonged to the ancient Far Eastern law and legal system, where the Western concepts of the separation of powers, independence of the judiciary and the role of lawyers as intermediaries between the court and the parties were alien. Confucianism was a functional equivalent to the Western concept of constitutionalism (Choi 1980, p. 71; Choi 1983, p. 63), and the codified law, as such, was rather a repressive one. Furthermore, Korea's economy was largely agricultural. 'Modern' law appeared in Korea for the first time with the adoption of the Court Organization Act of 1895. The adoption of this modern law based on a civil law system was completed during the Japanese rule over Korea (1910–45). Before this time, the *yangban* (noblemen) bureaucrats – officials dispatched from the centre – acted as the governors of districts, dispensing justice as well as conducting administrative chores.

The 'modern' Roman concept of ownership over land, in particular, began with the Japanese-conducted nationwide cadastralization; the work, involving surveys, the investigation and registration of land (Choi 1980, p. 83) started from 1911 and was completed in 1918 in the early stage of Japanese rule. The forcefully conducted cadastral work, which ignored the niceties and complex variations of pre-modern land tenure, mixed with official social status, turned Korean society with a single stroke into a society composed of two classes of people, namely a small number of Japanese and Korean landlords and a large number of tenants

(sharecroppers). The change was as fundamental as that from European feudal law to modern law, but much more sudden, without the transitional period of a few centuries. The Government was run by the Governor-General alone, and came to own a half of all Korean land. With the existence of publicly owned lands, the Government allowed a large number of Japanese peasants to settle successfully as landlords and landowning farmers in Korea.

The Japanese laid down the characteristic features of their civil law system in Korea, with the adoption of the Japanese Civil Code, the concept of judges, courts and legal scholars. However, there was no concept of independence of the judiciary, which was under control by the Governor-General; there was no concept or institution for the judicial review of governmental actions, and not even the pre-Second World War Japanese constitution was applied to Korea. Currently, there are scholarly controversies on whether the Japanese indeed modernized the Korean economy or whether they simply exploited Korea more effectively; for example, the cadastralization, the laying of railways, telegraph and telephone systems and other infrastructure were mainly for the benefit of Japan's more effective exploitation of Korea, and were not simply for Korean development. The Japanese adopted an obscurantist policy, intentionally omitting to train Koreans as scientists, engineers, managers or ranking army officers beyond the bottom-level functionaries, so that they were incapable of running modern industries, the army and the administration in a liberated country (Choi 2003, p. 32).<sup>8</sup> Following the Japanese surrender at the end of the Second World War, enormous efforts in terms of education and manpower training were undertaken to meet the imminent needs of the newly established free democratic nation for national security and development, and to catch up with the more advanced countries. The Japanese developed the northern part of Korea largely into a mining and heavy industrial area, and the southern part into an area combining light industries with the farming of rice and other crops to supply the Japanese war effort.

Following its independence from Japanese rule at the end of the Second World War, Korea was divided into two countries, North Korea and South Korea. North Korea developed into a Stalinist totalitarian society with its law and economic system (a centrally controlled command economy) under the aegis of Soviet Russia's military authority, since the first day of their occupation. South Korea developed (at least formally) into a liberal democratic country, with the American Government's military support. At this point, the South Korean economy was largely agricultural. Until the early 1970s, the North Korean economy was held to have surpassed that of the South Korean economy.



From this point, this chapter will examine the law and economy of South Korea alone.

### III. LAW AND ECONOMIC DEVELOPMENT IN SOUTH KOREA

#### **The Layering of Legal Foundation**

With the adoption of a liberal democratic constitution in 1948, the country of South Korea was founded under the auspices of the United Nations (UN). One of the first tasks of the Korean Government was to lay down a liberal democratic foundation of law and a legal system in line with the formal constitution, while eliminating the repressive former legal legacies and usages of Japan. A series of Korean codes of law, including the Civil Code, Commercial Code, Criminal Code and the Code of Criminal Procedure, was adopted through the 1950s and the 1960s to replace the former Japanese codes. Another top priority was to build a balanced national economy, which the Constitution formally provided for in its Chapter on Economy. Thus, the legal foundation for liberal democratic political rule and the market economy was laid down, at least formally, in Korea.

The Farmland Reform of 1948–49 was the epoch-making first step towards the building of a balanced national economy.<sup>9</sup> Along with the reform of farmland, the landlord and tenant classes (regarded as a hindrance to economic development) disappeared from Korean society. From this point, the Korean economy began to develop, and the state became independent from the landed interests. However, one of the reform's aims of inducing money from the landlords into capital for industry had largely failed. To a certain extent, the Korean War (1950–53) had contributed to that failure, because war-time inflation rendered farmland bonds paid as compensation to landlords practically worthless. The Korean War devastated the meagre industrial base, and the country sustained a huge loss in human resources. Roughly speaking, the Korean economy in the 1950s had to sustain itself with foreign aid.

#### **Contributing Factors and the Role of Law**

The chapter now moves its focus to Korean economic development from the 1960s onwards. It is difficult to explain with a single theory what sparks market-orientated economic development (especially when it begins from scratch, as in the case of South Korea) because there are

multiple variables directly and indirectly affecting economic development.<sup>10</sup> Before its economic take-off in the 1960s, Korea was a war-devastated, poverty-stricken agricultural society with no accumulated capital and per capita income lower than a hundred dollars. Was Korea's take-off due to the invention of new technology such as the steam engine, Protestant work ethics,<sup>11</sup> the work of inventors and entrepreneurs, the determination of the people to improve their lot,<sup>12</sup> a social movement<sup>13</sup> or political leadership?<sup>14</sup> What kind of role did law play, if at all, in the country's economic development?

In an advanced economy, the rule of law is an indispensable element of market-orientated economic development.<sup>15</sup> In general, those countries that have incorporated the substantive rule of law (whose concept includes law's power-restraining role, judicial independence and protection of fundamental rights), or at least a formal rule of law, have without exception an advanced economy. Their rule of law particularly enhances political, social and legal stability and facilitates planning for the future, creating a favourable environment for business enterprises in terms of savings and investment. The formal legal features that both the formal and substantive rule of law enable, clearly promote such political, social and legal stability and predictability. By contrast, the prevalence of arbitrary laws, which usually goes hand-in-hand with corruption, is inimical to economic development, since it makes it difficult for entrepreneurs to conduct long-term plans and investments for the future. Corruption undoubtedly defeats legal stability and predictability. In fact, governmental anti-corruption campaigns have been persistently waged alongside economic development drives.

The level of the rule of law that provides a favourable environment for business enterprise is attainable only in advanced liberal democratic polities, which usually exist in economically prosperous countries. Theoretically, however, a favourable environment for the exercise of entrepreneurship can also be fostered in an authoritarian or dictatorial country,<sup>16</sup> as attested to by the case of Korea in the past and by the case of China in the present. An authoritarian country by definition does not seem to have such a concept or stage of the rule of law, and not all dictatorial countries have been successful in inducing economic development. So, what differentiates those authoritarian countries that have had successful economic development from other authoritarian countries that are still economically impoverished?

The answer to that question may be 'benevolent dictatorship'. Indeed, there was an intellectual debate in the 1960s and 1970s over whether a benevolent dictator was necessary or tolerable for the advancement of Korea; in the interim, Korea missed out on a fully fledged democracy.

Did President Park Chung Hee need the country's economic development as a justification for his dictatorial rule, or was dictatorial rule indeed necessary for the successful launch of the economic development programme? A successful, government-led economic development programme may lead people to think that dictatorship is tolerable or necessary to a great extent.<sup>17</sup> In any case, there is no doubt that President Park contributed to Korea's successful economic development.

The leadership of a benevolent dictator and the longevity of such a regime can nurture a favourable environment for economic enterprise by providing long-term socio-political stability and predictability for investment through protection of contracts and property rights. Based on authoritarianism,<sup>18</sup> this socio-political stability and predictability can be considered a functional equivalent to the legal stability and predictability which are provided for by the rule of law enjoyed by Western liberal democratic countries. In Korea, however, authoritarianism was practised within the framework of the liberal democratic and market-orientated constitution; that is, it was a limited rule of law. There existed a plurality of political parties and a representative government, although authoritarian practices such as restrictions of the press and warrantless arrests continued to take place. Economic growth, the accompanying emergence of the middle class, and active democratic and labour movements led by liberal intellectuals, combined with other factors to bring authoritarian practices to an end, making democratization possible in Korea.

Soon after consolidating power by leading the coup d'état of 1961, President Park began to undertake a government-led economic development drive, consisting of setting goals and making the maximum effort to achieve those goals by authoritarian as well as non-authoritarian means, including various incentives and instrumental legislation. The economic development drive was a market-orientated one in which policies and strategies of import-substituting and export-inducing industrialization were pursued under his personal leadership. He was an energetic CEO in organizing and leading the entire nation towards economic development. For example, his catch phrase, '*chal sara pose*' ('let us live a prosperous life'), caught people's imagination.

While he conducted the industrialization-drive programmes, President Park initiated the government-led self-help community movement, known as *Saemaül undong*.<sup>19</sup> *Saemaül undong* was a self-help community development movement to correct the imbalance between the advanced urban and industrial centres and the farming villages left behind during economic development, and to modernize the rural areas in order to achieve goals such as increasing farming income, mechanizing farming, increasing cultivated land, improving irrigation and farmhouses, roads,

sanitation and the water supply. The community development movement later expanded to towns and cities. Certainly the movement was instrumental in implanting a nationwide spirit of self-help and 'we can do it', complementing the catch phrase '*chal sara pose*'.

President Park launched the government-led five-year economic development plan in 1962, which was followed consecutively by five other five-year plans (the Consecutive Plans). With the five-year economic development plan, he set many different goals, ranging from fixing targets for exports and imports, rapid increases in the Gross National Product (GNP) (over 8 per cent increase per year) and per capita income, the acquisition of foreign loans, the construction of social overhead capital infrastructure such as roads, highways, harbours and electric plants, to improve rural communities. Furthermore, he personally encouraged, directed and supervised civilian entrepreneurs as well as government officials in the achievement of those goals by using various incentives and sanctions. He is known to have personally monitored all the statistical results of economic drives on a daily basis, reviewed reports and conducted frequent on-site inspections with his ministers and aides. In total, six of the five-year economic development plans from 1962 to 1991 (Chung 2007, pp. 13–16)<sup>20</sup> were achieved and went beyond his set goals and objectives.

The Korean economic development plans were directed towards the construction of export-orientated light industries (largely textiles, plywood and wigs) in the 1960s, the construction of heavy chemical industries (steel, machinery and chemicals) in the 1970s, the stabilization and development of economic democracy (along with car manufacturing and ship-building industries) in the 1980s and the advancement of a neo-liberal market economy (along with semiconductor, computer and communication-equipment industries) in the 1990s, punctuated by the economic crisis of 1997–8 (Chung 2007, pp. 84–90). President Park died in 1979, yet Korea's authoritarian phase continued up to 1987 when so-called democratization took place along with a nationwide revolt against the authoritarian government then in power. Now the gap between the formal liberal democratic constitution and the authoritarian practice has largely disappeared from the Korean socio-political scene.<sup>21</sup>

Anti-governmental active democratic and labour movements were formed to realize political and labour rights constitutionally provided for during the authoritarian period. These movements helped to align the Korean democracy with what the liberal constitution provided for. In 1987, the Constitution was amended to incorporate the direct popular election of the President and to adopt the Constitutional Court, among

others. People's freedom in Korea has definitely been increased as the rule of law has progressed.

### Two Different Kinds of Law that were Involved

During the period of the government-led economic development drive from 1962 and the Consecutive Plans, a vast amount of special legislation was adopted in order to support the economic development drive and to stimulate the growth of private-sector industries. The special legislation may be characterized largely as 'instrumental' law.<sup>22</sup> The Consecutive Plans provided for various incentives including tax exemptions,<sup>23</sup> guaranteed remittance,<sup>24</sup> subsidies, citations and rewards of funds to the entrepreneurs who were performing well in manufacturing and exports. They also provided for a variety of sanctions including forfeitures of incentives and the retraction of permits and licenses. The Plans certainly helped to bring about rapid economic development in Korea.

Two sets of laws were therefore established during the period of the government-led economic development drive: the instrumental law in the form of special legislation, which was closely associated with authoritarian practices such as the suppression of democratic and labour rights and freedom; and the formal liberal democratic law in the form of the written Constitution and the set of Codes (including the Civil Code, Commercial Code, Criminal Code, Civil Procedure Code and Criminal Procedure Code) that laid the very foundation of the rule of law and the market.

Instrumental special legislation was aimed primarily at government officials in charge of policy implementation for the economic development drive in order to deal with before-the-fact situations such as permits, licences and the provision of incentives for business activities.<sup>25</sup> Legislation such as the written Constitution and the Civil Code covered after-the-fact situations where the courts and judges dealt with the protection of property rights and contracts, and with damages and so forth. Indeed, the formal rule of law was there in the background. However, it was goal-orientated government officials armed with the special legislation instruments, rather than judges and lawyers, who primarily helped to move people to engage in industrial activities. This was mainly due to the fact that Korea simply had no capital, no skill and no technology in the early stage of its economic development.

The existence of formal legality differentiates Korea at that time from China today, because China does not have a liberal constitution providing for party pluralism, freedom of speech and other human rights. China has only recently begun to adopt civil law (property law) and other laws that are essential for a market economy, but not politically liberal law for

pluralism and freedom of speech. The formal liberal democratic law had a profound educational impact on Koreans, especially on students and intellectuals. Even governmental authoritarian practices had the reverse impact by making Koreans confirm their liberal conviction in their hearts. Anti-authoritarian democratic and labour movements took the form of activists claiming human and labour rights provided for in the written Constitution.

Rapid economic developments and industrialization brought about enormous social changes including large-scale rural emigration, urbanization, social complexity, globalization and the emergence of large-scale organizations such as business firms, the press, political parties and labour unions.<sup>26</sup> Among other social changes, the emergence of the middle class and intellectuals stood out in the socio-political scene, and had a liberal impact on politics and social processes. As mentioned above, this emergence contributed to the fall of the authoritarian regime and to the rise of the substantive rule of law in Korea.<sup>27</sup>

The same social changes that were brought about by industrialization and economic growth had now made economic and social environments too complex for economic actors such as business firms and investors, so that bureaucratic governmental directions and regulations were no longer efficient. Neo-liberalist opinion that business activities should be subject to the market, not to governmental directions and regulations, became prominent, and further strengthened by the economic crisis of 1997–8 during which the International Monetary Fund (IMF) made bailout loans (this is remembered by Koreans as ‘the IMF crisis’). Currently, economic development in Korea’s globalized economy is very much led by entrepreneurship and invisible market forces, supported by the enhanced rule of law rather than governmental directions and regulations. Elimination or reduction of governmental regulations and combatting corruption are the objectives for today’s Korean Government. Transparency, restructuring and bans on slush money have become the guiding rules and doctrines of business firms in the private sector, particularly after the IMF crisis.

The rule of law has become inevitable and necessary not only for market forces, but also for social pluralism, as plural groups, organizations, social strata, classes and even labour–management relations, have emerged. As no single group or class can dominate or dictate to others in the political, social and economic arena, people must resort to the rule of law. The activism of the Constitutional Court has also contributed greatly to the expansion of the rule of law in Korean society (Choi 2008).

The Korean concept of '*haengjŏng chido*' (administrative guidance)<sup>28</sup> along with instrumental special legislation played a particularly important role in the economic development drive. *Haengjŏng chido* is not a legal term involving legal force, but the concept appears in every Korean administrative law textbook because it played a very important role in administrative practices. The concept also has a firm position in Japan's administration. A *haengjŏng chido* issued by a public official towards economic actors did not have a legally binding effect, since it was simply an official's guidance or advice for those who plan to invest, apply for foreign loans, build a business office or decide on pricing. However, those who refused to respect such advice or guidance might face various forms of adverse reaction from the officials, such as the refusal of the extension of permits or the denial of licences (Kim 1988, pp. 482–3). The *haengjŏng chido* used to be effective in the era of the government-led economic development drive, but it is no longer effective alongside the rule of law, and is also inefficient in complex market situations. Today, the Government has only a limited leverage over the market. The rule of law is now firmly in place, although it needs to mature further.

#### IV. CONCLUDING REMARKS

The government-induced rapid economic development in Korea during the 1960s, 1970s and up to the mid-1980s deviates from the Western model that associates development with the rule of law and the market economy, since those years are recorded as an authoritarian period that threatened the rule of law. Indeed, certain aspects of the rule of law – such as freedom of speech and assembly as well as labour rights – were denied constitutionally provided protection, and judicial independence was often compromised. Political expediency in the name of governmental economic development drives (such as government incentives) prevailed over market rules of competition in certain sectors such as import-substituting, exports and heavy industries. Labour wages were also suppressed to give Korean products a competitive edge in foreign markets. However, the formal liberal democratic and market-orientated constitution was basically there. Thus, Koreans experienced a gap between authoritarian political practices and the formal law. The fully fledged rule of law (i.e., the substantive rule of law) was compromised accordingly.

The very existence of a liberal democratic constitution had a significant educational impact on citizens, especially on intellectuals and students. In fact, active anti-authoritarian democratic movements were

formed in the name of realizing fundamental and constitutional rights including labour rights and democratic ideals. The government-led economic development drive aimed to foster a self-sustaining market economy in Korea and to strengthen it.

Eventually, economic growth and democratization filled the gap, bringing the formal constitutionally promised rule of law, concomitant liberal democracy and economic prosperity. During the years of the economic development drive, public government officials played a more important role in the change than lawyers, readily using the *haengjŏng chido*. Today, however, the lawyers are coming to the forefront to serve the globalized economic activities.<sup>29</sup> Large law firms are mushrooming in Korea.<sup>30</sup> The methods of administrative guidance proved to be inefficient, and the reduction or the abolition of regulations are today's objectives. The Constitutional Court has been very active in protecting human rights and freedom as well as in protecting the Constitution. Maturity in the rule of law and democratic rule is now the norm for Korean society.

A final comment relates to the performance of China's so-called 'socialist market economy'. China has been doing extremely well in developing its own economy under one-party rule. However, Chinese economic development will inevitably bring about enormous social changes in which the middle class and intellectuals emerge, with a liberalizing impact on their country's politics and society. As an intellectual observer, the author is curious as to whether China's one-party rule, the suppression of political rights and freedom and the lack of the rule of law will ultimately survive this change. In the meantime, the rule of law is steadily growing in China, with the adoption of property laws and other market-demanded legislation, although this is not yet politically and religiously liberalizing the country.<sup>31</sup>

## NOTES

1. See Trubek 1972; Trubek 2001, pp. 8443–6; Kennedy 2006. See generally, Trubek et al. 1974; North 1992; North 1990; Jayasuriya 1999; Pistor and Wellons 1999; Brown and Gutterman 1998.
2. Cf. Hunt 1978, pp. 93–133; Roach Anleu 2000 (explaining that the rise of capitalism was attributable to the formal-rational law).
3. See Nonet and Selznick 1978, pp. 29–52; Unger 1976, pp. 50–51.
4. See Hayek 1994, pp. 80ff.
5. See Tamanaha 2004, pp. 91–101; see also Fuller 1969, pp. 39ff.
6. See Corwin 1955; Koopmans 2003, pp. 239–45.
7. See, e.g., Choi 2001, pp. 321–4; Tamanaha 2004, pp. 102ff.; Dicey 1959, pp. 144ff.; Kommers 1976, p. 209; Starck 1999, pp. 13–23; Grote 1999, pp. 269–306; Koopmans 2003, pp. 35–62, 63–97.



8. See also Pak 1999, pp. 35–9 and especially 48–9.
9. For the Farmland Reform in (South) Korea, see generally Hong 2001; Kim et al. 1989. The successful farmland reform, in accordance with the tiller–owner principle, seems to have been one of the crucial factors that differentiated Korean economic development from ‘dependent development’ experienced in many Latin American countries and perhaps in the Philippines. The factors that could account for the successful farmland reform include the political necessity to meet with the communist threat, the leading governmental officials’ determination for farmland reform, and the support of President Rhee Syngman (as he was conscious of the tillers, who formed the majority of votes). North Korea had already completed its communized land reform, known as the ‘confiscation without compensation-free distribution’ formula, in 1946, and was threatening to do the same thing in South Korea. The lands, thus distributed to farmers in North Korea, were however soon to be placed into collective farms. South Korea adopted confiscation with compensation-distribution with a payment rule for their farmland reform.
10. See generally Barro 1997 (discussing variables affecting economic growth).
11. See Weber 1958 (explaining that religious conviction provides motivation to work hard and live frugally). Incidentally, Korea has the highest Christian-population ratio (a third of its population) from among the three East Asian countries of Korea, China and Japan.
12. See McClelland 1961.
13. By relying on education, mass media, various government-led campaigns and self-help community movements such as ‘*Saemaul undong*’ (New Community Movement), President Park ignited people’s will to improve their lot and the ‘we can do it’ spirit is expressed in the catchphrase ‘*chal sara pose*’ (‘let us live a prosperous life’).
14. See Yoo 1983.
15. See ‘Economics and the Rule of Law: Order in the Jungle’, *The Economist*, 13 March 2008, p. 83, [www.ruleoflawus.info/Economy/Economics\\_and\\_the\\_rule\\_of\\_law.pdf](http://www.ruleoflawus.info/Economy/Economics_and_the_rule_of_law.pdf).
16. See Trubek 1972, pp. 48–9 (hinting at the possibility of authoritarianism-induced stability that could lead to economic development similar to the Brazilian situation); Haggard and Cheng 1987; Johnson 1987.
17. Probably the present Chinese situation fits closely with this statement. Interestingly, former Chinese politician Jiang Zemin is known as having demanded the rule of morality from the Chinese Communist Party cadres and governmental officials.
18. Perhaps a limited rule of law may be possible even in authoritarianism, as seen in Korea in the past and in China today. It is characteristic of an authoritarian regime, as compared with totalitarianism, that autonomies are permitted in areas other than politics unless the political power base is threatened. An authoritarian regime is usually interested in having the semblance of the rule of law entailing predictability and stability in law and the legal system in order to enhance its legitimacy and to keep officials in line, among others, so as to combat corruption. For example, see Ginsburg 2008; Moustafa 2008; Barros 2008. The rule of law albeit a limited one probably reduces the ruling costs even in authoritarianism.
19. See Korean Overseas Information Service 1973 (discussing government-released descriptions of the movement); Kim 2009, pp. 88–99.
20. Chung 2007, pp. 13–16. The first Economic Development Plan (1962–6), the second Plan (1967–71), the third Plan (1972–81), the fourth Plan (1977–81), the fifth Plan (1982–6) and the sixth Plan (1987–91) make up the six consecutive economic development plans undertaken by the Korean government containing the goals and objectives that were to be achieved and the policy implementation tools with which to reach the set targets.

21. See Choi 2003, pp. 34–7; Choi 2005, pp. 180–86.
22. For the history of such instrumental legislations, see for example Lee 1986; see also Lee 1998.
23. For example, Foreign Capital Inducement Act (1966), arts 15 and 21, available at <http://www.law.go.kr/lsSc.do?menuId=0&p1=&subMenu=2&query=%EC%99%B8%EC%9E%90%EB%8F%84%EC%9E%85%EB%B2%95&x=27&y=14#liBgcolor11>
24. For example, Foreign Capital Inducement Act (1966) art 22 and the subsequent articles.
25. The special instrumental legislation consisted of regulatory administrative laws in their nature. Their provisions for permits, licences, incentives for business activities and others are *de facto* enabling clauses for the exercise of *haengjŏng chido*, which does not carry a legally binding force, but power of influence; see p. 13 below.
26. See Choi 2005, p. 179.
27. See Choi 2003, pp. 34–7.
28. For the concept of *haengjŏng chido*, see Kim 1988, pp. 479–84.
29. See Choi 2005, pp. 179–86.
30. See Lee, Kuk Woon 2007.
31. See Peerenboom 2002.

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## 2. The rule of law and forms of power: theorizing the social foundations of the rule of law in South Korea and East Asia<sup>1</sup>

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### I. INTRODUCTION

A quarter of a century has passed since the June Protest of 1987 ended the semi-military authoritarian rule in South Korea and opened up the gate to constitutional democracy. Much literature has been produced over the past two decades to provide empirical findings and normative appraisals of the changes in the politico-legal system and practices (for example, Ginsburg (ed.) 2004; Mo and Brady (eds) 2009). While this chapter has been inspired by the growing literature that embodies broadened comparative perspectives and nuanced assessments, it pursues a different methodological strategy. It does not address such questions as how much South Korea has achieved and what it should do to achieve its goal. Neither is it aimed at showing what has happened and is happening. This chapter offers a theoretical outline for explaining the social foundations of the rule of law in a post-authoritarian society. Its main purpose is to construct ideal types that can be used in describing and explaining socio-legal realities. The ideal types are constructed on the basis of a number of existing theoretical categories and certain experiences regarded as characterizing East Asian societies problematically subsumed under the typification 'Confucian'.

The central concept in this theoretical project is *power*. It is often assumed that the rule of law comes in where authoritarian political power withdraws, and that the rule of law should be implemented in order to hold power in check. This chapter objects to positing such a conceptual opposition between the rule of law and power. It proposes to broaden the concept of power in an effort to highlight the various forces that facilitate or impede the rule of law. The author's motivation to embark on this

conceptual handiwork was stimulated by interesting remarks made by Roh Moo-hyun, a former President of South Korea.

In 2002, when Roh was campaigning for the presidency, a series of corruption scandals had broken out in which members of President Kim Dae-jung's family were implicated. Feeling bound to defend the President and his party and to prevent the bad reputation of the ruling party from tainting him, Roh explained that the scandals were not 'structural irregularities caused by crooked ties between politics and business (*chönggyöng yuch'ak*) or resulting from the attributes of power (*kwollyö*) per se'. He added that, thanks to the increasing transparency of financial transactions, stricter administrative control and meticulous surveillance by the press, little room was left for 'structural irregularities involving abuses of power' (*kwollyökhöng kujöök piri*) and that the scandals were no more than 'products of a nepotism-prone culture' (*Chosön Ilbo*, 20 April 2002).

With these rather unclear terms, Roh tried to convey the message that these political scandals were different from those of the authoritarian past. Roh implied that, compared with corruption under the previous governments, the scandals troubling the Kim Dae-jung administration involved less collusion between political magnates and *chaebol*, and resorted less to threat and coercion in amassing illegal funds. Instead, he observed, the scandals were caused mainly by cronyism and nepotism, which he regarded as marginal and episodic.

Roh Moo-hyun distinguished between two kinds of irregularities in Korean politics. The first is typified by either direct recourse to arm-twisting or behind-the-scene deals between *chaebol* and top politicians or bureaucrats. These practices are either dependent on asymmetry of power under an authoritarian regime or generated by a structural corporatist nexus between the government and businesses. The second type consists in cronyism, favouritism or nepotism, which does not involve coercion, but emanates from unstructured, fluid personal connections. Roh labelled the first kind as *kwollyökhöng* (power-driven type), and distinguished it from the second. Roh's use of the term 'power' (*kwollyö*) stimulates a critical re-examination of the notion of power in public discourses in Korea, which in turn provokes questions about power as an analytical term.

In Roh's vocabulary, the word *kwollyö* (權力), translated in English as 'power' and pronounced as *quanli* in Chinese and *kenryoku* in Japanese, is a stock of force owned and possessed by an identifiable person, who uses or abuses it by directing it against another person, driving him/her into some action or inaction. It is the standard concept of power in worldwide politico-juridical discourse, which is best captured in Weber's

definition of power: 'the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests' (Weber 1968, p. 53). This notion of power is central to the dominant rule-of-law discourse: law is produced by power, but it should contain power within certain limits and keep it from being abused.

This chapter critically re-examines the notion of power as represented by Roh Moo-hyun's use of the term *kwollyŏk*, which accords with the conventional politico-juridical and social-scientific concept of power. This is followed by an attempt to broaden the concept of power to encompass various other forces influencing human action. The author takes issue with the narrow application of the term *kwollyŏk* because it marginalizes a variety of practices that are not regarded as infused with power or labelled as *kwollyŏkhyŏng* but which nonetheless significantly affect the rule of law in post-authoritarian Korea. The author's strategy resembles and extends that of Foucault, who remoulded the concept of power by juxtaposing another form – disciplinary power – to the standard politico-juridical notion. In addition to politico-juridical power and disciplinary power, the author posits a third form – relational power – which consists in non-coercive communicative practices that feed on affective interpersonal relations. This attempt runs the risk of inflating the concept of power, but it is deliberately adopted as a provisional strategy to sensitize the inquiry to some features of the regulation of society and control of practice that have been slighted in the discussion of the rule of law in Korea and East Asia.

This theoretical strategy helps to overcome what Dezalay and Garth (2007) criticize as the 'promotionalism' prevalent in the literature on rule of law in Asia, which sanctifies the rule of law as a universal goal and uses it as a yardstick in judging societies. Promotionalist accounts of socio-legal realities in Korea tend to assume that the rule of law is achieved in proportion to the withdrawal of power, which is equated with a shift away from authoritarian rule, and to the removal of pre-modern and culturally idiosyncratic obstacles such as nepotism, which are not explained in terms of power.

The author's theoretical framework, with multiple models of power employed as analytical concepts devoid of normative connotations, leads to a reconsideration of the notion of rule of law and its relationship with power. The rule of law should not be identified simply with the withdrawal or circumscription of power, but should be considered as a result of the interplay between different kinds of power. This chapter offers an outline of the workings of different types of power in creating conditions for the rule of law. While the discussion in this chapter



primarily focuses on the Korean situation, the theoretical schema in reference to other East Asian experiences is also developed. Further, the conceptual tools introduced here can be employed in explaining the conditions of other culturally diverse societies, which demonstrate differing permutations of the forms of power that this study discerns.

## II. FORMS OF POWER

Power is a stock of force owned and possessed by an identifiable person, who uses it or abuses it by directing it against another, driving him/her into some action or inaction. Power of this kind is possessed in quantity; one may have a greater amount of power than another. It can be distributed, augmented, reduced and removed. Since this power is coercive and entails deprivations, discourse is focused on how to justify its possession and exertion on the one hand, and how to prevent it from being abused on the other. In conventional politico-juridical discourse, or in what Foucault characterizes as the 'juridical and liberal conception of political power', power 'obeys the model of a legal transaction involving a contractual type of exchange' (Foucault 1980, p. 88). Such a contractual notion of power may not be found everywhere, but most cultures are familiar with its underlying supposition that power is imposed by one upon another against his/her will and with discursive efforts to either legitimate or delimit power. Whereas Confucian thought denigrates uninhibited use of power and regards rule by power as an inferior mode of domination to 'rule by ritual', the legalists of ancient China tried to maximize the efficiency of power by enhancing public awareness of the conditions for its exercise.<sup>2</sup>

The above conception assumes that power has a subject, an owner or possessor, and its size and strength rest on the position of the subject. The holder of power finds him/herself in more or less institutionalized relations. The institutionalization of relations between power holders and their hierarchical positioning economizes the management of power, as the probability of exercising power without an actual realization of the holder's will is sufficient to motivate the targeted actor to behave in a certain way. Bureaucracy is the best example of institutionalization of power and the most effective strategy for the economy of power. The Chinese word *quanli* connotes force coupled with an institutionalized position. Li Zhang defined *quanli* as 'bureaucratic power determined by one's officially appointed position' and contrasts it with *shili* (勢力), a more amorphous form of power better interpreted as 'social and political influence ... determined by one's wealth, social networks, and personal

ties' (Zhang 2001, pp. 10, 218). Roh Moo-hyun's use of the term *kwollyŏk* is close to this definition of *quanli*, although Roh uses the term mainly in a negative way as if abuse were its intrinsic attribute.

Foucault (1980) described power in this conventional conception as organized on the basis of sovereignty. He juxtaposed disciplinary power to this politico-juridical form of power. Disciplinary power differs from politico-juridical power in that it does not 'deploy the ostentatious signs of sovereignty' but is simply power to 'observe' (Foucault 1979, pp. 220, 224). It is not located in the iron fist of a magnate or state apparatuses. It is subjectless and is not possessed by identifiable individuals. It cannot be measured, nor is it divided, added to, increased or reduced. It is spread across the whole of society in the form of scientific knowledge and omnipresent surveillance, through which practices of human beings as social bodies are normalized and regularized. The relationship between politico-juridical power and disciplinary power is subtle. 'The disciplinarization of society is not a project deliberately orchestrated by the state but the unfolding of authorless programs across the society through which social behaviour is normalized without the presence of a unidirectional command' (Lee 1999, p. 36). Despite the difference in logic and nature, however, the two species of power are complementary: 'Sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society' (Foucault 1980, p. 108). While disciplinary power is not fixed to particular institutions and apparatuses, disciplines may take on various institutional forms. Instead of replacing other mechanisms of control, the disciplinary modality of power serves 'as an intermediary between them, linking them together, extending them and above all making it possible to bring the effects of power to the most minute and distant elements' (Foucault 1979, p. 216). It is natural that the state appropriates disciplinary techniques and that disciplinary power permeates the working of the state. This occurs through the process that Giddens (1985, Chapter 7) terms 'internal pacification', where disciplinary power becomes 'a subtype of administrative power' and is enmeshed with coercive forms of state power and direct sanctions.

If Foucault expanded the conceptual terrain of power, we may expand it further by positing another form of power and subsume under the rubric of power many features of domination that slip out of the existing conceptual grid, including those regarded as peculiar to the ordering of social relations in East Asian societies. Hahm Pyong-Choon (1986, p. 283), who saw the 'threat of sanction' as the essence of power, pointed out that power occupied only a minor place in the traditional Korean social order. Much of the traditional order was devoid of power, and the

vacuum was filled by 'affection', which consisted of interpersonal commitment and emotions.<sup>3</sup> Hahm characterized Korean society as an affective society in contrast to the West, which, in his eyes, prizes power and wealth as the most important values. According to Hahm,

Koreans pursue affection as the most important value; their demand is the maximization of affection. As such their identity tends to be non-individualistic inasmuch as affection presupposes the exchange of emotions with non-egos ... Koreans demanded from life the feeling of being alive in the exchange network of deep affection and emotion with other human beings. (Hahm 1986, pp. 287–9)

Because of the ascendancy of affection, Hahm argued, power was distrusted and recourse to power kept to a minimum in traditional Korea. For Hahm (1986, pp. 7–8), 'it is the peculiarity of the Korean heritage of symbols ... that we must experience a significant amount of reluctance in accepting the importance of power as a dominant value even in the arena of power itself'.

Hahm finds the family to be the principal locus of affection and notes that 'the concept of a nation was understood as an extended family' (Hahm 1986, p. 293). The conflation of the family and the nation manifests the diminution of the distinction between the power process and affection process (Hahm 1986, p. 311). Hahm points to the persistence of the affective tradition and talks of its impacts upon the socio-legal situation of Korea.

The carryover of the traditional perspective which had endeavoured to inject as much affection into the power process as possible still continues. ... Instead of proceeding on the basis of rational individualism, Koreans are still liable to proceed on the basis of interpersonal feeling and particularistic notion of decency and affection. The notion of abstract rational legality has not yet gained full acceptance by the people as legitimate. (Hahm 1986, pp. 312–13)

Critics take issue with Hahm's sweeping generalizations about Korean culture, the way he compares it with so-called Occidental culture, and his assumption about how culture matters in society (Yang 1989; Lee 1998). However, Hahm's reference to affection as a principle of human relationship can be developed into an analytical model for delineating certain aspects of social order and domination.

Hahm's term 'affection' is a translation of the Chinese term *qing* (情; *chŏng* in Korean).<sup>4</sup> Defined by Hahm (1986, p. 291) as 'the entire spectrum of interpersonal emotions', affection permeates a variety of relationships and practices where there is apparently little coercion and

command, from love between romantic partners or members of the same family to exchanges in mutual aid networks, paternalistic concern for another, long-term transactions based on personal trust, and conforming with the behaviour of others based on the sense of belonging to the same group. Indeed, such relationships are infused with power (in a conventional sense), calculation of interest, and many other forces and motivations. But we may proceed beyond noting the coexistence of power and affection in real practice and develop a notion of power that covers at least some elements of the variety of motivating forces which Hahm associates with affection. In many instances where there appears to be a contest of power *versus* affection, we can see a competition between different kinds of power. This third form of power can be tentatively termed 'relational power'.

This notion of power that is centred on neither coercion nor discipline (in the Foucauldian sense) is not so out of touch with existing discussions of power. Bertrand Russell (1986) defined power as the 'production of intended effects', and included in his catalogue of power 'influence on opinion' and 'traditional power', which musters respect on the basis of habit and custom. According to Hannah Arendt (1986, p. 64), power 'corresponds to the human ability not just to act but to act in concert.' Arendt was wary of conceiving power in terms only of command and obedience and thus equating it with violence. Some scholars talk about ideological/normative power and religious power, which, in their pure form, contain little coercion (Poggi 2001, Chapters 3–4). The types of power these studies have identified are not of the same nature and share only a few attributes with what the author terms relational power. Those discussions nonetheless call for expanding the concept of power to encompass various motivating factors lurking in relations not governed by command, coercion and the threat of sanction.

While the concept of relational power accounts for at least some elements of the motivating forces which Hahm Pyong-Choon associated with affection, it is not equated with and does not replace affection entirely. Not all elements of affection have a bearing on the distribution of resources in society, nor is relational power composed only of emotive elements, although there is a substantial overlap between relational power and affection. The term relational power is aimed at delineating variegated non-coercive communicative factors that are mobilized in social networks. It echoes Li Zhang's search for 'a more nuanced understanding of power that takes into account cultural specificities' in the Chinese context. According to Zhang (2001, p. 10), power is 'a relational process rather than a thing possessed only by the dominant class' and 'operates through both discursive and non-discursive everyday practices, and

through both visible, formal state apparatuses and social institutions and informal, diffused social networks.'

The attributes and *modus operandi* of relational power can be summed up as follows.

- Primordial feelings are one of the fuels for generating relational power, and to that extent, relational power overlaps with affection. However, an actual appeal to sentiment is not necessary. An expectation of primordial sentiment or a normative imperative calling for such sentiment can also motivate a person in the same way. Hence, although relational power is amorphous and does not take on a formal institutional framework, contexts in which it is generated can be inscribed into norms and even codified. Such values as loyalty, filial piety and trust between friends have been constantly inculcated by way of official and everyday instructions on behaviour, and people are motivated to act in line with those teachings regardless of whether they actually entertain any emotional commitment.
- Relational power resides in more or less informal, non-institutionalized or diffused networks. This does not mean that it cannot exist in a formal apparatus or legally institutionalized relationship. Even when it does, however, it operates mainly outside of, or cuts across, formal boundaries of rights and obligations. Of course it may exist between individuals in a legally structured relationship, such as parties to a contract or bureaucrats cooperating in official capacity. In such a situation, relational power works alongside politico-juridical power and complements it.
- Relationships in which relational power arises can take on varied scales and sizes, from a tie between siblings to connections between members of an alumni network or an association of people from the same region. While face-to-face acquaintance is effective in mobilizing relational power, abstract membership in a large group can also be a ground for laying claim to it. The group does not have to be a communal group; it can be a *Gesellschaft*. However, if an action is to be governed by relational power, the motivation has to derive from a sense of commitment based on shared identity or interpersonal trust rather than a threat of sanction or sense of legal obligation. Such a huge group as an *ethnie* can be a locus of relational power insofar as its members share 'a common myth of descent' and appeal to 'a definite sense of identity and solidarity which often finds institutional philanthropic expression' (Smith 1986, pp. 22–31), although the adjective 'relational' may not

fit well in such a situation. In this light, the distinction between *categories* and *networks* as two different kinds of group taxonomy is not of decisive importance.<sup>5</sup> Inter-individual networks are the more typical breeding ground of relational power, but an identity based on belonging to a category often constitutes a rallying point of an inter-individual network, as we see in ethnic trading networks such as overseas Chinese business ties (Landa 2001). Nan Lin (2001, Chapter 21) has introduced the concept of 'institutional field' in explaining cooperative interactions between spatially distant people who nevertheless share the same rules of behaviour assumed from their belonging to the same group, as seen in ethnic Chinese communities across the world.<sup>6</sup> The cohesiveness of a group depends on the combined extensiveness of its common identity and internal networks (Tilly 1978, p. 63).<sup>7</sup> In this light, there is much overlap between relational power and social capital, defined as 'the aggregate of the actual or potential resources which are linked to ... membership in a group, which provides its members with the backing of the collectivity-owned capital, a "credential" which entitles them to credit' (Bourdieu 1986, pp. 248–9).

- As relational power arises in networks and groups of different scales and sizes, people move in and out of differing networks to make the best of their multifarious and interwoven connections. One can invoke friendship with a neighbour, alumni ties, a place in a network of people from the same region, membership in a social club and so forth, depending on what one seeks in that particular context. Often multiple networks are brought into play in pursuit of the same goal, in the face of the danger of conflict between them. Cultures differ as to which kind of network is more powerful than others and how strong a commitment people have to a particular kind of network.
- In what form is relational power exercised? Relational power resides among others in governance based on moral and emotional appeals of paternalism. It consists in the mobilization of concerted action of members of a group by invoking common symbols and representations. It is found in the factional appropriation of influence; in other words, the act of benefiting from the influence of another person belonging to the same group. As mentioned above, relational power is mobilized among the members of a collectivity, but it manifests itself more clearly in an inter-individual nexus. It takes on the form of an exchange of favours between people in a dyadic relationship. It resides in patron–client ties. Brokerage

frequently draws on relational power. Perhaps the most prominent manifestation of relational power is *guanxi* (關係) in China – informal connections which are ego-centred rather than group-orientated and therefore highly susceptible to instrumentally rational engineering (King 1991). Korean society is also known for a proliferation of *yŏnjul*, meaning personal connections. As has been pointed out, however, these connections often need, and are strengthened by, a sense of shared identity which operates as a rallying point in mobilizing cooperative action.

- Unlike disciplinary power, relational power is not subjectless. It resembles politico-juridical power in that someone may have more of it than others. Relational power can be mobilized by someone for a particular purpose. Yet it has unclear boundaries and cannot be transferred to another as freely as politico-juridical power. As Coleman (1990, p. 315) has pointed out with regard to social capital, relational power is characterized by its ‘practical inalienability’. It is subject-bound inasmuch as who is connected to whom is decisive. In characterizing the *guanxi*-based gift economy, Mayfair Yang (1994) pointed out that the personal identity of the subject is an integral part of the transaction. Relational power is generated from a concrete nexus rather than the subject’s abstract position. This subject-boundedness or concrete subjectivity can be expressed in terms of a fusion of subjectivity and relationality.
- Relational power does not always flow from a higher person to a lower person, but can be directed against anyone in the network. All participants in the network have real or assumed commitment to one another. Setting up a barrier is regarded as contrary to the moral principles governing the network, while barriers create another network which is a separate locus of relational power. Within the same network, a favour offered by one to another, whether it is a material interest or symbolic benefit such as deference and loyalty, has to be repaid by the recipient. However, as the favour is taken as an expression of heart, the recipient should not reciprocate in the same way he or she repays a money debt. Repayment has to be a reproduction, rather than liquidation, of the transaction. Hence, a person superior in the politico-juridical system often comes to be in the position of an obligor and is impelled by moral pressure to make him- or herself amenable to the wishes of an inferior person. This is well captured in Mayfair Yang’s interpretation of *guanxi* as a form of ‘subversion’ against power which involves a ‘tactical movement of moral subordination’ that neutralizes the existing hierarchy (Yang 1994, p. 197). Yang does



not conceive the moral pressure that obtains in *guanxi* as a kind of power. But, whichever way the pressure is exercised, it can be conceived as the enactment of another form of power.

If power is theorized in this way, much of what Hahm Pyong-Choon described in terms of affection and thus regarded as devoid of power will be reconsidered as power phenomena. Many practices that Roh Moo-hyun refused to label as *kwollyŏkhyŏng* will also be subsumed under the rubric of power. This reconceptualized notion of power also captures the enabling and inducing as well as the constraining and commanding features of the sources of influence described in terms of capital, namely social capital or relational capital (Winn 1994, pp. 2255–6).<sup>8</sup>

### III. THE RULE OF LAW AND CONSTELLATIONS OF POWER

Definitions of rule of law are notoriously diverse. The concept is used as a catchword serving widely differing and often conflicting politico-economic interests. Some project onto the concept certain aspirations about the legal system, while others use it for describing the condition of a society governed by a functioning legal infrastructure (Ohnesorge 2003, pp. 92–3). Scholars often distinguish between thick and thin definitions of rule of law. A thin definition captures the formal side of the rule of law with no reference to the political or economic system that the rule of law serves or is expected to serve. A thick definition includes the substantive values that the legal system promotes or the politico-economic system that it protects or should protect as an essential attribute of the rule of law. Peerenboom (2003) offers four ideal types of thick rule of law to explain Chinese conceptions of rule of law: statist socialist, neo-authoritarian, communitarian and liberal democratic. But it is problematic to regard the political or economic systems that these conceptions represent as attributes of the rule of law per se. As Peerenboom (2004) acknowledges, thick definitions make the rule of law lose its distinctiveness and get ‘swallowed up in the larger normative merits or demerits of the particular social and political philosophy’. Yet Peerenboom’s thin definition is still too thick or value-laden to be used as an analytical tool. He adds such elements as fair application and ‘a narrow gap between the law on books and law in practice’ as constitutive elements of the rule of law, and takes an unclear position on whether the normative purposes served by thin conceptions of rule of law, such as stability, predictability and the provision of a fair mechanism, are essential elements of the rule



of law at the definitional level (Peerenboom 2004, pp. 2–3). Although he asserts that thick and thin conceptions are analytical tools, he refers to the thin rule of law as if it is an ideology advocated by authoritarian governments like that of Singapore. He also talks of it in terms of its instrumental advantage in persuading such countries as China or Vietnam to implement rule of law (2004, pp. 6–10).

Tamanaha (2009, pp. 3–10) is much more careful in distinguishing between the definitional elements of rule of law on the one hand and its functions, purposes and benefits on the other. He methodologically prefers the thin definition as a common baseline for all competing definitions. The rule of law is defined simply as the requirement that ‘government officials and citizens be bound by and act consistently with the law’, although he adds certain characteristics that need to exist for the rule of law to be achieved, such as the prospective character of rules, publicity, generality, clarity, stability, certainty and equal applicability (Tamanaha 2009, p. 3). If there are too many additional requirements, a thin definition might slip into a thick one. One should be wary of conflating the definitional elements of the concept and the conditions that make the rule of law function. This caution will move Tamanaha’s position close to the minimalist definition offered by Raz (1979), which is adopted as the standard meaning of rule of law in this chapter.

Raz (1979, p. 212) defines the rule of law at two levels. At one level, the rule of law is the axiom that ‘people should obey the law and be ruled by it’. At the higher level, it denotes the principle that ‘the government shall be ruled by the law and subject to it’. The rule of law at the first level is not different from what scholars often describe as ‘rule by law’.

Rule by law is defined as rule by known rules rather than mere fiat or arbitrary dictates (Clark 1999, pp. 35–6). However, that people should be ruled by law presupposes the condition that the politically organized society is capable of subjecting a substantial portion of the life of its members to the legal rules it enacts. From this angle, the author takes rule by law to mean general subjection of social life to legal rules. It has much in common with the law-and-order version of rule of law. Although this notion contains no literal reference to whether governmental power is boundless or bounded, those who use the concept, no matter how they judge the idea, highlight the failure, reluctance or refusal to subject governmental action to legal rules (Yoon 1990, pp. 23, 70, 87; Peerenboom 2003, p. 55).<sup>9</sup> Borrowing Unger’s nomenclature, Carol Jones (1994) distinguishes between interactional law, bureaucratic/regulatory law and full legal order, and pairs bureaucratic/regulatory law and full legal order with rule by law and rule of law respectively.

Cynicism towards the law-and-order projects of governments, colonial and authoritarian ones in particular, makes people portray rule by law as antithetical to the rule of law. Yet rule of law cannot be established from a vacuum. The subjection of governmental action to legal rules would hardly be possible were it not for a general subjection of social life to law. On the other hand, the deficiency of rule of law erodes the legitimacy of the law and reduces the breadth and effectiveness of the rule-by-law project. Hence the rule of law and rule by law condition each other.

How do the two dimensions of the rule of law relate to power? We may think of the following permutations. To begin with, rule by law involves the concentration, political organization and juridification of violence. At the same time, the progress of rule by law entails an increase in the amount of politico-juridical power that the state possesses. Rule by law is the result of a tug of war between the state on the one hand and non-state organizations, groups or individuals on the other.

Disciplinary power facilitates the general subjection of social life to politico-juridical power and rule by law to the extent that mechanisms of disciplinary normalization turn the targets of power into 'docile bodies'. Disciplines constitute an 'infra-law' in that they 'extend the general forms defined by law to the infinitesimal level of individual lives; or they appear as methods of training that enable individuals to become integrated into these general demands' (Foucault 1979, p. 222). As the state's campaign to subject the population to law calls for greater knowledge of the population, the state appropriates various techniques of discipline and surveillance, marking a convergence of *pouvoir* and *savoir*. This is coupled with the conception that the state of the society, which manifests itself in demography, territory, and material well-being, is to be observed, accounted for, and acted on as a totality – the type of rationality which Foucault (1991) calls 'governmentality'. The governmentalization of the state and the disciplinarization of society integrate the targets of power, the people who are constituted simultaneously as subjects, into a single population. At the same time, they dissolve the population into individuals and thereby facilitate the downward penetration of politico-juridical power into the minutest details of social life. In other words, the subjects/targets of power are constituted simultaneously as *omnes et singulatim* (Foucault 1981).

The juridification of social practice under rule by law increases system trust and reduces chances for personal networks and relational power. Relational power, for its part, both obstructs rule by law and serves it. Informal ties and networks, and factionalism and familism, may corrode loyalty to the politico-legal community. In southern China traditional

lineage ties functioned as shields against the power of the state, namely the power to tax. On the other hand, relational power enhances social integration by way of feelings of solidarity and a sense of interpersonal commitment, and helps to reduce the cost of social control.<sup>10</sup> This does not necessarily constitute a reinforcement of rule by law and politico-juridical power, because social integration can be achieved without recourse to law. Scholars refer to many East Asian experiences to argue that order can be achieved without law, let alone power. In fact, that which might appear to be 'authority without power' (Haley 1991), is not devoid of power, but demonstrates a substitution of relational power for politico-juridical power. Even when the state appears to be relying on relational power in securing order, it never purports to supplant politico-juridical power and rule by law. Lee Kuan Yew, the chief proponent of 'Asian values', parades his belief that family solidarity is essential to the order of the political community and society by quoting the Confucian maxim *xiushen qijia zhiguo pingtianxia*.<sup>11</sup> It is part and parcel of Singapore's well-known law and order strategy. One might find in Japan's 'benevolent paternalism' (Foote 1992) some features of an affection-based order with restraint on brute force, but in pre-Second World War Japan and colonial Korea it worked as an ideology and strategy for maximum delivery of politico-juridical power and therefore rule by law without restraint by rule of law (Lee 1999).

The relationship between relational power and disciplinary power in the context of rule by law is subtle. Relational power promotes order in society. The family and family-like relations are used to promote thrift, hard work, reticence and humility; in other words, discipline but not in the Foucauldian sense. But to the extent that relational power appeals to common symbols, it serves disciplinarization as conceived by Foucault, as the sharing of common symbols facilitates communication and the flow of information. On the other hand, disciplinary power, when it is appropriated by the state and thus turned into a subtype of administrative power, comes in conflict with relational power when the state interjects its gaze into uninstitutionalized interpersonal ties such as a parent-child relationship. A governmentalized state seeks to expand its control of information and to refine its storage by conducting censuses and surveys and by implementing systems of registration, auditing and licensing, which often has inimical consequences on practices based on informal networks and helps to curtail relational power. Relational power often resists encroachment by disciplinary power. When Mayfair Yang (1994) sensationalized *guanxi* as subversion of power, she found in *guanxi* a moment of subversion not only of formal bureaucratic power but also of

biopower spread through disciplinary techniques employed by the communist regime.

Much of what has been inferred from the relations between rule by law and the three kinds of power is relevant to the implications of power in its relation to the rule of law. The rule of law, in the sense of subjecting governmental action to legal rules, calls for additional considerations. It is an outcome of the struggle between different sets of politico-juridical power, as well as a framework for that struggle. The idea of rule of law presupposes a single origin of politico-juridical power – the people, who collectively constitute the sovereign. From this *power* of the sovereign derive the *powers* of the branches of government, which check each other.

The relationship between rule of law and disciplinary power is double-edged. Genealogically, disciplinary power and the rule of law have emerged alongside each other. According to Foucault, ‘the general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by ... the disciplines’, ‘the real, corporeal disciplines constituted the foundation of the formal, juridical liberties’, and ‘the “Enlightenment”, which discovered the liberties, also invented the disciplines’ (Foucault 1979, p. 222). It is through disciplinary normalization that the people, who are targets of power, are moulded into subjects, and the democratic control of the disciplinary mechanism by the collectivity of subjects creates the best condition for the anonymous working of power.

Disciplinary power contributes to the rule of law, as disciplinary techniques and mechanisms are used to check and oversee the working of the government and politics. In a disciplinary society, panoptic surveillance takes on multiple directions, and governmental action is not exempt from observation. The expansion of *savoir* on the part of civil society increases *pouvoir du peuple* against authoritarian rule and tightens popular surveillance over what Roh Moo-hyun described as ‘structural irregularities involving abuses of power’.

On the other hand, disciplinary power can disturb the rule of law, as disciplinary normalization entails discretionary exercises of power. Disciplinary power classifies individuals, and puts them in different places on a scale of treatment. Discretion and flexibility emerge through the interstices of the formalism that characterizes juridical liberties. In this sense, the disciplinary mechanism can be regarded as a ‘counter-law’ (Foucault 1979, p. 223).<sup>12</sup> This does not mean that the disciplinary mechanism is at loggerheads with the rule of law. Disciplinary normalization may occur while the rule of law is perfectly in place. It is, however, possible that disciplinary power combines with violence of the

state and jeopardizes the rule of law. Increased discretion in crime control, armed with scientific knowledge, has the danger of upsetting the principle of *nulla poena sine lege*.

What is the relationship between relational power and the rule of law? Like rule by law, the rule of law is aided by relational power inasmuch as solidarity based on common symbols and interpersonal commitment enhances respect for order. Relational power propels cooperative efforts, facilitates communication, and thus contributes to social integration, which constitutes a favourable condition for the rule of law. From Putnam (1993) to Fukuyama (1995), many social philosophers stress the importance of social capital in achieving economic prosperity and good society. Social capital accruing from interpersonal networks contributes to preventing malfeasance in business transactions, as is emphasized in Granovetter's (1985) theory of the embeddedness of economic action. Granovetter (1985, pp. 496–7) echoes Stewart Macaulay's (1963) pioneering view that business transactions are governed by various relational factors surrounding the parties. Empirical studies have been produced from similar viewpoints. The diamond trade in New York is a favourite example among those who emphasize the embeddedness of business transactions and the efficacy of social capital (Coleman 1988, pp. 98–9; Bernstein 1992). Scholars on China have enthusiastically embraced such a perspective and highlight the strengths of *guanxi* as a social mechanism that helps to promote trust and reduce transaction costs (Jones 1994; Chung and Hamilton 2001; Landa 2001). Lew Seok-Choon found a similar role from 'affective linkage groups' in Korea, which, according to him, not only help to reduce transaction costs in business relations but also provide social capital necessary for good government (Lew 2001; Lew and Chang 1998; Lew et al. 2002; 2003).

At this point, one may ask if we need not distinguish between different kinds of social-capital-producing organizations/networks by reference to their nature, namely whether they are voluntary 'civic' organizations or personal affective relationships. The question arises because the two types of organization are conflated when they are described as sources or loci of social capital, whereas Putnam had the former type of organization in mind when he emphasized the importance of social capital. Lew Seok-Choon responds to this question with his observation that voluntary civic organizations are not necessarily superior to family or personal ties in generating trust. He simultaneously rebuts the assumption that the two types of organization correspond respectively to two types of trust, trust in institutions and trust in people. Lew warns against associating each of the two types of trust with the universalistic West and the particularistic East respectively (Lew et al. 2002; 2003).<sup>13</sup> Indeed, what

matters is the guiding principles of the institutional field in which an organization or network is located rather than the type of organization or network. Organizations or networks have express or tacit rules that inform the behaviour and identity of their members or participants (Lin 2001, pp. 187–93). Those rules, which are a crystallization of relational power, serve the rule of law in proportion to the degree to which they conform to the formal legal rules.

However, on the whole, the relationship between the rule of law and relational power is negative, and the contradiction between relational power and the rule of law appears more prominent than the harmony between the two. At the conceptual level, the trust and normative commitment engendered by relational power is outside of the parameters of rule of law more than it is within. The personal networks and relational resources that help to secure compliance and prevent malfeasance are described as ‘extralegal’ (Bernstein 1992).<sup>14</sup> Scholars who positively appraise the role of *guanxi* networks describe the operation of *guanxi* in terms of ‘rule of relationships’ and contrast it with the rule of law, positing a conceptual opposition between the two (Jones 1994).<sup>15</sup> Characterizing various relational practices in Taiwan as a ‘marginalization of law’, Jane Winn (1994) refused to describe those practices as constituting any kind of law, even an alternative non-state form of law theorized in terms of legal pluralism.

At an empirical level, abundant literature shows how particularistic networks and relationships trump formal legal rules, which are believed to be essential for securing trust in a complex and differentiated society. This is the usual understanding that underlies today’s rule-of-law (RoL) campaigns. These second-order discourses are consistent with people’s first-order perceptions of *guanxi* in China, *yŏnjul* in Korea, *blat* in Russia, and *wasta* in Arabic cultures, perceptions which carry varying degrees of disapproval.<sup>16</sup> Relational power manifests itself in cronyism, favouritism or nepotism, which wears down the rule of law. The corruption scandals that Roh Moo-hyun brushed aside as devoid of power-driven conduct are illustrations of the corrosion of the rule of law by practices of corruption committed through informal nexuses of power, in which officeholders collude with people outside of the government linked to them through regional ties, alumni ties or other personal connections. Relational power, and for that matter social capital, are now mobilized against the trust, solidarity and order that they have contributed to strengthening, and help politico-juridical power to deviate from the legal framework in which it is supposed to operate.<sup>17</sup>

While corrupt practices involve collusions between politico-juridical power and relational power, laws designed to combat corruption are

spaces of contest between the two forms of power. The two types of power form different permutations in divergent practices of corruption and in legal rules targeting differing practices. This chapter now looks at a few characteristic features of the relationship between relational power and politico-juridical power in Korea's anti-corruption law.

Korean law punishes not only acts of profiteering by officials, such as bribery, but also private persons' use of relational power in mediating business interests and politico-juridical power in exchange for a material interest. The Act on Aggravated Punishment of Specific Crimes punishes the act of *alsŏn sujae* (brokerage in return for a material benefit, 斡旋收財) committed by a private middleman between a private person and a public official (art 3).<sup>18</sup> The Attorney-at-Law Act also makes it an offence for a private person to broker a favourable decision by a public official (art 111). Abuse of relational power in the market is treated similarly. The Act on Aggravated Punishment of Specific Economic Crimes punishes *alsŏn sujae* committed in connection with the service of a financial company employee (art 7).

The law against *alsŏn sujae* is peculiar in that it is the private middleman that is punished, and not for complicity with a public official receiving a bribe but for his or her own act of arranging to solicit a favourable decision by the official, regardless of whether or not the public official's decision is lawful. Perpetrators of *alsŏn sujae* have diverse backgrounds and exploit many kinds of relational resources. Some have institutionalized power, *kwollyŏk*, while others only have informal social influence. But the official position of the person is not essential. No matter what place they occupy in the social hierarchy, they evoke informal norms and stimulate a sense of obligation that arises in affective personal connections in order to justify and encourage the responsiveness of the official whose decision they seek to influence. Few examples are better than *alsŏn sujae* in illustrating relational power disturbing the formal system of politico-juridical power.

It is often difficult to tell an act of *alsŏn sujae* from an informal consultation based on friendship and personal trust, and to distinguish a material interest offered in exchange for brokerage from a gift as a token of friendship or courtesy. This blurry borderline between legal and illegal is indeed common to most forms of corruption including bribery. Scholars on *guanxi* are keen to distinguish between *guanxi* and bribery. Among the criteria of distinction are how embedded and long-term is the relationship and how instrumental is the motive (Smart 1993; Yang 1994, Chapter 5). But the social meaning of a relational practice depends on 'arbitrarily and delicately poised cultural conventions which ... vary according to context' (quoted in Smart 1993, p. 401). Courts are often



called upon to draw a line. In the Korean courts' jurisprudence, an important criterion is whether there was reciprocity between the favourable decision made and the material interest offered, but the courts have gradually expanded the breadth of bribery, up to the point of developing a 'comprehensive bribery' doctrine, which discovers a bribery even when there is no direct reciprocal nexus between the official's decision and the material interest. This doctrine was first developed and applied in the slush fund trials in 1996 where the ex-Presidents Chun Doo-hwan and Roh Tae-woo stood as defendants for their acts of receiving a total of 510 billion won (638 million US dollars) between them from major *chaebol* chief executives (Kim and Kim 1997, pp. 561–71). Yet the applicability of this doctrine depends on the range of power that the recipient of the alleged bribe possesses, which needs to be sufficiently broad to make a direct nexus between a specific decision and a material benefit irrelevant. There are a myriad of practices that are not 'power-driven' (*kwol-lyŏkhyŏng*) in the conventional sense and therefore defy the application of the doctrine.

Because of the subtle nuances of meaning projected onto relational practices, legal sanctions against bribery and illegal brokerage in Korea often generate controversy. While public resentment against high-level corruption runs high and investigations and criminal proceedings against high-profile offenders provide exciting spectacles for the public, those who are punished perceive themselves as unlucky and represent themselves as victims of political plots, which often wins them sympathy. Indeed, rules against relational practices of corruption tend to be instrumentally mobilized in political battles. But the fact that such rules can be used as effective weapons testifies to a public consensus that circumscribes relational power. The democratization of politico-judicial power and the spread of disciplinary power across the state and civil society generate pressure against the proliferation of relational power in public processes.

#### IV. CONCLUDING REMARKS

Roh Moo-hyun became President in 2003. Few people might have imagined that he would be subjected to criminal investigation for corruption some years later. In the spring of 2009, a year after he had left the Blue House, the prosecution launched a ruthless investigation against the former President. Roh was suspected, among others, of having received a million US dollars from a businessman known to have been his long-term friend. The prosecution sought to charge him with bribery



by invoking the comprehensive bribery doctrine. Three weeks after appearing in the prosecution office, Roh killed himself by throwing himself from a cliff, putting an end to the investigation. The public furor that subsequently erupted was not so much against the former President's alleged commission of a crime that was contrary to the image that he had nurtured in the minds of the people, as the prosecution's seemingly politically motivated exercise, or even abuse, of power. Nothing has been more dramatic an illustration of the ascendance of 'prosecutorial justice' than the Roh Moo-hyun investigation.

In post-authoritarian South Korea, continuing and widespread practices of corruption have come to be seen as the clearest symptom of the failure to achieve the rule of law and the most fatal impediment to achieving it (Mo 2009, p. vi). Yet the salience of corruption scandals is not unique to Korea. David Johnson (2004, pp. 48–9) gives a number of reasons why corruption has become a prominent problem across the world, among which are the development of the mass media and the increasingly aggressive culture of journalism. These combine with powerful technologies of communication and surveillance to reduce the scope of privacy. Johnson also points to the decline of ideology- and policy-orientated politics and concomitant ascent of personal character and morality as the most important factor in political selection. This partly explains the judicialization of politics, which is reinforced by increasingly robust rule-of-law campaigns. All of these are clearly noticeable in post-authoritarian South Korea. What might be unique in South Korea, or at least more conspicuous than other countries, is the spectacular empowerment of the procuracy. In Korea not only is corruption at its current level regarded as a threat to the rule of law, but corruption control is also suspected of being used as a pretext for authoritarian exercise of power by the prosecution service (Johnson 2004). The judicialization of politics strengthened by democratic competition between political groups and their recourse to law in restraining each other, ironically empowered the procuracy to an excessive level, putting 'prosecutorial justice' in the place of authoritarian rule (Cho 2002). Campaigners for reform of the procuracy say it is a requisite for the rule of law. These latest experiences demonstrate a new round of competition between, and changing combinations of, the three forms of power that we have discerned.

## NOTES

1. This is a revised version of the author's publication 'The Rule of Law and Forms of Power: Theorizing the Social Foundations of the Rule of Law in South Korea', *Korea*

*Journal*, 49 (4), 5–28 (2009). The author would like to thank Sangmee Bak, Chaihark Hahm, Jong-Ho Jeong, Jonathan Kang, Sung Ho Kim, Sug-In Kweon, Seok-Choon Lew, Jongryn Mo, Hui Gi Sim and Jane Kaufmann Winn for their advice, comments and help in various stages of developing this study. He would like to express his special gratitude to the late Professor Stephen Salzberg of the University of British Columbia, who chaired the panel in the 2002 Law and Society Association Annual Meeting where the earliest manuscript of this chapter was presented, and to Kun Yang of Hanyang University, the organizer of the panel.

2. Here the author translates *li* (禮) as ritual, following Chaihark Hahm (2009), who discovers a tradition of constitutionalism in Confucian government in traditional Korea which manifested itself by way of the supremacy of ritual as the single-most authoritative ground for both legitimating and checking monarchical power. The interpretation of Confucian political philosophy and its relationship with legalism introduced here can perhaps be challenged, but it is of secondary importance in this chapter as long as its main purpose is to construct ideal types.
3. According to Hahm (1986, p. 291), ‘affection includes not only such euphonic interpersonal emotions as love, loyalty, friendship, or intimacy, but also such “negative” ones as hate, anger, and even jealousy.’ ‘What is involved here is the entire spectrum of interpersonal emotions from the most negative and destructive to the most positive and constructive.’
4. *Qing* is loosely translated as ‘appeal to others’ feeling, emotions, and sense of humanity or common decency’ (Sin and Chu 1998, p. 152).
5. Citing Harrison White, Charles Tilly (1978, p. 62) distinguished between *categories* of people who are distinguished by the common characteristics recognized by both the members and non-members, such as all females, all Koreans, and all residents of Seoul, and *networks* of people ‘who are linked to each other, directly or indirectly, by a specific kind of interpersonal bond’. Fei Xiatong, the Chinese sociologist, typified Western society as category-centred and Chinese society as network-centred by using the metaphor ‘a haystack composed of bundles of straw’ for the former and ‘the concentric ripples that spread out when a pebble is thrown into a pond’ for the latter (Winn 1994, p. 199).
6. ‘Within an institutional field, actors recognize, demonstrate, and share rituals and behaviours, and subscribe to constraints and incentives as dictated by the social institutions ... . An institutional field may define a society. However, the field may transcend a society’s usual spatial boundary.’ (Lin 2001, p. 187)
7. Borrowing from White, Tilly (1978, p. 63) used the term *catnet* to stress the combination of category and network in human organizations.
8. While recognizing that Bourdieu equated capital with power, Alan Smart (1993, pp. 390–4) refuses to replace capital with power in theorizing *guanxi* because there is little commanding element in the type of capital mobilized in *guanxi*, namely social capital. But the power that obtains in *guanxi* – relational power – influences action more visibly than disciplinary power as conceived by Foucault, which is nonetheless defined as a form of power.
9. This connotation is best captured by the title of the book *Rule by Law* edited by Ginsburg and Moustafa (2008).
10. According to one journalist, *guanxi* helps explain ‘how a nation of one billion people coheres’ (King 1991, 64).
11. ‘*Xiushen* (修身) means to look after yourself, cultivate yourself, do everything to make yourself useful; *qijia* (齊家), to look after the family; *zhiguo* (治國), to look after your country; *pingtianxia* (平天下), all is peaceful under heaven’ (Zakaria 1994, pp. 113–14).
12. According to Foucault (1979, p. 223), ‘although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread

- panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law'.
13. See the comparison between Sweden, Denmark, Japan and Korea in Lew et al. (2002). See Jones (1994) for similar arguments.
  14. While Macaulay (1963) portrays such practices as 'non-contractual', Bernstein (1992) conceives them as 'contractual' though simultaneously as 'extralegal'.
  15. Dezalay and Garth (1997) apparently establishes an opposition between rule of law and rule of relationships in the title of their article, but they are more concerned to dismantle that opposition. They highlight the fact that the Americanization of legal practice, which is combined with the rule-of-law ideology, brings a new type of relational capital and refashioned rule of relationships.
  16. The author is grateful to the students of his course Law and Society in Asia at the University of Washington School of Law in the Winter Quarter of 2010–2011. The students of this diverse class supplied comparative knowledge of personal connections and relational practices in various cultures. Similar concepts in other cultures include *sociolismo* in Cuba and *jeitinho* in Brazil (Smith et al. 2011; citations of online sources omitted).
  17. Social capital as relational resources undermines social capital as trust. These two sides of social capital are often taken for two different kinds of social capital illuminated by different scholars, namely Bourdieu on the one hand and Coleman and Putnam on the other (Lin 2001, pp. 26–7). But the author proposes to view them as two sides of the same source of dynamics instead of making a categorical distinction between them.
  18. The provision reads, 'Any person who has received, requested or promised money, valuables or other benefits in nexus with arranging to solicit a favour with regard to a case or affair by a public official who has competence over the case or affair shall be punished by imprisonment for a maximum of five years or a fine of ten million won or less.' For the full texts of Korean statutes and regulations, see <http://www.law.go.kr>.

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### 3. Colonialism and patriarchy: where the Korean family-head (*hoju*) system had been located<sup>1</sup>

**Hyunah Yang**

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#### I. INTRODUCTION

In February 2005, after almost five years of scrutiny, the Korean Constitutional Court found that the central articles in the ‘Family-head and Family’ section of the Civil Act of Korea were incongruent with the Korean Constitution. According to the decision, this section was particularly incompatible with article (hereafter, art) 11, paragraph (hereafter, para) 1 of the Constitution on the basic rights of equality under the law, art 10 on the protection of human dignity and art 36, para 1 on the protection of human dignity and gender equality in the marriage and family life.<sup>2</sup> This decision was tantamount to a declaration that the family-head system per se was unconstitutional. Exactly one month later, the National Assembly passed an alternative Bill for the Civil Act that abolished the family-head system; this came into effect on 1 January 2008.<sup>3</sup>

Although the family-head system has now been removed from the law, this chapter will give a critical review of the system from the standpoints of sociology, legal history and feminist legal studies. The family-head system was a family institution stipulated in Books 4 and 5 of the Civil Act. The system regulated virtually every legal relation within a family by legally designating a ‘family head’ (戶主; *hoju*), usually an adult male, as well as the family members who would be represented by this family head. With this simple configuration, the institution exerted strong and complex effects on the family in Korea: it defined the boundary of the family and endowed adult males with a kind of natural right to make decisions for the family. By the same logic, this system also naturalised adult women’s inferior status as merely family members, without much decision-making capacity. Although the right of the family-head



was often conceived as symbolic rather than substantial, his status proved to be real enough in terms of the family register (戶籍; *hojök*), the identification system of the Korean people. The main function of the family register was for public verification of the identity of a person (Chang 1996). Since the family members were documented with titles according to their 'relations with *hoju*' – such as 'wife' (妻; *ch'ö*) for the family-head's wife, 'child' (子; *cha*) for the family head's child, and 'I' (本人; *ponin*) for the family-head himself – it was impossible to file a family register without accepting the family-head system. Thus, the system defined what a family was, rather than vice versa.<sup>4</sup> This systematic gender discrimination was represented in the central public registration system of the Korean people for nearly 100 years.

The system has grave significance from a societal angle but also from the historical aspect. As a legal code, it was imposed in conjunction with the family register in Korea during the Japanese colonial period (1910–45). Moreover, the family-head system exemplified how the colonial legacy could be transformed as the sacred site of 'tradition' in the context of postcolonial society. This claim to tradition became particularly tenacious in that the institution was indeed the vehicle to maintain the male-centric, patrilineal, son-preferred family and kinship system. Focusing on the family-head system, this chapter will trace how colonialism and patriarchy interacted with each other, and how postcolonial Korea took advantage of the dubious notion of this 'tradition' as the cloak of patriarchal family law.

In this context, it is not surprising to find that the social movement to reform this legal system continued for more than 50 years, from the early 1950s when the new Civil Act in Korea was legislated to 2005, when the system was indeed abolished. Such reform took such a long time because both abolitionists and preservationists of the system vehemently supported their cause. The abolition of the family head has been one of the most central and difficult agendas in the family law revision movement in Korea. In this respect, the abolition movement itself can be seen as a monument to legal feminism in Korea and law and social change, in which ordinary citizens participated.

Due to space limitations, this chapter will focus on the last phase of the abolition movement, specifically, a constitutional lawsuit raised against the system in early 2000. In order to appreciate the meaning of the abolition of the family-head system, the chapter also discusses its nature in terms of gender discrimination, as well as the historical development of the system in light of its colonial legacy. Although the



system has been expunged from the law, the law still carries important socio-historical traces of it, and it continues to influence Korean society.

## II. THE FAMILY-HEAD SYSTEM AS A SYSTEM OF GENDER DISCRIMINATION

The family-head system was a systemic allocation of the place of men and women in the family. This chapter examines the articles of the family-head system that discriminated against women vis-à-vis men's role in the family unit. These were also the articles under the Constitutional Court's review, discussed below. The issue is that these gender discriminatory articles were indeed the backbone of the system.

Article 778: A person who has succeeded to the family lineage or set up a branch family, or who has established a new family or has restored a family for any other reasons, shall become the head of a family.<sup>5</sup>

This article articulated the methods of and cases related to becoming a family-head. This stipulation conveyed a substantial message of the indispensability of the family-head in every family, which was why a discrete family register was used. Article 781, para 1 consisted of two parts: firstly, it institutionalised the patrilineal surname/origin of surname as the principle whereby a mother's surname was merely used out of choice for a child born out of the wedlock;<sup>6</sup> secondly, this article also made it mandatory for a child's identity to be registered in his or her father's family register when the father – either legal or *de facto* – was known. Only the latter part (italicised below) of the article was under the review. In this way, the family-head system treated motherhood and fatherhood in systematically discriminatory ways; see also art 826, para 3 below.

Article 781, para 1: A child shall assume its father's surname and origin of surname and *shall have its name entered in its father's family register*.

Article 826, para 3: The wife shall have her name entered in husband's family register.

Although art 826, para 3 looks very plain, it was regarded as a critical article supporting all of the apparatuses of the patriarchy through the institutionalisation of the patrilocal marriage, wherein a wife's familial identity belonged to the husband's family. In conjunction with this

article, according to art 778 above, the father (and husband) was usually the head of a family.

Seen in this way, it is clear that these articles were interdependent, allowing them to build the legal institution of the 'family'. Article 778 attained its full meaning in its interrelation with art 826, para 3, and the latter was most powerful in conjunction with art 781, para 1. With the orchestrated effects of these articles, the status of women in the family as wives, mothers, daughters and daughters-in-law was inferior and even supplementary to that of their male counterparts, husbands, fathers, sons and sons-in-law. Perhaps this gendered status would not have seemed very discriminatory in the 'normal' family, which was a married couple often in their first marriage with their own offspring, since the gender role was assumed and smoothly fulfilled. In this respect, the family-head system performed the function of 'normalising' the family by stabilising the marriage, gender roles and generational relations.

The discriminatory nature of the system, however, emerged when the marriage did not follow the norm, that is in cases of divorce, remarriage and so on. With the rapid increase in divorce and remarriage in Korean society and the breakdown of the 'normal family' fantasy in the 1990s,<sup>7</sup> the gap between law and social reality became clear. It was mainly divorced mothers with custody of their children that carried the burden of this divergence. The articles highlighted above were particularly disadvantageous to the women and children.

Since almost every child in Korea had his or her name registered on the father's family register, the parents' divorce was no reason for the child to be transferred from one family register to another under the previous family law. Children were unable to change family registers even in cases of parental divorce and maternal custody,<sup>8</sup> and it was impossible for a divorced mother to have her children's name in her own (or her natal family's register), even if she was the custodian of the children. In this way, the divorced mother's legal tie with her children was indirect, as it was always mediated by the divorced father. The father, however, did not have to worry about the status of his children as expressed in the family register, since the children continued to be the father's children, regardless of divorce or custodial status.

There was one possibility to transfer the family registration of children of divorced parents to the mother's register upon her remarriage. In this case, however, the children's registration was transferred into the register of the mother's new husband, not her own, as stipulated in art 784, para 1:

Article 784, para 1: If a wife has lineal descendants who are not her husband's blood relatives, she may, upon the consent of her husband, have their names entered in her husband's family register.

Paragraph 2: If, in the cases mentioned in para (1), the wife's lineal descendants are members of another family, their entry into her husband's register shall be subject to the consent of the head of such family.

When a child was transferred from his or her initial family register to the mother's new husband's register, the mother had to obtain the consent of both the current head of the child's family (likely the biological father) and the mother's current husband. Even if the child obtained the two types of consent, however, he or she still had the problem of an inconsistency in his or her surname. That is, children had to retain their birth names, since Korean law did not allow changes in surname in cases of parental divorce or even adoption.<sup>9</sup> In this way, the family-head system also meant legal discrimination against motherhood in favour of fatherhood. This is also apparent in the following articles:

Article 782, para 1: If a member of a family fathers a child out of wedlock, he may have his child's name entered in his family register.

Article 785: The head of a family may have the names of his own lineal ascendants or descendants who are not the head of another family register entered into his own family register.

Articles 782 and 785 indicated that a family-head, who was often a senior male in the family, did not need the consent of the child's current family head or mother for registration. This violated the right of the 'biological' mother of a child if she did not want to have her child's name in the father's family register, as well as the rights of stepmothers who did not want to have children born outside of marital relations included in their family's register. Thus, the system evidently had discriminatory effects related to women's sexuality.

Articles 782 and 785 show that the institution of the family-head, with its specific constellation of articles on fatherhood, provided men in Korea with the power to register their offspring born out of extramarital relations in the family register without including any information regarding their origin. In other words, a man's offspring from both inside and outside of the matrimonial relationship appeared virtually identical in the family document, but only if he wanted to put the offspring's name in his register. This would have given men more freedom to have extramarital sexual relationships than women. For women, it was very difficult to

include legitimate children from a previous marriage in their new husband's family register, let alone children born out of wedlock, as examined in relation to art 784. There was comparatively skewed treatment even between a father's illegitimate child and a mother's child from a previous marriage. The institutions of fatherhood, family name and family register were all included in the system.

The succession of the headship was another critical aspect of the survival of this institution, and this was also male-centred.

Article 984: With respect to succession to the family headship, persons become successors in the following order:

1. A male person who is a lineal descendant of the inheritee;
2. A female lineal descendant who is a member of the family of the inheritee;
3. A wife of the inheritee;
4. A female lineal ascendant who is a member of the family of the inheritee;
5. A wife of a lineal ascendant who is a member of the family of the inheritee.

According to this article, female descendants were given second priority in succession. While four of the five candidates were women, the second in priority had a status that was very far from that of the first, because there were several types of male successors who had absolute priority over females. The eldest son, second son and adopted or step-son were given priority over the older female biological descendants of the family head. Even a son born out of wedlock had a claim prior to the older daughters in the succession of the headship. The specification attached to women, that they must be a 'member of the family' of the family head was also significant, since women automatically changed to their husband's family register upon marriage. Thus, the headship that was rarely bestowed upon women was also temporary. As a result, sons were indispensable in every family register.

Examination of the system makes clear that it was not only about the family head per se, but also about the family institution, regulating every kind of family relation as well as the production of the genders. The family-head system was an eloquent way of defining women, men, mothers and father. Men and women were positioned in a binary code in the grammar of the family-head system. This marks the precise point where the Constitutional Court found that the system was incompatible with the Constitution.

### III. THE CONSTITUTIONAL DECISION ABOUT THE FAMILY-HEAD SYSTEM

In September 2000, 113 women's organisations founded an umbrella organisation called 'The Citizens' Alliance for the Abolishment of the Family-head (*hoju*) System' ('the Alliance'). With the support of the Alliance and Lawyers for a Democratic Society, several appeals to courts to scrutinise the constitutionality of the pertinent articles in the family-head system in the Civil Act were raised by citizens. Two local courts in Seoul accepted these in March 2001 and forwarded the cases to the Constitutional Court of Korea. In February 2005, the Constitutional Court made a final verdict.

An overview of the litigation focusing on the appeals is illuminating. One of the appeals accepted was raised by a married woman who did not want to have a family-head in her and her husband's register. Since the status of the family-head has to be bestowed when the couple files its registration of marriage, as stipulated in art 778, these individuals could not register their marriage without accepting a family-head. The responsible family register office (*Kangseo* district office in Seoul) rejected the demand to have no family head, based upon Civil Act art 778. The woman did not accept the office's decision and filed an appeal to ask if this article was congruent with the Korean Constitution.

A local court in Seoul (the Northern District) examined the appeal and held that the pertinent article needed to be assessed in terms of its compatibility with the Constitution. Although the claimant also appealed for deliberation of the unconstitutionality of art 826, para 3 (main part), in relation to this article the court held that 'the unconstitutionality of art 826, para 3 is irrelevant to the pending case about the indispensability of a family-head, even if the article would be unconstitutional'.<sup>10</sup> The Constitutional Court, however, included this article in the scope of the constitutional review.

Another accepted appeal was raised by a divorced woman who was the mother of a five-year-old child. She was the main caretaker of the child, but when she requested the transfer of the child's name to her own family register from that of the child's father, the family register office (*Eun-pyong* district office) did not accept the demand on the ground of Civil Act art 781, para 1, discussed above.

The local court in Seoul (Western District) accepted this appeal by holding that the latter part of this article had the potential to violate the Constitution, particularly art 11, para 1 and art 36, para 1 – the articles protecting the fundamental rights of equality between men and women.<sup>11</sup>

The latter part of the article, in which it was made mandatory for a child to be listed on the father's register, could violate the fundamental rights of the mother and child, the real living family unit. The court also held that the former part of the article concerning the child's surname and the origin of surname was not relevant to this case regarding the family register.

Accordingly, the Constitutional Court reviewed the constitutionality of the three articles: art 778; art 781, para 1 (the latter part of the first sentence); and art 826, para 3 (main part). The majority opinion of six justices held these three articles were unconstitutional and incompatible with the Constitution.<sup>12</sup> The reasoning was mainly based upon arts 10 and 36, para 1 of the Constitution, which protect human dignity and gender equality in marriage and family life.<sup>13</sup> As discussed above, the articles under the review treated men and women in systematically discriminatory ways, without providing freedom of choice, as the system was built upon the assumption of the succession of the headship via the eldest sons. These apparatuses became more problematic in the 1990s than they had been before; at this time, the realities of the family were changing dramatically, as demonstrated in the increasing divorce, remarriage and single-person unit rates, as well as the decreasing numbers of children and population growth in general. The family-head system had diverged from the reality of family life and had ultimately become obsolete.

In another vein, clarification of the relationship between art 9 and art 36, para 1 of the Constitution was also a central task in this deliberation.<sup>14</sup> This was because the family-head system had long been affirmed on the ground of 'tradition', 'beautiful mores' and 'good custom', as discussed below. As stipulated in art 9, the state carries the duty to 'develop cultural heritage and national culture'. For preservationists of the system, this article was provided as the grounds of the constitutionality of the system. However, according to the majority opinion, the 'tradition' supported in the Constitution should be understood not so much in terms of a cultural essence as a time-bound concept. The Court made it clear that the tradition protected by the state should also be compatible with the Constitution. Thus, in the realm of family, tradition or national culture should not breach the dignity of the individual or gender equality. Accordingly, if a certain tradition contravenes such rights, the court found, it cannot be justified on the ground of art 9 (Yune 2005).

Although this reasoning is based upon the notion of fundamental rights that every Korean should enjoy, with which the author agrees, there are some unclear aspects in this decision. In the reasoning, the question of

whether the family-head system is indeed tradition in Korea was not really delineated. Is the family-head system incompatible with the Constitution mainly because of its gender discrimination, even though it is an age-old tradition of Korea? Or is it incongruent with the Constitution because of its contravention of basic rights while at the same time being far from authentic tradition? Perhaps the Constitutional Court's final holding about the constitutionality of the system would not be bound by these questions because it was already too evident that the system was discriminatory. For the articulation of the genealogy and nature of this legal system that lasted almost 100 years on the Korean Peninsula, however, the question of 'tradition' is critical. Both for those who believed in the family-head system as an age-old tradition and those who saw the system as a colonial legacy, the question of 'tradition' has been a black box in the 50-year history of the family law revision. The Constitutional Court kept silent on the controversy of the colonial aspect of the system, and did not open the black box. In this regard, the Court has lost a very valuable opportunity to clarify and uncover the colonial and postcolonial legacy left in Korean law.

#### IV. DUBIOUS 'TRADITION' AND THE COLONIAL STAMP

##### 1. The Patriarchal Imagination in the Glorification of 'Tradition'

After the family-head system was legislated in Korean family law in 1957, the system has incessantly been criticised for its patriarchy and the control of the people. Throughout the 1960s, 1970s and 1980s, progressive scholars of family law, women lawyers such as Lee Tae-young and feminist activists put enormous energy into the abolition of the system. Nevertheless, the family-head system was a vehemently defended institution, and remained legal until 2005 (Lee 1992; Kim 1994). What does this vehement resistance against the revision of the law that often fuelled intense sentiments represent?

The Confucians (儒林; *Yurim*) in Korea were the main group against the abolition of the family-head system, although they did not otherwise deal with socially salient issues. Under the name of 'tradition,' they defended this system in terms of 'beautiful mores and good custom' (美風良俗; *mip'ungyangsok*) for decades. 'Tradition' indeed represented the central concept, spirit and jurisprudence of the conservation of the family law throughout the history of modern Korean family law. In comparison to their loud voice about the importance of the tradition,

however, the reasons why and by which criteria a specific institution such as the family-head system could be regarded as a contemporary Korean tradition was only barely explained and documented. Moreover, why a 'tradition' should be maintained in contemporary family law at all remained unexplained, even when an institution was proven to represent tradition as such.

Tradition as the doctrine of Korean family law can be traced back to the legislative stage of the postcolonial state in the 1940s and 1950s. The first Chief Justice of the Supreme Court in Korea, Kim Byung-Ro, was in charge of drafting the new legal system. The Chief Justice purported that the doctrine of tradition was the central philosophy of Korean family law. The narratives that follow reveal his beliefs, as well as the hegemony of the Legislature at that time, which accepted this doctrine. In June 1957, the Chief Justice as the Chair of the Law Compilation Committee (LCC) presented himself at the National Assembly to explain his own drafting of a governmental bill of the Civil Act.

It was very difficult to draft the bill of Korean family law. This was because we should not adopt the standards of foreign law in family law. Family law has to be based only on one's own history and cultural tradition. (National Assembly Records [NAR] 1957, 26–30:7, the author's own translation)

Neither why 'the family law has to be based on one's own history and cultural tradition', nor the rationale for who could determine the correct tradition, were explained in the speech. Instead, belief in the superiority of Korean tradition and culture was repeatedly stressed. Under the sign of 'nation', the male-centred notion of family was shamelessly affirmed. Chair Kim continued:

The family (*jip*) is the one which succeeds the root of our nation. The Korean family institution succeeds through patrilineage, which precisely corresponds to human physiology ... since the kernel of the human body comes from the father. (National Assembly Records, NAR 1957, 26–30:11, the author's own translation).

Following this logic, the family is the root of the nation, as the father's seed is the root of the family. The most interesting feature of this patriarchal discourse seems to lie in an ideology in which patriarchy did not reveal itself. Here, patriarchy is silently legitimised, naturalised and hidden under the names of 'the nation', 'tradition' and 'Korean-ness'. As the belief in tradition was curiously twisted in the terrain of patriarchal family, we could call this a 'nationalist patriarchy' or 'patriarchal nationalism' (Yang 2000). The Constitutional lawsuit discussed above



revealed that multilayered patriarchal apparatuses had been vital in family law at least until 2005: it was patrilineage constituted by the system of surname/origin of the surname and the family register (art 781), patrilocal marriage naturalised by the married woman's entry into the husband's family register (art 826, para 3) and patriarchy in the sense of the male family headship in every family (especially arts 778 and 984). According to this 'national' logic, however, the category of gender in affirming the patriarchal family was securely blocked from view. Thus, specific gender allocation in patrilineage, for the lineage and by the lineage was not even acknowledged in the discourse. Claims about gender equality tended therefore to be posited as antinational in this discursive terrain, so that the Korean family came to reside in the space of a trans-historical 'culture'.

## 2. The Silenced Legacy of Colonialism

As the patriarchal family was affirmed as a tradition of the nation, the specific historical deployment of the institution was invisible, especially in terms of colonialism. The family-head system was transplanted to Korea during the colonial era; it originated in Japan in the old Japanese Civil Act and family registration codes (Chung 1967; Chung 1978; Park 1992). The institutions of the family head, succession of family headship (家督相續; *kadoksangsok*) and family register were imposed by the Japanese colonial Government based upon that country's own family institution, the *Ie* (家) institution. As *Ie* was not just a patriarchal family, but extended to specific constellations of the relationships of the state, family and the people, it also had clear political meanings. In the Meiji Imperial state, which itself was modelled as a family form, the *Ie* family could be said to be a living cell of the state, while the state was an extended form of the *Ie*. The family-head in this model existed as a link between the Emperor and family members (the people), analogous to the relations between parents and their children (Watanabe 1963; Smith 1996). In this light, the imposition of the family system in Korea, especially the family register and family-head systems, were politically indispensable for the integration of the Korean Peninsula and its people into Imperial Japan.

If this is so clear, why and how did the Confucians and many Koreans think that the family-head system was 'traditional'? It was ironic that those who had a strong belief in the national authenticity of the system did not identify its colonial traces. This is very important to note. The family-head system remained in the Korean Civil Act after decolonisation, without much serious discussion. Instead of determining how to

deconstruct colonial law and reconstruct modern law by accommodating new social relations, the dogma of 'tradition' mostly prevailed in the Legislature. The fact that the system remained in the Korean family law from 1957 until 2007 can be taken as an excellent example of postcoloniality – a prolonged and reconstructed instance of coloniality in the law and society.

The irony of the colonial influences seems to have been embedded in the colonial policy on family law itself. Article 11 of the Civil Ordinance, tantamount to the Civil Act in colonial Korea, stipulated the central principle of 'following the Korean custom' in the field of relatives and succession. 'Custom' in Korea in fact became an area in which the colonial government deeply intervened. For the purpose of knowing and ruling Koreans, Japanese legal scholars and pertinent committees sought to investigate, interpret and determine Korean family customs. However, the concepts and frameworks for the investigation and decisions to do with these customs were embedded in the Japanese Civil Act and customs. The 'customs' of Korea were not only studied, but also constructed by the framework of Japanese law (refer to Chung 1992; Yang 2011). As the colonial bureaucrats made decisions regarding Korean customs, these were incessantly rewritten and re-established during the colonial rule.

In this respect, art 11 of the Civil Ordinance applied a curious principle on Korean soil that seemed to respect the autonomy of the Korean culture and family life, and yet it was the Japanese officials and scholars who generated the contents of such 'customs' (Chung 1967; Yi 1977; Kim 1996). In the process of definition of these 'customs', political arbitrariness and Japan-centredness were profound and serious. Nevertheless, phrases such as 'it is the Korean custom' became a cliché in the language of the court and administrative decisions regarding the family, even in the decolonised Korea of the 1950s (Chung 1967; Yang 2011).

When there were no appropriate 'customs' in Korea, however, specific articles in the old Japanese Civil Act were applied, and the scope of the application expanded throughout colonial rule (1910–45). The interaction between the applied Japanese codes and Korean customs was another aspect of these customs' coloniality. The family-head system in Korea was an instance of this. As 'custom' was the central principle of colonial family law, the Korean family institution – including family headship – was studied in the process of legal imposition. In this way, Korean family-headship was interpreted from the view of, tailored by and even mutated with, Japanese family headship. The Korean family was regarded as an '*Ie*', and the male heir for ancestor veneration was interpreted as 'the family head' as documented in the family register. In this regard, the

author interprets the family-head as a form of 'mutation' of the two different headships of the family, between Korean heirship and Japanese family headship (Yang 1999). Nevertheless, the Japanese *Ie* model was at the centre and incorporated the Korean kin and relative system, not vice versa. As a result, Korean family headship became even more rigidly patrilineal after the colonial experience, as the 'customs' of the Chosun dynasty were renewed in the colonial state policy, and the male-centred, noble-class customs were universalised during the investigation of the colonial custom. It is interesting to see a similar report made by postcolonial theorists who uncovered the process of the legalisation of 'customs' in India during the English colonial period, and saw how the customs became more rigid and even more feudalistic when they were translated into the system of 'modern' law than those practices which remained informal and local (Spivak 1988; Mani 1989).

As every small household became a pseudo-lineage to be continued, having a son was indispensable to the status of being 'a family' in Korea. In which space and time did the Korean family reside? While the family-head system in Korea was defended as 'tradition', the colonialism embedded in the system was able to silently continue. In order to save the dignity of national patriarchal subjectivity, the traditionalists did not face the issue of colonialism. This suggests that the colonial influences on 'tradition' were not only from the outside, through colonial imposition, but also from the inside, in terms of Korean invention.

## V. CONCLUDING REMARKS

When the family-head system was in effect, all Koreans had to submit the family register and/or resident's register to secure a job, enter school, receive social welfare benefits or engage in any kind of administrative or legal action. Moreover, all personal information about births, deaths, marriage, divorce and adoption regarding all the family members was integrated in the family register, which was again interrelated with other identification systems.<sup>15</sup> The multiple identification system in Korea was connected with the issue of 'citizenship' in society. The family-head system and the state's interest in the system were closely allied. The family registration system, which was built upon the structure of the family-head system, fulfilled the administrative function of monitoring all people in the nation. In this regard, the abolition movement which lasted more than 50 years was tantamount to the struggle not only for gender equality, but also for citizenship. For women, who were systematically discriminated against, the issue of citizenship was an even greater

dilemma. Since only few women in Korea either represented the family as a family-head or moved beyond the family boundary in order to set up or lead a family, they could not but be posited as 'familial beings'. This explains why it is nearly impossible to think about women in Korea without thinking specifically about specific family relations.

When it was argued that the family-head system should be abolished, this raised the question: what exactly needed to be abolished and why? In order to answer this question, this chapter tried to articulate the nature of the family-head system in society and history – more specifically within the contexts of colonialism, the systematic discrimination against women and citizenship. Even though the Constitutional Court of Korea held that arts 778, 781, para 1 and art 826, para 3 of the Civil Act were unconstitutional, this ruling was still too narrow to capture fully the nature of the system in law and history. The court was silent on the aspect of colonality of the system, whereas the systematic gender discrimination was well articulated. In addition to constitutional grounds such as human dignity, the pursuit of happiness, freedom of family and marital life and gender equality, the historicity of the law should also have been delineated in the reasoning. If such a step were taken, Koreans would see how the conditions of and constraints on the basic rights of gender equality and human dignity have also been located in historical conditions.

As a conclusion, let me make some remarks on how to appreciate the meanings of the abolition of the family-head system. First, as a legal structure, the family-head system is an excellent instance of how colonial legacy has been intertwined with patriarchy, and vice versa. The system had surprising resilience which suited a male-centred society and a postcolonial state where colonial legal legacies were not elucidated. The nature of the family-head system suggests that the task of legal feminism in Korea could be different from that in the West. While gender discrimination and gender construction have been the main agendas in the latter, the historical conditions firstly need to be elucidated in the former in order to uncover the male-centred positive law and customary law that underpin the Korean system of law. In particular, the legacy of colonialism when 'modern law' was first introduced or imposed represents a critical bottleneck for legal feminism, and a postcolonial feminist jurisprudential viewpoint needs to emerge.

Secondly, the family-head system is a unique family institution which exemplifies how the colonial legacy was covered up by the belief in 'tradition'. This was even so when the belief was deeply imbued with a nationalism that denied any colonial distortion of the 'pure tradition'. Tradition in the family-head system was invented after colonialism. Once

we identify this perspective of the construction of tradition, we can also see tradition as something that can be reinvented in a manner that fits the Constitution as well as people's current need. In this way, the tradition regarding surname and place of origin, ancestor veneration, ancestor commemoration groups and the place of women in society, for instance, can be created from the standards of the contemporary needs and feminist perspectives.

What needs to be abolished in the expurgation of the family-head system? This was a colonial legacy, representing a male-centred and outdated 'normal' family model, as well as the state's interest in maintaining this convenient system of identification. Although the problems of the family-head system have been voiced mainly by divorced women, mothers and their children, these voices resonate with a much larger historical and structural context in society. The family-head system in Korea reminds us of how the law can be a miniature of the socio-historical landscape, and thus how legal change can be a cornerstone of a new society.

## NOTES

1. This chapter is a revised version of the article which appeared in the *Journal of Korean Law*, entitled 'Vision of Postcolonial Feminist Jurisprudence in Korea: Seen From the "Family-head System"' in *Family Law*, vol.5, 2 (2006).
2. Constitutional Court, 2001 *hŏn'ga* 9–10, 2001 *hŏn'ga* 11–15, 2004 *hŏn'ga* 5, delivered on 3 February 2005.
3. The new bill for Books 4 and 5 came into effect on 31 March 2005. However, the part of the bill relating to the family-head system, surname and adoption (親養子; *ch'inyangcha*) entered into force on 1 January 2008.
4. Along with the two articles above, stipulations to be revised are proposed as follows: Civil Code Book IV Relatives art 778 (Definition of Head of Family); art 779 (Scope of Family Members); art 780 (Replacement of Head of Family and Members of Family); art 781 (Entry into Family Register and Surname and origin of Surname, of Child); art 782 (Entry into Family Register for Child Born out of Wedlock); art 783 (Entry into Family Register for Adopted Child and his Spouse etc.); art 784 (Entry into Family Register for Wife's Lineal Descendents who are not her Husband's Blood Relatives); art 785 (Entry into Family Register for Lineal Blood Relatives of Family Head); art 786 (Returning Family Register of Adopted Child and his Spouse, etc. to their Original Family Register); art 787 (Returning in Family of Wife, etc. and establishment of new Family); art 788 (Setting up Branch Family); art 789 (Legal Branch Family); art 791 (Head of Branch Family and its Family Members), art 793 (Adoption of Family Head and Extinguishment of Family); art 794 (Marriage of Female Family Head and Extinguishment of Family); art 795 (Family Head Whose Name entered into Another Family Register and his Family Members); art 796 (Special Property Belonging to Members of Family); art 826 (Duties of Husband and Wife); art 980 (Cause of Succession of Headship of Family); art 981 (Place Where Succession to Family Headship is to be Opened); art 982 (Action for Recovery of

Succession to Family Headship); art 984 (Order of Succession to Family Headship; art 985 (Same); art 986 (Same); art 987 (Real Mother who has no Right of Succession to Family Headship); art 989 (Order of Succession of Child Born out of Wedlock); art 991 (Waive of Right of Succession to Family Headship); art 992 (Reason and Cause by which Successor become Disqualified); art 993 (Female Head of Family and her Successor); art 994 (Litigation in Respect of Succession and Court's Disposition for Management of Inheritance); Section 3 Effect of Succession to Family Headship.

5. The Civil Code and Constitution were translated into English by the Korea Legislation Research Institute.
6. The current code expanded the chances for children to be given their mother's surname. A newly married couple can make this choice when the couple registers the marriage. Otherwise, the paternal surname system is assumed. Other than this 'choice' upon marriage, the maternal surname can be carried by the children when the father is a foreigner or unknown. Thus, the article regarding the children's surname in the Civil Code remains incongruent with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force on 26 January 1985 in South Korea). Article 16, para 1(g) stipulates the state's duty to take the appropriate measures to guarantee 'the same personal rights as husband and wife, including the right to choose a family name, a profession and occupation'.
7. The number of divorces in Korea increased rapidly during the 1990s: 45,694 couples divorced while 362,673 couples married in 1990; 68,279 couples divorced while 398,484 couples married in 1995; and there were 119,982 divorces and 333,975 marriages in 2000. During the 1990s, the divorce rate increased by 145 per cent. In 2000 alone, every day 329 couples divorced while 915 couples married. On average, one of three marriages will end in divorce. There were 98,498 children of divorced parents in 1998. Moreover, the number of single-parent family households increased by 148 per cent (from 50,000 to 124,000 households) between 1990 and 1995. An analysis of 200 divorce cases at the family court in Seoul in 1999 illustrates that there were 132 cases (66 per cent) in which mother became the main caretaker of the children, while only 64 fathers (34 per cent) gained custody (refer to Kim 2000: 46). The rate and number of remarriages also increased throughout 1990: there were 18,850 remarriages in 1990; 22,779 in 1995; and 33,607 in 1999. During the 1990s, the number of remarriages increased by 68 per cent. Both women's and men's remarriage has increased steadily (refer to the Korean Statistics Information System, <http://kostat.go.kr/portal/korea>)
8. After the family-head system was abolished, a new registration system was introduced on 1 January 2008. Since the new system is not documented by the family unit but by the individual, now a child does not 'belong to' parental registration. Every individual is registered in his or her own document.
9. In the current civil code, it is permitted to change the minor's surname with the permission of the Court and the new adoption system named as *ch'in yangja* has been introduced, where the surname of the adopted child is changed.
10. The Local Court in Seoul (Northern District), 2000 *hopa* 1673.
11. The Local Court in Seoul (Western District), 2000 *hopa* 988.
12. Constitutional Court, 2001 *hŏn'ga* 9–10, 2001 *hŏn'ga* 11–15, 2004 *hŏn'ga* 5, delivered on 3 February 2005.
13. Constitution art 10: All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

Constitution art 36 para 1: Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.

14. Constitution art 9: The State shall strive to sustain and develop the cultural heritage and to enhance national culture.
15. The multiple identification systems in Korea have increasingly been criticised from the perspective of human rights in Korea. The state's possession of too much information about the people is now regarded as the legacy of the Cold War (division of the nation) and colonialism. Refer to Kim (1999).

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Constitutional Court, 2001 *hōn'ga* 9–10, 2001 *hōn'ga* 11–15, 2004 *hōn'ga* 5, delivered on 3 February 2005 (regarding the constitutionality of the family-head system).



## PART II

### Theory and methodological questions



## 4. Korean perception(s) of *pyungdeung* (equality)<sup>1</sup>

Ilhyung Lee

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A frequent refrain heard in the Korean self-description is that it is a society with a 5,000 year history.<sup>2</sup> Yet the country has been a constitutional democracy for just over 20 years, when the momentous reforms in 1987 overturned decades of tumultuous authoritarian rule. It is against this backdrop that one commentator (and former member of the Korean National Assembly) noted at the turn of the twenty-first century that terms like ‘freedom’ and ‘equality’ are ‘unfamiliar’ to average Koreans.<sup>3</sup> Such an observation presumes that these terms have commonly understood meanings in other societies, and also might encourage a comparative study. This chapter attempts to shed light on the Korean setting, with an examination of how Koreans perceive *equality* and *equality rights*.

Two competing forces shape Korean perceptions of individual legal rights, and indeed virtually every aspect of the contemporary Korean scene. First, Korea is a national society with a long history and deeply-rooted norms that continue to shape contemporary practices. The legally segregated classes of the dynasty centuries might explain the acute status consciousness prevalent in current society. The second force is almost diametrically opposite: in recent years, Korea has undergone a radical social transformation, leading to changes in attitudes which might fuel an angry demand for social equality, and a willingness to assert legal rights in court, over the traditional preference for harmonious conciliation. All of these realities impact on the contemporary views towards equality within Korea.

The discussion in this chapter begins with a brief history of Korea’s constitutional development and description of the jurisdiction’s approach to equal protection analysis. This legal summary is followed by an ethnographic discussion, elaborating on Korean societal and cultural norms that might shape perceptions of equality and the resolution of disputes. As discussed below, the sensitive subject of equality has risen in

a number of situations in contemporary Korean society, forcing policy-makers to consider public attitudes (occasionally bitter), the legal framework, and traditional norms.

With this background, the chapter explores how Koreans perceive equality and equal protection under law, and reports the results of a survey designed to ascertain Korean participants' reactions to, and perceptions of, discriminatory activity, illegality, and what action they would take in response. The survey results reflect participants' keen awareness of equality and discriminatory treatment, and an aggressive willingness to seek a remedy.

## I. EQUALITY AT LAW

After years of authoritarian rule, public outrage and protest led to the ousting of the Chun Doo-hwan regime, and ushered in profound democratization reforms. Commentators have described 1987 as the 'year of the constitutional miracle' (Kim and Lee 1992, p. 322). A constitutional text was not new to Korean society, of course, having adopted its original Constitution in 1948 after liberation from Japanese rule. Yet the document was revised periodically to maintain and continue the power of the chief executive, beginning with Rhee Syngmahn, followed by military generals. The suppression of dissent was brutal and often violent, and the constitutional provision of civil liberties meant little.

Reforms in the post-Chun era included the implementation of the Constitutional Court, modelled on the German Federal Constitutional Court, and the final arbiter of questions relating to constitutional law. With the memory of authoritarian rule still fresh, the Constitutional Court regards itself as having a mandate to check executive power.<sup>4</sup> Court observers note that the relatively new tribunal has taken on an active role in Korean politics and the legal process.<sup>5</sup> Indeed, the Constitutional Court took centre stage in 2004 when it decided the fate of President Roh Moo-hyun, in the first ever impeachment of a Korean president.<sup>6</sup>

It is in this setting, a jurisdiction with a relatively new constitutional democracy and an increasingly visible judiciary, that the notion of equal protection is examined. Article 11(1) of the Constitution provides: 'All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status'.<sup>7</sup> Comparativists will note that the Korean article provides for legal equality and proscribes discriminatory action more affirmatively and positively than does the Fourteenth Amendment of the

US counterpart ('No State shall ... deny to any person within its jurisdiction the equal protection of the laws').<sup>8</sup> The Korean version also explicitly lists 'suspect classes' (in the parlance of US constitutional commentary), whereas equivalent classifications on the US side must be uncovered from the case law.

The positivist phrasing and explicit enumeration of prohibited classifications in the Constitution aside, equal protection jurisprudence in Korea (indeed constitutional law generally) is far from its US counterpart version in development or sophistication. The case law is limited, and those versed in US constitutional precepts will not easily find equivalents in the Korean model. An example relates to the standard of review to be applied for particular constitutional claims. In 1999, the Constitutional Court specifically declared that one of two standards of review is to be applied, depending on the nature of the case.<sup>9</sup> The 'reasonable test'<sup>10</sup> would be applied in a large number of cases, but the more heightened 'balancing test'<sup>11</sup> would be applied in cases that allege violations of fundamental rights provided for in the Constitution, or discrimination based on grounds explicitly stated in the Constitution. Yet the Constitutional Court has not applied the balancing test evenly, leading to inconsistent results. As one commentator notes, it is not always clear what standard the Court is applying or why it is doing so (Ahn 1997, p. 102).

As with the Fourteenth Amendment, Korea's art 11(1) applies only to governmental, not private, action.<sup>12</sup> Thus, the guarantee of equality and the prohibition of discrimination explicitly stated in the Constitution do not apply to private actors, unless a specific statute so provides. In this regard, the leading anti-discrimination law in Korea appears to be the National Human Rights Commission Act 2001.<sup>13</sup> The Act covers both governmental and private actors.<sup>14</sup> Its purpose is to 'contribute to the realization of the human dignity and worth and ... to ensure the protection of the inviolable and fundamental human rights of all individuals.'<sup>15</sup> The law establishes the National Human Rights Commission (Commission), a 'quasi-judicial'<sup>16</sup> entity that has authority to address alleged incidents of discrimination. Citizens or foreigners residing in Korea alleging discrimination may file a petition to the Commission.<sup>17</sup> Under the statute, discriminatory action is generally described as any act 'committed without reasonable cause' based on a lengthy list of classifications, including: gender, religion, social status (repeating the proscribed classifications in art 11 of the Constitution); regional origin (of interest, given the intense regional factionalism in Korea); and race, national origin, and ethnic origin (akin to suspect classes in the US which gives rise to the highest level of scrutiny).<sup>18</sup>

When a petition alleging discrimination is filed, the Commission has the authority to conduct a wide range of activities, but most chiefly, investigation of alleged discrimination, recommendations to respondent parties, and conciliation services.<sup>19</sup> Importantly, the Commission does *not* have the authority to issue a decision or judgment binding on the parties. An unsatisfied petitioner may bring an action in court, and the Act allows the Commission to submit ‘opinions on *de facto* and *de jure* matters’ at the court’s request.<sup>20</sup> It is not clear what effect the Commission’s submissions have in a court action.

Although the Commission has reported significant activity in recent years, there is still some doubt in the public mind as to whether the Act or the Commission can, in reality, facilitate the lofty goal of achieving equality rights.<sup>21</sup> Nor does the law specifically permit a private cause of action for alleged discriminatory activity. Practitioners and commentators advise that, in practice, an action advancing a discrimination claim in a court of law must be brought under a provision of the civil code relating to tort actions, not an anti-discrimination law. Section 750 of the Civil Act (1958) provides: ‘Any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom.’<sup>22</sup> Thus, in the judicial arena, a discrimination claim must be presented under this framework.<sup>23</sup>

The above discussion provides an introductory description of the legal framework of equality rights in the Korean jurisdiction, namely: a constitutional equal protection clause; the jurisdiction’s most comprehensive anti-discrimination law that has broad scope, but that contemplates no binding result; and the practical particularities of a discrimination claim in a court of law. Yet understanding the notion of legal equality in the Korean setting requires more than reiteration of the legal text and practice. Given that notions of equality (along with those of ‘fairness,’ ‘justice,’ and ‘due process’) might be a matter of societal construction that impacts on legal conclusions, the next part of this chapter discusses relevant cultural norms that may shape the Korean perception.

## II. THE SOCIETAL CULTURE

Although the basic meaning of human equality may be universal, perceptions as to its implementation may differ from society to society. For the Korean setting, the discussion that follows is in two parts. The first part describes the deeply-rooted Confucian norms and hierarchical society seen in the dynasty era; Confucian attitudes arguably still have



influence in the contemporary scene. This iteration also notes, however, that the trend towards democratization has made equality a thorny subject, as seen in occasional media reports. The second part identifies Korean cultural norms and attitudes as presented in social science empirical research, giving Korea observers more concrete measures by which to assess the societal mindset.

### A. The Impact of Confucian Culture on Contemporary Korea

Any appreciation of the societal culture in Korea inevitably requires a return to a time during the country's 5,000 year history when deeply-rooted traditions were planted. An examination of Korea during the Chosŏn dynasty (1392–1910) reveals a pervasive presence of Confucian ideology, and as a result, a truly unequal society. An integral part of Confucianism<sup>24</sup> is that it provides for a 'means of ordering society' (Lett 1998, p. 14). Confucianism, or perhaps more aptly 'neo-Confucianism'<sup>25</sup> (a brand of Confucianism adapted by the founders of the Chosŏn dynasty), 'served as a blueprint for ordering and integrating Korea's political and social life' (Lett 1998, p. 13). When this blueprint was followed closely (at least in the early centuries of the dynasty), the Confucian tradition demanded hierarchy and adherence to respective roles in all aspects of human relations.<sup>26</sup> Within the hierarchical society, social status was 'rigid and dominant' (Yoon 1994, p. 19) and legally defined. Beneath the king and the royal family, Korean society was formalized and stratified into discrete classes, with the *yangban*, representing the ruling class and the societal elite at the very top, followed by, in descending order, *chungin* (literally, 'middle people'), *sangin* (the commoner class), and *ch'ŏnmin* (literally, the 'low-born' or 'inferior people').<sup>27</sup> 'Membership in all these status groups was ascribed by birth rather than acquired by achievement, and the law as well as social custom guarded against infringement of social boundaries' (Deuchler 1992, p. 13). Thus, ancestry and birth to a particular class determined one's social status, role in society, and all aspects of everyday life.<sup>28</sup>

Most relevant to the discussion herein is to what extent the Confucian norms, especially those of hierarchy and division, are present in contemporary Korean society. The views are somewhat scattered. Korea specialist William Shaw challenges the 'notion of static, timeless characteristics' of a 'Korean social order' and questions the lasting effects of Confucianism on Korea's institutions (Shaw 1991, p. 4). Another commentator notes that 'Confucian culture [still] provides the tools with which Koreans interpret and give order to the world around them' (Hahm 2003, pp. 257, 271–2). Even Shaw acknowledges 'the residual strength'

of Confucianism in 'interpersonal relations' (Shaw 1991, p. 4); such relations are a constant in the development of every society. Korea observers indicate that the residue has proved potent, and that the continuing influence of Confucianism on contemporary Korea is palpable.<sup>29</sup> Despite critical commentary of Confucianism in more recent years,<sup>30</sup> many of the Confucian norms prevalent in the Chosŏn dynasty are stitched tightly into the Korean social fabric.

On the one hand, the Korea of today may indeed be the most Confucian society in the world (Licht 2004, p. 215) and still deeply influenced by Confucian traditions. On the other hand, it is also a society in the midst of a social transformation, spurred by democratization reforms and the emergence of a middle class, which might mark the beginnings of a quiet egalitarian revolution. Perhaps the deeply-rooted Confucian regard for hierarchy profoundly shapes the behaviour of ordinary Koreans in their interactions with others; or perhaps the long-held expectation of certain conduct has led to chafing in a setting where the contemporary climate is that of citizens demanding their equal lot. Especially in the bearing of burdens and receiving of benefits, the public demands equal treatment, and suggestions of inequality touch upon tender sensitivities, and occasionally, simmering anger. Three brief examples will illustrate the contemporary angst regarding the equality demand.

### **1. Compulsory military service**

One of the most significant burdens for Koreans and indeed members of any society, is that of military service in defence of the motherland. Korean law requires all males to serve in its military for up to two years and four months, with limited exceptions.<sup>31</sup> Yet media reports of able-bodied males who receive exemptions for questionable reasons have become sufficiently routine as to be predictable.<sup>32</sup> Those who are exposed as having obtained exemptions through family connections or bribes endure the most critical and public scrutiny.<sup>33</sup> Most Koreans see military service as 'a sacred duty of manhood' borne of patriotic responsibility.<sup>34</sup> Individuals evading the duty or those securing exemptions for their sons through patronage or payment strike a sensitive chord in the Korean mindset.

### **2. Legal education reform**

Claims of discriminatory and elitist attitudes have also surfaced in the ongoing debate over reforms in legal education. After years of discussion and planning, against some stiff opposition, the National Assembly in July 2007 enacted legislation authorizing the creation of graduate-level

law schools similar to those seen in the US, which began operations in 2009.<sup>35</sup> Critics had long argued that the previous system – consisting of success on the National Judicial Examination (open to virtually everyone, with no requirement of formal education), followed by a two-year programme at the Judicial Research and Training Institute – was not adequate to prepare a practising bar for contemporary Korean society. Reformists proposed that an undergraduate degree be a prerequisite to admission to graduate-level professional legal education. Opposition came from various quarters, including (most relevant here) those who argued that the proposed format would be unfair and unconstitutional (as violative of art 11 of the Constitution), in that it would discriminate against those who do not have the financial means to obtain a legal education, thus effectively denying them the opportunity to be a member of the bar. The popular sentiment was that the traditional judicial examination was ‘a symbol of fairness, *equality*, and most of all, a decisive opportunity to achieve a Korean dream’ (Ahn 2006, p. 227).

### 3. Korean affirmative action

Commentators have emphasized that Korea is a homogenous society,<sup>36</sup> that does not suffer from the difficulties relating to race seen in the US.<sup>37</sup> Yet others have noted that the society is far from monolithic, and that deep divisions are present, based on a number of factors including regional origin.<sup>38</sup> Most pronounced in politics, partisan regionalism was hardened in the early 1960s, with the authoritarian rule of Park Chung Hee. Park’s rule began a 36-year reign of chief executives from the Gyeongsang Provinces who favoured their native South-eastern regions at the expense of others, especially the Jeolla Provinces. This period saw heightened regional consciousness in politics, civil service, employment, and even marriage selection.<sup>39</sup> Those from the disfavoured regions were said to have faced discrimination, both subtle and overt. Partisan regionalism continues to be a source of internal tension and division in Korean society.<sup>40</sup>

The recent years have seen an open discussion of the possible implementation of US-style affirmative action programmes in education and civil service that would provide for preferential treatment of those from traditionally disfavoured regions.<sup>41</sup> Those who support such programmes point to the disparity in economic standing between the Gyeongsang and Jeolla regions, as a result of ‘the legacy of political power and patronage’.<sup>42</sup> Those opposed to such programmes reject the notion of quotas, and urge the virtues of individual hard work and open competition. Cries of ‘reverse discrimination’ are also heard.<sup>43</sup> In short, the rhetoric heard in Korea relating to region-based affirmative action

programmes has a similar ring to the debate over race-based affirmative action programmes in the United States. References to legal equality are heard from both sides of the Pacific and on both sides of the argument.

## **B. From the Cultural Database**

Before this chapter turns to the survey mentioned earlier, it is useful to outline the cultural norms that might affect Korean reactions to such a survey. In order to better appreciate the Korean mindset, four different cultural characteristics are discussed below. Three of these characteristics have been advanced by social scientists who note differences between and among national societies (including Korea); the remaining cultural trait pertains to changing Korean attitudes regarding resort to the courts for the resolution of disputes.

### **1. Universalism/particularism**

In an insightful work, Charles M. Hampden-Turner and Fons Trompenaars report a 'discovery' of six dichotomous cultural dimensions that vary between national societies (Hampden-Turner and Trompenaars 2000). Of special interest here is the universalism/particularism distinction. 'Universalism emphasizes rules that apply to a universe of people, while Particularism emphasizes exceptions and particular cases' (ibid, p. 2). At the core of universalism is 'rules, codes, laws, and generalizations,' while particularism prefers 'exceptions, special circumstances, [and] unique relations' (ibid, pp. 11, 13).

In rankings based on survey data taken of 46,000 managers from more than 40 countries, the two authors note that while the most universalist countries tend to be 'Protestant and stable democracies' (including the United States), 'Buddhist, Confucian, Hindu, and Shinto countries' (including Korea), are notably more particularist (ibid, p. 16). Indeed, Korea emerges as one of the most particularist countries in the rankings, second only to Yugoslavia. Many of the negative consequences of particularism 'taken too far' have been seen in the contemporary Korean experience (ibid, p. 24). That is:

- Particularism 'resorts to power and coercion, using intimidation,' and '[t]here is no way of resolving rival particularities, in the absence of law, save through force' (Hampden-Turner and Trompenaars 2000, p. 24). This was evident in the authoritarian rule of Korea's army generals who occupied the Blue House, the official residence of the President.

- 'Nationalism, ... super-patriotism, and appeals to ethnic identity are ... particularistic' (ibid, p. 24). This is patent in the Korean setting.
- 'Particularism ... is a protest against rules imposed from the outside by cultures seen as foreign' (ibid, p. 24), as indicated by long-held attitudes in Korea that laws and rules were seen as an instrument of oppression by the Japanese, and to a lesser extent, the United States, in an effort to preserve imperial interests during their respective occupations of the Korean peninsula.
- Particularism is 'prone to favoritism and special privileges' (ibid, p. 25 Figure 1.6), as Korea is a society notorious for reliance on personal connections and special treatment.

Hampden-Turner and Trompenaars note explicitly that 'trust in the legal system' – another variable in the analysis of universalist–particularist countries – 'is known to be low' in various particularist countries, including Korea (ibid, p. 16).

## **2. Individualism/collectivism**

The individualism/collectivism dichotomy is one of the most widely researched constructs that explains behaviours in different countries. Professor Harry C. Triandis offers this definition of individualism:

a social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to their personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others (Triandis 1995, p. 2).

In contrast, collectivism is:

a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation); are primarily motivated by the norms of, and duties imposed by, those collectives; are willing to give priority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives (ibid, p. 2).

Triandis' well-cited text isolates the United States as the model individualist culture on the one hand, and Japan (as well as China) as a classic case of collectivist culture on the other (ibid, pp. 89, 97). Triandis also comments on the collectivist leanings in Korean culture (ibid, p. 3).

The individualism/collectivism cultural dimension is also included in widely known works by Geert Hofstede (Hofstede and Hofstede 2005, p. 76), who has been described as ‘the ‘father’ of cross-cultural data bases’ (Hampden-Turner and Trompenaars 2000, p. x). In Hofstede’s survey and rankings of 74 countries, the United States emerges as the most individualist society, thus confirming Triandis’ observation; Japan is significantly more collectivist, in a tie for 46th place (Hofstede and Hofstede 2005, p. 78 table 3.1). Yet in Hofstede’s study, Korea emerges in 63rd place, an even more collectivist society than Japan, the classic case of collectivist culture (ibid, p. 79 table 3.1).<sup>44</sup>

The significance of the individualism/collectivism dimension to perceptions of equality is strong. Hofstede draws a stark contrast between the two (and also draws a parallel to the universalism/particularism dichotomy): ‘Laws and rights differ by group’ in collectivist societies like Korea, whereas in individualist cultures like the United States, ‘[l]aws and rights are supposed to be the same for all’ (ibid, p. 109 table 3.5).<sup>45</sup>

Any discussion of the purportedly collectivist nature of the Korean setting must also consider reports of changes in social attitudes and norms there in recent years. A *New York Times* report in 2003 captured a Korea in transition and underscored the weight of its past and the directions of the present society: ‘Still anchored in Confucian values of family and patriarchy, South Korea is fast becoming an open, Westernized society – with the world’s highest concentration of internet broadband users, a pop culture that has recently been breaking taboos left and right, and living patterns increasingly focusing on *individual* satisfaction’ (Onishi 2003, p. 19 (emphasis added)). Korea may be in ‘the throes of a social transformation’ (ibid, p. 19) and, its place in Hofstede’s rankings notwithstanding, the society appears to be heading towards a more comparatively individualistic orientation.

### 3. Power distance

Power distance, another of Hofstede’s cultural dimensions, is defined as ‘the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally’ (Hofstede and Hofstede 2005, p. 46). A low power distance culture holds that ‘[i]nequalities among people should be minimized,’ while high power distance countries subscribe to the view that ‘[i]nequalities among people are expected and desired’ (ibid, p. 57 table 2.3). Privileges and symbols of status are ‘frowned upon’ in low power distance cultures, but are ‘normal and popular’ in high power distance cultures (ibid, p. 59 table 2.4). Given the deeply hierarchical nature of Korean society, the country appears surprisingly (to this author) on the

lower end of Hofstede's power distance rankings of 74 countries, tied for 41st place (with Greece) (ibid, p. 43 table 2.1). Still, Korea is a higher power distance culture in contrast to the United States, which occupies a three-way tie for 57th place (with Estonia and Luxembourg). Some of the contrasting characteristics that Hofstede attributes to lower and higher power distance cultures could easily be offered as key cultural differences between the US and Korean societies, respectively, especially in the educational setting:

<u>Low power distance/US</u>	<u>High power distance/Korea</u>
'Parents treat children as equals'	'Parents teach children obedience'
'Children treat parents and older relatives as equals'	'Respect for parents and older relatives is a basic and lifelong virtue'
'Students treat teachers as equals'	'Students give teachers respect, even outside of class' (ibid, p. 57 table 2.3)

Most informative for the discussion herein, Hofstede notes that in low power distance societies, it is the view that '[a]ll should have equal rights,' whereas in high power distance countries, '[t]he powerful should have privileges'(ibid, p. 67 table 2.5).

#### **4. Korean attitudes towards resort to court adjudication**

Traditionally, Korea has been described as a society profoundly shaped by deeply-embedded Confucian virtues that emphasize harmony and avoiding dispute and litigation. Professor Pyong-Choon Hahm wrote in 1969:

Koreans have abhorred the black-and-white designation of one party to a dispute as right and his opponent as wrong. Assigning all blame to one for the sake of rendering a judgment has been repugnant to the fundamental valuation of harmony, because such a judgment has retarded swift restoration of broken harmony. The ultimate ideal has been a complete absence of dispute and conflict. But if discord could not be avoided, society demanded the quickest restoration of broken concord (Hahm 1969, pp. 19–20 (footnote and citation omitted)).

Professor Hahm also explained:

A litigious man is a warlike man to the Koreans. He threatens harmony and peace. He is a man to be detested. If a man cannot achieve reconciliation through mediation and compromise, he cannot be considered an acceptable member of the collectivity (Hahm 1986a, pp. 152, 177).

Such observations might reflect the traditional Korean view, but may well be outdated for a significant portion of the current population. Although some Koreans adhere to the traditional preference for non-legal settlement over court adjudication, there has been a 'dramatic change in the attitudes of the Korean people toward litigation' (Ahn 1997, p. 84). Koreans are becoming more litigious, more willing to advance legal claims, and more willing to resort to the courts (Ahn 1997, p. 84; Kim 2000b, p. 323; Yang 1993, p. 303). In the late 1960s, '[t]he vast majority of the population ... ha[d] never been to a courthouse ... [and] were proud of that fact' (Hahm 1969, p. 22). Yet a survey taken in the 1990s shows that nearly 30 per cent of respondents had 'been to court for "legal problems"' and almost half 'regard[ed] filing a suit for a money matter as a means of achieving justice or as a method of exercising their rights' (Korean Legislation Research Inst. 1996, p. 146). The commentary's references to skyrocketing lawsuits<sup>46</sup> and an emerging 'litigious zeitgeist' (Youm 1995, p. 260) are evidence of change and a departure from traditional norms.

The background discussion to this point – first, the law on equal protection, and second, the cultural characteristics attributed to the population – is presented with the goal of better understanding the jurisdiction and the societal mindset. Importantly, the description of the Korean cultural norms is not offered to suggest any particular result in the survey, nor was the survey designed necessarily to *test* the presence of any of the cultural attributes. The discussion of the law and societal culture, as well as the survey results, is designed to inform about Korean perceptions on equal treatment.

### III. THE SURVEY<sup>47</sup>

The survey was conducted from December 2006 to March 2007, and available only on the internet. All of the survey was in Korean text. Participants could provide answers to open-ended questions in Korean as well. An initial test survey was conducted for Koreans in Columbia, Missouri (involving 36 participants), followed by the main survey for those in the Seoul metropolitan area in Korea (which numbered nearly



300 participants). The content of the survey was identical for both the test and main surveys, save for a few questions, as explained herein.

### **A. The Hypothetical**

The survey asks participants to place themselves in the following hypothetical situation:

Participants live in Korea, and are going on a business trip to Chicago. At the Incheon airport, they are to board a flight for Narita airport in Japan, from whence they will take a connecting flight to O'Hare. While they queue to check in for the flight to Narita, an airline employee tells them, first in Korean and then in English, that the morning flight to Narita is cancelled, and that those who have a connecting flight to Narita should go to the counter for another airline (Gah-Nah-Dah Airline) to see if there are seats on its flight to Narita that will allow enough time to make the connecting flight to O'Hare. A few people in the queue make their way to the counter for Gah-Nah-Dah Airline as instructed.

An employee at the Gah-Nah-Dah counter tells the participant that he or she must wait until all passengers with confirmed seats are processed before standby passengers can be considered. The employee refuses to take the name of the participant for a waiting list, and instead advises the participant to have a seat in the waiting area. The participant stands nearby, and observes four other passengers whose scheduled flight to Narita was also cancelled, and who, like the participant, attempt to obtain a seat on the Gah-Nah-Dah flight.

Eventually, of the five passengers – the participant plus the four other passengers – two receive boarding passes and check in their luggage, while the three others are told to step aside and wait until all confirmed passengers are processed, without being able to leave their names for a waiting list. The participant confirms this by approaching and asking the four passengers directly. The two passengers who received boarding passes – one male and one female – are American. The three passengers who did not – one male, one female, and the survey participant – are Korean. The hypothetical concludes with the participant approaching the Gah-Nah-Dah employee to again ask about getting a seat on the Gah-Nah-Dah flight to Narita. The employee tells the participant that the flight is completely booked. The participant asks the employee why the participant was not able to leave his or her name for standby when other people who came from the other airline received boarding passes. The employee tells the participant that there are no more seats on the flight and turns away.

Survey participants are asked to assume that the hypothetical described happened to them, and then to answer the questions that follow.

## B. Questions

Participants were asked whether they believed the actions of Gah-Nah-Dah were firstly discriminatory, and secondly illegal or unlawful, and to provide respective reasons for their views. They were also asked what action, if any, they would take. The survey also sought to assess the degree of the participants' reactions to the allegedly discriminatory and illegal nature of the airline's actions. Survey participants were asked whether they 'strongly agree,' 'somewhat agree,' 'neither agree nor disagree,' 'somewhat disagree,' or 'strongly disagree' with the statement: 'What Gah-Nah-Dah Airline did to me is discriminatory.' In a separate question, participants were asked to provide reasons for their responses, in open-ended form. Similarly, participants were asked to express their agreement or disagreement – with the five options given above – to another statement: 'What Gah-Nah-Dah Airline did to me is illegal or unlawful,' and were also asked to provide their reasons thereof.

Regarding the question of what action participants would take in response to the incident, the test survey asked the question in a completely open-ended form, soliciting responses without suggestion. For the main survey, participants were asked to assume that they returned from the business trip and filed a complaint with Gah-Nah-Dah management, but received an unsatisfactory or unresponsive answer. Then participants were asked what action they would take, and were provided with the following list of options from which they could choose one or more:

- Contact airport management about the incident.
- Contact a government agency about the incident. [*Participants choosing this option were asked to specify what government agency.*]
- Contact the participant's representative in the National Assembly.
- Contact an attorney for possible legal action.
- Other. [*Participants choosing this option were asked to specify what other action.*]
- Nothing. [*Participants choosing this option were reminded that they could not also choose any of the above options.*]

### **C. Participation**

In all, 329 people completed the survey, 36 for the test survey conducted in Columbia, Missouri, and 293 for those in the Seoul area. The participants in Missouri were primarily Korean graduate students and visiting scholars at the University of Missouri. Participants in the main survey in the Seoul area were company professionals, government employees, and university faculty, staff and students.<sup>48</sup>

## **IV. RESULTS AND ANALYSIS**

As discussed above, Korea has emerged from some studies as a comparatively particularist, collectivist, and high power distance society. A society with such characteristics, researchers say, is less likely to demand equal rights for all, and more likely to allow for different treatment based on the circumstances, group membership, or relative power position. In contrast, a universalist, individualist, and low power distance would be the opposite, demanding equal treatment for all regardless of the same factors stated above.

In this survey, over 90 per cent (298 out of 329) of all participants strongly agreed or somewhat agreed that the airline's action was discriminatory.<sup>49</sup> This result suggests an orientation more universalist than particularist, individualist than collectivist, and lower rather than higher power distance but caution is necessary to avoid hasty conclusions, as the hypothetical in the survey presents such a strong case of discriminatory activity that it transcends all or some of the cultural dichotomous distinctions. In all events, most of the participants who agreed that the airline was discriminatory separately emphasized the disparate treatment of similarly situated Korean and American passengers.<sup>50</sup> The predominant agreement with the discrimination description and supporting explanations do chime with the 'search for sameness and similarity' and attempt 'to impose on all members of a class or universe the laws of their commonality' (Hampden-Turner and Trompenaars 2000, p. 14). Although a large majority of the participants agreed that the airline's action was discriminatory, about seven per cent (23 out of 329) neither agreed nor disagreed with the statement, and just over two per cent (8 out of 329) strongly disagreed or somewhat disagreed. In the explanations for these responses, the most frequent comment was that the limited facts did not allow the conclusion that discrimination was present. Some participants responded that there could be a rational or legitimate reason for the airline's action, with a few offering the possibility that the American

passengers who received boarding passes had 'expensive' or 'privileged' seats or 'premium membership'. There is, in the author's view, a suggestion of a particularist orientation here. If indeed there was a simple reason why only the American passengers received boarding passes, the airline employee presumably could have said so when confronted, instead of turning away, or the airline in response to a formal complaint could have explained the reason, instead of giving an unresponsive or unsatisfactory answer, as the hypothetical explicitly states. Nevertheless, some of the participants engaged in a proactive search for a justifying reason.<sup>51</sup>

Without any exposition of the applicable law, statutes, or regulations, participants were asked whether they viewed the airline's action as illegal or unlawful. This question was not an attempt to test participants' knowledge of the law,<sup>52</sup> but rather to solicit their intuitive reaction based on their individual perception of the law and its application. Whereas over 90 per cent (298 out of 329) of the participants saw discriminatory activity by the airline, a significantly smaller portion, 52 per cent (170 out of 327), agreed with the statement that the airline action was illegal or unlawful.<sup>53</sup> Those who viewed the action as illegal emphasized separately the differing and discriminatory treatment, with some specifically referring to race- or nationality-based treatment. Several others made some reference to equal (*pyungdeung*) or unequal treatment. A small number referred to rights (*kwon*).

Nearly three in ten of all responding participants (29 per cent or 95 out of 327) neither agreed nor disagreed with the view that the airline's action was illegal or unlawful. Most of these indicated that they were uncertain as to the law, while a few explained that the situation did not present sufficient information to indicate unlawful conduct. In addition, just under 19 per cent of the participants (62 out of 327) disagreed, strongly or somewhat, that the airline's action was illegal or unlawful. Their explanations are informative.<sup>54</sup> Some of these respondents described the airline action as 'unethical,' 'immoral,' 'improper,' 'inappropriate,' or 'unfair,' but *not* illegal or unlawful. A few participants explicitly distinguished between discriminatory and illegal conduct. Others flatly dismissed a violation of law:

- 'It is not illegal' [*multiple*]
- 'There is no law regarding such matters.'
- 'It is not against the law.'
- 'Legally, there is no problem.'
- 'The airline did not violate the law.'
- 'I don't think the company has violated any laws by serving its customers poorly.'<sup>55</sup>

Similarly, some comments declared the irrelevance of law to the situation presented:

- 'I believe law has nothing to do with this situation.'
- 'It is not a matter of whether it is illegal or not.'
- 'I don't think we could govern these kinds of situations through laws.'
- 'Being discriminated is not a good feeling but I don't think you could regulate such action legally. An airline can be prejudiced against something for the benefit of the company.'<sup>56</sup>

For a few of the participants who saw no illegality in the airline's action, the fact that the airline may have had a 'policy' of giving preference to foreigners was apparently significant, as they emphasized this point in their comments.

The comments of some survey respondents who disagreed that the airline action was illegal might evoke recollections of the debate over (and especially the opposition to) civil rights legislation affecting common carriers, seen in the US in the 1960s. For example, a few participants specifically stated that the airline's action was not illegal because it involved a *private* company. Also consider the following comments:

- 'The service provider has the right to refuse to provide service to the customers. Regardless of the reason for not giving a boarding pass to me, it is not unlawful, if there was no direct money damage to me.'
- 'The airline has discretion.'
- 'The airline has the ultimate decision for boarding.'

If the situation in the hypothetical would give rise to a dispute (as is suggested by the majority of the participants' reactions), the survey also sheds light on what action the participants would seek to resolve the dispute. Would respondents seek compromise and conciliation (under the traditional Confucian construct), or more quickly resort to legal methods (as part of the so-called 'litigious zeitgeist')? The test survey, involving a small number of participants in Columbia, Missouri, posed the question of what the participants would do, soliciting open-ended responses. A majority of the respondents (21 out of 36) included in their answers the action of contacting the airline with a complaint. Others offered that they would: post a message on the airline website (one); and contact the Consumer Protection Board (four). Two respondents indicated that they

would take no direct action with respect to the airline. Significantly, however, in this open-ended format, with no leading questions or suggestive options, seven of the 36 participants referred to resort to some activity of a legal nature.<sup>57</sup>

In the main survey for those in the Seoul area, participants were asked to assume that they contacted the airline management with a formal complaint, but did not receive a satisfactory or responsive answer, and were then given a list of options from which they could choose one or more of their preferred actions. The results are as follows:<sup>58</sup>

- Contact airport management about the incident – 69 per cent (201 out of 291)
- Contact a government agency about the incident – 12 per cent (35 out of 291)<sup>59</sup>
- Contact one's representative in the National Assembly – 0.3 per cent (one out of 291)
- Contact an attorney for legal advice and possible legal action – 21 per cent (62 out of 291)<sup>60</sup>
- Nothing – 9.6 per cent (28 out of 291)
- Other – 20 per cent (59 out of 291).

The responses invite comment and analysis. First, nearly one in ten of the participants indicated that they would do nothing. It is interesting that of the 28 people who chose this option, 21 answered that the airline action was discriminatory, and 11 agreed that its action was illegal or unlawful.<sup>61</sup> Secondly, the responses indicate participants' (and perhaps societal) recognition and awareness of a grievance procedure, which includes petition to a governmental agency, as well as resort to adversarial legal action, in order to seek corrective measures or a compensating remedy. This is in contrast with further attempts to resolve the conflict directly with the other party. Specifically, nearly one in eight of the participants indicated that they would contact a government agency. Of these, the Consumer Protection Board<sup>62</sup> received the most mentions, identified by 18 people, followed by the Ministry of Construction and Transportation (six) and the Ministry of Foreign Affairs (three). Interestingly, only two of the respondents mentioned by name the National Human Rights Commission Act or the Commission, the organization established to address discrimination matters in Korea.<sup>63</sup>

Although the above figures indicate a societal awareness and willingness to contact a third party to seek a remedy, especially a government office, the survey reveals that only one out of the 291 participants in the main survey selected the option of contacting one's representative in the

National Assembly. Participants were far more likely to resort to legal advice or legal action (20 per cent of the participants indicated that they would contact a lawyer), suggesting that Korean society is indeed more willing to resort to the legal process. This figure also supports previous researchers' conclusions that the traditional method of resolving a dispute by seeking harmonious compromise and conciliation (without reliance on, or intervention by, an arm of the government) is no longer the predominant method. It should be noted here that changes in the public's accessibility to the legal institutions accompanied the increasing willingness to resort to court adjudication to preserve individual legal rights. Until 1996, only 300 people per year could pass the judicial examination that would allow them to begin the two-year programme at the Judicial Research and Training Institute, followed by law practice. But '*as demand for legal services has increased*, the number has gradually risen to 500 in 1997, 700 in 1998, 800 in 2000, and 1,000 a year since 2002.' (emphasis added).<sup>64</sup>

The other options – contacting airport management and 'Other' – present an opportunity to elaborate on the inherent challenges in survey design. The selection of options following the question of what, if any, action the participants would take if the hypothetical situation occurred to them, reflects the author's speculation and prediction. The option of contacting airport management seemed to the author as a rational, and altogether predictable, option of several. Indeed, nearly seven out of ten participants chose this very option. Nevertheless, the author was of the view that practically no significant result would be achieved if a passenger facing the situation presented in the hypothetical actually contacted airport management and filed a complaint. (This was confirmed by an exchange of email messages between the author's assistant and a manager at the Incheon International Airport.<sup>65</sup>) While contacting airport management was a predictable if an ineffectual option, this survey did not contemplate the option of internet-related activity in response to the airline action. Of the 59 participants (out of 291) who selected 'Other' as an option, 34 – or over ten per cent of all respondents – stated separately that they would post a complaint on the internet (with a few specifying that they would attempt to gather more information through that vehicle).<sup>66</sup> This underscores the fact that Korea, which has one of the highest rates of broadband access in the world, has seen a popular trend to vet social issues and individual matters in cyberspace.<sup>67</sup>

## V. CONCLUSION

Korea is a constitutional democracy, albeit a relatively new one, whose constitution guarantees equality before the law, at least with respect to state actors. This jurisdiction has also created a human rights commission to which people may petition to address complaints of unequal treatment by any party, private or otherwise. But how equality, discrimination and unlawful discrimination are viewed by members of various national societies may be shaped by their respective social histories and societal norms. This is not to suggest that cultural norms attributed to Korean society (or any society) must have a deterministic effect on a predetermined result. Moreover, with respect to Korea, one is reminded that a societal culture is not permanent, fixed, or unchanging.

The notion and perceptions of equality in contemporary Korea are of interest given the unique setting: a young constitutional democracy with a deeply-rooted Confucian history. One basic goal of the survey herein was to see how participating Koreans would respond to questions of discrimination, illegality, and responding action. A large majority of the participants saw discrimination in the hypothetical, but only about half regarded it as illegal or unlawful. The explanations provided by those who did not see illegality or unlawfulness or did not see how law was relevant to the situation, might indicate how a portion of the society perceives the role of law in everyday life situations. The comments relating to what action the participants would take in response indicate a society that appears to be more aware of the petitioning procedure, including resort to government and to a more accessible practising bar and legal system. All of these factors are indicators of a society in continuing transition. This chapter encourages further examination of Korean society, and a comparative examination of universal legal precepts.

## NOTES

1. A version of this chapter was originally published in Lee, Ilhyung (2008), *Boston College International and Comparative Law Review*, 31, p. 53.
2. For example, the Independence Movement of 1 March 1919 produced a declaration explicitly referring to the nation's 50-century history. See Ha, 1962, p. 242 (appendix.).
3. See Kim (2000a), p. 11.
4. See Constitutional Court of Korea, *Welcome*, at <http://www.ccourt.go.kr/home/english/welcome.jsp>.
5. See Ginsburg 2003, p. 206.



6. The Constitutional Court set aside the impeachment and restored the president's full powers.
7. South Korea Constitution, art 11(1).
8. US Constitution, amend. XIV, § 1.
9. The Constitutional Court, 98 *hŏnma* 363, delivered on 23 December 1999. The Constitutional Court had referred to the two tests in previous cases, but had not previously indicated which test should be applied in what circumstances.
10. The test is *cheheu kŏmji wŏnch'ik*, meaning roughly, 'anti-arbitrary principle,' which requires 'treating the like equally, and the unlike unequally.' The Constitutional Court, 90 *hŏn'ga* 97, 13 May 1991, quoted in Ahn 1997, p. 101 n.168. See also Constitutional Court of Korea 2001, p. 126.
11. Roughly meaning 'proportionality principle' (*pirye wŏnch'ik*), the balancing test would require consideration of (1) the legitimacy of government purpose; (2) the propriety of the government measure; (3) the degree of infringement on the individual or the degree of restriction of the measure; and (4) the balancing of the government interests and individual rights. See Kwon 2001, pp. 338–40.
12. This is implicit in the decisions of the Constitutional Court and is the majority view of the commentators. See, Kwon 2001, pp. 316–18.
13. National Human Rights Commission Act, No. 6481 (2001).
14. Ibid, art 30.
15. Ibid, art 1.
16. National Human Rights Commission, *Authority of the Commission*, at: [http://www.humanrights.go.kr/eng/nhrc/intro/nhrc01\\_03.htm](http://www.humanrights.go.kr/eng/nhrc/intro/nhrc01_03.htm) (last visited 17 Jan. 2008).
17. National Human Rights Commission Act, No. 6481, art 4 (2001).
18. Ibid, art 2(4).
19. Ibid, arts 19–50.
20. Ibid, art 28.
21. See Seok, Jin-Hwan, 'In'gwŏnwi ka madangbal in iyu (*The Reason Why the NHRC Became a "Nuisance"*), *The Hankyoreh*, 20 June 2003.
22. Statutes of the Republic of Korea, Civil Act, art 750.
23. To date, there is no reported case of a party who has brought a discrimination claim in court following an unsatisfactory result in the Commission.
24. As Professor Chaihark Hahm notes, Confucianism is multi-faceted and may mean different things to different audiences (Hahm 2003, pp. 268, 276).
25. See Bary and Kim 1983. See also Savada and Shaw 1992, pp. 88–9. Commentators have noted that Korean Confucianism was even more Confucian than the original Confucianism. See Macdonald 1988, p. 32.
26. 'Acknowledging the authority of the nation and family, and obedience of the common people to the king, children to parents, wives to husbands, and the young to the elderly were considered the cardinal rules in maintaining social order' (Yoon 1994, pp. 18–19).
27. See Nahm 1993, pp. 105–106; see also Hahm 1967, p. 110 n.4; Hahm 1986b, pp. 33–42. Hierarchy reigned supreme, as there was hierarchy within almost every class, including and perhaps especially, the *yangban*. See Eckert et al. 1990, p. 109.
28. Initially, *yangban* status was achieved by competitive civil service exams, which required mastery of philosophy and ethics in Chinese; thus, education afforded opportunities for social mobility. Eventually, however, 'members of the established ruling elite had effectively placed a hereditary requirement on future exam takers', and only descendants of a former successful candidate were eligible for the exams (Lett 1998, pp. 14–16). See Eckert 1990, p. 114; Henderson 1968, p. 37. It should be noted that the social status system described above lost much of its rigid and strict character long before the Chosŏn dynasty came to an end in 1910. Korea expert Gregory Henderson notes that the four-class description 'is the official one of the

- dynasty,' but that, especially in the latter centuries, class distinctions were not as sharp or rigid as presumed (Henderson 1968, p. 37).
29. Clifford 1998, p. 10; Choe 2003, p. 5.
  30. Confucianism has been the target of blame for some of Korea's societal woes and ills, including the loss of Korean sovereignty to Japanese colonial powers, crony capitalism, corruption, and authoritarianism. See Hahm 2003, p. 266.
  31. Statutes of the Republic of Korea, Enforcement Decree of the Military Service Act (2007); Statutes of the Republic of Korea, Military Service Act, arts 3(1) and 18(2) (2006).
  32. See Choe 2003, p. 5.
  33. See *ibid* (reporting 'repeated scandals showed many of the country's rich and powerful pay bribes or help their sons get US citizenship to keep them out of the military').
  34. *Ibid*.
  35. See Kim 2007.
  36. See Ahn 1997, p. 102; Yoon 1995, pp. 396–7. See also Seita 1995, p. 492 n.72 (referring to '99.9 % ethnic Korean' population in Korea).
  37. See Korean Overseas Information Service 1993, p. 14 ('There are no significant racial minorities in Korea').
  38. See Fouser 1997; Phillips 1997.
  39. See Yang 1994, p. 5.
  40. See Malay 2002 (quoting a Seoul National University professor: 'The country is in a crisis from three different confrontations – between regions, social classes and between South and North Korea').
  41. See French 2003, p. 14.
  42. *Ibid*.
  43. *Ibid*.
  44. The author notes that Korean acquaintances in academia have expressed strong and vocal objection to the characterization of Korea as a collective society, the writings of Hofstede, Triandis and others notwithstanding. The author, also without supporting research, would posit that although the Korean culture demands and expects an outward collectivist appearance, deeply individualist tendencies motivate many Korean people.
  45. Individualist cultures tend to be universalist; collectivist cultures, particularist (Hofstede and Hofstede 2005, p. 104 table 3.4).
  46. Ahn 1997, p. 84 (citing Ahn 1994, p. 133).
  47. The survey project received prior approval by the University of Missouri Institutional Review Board. The full results of the survey are on file with the author.
  48. The author acknowledges that one limitation of the survey is that the pool of respondents, although not monolithic, does not represent a cross-section of Korean society.
  49. Just over 58 per cent of the participants strongly agreed that the airline action was discriminatory; over 32 per cent somewhat agreed.
  50. Some of the respondents explained that boarding passes were not distributed on a first come, first serve basis.
  51. In all events, perhaps the comment most reflecting a particularist mindset is the explanation by one participant that 'the American may have had an urgent reason – family emergency, etc. – for Gah-Nah-Dah Airline to distribute a boarding pass.'
  52. To be clear, the participants were not asked whether they thought the airline action *should be* illegal or unlawful.
  53. A few points of explanation are in order. Two of the participants did not provide responses to the question regarding the (il)legality of the airline action; thus, the total number of persons responding to this question is adjusted from 329 to 327. Also, in

the raw numerical results, 190 out of 327 (about 58 per cent) selected the 'strongly agree' (about 24 per cent) or 'somewhat agree' (about 34 per cent) options, but the separate comments of 20 of these participants actually indicate disagreement with the statement that the airline's action was illegal or unlawful.

54. These include participants who selected the option that they 'neither agree nor disagree' with the statement that the airline's action was illegal, but whose comments indicate disagreement.
55. A few respondents expressed that 'if it was illegal, Gah-Nah-Dah would probably not have acted as such.'
56. Participants' comments on the role of law in the hypothetical situation touch upon the broader concept of a developing legal culture or legal consciousness in contemporary Korean society. The subject is beginning to receive more attention by commentators. See Kim 2006 (discussing Korean perception of law and its effect on individual conduct); Lee 1998.
57. Of the seven in the test survey, three respondents stated that they would file a lawsuit or take legal action. Another offered, 'I could sue.' Others indicated: a possible lawsuit but also noted the costs and obstacles; pursuing legal action if evidence is present; and finding out about the governing laws.
58. Because participants were permitted to choose more than one option, the total number of the options selected will exceed the number of people the main survey, and the total percentage will exceed 100 per cent.
59. The numerical results indicate that 28 participants chose this option, but an additional seven others referred to a government agency in their separate comments.
60. This is roughly equivalent in proportion to the respondents in the test survey (seven out of 36) for the same action.
61. One person, who strongly agreed that the airline action was discriminatory but neither agreed nor disagreed with the statement that the action was illegal, selected the 'Nothing' option under the question of what, if any, action that person would take. In separate comments, this respondent wrote, 'If the employee's discriminatory action is illegal, it is exaggerating this whole situation (taking the situation too seriously).'
62. The Korean Consumer Protection Board, created under the Consumer Protection Act, Act No. 3921 (1986), is a 'government-funded public agency that enforces consumer protection policies ... and strives to protect consumer rights and interests.' Korea Consumer Protection Board, *President Message*, at: <http://english.cpb.or.kr/president.htm> (last visited 17 Jan. 2008).
63. Two respondents explained that they would contact the complaint office at the Blue House. One respondent identified the Fair Trade Commission. The rest of the respondents did not identify the specific government agency or office.
64. Judicial Research and Training Institute, *Curriculum*, at: [http://jrtri.scourt.go.kr/english/curriculum\\_01.asp?flag=1](http://jrtri.scourt.go.kr/english/curriculum_01.asp?flag=1) (emphasis added, last visited 17 Jan. 2008).
65. The assistant received an individualized response by email, from someone identifying herself as 'manager of the online customer service at Incheon Airport' (copy on file with author).
66. Of the 59, 12 others stated that they would contact the media, ten said they would contact the airline another time, and five indicated leading a boycott.
67. See Choe 2007, p. A4 (noting use of the internet by Koreans to trade tips about committing suicide).

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## 5. The normative phenomenon of public sector in Korean society

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### I. INTRODUCTION

Korean society has tried to establish the rule of law for the last 60 years. Most legal scholars and social scientists have been concerned that Korean people are not sufficiently conscious of their legal rights and are therefore too passive to protect and exercise those rights (Hahm, 1986). But the recent tendency of the general public's attitude toward its legal rights shows that the situation has been changing radically. Korean people have become active in relying upon the law and legal system for their rights. Today, researchers are rather worried about the exceedingly high level of people's assertion of their rights.

One of the premises of the liberal legal system, which is the most typical one of the rule of law, is that even though the members of a society are primarily concerned with their own self-interest, those behaviors are strictly dependent on the legal system. However, the other side of the rule of law is to respect the other's right as much as his/her own right. While the private sector is the main area in which right holders exercise their rights, the public sector is the one in which each person respects the other's right and respects public interests. Then, are the Korean people as active in respecting the other's right in the public sector as much as in exercising their own rights in the private sector?

The major purpose of this article is to analyze the normative phenomenon observed in the public sector of Korean society. Specifically, the research focuses on the normative phenomena in those areas where the government interferes, such as the criminal law and the administrative law. One might challenge the definition of government interference, since the concept is not only applied to public acts but also to private acts such as fraud or embezzlement. However, even these private acts could be included in the public domain, in that the most important reason for

government to interfere in criminal activities by means of punishment is in order to maintain the minimum social order in a community.

Of course, analyzing the criminal, illegal and deviant activities that occur in the public sector would not be enough to assess the social order as a whole. Nor would it be possible for us to regulate every deviational activity through criminal punishment in a society. Instead, we have learned through the course of human history that such regulations could become extremely dangerous. It has been generally accepted among criminologists, as a principle, that the function of the criminal law is subsidiary in restricting criminal activities. According to Heinz Zipf

The subsidiary and explanatory characteristics of criminal law reveal the fallacy of those who consider criminal law as an ultimate means to manage the social disorder. Also, the principle of subsidiarity has a great significance when it comes to the formation and enforcement of the criminal law. In terms of criminal policies, the principle of subsidiarity exposes various perspectives. The criminal punishment is one of the harshest approaches among other social and legal policies. This is why the enforcement of criminal punishment should always be limited to the cases where the use of criminal punishments is essential and is the only way to protect the legal interests of our communal life. Therefore, if any informal or formal regulations suffice to control the social orders, there would be no room for criminal law and punitive sanctions to intervene. (Zipf, p. 87)

In some sense, it may be challenging for us to assess the normative phenomenon of a country as a whole just by examining the statistics of criminal activities. However, it does provide us with some standards in that criminal punishments are considered as the last resort in regulating social activities. In this chapter, normative phenomena occurring in Korean society, as well as the current situation of criminal activities, will be extensively dealt with by analyzing cases like summary trials, which directly affect basic social order. Furthermore, the social consciousness that Koreans have regarding the performance of public agencies and procedures is also in the scope of our analysis. In Korean society's private sector, the growth rate of civil litigations and their diversifying patterns have begun to follow those of Western societies (Kim 2000; 2010).<sup>1</sup> If this is so, what about the growth rate of criminal activities and their features? These questions will be dealt with in a diachronic perspective; how fast do crimes increase in Korean society, and are there any remarkable characteristics in the pattern of the growth of criminal activities? In addition to that, the following questions will be analyzed further: Are Koreans relatively law-abiding? If not, what are the main



reasons for this? People's legal consciousness and attitude toward the public agencies and legal procedures will also be dealt with.

These questions will be approached through the perspective of legal culture rather than through that of criminology. In contrast to the consideration that the private sector is an area where individuals make contracts with each other, the public sector is considered as an area in which legal relationships are formed without those kinds of contracts. Also, in the private sector, the public legal institutions intervene in these relationships. Thus, it would be safe to say that the regulations for basic social orders in a society and the criminal law share a common purpose.

## II. THE CHANGING TREND OF CRIMINAL INCIDENCES IN KOREAN SOCIETY

How fast is the rate of crimes in Korean society increasing and what are the causes of those crimes? Table 5.1 shows the increasing tendency of criminal incidences for the last fifty years.

*Table 5.1 Criminal Cases Filed in District Court*

Year	Population	Formal Trial	Summary Order	Total	Number per 1,000
1965	28,377,000	52,436	89,991	142,427	5.02
1970	31,469,000	95,835	149,583	245,418	7.80
1975	34,681,000	120,772	193,834	314,606	9.07
1980	37,448,000	142,782	347,655	490,437	13.10
1985	40,806,000	145,960	323,904	469,864	11.51
1990	43,869,000	186,184	577,040	763,224	17.40
1995	45,829,000	211,670	720,625	932,295	20.34
2000	47,976,000	257,262	935,992	1,193,254	24.87
2005	49,267,000	285,637	1,012,480	1,298,117	26.34
2010	50,515,000	356,587	868,901	1,225,488	24.26
Rate of Increase	78%	580%	865%	760%	383%

*Note:* The statistical figures in Table 5.1 are collected from the Korean Judiciary Yearbook published in 1964–1975 as '*Pöbwön t'onggye yönbo*' and since 1976 as '*Saböp yön'gam*'. The increasing rate in the bottom line is calculated between the figures of 1965 and 2010.

Before analyzing the increasing tendency in criminal incidences, the criminal legal terms in Table 5.1 need to be clarified. Both the formal trial and the summary order represent the cases where one offends the criminal law or the special law. The difference between the criminal law and the special law is based upon the degree of criminal intention or negligence, and the procedures are different. While formal trial cases are the ones that the courts decide following the formal trial procedure based upon the public attorney's prosecution, summary order cases, even if those belong to the formal trial cases, are decided following the summary trial procedure and fines, penalties or confiscations are usually imposed. Since judges in summary order cases declare committed persons guilty without formal trial procedure, the trial is not open and usually only documentary examination is used. However, the summary order cases are similar to the formal trial cases in that they require a request by a public prosecutor. For example, when a case occurs because of a violator's unintentional negligence, even if imprisonment or penalty may be imposed, the case can nevertheless proceed by summary trial. Thus, the court includes the number of summary order cases in the category of criminal cases.

The figures in Table 5.1 show the numbers of criminal cases that have been reported to the primary courts for the last 50 years. The population increased from 28,377,000 in 1965 to 50,515,000 in 2010, an increase of 78 per cent. Formal trial cases increased by 580 per cent, while on the other hand the summary trial cases increased by 865 per cent and the total criminal cases by 760 per cent. Compared to the rate in the increase of population during this period, the increase in the rate of formal trial cases is seven times greater and the rate of summary order cases is eleven times greater. A remarkable point in the changing trend of criminal cases is that the increasing rate of formal trial cases is overtaken by the number of summary order cases. Comparing the increasing rate in each decade, the formal trial cases increased 131 per cent from 1965 to 1975, 20 per cent from 1975 to 1985, 45 per cent from 1985 to 1995, and 35 per cent from 1995 to 2005. The summary order cases increased 115 per cent from 1965 to 1975, 67 per cent from 1975 to 1985, 122 per cent from 1985 to 1995, and 40.5 per cent from 1995 to 2005. Another noticeable point in the changing trend is that between 1985 and 1995 there has been a rapid increase in the frequency of crimes occurring and, especially, the number of punishments by summary trial procedure has doubled during that same ten-year period. The interesting fact is that while civil litigation had the highest growth rate between 1975 and 1985, by a rate of 224 per cent, that of criminal cases was highest between 1985 and 1995 (Kim 2010, p. 26).

As Table 5.1 shows, the number of criminal cases increased rapidly until the year of 2000. But after that, the rate of increase has stabilized. For example, the number of criminal cases among a population of 1,000 was 24.87 in 2000, 26.34 in 2005 and 24.26 in 2010. But the civil litigation numbers show a different trend. The number of civil cases among a population of 1,000 was 24.8 in 1995, 36.3 in 2000 and 50.68 in 2005 (Kim 2010, p. 26). Until the year 2000, the growth rate of criminal incidence parallels that of civil litigations. But while the contestations or conflicts among people in the private sector are still increasing, the number of criminal violations are steady or even decreasing a little. Of course, we need to closely observe whether the transition in the public sector is taking place in Korean society as well.

Then, why do people commit crimes in Korean society? For this, we need to analyze the motives of the criminal violators and the changing trends. Table 5.2 shows the major motives of criminal activities.

In Table 5.2, assault cases account for the largest number in criminal incidences. Assault accounts for almost half of all the crimes, amounting to 38.6 per cent. After assault, the next-highest number of crimes is that of intellectual crime, numbering 360,645 cases and accounting for 34.9 per cent. We can discern similar patterns in the criminal motives for other criminal activities. First, accidental crimes occupy 27.4 per cent. In Korean society, crimes are either caused mainly by accident or because of greed for the purpose of gain. Especially, it is surprising that among 1,344 of the total number of cases of homicide, accidental manslaughter amounted to 46.7 per cent and the incidences of homicide in families occupied 7.9 per cent. Among the crimes of assault, accidental crimes occupy 52.8 per cent of the total. In rape cases, the number of accidental rape cases is 6,147, and this amounts to 34.8 per cent of the total number of rape cases. These findings show that accidental assault is the most frequent among crimes other than those crimes that are not classified specifically.

Recent changes in trends between 2000 and 2010 reveal very interesting points.<sup>2</sup> Among the different types of criminal incidents, homicide, rape, arson, larceny, and intellectual crimes have increased while burglary and assault have decreased. The burglary cases have decreased from 6,337 to 5,542, and so have the assault cases, changing from 517,621 to 399,184. Among the increased number of criminal incidents, it is crucial to note that cases of rape increased from 5,920 to 17,646, cases of larceny from 66,082 to 119,130, and cases of intellectual crimes from 217,768 to 360,645. Rape cases have increased almost three times within ten years. And an unprecedented change is that among the criminal motives, the number of retaliation incidences decreased significantly from 5,310 to 191 and that of accident from 340,317 to 283,465.

Table 5.2 Criminal Motives

	Greed	Retaliation	Speculation	Family Feud	Curiosity	Seduction	Accident	Discontent	Negligence	Others	Total
Homicide	114	7	1	106	2	1	627	84	3	399	1,344
Burglary	2,215	3	109	7	40	59	1,237	69	24	1,779	5,542
Rape	1,595	3	22	31	1,325	838	6,147	78	196	7,411	17,646
Arson	113	4	1	94	56	2	646	183	15	340	1,454
Larceny	36,131	10	2,023	75	8,058	3,207	34,070	587	2,144	32,825	119,130
Assault	23,197	55	501	4,148	529	309	210,814	7,232	3,719	148,680	399,184
Intellectual Crime	58,105	77	2,626	88	1,004	1,549	5,875	374	6,491	284,456	360,645
Public Morals	6,320	2	15,533	73	1,755	598	2,640	27	662	15,581	43,191
Others	9,440	30	192	223	297	241	21,409	2,732	6,279	45,498	86,341
Total	137,230	191	21,008	4,845	13,066	6,804	283,465	11,366	19,533	536,969	1,034,477

*Note:* In this table, the sorts of crimes are shown as the police department categorizes them. For example, the category of homicide includes general homicide, instigation, abetting, etc. Intellectual crime includes delinquency, improper use of authority, bribe, illegal election campaign, fraudulence, forgery, etc. Behavioral violations of public morals are adultery, illicit intercourse, public performance of obscenity, gambling, etc. See Korea Police Agency 2011.

Judging from this changing tendency, we can infer several points. First, the decrease in burglary and assault cases may imply that Koreans began to restrain their physical criminal behavior. In Korean society, the public attitude of respect for others' rights and properties permeates people's consciousness. However, rape, which is categorized within the criminal incidence caused by physical assault, has been rapidly increasing. The number of rape cases was 5,920 in 2000, 6,667 in 2005 and 17,646 in 2010 (Korea Police Agency 2001, 2006, 2011). This phenomenon of such an increase is very exceptional, compared to the other physical crimes such as homicide, burglary and assault.

The Korean government enacted the 'The Act on the Prevention of Sexual Traffic and Protection, etc. of Victims Thereof' in 2004 and began to enforce it. Although Korean society maintained similar legal regulations before the enforcement of the new law, they were not strictly enforced tools. But the 2004 law included clauses urging strict regulations and strengthened punishment for violators. Although there is no definite link between the new law and the increase in the number of rapes, it is necessary to examine the causes of rape further.

Second, the rate of personal retaliations and accidental crimes is decreasing, which is a very positive change. This change can be interpreted in two ways. One is from the aspect that Korean people tend to solve their disputes by depending upon law and order rather than by themselves. The other is that legal institutions, to which people can bring their disputes, are better arranged than they used to be and Koreans see them as more trustworthy than before.

Third, one of the distinctive points in this changing trend is that the characteristics of criminal incidence are moving away from physical crimes and toward intellectual crimes, which include fraud, embezzlement, dereliction of duty and so on. It can be inferred that the criminal tendency and this phenomenon run parallel with the rapid increasing of Korean economic power.

In other words, the number of crimes in Korean society has increased very quickly along with the rate of misdemeanor, which will be discussed further in the following section. Also, we can conclude that the growth of people's legal consciousness did not catch up with the rapid speed of Korean social changes. For the last fifty years, Korean society has experienced tremendous changes in the economic, political and social areas. But up to the present, we have not yet established a variety of social institutions that are appropriate and eligible for this new social environment, and have not invested sufficient social assets to enhance the awareness and attitude of the Koreans toward law and order. One of the main problems in criminal incidence in Korean society is that there are

still so many accidental crimes resulting from the psychological unsteadiness of the criminals. Of course, various factors attributable for such crimes need to be looked at more closely. So many social factors or events exist that can lead to emotional unsteadiness. This kind of social condition might be one of the main sources that make the psychological state in a society as a whole unstable.

### III. RESPECT FOR BASIC SOCIAL ORDER: CURRENT STATUS

In a society where the members live a peaceful life, proper security must always be provided, basic social orders must be fully established, and respect for social orders must prevail throughout the society. Obedience to the basic social order is necessary to maintain sound human relationships in a society. When these social orders are well respected, people can enjoy more active and comfortable lives.

In this section, the misdemeanor cases punished by summary trials will be analyzed. There are a number of cases that are regulated by various statutes; light administrative penalty, tax evasion, smuggling and environmental pollution. However, in order to secure the coherence of this article, I will focus strictly upon analyzing the patterns of misdemeanor instances and their distinctive features. The main cases, which the summary trial procedure is applied to, are those of violating special statutes of preventing misdemeanors and statutes of traffic regulations. Because these areas are most closely related to the everyday lives of members of Korean society, focusing on them will only be appropriate to an understanding of members' legal consciousness and law-abiding behavior.

In Korea, a summary trial refers to a trial procedure that is associated with light violation instances against formal rules. It deals mainly with the violation of basic social orders and can impose a light penalty on the violators. Without plenary criminal procedure, summary trial follows the procedural law that deals quickly with the cases in which the evidence of crime is clear and the nature of crime is light. The law of summary trial provides that it would only be applied to criminal cases that would impose a penalty of under 100 000 won, custody, or a fine. This signifies that summary trial law functions as a procedural law for 'the Punishment of Minor Offenses Act'. But as shown in Table 5.3, violations of the 'Road Traffic Act' or the 'Anti-prostitution Act' can also be punished under summary trial law. The difference between the summary trial and the summary order is that while the former is requested by a police officer, the latter is requested by a public prosecutor.

*Table 5.3 Cases Punished by Summary Trials*

	1971	1975	1980	1985	1990	1993
Gambling			11,370	8,464	8,566	15,316
Assault		28,478	33,956	21,940	21,760	20,112
Fraud			7,149	5,611	2,849	1,121
Damage			4,212	3,336	4,723	3,477
Punishment of Minor Offenses Act	215,306	333,204	394,289	153,145	111,231	268,267
Road Traffic Act	407,829	147,835	270,397	147,943	387,958	437,679
Motor Vehicle Management Act			28,903	52,161	3,797	1,486
Food & Public Health Law	14,173	9,773	8,827	2,906	4,320	9,498
Anti-Prostitution Act	23,206	11,385	4,486	3,149	1,887	7,981
Railroad Act	4,343	8,064				4,621
Assembly and Demonstration Act					1,151	473
Establishment of Homeland Reserve Forces Act				31,397	21,400	24,218
Others	68,735	73,873	18,248	20,142	13,059	11,201
Total	758,216	612,612	781,837	450,194	582,701	807,819

*Note:* The figures in Table 5.3 are collected from the Korean Judiciary Yearbooks. Since 1994, the statistics of summary trial has not been collected like this category, but indicated just the total number of cases. Because the number of violation of 'the Traffic Regulations Act' is enormously enlarged due to the rapid increasing of auto retainers, the violation of traffic act has been collected in different section in the Yearbook.

As shown in Table 5.3, it is hard to discern an apparent tendency in the total number of summary trial cases. Unlike the formal criminal cases and summary order cases that have been discussed in Section II, the changing trend of summary trial cases is not consistent. This inconsistency is caused by the fact that the police department, the governmental agency to control these criminal activities, is largely influenced by social and political factors. Thus, the number of summary trial cases depends upon whether the regulation and enforcement of the police department is strengthened or not. For example, when Kim Young-sam's government, the first regime after the democratization of Korean society, came into power in 1993, the number of summary trial cases increased drastically due to the strengthened enforcement of police power in regulating and

sanctioning behavioral violations of basic social order. According to police department statistics, the number of summary trial cases increased steadily from 823,589 in 1993, to 1,096,585 in 1994, and 1,032,789 in 1995, until it plummeted to 832,005 in 1996.

Table 5.3 also shows us several distinguishable features. First, when compared to the total number of cases, the proportion of cases in violation of 'the Punishment of Minor Offenses Act' and 'the Road Traffic Act' started to change. In 1975, while the cases in violation of 'the Punishment of Minor Offenses Act' accounted for 54.4 per cent, violation of 'the Road Traffic Act' accounted for 24.1 per cent. However, in 1993, the number of violations of 'the Punishment of Minor Offenses Act' decreased to 33.2 per cent and that of 'the Road Traffic Act' amounted to 54.1 per cent. In the 1970s, violations of 'the Road Traffic Act' were usually committed by pedestrians, but after the 1980s, drivers of auto-vehicles became the main violators. Second, the number of cases punished for assault, fraudulence and damage has either decreased or remained stagnant. And the number of acts in violation of 'the Motor Vehicle Management Act' has markedly decreased.

Recent detailed analyses of the violation cases of basic social orders allow us to observe several unique phenomena. The prohibition of smoking in public places, in the 1990s, has been most frequently violated, and the increased number of violation cases supports the finding. The number of such cases has rapidly increased: 6,923 in 1991, 23,368 in 1992, 115,860 in 1993, and 265,382 in 1994, but then drastically decreased to 65,427 cases in 1995. From this changing pattern, we can draw a somewhat interesting point about regulation or control by law in a society. When a new regulation or enforcement is introduced, behavior in violation of a new law will increase at first, but the number of violations will decrease as time elapses. It means that a society needs time in order to establish a new institution that its members will accept as a norm to be obeyed. This finding should be taken into consideration when a society tries to establish a new regulation to control the behavior of its members.

According to the national police agency statistics, cases of violations of disturbance of the peace through drunkenness are the second-most frequent after cases of anti-smoking violation. And trespass, threatening behavior, illegal disposal of garbage, fare dodging and eating without paying are the major violating activities sanctioned to be dealt with by summary trial. Looking into the characteristics of these violations, we can draw some interesting points peculiar to Korean culture. Collectivism prevails throughout Korean society. People enjoy informal gatherings and place great importance on personal relationships. They form various



inter-personal groups and try to identify themselves with those groups. These gatherings can be easily related to drunkenness and disturbance of the peace. Then, those behaviors could be considered by others as an infringement of their basic rights. Korean society is in a transitional period in which a liberal legal system is beginning to replace the traditional legal culture. In contrast to the past when some degree of disturbance was tolerated, nowadays Korean people are beginning to reject any tolerance of those kinds of act.

Of course these cases do not represent the entire social order existing in Korean society. When it comes to the incidences of violation against 'the Road Traffic Act', we can discern how disordered basic social order in Korean society really is. Ownership of cars in Korean society grew beyond ten million by the middle of 1997. Compared to the rapid increase in the number of cars, the legal culture of respecting and abiding by the rules and orders relevant to roads and transportation has not yet fully developed. According to the statistics as of 2010 (Korea Police Agency 2011), the total number of cases of traffic regulation violation is 13,482,310. At that time, the total number of cars in Korea was 17,941,356, and the number of people who had a driver's license was 26,402,364. Practically one-half of the license holders in Korea violated the traffic rules every year. Among the cases of traffic rule violations, the most common violations were infringements of speed limit and traffic sign law, amounting to 9,966,450 cases. The number of violations by pedestrians was 243,532 and among them, at the top, was illegal road crossing, 120,831 in total. Since the statistics only reflect the number of violations detected and sanctioned by public agencies, the actual number would exceed this if the undetected cases were to be added.

Judging from the normative phenomena appearing in the area of basic social orders, we can conclude that the legal consciousness of Korean people is not yet mature. There is a considerable gap between citizens' law-abiding behavior and their consciousness of rights. A study that surveyed the law-abiding consciousness of the citizens in Seoul in the area of basic social orders found that the main reasons why citizens in Seoul fail to obey basic social orders are their low awareness of the need to abide by the law and its inconsistent enforcement by public agencies. According to the findings of the survey, the main causes that participants in the survey selected in a questionnaire that asked why basic social orders are not respected by the Korean people were 'the low awareness of people's obeying the rules', 'rare enforcement of police officer', and 'obeying the rules leads to a loss' (Cho and Cheon 1996).

The interesting fact in this survey is that participants in the survey thought that while they themselves or their neighbors obeyed the rules

very well, they thought that other people of no relevance to them did not respect the rules well. It seems that the discrepancy in recognition is related to the traditional collective culture of Korean society. This reveals a gap between the insiders and outsiders of a group in the practice of ensuring homogeneity and bestowing tolerance. It might be pointed out that people's legal consciousness of the need to respect basic social orders is not yet generalized or universalized in Korean society.

#### IV. PUBLIC AGENCIES' RECOGNITION AND THEIR ATTITUDE TOWARD LAW

So far, we have discussed the normative status in Korea, especially in the public sector. We explored how often the infringement of other's rights occurs in Korean society, how much people respect the public rules or basic social orders. However, the normative situation in a society cannot be judged or estimated only by people's practice of abiding by the law. The question of how well the law and order is maintained in a society is closely related to how well public officers enforce them. The rule of law, as one of the most important governing principles in modern society, can be firmly established when not only the general population being regulated follows the rules, but also when the public officers, who have power conferred on them to enforce the rules, make good use of their authority.

If so, what would be the public opinion about the practices and procedures of public agencies? A survey report on the Korean people's legal consciousness conducted by the Korea Legislation Research Institute pointed out that the general perception of Koreans towards law enforcement agencies was very negative (Park et al. 1994). Compared to the survey in 1991, the degree of distrustfulness has deepened. Especially, they feel more distrustful about the fairness of the way in which the law is executed. For example, in response to the question whether the national assembly or the government is fair when they make laws or ordinances, 56.7 per cent of the respondents answered negatively. About the legal enforcement methods of an administrative officer, police officer or public prosecutor, only a half of them answered that these are fair. The 62.2 per cent of the respondents answered negatively to the question that asked whether the laws enacted by the national assembly are considered as of people's own making. It can be interpreted that social members do not feel an identification with the laws that regulate their behaviors or acts. This phenomenon reflects Korean people's distrustfulness of public authorities when it comes to legal enforcement.

This distrustfulness of legal enforcement authorities has become one of the highest obstacles in enhancing Korean people's legal consciousness of the need to respect law and order.

One of the most important reasons for Western societies to have such stable law-enforcement systems was to restrain a ruler's arbitrary power. Of course the rule of law and law-enforcement systems do not have universality and are interpreted differently depending on circumstances. Under an authoritarian regime, the rule of law takes the form of governing people from top-down and of making laws only for the rulers. But essentially, the rule of law means that people conform to the social order based upon autonomy, and that laws are made for the members of the society. However, until now public officers in Korean society have not fully recognized that their acts, as well as the citizens' acts, should be regulated and restrained by law. The idea that public organs exist for people rather than for exerting power has not been accepted in the past. When people, including public officers, recognize the fact that the law is made to provide people with security and a prosperous life, the normative culture will definitely be changed.

Another reason for people's distrustfulness toward law and order results from the fact that public agencies' attitude toward law is very rigid and inflexible. Public officers' rigid notion of law infringes people's economic life and everyday life. That results in depriving a society of vitality. A robust and strict regulation is one of the causes for public agencies losing the trust of people in Korean society. If public agencies maintain fairness in enforcing laws and have a more active attitude, one that recognizes the purpose of legal enforcement as being for people's welfare, there would be no reason to enforce the law inflexibly. However, because legal enforcement has been swayed by corruption, personal relationships or other reasons rather than the maintenance of neutrality or fairness, someone who has to be protected by the law can develop a sense of unfairness or unjustness. This is another important reason why people surveyed had a negative attitude towards the law and distrusted it.

We need to consider the question whether the official execution of the law is fair. The question can be examined at two different levels: the subjective justice that people consider to be fair, and the objective justice in actual practice. Even if people have a feeling of fairness, the process or procedure itself might not be fair. And even if a process is objectively fair, people could subjectively see it as unfair. For example, people who have been involved in disputes or who have violated the rules would estimate the degree of procedural justice depending upon what they have experienced in their own legal proceeding. Of course, their feelings about whether they are dealt with fairly or not do not always coincide with the

opinion of the objective justice. With regard to the conflicts between objective norm and subjective feeling of justice, Lind and Tyler pointed out the following:

In small claims court cases this means that all parties to a case would like to have an opportunity to tell their story, taking as much time as they feel they need to articulate the issues that matter to them. But judges must often limit such opportunities for expression because of judicial concerns with efficiency and legal propriety. They must be sensitive to the caseload they must handle, and this may prompt them to limit litigants' opportunities to speak. Judges are also knowledgeable about the law and may restrict litigants' opportunities to present information that is legally irrelevant or inappropriate. In these situations, the judge is acting to maximize objective justice and legal efficiency, but his or her actions may clash with the experience of subjective justice on the part of the litigant. (Lind and Tyler, p. 5)

Thus, if public officers enforce or apply law too strictly, it would be difficult to expect people's voluntary obedience to law and social order.

## V. CONCLUSION

The research above can be summarized in the paragraphs that follow.

First, the normative phenomenon that is occurring in the public sector began to threaten communal life in Korean society, and the gap between the high level of consciousness of rights formed in the private sector and the low level of awareness in the public sector of the requirement to abide by the law must be taken seriously. Recent studies depict that many non-essential provisions in 'The Punishment of Minor Offenses Act' unintentionally criminalize citizens. Although immediate action is required to mend such inequality, long-term proceedings to encourage people to voluntarily respect and obey basic social orders are vital.

Second, numerous accidental crimes and violations occurring in Korean society represent the depleted level of emotional stability of its members. With the recognition that unstable emotions cause violent behaviors, it is crucial for the government, as well as for ordinary people, to foster social circumstances which provide emotional stability for people and in which they can form more comfortable human relationships in their everyday lives. Fundamental means by which to resolve such problems would be to enhance people's normative consciousness so that his or her right can be made more secure through respecting the other's right and obeying law and order.

Third, the traditional disciplinary system – restraints of behavior by shame or dishonor – fails to fulfill its function as a primary means by which to manipulate Koreans. Under that system, disgrace and humiliation worked as a catalyst to restrain society as a whole. However, the social system now has failed to find a substitute for such an effective approach. For this, a more universalized legal consciousness and attitude toward the law are necessary in order to overcome the problem of different treatments between insiders and outsiders of the groups and also to cultivate a spirit of wider tolerance.

## NOTES

1. For the changing trends of Korean Legal Culture, Kim 2006.
2. See Korea Police Agency 2001; Korea Police Agency 2011.

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## 6. The legal development in Korea: juridification and proceduralization

**Sangdon Yi and Sung Soo Hong**

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### I. INTRODUCTION

The last three decades have seen the rapid industrialization and modernization of Korean society, bringing the appearance of Korean society closer to that of Western industrialized societies. Also, in terms of legal development, features of modern law have appeared in Korean society such as the autonomy of law, the differentiation of law from politics and the establishment of the rule of law. Indeed, legal decision-making has become differentiated from political decision-making and legal principles have developed their own distinct logic and systems. The training and recruiting system for judges has also been autonomously established and the autonomy of the judiciary, which is described in the Constitution (art 103) as a system where judges rule independently according to their conscience and the law, has been realized. However, there is still some way to go before we can argue that a modern legal system has been fully established, as in Western societies. This is because, in contrast to Western societies which experienced a step-by-step development from a civic revolution and liberalization to industrialization and the establishment of a welfare state after the Second World War, the Korean legal system has experienced more complex and multiple-faceted processes of legal development. In other words, Korean society still contains some elements which are typical of pre-modern society.

Some legal problems experienced in industrialized and modern society have been recognized in Korean society. In particular, Korean society has come to face the legal problem which has been recognized as 'juridification'. In fact, in Korea, social demands are increasingly implemented by law, so that the law is materialized and politicized.

In this chapter, Habermas' and Teubner's theoretical analysis of legal development will first be examined (part II). Then, by using the term 'juridification', the legal problems in modern and industrialized society

will be discussed, in particular in a Korean context (part III). Lastly, we will examine the future of the legal development in Korea (part IV).

## II. THE DEVELOPMENT OF LAW AND JURIDIFICATION

### 1. Approaches to the Legal Paradigms

A paradigmatic approach is useful when examining the development of law. According to Habermas, the legal paradigm serves as ‘implicit ideas or images of one’s own society that provide a perspective for the practices of making and applying law’ (Habermas 1996, p. 392) or as a form of background understanding, which enables all legal actors – not only legislators, lawyers, judges and administrators but also citizens and clients – to predict how the law will work in practice (ibid, p. 221), so that it reduces the overtaxed complexity of the task of deciding a case by providing guidance (ibid, p. 220).<sup>1</sup> Although it is not to say that a certain assumption exclusively belongs to a particular paradigm (Rehg 1996, p. xxxii), we can categorize the legal paradigm into the liberal paradigm, the social-welfare paradigm and the proceduralist paradigm (see Habermas 1996, pp. 392–409; Teubner 1983, pp. 251–7; Yi 2007, pp. 33–92).

The liberal paradigm emerged in the eighteenth century. Based on the liberty and autonomy of individuals, the liberal paradigm tries to guarantee the citizen’s freedom against the state through formal law (Teubner 1983, pp. 252–3). For this reason, formal law just delineates abstract spheres for private autonomous action (ibid, pp. 252–3; Kennedy 1973; 1976; Unger 1976, pp. 166ff). In this sense, the role of modern law, in Nonet and Selznick’s account (2001, p. 71), is ‘to restrain the authority of rulers and limit the obligation of citizens’, and under such a condition people can create their own private ordering of life in a society. In addition, in order not to be prejudiced against individuals, formal law should be independent of other extra-legal values. Thus, formal law can acquire its legitimation not by political or moral values, but by its own internal, systemic, logical structures (Cotterrell 1984, p. 166). These characteristics have been identified as formality and rationality (Weber, 1956, p. 397), ‘formality meaning generality, autonomy, publicity and positivity’ (Unger 1976, p. 204), or ‘positivity, legalism and formality’ (Habermas 1984, pp. 259–62; also see 1976, p. 264; 1987, p. 358).

However, the liberal paradigm faces its own limitations since it is indifferent to the outcome of that regulation and therefore it fails to guarantee substantive equality and freedom. This leads to the emergence

of the social-welfare paradigm, which seeks justice between the weak and the strong, and supposes that direct and interventionist legal regulation is indispensable in obtaining that justice. In contrast to formal law, which limits itself to providing abstract boundaries and spheres, the substantive law of the social-welfare paradigm dictates desired goals for social justice and equal liberty. Therefore, 'the rise of purpose in law' or 'the sovereignty of purpose' (Nonet and Selznick 2001, pp. 78–86) becomes an important feature of juridification in the welfare state, and the law can be justified by the social results it is designed to achieve (Teubner 1987, p. 15).

## **2. Juridification and Regulatory Trilemma**

### **A. Debates on juridification**

Since the 1970s, the problem of increasing legal regulation in the welfare state has been actively studied and variously termed 'juridification', 'regulatory crisis', 'flood of norms' and 'legal explosion' (see Teubner 1987; Voigt 1980; Blankenburg et al. 1980; Friedman 1975). The main point of these discussions is that the legal regulation of the welfare state represents a threat to the formal rationality of law which has guaranteed the legitimacy of law. It leads to a negative attitude towards legal growth in the welfare state.

### **B. Regulatory trilemma**

In terms of regulatory problems in the welfare state, Teubner's term, a 'regulatory trilemma', is useful and accepted as one of the most convincing explanations of these problems. Indeed, regulatory scholarship adopts regulatory trilemma as a useful model for analysis to approach the regulatory failure (see Parker et al. 2004, pp. 10–11; Parker and Braithwaite 2005, pp. 126–9). Teubner's argument proceeds in three dimensions: the legal system (legal norm-making), the political system (political decision) and the social area of life (social guidance) (Teubner 1987, p. 21). By discussing the interaction and inappropriate relation between these three areas, Teubner provides the idea of trilemma. According to him, the trilemma exists as a problem in three forms: (1) mutual indifference, (2) social disintegration through law, and (3) legal disintegration through society.

*Mutual indifference* Mutual indifference can also be expressed as incongruence of law, politics and society (Teubner 1985, p. 311; 1987, pp. 22–4). When political decision is translated into law, the regulatory intention of politics is necessarily actualized through law (see Luhmann



1990, chapter 3). However, the inner logics of law and of politics are different from each other. So, politics adjusts its decisions to legal relevance criteria, and law too should attune its relevance criteria to politics. However, if politics fails to achieve the relevance criteria of law or law does not adjust its relevance to politics, law and politics fail to regulate the social areas of life (society), and do not create changes in behaviour. In other words, the regulated system reacts by not reacting and politics fails to acquire the desired results through law. Nonetheless, if politicians continue to use law as an instrument for realizing their political intentions, politics fails to reach society; this can be described as a 'symbolic use' of politics and law (Edelman 1964; for discussions in Germany, see Hassemer 1989; Voß 1989, pp. 82ff), where politics cannot substantially affect society and is only considered as a symbol.

*Social disintegration through law* The second problem is social disintegration through law or over-legalization of society (Teubner 1985, p. 311; 1987, pp. 24–5). This means that legal regulations tend to have disintegrative effects on the internal interactions of the regulated systems. These tendencies have been convincingly explained by Habermas as 'colonization of the lifeworld' (Habermas 1987, p. 355). According to Habermas, the juridification of the welfare state was originally orientated towards substantial protection of freedom, but it also tends to deprive citizens of freedom by destroying the social area of life. In other words, juridification has both a freedom-guaranteeing and a freedom-depriving character (ibid, p. 361; 1996, p. 407). This is because the regulatory programmes of law, such as bureaucratic procedures and cash payment of legal entitlements, are poorly suited to the internal social structure of the regulated spheres of life. Nevertheless, if juridification proceeds without considering this problem, it tends to destroy the social area of life.

*Legal disintegration through society* The third problem is legal disintegration through society, or over-socialization of law (Teubner 1985, pp. 311; 1987, pp. 25–7). This means that the self-producing organization of law is endangered when law is subjected to the regulated system. In the welfare state, there are increasing political and social demands for regulation, and law becomes instrumentalized for the purpose of policy. This inevitably threatens the integration of law. Because the logic of political guidance is not often in accord with the inner structure of law, 'the quest for purpose is a "high-risk" alternative' (Nonet and Selznick 2001, pp. 76–7). This also leads to the decline of the rule of law (for the relationship between the rule of law and the welfare state, see Unger 1976, pp. 193–200). To make matters worse, the regulated areas of social

life resist the regulation of law in order to avoid intrusion into their autonomous logic. Eventually, law is sandwiched by these double demands on law, and its own self-reproductive organization is endangered. This problem is also explained by Luhmann (1985, pp. 118–19, 122–5) in relation to time. For the unity of the legal system, sufficient time is needed to develop new concepts and dogmatic rules and to aggregate cases into types of problems. However, the continuous reorientation of political requirement forces law to be subjected to incessant and rapid modifications (Zacher, 1987, pp. 410–11). This does not allow enough time for case law and legal doctrine to develop independently, and therefore the function of law to stabilize behavioural expectation over time cannot be properly fulfilled, because the clarity and certainty of law is threatened by rapid modifications of law.

### III. LEGAL DEVELOPMENT AND JURIDIFICATION IN KOREA

#### 1. The Legal Development of Korea

In considering the legal development of Korea in relation to these Western theories, some interesting observations can be made. The authors will attempt to approach the legal development of Korea by drawing attention to its ‘dual structure’ (see Yi 2007, pp. 37–40). This dual structure means that the liberal paradigm of law has not yet fully developed in Korea, while the juridification of the welfare state has been carried out at the same time.

##### A. The reception of modern law through Japanese imperialism

In Korean society, neither liberalism nor individualism (the fundamental ideas of the liberal paradigm) have been fully established in terms of the social and political culture. In fact, many scholars have pointed out that Korean culture contains many traditional elements which can collide with liberalism or individualism. In terms of legal development, it has been pointed out that these features are closely related to the influence of the Japanese colonial period from 1910 to 1945. In other words, Korea had to introduce the liberal paradigm of law due to Japanese colonial rule, but it was received in a distorted form. Although this gave Korea an opportunity to introduce a Western legal system, the fundamental ideas of the liberal paradigm, such as the rule of law and liberalism, were omitted from this process (Chung [Geunsik] 1999, pp. 291–2). In fact, the rule of law was not presented as a principle to check the arbitrary power of

the state but as an ideology to force people to accept and obey the existing legal system. This means that the totalitarian aspect of dominance was simultaneously reinforced by the introduction of the liberal paradigm. Because of this distortion, Koreans came to have a negative image of law. For them, law was not presented as a way of protecting people against the state, but just as a means of ruling by the state. Consequently, the reception of the Western legal system produced the exact opposite result that the liberal paradigm had originally intended (Kim 1992, pp. 264–5). In other words, the idea of liberalism was not appropriately accepted during the process of the introduction of modern Western law. This problem continued during the military government of the US and the dictatorship period, and it became the dominant problem in Korean legal practice and scholarship. More importantly, it served as an obstacle to the establishment of the liberal paradigm in Korean society (Han 1994; 2000; 2001; Korean Association of Legal History Studies 1995; Kim 1998; Hahn 1998; Chung 2006).

### **B. The cultural tradition of Korea**

In addition, Korean traditional culture itself can collide with the idea of liberalism. In fact, it has been pointed out that Korean traditional culture consists of relationism, in-group favouritism, nepotism, familism, authoritarianism, blood relation emotion, ritualism, in-group collectivism, sectionalism, compartmentalism and altruism and these cultural features still remain in the contemporary society of Korea (Choi 1995; Kim 1995, pp. 120–4; Lee 1999; Han 2001; Cho 1985; Lee 2001; Hahn 1988; Park 1986; Lee and Park 2000).

Collectivism, the prioritising of the group (or the state) at the expense of individuals, underpins these cultural characteristics, and this can function as an impediment to liberalism which pays attention to individual autonomy. In terms of law, the traditional legal culture of Korea can be described as fundamentally alegalistic, and Koreans usually do not prefer to solve a problem by means of a lawsuit (Hahn 1986, p. 7; Kim 2003). In terms of psychology, Koreans tend to give priority to humanity rather than to legal principles (Kim and Kim 2003). However, there is no overall agreement on this subject and opinions are divided among scholars. For example, the avoidance of litigation may not be caused by cultural tradition but by scepticism as to the fairness of the legal system and the economic burden of using the judicial process (Lim 1974, pp. 49, 74; Yang 1989, p. 895). In fact, it can be argued that Koreans have some difficulties in taking their case to an advocate because of the very limited number of lawyers in Korea (see Kim [Jae Won] 2001). However, traditional culture is also associated with corruption and favouritism so

that it leads to a deterioration of the reliance on the judicial process (Choi 1972, pp. 116–17). In this sense, the cultural tradition may deter Koreans from seeking litigation. However, liberalism and individualism prevail among the young, and as an increasing number of cases have been dealt with in the courts, we can no longer say that there is an avoidance of litigation in Korea (Parker et al. 2004; Lim 2003, pp. 154–7; Kim [Jeong-Oh] 2000; Kim 2006, Chapter 7). It would go beyond the scope of this chapter to examine which aspects are more justified, but it is at least possible to say that Korea has a ‘complicated mixed norm system’ in which the liberal norm system and the traditional norm system co-exist (Kim 1995, pp. 124–6). Similarly, Korean society can be regarded as a ‘simultaneous complex of premodern, modern and postmodern phenomena’ (Chung [Ho-Geun] 1999, p. 184); or it can be said that there exist the features of traditional society (the traditional subject mind), the atomized and alienated mass mind, the dissatisfied class mind and the politically competent civic mind at the same time in contemporary Korean society (Lim 2001).

### **C. The welfare paradigm in Korea**

Although the liberal paradigm has not been fully developed, the welfare paradigm of law has grown rapidly. This is the result of rapid democratization and industrialization since the 1960s in Korean society. In fact, the rights of the weak have been promoted as a result of democratization (materialization of employment, social security law, law for women’s protection, etc.), and juridification to protect the functioning of social sub-systems has been undertaken as a result of industrialization (laws to protect the medical system, economic system and transport system).

### **D. The dual structure in Korea**

Examining Korean society in terms of its legal development, the social-welfare paradigm has developed at a faster rate than the liberal paradigm. This is different from the development in the West, where the liberal paradigm and the welfare paradigm were established consecutively.

This dual structure has made the original problems of the welfare paradigm worse. In other words, the problems of juridification (which have been pointed out by Habermas, Luhmann (see King and Thornhill 2003, pp. 216, 225; King and Schütz 1994, p. 283) and Teubner can be more seriously aggravated when related to the particular cultural tradition of Korea. For example, paternalism (Habermas) or de-differentiation (Teubner) can easily be combined with the traditional collectivism of Korea. In fact, it can be argued that familism in Korea tends to represent the state as the extension of the family by regarding the ruler as a

patriarch, which functions as an obstacle to the development of modern law (Choi 1972, p. 105). Paternalism based on Korean tradition can be easily linked to the extension of state power (for paternalism in relation to the centralization of state power, see Park 1996). It is also assumed that the tendency towards de-differentiation through politics can be accelerated by the influence of this cultural basis. This means that Koreans have a favourable opinion about the extension of the activities of the welfare state. To put it differently, in Korea, the 'state paternalism' caused by the welfare state can be amplified with the help of the 'ethical paternalism' arising from the cultural tradition (Yi 1997, p. 14). Paternalism can therefore cause serious problems in Korea.

The juridification of the welfare state brings a raft of general clauses, which can cause further problems. General clauses do not have any specific contents, only abstract and general contents. This would be a threat to the principle of the legal state, which is based on rule of law. If law is not clearly described in a statute, the principles of the modern legal state such as predictability, objectivity and precision are threatened. This phenomenon can be described as 'the decline of the rule of law' (see Unger 1976, pp. 193–200). In particular, this leads to an infringement of a principle of modern criminal law, *nulla poena sine lege*. According to this principle, crime and punishment should be based on criminal law which has been clearly described before the illegal action. The more ambiguous and indefinite the statute, the greater the possibility of infringing this principle. The interpretation of these ambiguous general clauses has to depend on 'intuitive legal emotion', and this can be associated with the ethical legal emotion of Korean tradition society (see Kim [Young-Whan] 2001; Yi 1999).

For example, in Korea, a comprehensive registration system for all residents has been established (see Kim [Ki-jung] 2000) and the National Education Information System (NEIS), which collects information on students and teachers, has been introduced comprehensively (see Lee 2004; Hong 2004). These policies may violate the rights and freedom of individuals but they were easily introduced without any severe objections. In fact, it seems that in comparison with other Western countries, policy-makers in Korea do not need to worry about the resistance of their people when introducing policies which may be a threat to the rights and freedom of people, such as CCTV for surveillance, electronic bracelets, electronic passports including bio-information and electronic ID cards including much private information. Korean people tend to give priority to their effectiveness and convenience when such policies are introduced, rather than the threat to their rights and freedom. It should be pointed out, in the same context, that strong criminal punishment has been used

as *prima ratio* not as *ultima ratio* (Cho 2001; Yi 1999); even this policy is often supported by civil society without considering its side effects.

## 2. The Regulatory Trilemma in Korea

Interestingly, the problems of juridification such as the regulatory trilemma are to be found in Korea. The juridification of medical areas is a good example (Yi 2007, pp. 75–7). The welfare state aims to protect the interests of patients, as the weakest in society, against doctors, as the strong who may commit a fault. In Korea, legal precedents and legislation changed over recent decades to protect and promote the interests and rights of patients. However, as this policy has been strengthened, so-called ‘defensive medicine’ has spread among doctors; they tend to concentrate their efforts on preventing medical accidents rather than on providing the best treatment. This means that their behaviour becomes strategic and preventive. The point is that such attitudes may destroy the social trust between doctors and patients, and their relationship may become reformulated as strategic relations between two traders who compete with each other to maximize their profits. The authors’ concern is that law may deconstruct social integration through this change. In addition, a strong orientation towards the protection of patients may lead to the destruction of the original principles of contract law and criminal law in relation to medical accidents. This means that the normative structure of law may be under threat. Eventually, the original aim of protecting the rights of patients cannot be undertaken and, if this happens repeatedly, law and policies fall into a state of mutual indifference.

A similar problem can be recognized in the economy. Since the Korean Financial Crisis of 1997, structural changes in the economy (in particular, the financial industry) to maximize economic rationality have been undertaken according to the requirements of the International Monetary Fund (IMF). Strong regulation of false audits to protect the rational capital market was introduced in this context (Yi 2005). However, the legal policy of providing special protection for capital investors may deconstruct the normative structure of law. For example, in Korea, criminal punishment for auditors associated with false audits was attempted without considering the possibility that it would violate the principles of *ultima ratio* or the evidence rule. Also, the severe punishment of false audit often leads to the bankruptcy of audit firms, possibly dissuading good quality auditors from accepting auditing work to avoid the huge liability for false audit and the payment of compensation money. This leads to the destruction of the work culture of auditors. Also, this policy often fails to produce the intended results; in other words, it may

be ineffective. In fact, criminal approaches to false audit may be ineffective because the criminal law, generally speaking, requires higher standards of evidence. Also, a legal claim for damage from false audits often fails because the causation between false audits and damages is not easily clarified. All in all, this means that law is not an appropriate way to regulate false audit. If this legal policy continues in spite of its failure, it will lead to mutual indifference between policy and law in relation to false audits.

#### IV. THE FUTURE OF LEGAL DEVELOPMENT IN KOREA

##### 1. The Proceduralist Paradigm of Habermas

Habermas' new paradigm focuses on securing 'the necessary conditions under which legal subjects in their role of enfranchised citizens can reach an understanding with one another about what their problems are and how they are to be solved' (Habermas 1996, p. 445), or 'those conditions of communication under which the political process can be presumed to produce rational results because it operates deliberatively at all levels' (Habermas 1998a, p. 245). In this sense, what law must institutionalize is the 'communicative presuppositions and procedure of a political opinion- and will-formation in which the discourse principle is applied' (Habermas 1996, p. 458). The proceduralist paradigm is not limited to designating minimal conditions under which social actors act freely without considering the result, and it does not try to take positive legal action to correct social inequalities. Instead, it attempts to legalize discursive and procedural preconditions of democratic opinion- and will-formation. This is why Habermas conceives this new paradigm as the 'proceduralist' paradigm of law.

In this new paradigm, a new subject emerges as a participant who expresses his or her will freely and participates positively in the political process. Through this process, they can 'participate in political communication in order to articulate their wants and needs, to give voice to their violated interests, and, above all, to clarify and settle the contested standards and criteria according to which equals are treated equally and unequals unequally' (Habermas 1998b, p. 18). Eventually, instead of 'the private competitor on markets' of the liberal paradigm and 'the private client of welfare bureaucracies' of the social-welfare paradigm, 'the citizen who participates in political opinion- and will-formation' emerges as a central concern' (Habermas 1999, p. 334).



## **2. Reflexive Law of Teubner**

Teubner approaches the crisis of the welfare state by introducing reflexive law which is based on reflexive rationality. The justification (norm rationality) for reflexive rationality is found in 'the desirability of coordinating recursively determined forms of social cooperation' (Teubner 1983, p. 254). For this reason, reflexive law provides structural premises for reflexive processes in other social sub-systems, instead of authoritatively regulating other sub-systems (*ibid.*, p. 255). The internal structures of reflexive law are therefore changed: instead of formally regulating (formal law) or substantively and directly regulating social behaviour, reflexive law 'confines itself to the regulation of organization, procedures and the redistribution of competences' (Teubner 1987, p. 34; 1985, p. 334). This alternative strategy is also characterized by 'control of self-regulation' (1985, pp. 33–40; 1985, pp. 307–308, 313–21) 'decentralized context regulation' (Teubner and Wilke 1980), 'autopoietic law' (Teubner 1993), and 'reflexive law' (Teubner 1983, pp. 266–81).

Reflexive law is limited to regulating the process, and the related parties autonomously pursue their interests within the sphere which is constituted by law (Teubner 1983, p. 256). Accordingly, the initiative is placed on the related parties rather than on authoritatively organized bodies. In this sense, reflexive law regulates society in an indirect way, and fosters the autonomous problem-solving capacity of social actors. One of the weak points of juridification of the welfare state is that it does not consider this structural coordination between law and other social systems. However, reflexive law only fosters the mechanism to develop the reflexive pre-structure of the regulated systems (*ibid.*, p. 275). Therefore, instead of focusing on the social problems to which the law should respond, reflexive law 'seeks to identify opportunity structures that allow legal regulation to cope with social problems, without, at the same time, irreversibly destroying valued patterns of social life' (*ibid.*, p. 274); 'the semi-autonomous social field' (Moore 1973) can thereby be respected. The point here shifts to the question of how to harmonize the inner-systemic logic of the legal system with other social systems. This also leads to guaranteeing the autonomy of other social systems.

## **3. Proceduralization in Korea**

### **A. Proceduralization**

The suggestions of Habermas and Teubner are both basically procedural. The idea of proceduralization focuses on providing a process for problem-solving rather than providing any substantial standards which



would decide which value should be chosen (Yang 2006; Cohen 2002; Wiethölter 1985, pp. 222–49). Of course, Habermas' and Teubner's ideas for proceduralization are based on different theoretical backgrounds (see for more detail Black 2000; 2001). For Habermas, the procedural rationality which replaces substantive rationality is provided as a substantial normativity. In fact, his idea of rational discourse, which is based on language philosophy, actually includes substantial normativity. In other words, a discursively grounded consensus is regarded as a kind of normative objective. In contrast, Teubner focuses on the unavoidability of a collision between different kinds of rationality and provides some procedural principles for dealing with this collision; this means that the normativity is vague in his theory (see Teubner 1997).

### **B. Legal interpretation and legal theory**

Proceduralization can be observed in the plural instances of legal interpretation and legislation. For legal interpretation, discourse theory provides more practical suggestions. In fact, considering the obligation of judges to make a decision, simply emphasizing the inevitable collision between different rationalities does not provide any practical suggestions. The implication that Habermas' proceduralist paradigm of law claims the participation of people in legal interpretation as an ideal which the legal interpretation community should pursue. This is not necessarily related to the direct participation of people in the legal decision (i.e. the jury system) or the election of judges. Habermas argues that courts have to 'justify opinions before an enlarged critical forum specific to the judiciary' (Habermas 1996, p. 440) and the legal decisions of judges must also be exposed to public controversies; this is 'the institutionalization of a legal public sphere' (Habermas 1996, p. 440). In other words, the power of legal decision-making should not be exclusively monopolized by judges, but it should be open to the 'legal communication community' of society (Yi 1997, p. 179) or 'a legal public sphere' (Habermas 1996, p. 440). More importantly, it should be pointed out that legal interpretation itself is the result of a collision between various social values. One kind of rationality must not have an exclusive priority over others. In particular, on the one hand, traditional metaphysical ethics has influenced legal interpretation (a problem peculiar to Korea), and on the other hand the imperatives of the administration and the economy have recently had an impact on legal interpretation (a common problem in any advanced society) (Yi 1997, p. 27). Of course, this does not mean that the rationalities of ethics, the economy and the administration should be excluded or do not need to be considered. Instead, the concern is that one of these rationalities will dominate the other rationalities. In this sense,

legal interpretation should be understood here as a 'communicative phenomenon' (Yi 1997, pp. 171–2). From this perspective, legal interpretation is a result of communication in a society, and its justification can be secured to the degree that people reach understanding with each other. In this sense, legal interpretation can be regarded as 'legal language play' and judges, as institutional subjects of this play, conduct normative language play; in this respect, judges need to adjudicate just by saying that 'I insist that my interpretation was normatively justified' rather than saying that 'I recognized the truth of the case.' Legal interpretation by judges is 'constituent participation in legal language play' (Yi 1997, Ch.8), and judges are obliged to persuade people in the community for legal interpretation to agree with their decision-making by providing enough argumentation. This points out a democratic aspect of legal interpretation, but this is not necessarily related to radical democracy; e.g. the introduction of the jury system or the direct election of judges. In particular, it is not expected that ordinary people who lack any professional understanding of the function and duty of law and do not have enough information about complicated problems within a case will be more eligible to make a legal decision. It may even be the case that ordinary people tend to behave as an interest group rather than as public citizens in the public sphere. This means that radical democratization of the judicial system is not always justified, and it may be more realistic and desirable that the legal participation of ordinary people should be restricted. For example, it may be advisable that a professional group should still be placed at the centre of legal communication and that people surrounding the centre should indirectly participate in monitoring and criticizing its practice at the periphery; indeed, professional legal communication should be open to the public for people to participate in communication. This constitutes 'the dual structure' in the sphere of the judiciary, just as Habermas suggests in relation to the formal sphere of politics and the informal sphere of civil society and the public sphere. As a practical suggestion relating to this strategy, 1) legal language should be made easier so that ordinary people could participate in its interpretation, 2) professional groups in law should reflect the various parts of civil society and be freely open to the public sphere, and 3) civil society should monitor and criticize the practice of the legal profession in an appropriate way (Yi 1997).

### **C. Alternative forms of legislation**

In terms of legislative forms, the proceduralist paradigm of law which is provided by Habermas makes clear that what law must institutionalize is the 'communicative presuppositions and procedures of a political

opinion- and will-formation in which the discourse principle is applied' (Habermas 1996, p. 458). In this condition, 'the contested standards and criteria' concerning the wants, needs, violated interests and equality of the parties concerned should be clarified and interpreted by themselves, not authoritatively given by judges, official servants or legislators (Habermas 1998b, p. 18). Here, citizens' rights should be guaranteed to use their communicative freedom in the public sphere without any restrictions. While Habermas does not provide any concrete forms of law that incorporate these ideas, Teubner's ideal of reflexive law provides some clearer forms of law. According to him, law is limited to 'the regulation of organizations, procedures and the redistribution of competences' (Teubner 1987, p. 34; 1983, p. 256).

However, it is not clear whether Habermas' new paradigm of law aims to introduce new legal institutions and practices (Arato 1998, p. 27). Although Habermas seems to think that a particular legal form, such as Teubner's idea of reflexive law, is not sufficient to do justice to the proceduralist paradigm of law (1996, p. 410) and that he simply indicates that a certain form of law cannot be an ideal objective, he does not try to argue that reflexive law is never in accord with his proceduralist paradigm. Indeed, his concept of deliberative politics can be more easily exercised by means of reflexive mechanisms or forms of regulation, rather than by means of other previous mechanisms (Black 2000, p. 613), although Teubner is sceptical of participatory democracy (see Teubner 1987, p. 38). In other words, Teubner's idea of reflexive law is 'inherently democratic' (Black 2000, p. 606) and this means that it has a certain normative aspect (Black 2001, p. 57).

The point here is that these two theories do not collide with each other in practical aspects, in particular in terms of concrete forms of law. In fact, Cohen, who provides the 'reflexive paradigm of law' by using these two theories, argues that the new paradigm of law 'foster[s] a learning process that leads to reciprocity and to the recognition of the agency (sexual and other), competence, voice, moral and civic equality and integrity of all workers' (2002, p. 150). A practical procedure which incorporates this learning process will not collide with either of these two theories.

Here, alternative dispute resolution (ADR) processes can be put forward as a legal form which legalizes the colliding rationalities and as a learning process. In fact, in Korea, various forms of ADR have been created, such as the Trade Union and Labour Relations Adjustment Act (1996), the Environmental Dispute Adjustment Act (1990), the Gender-Equal Employment Act (Chapter 4); there has also been an attempt to enact a bill of medical dispute resolution. The point of ADR is to provide

a mechanism in which the parties concerned can autonomously settle their disputes without deciding on any substantial standards in advance (Yi 2007, pp. 83–5). In fact, this ADR is not aimed at direct intervention but tries to only regulate organizations, procedures, the distribution of coordination which Teubner suggests is the core of reflexive law; in fact, it legalizes self-regulating processes, but does not try to provide any substantive standards for the settlement of disputes. For example, a bill of medical dispute resolution, which was introduced in 1994, 1996 and 2001 (but these have not been enacted) includes the idea of proceduralization (Yi 2000). According to these bills, the prescribed cases must be dealt with through mediation. Mediation here provides a procedure in which the parties associated with a dispute can settle the dispute using their own initiatives without relying on legal enforcement. Furthermore, this medical dispute resolution system does not provide any substantial standards concerning the liability of doctors or damages, and instead regulates the organization (e.g. medical dispute resolution committee, investigation process), procedures and competences, as Teubner suggests, as a form of reflexive regulation. In other words, law here does not directly regulate the collision between doctors and patients but instead indirectly regulates the social acts of doctors and patients by introducing self-regulation.

If the parties reach consensus through mediation, its effect is the same as an in-court settlement. Also, doctors must be insured against medical accidents (i.e. obligatory insurance) so that the damage from medical mistakes can be compensated by means of insurance. Through this obligatory insurance system, patients' damages can be more effectively compensated and doctors can avoid the overburden of paying compensation money. Through mediation, patients' rights can be more securely guaranteed, since patients' damages can be more easily compensated on one hand and the tendency of doctors to practise defensive medicine is mitigated on the other hand. Of course, doctors are not totally exempted from their mistakes, because a premium of insurance increases if an accident takes place because of a doctor's mistake. This means that they take an appropriate level of obligation and responsibility through this system.

## V. CONCLUDING REMARKS

The last question should be whether this idea of proceduralization can be applied to the Korean contexts; to put it more concretely, whether it can be applied to the Korean legal system, which has the dual structure of the

liberal and welfare paradigms. On the one hand, the liberal paradigm is not yet fully developed, but, on the other hand, Korean society has to suffer from the original problems of the juridification of the welfare state. As discussed above, this dual structure may make the problems of juridification worse. The symptoms of the welfare state tend to be easily combined with the pre-modern features of the cultural conditions of Korea. In considering this particular situation, can alternative forms of proceduralization still be applied to Korean society?

It would go beyond the scope of this chapter to carry out an overall examination of Korean society, but some diagnoses and prospects have been discussed here. Despite the incomplete achievement of the liberal paradigm, Korea cannot go back to the past to elaborate the liberal paradigm again. Instead, it is necessary for the country to achieve the two subjects which arose from each paradigm at the same time; Habermas' idea (1990) of the 'catch-up revolution (*die nachholende Revolution*)' is relevant here.

Moreover, the changed situation of Korea shows the possibility of this strategy. Since the democratization in 1993, Korean society has experienced a rapid change in many areas. In some senses, it is no longer appropriate to say that Korean society is characterized by authoritarianism or collectivism. In particular, the power of civil society, which had been suppressed during the dictatorship period, has exploded and there is even some concern about the collapse of the authority of the state in Korea. For example, considering some cases such as the social movements which had a great effect on the general election in 2000, the great resistance of people against the impeachment of the president in 2004, and people's appeal against the import of American cows which might be vulnerable to bovine spongiform encephalopathy (BSE, known as 'mad cow disease') in 2008, it is no longer the case that individual freedom is being suppressed by the state or by any other communities. In particular, the activity of the young Korean generation on the internet is more vigorous than that of any other country; they are very good at expressing their opinions and organizing protests online.

From this perspective, it does not seem right to argue that Korean society tends to give priority to the state or to communities rather than to individuals. Some people are even concerned that, considering the recent resistances on the street (the so-called 'demonstrations with candles'), the direct participation of people in politics is excessive and the representative body, the parliament, is so shrunken that it does not play its role of mediating between the public and the state. The same is true for medical paternalism mentioned above. On the one hand, Korean cultural tradition includes paternalism, which can be related to the paternalistic attitudes of

doctors towards patients and the great respect shown by Korean people to doctors. However, on the other hand, it seems that patients no longer show such overwhelming respect to doctors; in practice, recent decades have seen an increasing amount of litigation to claim damages from the professional negligence of doctors. In this respect, we can no longer say that Koreans avoid litigation and settle cases without going to law because of the lack of a culture based on liberalism. The insistence that Koreans need more liberalism (Hahm 1967; 1986) is justified only to a limited extent.

This means that debates on juridification in Western countries can be also useful in the Korean context, regardless of which ideas are more persuasive. Given the rapid industrialization and modernization of Korean society, the view that the Korean legal culture is based on different backgrounds from those of other Western countries is increasingly losing its theoretical ground. More importantly, as stated above, regulatory problems (e.g. regulatory trilemma) are already recognized in various areas in Korea. This is why Korea cannot avoid the debates on juridification and accordingly should seek for a strategy, including proceduralization, to overcome problems arising from juridification.

## NOTE

1. Theoretical discussions on Habermas and Teubner in this chapter are mainly based on Sung Soo Hong's thesis (2008).

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## PART III

### Critical issues in law and society in Korea



## 7. The making of public interest law in South Korea via the institutional discourses of *Minbyeon*, PSPD and *Gonggam*<sup>1</sup>

**Patricia Goedde**

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On 2 September 1984, heavy rains and a faulty floodgate system resulted in the flooding of the *Mangwon* region in Seoul, affecting 17,900 households and over 80,000 people. Flood victims blamed the city of Seoul for failing to maintain the floodgates as well as Hyundai Construction, Inc. for defective workmanship. In the next month, 20 households representing 80 individuals brought the first series of lawsuits. The first lawsuit was finally won in August 1987, which found the Seoul city government liable for flood mismanagement.<sup>2</sup> Within a week, 5,000 households involving over 20,000 people filed applications for compensation. Of these applications, 2,300 families qualified for compensation. Three consecutive waves of lawsuits went to court between 1989 and 1991, all of which were decided in favour of the plaintiffs. All told, the lawsuits took between five and seven years to litigate.<sup>3</sup>

The *Mangwondong* Flooding Incident is significant from a public interest law perspective for several reasons. First, the turnout in plaintiffs in 1989 was unprecedented in the history of Korean litigation. Second, that the government could be held liable for its actions in the courts was a phenomenal event in South Korean society, considering its past three decades of military rule and the doubtful judicial independence of this period. And, third, the attorney responsible for organizing the *Mangwondong* cases, Cho Yeong-nae, was the symbolic leader for a burgeoning public interest law movement in South Korea. While the *Mangwondong* cases were not called ‘public interest litigation’ at the time, they heralded a new awareness of litigation being used collectively to check the power of the state.

The purpose of this chapter is to chart the development of public interest law in South Korea and to grasp its defining characteristics. First

of all, what is meant by 'public interest law'? What particular institutional forms has public interest law taken? And, why does public interest law discourse emerge more earnestly in the 1990s? To answer these questions, this chapter follows shifts in discourse and activities through several legal advocacy organizations: Lawyers for a Democratic Society (*Minbyeon*), People's Solidarity for Participatory Democracy (PSPD), and the public interest lawyers' group, *Gonggam*. The chapter finds that public interest law in South Korea develops as an explicit discourse in the 1990s with the creation of PSPD as it increasingly employed legal measures on behalf of 'the public interest' for social reform issues, but that the concept matures under *Gonggam*'s prerogative to focus on minority rights by providing direct legal aid, alongside calls for deeper commitment to *pro bono* service by the legal profession.

## I. CHO YEONG-NAE'S LEGACY

The *Mangwondong* Flooding Incident was the first group litigation of its kind in terms of the number of plaintiffs and the amount of damages sought. Without a class action system in place, the task of organizing thousands of plaintiffs was massive and not one most attorneys wanted to tackle. The time it would take to interview and confirm the veracity and personal stories of each plaintiff, the vast filing of court documents, the number of hours in terms of workload, the uncertainty of winning and the unlikelihood of profitability; all of these factors were serious disincentives to the average private attorney.

Cho Yeong-nae and his team of lawyers, however, were undaunted by the difficulties of time, manpower and money, and managed to organize the collective lawsuits, not predicting the triumph ahead and the snowballing effect it would have. Due to their efforts, the *Mangwondong* litigation served as a 'prototype' for other collective suits that followed (Hwang 1998). While the compensation in damages was trivial from the plaintiffs' perspective, the fact that citizens emerged victorious in a case against local authorities was an important milestone. Timing was also conducive given that the first favourable verdict passed in the late summer of 1987, after presidential candidate Roh Tae-woo (1988–1992) promised widespread constitutional reform in the wake of the 1987 June Uprising (Democratic Movement).

Cho Yeong-nae's advocacy in this and other high profile cases on behalf of individuals against the government made him one of the foremost human rights lawyers in South Korea at the time. He also expressed interest in the concept of a public interest law movement in the

late 1980s and set up the *Simin Kongik Hwaldong Pŏmnyul Samuso* (Citizens' Public Interest Law Office) by 1987.<sup>4</sup> Cho Yeong-nae was very knowledgeable about the American public interest law movement and its movement leader Ralph Nader, whom he had the chance to meet on a visit to the United States. However, his efforts at cultivating a public interest law movement in South Korea ended when he died of cancer at the age of 43 in 1990. The legal community mourned his loss as also one for a nascent public interest law movement in South Korea (*Minbyeon* 1998, p. 11).

## II. LAWYERS FOR A DEMOCRATIC SOCIETY (MINBYEON)

What the Korean community lost with the death of Cho Yeong-nae, it gained with the Lawyers for a Democratic Society (*Minbyeon*). Cho Yeong-nae and his legal team handling the *Mangwondong* cases were members of *Minbyeon*'s underground predecessor, *Chŏngbŏphoe*, which had operated formally as the Human Rights Committee of the Korean Bar Association. *Minbyeon* became the first independent lawyers' association that functioned openly and legally to protect the civil liberties of Korean citizens. While Cho Yeong-nae was an influential individual in organizing cases on behalf of the underdog, *Minbyeon* was the first central organization for the development of public interest law in South Korea, that is, by litigating on behalf of hundreds of individuals who had suffered abuse by government authorities, mostly for alleged violations of the National Security Act and the Assembly and Demonstration Act.

When *Minbyeon* formed in the late 1980s, the conceptualization of 'public interest law' had not fully entered the South Korean legal discourse because its activities were couched in the prevailing theoretical framework and language of human rights, thus explaining the native term *in'gwŏn pyŏnhosa* (human rights lawyer). Nonetheless, *Minbyeon* downplays an institutional role in advancing public interest litigation. For example, one *Minbyeon* report on public interest litigation in South Korea acknowledges the *Mangwondong* Flooding Incident as the start of public interest litigation, recognizes the general public interest law nature of human rights defence during the 1970s and 1980s, but then credits that the age of serious public interest litigation began in the mid-1990s with other non-governmental organizations such as the Citizens' Coalition for Economic Justice (CCEJ), People's Solidarity for Participatory Democracy (PSPD), and the Korea Federation for Environmental Movement

(KFEM), all of which have public interest litigation centres (Kim and Yi 2002, p. 10).

While the phrase and concept of ‘public interest law movement’ (*kongik pŏp undong*) originated with PSPD activities in the mid-1990s, one of *Minbyeon*’s former chairs believes that ‘public interest law’ is what *Minbyeon* has been doing all along, only that it was PSPD that vocalized the concept.<sup>5</sup> After all, *Minbyeon* lawyers have been providing voluntary legal services for many causes, starting historically with cases related to the National Security Act and labour law but now expanded to include improving criminal procedure, women’s rights, environmental protection, consumer protection, and providing legal assistance to North Korean refugees. *Minbyeon* lawyers are mainly located in smaller private firms, so they either actively volunteer to take cases of interest to them or accept those that come directly unsolicited to them, whether from a *Minbyeon* committee, fellow attorneys or clients themselves, usually on a *pro bono* basis. In other words, *Minbyeon*’s role has been that of a professional outsourcing network of legal providers. *Minbyeon* lawyers on corresponding committees have often worked in conjunction with other citizen advocacy groups, particularly public interest litigation centres of the latter. For example, lawyers on the environment committee have often been involved in the public interest litigation centres of KFEM or Green Korea United. Other lawyers have worked respectively with women’s advocacy groups, the YMCA or other civic organizations, though their services do not necessarily entail litigation. Thus, *Minbyeon* lawyers have played a crucial role in advisory and *pro bono* capacity in conjunction with these civic groups.

### III. PEOPLE’S SOLIDARITY FOR PARTICIPATORY DEMOCRACY (PSPD)

The phrase ‘public interest litigation (*kongik sosong*)’ entered the Korean vocabulary more quickly and apparently in the 1990s with the emergence of a new citizens’ advocacy group called People’s Solidarity for Participatory Democracy (PSPD). Its overall mission has been to serve as a citizens’ watchdog group against the government and *chaebol* conglomerates, and it wielded the law to do so as explained below.

PSPD rose meteorically in the civic community since its establishment in 1994, boasting a membership of over 13,000 citizens by 2004 and ranking number one in annual society polls for four consecutive years as the most influential citizen’s group in South Korea, with a vote of 53.7 per cent in 2005.<sup>6</sup> PSPD enjoyed wide support for its platforms appealing



to all levels of society, such as anti-corruption, economic justice, and improvement of social welfare. For example, it succeeded in passing the Act on the Prevention of Corruption, calling for better government accountability, and in raising and guaranteeing social welfare for the South Korean population with the National Basic Living Security Act. PSPD acted on behalf of hundreds of citizens in numerous cases citing rights violations and also vigorously questioned *chaebol* market dominance by bringing lawsuits.

One reason that PSPD achieved recognition and certain success with its reform agendas is the extent to which it mobilized the law and legal procedures. In its first decade, PSPD filed 194 lawsuits, lodged 21 audit requests, and submitted 394 opinions, 109 legislative petitions, and 63 requests for information disclosure, totalling 781 instances of legal submissions (Hong 2004, p. 114; PSPD 2004, Appendix 127). Its principal founder, an attorney and activist by the name of Park Won Soon (the current mayor of Seoul), stated that the main element or 'weapon' of a civic movement must be legal instrument or application.<sup>7</sup> PSPD has followed through on this philosophy. It has benefited from the leadership of attorneys in its organization, the creation of a Public Interest Law Center, and its heavy reliance on legal measures.

The leadership of legal professionals helped formulate much of PSPD's strategy in pursuing reform tactics vis-à-vis the government and *chaebol* conglomerates. Park Won Soon was a widely networked attorney who had worked alongside Cho Yeong-nae in both *Chōngbōphoe* and *Minbyeon* as a junior colleague. He and a group of almost 20 people, including lawyers, academics and social activists, gathered in early 1994 to decide the tentative name, basic aims, activities and organizational structure of PSPD. The Executive Committee consisted of nine legal professionals (lawyers or law professors) versus seven (professors and research directors) in non-law fields such as labour, sociology, communications and political science (PSPD 2004, p. 37). Meanwhile, 16 of the 50-member Operations Committee consisted of legal professionals, eight being lawyers, and the other eight law professors (PSPD 2004, p. 36). Thus, over half of the Executive Committee and one-third of the Operations Committee were legal professionals. Of the five initial advisors to PSPD, one was Yi Sae-jung, then director of the Korean Bar Association, which signifies at least the partial support of Korean bar leadership during PSPD's formative years. Meanwhile, at least one attorney was a member of each of PSPD's subcommittees. At least six out of the eight lawyers on the Operations Committee belonged to *Minbyeon*. Furthermore, Park Won Soon regularly called upon *Minbyeon* lawyers throughout the years to contribute their services to various cases.

By 1999, 116 lawyers were volunteering their services for PSPD (Park 2003, p. 535).

PSPD also established the Public Interest Law Center in 1994, the same year as its inception. PSPD was the first citizen movement organization to do so, with other movement organizations like CCEJ, KFEM and Green Korea United creating internal legal centres later. The existence of such a centre speaks to the importance which PSPD leaders, particularly Park Won Soon, placed upon public interest law as a methodology for PSPD. Terms like 'public interest litigation (*kongik sosong*)', 'public interest law (*kongik pŏp*)', and 'public interest law movement (*kongik pŏp undong*)', mainly derived from PSPD's resort to the law and its explicit labelling of this process as public interest law. In other words, 'public interest law' was the explicit naming of a new phenomenon in South Korea: legal mobilization by citizens and their purported agents. Likewise, 'public interest litigation' referred usually to collective litigation on behalf of groups of aggrieved citizens.

While the Public Interest Law Center initiated a few lawsuits, the bulk of legislative petitions and litigation have come from the other PSPD subdivisions. Park Won Soon believed that the Public Interest Law Center as created in 1994 was no longer necessary given that public interest litigation was infused throughout PSPD's various centres' operations, and should instead be replaced with a Public Interest Law Clinic that focused instead on research and development of the actual state of public interest litigation (Park 2003, p. 536). Considering that lawsuits no longer originated from the Public Interest Law Center, it shifted its responsibilities to researching and advancing the state of affairs of public interest litigation. Starting in 2001, the Public Interest Law Center's objectives have been to promote a public interest law movement, to support public interest litigation, to aid public interest lawyers' activities, and to research and educate about public interest law. In line with these goals, the Public Interest Law Center has held conferences on various themes such as product liability, compensation for damages, legal aid, legal education and training, lay participation as jurors, and the need for a class action lawsuit system. The Center's role has shifted primarily to an informational one or to one of awareness promotion, by holding conferences, encouraging *pro bono* work by attorneys, keeping track of and publishing data on PSPD lawsuits, as well as publishing articles on the state of public interest law practice. The Public Interest Law Center's diminishing role speaks to the growing ability of the other PSPD centres to pursue and organize public interest litigation.

Litigation and legislative petitions were the two methods most employed by PSPD. Although legislative petitions, discussion forums and

assemblies were the most common campaign methods, these were not activities that always resulted in immediate concrete actions or decisive outcomes. Instead, PSPD relied on litigation for two main reasons: first, lawsuits can provide concrete results, and second, victims other than the plaintiffs to successful lawsuits can find similar relief under the authority of a court decision (Park 2003, p. 535). As we will see below, litigation also had its benefits even in the absence of courtroom victory. The chapter examines next how legislative petitions and litigation came to define PSPD's public interest law activities.

## **1. Legislative Petitions**

A legislative petition is a proposal for a new or revised law submitted to a legislative session of the National Assembly. Although frequently used by citizens' groups due to their low cost, legislative petitions have no track record for direct success. Out of the 273 legislative petitions deposited by various South Korean non-governmental organizations during the three-year period of 1996–9, not a single one was accepted directly (Park 2002, p. 28). The parliament rejected 73, while the remaining 200 moored with standing committees automatically expired with each term's end. Among those submitted by PSPD, none has been directly successful either. PSPD divisions filed 109 legislative petitions between 1994 and 2004. Of these, the National Assembly rebuffed 56 petitions, while the rest dissolved by expiry of the legislative session.<sup>8</sup>

Why do legislative petitions have such a dismal failure rate, and why do PSPD and other NGOs continue to draft and send them to unresponsive parliamentarians? Park Won Soon attributes failure to Assembly Members' conflicting party interests, justifiable opposition to a disadvantageous reform proposal, or simple disinterest (Park 2002, p. 28). There may be a more basic reason. Legislative petitions sometimes propose, over time, several different amendments to a single law or propose a new law altogether. In either case, such proposals would call for a more thorough, time-consuming evaluation by legislators. Thus, there appears to be a technical reason as to why legislative petitions do not pass immediately.

However, petitions can be highly effective tools in the long run based on their cumulative effect. Confronted with waves of petitions, Assembly Members start working on the laws in question. Instead of accepting individual petitions at face value alone, legislators begin to consider different, compromised or compiled versions of legislative petitions. For example, PSPD achieved the enactment of two instrumental laws, the National Basic Living Security Act and the Act on the Prevention of

Corruption, with the collective effect of legislative petitions. PSPD's Social Welfare Committee submitted the most legislative petitions with a total of 24 between 1994 and 2004 (PSPD 2004, Appendix 128). These petitions targeted a new law, the National Basic Living Security Act, which passed relatively quickly in 1999. The Social Welfare Committee renewed legislative petitioning again in 2000, this time supplemented with lawsuits, because it still found the law flawed with respect to the homeless and destitute.<sup>9</sup>

As for the Act on the Prevention of Corruption, PSPD's Campaign for a Transparent Society submitted its first legislative petition on anti-corruption in November 1996 in the form of a completely new law. Provisions included a public officials' ethics code, whistle-blower protection, money-laundering prevention, punishment and the institution of an independent investigative board for corruption cases. Although senior government officials and party leaders supported the idea in principle, party officials as well as the Ministry of Justice and the Board of Audit and Inspection especially opposed the creation of an independent investigation board with a special prosecutor. Nonetheless, the law passed six years later in 2001 after some modifications, with 210 out of 299 legislators in favour of the Act.<sup>10</sup>

Despite what appears to be their short-term impotence, legislative petitions had the potential to be very effective in the long term as illustrated by the passages of both the National Basic Living Security Act and the Act on the Prevention of Corruption, albeit compromised.

## **2. Litigation**

Between 1994 and 2004, various centres of PSPD initiated 194 cases. Specifically, the Participatory Economic Committee brought 49 lawsuits, the Restoration of Citizens' Rights Campaign 48 lawsuits, and the Campaign for Transparent Society 38 lawsuits.<sup>11</sup> The Legislative Watch Center followed with 17, the Social Welfare Committee with 14 lawsuits, and the Judicial Watch Center with 12. The Public Interest Law Center filed three lawsuits during this time, while other small centres brought almost a dozen suits combined.

Out of the total 194 cases brought by PSPD during this period,<sup>12</sup> there were 33 final wins (including wins on appeal, partial wins and indictments), 32 final losses, 32 cases pending, 59 dismissals (22 by the courts, 37 by the prosecuting office), 19 withdrawals (many upon the disclosure of information requests and some after reaching agreeable settlements) and five formal settlements.<sup>13</sup> Fourteen cases fell into a variety of other categories.<sup>14</sup>

Based on these statistics, PSPD won one out of every five cases, and had cases and charges dismissed one-third of the time. Whether this is a low success rate or not is open to interpretation. Winning is not strictly a numbers game in the courtroom. Filing a criminal charge against a business or corporate official may not have much merit inside the courtroom or with prosecutorial priorities. However, the action of filing a lawsuit succeeds in publicizing an alleged wrongdoing and embarrassing the named violator, possibly forcing concessions outside the courthouse. The win or loss in the courtroom is not necessarily reflective of gaining ground in a targeted cause. Litigation can have several purposes besides winning a case on the merits for the benefit of the plaintiffs (Rabin 1975, p. 234). Lawsuits are also important for consciousness-raising, as leverages for bargaining, and as a means to embarrass or pressure reluctant institutions and organizations to act (McCann and Silverstein 1998, pp. 267–9; Shaw 1996, pp. 207–208). While scholars generally recognize the utility of litigation for social movements, studies have shown that activist lawyers are generally more critical about the impact of litigation for reform objectives and rely on lawsuits as but one tactic in concert with other strategies like lobbying, legislative advocacy, coalition-building, awareness-raising and public protest (McCann and Silverstein 1998; Shaw 1996, pp. 206–11). This is consistent with how PSPD pursues litigation, as one means of a broader strategy incorporating various measures such as media announcements, conferences, public forums, internet communication, and legislative advocacy (Hong 2004, pp. 112–13).

Besides the fact that PSPD has vigorously pursued litigation as a method for reform, the collective nature of the litigation is also important: first, in terms of building coalitions and, second, in terms of organizing a class-action type of lawsuit. Take, for example, the *Gimpo Airport Noise Pollution* case, which is instructive for the development of public interest litigation in South Korea. In February 1999, PSPD initiated a lawsuit to compensate residents around Gimpo Airport and their suffered losses due to noise pollution. After several months requesting information disclosure from various government agencies, the *Min-byeon* Environmental Commission, KFEM and local NGOs agreed to organize a lawsuit on behalf of 115 injured plaintiffs (Choi 2003, pp. 13, 15). Numerous difficulties, however, prevented the effectiveness of the lawsuit: primarily, the cost of collecting evidence was prohibitive and time-consuming, but there were other costs like gathering, educating and informing plaintiffs. The sheer number of plaintiffs across five different provinces and cities with their own administrative complaint procedures also hindered smooth litigation. Although plaintiffs suffered commercial

losses in terms of real estate and assets, the burden of proof was too high and the legal argument for injury was ultimately premised on mental and emotional distress (Choi 2003, p. 17). The court still required evidence for the extent of distress endured, stating that it was necessary to have some basis for calculating damages.<sup>15</sup> In the end, some plaintiffs received compensation, but not the 10,000,000 *won* demanded for each plaintiff.

Due to the difficulties of organizing the *Gimpo Airport Noise Pollution* case, it became the catalyst for a citizen group movement to establish a class action lawsuit system in South Korea. The first meeting was held on 30 August 2000, with representatives from *Minbyeon*, PSPD, CCEJ, YMCA Seoul Branch, KFEM and Green Korea United, followed by a legal evaluation of four lawyers from *Minbyeon* and PSPD and additional meetings involving more NGOs, this time religious and women's groups, along with government representatives (PSPD 2003, p. 53). In October 2000, the NGOs submitted a legislative petition for a general class action lawsuit system. Lawyers of NGOs gave significant attention to this during the first year, but efforts splintered as NGOs pursued more specialized class action lawsuits. For example, PSPD pursued the Securities-Related Class Action Act; KFEM drafted one specifically for environmental lawsuits; and consumer groups worked on a collective litigation system for consumers.

Meanwhile, PSPD's use of shareholder derivative lawsuits and its push for a securities class action lawsuit system have been both celebrated and criticized. At core, the argument is whether PSPD should be heralded for improving corporate governance in South Korea on behalf of minority shareholders, or if this type of activity subverts the notion of PSPD as being a representative of 'the people' in that unlikely alliances have been forged with foreign institutional investors and corporate lawyers to sell out or otherwise constrain national *chaebol* companies that ultimately help run the South Korean economy. While PSPD has received public praise for enactment of the National Basic Living Security Act and the Act on the Prevention of Corruption, the passage of the Securities-Related Class Action Act in 2003 has received mixed reviews even from within PSPD.<sup>16</sup>

PSPD has not been without its detractors on account of its overall political make-up. The major issue is whether PSPD has actually represented the public interest. The main criticisms are that (1) its leadership is elite-based given that many of its board members were educated at Seoul National University; (2) its first decade of membership was comprised mostly of men in their thirties and forties who occupied white-collar jobs (otherwise known as the '3-8-6' generation, at the time

those in their thirties who entered college in the 1980s and were born in the 1960s); and (3) almost one-third of PSPD committee members have at some point held positions in either one or both of the past progressive administrations of Kim Dae-jung (1998–2003) or Roh Moo-hyun (2003–2008). From a social movement standpoint, it is not unusual for professional elites to organize and lead a movement given their credentials and networking resources (McCann 1986, pp. 204–205). Furthermore, it is not surprising that PSPD held an allure for those college graduates who were part of or witnessed the student movements of the 1970s and 1980s against military rule because PSPD's major objective has been to check state power and hold the government accountable to the people. While it is debatable whether PSPD is a *bona fide* NGO given its leadership's involvement with the former administrations, one of the outcomes was that PSPD had better communication channels with the Roh Moo-hyun government, which led in part to a decline in litigation (that is, fewer 'test cases') and reorientation toward more policy-orientated measures.<sup>17</sup>

#### IV. GONGGAM

PSPD litigation rates dropped drastically after 2004. PSPD filed a combination of 10 lawsuits and criminal charges in 2005, four in 2006, and two lawsuits in 2007.<sup>18</sup> PSPD and *Minbyeon* members attributed this decline mainly to the creation of a public interest law firm, *Gonggam* (meaning 'empathy').<sup>19</sup> Park Won Soon created *Gonggam* under the auspices of the Beautiful Foundation, a charity institute that he left PSPD to found in 2000, once again denoting his commitment to developing the notion of public interest law.

With a small staff of eight attorneys who also happen to be *Minbyeon* members, *Gonggam*'s self-description as a 'nonprofit public interest law firm' illustrates its conscious adoption and promotion of public interest law discourse. Its mission statement is probably the most instructive as to how *Gonggam* defines public interest law:

1. To develop and nurture a culture of human rights in Korean society by protecting the minority and under-represented.
2. To pursue social change through legal channels and action.
3. To promote public interest lawyering (*Gonggam* 2006, p. 2).

*Gonggam* activities fall into five major areas: litigation, legal aid projects, mediating *pro bono* activities, development of public interest programmes, and research. While public interest law in South Korea started



off being largely related to collective litigation, this is not the mainstay of what *Gonggam* does. One attorney explained that litigation is not the bulk of their work, but rather 'legal aid, writing manuals, and doing research'.<sup>20</sup>

Nonetheless, *Gonggam* has pursued litigation on three of its major fronts: discrimination against people with disabilities, violence against women, and abuse of migrant workers. In 2006, *Gonggam* listed its 21 most significant cases, out of a yearly average of 40.<sup>21</sup> Of these 21 cases, seven concerned migrant workers' rights; four were on behalf of women's issues like domestic violence and abuses in international marriage; two on behalf of clients with disabilities; one regarding a welfare facility; and seven concerning general public interest matters like wasteful spending by governmental entities.<sup>22</sup>

Besides litigation, *Gonggam*'s activities extend to legal aid for clients, like legal education seminars and drafting manuals with legal advice. Much of the work aiding women, for example, comes from seminars and the distribution of manuals giving legal advice to women victimized by violence, especially informing those women who come from abroad about how to obtain a divorce yet retain residency in the country.

*Gonggam*'s activities also include partnering with government agencies (such as the National Human Rights Commission of Korea) on legal aid projects; brokering between clients (sometimes NGOs) and other attorneys; improving laws and regulations concerning their clients; and trying to improve the state of public interest law overall, such as fact-finding missions to the United States and promotion of public interest law in the legal education and training process. One way that *Gonggam* has tried to promote public interest law is to learn from the experiences of other public interest law advocacy groups overseas, from countries like Canada, the Philippines, the United Kingdom, and the United States, for modelling purposes and to share information at international meetings and conferences.

*Gonggam* considers advancing the awareness and state of public interest law practice in South Korea as one of its important goals. Although *Gonggam* has received media accolades for its mission and its network with civic organizations is extensive, the work of eight attorneys versus the entire lawyers' population of approximately 10,000 is but a small dent in addressing citizens' legal concerns. The corrective, as viewed by *Minbyeon* leaders and legal scholars, is to embed the ethic of public service as a professional obligation earlier in the legal education and training process.<sup>23</sup> Accordingly, *Gonggam* lawyers urge revision of the legal education and training curriculum to incorporate public service courses and clinics.



*Gonggam* has given new meaning to the term ‘public interest law’ by virtue of its existence and the priorities of its group of founding attorneys. In terms of discourse, it has given a contemporary name to human rights lawyering: public interest law. In other words, public interest law is the explicit labelling of the role and the acts of lawyers who mobilize the law on behalf of minorities for protection of their human rights, and thus social change. This is the definition that *Gonggam* gives to public interest law.

## V. WHAT DOES ‘PUBLIC INTEREST LAW’ MEAN IN SOUTH KOREA?

Public interest law is a contested concept. This is especially true in the United States. The contested exclusions/inclusions to the meaning of public interest law in the United States demonstrates its conceptual dynamism and presents many comparative points to explore the Korean conception in greater detail.

If one had to select the simplest definition of public interest law in the United States, it would probably be the ‘representation of the unrepresented and underrepresented’(Ford Foundation 1973, p. 9; American Bar Association 1976, p. 9). Public interest law in the United States is often defined by the clientele or cause served, for example, the poor, ethnic minorities, women, or environmental protection, consumer affairs, fair housing, mental health and workplace discrimination. However, public interest law is as much about the means and purpose as it is about the groups represented. The American Bar Association has expanded the concept by including the following elements (American Bar Association 1976, p. 9):

- an orientation toward test cases;
- an interest in non-money damage remedies;
- an emphasis on opening up and improving government operations;
- a concentration on administrative processes; and
- a clientele not necessarily indigent but lacking resources for effective representation on issues of broad concern to the community (for example, the environment and consumer affairs).

This definition has some overlap with South Korea’s evolving concept of public interest law. The *Minbyeon* Public Interest Litigation Committee gives a lengthy categorization, calling it litigation pursued to effect a more just and democratic society by pursuing the following (Kim 2002, 22):

- protection of rights of the underprivileged and minorities
- expansion of civil rights
- amendment of flawed laws
- prevention of abuse of state power
- improvement of social institutions through the redemption of citizens' rights infringed by state power.

The commonalities between the two concepts are representation of disadvantaged clients and checking the actions of the government. What distinguishes the Korean concept is that *Minbyeon's* definition emphasizes protection of rights vulnerable to government abuse through the revision of bad laws and empowerment of social groups. Public interest law in Korea essentially developed as a socio-political reaction to current and lingering misdeeds of the state, especially those committed prior to civilian rule. Legal advocacy groups like *Minbyeon* and PSPD were the principal institutional actors (or networks) able to mobilize the law against the state in the name of rights protection. This is not surprising given their resource pool of attorneys, many of whom had activist backgrounds and now the legal skills to organize litigation against offensive actions of the state or major *chaebol*.

This leads into whether public interest law is by nature ideologically defined. While most literature on public interest lawyering (or 'cause lawyering') has mainly focused upon politically progressive activities (Sarat and Scheingold 1998), an increasing number of scholars posit that the concept should be neutralized since lawyering for a cause can be easily assumed by both ends of the conservative–progressive spectrum (Southworth 2005, pp. 85–6; Hatcher 2005, pp. 112–17). This debate may just as easily hold for South Korea with the emergence of lawyers of conservative alignment forming coalitions vis-à-vis the past Roh Moo-hyun administration, such as *Lawyers with Citizens (Sibyŏn)* which was founded in 2005 to monitor government policies on behalf of the larger citizenry. However, some *Minbyeon* lawyers are sceptical as to whether their activities should count as 'public interest lawyering' given these groups' past efforts to use the law to attack government policies rather than to represent individual citizens' claims.<sup>24</sup>

*Pro bono* work also deserves mention for its role in public interest law. *Pro bono* services have held a dubious place in the tradition of public interest law in the United States primarily because public interest law activities have been viewed as being limited to the voluntary sector (Weisbrod 1978a, p. 29). Legal scholars have considered *pro bono* to be 'substitutes' or 'supplementary' to public interest law given that *pro bono* originates in the private law firm setting (Handler et al. 1978, p. 49).

More recent scholarship illustrates, however, that some *pro bono*, especially geared toward under-represented communities or specific causes, should now be included in the definition of public interest law given the alternative (albeit private) sites already created for ‘critical lawyering’ or ‘to advocate on behalf of subordinated groups’ (Trubek and Kransberger 1998, p. 201). Trubek and Kransberger argue that since the protection of disadvantaged clients is diminishing in the public sphere, other modes for critical lawyering in the non-traditional law firm setting must be examined (Trubek and Kransberger 1998, p. 205). This type of development – that legal services in the private sector can support a social agenda – may be taken into account in the South Korean case considering that public interest law activities in South Korea frequently depend on the *pro bono* services of private practitioners (often between a citizen advocacy group and frequently, but certainly not limited to, *Minbyeon* attorneys). *Minbyeon* member and PSPD leader, Cha Pyeong-jik also claims that *pro bono* service falls under the category of public interest law (Cha 2002, p. 180). Taken altogether, public interest law practice in South Korea includes legal measures exercised by citizen advocacy groups toward an agenda for social reform, and *pro bono* activities of lawyers and law firms toward the same ends.

While *Minbyeon*’s lawyers mobilized the law to act on behalf of their clients in the name of human rights protection, it was Park Won Soon and other PSPD members that first elevated the concept of public interest law by having an explicitly named Public Interest Law Center, resorting to litigation and legislative petitions, and pushing for more *pro bono* volunteer work from *Minbyeon* attorneys on what were perceived to be more timely issues of the 1990s, especially in light of the 1997 Asian Financial Crisis, such as anti-corruption, social welfare improvement, and improving the transparency and accountability of many *chaebol* practices. Since 2004, *Gonggam* attorneys have added further depth to the notion of public interest law in South Korea to include not just collective litigation as managed between NGOs and volunteering lawyers, but also legal aid projects, the brokering of various *pro bono* opportunities, the importation of ideal public interest law practices from abroad, and the promotion of public interest law activities and awareness within the legal profession.

As in the United States, it is difficult to capture a single definition for public interest law in South Korea. However, different legal advocacy institutions such as *Minbyeon*, PSPD and *Gonggam* have moulded the definition by virtue of their existence, missions, and legal activities toward purported public ends. If one had to rely on a single meaning of public interest law as it evolved through the 1990s until now, it would be

the mobilizing of law to gain rights protection for the under-represented, ultimately for social change.

## VI. CONCLUSION

The precedents set by Cho Yeong-nae in the *Mangwondong* Flooding Incident and *Minbyeon*'s dedication to defending the constitutional rights of individuals against governmental abuse indicate that lawyers and other legal professionals in South Korea were ready and equipped to use the law, particularly through litigation, for the collective good of marginalized populations and for greater social change in general. However, *Minbyeon* passes institutional credit to PSPD for actively and consciously starting 'a public interest law movement' from the mid-1990s onward. While other NGOs in the fields of environmental protection, consumer rights and human rights in general have also pursued litigation in concert with volunteer lawyers, PSPD lives up to *Minbyeon*'s claim considering that legal mobilization has been PSPD's explicit platform for achieving many of its social reform goals. It may be argued that some of PSPD's causes served its more narrow constituents than the public at large, but the methods of litigation and legislative petitions, along with its promotion of *pro bono* work on the part of attorneys, nonetheless raised an awareness of public interest law discourse. While PSPD's legal activities slowed down in the early 2000s, the newly founded public interest law group, *Gonggam*, picked up the torch for using legal measures to advocate on behalf of minorities. *Gonggam* refocused and added new dimensions to the notion of public interest law by concentrating on the human rights of minority communities, moving beyond primarily litigation and legislative manoeuvres to direct legal aid and empowerment for its clients. *Gonggam* attorneys also retain conscious discussion of public interest law by actively promoting its significance in South Korea's legal education reform. As a concept, public interest law is here to stay in South Korea. Its dynamism, however, rests not only with the initiative of legal advocacy organizations, but in the hands of the larger legal community and their level of *pro bono* commitment.

## NOTES

1. This is a modified version of the article by Patricia Goedde (2007), 'Is there a Public Interest Law Movement in South Korea?' *Korea University Law Review*, 1, 1–19.
2. Case Report, *Law and Society*, Vol. 4 (1991), p. 107.
3. 11,000 *won* was roughly equivalent to ten US dollars.

4. Interview with a law professor of socio-legal studies, 12 May, 2004, Seoul, Korea.
5. Interview with a former *Minbyeon* chair, 29 April, 2004, Seoul, Korea.
6. 'Who's Moving Korea, 2005?' *Sisa Journal*, 25 October, 2005, 60.
7. Interview with Park Won Soon, 8 May, 2004, Seoul, Korea.
8. These figures were derived from data in Appendix 128 of *PSPD's 10-Year Record, 1994–2004*.
9. National Basic Living Security Act, Law No. 6024, 7 September, 1999, as amended by Law No. 7796, 29 December, 2005.
10. Act on the Prevention of Corruption, Law No. 6494, 24 July, 2001, as amended by Law No. 7612, 12 July, 2005.
11. These figures were derived from data in Appendix 127 of *PSPD's 10-Year Record, 1994–2004*.
12. PSPD cases include both lawsuits (*sosong*) and prosecutorial charges (*kobal, koso*) within the general category of litigation (*sosong*). Prosecutorial charges are included on the list of lawsuits since the litigation process was started, though many of the charges and suits were eventually dropped or dismissed for various reasons and never made it into court.
13. These figures were derived from data in PSPD 2004, Appendix 128.
14. For example, some results were not logged or yet unknown. A few were suspended sentences, fines and warnings. One case ended due to the death of the petitioner.
15. Supreme Court of Korea (27 January, 2005), 2003da49566; Seoul District Court (14 May, 2002), 2000kahap6945.
16. Securities-Related Class Action Act, Law No. 7074, 20 January, 2004, as amended by Law No. 7387, 10 March, 2005.
17. Interview with PSPD and *Minbyeon* members, 9 April, 2007, Seoul, Korea.
18. Interview with PSPD member, 9 April, 2007, Seoul, Korea. See also *Sosong charyosil* (Litigation Documents) at the PSPD website, at [http://www.peoplepower21.org/sue/sue\\_list.php](http://www.peoplepower21.org/sue/sue_list.php) (last visited 10 January, 2008).
19. Interview with PSPD members, 9 April, 2007, Seoul, Korea.
20. Interview with *Gonggam* attorney, 9 April, 2007, Seoul, Korea.
21. Interview with *Gonggam* attorney, 9 April, 2007, Seoul, Korea.
22. '*In'gwon pyŏnhosa pyŏnsinjung* (Transformation of Human Rights Lawyers)', *Seoul Shinmun*, 20 December, 2000.
23. Interview with *Minbyeon* attorney, 29 April, 2004, Seoul, Korea. See also: Mun Jae-wan 2006.
24. Interview with PSPD and *Minbyeon* members, 9 April, 2007, Seoul, Korea.

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## 8. Recent reforms in the legal profession and legal education

**Dohyun Kim**

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### I. INTRODUCTION

Since Roh Moo-hyun's government came into power in 2003, Korea has experienced the overhauling and rapid reformation of all of its judicial institutions and the entire legal profession. In 2009, the graduate-level law school system (*pŏphak chŏnmun taehagwon*), a new legal education scheme, replaced its predecessor, the National Judicial Examination (*sabŏp sihŏm*).<sup>1</sup> An entirely new system of lay participation in criminal procedure, similar to the jury system of the common law world, had already been in operation since 2008. The unified plan for judicial appointment (*pŏpcho irwŏnhwa*), under which judges are appointed from among lawyers with five or more years of experience as practising lawyers, is another judicial reform item already in the process of piecemeal implementation which will eventually replace the past practice of appointing all judges from among new lawyers just graduated from the Judicial Research and Training Institute (*sabŏp yŏnsuwŏn*, hereinafter JRTI).

Though the reforms are well under way, the reform agenda did not suddenly fall from the sky one day. Since the mid-1990s, there have been vehement debates between law professors, legal professionals and members of civil society over the judicial reform agenda. This chapter purports to describe the background and history of the judicial reformation in Korean society from the mid-1990s until today, including, if necessary, detailed specifications of individual reform items. In the process of these descriptions, the author also wishes to explain what is missing or what issues are insufficiently reflected in the judicial reforms currently being implemented.

Part II covers the background of the judicial reform debates, providing an explanation of why judicial reform has become a keen subject for debate in Korean society by describing the past conditions of the Korean



legal profession and the legal services provided to citizens. Part III briefly reports the reform proposals of some law professors under the governments of Kim Young-sam and Kim Dae-jung which were made in the 1990s, along with the processes leading to the failure of these proposals to be implemented. Part IV describes the judicial reform proposals made mainly by legal professionals (especially elite judges) since 2003 under Roh Moo-hyun's government, which faced a vehement response from non-governmental organizations (hereinafter NGOs) in civil society after being successfully embodied in legislative bills and submitted to the National Assembly in 2005. Part V deals with the critical role of civil society, especially in the passing of the Law School Act through the National Assembly. In the conclusion, the author will evaluate the overall picture of recent judicial reform in Korean society and attempt to analyse the limitations to the changes.

## II. BACKGROUND OF THE JUDICIAL REFORM

In the normal context, the term 'lawyers' in Korea indicates none other than judges, public prosecutors, and practising lawyers; 'the three wheels of the legal profession (*pŏpcho samryun*)' is a familiar piece of journalistic jargon indicating these three categories of lawyer. Even law professors do not fall under the category of 'lawyers' as they do not normally have lawyers' licences, which are reserved for those who have passed the National Judicial Examination and finished two years of coursework at JRTI.

Similar to Japan, the neighbouring country whose legal and judicial system has greatly influenced Korea not only during the colonial rule maintained for 35 years in the early twentieth century but also after the independence of Korea from Japanese colonialism, Korea has several kinds of 'quasi-lawyers', such as scriveners (*pŏmmusa*), patent lawyers (*pyŏllisa*), tax lawyers (*semusa*), and labour lawyers (*nomusa*). The licensing systems of these quasi-lawyers are totally different and separate from the lawyer licensing system: those who want to become a scrivener, for example, have to pass the Scrivener's Examination administered by the Supreme Court (Certified Judicial Scrivener Act, art 5) rather than the National Judicial Examination administered by the Ministry of Justice. Generally speaking, a scrivener's job is confined to preparing legal documentations and acting as an agent in real estate registrations or in public auctions. Contrary to the situation in Japan, scriveners cannot represent parties in lawsuits even in small claims cases,<sup>2</sup> let alone ordinary civil litigations: representation in lawsuits is a monopoly right

exclusively granted to practising lawyers. The only exception to this rule is the representation right given to patent lawyers in patent cases (Patent Attorney Act, art 8), which involves filing objections to the granting of patent rights by the Patent Office and consists of fewer than 2,000 cases a year. Moreover, in principle, only practising lawyers can provide general legal advice to citizens for remuneration (Attorney-at-Law Act, art 109).

As a result, in Korea, the right to deal with judicial and legal affairs is almost entirely monopolised by the three wheels of the legal profession, all of whom have passed the highly competitive National Judicial Examination and are graduates of JRTI. The National Judicial Examination was introduced in Korea in 1963, replacing the previous Judicial Section of Higher Civil Service Examination (Kim and Hwang 2007, p. 142). During the 1960s and the 1970s, the number of those who passed the National Judicial Examination remained as low as 20 to 80 out of 2,500 to 4,500 applicants each year. With such a small number passing the exam, almost all the graduates of JRTI were appointed as judges or public prosecutors in the courts or prosecutors' offices, and only after resignation from their posts as judicial officials were they able to become practising lawyers who could provide legal services to the public.<sup>3</sup> However, with ten to twenty years of experience working as a lawyer, along with the fact that the number of practising lawyers remained small, a practising lawyer's fee used to be so high that the average worker in Korea, if involved in litigation, could not afford to obtain a lawyer's assistance.

These conditions did not improve even after the introduction in 1971 of a quota system for the National Judicial Examination, along with the establishment of JRTI under the auspices of the Supreme Court, replacing its predecessor the Seoul National University Graduate School of Law (Choi 2007, pp. 297–300). Though a pre-defined number of applicants had to pass the National Judicial Examination, from 1971 until 1981, the number remained at 80 or fewer per year. It was then increased to 300 per year under the military authoritarian regime of the Fifth Republic. Still, the majority (often two-thirds) of JRTI graduates were appointed to the courts and prosecutors' offices, which meant that each year during the 1980s and the 1990s, only about a hundred could begin their careers as practising lawyers (Kim and Hwang 2007, p. 143). In light of the ever-increasing demand for lawyers, the shortage of lawyers and poor legal services for the public persisted.

With rapid economic development and social changes in Korea, the number of civil litigation cases submitted to the judiciary began to increase steeply from 1981 onward: there were fewer than 100,000 civil

litigation cases in 1979, but that number tripled to about 300,000 cases in 1989, which again tripled to about 900,000 cases in 1999 (for detailed numbers see Kim and Han 2007, pp. 72–3). In 2006, the judiciary had about 1,340,000 civil litigations *in toto* filed in the courts.<sup>4</sup> As a result, together with the low supply of practising lawyers, more than 80 per cent of civil litigations and about 60 per cent of criminal trials were *pro se* litigations as of 2006: most parties in litigations had to proceed with their court cases by themselves without any representation by attorneys-at-law (Kim 2007, p. 18).<sup>5</sup>

In the meantime, the inner structure of courts and prosecutors' offices maintained their highly bureaucratic characteristics. It has been *de facto* practice for decades that judges and public prosecutors were recruited from among newcomers just graduated from JRTI. Furthermore, newly appointed judges and public prosecutors had to compete with each other, climbing up the steep ladders of promotion to become high-ranking judicial officials. It was another *de facto* practice that those who failed to be promoted or had little hope of promotion to higher positions largely resigned from the courts or prosecutors' offices and then opened up their own law offices or entered law firms as practising attorneys (for details see Kim and Hwang 2007, pp. 155–60). Unlike their Japanese counterparts, few judges or public prosecutors in Korea remained in the courts or prosecutors' offices until their compulsory retirement age; every year, 50 to 60 judges, ranging from those with less than a ten-year career to those with more than a twenty-year career of judgeship, resigned from the courts and became practising lawyers. This phenomenon was not just a source of public distrust of the judicial system, but also a latent threat to the idea of the fair administration of justice.

The combined scheme of the National Judicial Examination with the quota system and the JRTI was identified as the main culprit behind these undesirable conditions. The National Judicial Examination with its pass quota of 300 was a bottleneck point controlling entry to the legal profession and thus restricting the supply of lawyers to a certain limit. The number of practising lawyers in Korea was 8,174 as of 2007,<sup>6</sup> and thus, the population contained around 6,000 people per lawyer; this placed Korea in one of the worst positions together with Japan among the 30 member countries of the Organization for Economic Cooperation and Development (OECD) (Lee, Cho and Kim 2007, p. 30). Moreover, because of the highly competitive Judicial Examination, which fewer than five per cent of applicants were able to pass, most students attending at the law colleges studied for the sole purpose of successfully passing

the examination, which, in general, meant that they focused on memorisation rather than developing a legal mind and problem-solving capabilities. Since the 1990s, not only law students, but also students with majors other than law, such as social science, literature, natural science, engineering, and so forth, prepared for many years to pass the examination: the so-called hot pursuit of the judicial examination (*gosi yŏlpung*) was sweeping the campuses. Even after graduation from university, most would-be lawyers, including those attending graduate courses at university, rushed to private 'cram schools (*gosiwŏn*)' to learn examination techniques (Kim 2006, pp. 246–8; Choi 2007, pp. 301–302; Kim and Hwang 2007, pp. 144–6). Because the life-long lucrative job of being a lawyer could only be secured by passing the Judicial Examination, many young Korean people focused on that in order to achieve the 'Korean Dream' (Ahn 2006, p. 277), leaving legal education, as well as higher education in general, desolated.

To those who passed the Judicial Examination, two years of coursework was provided at JRTI, with its faculty of mostly judges, public prosecutors and practising lawyers, or in other words, legal professionals. In the first year at JRTI, students received training in how to prepare civil and criminal decisions, written arraignments, briefs and other legal technical documents, with the training to become future judges and public prosecutors regarded as the most important subject area. In the second year, trainees were placed in the courts, prosecutors' offices and practicing lawyers' offices as probationers, after which they took the JRTI graduation examination (Kim and Hwang 2007, p. 150). Upon graduation from JRTI, they were appointed as judges or public prosecutors, or became private practitioners, depending upon the scores they achieved in the National Judicial Examination and the JRTI graduation examination. Consequently, similar to the preparation period for the National Judicial Examination, legal education at JRTI focused on technical matters rather than developing problem-solving abilities and a legal mind, and this remained true in spite of the forthcoming opening of the legal services market to foreign lawyers and law firms. In addition, trainees at JRTI spent time over their two years together creating informal personal ties and a pecking order among themselves, even though they were expected to appear as legal opponents in the courtrooms right after their graduation from JRTI.

Against the backdrop of these peculiar conditions in Korea, some elite law professors among others began to propose a judicial and legal education reform agenda. Beginning in the mid-1990s, under the democratised 'Civilian Government' headed by the President Kim Young-sam, the first President since the 1960s who was not a former military person,

these individuals led the reform debate. A similar phase of reform proposals and debate began in 1998 under the succeeding President Kim Dae Jung's government, after the first peaceful turnover of political power in the history of the Republic of Korea.

### III. INITIATIVE OF ELITE LAW PROFESSORS IN THE 1990S

The Presidential Commission on Globalisation (*seggyehwa ch'ujin wiwŏnhoe*), launched in January 1995 under Kim Young-sam's government, chose judicial reform as one of the central projects to be undertaken, and organised a subcommittee to prepare judicial reform plans. In February, the Presidential Commission reported to the President the 'plan for the globalisation of legal services and legal education', which was the start signal for full-scale judicial reform debate (Kwon 1996, p. 11). At the same time, almost every newspaper and broadcast was devoting its daily special feature to criticising the chronic diseases of the legal profession, such as the shortage of lawyers, excessive lawyer fees, preferential treatment given to former judges and public prosecutors (*cheon'gwanye'u*), the unkind and arrogant attitudes of lawyers towards citizens, and so forth. With these critical reports, the news media emphasised the necessity and legitimacy of judicial reform, including the abolition of the National Judicial Examination, the increase of the number becoming lawyers to 2,000 per year, and the introduction of a law school system (Choi 2007, pp. 304–305; Kwon 1996, pp. 11–12).

At that time, elite law professors, especially from Seoul National University, took the initiative in proposing a judicial reform agenda and spreading the word of its necessity. In particular, Park Se-il, a law professor from Seoul National University School of Law, played a critical role as a chief secretary of the President, organising the Presidential Commission on Globalisation and implementing the plan to be undertaken. Another law professor, Kwon O-Seung, again from the same law faculty, participated in the subcommittee on judicial reform under the Presidential Commission and played an active role as a research secretary. Generally speaking, the judicial reform movement in the mid-1990s was initiated by law professors, who were so discontented with the conditions of the legal profession and legal services at that time that some of them, when offered to work in the government for judicial reformation, willingly accepted responsibility (see Kwon 1996, p. 14).

Established legal professionals did not take kindly to these reforms. Unofficially, they even accused some of the law professors involved of

being 'the five enemies of the legal profession (*pöpch'o ojök*)'.<sup>7</sup> Officially, they continuously attacked the Presidential Commission, stating that planning and implementing judicial reform without their participation violated the principle of separation of the three branches of government. Consequently, in March, the Presidential Commission and the Supreme Court agreed to undertake the judicial reform project jointly (Kwon 1996, p. 15). Afterwards, however, each and every reform proposal made by the Presidential Commission was put on hold by the counterforce, especially the Supreme Court, which focused on publishing unsubstantial and impractical reports.

The proposal for a graduate-level law school system was virtually abandoned because of the disagreement between the Commission and the Supreme Court. Again, the unified plan for judicial appointment was not agreed upon other than in principle, and no specific plan for judicial appointment from among experienced lawyers was reached. The one and only fruitful outcome was the agreement between the Commission and the Supreme Court that the annual quota for the National Judicial Examination, which was 300 at that time, should be increased to 1,000, starting with 500 in 1996, increasing to 600 in 1997, and so on.<sup>8</sup> This plan to increase the number of lawyers was actually realised, though delayed by a period of one year, and since 2001 until today, the National Judicial Examination has been passing 1,000 test-takers each year. The annual quota of 1,000, however, has remained utterly fixed since then without further increase.

Another round of confrontation over judicial reform between law professors and legal professionals developed during the succeeding government under President Kim Dae Jung. In 1998, the Presidential Commission for New Education Community (*saegyoyuk gongdongch'e wiwönhoe*) was launched to pursue various educational reforms in the age of the information society and globalising world. Among the reform agenda items, legal education reform was a central issue, for which a subcommittee for research on legal education reform was organised under the Commission. This time again, like the counterpart under the previous government, the Presidential Commission reported to the President in September 1999 a reform proposal recommending the introduction of a graduate-level law school system to replace the combination of the National Judicial Examination and JRTI. The subcommittee in charge of the research on legal education reform was headed by Choi Dai-Kwon, a law professor from the law faculty of Seoul National University (Choi 2007, pp. 305–306).

In the meantime, another Presidential commission, the Judicial Reform Committee (*saböp kaehyök ch'ujin wiwönhoe*), was launched in May

1999, to prepare judicial reform proposals for the President. The President instructed that the law school proposal from the Commission of New Education Community should be implemented after consultation with the Judicial Reform Committee, which was largely composed of judges, public prosecutors, and practising lawyers (for details see Choi 2007, p. 307). Instead of accepting the law school system, the legal professionals on the Judicial Reform Committee preferred maintaining the existing legal education scheme with only one small change. Their report to the President included a plan for the establishment of the National Judicial Graduate School (*han'guk sabŏptaehagwon*),<sup>9</sup> which was criticised by law professors as being not very different from JRTI in that it would still be an educational institute only nurturing all the would-be lawyers together and administered by the Supreme Court. As for the National Judicial Examination, the Judicial Reform Committee insisted on preserving the status quo; the sole change proposed was to limit those applying for the examination to those students who had acquired at least 35 credits in law at university, a change that was later realised in a legislative act (National Judicial Examination Act, art 5; National Judicial Examination Ordinance, art 3).

Between the conflicting proposals, the President ordered the Commission and the Committee to reach an agreement on the legal education reform agenda, but they never did. Once more, the recommendations of law professors regarding judicial reform, especially the law school idea, were frustrated by counterblows from established legal professionals, who were represented by the Supreme Court. In a changed environment under the new Roh Moo-hyun government, however, the judicial reformation proposed by law professors was finally realised, though led largely by elite legal professionals rather than law professors themselves. As a result, the actual implementation of judicial reform has been somewhat removed from the ideals that law professors had in mind.

#### IV. TAKEOVER BY LEGAL PROFESSIONALS UNDER ROH'S GOVERNMENT

In August 2003, when the Chief Justice of the Supreme Court met President Roh Moo-hyun, they agreed upon the joint undertaking of judicial reformation and, for the preparation of reform proposals, the establishment of the Judicial Reform Committee (*sabŏp kaehyŏk wiwon-hoe*) under the auspices of the Supreme Court (Lee 2007, p. 44). Subsequently, according to the agreement, the Judicial Reform Committee was created in October 2003, composed of the chairman (a practising



lawyer), the vice chairman (Vice Minister of Court Administration), two judges (from the Ministry of Court Administration), two public prosecutors (from the Ministry of Justice), two practising lawyers (from the Korean Bar Association), two law professors, two executive officials (Vice Minister of Education and a judge-advocate from the Ministry of National Defence), two representatives from NGOs (a lawyer and a law professor), two representatives from mass media, one representative from the Legislation and Judiciary Committee of the National Assembly, one representative from the Constitutional Court (a former senior judge), one representative from the business circle, one member representing labour groups (a lawyer), and one member representing feminist groups (Choi 2007, p. 289). Notably, this line-up of members consisted mainly of legal professionals, the legal service providers, rather than the consumers of legal services (Lee 2007, pp. 46–7).

Moreover, those on the Committee in charge of practical affairs, such as preparing specific legal reform proposals, were mostly elite judges from the Ministry of Court Administration, who had been exercising extensive power in the judiciary, such as judicial policy-making and judicial personnel affairs, along with the normal businesses of managing daily court administrations. Those assigned to positions in the Ministry of Court Administration, positions regarded as ‘royal courses’, were recruited from among the most promising young elite judges, lawyers who had acquired the highest scores in the Judicial Examination and JRTI graduation examination (Kim and Hwang 2007, pp. 164–5). Considering the occupations of Committee members and the major roles performed by elite judges in the practical process after the establishment of the Committee, we can conclude that the judicial reform debate after 2003 was initiated and led by legal professionals, especially by elite judges from the Ministry of Court Administration. Above all, it was radically different from reform under the previous governments in that the Judicial Reform Committee, this time, was formed under the Supreme Court rather than under the President of the Republic. The leading role in the judicial reform undertaking was taken over from law professors by legal professionals.

The fact that the reform proposals were prepared under the Supreme Court and led by elite judges actually affected the final recommendation report by the Judicial Reform Committee submitted to the President and the Chief Justice and made public in December 2004 after 15 months of deliberations.<sup>10</sup> Among the recommendations, one of the remarkable ones was the introduction of ‘lay participation in criminal procedure’, which had never been a major reform issue before the takeover of the initiative by the Supreme Court. This new system, designed by the Judicial Reform



Committee and embodied later as the Act on Citizen Participation in Criminal Trials in 2007, clearly had strong resemblances to the jury system widely used in countries with common law legal systems. In the most serious criminal cases, which number about 100 to 200 cases annually, a trial entity composed of three professional judges and five to nine laypeople selected for each case from the recent residence registration roll decide the case. These lay participants in the criminal trials are now referred to as 'the jury (*paesimwŏn*)', a decision made by the Presidential Committee on Judicial Reform (*sabŏp chedo kaehyŏk ch'ujin wiwŏnhoe*) that was formed in January 2005 to carry out the reform proposals recommended by the Judicial Reform Committee in the form of legislative bills and other necessary measures. Unlike the typical jury system found in Western countries, however, the verdict rendered by the jury does not have binding force, but only persuasive power with regard to the final decision: judges can reject the verdict of the jury and render decisions at their own discretion (Act on Citizen Participation in Criminal Trials, art 46, para 5). Additionally, professional judges can intervene in the deliberation process of the jury and provide their own opinions when the jury members are divided on whether the accused is guilty or not guilty. In this case, the jury verdict is to be reached by simple majority rule rather than decided unanimously (Act on Citizen Participation in Criminal Trials, art 46, para 3).

Among elite judges, especially those in the Ministry of Court Administration, many have studied at law schools in the United States for a year or two with the financial support of the Supreme Court. In addition, the Supreme Court runs a judicial research department under its Ministry of Court Administration manned by these young elite judges. Under these conditions, it is not surprising that the Supreme Court had been prepared for a lay participation system for a long time, as well as for a law school system (Choi 2007, p. 310; Lee 2007, p. 50). Incidentally, lay participation in the criminal procedure provides a means to check and restrain the power of public prosecutors.<sup>11</sup> Nevertheless, this system departs from the ideal jury system since the jury verdict has persuasive force only and judges can intervene in the deliberation of the jury, an approach that is indicative of the leading role that legal professionals, especially judges, played in the process of recent judicial reformation.

Another recommendation made by the Judicial Reform Committee relevant to the legal profession was the introduction of a unified plan for judicial appointments (*pŏpcho irwŏnhwa*). According to this recommendation, judges would be appointed from among lawyers with five or more years of experiences as practising lawyers or equivalent roles. In fact, this plan had existed since the mid-1990s, after the agreement between the

Presidential Commission on Globalisation and the Supreme Court, though only at the level of principle. Since that time, the Supreme Court continued to send practising lawyers to the courts, usually a number no higher than ten per year, and still pick out judges largely from among those just graduated from JRTI. Basically, the agreement in 1995 was futile in effect. Ten years later (May 2005) in response to the recommendation of the Judicial Reform Committee, the Supreme Court declared publicly that it would gradually decrease appointments of judges from among JRTI graduates and accordingly increase the number of appointments from among practising lawyers with five or more years of experience as legal professionals, amounting to more than 50 per cent of newly appointed judges being lawyers with prior experience by the year 2012. Actually, in 2006 and 2007, the Supreme Court appointed about 20 experienced lawyers as judges in each year; in 2008, it announced that about 30 experienced lawyers would be appointed as judges.<sup>12</sup>

The unified plan for judicial appointment recommended under the auspices of the Supreme Court may also be interpreted as a way to strengthen the influence of the court upon other occupations of the legal profession (Lee 2007, p. 51). It is expected that the unified plan for judicial appointment will raise not only the average age of judges, which is currently under 40, but also the trust in the judiciary among citizens. However, the qualification of five years of experience may not be sufficient to accomplish the true purpose of the unitary plan. Until the recent repeal in 2007 of the apprentice judge (*yebi p'ansa*) system, under which judges newly appointed upon graduation from JRTI were appointed as apprentice judges for two years, the difference between those promoted from apprentice judgeship and those appointed from among practising lawyers was no more than three years of experience as legal professionals. Besides, the Supreme Court has remained silent about how it will recruit the other 50 per cent of judges after 2012. Certainly, if the Supreme Court appointed those judges from among lawyers just graduated from law schools, the unitary plan for judge appointment will lose its practical meaning. Also, the Supreme Court has remained silent about reform of the inner promotion practice of the judiciary, which up until now has been highly hierarchical and bureaucratic. Presently, a judge has to survive a highly competitive promotion process before reaching the high-ranking positions, such as senior judgeship in the high courts (Kim and Hwang 2007: 155–68), a practice which does not appear to support the independence of individual judges. Indeed, the recent judicial reforms led by the judges seem unable to bring about fundamental changes to correct the longstanding ills inside the judiciary.

The introduction of a graduate-level law school system was another recommendation, perhaps the most important and remarkable one, proposed by the Judicial Reform Committee. In its final report made public in December 2004, the Committee recommended the implementation of a law school programme to begin in 2008. According to the report, the Judicial Examination will continue until 2012, when it will be replaced with a new bar examination system. Only those who have successfully completed a three-year graduate law programme will qualify for the new bar examination. As for the establishment of law schools, only those universities that acquire accreditation from the Legal Education Commission, which will be created under the Ministry of Education, will be authorised to set up law schools; unlike Japanese counterparts, however, universities authorised to establish law schools must discontinue their undergraduate law departments or programmes (Ahn 2006, p. 230; Kim 2006, pp. 248–51; Nam 2005, pp. 896–901; Choi 2007, p. 291). In accordance with these recommendations by the Judicial Reform Committee, the Presidential Committee on Judicial Reform prepared a legislative bill, the Act on the Establishment and Management of Professional Law School (hereinafter briefly Law School Act), and submitted it to the National Assembly for passage in October 2005.

The affirmative stance taken by legal professionals, especially members of the Supreme Court, and the leading role they have played in preparing the law school programme is surprising, considering their stubborn opposition to and continuous incapacitation of law school proposals during the two previous governments. Probably, they came to realise that they could no longer keep opposing legal reform due to the ever-increasing distrust of the legal profession among citizens and the opening of the legal services market to foreigners, especially with the advent of another reformist government elected to power by popular support, particularly by younger generations. Moreover, they likely realised that if legal education reform was unavoidable, taking the initiative and playing an active role in this matter would be the best way to protect their professional interests (Choi 2007, p. 309). All these factors, together with the judicial elitism among young judges, especially those in the Ministry of Court Administration, probably led the Supreme Court to change its attitude and take the lead in the legal reform debate and creation of a law school programme.

The leading role of the judiciary and other legal professionals in the formation of the law school programme, of course, deeply influenced the specific measures provided in the final report of the Judicial Reform Committee and the draft bill submitted to the National Assembly, which was prepared by the Presidential Committee on Judicial Reform. Above

all, a quota system for the number of law school admissions (*ch'ongjŏngwŏnje*) was declared in the proposal of the Judicial Reform Committee and then in the legislative bill by its successor. Seldom found in any country with a law school system, the admissions quota system, a variant of the quota system for the Judicial Examination, must have been introduced with the intention of maintaining control over the number of lawyers and thereby avoid too much competition among legal professionals. Certainly, if the law school programme was created under the initiative of law professors or civil society, the quota system would not have survived the legal education reform debate. Since the majority members of the Judicial Reform Committee consisted mostly of legal professionals, they thought that the national admission quota for law schools *en masse* should be determined considering the current pass quota for the Judicial Examination: around 1,200 annually, supposing an 80 per cent pass rate among law school graduates for the new bar examination. However, faced with the minority opinion ('let the market determine it'), the Committee under the Supreme Court and its successor, the Presidential Committee, could not agree on a specific number for the admissions quota; in the end, only the process to determine the quota was prescribed in the draft bill implementing the law school programme. According to the bill, the Minister of Education would determine the national admission quota after consultation with the Ministry of Court Administration, the Ministry of Justice, the Korean Bar Association, and the Korean Law Professors Association. The number of admissions to each law school would be determined by the Legal Education Commission created under the Ministry of Education.

Despite the failure to predetermine the specific number, however, a national quota of little more than 1,000 per year was regarded among the relevant parties as an established fact because of the highly strict qualification for acquiring accreditation. According to the proposals of the Judicial Reform Committee and the Presidential Committee on Judicial Reform, for instance, a law school must maintain a student-faculty ratio of less than twelve to one; it must have at least 20 full-time law professors, and more than 20 per cent of those positions should be occupied by practitioner-professors with five or more years of experience as lawyers (Enforcement Decree of the Act on the Establishment and Management of Professional Law School, art 9).<sup>13</sup> Currently in Korea, about 15,000 persons annually *in toto* graduate from about 100 undergraduate law departments established at various universities. If the number of students admitted to law schools had been limited in number to 1,200, only a small number of universities would be able to acquire the accreditation to run a law school. The strict requirements mentioned

above were the tool to cull a handful of high-ranking universities, though the number of admissions to each law school has been prescribed at 150 or less (Enforcement Decree of the Act on the Establishment and Management of Professional Law School, art 6).

Even before the submission of the Law School Act to the National Assembly, many universities anxious about acquiring accreditation rushed to secure more than the required number of full-time law professors, including practitioner-professors, and to prepare legal education facilities, constructing new law school and law library buildings, as well as moot courtrooms. In the end, excessive investments made by the universities have resulted in the burden of high tuition fees for law school students. While the Judicial Examination functioned in Korean society as a route for people from the lower class to climb up the ladders of social strata, law school education, due to its high cost, may be available only to those from the upper social class. In the end, the limited quota system for law school admissions can be blamed as the major cause of all these undesirable consequences. Though appearing to accept the idea of the law school system originally proposed by law professors, legal professionals represented by the Supreme Court have managed to accomplish legal education reform that is suitable to their tastes, disregarding the increased demand for legal services in Korean society.

## V. EMERGENT ACTIVISM OF CIVIL SOCIETY, ESPECIALLY OVER LAW SCHOOL MEASURES

Since the mid-1990s, civil society in Korea has been a major reference point for the judicial reform debate; the rationale for judicial reformation has mainly revolved around the increasing demand for good quality legal services in civil society. Until 2004, however, civil society largely remained only a 'backdrop' rather than an active player in the judicial reform debate. Certainly, it is true that some NGOs, such as People's Solidarity for Participatory Democracy (*Ch'amyöyöndae*, PSPD hereafter), have played an important role in watching the legal profession with vigilance and drawing attention to the ever-existing problems with the Korean judiciary and legal society.<sup>14</sup> However, the major players in the PSPD were largely university professors rather than pure civic activists. As judicial reform is a specialist area requiring expert knowledge to understand, it was not easy for non-legal professional civic activists to participate actively in the judicial reform debate.

In 2005, faced with the increasing probability of judicial reform being created by lawyers and, as such, partly disappointing to civic leaders,

together with the increased professionalism among civic activists, civic activists finally started to participate in the ongoing judicial reform debate under the banner of 'justice for the people'. One remarkable NGO was People's Solidarity for Democratic Judicial Reform (*minjujŏk sabŏp-kaehyŏk sirhyŏn ŭl wihan kungmin yŏndae*, PSDJR hereinafter), which was composed of human rights activists, labour unions, victims of justice administration, law students, research activists, and even some university professors, among others.<sup>15</sup> Since its establishment in May 2005, PSDJR has performed an active role, unprecedented in Korean legal history, in the realisation of judicial reform for the people, through such activities as holding public hearings and press interviews, proposing judicial reform methods from the viewpoint of the people, publishing books (especially see PSDR 2006) and newspapers, organising assemblies and demonstrations, and so on.

With the emergent activism of civil society, the discourse around judicial reform started to change from the past trends of stressing judicial independence and the integrity of the legal profession to the themes of the democratic administration of justice and the dismantling of legal professionals' privileges. A paradigm shift occurred with the perspective switching from that of law providers to that of citizens demanding satisfactory legal services and the right to participate in the process of justice administration. According to this philosophy, PSDJR announced in September 2005 the people's proposals for judicial reform, including items such as the introduction of a jury system free of judges' involvement in the jury deliberation or verdict in both civil and criminal procedures; citizens' participation in the appointment process for Supreme Court Justices, as well as Constitutional Court Justices; the introduction of a public defender system, a plan for providing legal services to the public by lawyers hired in large quantities by public authorities; and, above all, an increase in the number of practising lawyers to more than 3,000 annually together with the abolishment of the National Judicial Examination (see PSDJR 2006: 367–71).

It seemed natural that the united front against legal professionals was created between civic activists and law professors who were discontented with the limited quota for law school admissions and anxious about the possibility of accreditation of their own affiliated universities. In February 2006, the Korean Law Professors Association, the Law Faculty Deans Conference, and PSDJR jointly put together a new organisation, the Emergency Committee of Citizens, Human Rights, Labour, and Law Professors for the Right Law School System (*olbarŭn rosŭkul ŭl wihan simin in'gwŏn nodong pŏphakkye pisang taech'ae wiwŏnhoe*),<sup>16</sup> to cope with the law school programme pending in the National Assembly. The

Emergency Committee insisted on the elimination of the total admissions quota system from the law school programme, and if not feasible, a second-best policy of a total admissions quota of higher than 3,000 annually. It also vehemently criticised the current law school programme on the basis that it would only strengthen the privileges of the established legal profession, while neglecting the desire of average citizens for accessible legal education because of the expected high tuition fees for law schools.<sup>17</sup>

Partly accepting the requests of civil society, in April 2006 an agreement was made between the government party and the opposition party on an amendment of the then pending law school bill, featuring, among others, provisions that two more civil activists would participate in the Legal Education Committee created under the Ministry of Education for the accreditation of particular law schools and composed mainly of legal professionals and law professors; the power of the Law School Evaluation Committee, which would be created under the Korean Bar Association for the *ex post facto* periodical evaluation of law schools, to request a revocation of law school accreditation would be eliminated; obligatory consultation of the Korean Bar Association and the Korean Law Professors Association would be eliminated from the determination process of the total admissions quota by the Minister of Education; and, above all, a provision would be added that the total admissions quota determined by the Ministry of Education must be reported to the Education Committee of the National Assembly.<sup>18</sup> Though the skeleton of the previous law school programme was largely preserved, the intention to curb the power of legal professionals, especially of the practising lawyers represented by the Korean Bar Association, was evident in these amendments.

Despite the agreement made between the government and opposition parties, however, the law school bill had still not been passed by even the Education Committee, a standing committee in charge of the examination of the law school bill, one year and nine months after its submission to the National Assembly by the executive. The reason was largely because some lawyer-politicians strongly opposed the idea of the law school system itself. Actually, practising lawyers represented by the Korean Bar Association seemed to be as reluctant about a law school system as before because they thought that it would produce a large number of lawyers in the future. Their opposition, which was expressed by some Assembly Members who were also practising lawyers, obstructed the examination of the law school bill by the Education Committee. Even if it had passed the Education Committee, the bill would have needed to be passed by the Legislation and Judiciary Committee, which would likely



also have been difficult since the Committee was mostly composed of lawyer-politicians. Under these conditions, many Koreans thought that the introduction of a law school system would fail and probably be postponed until another attempt under the next Administration.

However, the Emergency Committee mentioned above came to the fore again and requested that the Speaker of the National Assembly exercise the power of directly referring the law school bill to the Plenary Session, bypassing standing committees (see National Assembly Act, art 85, para 2). To gain support for the enactment of Law School Act, the Emergency Committee utilised various tactics, such as organising public hearings, press interviews, assemblies and demonstrations, including a long march circulating the whole country. Faced with pressure from civil society, the Speaker of the National Assembly finally decided to make the direct referral after consultation with representatives of the major parties; on 3 July 2007, the Act on the Establishment and Management of Professional Graduate Law School, with amendments agreed upon between the government and opposition parties 15 months earlier, at last passed the Plenary Session of the National Assembly. Without the activism of civil society, the Law School Act probably would have failed to be enacted.

With the passage of the Act delayed, the opening of law schools was also delayed for a year from the original schedule: according to the Act, law schools were to offer their first classes in March 2009. Considering the time needed to prepare for operation, the provisional accreditation of particular law schools needed to be finished at least one year before the actual opening. As a matter of course, the accreditation of particular universities could only be done after the determination of a total admissions quota, which therefore had to be reached in a few months. After consultation with the Ministry of Court Administration and the Ministry of Justice, and after hearing opinions from the Korean Bar Association and the Korean Law Professors Association, the Minister of Education reported to the Education Committee of the National Assembly that the total admissions quota for law schools would be set at the level of 1,500 per year initially and increased to 2,000 afterwards. In response, fierce criticism erupted from civil society and law professors, as well as from Assembly Members on the Education Committee. Law professors and civil society, in particular the Emergency Committee, insisted again on at least 3,000 law students being admitted per year; Assembly Members on the Education Committee refused to accept the report of the Ministry of Education, some of them requesting at least 2,500 annually. A few weeks later, at the end of October 2007, the Ministry of Education reported again to the Education Committee a



revised quota for 2,000 annually from the very first year of operation of law schools. Considering the urgency of this matter, there was not enough time to continue the debates, and the Education Committee finally accepted the report of the Ministry of Education. As such, the total number of students to be enrolled was set at 2,000 annually, spaces that were to be allocated among the universities acquiring accreditation from the Ministry of Education.

Upon examination of the applications of aspiring universities, the Legal Education Committee, composed of 13 members who were legal professionals, law professors, officials of education administration, and others with knowledge and experience, but actually excluding those civic activists and professors who had performed active roles in the passage of Law School Act, selected in February 2008 25 universities for provisional accreditation, 15 from the Seoul metropolitan area and ten from other local areas, allocating from 40 to 150 spaces for students to each university as prescribed in the Enforcement Decree. Disappointed and angry, some universities that failed to acquire accreditation filed lawsuits against the Ministry of Education, raising questions on the reasonableness of the selection criteria and the fairness of the selection process. On the other hand, those universities that acquired accreditation expressed dissatisfaction about the small proportion of the admissions quota allocated to their own universities. In the midst of all the turmoil, the Legal Education Eligibility Test (*bŏphakchŏksŏngsihŏm*), which is held every year and must be written by law school applicants, was first scheduled and other preparations for setting the law school system in motion were initiated.

## VI. CONCLUSION

The recent judicial reform debate between law professors, legal professionals and civil society has shaped the reform plan and its implementation. At first, the initiative was in the hands of elite law professors who proposed the law school idea and other important judicial reform agenda items. Under Roh's government however, legal professionals, especially elite judges, came to the forefront and played a leading role in the proposition and implementation of judicial reform. In addition to these two powerful and elite groups of the legal community, civil society began to participate actively in the judicial reform debate in 2005, partly forming an alliance with law professors against legal professionals. Without the active role by civil society, judicial reform under Roh's government probably would not have been successful or would have

taken a different form, with legal professionals driving the changes and controlling the outcomes.

In spite of the success of the recent judicial reformation, the process is incomplete: the total quota system for law school admissions remains in its original form with an annual quota of 2,000, which was determined by the Ministry of Education and is still a long way from satisfying the wishes of civil society. In fact, only 1,400 people per year are expected to become lawyers: of the 2,000 students, it is expected that ten per cent will fail to graduate from law school and another 20 per cent will fail the National Bar Examination, which will operate in conjunction with the law school system to replace the previous National Judicial Examination. A total of 1,400 means that only an additional 400 lawyers per year will enter practice, compared to the 1,000 under the pass quota for the Judicial Examination. The increase seems too small in light of all the disturbance and turmoil created by the introduction and implementation of the law school system.

This and other unsatisfactory outcomes of judicial reform may be due to the fact that, as far as legal matters are concerned, the elite legal professionals belong to the inner circle of the 'dominant block' of Korean society. In spite of continuous criticism from civil society and law professors on the basis of principle, specific decisions on the detailed implementation of judicial reform have been made in the end by the dominant block of Korean society, including legal professionals. Consequently, the concrete and final form of legal institutions or their practical execution has not satisfied the desires of average people. A structural problem exists, which makes radical change in a year or two impossible.

Under the domination of legal professionals, the monopoly by lawyers over all legal matters seems to be a natural outcome. Until today for instance, from the Constitutional Court Justices as well as Supreme Court Justices, to the lowest level of judges of the municipal or county courts (*sigun pŏbwon*), all the judges in the Korean judiciary are composed of lawyers who passed the National Judicial Examination and graduated from JRTI, a phenomenon rarely found in other countries. Again, as mentioned above, the right to represent and provide legal advice for remuneration to the parties of litigation cases, including small claims cases, is permitted only to practising lawyers enrolled in the Korean Bar Association, a phenomenon again difficult to find in other countries. This kind of almost-perfect monopoly over legal affairs by legal professionals has seldom been the subject of judicial reform debate in Korea until recently, maybe because of the elitism of legal professionals and law professors who believe in professional integrity.

This long-lasting monopoly may possibly collapse or at least be weakened in the future due to the emergent activism of civil society, which has injected a new perspective of democracy and legitimacy into the legal services and judicial reform arena. Furthermore, along with the dismantling of the legal profession's monopoly, the quota of law school admissions will someday increase to more than 3,000 annually and maybe eventually the quota system itself will disappear. Korean society, one of the most dynamic societies in the world, will continue to change rapidly, deserving continuous research and study by legal sociologists from all over the world.

## NOTES

1. In this chapter, the author will use the term 'National Judicial Examination' for the Korean phrase *sabŏp sihŏm* to distinguish it from the National Bar Examination (*pyŏnhosa sihŏm*), which will become operative after the first graduates from newly established law schools are produced.
2. Small claims cases, a system introduced to Korea in 1973, are civil litigation cases with a monetary value of not more than 20 million KRW (around 20,000 US dollars) since 1998. Today in Korea, about 80 per cent of all civil litigations submitted to the judiciary are small claims cases (Kim and Han 2007, p. 72). Recently, scriveners have been insisting that they should have representation rights in small claims litigations, which practising lawyers cannot sufficiently cope with because of the small number of lawyers. Until now, however, the Korean Bar Association has successfully defended lawyers' monopoly over representation rights. See among others 'Scriveners Association strives for representation right in small claims cases,' *Pŏmnyul sinmun* (*The Law Times*), 12 July 2008, at <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=41086> (in Korean).
3. The peculiar practice in Korea that judges or public prosecutors become practising lawyers after retirement from courts or prosecutors' offices has produced the notorious phenomena called *chŏn'gwanye'u*, the preferential treatment (or at least the suspicion of such treatment) given to former judicial officials by the junior judges or public prosecutors. For detailed descriptions, see Kim and Hwang 2007, pp. 173–5.
4. See Ministry of Court Administration 2007, p. 598.
5. Actually, the situation (80 per cent of civil litigations being *pro se* litigation) was somewhat ameliorated; from 2002 until 2005, the self-representation rate in civil cases was actually around 90 per cent. This improvement was likely due to the increased number passing the Judicial Examination, 1,000 per year, since 2001. See Kim 2007: 20.
6. The Korean Bar Association, [http://koreanbar.or.kr/info/01\\_05.asp](http://koreanbar.or.kr/info/01_05.asp).
7. This phrase is a parody of 'five enemies of the Korean people,' indicating those five high government officials who actively assisted Japan in establishing Japanese colonialism in Korea in the early twentieth century.
8. The Supreme Court and The Presidential Commission on Globalization, *Pŏmnyul sŏbisŭ mit pŏphak kyoyuk ūi segyehwa pangan* (*Methods for Globalization of Legal Services and Legal Education*), 25 April 1995, in Kwon 1996: 148–56.

9. See The Judicial Reform Committee, *Minjusahoe rül wihan saböp kaehyök* (Judicial Reform for Democratic Society: Report of Presidential Committee), 2000, pp. 427–30.
10. The Judicial Reform Committee, *Saböp kaehyök ül wihan kõnūmun* (Proposals for Judicial Reform), 31 December, 2004, available at [http://www.scourt.go.kr/information/jud\\_rfrm\\_comm/mtng\\_status/1173540\\_9822.html](http://www.scourt.go.kr/information/jud_rfrm_comm/mtng_status/1173540_9822.html).
11. Another recommendation of the Judicial Reform Committee, the introduction of a trial model centred on hearings in the courtroom (*kongpan chungsim chu'ui*), which will not be described in detail in this chapter, was a clearer example of the check and restraint upon the public prosecutors' power. In the original proposal, the investigation records produced by the public prosecutors would be totally denied their evidential effect in the courtroom. Subsequently however, this proposal was made less strict as a result of stout opposition from the public prosecutors' group during the process of the implementation of the legislative act: for example, the records produced by public prosecutors will still have evidential effect if they are supported by video or other forms of image reproduction recorded during the actual investigation process. See among others Choi 2007, p. 293 for more details.
12. See the press releases of the Supreme Court, available at <http://www.scourt.go.kr>.
13. According to an analysis, under the standards for professors proposed by the Presidential Committee's draft bill, only 12 of 183 United States law schools accredited by the American Bar Association as of August 2003, and only 21 of 68 Japanese law schools approved by the Ministry of Education as of April 2004, could gain approval in Korea. See Kim 2006, p. 252.
14. The Centre for Judiciary Watch (*saböp kamsi sentō*) is a department of the People's Solidarity for Participatory Democracy. The task of the Centre is to monitor power abuse in the judiciary and to provide judicial reform plans to Korean society. A periodical published by the Centre from 1995 to 2006, *Judiciary Watch* (*saböp kamsi*), was an influential magazine monitoring the legal profession and the administration of justice. See <http://blog.peoplepower21.org/Judiciary/>
15. See <http://lawyer3000.or.kr/>. On the other hand, in contrast to civil society and unlike its Japanese counterpart, the business circle in Korea as represented by the Federation of Korean Industries (*ch'ŏn'gyōngryōn*) has not been particularly enthusiastic about judicial reform, including the introduction of the law school system. Korean big businesses appear to be content with the existing informal networks with legal professionals and/or interested in expanding their own corporate law departments. See Choi 2007, p. 311.
16. <http://lawschool.society.or.kr/>
17. See The Emergency Committee of Citizens, Human Rights, Labour, and Law Professors for the Right Law School System, *Kungmin ūi rosūkul pōp chejōng: kŭ silch'ŏn ūi kirok* (White Paper of Enactment Movement of the Right Law School Act), 2007.
18. See *Pōphak chōnmun taehagwōn sōlch'i unyōng e kwanhan pōmnyuran e taehan sujōngan* (the Amendment Proposal to the Act on the Establishment and Management of Professional Graduate Law School), submitted to the Plenary Session of the National Assembly by Jinpyo Kim and other Assembly Members in July 2007, available at <http://likms.assembly.go.kr/bill>

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## 9. The constitutionalisation of the representative system in Korea

**Kuk-Woon Lee**

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### I. THE MEANING OF CONSTITUTIONALISATION IN KOREAN POLITICS

This chapter aims to show and explain some characteristics and limits of constitutional politics in the Republic of Korea (hereinafter ‘Korea’ or ‘South Korea’). A constitutionalisation of politics has been taking place in Korea since her dramatic transition from military dictatorship toward democracy in 1987. Nonetheless, the factors that actually facilitated that constitutionalisation of politics have rarely been revealed, and this is the purpose of this chapter. The introduction will focus on the concept of constitutionalisation and its meaning in the context of Korean politics.

Today, the concept of constitutionalisation frequently describes a worldwide phenomenon of judicialisation of politics, especially in the literature of law and political science (Hirschl 2004, 2006; Ginsberg 2003, etc.). It is true that, since 1987, Korea has been typical in its vivid national demonstration of the judicialisation of politics; for example, the Korean Constitutional Court functioned significantly in stopping many unconstitutional political regulations of the past and encouraging institutional reform efforts for the future. The judicial empowerment by the active Constitutional Court enabled institutional reform discourse in many areas of Korean society. The political representative system, where the political establishments had monopolised political power for more than half a century, was surely one of the most important areas where those reforms took place.

Nonetheless, it is not sufficient to use the concept of constitutionalisation or judicialisation of politics to describe the changes in the Korean political arena. There is also a real need to know the origins and consequences of those changes. As Ran Hirschl asserted in the context of Canada, New Zealand, Israel, and South Africa, hegemonic preservation might also be the political origin of constitutionalisation and the judicial

empowerment in Korea (Hirschl 2004, p. 214).<sup>1</sup> However, for a more complete explanation, an investigation must ascertain what the existing hegemony had been and why the constitutionalisation of politics and judicial empowerment were chosen to preserve the pre-existing hegemony in Korean politics. Accepting Tom Ginsberg's insurance model of judicial review will not change the situation; we must determine the rationale for choosing the judicial review in Korea for that type of political insurance among the power elites around the years of democratic transition (Ginsberg 2003, Chapter 7).

This chapter does not intend to investigate every issue that this type of approach will reveal. Instead, the author will draw a sketch to reveal and explain the specific meaning of constitutionalisation in the context of Korean constitutional politics. From the perspective of this study, there is one missing point in the contemporary usage of the concept of constitutionalisation. The concept includes two different stages: firstly, the enactment of constitution itself, and secondly, the normal execution of the constitution. For the constitutionalisation of politics, a constitution must first be legislated and then made to work normatively. The second stage can only start after the first. Because it was not an enactment of the new constitution but a revision and/or reinforcement of the pre-existing constitution, the 1987 democratic transition in Korea was evidently the starting signal of the second stage. Therefore, before analysing the constitutionalisation process after 1987, we must understand the Korean constitution, enacted in 1948, and the history of Korean constitutional politics during the years 1948–87.

From another perspective, the constitutionalisation of Korean politics after 1987 was a type of political reaction against the previous authoritarian, military and dictatorial regimes. The author prefers the term 'emergency government' since it could more meaningfully imply that the Korean War was the real cause and condition of the pre-democratic Korean regimes. If the Korean government before democratisation was an 'emergency government', what was the normative situation of the government before that emergency initially took place? Of course, this provokes a difficult and complicating discussion about the origin and nature of the Korean emergency government. However, no matter what the discussion concludes, constitutionalisation after 1987 was nothing but a return to the pre-existing normal government and a restoration of the original Korean constitution.

This type of approach enables us to understand Korean constitutional politics more dynamically. For example, if we accept that the democratic transition of 1987 is a return and a restoration, inevitably, there must be debate about which government it should be. Although the intent of this



chapter is not to participate in this type of debate, it is clear that the constitutionalisation of Korean politics after 1987 should be understood and analysed in relationship to the original design of Korean constitutional politics. Specifically, if there are remaining characteristics and limits of Korean constitutional politics after 1987, they should be scrutinised from the perspective of original design as well as in relationship to the new changes in Korean society after 1987, i.e., the impact of the International Monetary Fund (IMF) bailout in 1997.

This chapter will take some Korean Constitutional Court decisions related to the reform of the political representative system to outline Korean constitutional politics. Those decisions represent the tremendous political achievement of the Korean Constitutional Court over the past 20 years. Nevertheless, they are also tokens representing the characteristics and limits of the original design of Korean constitutional democracy.

## II. AN OVERVIEW OF THE KOREAN REPRESENTATIVE SYSTEM

### 1. Dynamic Nature of Korean Politics

Korea is a country of both tragedy and miracle. Her history since 1948 is full of both. On the one hand, there is the incomplete independence from colonialism after World War II, the division of the Korean peninsula and the political split of the South and the North, the severe Korean War (1950–53), the economic collapse and poverty after the war, the ideological confrontation between the two Koreas during the Cold War era, and nearly three decades of military dictatorship. On the other hand, there is a list of amazing accomplishments, such as the rapid economic growth of the 1970s, the smooth democratic transition and consolidation in the 1980s, the success of information technology (IT) and industry in the 1990s, and perhaps the Olympic Games (1988) and Football World Cup (2002). Today Korea represents herself in the world as a country that has, in a very short time, overcome the devastation of war and successfully achieved economic growth and political democratisation.

On both the micro and macro levels, the Korean people have always pursued economic growth as well as political equality. Nevertheless, they have also sometimes lost direction as to where they should be orientated. This is just one of the reasons why the Korean people were inclined to maintain the ‘emergency government’ after the Korean War and until 1987. During this period, President Park Chung Hee and his successors, who had led the military dictatorship since 1961, repeatedly proclaimed



that national security against the communists and rapid economic growth should be the top priorities on the national agenda. Their assertion was that only a strong and even dictatorial president who could decide everything and anything effectively would achieve those political goals. By virtue of this historical legacy, the overriding feature of Korean politics was the supremacy of governmental bureaucracy under a strong president.

Interestingly, all of the powerful politicians, including those who symbolised anti-dictatorial and civilian politics, shared this characteristic to some extent. It was for this reason that Korean politics split regionally around the democratic transition of 1987, along with the politicians known as the 'Three Kims' (Kim Young-sam, Kim Dae-jung, and Kim Jong-pil). Therefore, the Korean representative system must be examined from this perspective, which has stood for the past 60 years.

## **2. Constitutional Framework**

A short overview of the constitutional framework of the representative system in Korea is useful here. On 17 July 1948, the Constitution of Korea was adopted. As the nation underwent political upheaval in pursuit of democratic development, the Constitution was amended nine times, with the most recent on 29 October 1987. The current constitution represents a major advancement in the direction of full democratisation. Apart from a legitimate process of revision, a number of substantive changes are notable. They include the curtailment of presidential powers, the strengthening of the power of the legislature, and some further devices for the protection of human rights. In particular, the creation of an independent Constitutional Court and its successful operation played a vital role toward developing a more democratic and free society.<sup>2</sup>

The basic principles of the Korean Constitution include the sovereignty of the people, the separation of powers, the pursuit of the peaceful and democratic unification of the Korean peninsula, the pursuit of international peace and cooperation, the rule of law, and the responsibility of the state to promote social welfare. The Constitution envisages free and democratic political order and adopts a presidential system supplemented by parliamentary elements.

Legislative power is vested in the National Assembly, a unicameral legislature. It has 299 members, elected for four-year terms. Among them, 243 members are elected in single-seat constituencies and 56 by proportional representation. Elected by direct popular vote for a single five-year term, the president is the head of state and the chief officer of the executive branch. In addition to being the commander-in-chief of the

armed forces, the president also has considerable executive powers. As head of the government, the president appoints the prime minister, with approval of the National Assembly, and appoints and presides over the State Council of chief ministers. Judicial power is in the court, headed by the Supreme Court. However, the independent Constitutional Court has some constitutional powers, such as judicial review, impeachment, and constitutional complaints. Korea has no election for judgeship. Selection of all the judges, including the Justices of the Supreme Court and the Constitutional Court, is from among qualified lawyers according to the Constitution and related laws.

### **3. Characteristics of Korean Representative Politics**

#### **A. Strong president, weak parliament**

In the constitutional history of Korea, there has been a strong tradition of a presidential system. The parliamentary system was chosen for only ten months in 1960–61, namely the Second Republic. Because the parliamentary system seemed like a compromise with the unjust military dictators, the struggle for democracy against military dictatorship reinforced the Korean people's inclination toward a presidential system. Even though the last revision of the Constitution in 1987 attempted to create a power balance between the president and the parliament, Korean politics is still under the myth of the 'Strong President' who can dexterously lead both economic development and political reform. It is true that the Korean Constitution includes many aspects of a parliamentary system, for example, the existence of a prime minister. Nevertheless, its actual operation has had the approach of a strong presidential system. The prime minister, appointed by the president with the approval of the National Assembly, has been regarded as a temporary political shield to protect the president from the opposition parties' political critiques.

Until the end of the last century, the National Assembly of Korea had always been under the control of the president's office. The majority of Korean presidents have formed their own political parties in order to control the parliament, which has only managed relative autonomy from the president's office when led by strong and powerful members from the president's party. In this situation, the parliament was not functioning in relationship with the executive branch but between the ruling and oppositional political parties. However, soon after the president's candidates won the presidential election, they started to organise their own political parties in order to control the parliament as effectively as their predecessors had done.<sup>3</sup>

### **B. Privatisation of party politics**

The imbalance of power between the president and the parliament has fostered a kind of privatisation of party politics in Korea. The presidents themselves had always headed the ruling political parties until President Roh Moo-hyun refused to do so in 2004. Specifically, the ruling political parties were a kind of political instrument by which the presidents were able to gather political support and exercise political power in the parliament. Hence, the ruling political parties often changed along with the change in president. The oppositional political parties were in a similar situation, always governed by powerful politicians who were running for the presidency. Even if the names of parties varied from time to time, the famous 'Three Kims' mentioned above had their own political parties.

From this perspective, the presidents and powerful politicians developed some institutional tools by which they could maintain control of their own political parties. Because this practice guaranteed a kind of monopoly, especially in the region where they had overwhelming political influence, politicians leaned toward a single-member constituency for the election of congress. Since the electoral laws were legislated only through political bargaining between the powerful politicians, a great deal of quasi-gerrymandering was unavoidable. Introduced with reluctance, the proportional representation system was not connected with the vote for the political parties, but with the results of the local constituency election.

With these institutional tools, the presidents and presidential candidates of the major political parties successfully maintained a nearly private ownership of Korean politics. They kept the political parties inside of a highly centralised system. The nomination of candidates for the elections was determined by the headquarters of the political party, which was under direct control of the bosses (Three Kims). The nomination of the candidates for some political positions, such as the Constitutional Court Justice, was decided in the same way. Political money was always the bosses' exclusive matter, and even the nomination for proportional representation was used repeatedly as a channel for collecting illegal political money.

### **C. Tendency toward politics by other means**

Because of the political asymmetry between the president and the parliament and the privatisation of party politics, Korean representative politics have always been vulnerable to 'the politics by other means'. Before the democratic transition, the presidents (who were actually the leaders of the military officers) were frequently tempted to supplement

their lack of democratic legitimacy and/or to reinforce their governing power by violent and military means. The huge strong bureaucracy, the mass media, which had always been under governmental control, and some quasi-volunteer organisations around the government were other examples of politics by other means. President Roh Tae-woo even implemented an artificial reorganisation of the political arena through the integration of three different conservative political parties in 1990.

However, after the democratic transition, the tendency toward politics by other means in Korean politics dramatically represented itself in the form of juridical politics. The criminal procedure was used repeatedly for political purpose whilst under the prosecutors' control. The constitutional court and various procedures of constitutional adjudication were other examples of this phenomenon. To some extent, Korean constitutional politics were caught in a vicious circle of politics by other means and insufficient democratic representation, since the former automatically reinforced the latter and vice versa. In this sense, the existence of the politics by other means after the democratic transition was both the reason for and the result of Korean constitutional politics.

### III. UNEQUAL REPRESENTATION – A HISTORICAL AND STRUCTURAL PROBLEM

#### 1. Corruption

An initial consequence of the privatisation of party politics was corruption, with serious irregularities related to the collection and distribution of political money. Political scandals relating to large sums of illegal political money prompted the historic 1996 trials against former presidents, Chun Doo-hwan and Roh Tae-woo. Because their sons had been deeply connected with scandals involving illegal political money, presidents Kim Young-sam and Kim Dae-jung both faced political crises during the second half of their presidencies. The 2002 presidential election also produced some problems regarding illegal political money to the winner, Roh Moo-hyun, as well as the loser, Lee Hoe-chang.

Corruption is a cause of unequal representation, and political corruption in Korea was a route of mobilising politics by other means. At times, the investigations of the prosecutor's office were carried out for political purposes, generating more severe political conflict, which often resulted in enacting the laws of special and independent prosecutors. Even if prosecutors or independent prosecutors indicted politicians, it was not the end of political gaming. The subsequent criminal trials, up to the

Supreme Court, were full of political rumours and calculation. After the completion of all the criminal processes, so many presidential pardons were issued on so regular a basis that the final judiciary judgments were easily nullified. Finally, the same corrupt politicians would appear in the next election, usually as the nominees of their political bosses.

## **2. Over-centralisation and the Regional Split of Politics**

One distinctive aspect of Korean politics is over-centralisation. The majority of Korean people believe that politics should be central and centralising. Local governments depend heavily on central government for decision-making as well as financial support. Their main function is to implement policies and programmes as directed and guided by the central government's ministries and agencies.

The privatisation of party politics reinforced a centralising tendency in Korean politics. The Korean Constitution has some articles on local government and grass-roots democracy. However, the political bosses postponed the election for the heads of the local government until July 1995. Instead, they divided Korean politics along provincial borderlines. For example, Kim Dae-jung governed the south-west provinces, Kim Young-sam governed the south-east provinces, and Kim Jong-pil governed the mid-south provinces. This regional split of politics in the 1990s was so harsh that many of the political parties could not gain a single seat of the National Assembly from the provinces where the rival political parties dominated. That is true even now.<sup>4</sup>

In July 1995, for the first time in more than 30 years, Korean citizens elected the governors and mayors for the provincial and local governments. The second comprehensive local elections were on 4 June 1998, three years after the first elections. Beginning with the 1998 elections, local elections have been held every four years. However, because the major political parties, which were regionally rooted, also controlled local politics, local democracy has been under the centralising power of the political bosses.

## **3. No Leftwing Presence**

The combined strong presidency, weak parliament, privatisation of party politics, corruption, over-centralisation and regional split of politics all contributed to unequal representation. Political power itself was the best avenue to becoming a representative. Forming a close relationship with the political bosses was inevitable, through bribes or illegal political

money. In these environments, political minorities were at a disadvantage. In Korean political history, since 1948, not a single political party of peasants, labourers or other minority political group successfully took a number of seats in the National Assembly until the end of the twentieth century.

In explaining the ideological imbalance of Korean politics, no one could ignore the facts that the ideological legacy of the Korean War was enormous and the Korean people have a very strong anti-communist tradition. Nevertheless, it is also true that a growing number of labourers and middle class intellectuals were not satisfied with the rightwing domination of Korean politics. However, these people and their political desires were always outside of the political arena, since right-wingers always crowded party politics. There was no left-of-centre representation in Korean politics, and the winners took all.

#### IV. CONSTITUTIONALISATION OF THE REPRESENTATIVE SYSTEM

##### 1. Institutional Setting

The Korean Constitutional Court is a product of the last revision, in 1987, of the Korean Constitution. Even though the politicians who led the process did not pay enough attention to it, the Korean Constitutional Court started raising the Korean people's political expectations right after its establishment in 1988.

The Korean Constitution gives five exclusive jurisdictions to the Constitutional Court: constitutionality of law, impeachment, dissolution of political party, competence dispute, and constitutional complaint. The Constitutional Court is comprised of nine justices who are appointed. Candidates are eligible if aged 40 years or over, and have been in any of the following positions for 15 or more years: judge, prosecutor, or attorney; a person qualified as an attorney who has been engaged in legal affairs for or on behalf of a governmental agency, a national or public enterprise, a government-invested institution or other corporation; or a person who is qualified as an attorney and has been in a position higher than an assistant professor of jurisprudence in a recognised college or university. Of the nine justices, the president appoints three, three are elected by the National Assembly, and three are designated by the Chief Justice of the Supreme Court. The President of the Republic, with the

consent of the National Assembly, appoints the President of the Constitutional Court. The President of the Republic commissions all nine justices.

Until 1988, it was very rare and somewhat risky for the judiciary to declare the unconstitutionality of law. Eventually, however, judicial review came to Korean politics. In addition to some cases of the constitutionality of law, a great number of constitutional complaint cases were filed in the Constitutional Court. Furthermore, many of them were decided unconstitutional or unconformable to the constitution.<sup>5</sup>

The section below briefly outlines three important cases, all of which were closely related to the representative system and, more importantly, to its constitutionalisation.

## **2. No More Gerrymandering**

On December 27, 1995, the Korean Constitutional Court decided that the electoral district apportionment at issue was unconstitutional (95 *hōnma* 224). This decision forced the National Assembly to legislate the related law in accordance with the guidelines provided by the Constitutional Court.

At that time, the congressional electoral districts created by the Act on the Election of Public Officials and the Prevention of Election Malpractices (AEPOPEM) resulted in a population disparity of 5.87 to 1 between the most populated electoral district and the least populated. In addition, one electoral district united two cities or counties which were completely separate in terms of their geography and administration. Alleging that the AEPOPEM violated their constitutional rights to fair election and equality under the law, the petitioners filed a constitutional complaint challenging the constitutionality of this electoral district apportionment.

In the decision, the Constitutional Court said that the principle of equal election meant not only the equality in quantity of voting, i.e., 'one man, one vote', but also the equality in voting accomplishment value, termed 'one vote, one value', which entailed equality in the contribution degree of one vote value to the election of representatives. The analysis of the electoral districts table included in AEPOPEM showed that 54 of the total 260 electoral districts exceeded a 3:1 rate of disparity in population, and 22 exceeded a 4:1 ratio. The Constitutional Court held that such disparities in population were excessive and irrational, contravening the constitutional guarantee of equality in vote value. However, the opinions in the decision split on deciding what rate of disparity might be constitutional. Five justices suggested a 4:1 ratio. The Constitutional

Court also ruled that an arbitrary unification of two geographically distinct administrative districts into one electoral district was an unconstitutional abuse of discretion.

### **3. Separate Ballot for the Proportional Representation**

On 19 July 2001, the Constitutional Court decided that the law which permitted only one vote for each voter was unconstitutional (2000 *hŏnma* 91). This decision forced the National Assembly to introduce a separate vote system for proportional representation.

At that time, the Public Election Act permitted only one vote for each voter (art 146(2)) and did not allow an independent vote for the political party of one's choice. Article 189(1) of the Act stated that the allocation of seats for proportional representatives would be proportional to the sum of votes obtained by all candidates of a particular political party in the nationwide district elections, thereby assuming that the voter's choice of a candidate was in accordance with his or her support for a particular political party. In the decision, the Constitutional Court said that under the proportional representative system, when an elector supported either a candidate or a political party but not both, half of the value of his or her vote was either misused or wasted. That included whether he or she voted for his or her favourite candidate or for the political party of his or her choice. In addition, that system could not accurately reflect support for the newly formed political party and was inherently prejudiced in favour of the existing major parties by allocating seats that exceeded the actual support for them. The Constitutional Court said that this was contrary to democratic principles, which called for the accurate reflection of people's opinions and guaranteed people's individual freedom of choice in public elections.

According to the Constitutional Court's rationale, the principle of direct election should apply to the proportional representative system, which requires the determination of elections of proportional representatives, as well as the acquisition of the number of seats of proportional representatives of a particular political party, by the results of the direct election. Since the election of proportional representatives in the National Assembly and the election of district Assembly Members are two different elections, the voter should be allowed to cast two separate ballots: one for his or her favourite candidate in the electoral district and the other for the political party of his or her choice. However, the election system at that time only allowed one vote for the candidate in the electoral district, and did not allow a separate vote for the slate of party nominees for the seats of proportional representatives. This meant that



nomination by the political party had the final and decisive effect in electing the proportional representatives to the National Assembly, and voters could not exert a direct and conclusive influence in the election of the proportional representatives. The Constitutional Court decided that this was contrary to the principle of direct election.

Under the election system of allowing one vote per person and adopting the seat allocation for proportional representatives in the National Assembly, when a person votes for a party nominee in the electoral district, his or her vote contributes to the election of the district member of the National Assembly as well as to the allocation of seats for the proportional representatives. However, a vote for an independent in the electoral district only counts for the election of the district Assembly Member, and has no value in the allocation of seats for proportional representatives. This is how the problem of inequality in the value of a vote arises. When a person votes for an independent because the party of one's choice did not nominate a candidate in the electoral district, he or she suffers an inequality in the value of his or her vote. According to the Constitutional Court's rationale for this decision, discrimination against voters who support independent candidates is unreasonable, and it violates the principle of equality in election.

#### **4. One Step Further toward Equal Representation**

On 25 October 2001, the Constitutional Court decided to change the guideline suggested in the precedent of 1995 (2000 *hōnma* 92). In declaring that the National Assembly Election Redistricting Plan was unconformable to the constitution, the Constitutional Court ordered that the National Assembly should enact a new and constitutional act until the end of 2003.<sup>6</sup>

According to the Constitutional Court, there is a wide scope of legislative discretion in developing the National Assembly Election Redistricting Plan. However, the constitutional principle of equal election limited legislative discretion in the matter. First, the equality in the value of each vote is the most important and basic factor in constituency rezoning. Accordingly, unreasonable redrawing of electoral districts violating the constitutional mandate of equal weight of votes is arbitrary and therefore unconstitutional. Second, gerrymandering is not within the constitutional limits of legislative discretion, and is unconstitutional. Gerrymandering refers to intentional discrimination of electors in a particular region through the arbitrary division of electoral districts. It would be a case of gerrymandering if electors in a particular electoral district lost opportunities to participate in political affairs because of an

arbitrary division of electoral districts, or if redrawing the constituency prevented the election of a candidate supported by electors from a particular region.

The Constitutional Court admitted that there were many suggestions for permissible limits on population disparity in electoral districts, and considered adopting two of these options. One option was to set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at 33.3 per cent (equivalent to setting the permissible maximum ratio between the most populous district and the least at 2:1). The other was to set the maximum deviation at 50 per cent (in this case, the maximum ratio between the most populous district and the least populous district would be 3:1). Adoption of the 33.3 per cent criterion would create many problems because factors other than population (such as administrative district division and the total number of seats in the National Assembly) must be accounted for when readjusting the national electoral constituencies. It had only been five years since the court first deliberated on the problem of population disparity in electoral districts, and an idealistic approach disregarding practical limits would be imprudent. Therefore, the Constitutional Court decided to review the instant case using the 50 per cent criterion. However, after some time, the Constitutional Court would have to employ either the 33.3 per cent criterion or one which was more exacting.<sup>7</sup>

## **5. Political Effect of Constitutional Court Decisions**

The series of Constitutional Court decisions mentioned above were a catalyst which promoted the constitutionalisation of representative politics in Korea. In the area of political representation, the political effect of the decisions was tremendous: repeated revisions of the law attempted to match constitutional principles such as the equal weight of the vote; gerrymandering was no longer possible; electoral rezoning became a job for the experts rather than a bargaining chip between political parties. For that reason, proportional representation was by separate ballot.

In reality, the institutional reform provoked by the Constitutional Court made very important changes. First, the new proportional representation based upon the constitutional principles resulted in the Democratic Labour Party's entrance in the parliament. In the general election of 2004, it took ten seats, eight of them coming from the proportional ballot. This was the first substantial appearance of the Social Democrats in the Korean parliament after the Korean War, and it happened by virtue of the Constitutional Court decisions. This had been unimaginable under

the former system, which had been determined unconformable to the constitution by the Constitutional Court.<sup>8</sup>

## V. CONSTITUTIONALISATION AND ITS LIMIT

The vast majority of Korean citizens are aware that the Korean Constitutional Court initiated the constitutionalisation process of Korean politics. For them, the Constitutional Court was a kind of detour providing an alternative means of political representation beside the parliament and party politics, where the myth of the 'strong president' still dominates. Korean citizens recognise the contribution of the Constitutional Court in leading democratic consolidation and are generally admiring of its important role. However, some criticisms have been recently made, namely that the Constitutional Court is not actually in the political representative system. Two significant decisions were made by the Constitutional Court in 2004: the impeachment case of President Roh Moo-hyun and the case of Capital City Moving. Irrespective of their political orientations, all Korean citizens faced the danger of judicial politics. The Constitutional Court itself was by no means democratic, and from that point, many Korean citizens began to debate one of the classical questions of democracy, 'Who watches the watchman?'

It is the author's view that after 1987, the constitutionalisation of politics in Korea faced a legitimacy problem of judicial guardianship. In this regard, we should recall the concrete meaning of constitutionalisation in Korean politics. The constitutionalisation of politics after 1987 was the effort to return and/or restore the normal government established before the Korean War, and was therefore limited by that original model. Then the question arises: what was the normal government that returned, or was at least asked to return, by the constitutionalisation of Korean politics?

There is a unique ideological tension in liberal democracy between liberal legalism and democratic republicanism. Active competition between judicial guardianship and parliamentary supremacy sometimes institutionalises this tension. Unique historical foundations provided for the establishment of the Korean constitution and government; it was not the Korean people themselves, but the US Army Military Government in Korea (USAMGIK) that actually laid down the ideological and institutional foundations of liberal democracy in Korea during the years 1945–8. Hence, we can say, hypothetically at least: firstly, that the liberal democracy of Korea was imbedded by USAMGIK with some bias toward liberal legalism in the transitional period of 1945–8; secondly, that the

biased political system did not work because an emergency government had to be established after the Korean War began and was maintained until 1987; finally, that after democratisation, a form of judicial guardianship of the Constitutional Court revealed the real distinctiveness of Korean liberal democracy.

In an article published in 2005, the author attempted to prove the first hypothesis above, demonstrating that the collaboration between USAMGIK and Korean local attorneys was crucial for the transplantation of liberal democracy to Korea with some bias to judicial guardianship. The USAMGIK's need for political stability was paramount, and the occupational (sometimes opportunistic) interest of Korean local attorneys functioned as a platform of the liberal democracy leaning towards judicial guardianship. I predicted the result of the collaboration between USAMGIK and the Korean local attorneys with three propositions. They concluded: first, that law will be monopolised by selected lawyers in Korea; second, law will be independent from democracy in Korea; third, law will be bureaucratic not professional in Korea (Lee, 2005).

This chapter does not attempt to prove the rest of the hypothesis. Nevertheless, it presents a sketch of Korean constitutional politics to show a specific meaning of constitutionalisation in a Korean context. The Korean Constitutional Court triumphed in reforming the representative system after 1987, but deeper problems of judicial guardianship remained in Korean constitutional politics, which have hampered its successful evolution.

## NOTES

1. 'Governing elites in divided, rule-of-law polities face a constant struggle to preserve their hegemony. Such elites are likely to advocate a delegation of power to the judiciary (a) when their hegemony is increasingly challenged in majoritarian decision-making arenas by policy preferences of peripheral groups; (b) when the judiciary in that polity enjoys a reputation for rectitude and political impartiality; and (c) when the courts in that polity are inclined to rule in accordance with hegemonic ideological and cultural propensities.'
2. The Korean Constitution consists of a preamble, 130 articles, and six supplementary rules. It is divided into ten chapters: General Provisions, Rights and Duties of Citizen, the National Assembly, the Executive, the Courts, the Constitutional Court, Election Management, Local Authority, the Economy, and Amendments to the Constitution.
3. This is a very interesting and often repeated pattern of Korean politics. The coupling of presidents and their political parties are as follows: President Rhee Syngman (1948–1960), The Korean Liberty Party; President Park Chung Hee (1963–1979), The Democratic Republican Party; President Chun Doo-hwan (1980–1987), The Democratic Justice Party; President Roh Tae-woo (1988–1993), The Democratic Liberty Party; Kim Young-sam (1993–1998), The New Korea Party; President Kim Dae-jung

- (1998–2003), The National Council for the New Politics/The New Millennium Democratic Party; President Roh Moo-hyun (2003–2008), The Open Uri Party.
4. Korea has one special city (*tŭkpyŏlsi*, capital city), six metropolitan cities (*kwangyŏksi*), and nine provinces (*to*). Under these 16 provincial-level governments, 235 lower-level local governments (municipal governments) exist.
  5. According to the statistics of the Constitutional Court, 14,980 cases were filed up to the end of July 2007. Among them, 14,375 cases were constitutional complaints and 560 cases were about the constitutionality of law; 303 cases were decided unconstitutional and 105 cases were decided unconformable to the constitution. In total, at least 408 laws legislated by the National Assembly have been nullified by the Constitutional Court. See the homepage of the Korean Constitutional Court, <http://www.court.go.kr/>
  6. The Constitutional Court could render a decision of simple unconstitutionality in this case. However, the following facts had to be considered in doing so: that General Elections for the National Assembly had already been held based on the Redistricting Plan; that there might arise a vacuum in law if a special election or re-election for a particular district was to be held before the revision of the plan, because the speedy revision of the plan would be impossible due to its political nature; and that in order to maintain homogeneity in the composition of the National Assembly and to prevent confusion caused by changes in the electoral district, it was better that a special election or re-election was held under the Redistricting Plan. Therefore, the court found the instant Redistricting Plan nonconforming to the Constitution, but ordered it to remain effective temporarily until 31 December 2003, by which the legislature had to revise the plan.
  7. Two Justices of the Constitutional Court delivered dissenting opinions in this case. They said that, according to the court's decision in the 95 *hŏnma* 224 decision on 27 December 1995, an electoral district with a population not exceeding the 60 per cent maximum deviation limit from the average population of electoral districts is not unconstitutional. The Redistricting Plan at issue was not against that criterion. Considering deference to the legislative power, it would be imprudent for the Constitutional Court to change its earlier holding in 1995. These two justices agreed with the majority regarding the Election Redistricting Plan to be employed for the National Assembly Election in 2004, but they insisted that instead of rendering a decision of nonconformity to the Constitution, the Constitutional Court should reject the complaint, while suggesting that the new Redistricting Plan for the National Assembly Election in 2004 should set the permissible maximum deviation of population in an electoral district from the average population of electoral districts at 50 per cent and that the new criterion will be used for constitutional review from then on.
  8. The main political parties in Korea in 2008 are the New Democratic Party (NDP), the Grand National Party (GNP), the Democratic Labor Party (DLP), and the Democratic Party (DP). The Open Uri Party, which had been the ruling party for about four years, was extinguished and incorporated into the NDP in August of 2007. The NDP is sometimes recognised as the temporary political coalition preparing for the presidential election at the end of 2007. Even though the NDP is not a ruling party because the current President Roh Moo-hyun is not a member, many Korean people still regard it as a quasi-ruling party. The NDP occupies almost 140 seats in the National Assembly. But their political leadership is losing a lot because of the low popular support. The conservative GNP (almost 130 seats) has formed the dominant political opposition and is attempting to regain the presidency in this coming election. The centrist DP (eight seats) is sometimes counted as a regional political party. The social democrats' DLP (nine seats) is aligned with labour unions and farmers' groups.

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## 10. Transitional justice in Korea: legally coping with past wrongs after democratisation

**Kuk Cho**

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### I. INTRODUCTION

For over a decade, Korean society has taken legal steps to rectify past wrongs under the authoritarian-military regime. Part of a global wave of political democratisation after soviet communism's collapse,<sup>1</sup> the nationwide 'June Struggle' of 1987 led to the collapse of Korea's authoritarian-military regime and opened a road toward democratisation. Since then, a number of human rights violation cases have been revealed in Korea (hereinafter Korea or South Korea), and a cleansing campaign has been in operation since the 1993 launch of the 'Civilian Government'. The Korean public came to see the complete picture of its painful past, and with it came an unavoidable task for the Korean democratic-civilian governments to rectify past wrongs. How to properly achieve 'transitional justice' became a serious political and legal issue.<sup>2</sup> While liberals, including human rights organisations, supported the realisation of transitional justice, conservatives, in particular politicians with military backgrounds, objected to it.

This chapter attempts to review the legislative steps and judicial decisions regarding Korea's dark past, and to provide a Korean method to deal with past wrongs. Firstly, the chapter reviews the constitutionality of the 1995 Special Act Regarding the May 18 Democratic Movement, enacted to suspend the statute of limitations for punishing crimes committed by military leaders on and around 12 December 1979 and 18 May 1980. Secondly, this chapter proceeds to examine the recent laws excluding the application of the statute of limitations to state crimes against human rights and related issues of retrospective punishment. Thirdly, to extend the scope for rectification of past wrongs, the chapter briefly examines three recently enacted laws: the 2004 Special Act for

Finding the Truth of Anti-Nation Activities under the Japanese Occupation, the 2005 Special Act for Reverting the Property of Anti-Nation Pro-Japanese Collaborators, and the 2005 Basic Law for Coping with Past History for Truth and Reconciliation.

## II. BRINGING TWO FORMER PRESIDENTS TO JUSTICE

### 1. Punishing the Leaders of the Military Coup<sup>3</sup>

#### A. The civilian government's initial hesitancy

The task of coping with past wrongs began with the punishment of military leaders, including two former presidents, Chun Doo-hwan and Roh Tae-woo. They led the December 1979 military coup after the assassination of President Park Chung Hee, and ordered the brutal oppression of the May 18 Uprising of 1980 in the Kwangju area. Chun became president after dissolving the National Assembly and revising the Constitution under martial law. Roh was elected president by popular referendum in 1987.

The 'Civilian Government' launched by President Kim Young-sam in 1993 faced strong demands from the public to investigate and punish these military leaders. Under the previous Roh government, in redefining the uprising as a 'democratisation movement', the National Assembly passed a law that allowed for victim compensation,<sup>4</sup> and made Chun appear and testify in parliamentary hearings. However, these efforts did not alleviate the people's demands for justice and a full inquiry into the two historical incidents. In its inception, the Kim Young-sam government hesitated to pursue punishment against the two former presidents because he had entered the Blue House with support from numerous politicians with military origins. Although President Kim strongly criticised the military leaders and praised the May 18 Uprising of 1980, arguing that 'the truth should be reserved for historical judgment in the future' (Han 2005, p. 1005), he was reluctant to resort to criminal punishment.

Although in 1994 the Seoul District Prosecutor's Office recognised that the December 1979 coup involved crimes of mutiny, insurrection, and murder, and the suppression of the May 18 Uprising of 1980 constituted treason and murder, it made a controversial decision to suspend prosecution of the military leaders. The office was concerned that prosecuting them might cause political, social and legal confusion because, by law, the democratic-civilian government was a legal successor to the previous Chun and Roh governments. Therefore, they concluded, 'a victorious



coup should not be punished after a substantial lapse of time' (Park and Han 1995, pp. 225–7, 243–4). The office faced a 'dilemma between formal legality and substantive justice, or between normative reality and a normative ideal' (Han 2005, p. 1010).

In 1995, the majority opinion of the Constitutional Court held that this prosecutorial decision did not exceed the prosecutorial discretion allotted in art 247(1) of the Criminal Procedure Act, and was therefore constitutional.<sup>5</sup> The court held that the statute of limitations automatically ceases during the incumbencies of the former presidents according to art 84 of the Constitution,<sup>6</sup> which provides: 'The president shall not be charged with a criminal offense during his tenure of office except for insurrection or treason.'<sup>7</sup> This meant that Chun and Roh could be subject to prosecution for mutiny or homicide. However, considering the conflicting interests between realising justice by punishing the military leaders, and prolonged social confrontation caused by doing so, the court believed that it did not need to intervene in the prosecutorial decision.<sup>8</sup>

#### **B. The 1995 Special Act regarding the May 18 Democratisation Movement**

The Korean public was not satisfied with this compromised legal solution, and continued to press the government and the legislature to make a new law to punish the military leaders. Students demonstrated in the street, demanding the punishment of Chun and Roh. A newly revealed scandal that the two former presidents had amassed huge sums of money from bribes received during their presidency infuriated the people even more. It became certain that the Korean people did not want to leave their crimes to the judgment of history but to seek a legal response to them. As a result, President Kim directed his ruling party to enact new legislation and in December 1995, the National Assembly passed the Special Act Concerning the May 18 Democratisation Movement.<sup>9</sup>

The 1995 Special Act was enacted to suspend the statute of limitations for crimes against constitutional order, which had been committed on and around 12 December 1979 and 18 May 1980.<sup>10</sup> It stipulated that the limitation period ceased to run during the presidencies of Chun and Roh in which 'there existed obstacles for the State to institute prosecution.'<sup>11</sup> It also allowed the court to review prosecutorial disposition of cases where a prosecutor had declined to prosecute.<sup>12</sup> Conversely, a right to a special retrial was given to people who had been punished because of their engagement in the May 18 Uprising or because of their opposition to crimes against the constitutional order.<sup>13</sup>

In these new legal circumstances, the Seoul District Prosecutor's Office initiated prosecution and detained the two former presidents and former high-ranking officials who led the 1979 military coup and oppressed the May 18 Uprising of 1980.

## 2. Judicial Decisions Promoting the Case

During the trial, the defence challenged the constitutionality of the 1995 Special Act, arguing that it was made to punish only specific groups, and therefore arbitrarily violated the equal protection principle. In addition, it applied retrospective punishment and thus violated the *ex post facto* principle. However, the Constitutional Court confirmed the constitutionality of art 2 of the Special Act in 1996.<sup>14</sup>

Firstly, even though created for particular situations, the Constitutional Court held that the 1995 Special Act could not be regarded as automatically unconstitutional but was justified by other reasonable grounds: that the unlawfulness of the coup was grave and there exists a national demand to rectify past wrongs in an attempt to establish legitimate constitutionalism.<sup>15</sup>

Secondly, the Court held that the 1995 Special Act did not violate the *ex post facto* principle. Because the Supreme Court at that time had not decided whether the statute of limitations had expired when the Special Act was applicable, the Court based its decision on two hypothetical situations. It held that if the statute of limitations had not expired, it would be constitutional to extend the statute of limitations. The justices' opinions split in the case as to whether the statute had already expired.<sup>16</sup> Four justices maintained the Special Act was still constitutional, while five justices argued it was unconstitutional.<sup>17</sup> However, the vote of five dissenting justices did not meet the requirement for a decision of unconstitutionality, which requires a vote of six or more.

On 17 April 1997, the Supreme Court affirmed the defendants' convictions for treason and killing for the purpose of treason.<sup>18</sup> It maintained that the Special Act lawfully suspended the statute of limitations for crimes against the constitutional order and that the prosecution was instituted before the period expired.<sup>19</sup> It held that:

The defendants grasped political power after they stopped the exercise of the authority of constitutional state institutions by mutiny and rebellion. Even if they had arguably ruled the State based on the Constitution, which was revised by popular referendum, it should not be overlooked that a new legal order was established by mutiny and rebellion. It cannot be tolerated under any circumstances under our constitutional order to stop the exercise of the authority of constitutional state institutions and grasp political power by

violence, not following democratic procedure. Therefore, the mutiny and rebellion can be punishable.<sup>20</sup>

Chun was sentenced to life imprisonment and Roh was imprisoned for 17 years. Others received prison sentences ranging from three-and-a-half to eight years. Based on art 7 of the Special Act,<sup>21</sup> the decorations given to the military leaders were cancelled in 2006 (Park 2006; Sung 2006; Kim 2006; Chun 2006).<sup>22</sup>

### **3. The Prosecution and Trial: ‘Collective Lessons in Justice’**

Although support from numerous politicians with military origins established the Kim Young-sam government, transitional justice in Korea did not sacrifice justice. The government had to consider the people’s power that had overthrown the old regime. The trial of the military leaders declared that military coups and dictatorships would never be tolerated in Korea. Providing education about democracy and the rule of law, it was a symbolic break with the old regime. In this context, the trial of the military leaders was a ‘political theatre’ in which to provide ‘collective lessons in justice’ (Barahona et al. 2001, p. 26).

After the guilty verdict, the military leaders (which included two former presidents) received presidential pardons and were released in 1997. Nobody expected them to serve their entire sentence. Neither the investigation nor the prosecution of other inferior soldiers and/or government officials who served with them was pursued. The fact that the transition from the authoritarian-military regime was not established through revolution, but rather through compromise, embracing some parts of the political forces that had backed the authoritarian-military regime, constituted the restrictive surroundings for transitional justice. In this sense, justice was limited.

## **III. STATUTES OF LIMITATIONS PREVENT THE APPLICATION OF HUMAN RIGHTS LAWS**

### **1. Legal Difficulties caused by Statutes of Limitations**

Although two former presidents and other former military leaders were punished, a number of government officials and agents who had tortured citizens, distorted substantial facts to convict citizens, and even murdered citizens, remained unpunished. The Presidential Truth Commission on

Suspicious Deaths, established in 2001,<sup>23</sup> recognised their crimes. However, they were not prosecuted because the statute of limitations had expired. According to the Criminal Procedure Act, crimes such as murder are subject to statutory limitations of only 15 years.<sup>24</sup> This short period of statutory limitation is a major impediment to legal redress.

In addition to the 'suspicious death'<sup>25</sup> cases that occurred in the process of the democratisation movement, there was a notorious case where state authorities hid and supported a killer in order to maintain its anti-communist ideology and bolster the authoritarian regime. In 1987, in Hong Kong, Yoon Tae-Sik killed his wife, Kim Ok-boon, also known as Suzy Kim. He lied to law enforcement authorities, including the Agency for National Security Planning (ANSP), which was formerly the Korean Central Intelligence Agency (KCIA), telling them that she was a spy for North Korea, had kidnapped him with other spies, and that he had escaped from them. Even though they found Yoon to be lying, the ANSP announced that Kim was a spy and praised Yoon as an anti-communist fighter. In 2001, after democratisation, the truth was revealed and Yoon was arrested and convicted. In May 2002, Kim's family filed a civil suit against the State and in August 2003 was awarded 4.2 billion won (approximately 400,000 US dollars) as compensation in a court decision. The Seoul District Court held that the State could not rely on the statute of limitations if it has not taken any action to correct illegal activities by state authorities.<sup>26</sup>

However, the ANSP agents who fabricated and concealed the truth could not be prosecuted because the statute of limitations for their crimes had expired. The public was angered by such legal technicalities preventing the punishment of criminals. Civic organisations and human rights groups strongly argued for the establishment of a law to prosecute them. However, like American jurisprudence,<sup>27</sup> the majority of Korean jurisprudence maintains that retrospective application of an amended limitation period to time-barred prosecution violates the *ex post facto* principle because it may invite an arbitrary and oppressive exercise of state authority to punish and infringe upon the citizen's expectation of being free from punishment. By contrast, this principle is not violated by extending a limitation period before a given prosecution is barred.<sup>28</sup>

As seen in the decision of the Constitutional Court on the constitutionality of the 1995 Special Act Concerning the May 18 Democratisation Movement in December 1995,<sup>29</sup> the opinions of Constitutional Court justices were also split on whether the retrospective extension of the statute of limitations was constitutional when the limitation period had already expired.

## 2. The Contradiction between the Application of Retroactive Justice and the Demand for Punishment

There was certainly popular demand for punishment of officials who gravely infringed human rights under the old regime. During the authoritarian-military rule, citizens had no opportunity to seek justice. The prosecution of state crimes against human rights was impossible. The *ex post facto* principle presupposes a possibility that citizens at least have a chance to pursue justice through law enforcement authorities. Nevertheless, citizens had to risk their safety to pursue punishment of state crimes against human rights under the authoritarian-military regime. The principle must not be taken advantage of by state authority officials or agents who blocked investigation and prosecution against their own crimes. To prevent prosecution because of the lapse of statute of limitations would damage the popular sense of justice. For that reason, retrospective application of an amended limitation period to time-barred prosecution should be allowed under very limited and special circumstances. For instance, after the Liberation from Japanese Occupation (1910–45), the 1948 Act for Punishing Anti-Nation Activities<sup>30</sup> was legislated in 1948 to punish pro-Japanese collaborators. Additionally, after the April 1960 Revolution which ended the authoritarian Rhee Syngman government, the Act for Restricting the Civil Rights of Anti-Democracy Agents<sup>31</sup> was enacted in 1960 to restrict the civil rights, for five to seven years, of those who had participated in the Rhee government's illegal activities, including the fabrication of the result of the general election on 15 March 1960.

However, unlike extending a limitation period before a given prosecution is expired, much stricter constitutional review was required to apply an amended limitation period retrospectively after the limitation period has expired.<sup>32</sup> Procedural legality was required to punish those who violated human rights under the authoritarian-military rule. If the new democratic regime weakened procedural legality to serve substantive justice, this would satisfy the popular demand but undermine the new regime's commitment to the rule of law. This is the academic reason why the two bills to cease or exclude the application of the statute of limitations did not pass. Ironically, procedural legality, which grew in Korean society after democratisation, prevented the retrospective punishment of the perpetrators under the old regime after the limitation period had expired. The National Assembly was not sure if such an act could pass constitutional review by the Constitutional Court. As a result, it was hesitant to advance retroactive justice fully in criminal cases. However, regardless of constitutional review, the National Assembly could and

should have passed a bill to extend criminal statutes of limitations retroactively so long as the limitations period had not already expired.

#### IV. RESTORING THE HONOUR OF THE DEMOCRATISATION MOVEMENT ACTIVISTS

##### 1. Honouring the Right of Resistance and Providing 'Justice as Recognition'

The next step in punishing the perpetrators was to 'restore the honour of those sacrificed for the democratisation movement and their families, and provide compensation for them.'<sup>33</sup> Under the authoritarian-military regime, a great number of democratisation movement activists were not only expelled from their schools or companies, but also arrested, detained and convicted for the violation of a number of laws such as the 1961 Anti-Communist Act,<sup>34</sup> the 1980 National Security Act,<sup>35</sup> and the 1962 Assembly and Demonstration Act.<sup>36</sup> Punishment under these laws severely restricted political rights and freedoms.

In January 2000, under the Kim Dae-jung government, the Act for Restoring the Honour of Democratisation Movement Involveds and Providing Compensation for Them was enacted (Democracy Act). It owed much to the 422-day sit-in by human rights organisations such as the National Association of Bereaved Families for Democracy (*Chŏn'guk minjuhwa undong yugajok hyŏbŭihoe*) in front of the National Assembly.

The 2000 Democracy Act defines the 'democratisation movement' as 'activities that contributed to establishing democratic constitutional order and resurrecting and enhancing freedoms and *rights of people by resisting the authoritarian rule* that had disturbed free democratic basic order and violated people's fundamental rights guaranteed by the Constitution since August 7, 1969.'<sup>37</sup>

This Act officially recognised the 'right of resistance' against an illegitimate regime,<sup>38</sup> which is not available in the Constitution. It implies that a number of 'illegal' activities against the authoritarian rule may be justified as an exercise of 'right of resistance'. The Act maintains the beginning date of the authoritarian rule as 7 August 1969, when only the ruling government party passed the bill for revision of the Constitution to allow the election of President Park Chung Hee once more.<sup>39</sup> Although later approved by popular referendum, the revision was the first step to making President Park a permanent president.<sup>40</sup>

The Act also classifies 'democratisation movement involveds' as those who:

- (i) died or were lost in connection with the democratisation movement;
- (ii) were injured in connection with the democratisation movement;
- (iii) fell ill or died due to illness in connection with the democratisation movement;
- (iv) were convicted, fired or disciplined in connection with the democratisation movement.<sup>41</sup>

The 1990 Act for Restoring the Honour of Democratisation Movement Involveds and Providing Compensation for Them covered the 'democratisation movement involveds' in the May 18 Uprising of 1980.<sup>42</sup>

The Review Committee for Restoring the Honour of Democratisation Movement Involveds and Providing Compensation for Them (The Review Committee)<sup>43</sup> was organised under the prime minister's authority with the task of examining whether applicants were 'democratisation movement involveds', and deciding what kind of disposition was to be made for them.<sup>44</sup> Former Constitutional Court Justice Ha Kyong-Chul was appointed chairman of the Review Committee. Although the Review Committee itself is neither an investigative nor a judicial authority, it has the authority to make a necessary inquiry into the case and make a request to the relevant authorities.<sup>45</sup> It may recommend either a pardon for those convicted in connection with the democratisation movement, or abolition of the record of their conviction.<sup>46</sup> It may make recommendations to state and local governments or private companies to rehire those fired in connection with the democratisation movement,<sup>47</sup> and also recommend that schools abolish records of discipline on those who were disciplined in connection with the democratisation movement and bestow honorary graduation diplomas upon them.<sup>48</sup>

Under the old regime, a number of democratisation movement activists were labelled 'pro-Communism' or 'impure left-leaning' radical subversives (West and Baker 1991). Following the examination of the applications by the Review Committee, a number of democratisation movement activists have been recognised as 'democratisation movement involveds'. Disposition for honour restoration and compensation has been made for them. As of 28 December 2006, 543 democratisation movement involveds had received a total of \$28,700,000 (US dollars) in compensation.<sup>49</sup> The decisions of the Review Committee can be considered to provide 'justice as recognition' and 'compensatory justice' to those who sacrificed themselves to fight for democracy (Barahona 2001, p. 25).

One of the highest profile cases is that of the 'People's Revolution Party Rebuilding Committee (*Inmin hyŏngmyŏngdang chaegŏn wiwŏn-hoe*, hereinafter PRP)'. This was a case of fabrication by torture: as the anti-Yusin movement by college students and intellectuals gained strength

in 1974, the KCIA arrested PRP members because they had allegedly pursued a communist revolution with connections to North Korea. Eight PRP members were immediately executed just one day after the Supreme Court confirmed their conviction in 1975. For this reason, this case is frequently called 'judicial murder' (Catholic Human Rights Committee 2001).

In January 2006, the Review Committee decided that the conviction of 16 PRP members was based on facts fabricated as a result of the KCIA's severe torture, and the genuine reason why they were suppressed was that they had actively developed an anti-*Yusin* regime movement.<sup>50</sup> In December 2005, before the decision by the Review Committee, the Committee for Development through Finding Truth of the Past<sup>51</sup> under the National Intelligence Service (the successor to the KCIA) also found that the PRP case was fabricated by torture.<sup>52</sup> On 27 December 2005, the Seoul Central District Court decided to re-examine the conviction of the members,<sup>53</sup> and on 23 January 2007, the court overruled the previous conviction.<sup>54</sup>

## **2. The Controversial Aspect of the Democratisation Movement**

### **A. The Dong-eui university students – embracing counter-violence by the democratisation movement**

In May 1989, students of Dong-eui University staged a sit-in at the library building on campus to demonstrate against corrupt entrance exam procedures. They also detained five police officers. When the police entered the library to break up the sit-in, some students threw Molotov cocktails at the police. A fire broke out, killing seven police officers. The students were arrested and convicted of murder by arson.<sup>55</sup> This violent confrontation between college students and the authoritarian regime's police resulted in a terrible tragedy, which poses difficult questions of whether violent and lethal anti-regime activities can be considered a part of the democratisation movement.

It was inevitable that the 27 April 2002 decision of the Review Committee to acknowledge 46 students of Dong-eui University as democratisation movement involvers would provoke controversy. Even though it resulted in the death of several police officers, the Review Committee focused on the fact that the students' conduct was a routine method of demonstration without intent to kill police officers at that time; the grave result of the students' conduct did not prevent their conduct from being regarded as part of a democratisation movement.

Arguing that the decision of the Review Committee and the 1990 Act for Restoring the Honour of Democratisation Movement Involvers and



Providing Compensation for Them violated their constitutional rights, the family members of the dead police officers filed a constitutional petition to the Constitutional Court. On 27 October 2005, a five-to-four majority opinion of the Constitutional Court rejected the petition because (1) the family members did not have standing for the petition; (2) the decision did not necessarily cast the dead police officers in a negative light because the officers had already received the title of 'officers of merit'; and (3) the Act is constitutional because it does not disadvantage those who stood on the opposite side of the democratisation movement.<sup>56</sup> However, the minority opinion argued that the decision of the Review Committee was unconstitutional because, despite the students' desire to resist the authoritarian regime, the students resorted to destructive means which cannot be tolerated in a democratic order. The minority opinion reasoned that if the students' conduct were acknowledged as a democratisation movement, the dead policemen would inevitably be considered agents of the authoritarian regime.<sup>57</sup>

Claiming that these decisions turned police-killers into democratisation movement activists, other police officers, conservative party members and newspapers all strongly objected to the Review Committee and the Constitutional Court's two decisions.<sup>58</sup> Criticism was also raised from a different corner: Moon Boo-sik, who as a student movement leader in 1982 caused the death of an innocent student as he set alight the American Culture Centre in Busan to protest against the US government's leniency toward Korea's authoritarian regime, called for serious reflection on the use of counter-violence by a democratisation movement (Moon 2002, Chapter 5).

The Review Committee and the majority opinion of the Constitutional Court seemed to consider the socio-political background of the tragedy, in which there was an exchange of tear gas bombs from the police and Molotov cocktails from demonstrating students. They also seemed to consider the contribution of student movements toward democratisation. Article 2 of the Act seems to consider the deaths of state authority officers as an acceptable collateral consequence of recognising the 'right of resistance' in the 2000 Democracy Act.<sup>59</sup> The fact that the Dong-eui University students were given the title of democratisation movement involvers while the sacrificed police officers were given the title of officers of merit shows the complexity of this situation. Despite the legal classification of the Dong-eui University students as democratisation movement involvers, a more fundamental question remains about the legitimacy of counter-violence against the old regime. To cite Moon Boo-sik:

It is not honest to say that different forms of counter-violence were inevitable, or were used in self-defence. Criticism of a democratisation movement that did not limit the use of violence as an inevitable means of resistance, defence and last resort for expression, ... but rather advocated violence as a tool to create a new power, has been reserved because it may work as a grounds to justify the violence of state authority (Moon 2002, p. 165 (translated by this author)).

## **B. How the 'National Liberation Front of South Korea' embraced the leftist democratisation movement**

In March 2006 the Review Committee acknowledged 29 members of the 'National Liberation Front of South Korea (*Namchosŏn minjok haebang chŏnsŏn*, hereinafter NLF)' as democratisation movement involvers.<sup>60</sup>

During the late 1970s, the NLF fought vigorously against the authoritarian-military regime with an anti-America, anti-*Yusin*, and anti-capitalism agenda; its members received severe punishments for violating the 1961 Anti-Communist Act and the 1980 National Security Act. The NLF leader died after being tortured, before his scheduled execution; another leader was also executed.

While the Review Committee fully recognised the radical, leftwing characteristics of the NLF, it acknowledged that, in general, the NLF's activities could be considered political resistance against the authoritarian *Yusin* regime. Conservative rightwing newspapers and civic organisations strongly criticised the decision of the Review Committee because the ultimate goal of the NLF was a leftist revolution.<sup>61</sup>

In a broad sense, the decision indicates that the Review Committee understands and embraces the leftist democratisation movement. The 1961 Anti-Communist Act and the 1980 National Security Act reflected the anti-Communist ideology of the authoritarian-military regime; they considered all leftist activities 'non-democratic' and severely punished them. In this decision, the Review Committee attempted to evaluate the contribution of the leftist democratisation movement impartially. Its decision fell in line with the decision of the Ministry of Patriots and Veterans Affairs in February 2002 and August 2005 to confer decorations on a number of leftist activists who fought for national liberation under the Japanese Occupation.<sup>62</sup> Similar to this liberation movement, the leftist democratisation movement was acknowledged as an integral part of the broader democratisation movement against the authoritarian-military regime.

The Review Committee's decision reveals that Korea had freed itself of the 'red complex', which at one time overshadowed it. It also reflects the broader political spectrum of contemporary Korean democracy. The

'Democratic Labour Party (*minju nodong tang*)', a leftist party which would have been harshly punished under the authoritarian-military regime, is currently legalised and holds seats in the National Assembly.

## V. THE TRUTH COMMISSION'S INVESTIGATION AND SANCTIONS CONCERNING SUSPICIOUS DEATHS

### 1. Choosing Truth-finding rather than Oblivion

A number of democratisation activists and critical intellectuals were found dead under the authoritarian-military regime. State authorities announced that they had died either by accident or suicide. The State did not listen to the outcries of the torture victims and ignored the requests of families to re-examine the cause of suspicious deaths. Suggestions that law enforcement officers tortured citizens during interrogation, or that they concealed deaths that resulted from torture, were frequently treated as fallacious attacks on the regime's legitimacy. It was only after democratisation that victims and their families were given credence.

The Special Act for Truth-Finding about Suspicious Deaths was passed in 2001 under the Kim Dae-Jung government. Like the 2000 Act for Restoring the Honour of Democratisation Movement Involveds and Providing Compensation for Them, the 2001 Special Act owed much to the non-stop sit-in before the National Assembly by the Korea Association of Bereaved Families for Democracy.<sup>63</sup> The Korean public wanted to disrupt the silence of the past to learn the truth. The Presidential Truth Commission on Suspicious Deaths (the Truth Commission) was established for this task,<sup>64</sup> and it investigated the circumstances surrounding the suspicious deaths related to the democratisation movement before June 2004. Professors Yang Seung-Kyu and Han Sang-Beom served consecutive terms as chairman of the Commission.

The 2001 Special Act defined 'suspicious death' as 'deaths that occurred with relation to the democratisation movement whose cause has not been identified and which shows probable cause that it might have resulted from direct or indirect illegal exercise of state authority.'<sup>65</sup> The definition of 'democratisation movement' followed the definition provided by the 2000 Act for Restoring the Honour of Democratisation Movement Involveds and Providing Compensation for Them.<sup>66</sup>

The Truth Commission received the authority to initiate an investigation of a suspicious death upon the filing of a petition, or by its own decision in the absence of a petition.<sup>67</sup> Its powers were as follows:

- it could request relevant individuals to appear for investigation and relevant authorities to submit data and materials pertinent to the investigation;<sup>68</sup>
- it could perform a field investigation in the place where the suspicious death allegedly occurred;<sup>69</sup>
- if it found evidence of a crime, it could file a complaint to the Attorney General or the Chief of the Military General Staff,<sup>70</sup> and request law enforcement authorities to investigate the case;<sup>71</sup>
- it could issue an ‘order of accompanying’ to a person who refused to appear without just cause;<sup>72</sup>
- if its investigation concluded that the suspicious death resulted from an illegal exercise of state authority in the process of democratisation, the Truth Commission was obliged to request the Review Committee for Restoring the Honour of Democratisation Movement Involvers and Providing Compensation for Them to review the case.<sup>73</sup>

However, the Truth Commission was neither an investigative nor a judicial authority, and therefore it received neither the authority to search and seize relevant materials and institute prosecution, nor the authority to subpoena witnesses and suspects. Law enforcement authorities did not want to provide the Truth Commission with such authority. Only administrative fines could be imposed on those who did not cooperate with the Truth Commission’s investigation without just cause or refused to follow the request for appearance without just cause.<sup>74</sup> In this sense, the activities of the Truth Commission were so limited that it had difficulty discovering the truth surrounding suspicious deaths without the voluntary cooperation of relevant people and state authorities.

## **2. Important Decisions relating to Suspicious Deaths in the Democratisation Movement**

Ultimately, the Truth Commission recognised 30 cases of ‘suspicious death’;<sup>75</sup> it classified others as ‘impossible to investigate’<sup>76</sup> due to a lack of evidence and dismissed those that lacked merit. Three major decisions are reviewed below.

**A. Victims killed under 'protective custody'**

In 2001, the Truth Commission acknowledged that the deaths of two inmates, which occurred while they were incarcerated under the pretext of 'protective custody' (*poho kamho*),<sup>77</sup> were 'suspicious deaths'.

In 1980, the military coup committee issued Martial Order No. 13, which was to put vagrants and repeat criminals into concentration camps under the name of '*Samch'ŏng* Education'.<sup>78</sup> Later, the 'Legislative Council for Protection of the State' wrote the Social Protection Act<sup>79</sup> to provide legal grounds for retroactively applying the Martial Order. The 1980 Social Protection Act imposed 'protective custody' on repeat felons when they were found to have a 'danger of recommitting crimes'.<sup>80</sup> However, under the Act, even ordinary citizens who were neither vagrant nor criminal were incarcerated in the camps. Inmates were brutally abused under the harsh and oppressive 'education'. Later, those placed under 'protective custody' were incarcerated in strict confinement centres in the Cheongsong region.

The Truth Commission found that in 1981, while protesting against the '*Samch'ŏng* Education', military officers had shot Jean Jeong-Bae dead in a concentration camp. It was determined that he was involved in the democratisation movement because he contested his illegal detainment by requesting a formal trial and meeting with a higher-ranking official.<sup>81</sup> In 1984, after he demanded the abolition of 'protective custody', an end to jailors' violence against inmates, and improvement of treatment for inmates, jailors cruelly treated Park Young-doo and he died in a discipline cell at a heavy confinement facility in the Cheongsong region. His body was buried without an autopsy or his family's attendance.<sup>82</sup>

**B. The death of Professor Tsche Chong-Kil during interrogation by the KCIA**

In May 2002, the Truth Commission acknowledged that the death of Professor Tsche Chong-Kil of Seoul National University College of Law was a 'suspicious death'.<sup>83</sup>

In 1973, Professor Tsche was found dead in a KCIA building. The KCIA announced that he had committed suicide by throwing himself out of a building after confessing he was a spy for North Korea. The KCIA had interrogated him because a self-surrendered North Korean spy had mentioned his name. However, the Truth Commission found that KCIA agents tortured him during interrogation and that he had never confessed to being a spy. They further determined that there was a high probability that he was killed and the agents threw his body away; and even if he had thrown himself out of the building, it was probably to evade additional

torture by the agents. They also found that the case of a spy group in Europe, which the KCIA announced after his death, was fabricated.

In February 2006, the Seoul High Court decided that the State should provide about 1.8 billion won (approximately 1.9 million US dollars) to Professor Tsche's family as compensation. The court reasoned that the State could not rely on the statute of limitations if state authorities fabricated and concealed the truth.<sup>84</sup> As in Suzy Kim's case,<sup>85</sup> this decision shows that Korean jurisprudence distinguishes retroactive civil sanction from retroactive criminal sanction.

### C. North Korean spies killed in prison

In July 2004, the Truth Commission made a controversial decision. It acknowledged that the deaths of two former North Korean spies and one former communist partisan during the Korean War were 'suspicious deaths'.<sup>86</sup> It found that state authorities tortured and forced them to convert their political beliefs before they were killed in prison, under the *Yusin* regime. The Social Security Act enacted in 1975<sup>87</sup> enabled the imprisonment of a number of non-converted leftists, including North Korean spies, after they had served their sentences – on the grounds that there was a 'danger of recommitting crimes'.<sup>88</sup> 'Security custody', which is another kind of 'protective security measure',<sup>89</sup> was imposed by the Ministry of Justice,<sup>90</sup> not the judiciary, and it could be renewed repeatedly until 'anti-Communism was established' in the leftists' minds.<sup>91</sup> Under this system, leftists who refused to submit a 'conversion document' to state authorities faced the danger of never being released.

Although it was disputed whether their death met the requirement of the 'death happening *with relation to the democratisation movement*' in the Special Act, the Truth Commission confirmed that the three inmates were killed by an 'illegal exercise of state authority'.<sup>92</sup> Maintaining that it was unconstitutional and illegal to force them to convert their political beliefs, and that their resistance contributed to the abolition of the undemocratic 'conversion system', the Truth Commission interpreted the requirement broadly. Arguing that the inmates adhered to their Communist beliefs and that their resistance could not be classified as a part of the democratisation movement, conservative politicians, newspapers and civic organisations all strongly criticised the decision.<sup>93</sup>

Soon after the Truth Commission rendered its decision, the Review Committee for Restoring the Honour of Democratisation Movement Involvers and Providing Compensation for Them<sup>94</sup> rejected the decision of the Truth Commission.<sup>95</sup> The Review Committee has the final authority to confirm whether a suspicious death is related to the democratisation movement.<sup>96</sup>

The Review Committee distinguished North Korean spies from home-grown leftists, as it acknowledged in 2006 that the activities of the home-grown leftist NLF belonged to the democratisation movement.<sup>97</sup> Separate civil suits may be pursued to compensate for the deaths of the two former North Korean spies and the one former communist partisan.

### **3. The Truth Commission: Conclusion**

The Truth Commission was dissolved in 2004 leaving a number of unresolved cases. For instance, mysteries still surround the deaths of Chang Joon-ha, a leading dissident against the Park Chung Hee regime found dead on a mountain in 1974, and two student activists, Lee Chul-kyu and Lee Rae-chang, who were found dead in a reservoir and on a beach, respectively, in 1999. Crucial witnesses and evidence were not available after the long lapse of time since their deaths. It is necessary to emphasise that the Truth Commission had limited legal authority to discover the actual truth about suspicious deaths;<sup>98</sup> other state authorities were reluctant to cooperate with the investigation of the Truth Commission for fear that their own misconduct would be uncovered.<sup>99</sup> When concluding their investigation, the Truth Commission recommended that the government and the National Assembly enact a new law to bar application of the statute of limitations to state crimes against human rights, to punish perjury or refusal to submit relevant materials in hearings for rectifying past wrongs, and to require disclosure of all information regarding past wrongs.<sup>100</sup>

However, despite these difficulties, the Truth Commission made substantial contributions to the advancement of Korean society. Their findings provided consolation to the victims and healing for their families' trauma. The Truth Commission also forced the Korean people to confront the dark shadow of the painful past, making them ever more determined to maintain democracy in Korean society.

## **VI. BROADENING THE SCOPE OF ILLUSTRATING PAST WRONGS**

### **1. Uncovering the Activities of Pro-Japanese Collaborators**

The fact that the pro-Japanese Koreans who sided with Japanese rule and oppressed the Korean liberation movement under the Japanese Occupation (1910–45) were not thoroughly investigated and justly sanctioned

even after the Liberation of 1945 posed a lingering political and social problem for Koreans.

President Rhee Syngman and his far rightwing conservative allies, who gained political hegemony over the left after the Liberation, objected to the thorough abolition of colonial legacies. With a strong anti-communist and anti-North Korean agenda, pro-Japanese Koreans supported the party's fight against the leftist movement in South Korea. Although the Act for Punishing Anti-Nation Activities<sup>101</sup> was enacted in 1948 and the Special Committee for Punishing Anti-Nation Activities was formed in the National Assembly, President Rhee and his political allies interfered substantially with the activities of the Special Committee, and it was ultimately dissolved without any meaningful achievement.<sup>102</sup> Since that time, pro-Japanese Koreans survived and even flourished in Korea. Successive authoritarian-military governments did not attempt to investigate them. The fact that a number of political and social leaders, including Park Chung Hee, had served as a bureaucrat or military officer under the Japanese Occupation was one of the factors that prevented thorough investigation.<sup>103</sup>

Although the legacy of the Japanese Occupation in Korean society has received much academic attention, it was not until the Roh Moo-Hyun government that legal action was taken to address these issues. There has been strong pressure from civil society to investigate pro-Japanese Koreans' activities under the Japanese Occupation. For instance, in August 1999, 10,000 professors signed a declaration demanding the publication of an Encyclopaedia of Anti-Nation Pro-Japanese Collaborators.<sup>104</sup> Then, in 2001, the Institute for Research of the Nation Issues,<sup>105</sup> an independent research organisation, formed a board of editors to take responsibility for publishing it. After the government cut off public funding for the project in 2003, the public further demonstrated its interest in and support for it by successfully completing a fundraising campaign to raise the funds required for the project in 2004.<sup>106</sup>

Although the Korean Constitution provides, 'No citizen shall suffer unfavourable treatment on account of an act not of his own doing but committed by a relative',<sup>107</sup> being the descendant of pro-Japanese collaborators is likely to inflict significant social and political damage to a politician. Conservatives were initially concerned that legal action could lead to political bias that would harm conservative political leaders, including Park Geun-Hye, a daughter of Park Chung Hee, but public support for uncovering the activities of pro-Japanese collaborators under the Japanese Occupation overwhelmed their opposition.<sup>108</sup> The newly revealed fact that the parents or great-grandparents of some leading liberal politicians, including Shin Ki-nam,<sup>109</sup> had served under the



Japanese rule, also neutralised the conservatives' concern. As a result, objections to legal action became politically dangerous. In 2004, the Special Act for Finding the Truth of Anti-Nation Activities under the Japanese Occupation was enacted.<sup>110</sup>

In 2005, the Presidential Committee for the Act for Finding the Truth of Pro-Japanese Anti-Nation Activities was organised, and Professor Kang Man-kil, a leading historian, was appointed chairman.<sup>111</sup> The Presidential Committee is to investigate 'pro-Japanese anti-Nation activities', to collect, analyse, and edit data, and establish a historical museum about this subject.<sup>112</sup>

The 2005 Special Act classifies pro-Japanese anti-Nation activities into 20 categories. These include: attacking or obstructing the liberation movement; killing, abusing, or arresting liberation movement activists or their family members; leading an organisation with the purpose of obstructing the liberation movement; spying for the Japanese regime; making or conspiring to make a treaty with the Japanese government to infringe the Korean Nation's sovereignty; receiving a peerage from the Japanese government for their activities for Korea's annexation to Japan; forcing females to provide sexual services for the Japanese army; cooperating and participating as a military officer in the Japanese invasion; performing activities as a high-ranking government official to suppress Koreans; and cooperating with the Japanese destruction of Korean culture and carrying Korean cultural heritages out of Korea.<sup>113</sup>

The Presidential Committee received a four-year mandate to initiate investigations of anti-Nation activities at its own volition.<sup>114</sup> The committee could request relevant individuals to appear for inquiry, and require relevant individuals and authorities to submit pertinent data and materials.<sup>115</sup> It could issue an order of accompaniment to a person who has crucial evidentiary proof or information but refuses to appear more than three times without just cause.<sup>116</sup> Like the Presidential Truth Commission on Suspicious Deaths,<sup>117</sup> the Presidential Committee was neither an investigative nor a judicial authority. Most often, administrative fines could be imposed only on those who obstructed the inquiry of the Presidential Committee.<sup>118</sup> However, imprisonment could be imposed on those who made a false statement or submitted false materials with the purpose of obstructing the investigation.<sup>119</sup>

The Special Act for Reverting the Property of Anti-Nation Pro-Japanese Collaborators to State was also enacted in 2005.<sup>120</sup> This Act was passed in response to a public outcry over court rulings which enabled descendants of pro-Japanese Koreans to retrieve lands and properties from the State. In some instances, descendants who filed lawsuits won, even though the Japanese government had given them the

lands in exchange for their ascendants' pro-Japanese activities.<sup>121</sup> For example, the great-grandson of Lee Wan-Yong, who as Prime Minister of the short-lived Empire of Korea (1897–1910) facilitated Korea's annexation to Japan and received a peerage from the Japanese government for his pro-Japanese efforts, won back his great-grandfather's lands in a civil trial in the Seoul High Court in 1997.<sup>122</sup> The public fervour over this ruling led the National Assembly to pass the 2005 Special Act. The Act attempts to prevent the successors or descendants of the pro-Japanese Koreans who received properties from the Japanese government given in exchange for pro-Japanese anti-Nation activities from retrieving such properties.<sup>123</sup>

## **2. Making a Politically Neutral Extension of Past Lustration**

The two laws, the 2000 Act for Restoring the Honour of Democratisation Movement Involvers and Providing Compensation for Them and the 2001 Special Act for Truth-Finding of Suspicious Deaths received criticism from two different angles. From one side, liberals complained that the laws did not cover past wrongs committed by the State before 7 August 1969,<sup>124</sup> and that the Truth Commission on Suspicious Deaths was dissolved without resolving a number of high profile cases.<sup>125</sup> On the other side, conservatives argued that the laws did not cover the terrors and human rights violations committed by those who were antagonistic to the Republic of Korea. In 2004, each political party submitted its own bills to rectify past wrongs.<sup>126</sup>

In 2005, the Basic Act for Coping with Past History for Truth and Reconciliation was enacted as a compromise.<sup>127</sup> The Truth and Reconciliation Commission was established as an independent organisation, and Catholic Father Song Kee-in, a long-time advisor to President Roh Moo-hyun, was appointed as chairman.<sup>128</sup>

Article 2's subsections of the 2005 Basic Act calls for inquiry into the following:

- (i) the anti-Japanese liberation movement before or under the Japanese Occupation;
- (ii) the history of overseas Koreans who have maintained the sovereignty of Korea or enhanced national capability since the Japanese Occupation;
- (iii) the unlawful killings of civilians from 15 August 1945 to the Korean War;
- (iv) death, injury, and disappearance as a result of unlawful or conspicuously improper exercises of state authority, such as conduct

- destructive to constitutional order, serious human rights violations and cases of fabricated facts from 15 August 1945 through the period of authoritarian rule;
- (v) terror, human rights violations, violence, massacre, and suspicious deaths committed by those who denied the legitimacy of the Republic of Korea or were hostile to the Republic of Korea from 15 August 1945 to the period of authoritarian rule; and
  - (vi) cases for which the Truth and Reconciliation Commission have recognised the necessity of investigation.<sup>129</sup>

Subsections (iii) and (iv) provided for the extension of the 2000 Act for Restoring the Honour of Democratisation Movement Involveds and Providing Compensation for Them and the 2001 Special Act for Truth-Finding of Suspicious Deaths. They resulted from the requests of liberals to broaden the investigative scope of human rights violations by the State. Subsection (v) stems from the requests of conservatives to include the investigation of human rights violations committed by North Korean authorities or pro-North Korean leftist civilian organisations. Thus, uncovering the truth remains significantly influenced by politics.

The Truth and Reconciliation Commission received a four-year mandate to initiate investigations on suspicious deaths when a petition is filed or by its own volition absent a petition.<sup>130</sup> It may request relevant individuals to submit an affidavit and appear for inquiry, and relevant individuals and authorities to submit pertinent data and materials.<sup>131</sup> It may also conduct a field investigation in the place where the cause of a case has occurred,<sup>132</sup> and issue an order of accompaniment to a person who refuses to appear more than three times without just cause.<sup>133</sup>

As discussed above,<sup>134</sup> the Truth and Reconciliation Commission was neither an investigative nor a judicial authority. Primarily, administrative fines could be imposed only on those who made false statements or submitted false information, refused or evaded the Commission's field investigation, or refused to follow an order of accompaniment.<sup>135</sup> However, imprisonment could be imposed on those who submitted a false application with the purpose of harming another's honour or with the intent to obstruct the activities of the Commission.<sup>136</sup> The Truth and Reconciliation Commission could recommend non-prosecution, lesser punishment or pardon for offenders who actively cooperated with its truth-finding efforts, and the relevant state authority must respect the recommendation.<sup>137</sup> The Commission is given a duty to recommend reconciliation between offenders and victims or their families based on an offender's repentance and the victims' or their families' forgiveness.<sup>138</sup>

The Truth and Reconciliation Commission actively reviewed cases until its mandate ended in June 2010. It was able to investigate all the cases that the 2000 Act for Restoring the Honour of Democratisation Movement Involvers and Providing Compensation for Them and the 2001 Special Act for Truth-Finding of Suspicious Deaths did not or could not cover. In particular, the following high-profile cases were reviewed: the case of Cho Yong-soo, who was the president of a progressive newspaper, the case of Minjok Ilbo, who was executed after the coup of 16 May 1961,<sup>139</sup> the case of Cho Bong-ahm, the first Minister of Agriculture under the Rhee Syngman government who was accused of spying for North Korea, and executed after he received phenomenal support from the public as a social democrat presidential candidate of the opposition party in the 1956 presidential election.<sup>140</sup> In November 2006, the Truth and Reconciliation Commission recommended that the State should apologise to the late Cho Yong-soo and his family and review his conviction.<sup>141</sup> On 16 January 2008, the Seoul Central District Court overruled Cho Yong-soo's conviction.<sup>142</sup> In September 2007, the Truth and Reconciliation Commission also made a similar recommendation for the late Cho Bong-Ahm,<sup>143</sup> and on 20 January 2011, the Supreme Court also overruled his conviction.<sup>144</sup>

The Commission reviewed a number of unlawful killings of civilians by either the South or North Korean government or by either pro-South militia or pro-North partisans from 15 August 1945 to the end of the Korean War. It was reported that 86.7 per cent of the petitions to the Commission were about such unlawful killing cases.<sup>145</sup>

The Commission faced difficult challenges since its mandate was only for four years, its jurisdiction was very broad, the incidents in question had occurred so long ago, and political parties were likely to make use of the lustration of past wrongs for their own political purposes. Although the 2005 Basic Act allowed a two-year extension of the mandate,<sup>146</sup> the newly elected conservative President Lee Myung-bak did not allow such an extension.

## VII. CONCLUSION – CONSTRUCTING THE FUTURE THROUGH LOOKING BACK TO THE PAST

For nearly a decade, the Korean people have chosen to pursue national reconciliation and unity through disclosing truths and achieving justice instead of forgetting the past. With strong pressure from civil society, the legislature, the judiciary and several committees and commissions have played their own unique roles to rectify past wrongs and re-evaluate the past.

The Korean method for dealing with past wrongs may be summarised as follows:

1. retroactive criminal sanction is limited to the core perpetrators who acted under the authoritarian regime;
2. retroactive civil sanction is given broadly to the victims of the authoritarian rule;
3. the contribution by past activists for democratisation of Korea is officially recognised;
4. counter-violence by them is leniently examined;
5. even homegrown leftist movements are embraced despite the current ideological and military tension between the two Koreas; and
6. uncovering past wrongs without criminal sanction is extended beyond the period of the authoritarian regime to include the Japanese Occupation and the Korean War.

Illustrating past wrongs has provided a new political and social ground on which Korean society can build. With the broader perspective for democracy established by the Special Acts and decisions that follow, the Korean people will be able to internalise their belief in democracy and move forward. Looking back to their past is a way for Koreans to view and construct their future. To cite E. H. Carr, history is 'a dialogue between the events of the past and progressively emerging future ends' (Carr 1961, p. 164).

This process has certainly not been free from political struggle. Liberals initiated and propelled legislation to achieve the task while conservatives were passive. Although conservatives have criticised such activities to rectify past wrongs as politically biased and responsible for consuming too many social resources, they have come to understand the Special Acts as necessary to relieve the burdens they carry from the period of authoritarian rule. This reflects the complicated psychology inherited by the Korean people from their experience under the old regime. They were not only victims of the old regime but also passive collaborators or partial beneficiaries.

However, agreements between the liberal and conservative parties forged the Special Acts. Although each side has advocated somewhat different methods with differing scopes for rectifying past wrongs, they have come together in the belief that Korean society needs to discard the legacy of the authoritarian regime. In this light, the Acts are symbolic statements that officially declare the people's dissatisfaction with the authoritarian regime. They are necessary for Koreans to heal old wounds, and to move beyond their tortured past.

## NOTES

1. Regarding the global situation of lustration of the past wrongs, see McAdams 1997; Ellis 1997, p. 181; Barahona et al. 2001.
2. 'Transitional justice' is defined as the concept of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes. See O'Donnel and Schmitter 1998; Teitel 2003, p. 69.
3. See generally West 1998; Han 2005.
4. *Kwangju minjuhwa undong kwallyŏnja posang tŭng e kwanhan pŏmnyul* (the Act for Compensation for the Victims in the Democratization Movement in Kwangju), Statutes of S. Korea, Law No. 4266 of 1990) (last revised by Law No. 7911 of 2006).
5. Korean Constitutional Court, 94 *hŏnma* 246, delivered on 20 January 1995. See also Korean Constitutional Court, 95 *hŏnma* 221, 95 *hŏnma* 233, 95 *hŏnma* 297, delivered on 15 December 1995.
6. Korean Constitutional Court, 94 *hŏnma* 246 at 5-ka-(2)-(da), delivered on 20 January 1995.
7. See *Taehanmin'guk hŏnpŏp* (The Constitution of the Republic of Korea), art 84 (last amended 1987), available at [http://english.ccourt.go.kr/home/att\\_file/download/Constitution\\_of\\_the\\_Republic\\_of\\_Korea.pdf](http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf)
8. Korean Constitutional Court, 94 *hŏnma* 246, delivered on 20 January 1995, above note 5 at 5-Da.
9. *5.18 Kwangju minjuhwa undong tŭng e kwanhan t'ŭkpyŏlpŏp* (The Special Act Regarding the May 18 Democratization Movement), Statutes of S. Korea, Law No. 5029 of 1995.
10. Ibid, art 2(1).
11. Ibid.
12. Ibid, art 3.
13. Ibid, art 4.
14. Korean Constitutional Court, 96 *hŏn'ga* 2, 96 *hŏnba* 7 and 13, delivered on 16 February 1996.
15. Ibid at 3-Ka-(3).
16. Ibid at 3-Da and Ra.
17. Ibid at 3-Na.
18. Korean Supreme Court, 96 *to* 3376, delivered on 17 April 1997.
19. Ibid, Chapter 1 (2)-Ka.
20. Ibid, Chapter 1 (1).
21. *5.18 Kwangju minjuhwa undong tŭng e kwanhan t'ŭkpyŏlpŏp* (The Special Act Regarding the May 18 Democratization Movement), Statutes of S. Korea, Law No. 5029 of 1995, art 7.
22. Park Joong-Hyun (2006), 'Disgraced Ex-Presidents Lose State Honours', *Chosun Ilbo* (South Korea), 22 March; Sung Dong-Ki (2006), 'Former Presidents Stripped of Medals', *Dong-A Ilbo* (South Korea), 22 March; Kim Hak-Joon (2006), 'The Decorations Awarded to Former Presidents Cancelled', *The Hankyoreh* (South Korea), 21 March; Chun Su-jin (2006), 'Ex-Presidents Stripped of All Decorations, Orders of Merit', *Joong-Ang Ilbo* (South Korea), 22 March.
23. *Ŭimunsŏ chinsang kyumyŏng e kwanhan t'ŭkpyŏlpŏp* (The Special Act for Truth-Finding of Suspicious Deaths), Statutes of S. Korea, Law No. 6170 of 2001 (last revised by Act No. 7796 of 2005). Regarding the activities of the Truth Commission, see text accompanying notes 63–74 below.

24. *Hyöngsa sosongpöpp* (The Korean Criminal Procedure Act), Act No. 341, Statutes of S. Korea, art 249 (1954) (last revised by Law No. 7965 of 2006).
25. *Ibid*, art 2.
26. Kim, Soo-Kyung (2003), '4.2 Billion won Paid to Suzy Kim's Family', *Dong-A Ilbo* (South Korea), 15 August; Yang, Sung-Wook (2003), 'Suzy Kim's Family Won the Lawsuit Against the Government', *Dong-A Ilbo* (South Korea), 15 August.
27. *Commonwealth v Guimento*, 491 A.2d 166 (Pa. Super. Ct. 1985); *People v Shedd*, 702 P.2d 267 (Colo. 1985); *State v Hodgson*, 740 P.2d 848 (Wash. 1987); *State v Creekpauum*, 753 P.2d 1139 (Alaska 1988); *State v Nunn*, 768 P.2d 268 (Kan. 1989); *Commonwealth v Bargerion*, 524 N.E.2d 829 (Mass. 1989); *Commonwealth v Rocheleau*, 533 N.E.2d 1333 (Mass. 1989); *People v Chesebro*, 463 N.W.2d 134 (Mich. Ct. App. 1990); *State v Cookman*, 920 P.2d. 1086 (Or. 1996).
28. See Bae 2005, p. 95; Kim 2006, p. 6; Lee 2003, p. 19; Park 2004, p. 31; Shin 2006, pp. 39–40; Yim 2002, p. 22.
29. See text accompanying notes 14–18.
30. *Panminjok haengwi ch'öbeol pöpp* (The Act for Punishing Anti-Nation Activities), Statutes of S. Korea, Law No. 3 of 1948 (abolished by Law No. 176 of 1951). Different from France, however, the Special Committee for Punishing Anti-Nation Activities could not produce meaningful outcomes because of President Rhee Syngman's interference and ultra rightwingers' attack of the Special Committee.
31. *Panminju haengwija kongmin'göwn chehan pöpp* (The Act for Restricting the Civil Rights of Anti-Democracy Personals), Statutes of S. Korea, Law No. 587 of 1960 (abolished by Law No. 1032 of 1962).
32. For a leading American decision on the issue, see *Falter v United States*, 23 F.2d 420 (1928). 'Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw its assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or, if it does, the stake forgives it' *Ibid*, 425–6.
33. *Minjuhwa undong kawlyönya myöngye hoebok mit posang e kwanhan pömnnyul* (The Act for Restoring the Honour of Democratization Movement Involveds and Providing Compensation for Them), Statutes of S. Korea, Law No. 6123 of 2000), art 1 (last revised by Law No. 8273 of 2007).
34. *Pan'gong pöpp* (Anti-Communist Act), Statutes of S. Korea, Law No. 643 of 1961 (abolished by Law No. 3318 of 1980).
35. *Kukka poan pöpp* (National Security Act), Statutes of S. Korea, Law No. 3318 of 1980 (last revised by Law No. 5454 of 1997). For more discussion regarding this Act, see Cho 1997.
36. *Chiphoe mit siwi e kwanhan pömnnyul* (Act Concerning Assembly and Demonstration), Statutes of S. Korea, Law No. 1245 of 1962 (last abolished by Law No. 7849 of 2001).
37. The Act for Restoring the Honour of Democratization Movement Involveds and Providing Compensation for Them, Act No. 6123, art 2.1 (emphasis added).
38. The right to resist against an illegitimate regime was incorporated into the documents of the American and French Revolutions. See Laqueur 1979, pp. 107, 118. This right was explicitly recognised in a number of early American state constitutions. For instance, art 10 of the New Hampshire Constitution of 1797 states that 'whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and



- destructive of the good and happiness of mankind' (N.H. Const. art 10 (1797), reprinted in Kitztrie 1986, p. 85).
39. See *Taehanmin'guk hŏnpŏp* (The Constitution of the Republic of Korea of 1969), art 69(3) (amended 1969; last amended 1987).
  40. Even though Presidents Rhee Syngman and Park Chung-Hee exercised authoritarian rule before the date, the Act does not explain why the beginning of the authoritarian rule was fixed on 7 August 1969. It is assumed that the establishment of authoritarian rule at the constitutional level on 7 August 1969 was considered.
  41. *Minjuhwa undong kawlyŏnja myŏngye hoebok mit posang e kwanhan pŏmnyul* (The Act for Restoring the Honor of Democratization Movement Involvers and Providing Compensation for Them), Statutes of S. Korea, Law No. 6123 of 2000, art 2.2 (last revised by Law No 8273 of 2007).
  42. See *Kwangju minjuhwa undong kwallyŏnja posang tŭng e kwanhan pŏmnyul* (Act for Compensation for the Victims in the Democratization Movement in Kwangju), Statutes of S. Korea Act, Law No. 4266 of 1990 (last revised by Law No. 7911 of 2006).
  43. <http://www.minjoo.go.kr/>
  44. The Act for Restoring the Honour of Democratization Movement Involvers and Providing Compensation for Them, Act No.6123, art 4(2).
  45. Ibid, art 2(1).
  46. Ibid, art 5-3.
  47. Ibid, art 5-4.
  48. Ibid, art 5-5.
  49. Jung-Min (2006), 'Recognizing 46 Illegal Labor Activists as Democratic Activities', *Dong-A Ilbo*, 18 December.
  50. The decision is available at <http://www.minjoo.go.kr/section/news/reportcontent/DB.html?inum=113&iKind=3> (last visited 26 April 2007).
  51. Baek, Ki-Chul (2004), 'NIS Committee for Development through Finding Truth of the Past Starts', *The Hankyoreh* (South Korea), 2 November; Park, Joo-Ho (2004), 'NIS Begins Truth Finding of the Past'. *Kookmin Ilbo* (South Korea), 2 November; Chang, Yong-Hoon (2004), 'NIS Starts out to Find Truth of the Past', *Yonhap News* (South Korea), 2 November.
  52. Lee, Hee-Jin (2005), 'The PRP Case Fabricated as Directed by Park Chung Hee', *Hankook Ilbo* (South Korea), 12 December; Son, Byung-Ho (2005), 'The Truth-Finding Committee Said the PRP Case was Fabricated on the Request of the Former President Park', *Kookmin Ilbo* (South Korea), 7 December; Chung, Joon-Young (2005), 'Behind the PRP Case, There was a Man in Power', *Yonhap News* (South Korea), 7 December.
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64. *Ibid*, art 3.
65. *Ibid*, art 2.
66. *Ibid*; see also above note 41 and accompanying text.
67. The Special Act for Truth-Finding of Suspicious Deaths, Law No. 6170, art 21.
68. *Ibid*, art 22(1).
69. *Ibid*, art 22(3).
70. *Ibid*, art 25(1).
71. *Ibid*, art 25(2).
72. *Ibid*, art 22(8).
73. *Ibid*, art 26.
74. *Ibid*, art 37. Imprisonment may be imposed on those who committed assault or battery to the officials of the Truth Commission. *Ibid*, art 34.
75. Kim, Nam-Kwon (2003), 'The Second Suspicious Death Activities Outlook', *Yonhap News* (South Korea), 30 April; Choi, Sung-Hyun (2004), 'The Second Suspicious Death Activities Report to Cheongwadae', *Yonhap News* (South Korea), 30 July.
76. The Special Act for Truth-Finding of Suspicious Deaths, Law No. 6170, art 24(2). The decision of 'impossibility of investigation' is made when the Truth Commission finds that it was not clear if the death occurred in the process of the democratisation movement, or resulted from an illegal exercise of state authority.
77. 'Protective custody' is one of 'protective security measures' (*poan ch'ŏbun* or *Maßnahmen* in German). In Korean criminal law, there are two types of criminal sanctions: punishment and 'protective security measures'. The Korean Constitution provides the legal basis for this distinction, saying that no punishment or protective

security disposition shall be imposed without law (The Constitution, art 12(1)). These two sanctions are distinguished in theory since the first is imposed on those with the capability to be responsible for their past criminal conduct, while the second is used to rehabilitate criminals and protect society from any future crimes that non-rehabilitated criminals may commit. The second is prescribed mainly in special criminal acts.

78. See generally Suh 2004.
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80. Ibid, art 5.
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85. See text accompanying notes 26–8.
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87. *Sahoe anjŏn pŏp* (Social Security Act), Statutes of S. Korea, Law No. 2769 of 1975 (last revised by Law No. 3993 of 1987).
88. Ibid § 6(1).
89. See above note 62.
90. Social Security Act, *supra* note 87, § 7(4).
91. Ibid, § 7(1).
92. *Ŭimuna chinsang kyumyŏng e kwanhan t'ŭkpyŏlpŏp* (The Special Act for Truth-Finding of Suspicious Deaths), Statutes of S. Korea, Law No. 6170 of 2001, art 2 (last revised by Act No. 7796 of 2005) (emphasis added).
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116. Ibid, art 21(8).
117. See above note 73 and accompanying text.
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125. See above note 98 and accompanying text.
126. See the Bill for Basic Law for Finding Truth and Reconciliation submitted as of 20 October 2004 (Bill No. 603); The Bill for Basic Law for Investigation and Research of Modern History submitted as of 30 September 2004 (Bill No. 519). The former was submitted by the ruling liberal Uri Party, the latter by the conservative Grand National Party.
127. *Chinsil hwahae rŭl wihan kwagŏsa chŏngri kibonpŏp* (The Basic Act for Rectifying the Past History for Truth and Reconciliation), Law No. 7542 of 2005. In addition, two other special acts to rectify the past were legislated: The Special Act for Restoring the Honour of the Keochang Incident Involvers (Law No. 5148 of 1996) and the Special Act for Truth-Finding and Restoring the Honour of the April 3 Incident of the *Cheju* Province (Law No. 6117 of 2000). Their purpose is to restore the honour of people who were falsely accused as 'reds' and killed by the military during the de facto civil war just before the Korean War.
128. See Truth and Reconciliation Commission, Republic of Korea, <http://jinsil.go.kr/English/index.asp>
129. The Basic Act for Rectifying the Past History for Truth and Reconciliation, art 2.
130. Ibid, arts 19, 22(3), 25(1).
131. Ibid, art 23.
132. Ibid, art 23(3).
133. Ibid, art 24.
134. See above note 76 and accompanying text.
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136. Ibid, art 45(1).
137. Ibid, art 38.
138. Ibid, art 39.
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- 1961) after the May 16 coup of 1961. The Special Act was legislated on 22 June 1961, and its appendix stated that the Act shall be *retroactively* applicable for three years and six months before promulgation. In 2007, Cho's brother filed an application for retrial to the Seoul Central District Court. See Kwon, Yong Tae (2007), 'The Minjok Ilbo Case Goes to Court Again', *The Law Times* (South Korea), 12 April; Kim, Tae Jong and Sung Hye Mi (2007), 'Application for Retrial of the Minjok Ilbo Case Is Filed', *Yonhap News* (South Korea), 10 April.
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